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**DEADLY DICTA: ROE'S "UNWANTED  
MOTHERHOOD", GONZALES'S "WOMEN'S  
REGRET" AND THE SHIFTING NARRATIVE  
OF ABORTION JURISPRUDENCE**

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DEADLY DICTA: ROE’S “UNWANTED MOTHERHOOD”,  
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NARRATIVE OF ABORTION JURISPRUDENCE

*Stacy A. Scaldo*<sup>1</sup>

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. All these are factors the woman and her responsible physician necessarily will consider in consultation.

*Roe v. Wade* (1973)<sup>2</sup>

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *Casey, supra*, at 852-853, 112 S.Ct. 2791 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow. See *ibid*.

*Gonzales v. Carhart* (2007)<sup>3</sup>

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<sup>2</sup> *Roe v. Wade*, 410 U.S. 113, 153 (2007).

## I. Introduction

For thirty-four years, the narrative of Supreme Court jurisprudence on the issue of abortion was firmly focused on the pregnant woman. From the initial finding that the right to an abortion stemmed from a constitutional right to privacy<sup>4</sup>, through the test applied and refined to determine when that right was abridged<sup>5</sup>, to the striking of statutes found to over-regulate that right<sup>6</sup>, the conversation from the Court's perspective maintained a singular focus. Pro-life arguments focusing on the fetus as the equal or greater party of interest were systematically pushed aside by the Court.<sup>7</sup> The consequences of an unwanted pregnancy, or as the Court in *Roe v. Wade* suggested, "unwanted motherhood," and the effect it had, or would have, on a woman remained at the forefront of abortion opinions. In 2007, the Court, in *Gonzales v. Carhart*,<sup>8</sup> upheld the Partial Birth Abortion Ban Act of 2003. In the few years since its release, the scholarly attention paid to this case has been fueled in large part by what has been dubbed the Court's discussion of "women's regret" and its potential effect on future abortion case law. Proponents of abortion rights argue it sets women back years and essentially reverts them to pre-Roe status in society.

These criticisms focus almost exclusively, whether expressly or impliedly, on the validity of women's regret because the effect of the Court's reasoning could be a change in the way we view abortion, in the stories we tell about abortion, and in who and what we think of when deciding the constitutionality of abortion regulations. The fear which dwells in the heart of these critiques is that women's regret could supplant thirty-four years of abortion narrative focused almost exclusively on the pregnant woman. Roe gave us the trimester test, the physician-state competing rights analysis, and the extension of the right to privacy – all under the guise of "unwanted motherhood." While *Gonzales* may not have

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<sup>3</sup> *Gonzales v. Carhart*, 550 U.S. 125, 159 (2007).

<sup>4</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>5</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>6</sup> *See, eg.*, *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>7</sup> Even *Roe's* competing rights analysis was set up and applied as a balance between the physician's medical judgment and the state's ability to regulate that right in the interest in the fetus. It was neither designed nor applied as a "fetal rights" analysis. *Roe*, 410 U.S. at 164-65.

<sup>8</sup> 550 U.S. 125 (2007).

changed much in terms of abortion rights and regulations, its effects may have far greater consequences, and the pro-abortion community knows this.

Despite all of the theories, tests and holdings discussed and implemented in these two cases, what remains within our collective conscience are the effects of unwanted motherhood and women's regret. Under most definitions, these statements are a type of social dicta – unnecessary, memorable language that speaks directly in favor of a particular societal point of view. In light of the current debate, these social dicta are also deadly dicta - unwanted motherhood deadly in its effect on the rights of the unborn; women's regret deadly in its effect on unwanted motherhood. As Supreme Court level dicta functions differently than dicta from lower level courts, it is even more crucial that it is properly identified and understood. As will be explained, social dicta have the potential to be particularly influential as it becomes part of the nation's consciousness. This is especially so in highly controversial cases like abortion. It is usually the most quoted by popular media outlets and non-legal sources, is often times the most remembered part of the case, and is thematically opportunistic in guiding the debate and framing the narrative for use in future cases.

The focus of this article is to explore how this type of dicta drives and affects the long-term societal opinion and understanding of a stated controversy, and note the glaring inconsistencies between the current critiques of women's regret and abject silence with regard to unwanted motherhood. Part II of this article will define social dicta and explain the theme creating and narrative shaping effect of its use in case law. Part III will provide examples of how the use of social dicta frames the narrative of controversial cases and steers the debate going forward. Part IV will debate the success of using social dicta in both *Roe* and *Gonzales* and the result of its placement in these opinions. The parallel effects of the reasoning to support the Court's holding in each case will be examined. Part IV will explore the future of abortion jurisprudence as a consequence of the *Gonzales* shift in narrative. Part VI will conclude this article.

## II. Social Dicta and Its Influence on Controversial Legal Issues

### a. Social Dicta Defined

Dictum is often times defined by what it is not. On the most basic level, dictum “refers to [a] statement[] that [is] not necessary to support the

decision reached by the court.”<sup>9</sup> In contrast, a holding has been broadly defined as “a rule or principle that decides the case.”<sup>10</sup> Under a more detailed definition of holding, “[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment.”<sup>11</sup> Two main differing methods used to classify a holding have been noted: the “facts plus the outcome”<sup>12</sup> method and the inclusion of the “rationale or reasoning a court employs to reach a particular result”<sup>13</sup> method. Under either of these theories, however, the language at issue must still be necessary to the result reached by the court.<sup>14</sup>

Whether highly-detailed or over-simplified, finding a consistently workable definition of dicta is akin to shooting at a moving target.<sup>15</sup> But the more pertinent question to be addressed is the potential effect dicta have on

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<sup>9</sup> Michael C. Dorf, *Dicta and Article III*, 142 U. Penn. L. Rev. 1997, 2000 (1997); see also Judith M. Stinson, *Why Dicta Becomes Holding and Why it Matters*, 76 Brook. L. Rev. \_\_\_\_ (2010); Kent Greenawalt, *Reflections on Holding and Dictum*, 39 J. Leg. Ed. 431 (1989); Pierre Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. Rev. 1249, 1257 (2006).

<sup>10</sup> Dorf, *supra* note 8, at 2000; see also Greenawalt, *supra* note 8, at 435; Leval, *supra* note 8, at 1256; Stinson, *supra* note 8, at \_\_\_\_.

<sup>11</sup> Michael Abramowicz and Maxwell Stearns, *Defining Dicta*, 57 Stan. L. Rev. 953, 961 (2005).

<sup>12</sup> Stinson, *supra* note 8, at \_\_\_\_ n.8 (citing Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, at 25 (1989)). According to Professor Stinson:

This approach is appealing, most significantly because it is arguably easier to identify the facts and outcome of a given decision than it is to articulate the rationale/reasoning. However, judges rarely state every relevant fact in an opinion, and judicial efficiency suggests this might be justified, especially when the outcome is a relatively foregone conclusion[.] Additionally, the facts in a particular case are almost never identical to the facts in a subsequent case.

*Id.*

<sup>13</sup> Stinson, *supra* note 8, at \_\_\_\_ n.9 (citing Dorf, *supra* note 8, at 2024; Leval, *supra* note 8, at 1256-57; Henry J. Friendly, *In Praise of Erie-and the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964). Professor Stinson notes:

Under this theory, the underlying *principles* in a judicial opinion are binding. In addition to resolving concerns about the level of factual abstraction, the main benefit of this approach is stability: judges have less ability to distinguish binding precedent simply because they do not wish to follow it. If the rationale is the same, the later court is bound. However, discerning the rationale or reasoning from a prior case is not always easy to do.

*Id.*

<sup>14</sup> See Dorf, *supra* note 8, at 2003.

<sup>15</sup> See Marc McAllister, *Dicta Redefined*, 47 Willamette L. Rev. 161, 165-69 (2011). Professor McAllister cites three main reasons why the traditional “not necessary to the result” definition of dicta is unhelpful: (1) failure to account for the range in types of dicta; (2) courts sometimes draw distinctions in types of dicta and these distinctions are often inconsistent among courts; (3) failure to account for the case rationale. *Id.*

future cases. If dictum is not part of the holding of a case, it should not be binding precedent.

The courts have laid down a mist of qualification over the simple rule that dictum does not constitute precedent. A dictum – whatever it is – may not be binding under the doctrine of stare decisis, but it may be very persuasive. So-called dicta are often followed. While it may be theoretically true to say that they are not followed as precedent, it is very difficult in practice to distinguish between following a statement of law in one way and following it in another.<sup>16</sup>

That dictum does not constitute precedent does not prevent this non-necessary language, although contrary to logical rules of succession, from becoming the law of a future case.<sup>17</sup> “Once a dictum has been planted, it is likely to achieve its desired effect. History shows that dicta are not lightly disregarded, and that courts frequently cite to and rely upon dicta as support for their holdings.”<sup>18</sup> Perhaps from repetition alone, not just within opinions, but throughout societal discourse – social settings, media outlets, organizational and political campaigns – dicta comes full circle and finds itself placed back into the court’s consciousness when the issue is revisited. “If a dictum is not controlling in the inception, it should gain nothing from repetition. Three times nothing is still nothing. Yet courts have said that long repetition of a dictum . . . may clothe it with the weight of a precedent.”<sup>19</sup> Or, it could have the opposite effect. It could be rejected in whole or in part, from the outset or over time.<sup>20</sup> It is social dicta because it is more than just unnecessary language that is not part of the holding. Social dictum is language that, in addition to being unnecessary to the holding, speaks in favor of a particular societal point of view. The critical component, and what appears to be the intent of the author of this type of

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<sup>16</sup> Dictum Revisited, 4 Stan. L. Rev. 509, 512 (1952).

<sup>17</sup> See McAllister, *supra* note 14, at 163-65. Professor McAllister identifies three categories of dicta – vibrant, dead and divergent. He argues dicta is vibrant “when the otherwise non-binding judicial pronouncement promptly flowers into law,” dead when it has died either explicitly or implicitly in subsequent case law, and divergent when it “prompts scholarly commentary and lower court development of the issue discussed in dicta.” *Id.* Professor McAllister’s categories highlight the purpose and effect of including dicta in a controversial opinion.

<sup>18</sup> *Id.* at 178. Professor McAllister argues that “judges sometimes plant dicta into their opinions to subtly influence the law’s development, and [] this practice will continue precisely because it is effective.” *Id.* at 177.

<sup>19</sup> Dictum Revisited, *supra* note 15, at 513.

<sup>20</sup> See McAllister, *supra* note 14, at 164.

language, is that it is targeted at the public, its longevity is determined by forces both inside and outside of the court, and its life or death is fueled by the response it receives from the public over time. It is memorable, and therefore subject to repetition and incorporation into the very fabric of the issue's jurisprudence. It comes as no surprise, then, that an attempt to implant the message behind this type of dicta within the collective mind of the public has the potential for greater acceptance if that dicta is supported – at least in theory – by social science data.<sup>21</sup> Why social science data is so compelling as support for social dicta stems from the fact that the opinion writer resorts to this because the facts and law in some way are incapable of sufficiently persuading the reader of the rightness of the decision. Opinion writers live in a world of rules – of contrived absolutes – and the lack of concrete legal corroborating structures is unsettling to their very nature. Social science data fills that void and provides support and legitimacy to otherwise tenuous findings. Social dicta, whether reliant upon social science data or as a consequence of the personified manifestation of the court's collective point of view, have profound impacts upon both the theme of a particular opinion and on the narrative of the debate springing forward from the emerging jurisprudence.

#### b. Social Dicta's Theme-Creating Properties

When learning to write persuasively to the court, law students are taught that the theme of the case is “where the client's voice and point of view are present.”<sup>22</sup> It “unifies all the elements of a text to express a

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<sup>21</sup> See, eg., *Muller v. Oregon*, 208 U.S. 412 (1908). Considered the genesis of the use of social science data, the “Brandeis Brief,” filed by future Supreme Court justice Louis Brandeis, highlighted the social authorities' viewpoints on the impact on women of working long hours. Based in large part on the arguments and data provided by Brandeis, the Court upheld an Oregon statute limiting the hours women were permitted to work outside the home. *Id.* at 423. The Court explained the reasons for doing so were not based upon political inequality between men and women but “rest[ed] in the inherent difference between the two sexes, and in the different functions in life which they perform.” *Id.* The Court relied on social science data to construct its social dicta:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

*Id.*

<sup>22</sup> Mary Ann Becker, *What Is Your Favorite Book?: Using Narrative to Teach Theme Development in Persuasive Writing*, 46 *Gonz. L. Rev.* 575, 576 (2011) (“The theme is the answer to ‘Who cares?’”).

common idea or emotion” and “resonates with a reader because it is familiar[, tying] all the complex analysis into an emotional trigger.”<sup>23</sup> Although the theme carries with it no independent legal weight, it nevertheless gives persuasive force to the underlying legal analysis “because it is the function by which the reader remembers the details.”<sup>24</sup> And those details are remembered not because of the legal analysis but because the theme has provided the reader the emotional justification for that legal analysis.<sup>25</sup> Consequently, law students are instructed that a winning argument includes convincing the court why it should care about the client and why the actions of the client were justified.<sup>26</sup>

In writing an opinion, the court has a similar but broader-based and further-reaching responsibility. It too must present a theme that the reader of the opinion will accept and adopt. It too must make the reader care about its client. The Court however, has greater leeway in defining and setting the parameters for identification of the client. In a technical sense, the court does not have a client. It is an independent, non-adversarial body tasked with rendering unbiased decisions in accordance with existing law. However, the court could be said to have a client in the sense that it has to sell its opinion to the public. Therefore, while the lawyer in any given case only has to convince one judge or group of judges to rule in favor of his client, the court must persuade the public that it has rendered a fair and just decision. The court is not just declaring a win for one of the parties in the case, it is also demonstrating that this win is a win for the public. It could be said that the court’s clients include everyone – not only the case’s litigants, but also the members of the public. The lawyer who writes to persuade the court does so with the purpose of convincing the court to care about the client and the client’s ordeal enough to declare that client the winner. The court, on the other hand, is responsible for informing the public why it should care and what effect that decision will have. While a lawyer’s creation of the theme aides the court in caring about the winner of the case, the court’s creation of the theme is crucial in convincing members of the public not only that they should care about the winner but also why that win is important to them and to society at large. Therefore, creating the theme is vital in order to accept the court’s opinion as the public must connect with the court’s emotional justification for its legal analysis.

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<sup>23</sup> Id. at 579.

<sup>24</sup> Id. at 580 (citing Steven Lubet, *Modern Trial Advocacy: Analysis and Practice* 9 (3d ed. 2004) and Thomas A. Mauet, *Trials: Strategy, Skills and the New Powers of Persuasion* 9 (2d ed. 2009)).

<sup>25</sup> Id. at 581.

<sup>26</sup> Id.

c. Social Dicta's Effect on Narrative

Social dicta's greatest accomplishment in any opinion is the thematic effect on the legal controversy. In creating the theme of the individual opinion, effective social dicta can shape and shift the narrative of the broader debate.

[I]n American law, all the issues – including those that concern the telling of and the listening to stories - find their ultimate commentary in the judicial opinion, especially the Supreme Court opinion. “It is so ordered,” the Opinion of the Court typically concludes, letting us understand that the Court has delivered a narrative of order, and, more generally, that narrative orders, gives events a definitive shape and meaning. “It is so ordered”: this rhetorical topos inevitably fascinates the literary analyst, who normally deals with texts that cannot call on such authority. Much literature, one suspects, would like to be able to conclude with such a line – to order an attention to its message, to institute a new order or a new point of view on the basis of imaginative vision it has elaborated. It is powerless to do so, except insofar as it has been rhetorically persuasive. Story must carry conviction – legal conviction mirrors, with an often violent reality, the conviction sought by all storytelling.<sup>27</sup>

As the quote demonstrates, the court's opinion can change the complexion and outcome of the story. “Legal storytelling has the virtue of presenting the lived experience of marginalized groups or individuals in a way that traditional legal research doesn't.”<sup>28</sup> Consequently, an opinion is fertile ground for taking that story and creating class shifting narratives whose effects reach far beyond the individual justice the winning party in the case receives. The power of the theme and story told in a court opinion, especially a Supreme Court opinion, can result in the social rearrangement of class and culture. This is accomplished by identifying the points of view which are present in every opinion and intertwining them to create one, forward moving narrative.

Professor Mary Ann Becker identifies three main points of view that exist in narrative text: the teller's, the character's and the reader's, and

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<sup>27</sup> Peter Brooks, *Narrativity of the Law*, 14 *Law & Literature* 1, 7-8 (2002).

<sup>28</sup> Peter Brooks, *Narrative Transactions – Does the Law Need a Narratology?*, 18 *Yale J.L. & Human.* 1, 2 (2006).

applies them to the points of view present in a well-composed brief.<sup>29</sup> According to Professor Becker, “[t]he character’s point of view (the client’s) and the teller’s point of view (the attorney’s) must be the same in a legal brief to have the desired effect on the reader’s point of view (the judge’s).”<sup>30</sup> Understanding and representing the character’s point of view requires developing a story that relies on more than one single action to offer a complete depiction of that person.<sup>31</sup> Seeing the character as a whole, not just as one event, helps the judge to relate to the character and care about how the outcome of the case will affect his or her future. In order to do this successfully, the teller must understand the reader’s point of view as well. The briefwriter is tasked with transporting the judge into the client’s story.<sup>32</sup> The judge can then relate and be “sucked into [the] story, despite how unfamiliar it is.”<sup>33</sup> Professor Becker explains that the final piece of the puzzle is the teller’s point of view. Although the briefwriter is on some level merely an implied author,<sup>34</sup> by combining the analytical elements of the brief with the storytelling components, the teller’s point of view bridges the gap between the points of view of the character and the reader.<sup>35</sup> Professor Becker concludes that specifically in the case of legal briefs,

[L]awyers create the relationship with the client by being the client’s voice. The teller’s voice is created when an attorney learns to bridge these two relationships and acts as a medium for the client’s expression (the tale) to the judge (the audience).<sup>36</sup>

A similar relationship exists in opinion writing. The characters’, teller’s and readers’ points of view are all present. However, the roles that each of the parties play and the reason they are thrust into those roles is evidence of the power of social dicta. In briefwriting, the character and the teller must represent a singular point of view in order to have the desired effect on the reader. In an opinion, the teller is the court. Unlike the teller in a brief, the court is anything but an implied author – it is the point of

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<sup>29</sup> See Becker, *supra* note 21 at 584.

<sup>30</sup> *Id.* at 585 (explaining that “[a] legal writer must tell the client’s story to convince a judicial reader to find in the client’s favor at the same time that the writer imparts her point of view as the teller of the text”).

<sup>31</sup> *Id.* at 586-88. The character provides the teller with the story; the teller provides the character with a voice. *Id.* at 588.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 590.

<sup>34</sup> An implied author typically has no voice and no direct means of communication. See *id.* at 585 (quoting H. Porter Abbott, *The Cambridge Introduction to Narrative* 1 (2d ed. 2008)).

<sup>35</sup> *Id.* at 592.

<sup>36</sup> *Id.* at 595

view of the court that controls the story and how it is told. It has its own point of view because of the nature of its relationship to the characters and the readers. It has an inherent legitimacy and is persuasive by its very nature. In writing an opinion, the court, exercising providential power, merges the characters with the readers, writing not only to solve the dispute between the parties at issue, but also to inform the public as to how these issues will be addressed in the future.

The litigants on each side axiomatically identify with the points of view of both the characters and the readers. They are first and foremost the literal characters in the story and the issues are based upon events that happened to and between them. But the litigants are also readers of the opinion. They are already “sucked into the story” because the outcome affects them each personally and immediately. It is the court’s job to provide an explanation of its decision that helps the litigants accept the written disposition of their case.

The less obvious, but arguably more critical audience with which the court must identify is the public. The public is first introduced to the characters and told their story. The public begins as a third party looking in on the events as they are told. The existence of the reader’s point of view transports them into the story. The readers identify with the characters, often times because they may have had a similar experience. At the very least, they have thought about how that experience would have affected them. But there is still a barrier. The public, while maintaining only the reader’s point of view, can only identify with the litigants from afar. The holding of the case tells the public how these litigants will fair in this particular situation.<sup>37</sup> But the holding addresses only the litigants involved and so it is by definition exclusionary. Social dictum takes the opinion beyond the holding and beyond the litigants in the case and brings the public fully into the story, allowing those that begin as mere readers to identify as characters and with the character’s point of view. This is deeper than a parasocially interactive transportation into the story. The public, as both the reader and the character, is fully immersed. The court, through the use of social dicta, merges the characters’ and readers’ points of view into the public’s perspective. Instead of thinking “this could happen to me,” the public says “this is me.” The court adds credence and legitimacy to its

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<sup>37</sup> The emotion is akin to witnessing a car accident on the side of the road. Those passing by feel something because it reminds them of a similar event, or they remember a friend or loved one involved in a similar situation. But the emotion is parasitic at best because, even though the witness may feel a connection to the event and those involved, the passersby are still only witnesses.

decision and the stakes become higher for the public on both an individual and community level.

d. Social Dicta and the Public's Acceptance of the Court

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>38</sup>, Justice O'Connor discussed the acceptance that is required to legitimize the Court's opinions:

As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.<sup>39</sup>

Justice O'Connor continued:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make.<sup>40</sup>

The legitimacy about which Justice O'Connor wrote stems from a history of decision-making that stands, not because the public necessarily supports the ideological origins of the holding of a case, but because it can accept it. And, the public can accept such a ruling, and abide by it even if unwillingly, because the court has provided a fair and just reasoning to back up the result. Even the most well-reasoned of opinions must be viewed within the vacuum of time. As the Court alone cannot set the terms of what a society will accept, neither can it rightly cling to legal propositions nor decisions that have socially worn out their welcome. Opinions can and do drive culture, but the public will not allow the Court to maintain control of the wheel only to drive it to an unwanted destination. The Court can only

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<sup>38</sup> 505 U.S. 833 (1992).

<sup>39</sup> *Id.* at 865-66.

<sup>40</sup> *Id.*

hope that the public will accept and adopt the Court's path. Social dictum provides the vehicle for getting there.

Constructing a well-reasoned opinion is no small task by any court and is without a doubt most difficult on the Supreme Court level. Whether departing from existing precedent or affirming standing precedent, the rules of stare decisis<sup>41</sup> require adherence to fair and just existing principles.<sup>42</sup> So, whether invalidating prohibitions on desecrating the American flag,

The outcome can be laid at no door but ours. The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases. . . . Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the coasts to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt[,]<sup>43</sup>

or, overturning the conviction of a teenager for burning a cross on the lawn of an African American family,

St. Paul has no [] authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquess of Queensberry rules . . . [I]et there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St.

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<sup>41</sup> Latin for "stand by things decided." 21 C.J.S. § *Courts* (2012).

<sup>42</sup> See David L. Berland, Note, Stopping the Pedulum: Why Stare Decisis Should Restrain the Court From Further Modification of the Search Incident to Arrest Exception, 2011 U. Ill. L. Rev. 695, (2011). Modern factors used to determine the applicability of stare decisis include reliance, workability, changed circumstances, and inconsistency with developments of the law." *Id.* at 701. Other considerations are "whether the decision was poorly reasoned, the age of the prior decision, and the margin of victory." *Id.*

<sup>43</sup> *Texas v. Johnson*, 491 U.S. 397, 420-21 (1989) (Kennedy, concurring).

Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire[.]<sup>44</sup>

or, upholding the right to picket close to the funerals of soldiers killed in action,

Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate[.]<sup>45</sup>

we can accept the results of opinions whose acceptance, before reading them, we would not have thought capable. To be clear, it is not that we hail these outcomes as in all ways fair and just. Often times these decisions result in grave consequences for the defeated party. Because of this, we struggle throughout the process and search within our own hearts and minds for what we could proffer as a more just result. But in these opinions what becomes apparent is the greater good these rulings serve. They permeate the social fabric of our country. Because of this connection with our inner sense of community and the desire for harmony within it, we can accept these opinions, and by extension accept the legitimacy of them, and of the Court.

In order to view these opinions as legitimate, though, they must speak to us on a deeper level than the general effect of a traditional ‘facts plus law’ analysis. More than a statement of the holding is required. Instead, the use of social dicta by the court creates the theme – and the theme places the holding into the context the court creates for it. The resulting narrative is then tested in the public square. The memorability of social dicta, the driving force behind these opinions, cannot be understated. As such, social dicta have, at times, outlived the rule of law. For example, many unfamiliar with the law would cite to Justice Stewart’s “I know it when I see it” language from *Jacobellis v. Ohio*<sup>46</sup> to define obscenity, even

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<sup>44</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 396 (1992).

<sup>45</sup> *Snyder v. Phelps*, 562 U.S. \_\_\_\_ (2011).

<sup>46</sup> 378 U.S. 184, 197 (1964) (Justice Stewart, concurring).

though the statement was within a concurring opinion of a deeply divided court,<sup>47</sup> and notwithstanding that the Court's obscenity jurisprudence has since been clarified.<sup>48</sup> When asked about the first amendment and the right to freedom of speech, one might rattle off the phrase "shouting fire in a crowded theater," a paraphrase of Justice Holmes's statements in *Schenck v. United States*, but whether one could or couldn't utter that cry remains unresolved among those engaging in common discourse regarding the law, and neither the "clear and present danger" test from *Schenck*,<sup>49</sup> the "bad tendency" test from *Whitney v. California*,<sup>50</sup> nor the "imminent lawless action" test from *Brandenburg v. Ohio*<sup>51</sup> is known to even a casual follower of the law.<sup>52</sup> And, this list of examples would be incomplete without noting the purpose behind the finding that the sterilization of Carrie Buck was best for society.<sup>53</sup> The language leading up to Justice Holmes's infamous edict in *Buck v. Bell* that "[t]hree generations of imbeciles are enough" is even more disturbing than his conclusion.<sup>54</sup>

The memorability factor is exactly what makes social dicta so powerful. The public takes hold of these judicial statements, and through

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<sup>47</sup> See *id.* at 196, 197, 198, 199, 202.

<sup>48</sup> See *Miller v. California*, 413 U.S. 15 (1973).

<sup>49</sup> 249 U.S. 47 (1917).

<sup>50</sup> 274 U.S. 357 (1927).

<sup>51</sup> 395 U.S. 444 (1969).

<sup>52</sup> The holding of *Schenck* identifies that issue "in every case [as] whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck*, 249 U.S. at 52. The famous "fire in a crowded theater" language is a paraphrase of the following: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." *Id.*

<sup>53</sup> *Buck v. Bell*, 274 U.S. 200, 207 (1927).

<sup>54</sup> See *id.* Before concluding that Carrie Buck was to be sexually sterilized, Justice Holmes noted:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.

*Id.*

continued and prolonged discourse, broadens the message.<sup>55</sup> At some point, the case stands for something that reaches farther than the initially written holding. Sometimes as a natural and unintended consequence, but often by design, the social dicta placed in the opinion by the court takes on a life of its own. As social dicta, an opinion's theme and the resulting narrative are each by definition broader than any one holding, the result of injecting social dicta into an opinion is, at least regarding certain issues, an inaccurate social jurisprudence, which leads to a broader interpretation of the initially written holding when applied in a future case. And, the repetition and reinforcement of this broader interpretation circuitously enhances society's understanding and acceptance of it – unless and until things change.

Stated plainly, an opinion's message can only last as long as the people buy it. Because of this, as the winds of reason begin to blow in a different direction, the Court's sometimes stubborn obedience to jurisprudence that is in contradiction to that movement becomes negligent adherence and continuation at best and intentional misrepresentation and deceit at worst. The foregoing examples demonstrate how social dicta can remain in the consciousness of the public and be thought of as good law long after the decisions containing that dicta have been either altered or overturned. But, social dicta also serve at least one of two other important functions. First, it can create and keep otherwise ill-fated decisions alive longer than legally expected. It does this by providing irrelevant explanations for holdings that support the existing or emerging group in power's point of view. Second, it can completely reframe the narrative and change the issues for future cases. The catalysts for this second function vary, and can include implementation by use of the same tactics noted in the first function. Regardless of its purpose, however, social dicta's connection with the public has a direct effect on the legitimacy of the opinion and of the Court.

### III. Social Dicta as Theme Creating and Narrative Changing – The Effects of Plessy and Brown

An example of the influence of social dicta can be demonstrated through a brief comparison of *Plessy v. Ferguson*<sup>56</sup> and *Brown v. Board of*

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<sup>55</sup> Over time, a narrow holding is interpreted far more broadly than anticipated.

<sup>56</sup> 163 U.S. 537 (1896).

Education<sup>57</sup>. A side-by-side analysis of these two cases highlights not only the power of social dicta on creating a case's theme and setting the narrative, but also how the marriage of time and cultural shifts of attitude affect an opinion's long-term credibility.

In *Plessy*, the Louisiana statute at issue required all trains to “provide equal but separate accommodations for the white and colored races.”<sup>58</sup> *Plessy*, who was seven-eighths Caucasian and one-eighth African, took a seat in the coach designated for white people.<sup>59</sup> He was told to move to the coach designated for non-whites and refused.<sup>60</sup> He was forced off of the train and arrested.<sup>61</sup> *Plessy* argued that the statute violated the Thirteenth and Fourteenth Amendments.<sup>62</sup>

In *Brown*, school children in Kansas, South Carolina, Virginia and Delaware challenged statutes in their states that required segregated schools.<sup>63</sup> They alleged the segregation deprived them of the equal protection of the laws under the Fourteenth Amendment.<sup>64</sup>

Each opinion addressed a seemingly similar issue, but the Court's social dicta, divergent themes and differing points of view guided the decisions toward opposite results. In *Plessy*, the Court stated the issue as whether the Fourteenth Amendment was intended to abolish distinctions

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<sup>57</sup> 347 U.S. 483 (1954).

<sup>58</sup> *Plessy*, 163 U.S. at 540. The statute stated that “all railway companies carrying passengers in their coaches in this state shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations . . . No person or persons shall be permitted to occupy seats in coaches, other than the ones assigned to them, on account of the race they belong to. *Id.* It also provided that “the officers of such passenger trains shall have power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs” and that “any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable . . . .” *Id.* at 540-41. Penalties were provided “for the refusal or neglect of the officers, directors, conductors, and employes [sic] of railway companies to comply with the act . . . .” *Id.* at 541.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Brown*, 347 U.S. at 487.

<sup>64</sup> *Id.* at 488 (“The plaintiffs contend that segregated public schools are not ‘equal’ and cannot be made ‘equal,’ and that hence they are deprived of the equal protection of the laws.”).

based on color or enforce social equality.<sup>65</sup> The Court could answer that very narrow question in the negative, holding that the statute was constitutional because the Fourteenth Amendment did not require that the races have to comingle, and instead only required equality before the law.<sup>66</sup> As such, the statute was a reasonable regulation as it denied no one the right to ride, it merely separated passengers into coaches based upon race.<sup>67</sup> The issue in *Brown* was stated in light of answering a broader question.<sup>68</sup> There, the Court asked whether segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors might have been equal, deprived the children of the minority group of equal educational opportunities.<sup>69</sup> Examined in that light, the Court was able to conclude that separate is inherently unequal.<sup>70</sup>

While each opinion answered with particularity the question before the Court with regard to the individual litigants, both *Plessy* and *Brown* addressed a greater issue – the legal parameters of equality. But, in neither case could the Court stop at a strict analysis of the law. The legal understanding of equality was and remains entirely contingent upon that term’s social definition. It is this exact notion and definition of equality that led the Court in *Plessy* and *Brown* in different directions. The ultimate explanation of the parameters of equality was set by the Court’s social dicta in each case.

The Court in *Plessy* rationalized its holding that the legal definition of equal included forced separate accommodations by blaming the appearance of inequality on the underprivileged race, stating:

We consider the underlying fallacy of the plaintiff’s argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be

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<sup>65</sup> *Plessy*, 163 U.S. at 540.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.<sup>71</sup>

The Court rejected its requested responsibility to ensure that equality applied to all and claimed, instead, that the state was powerless to remedy any perceived injustice between the races:

The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.<sup>72</sup>

It concluded this reasoning by stating:

Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.<sup>73</sup>

The use of social dicta by the Court in *Plessy* to explain the holding that separate was, in fact, equal, had a profound impact on the resulting theme of the case. The Court's reasoning was cold and detached, blaming the minority race for the existing and resulting inequality. The minority race was left to deal with its self-inflicted feelings of inferiority. In other words, all one has to do is believe that they are equal, and everyone else, no matter how racist or discriminatory, will accept that as legally and socially accurate. The minority race was simply told to deal with it and be happy that it was provided with a railway car in which to ride.

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<sup>71</sup> *Plessy*, 163 U.S. at 551.

<sup>72</sup> *Id.* at 551.

<sup>73</sup> *Id.* at 551-52.

Because of the theme it had created, the Court was able to dispose of the case by answering only the questions as it had framed them. The Plessy Court refused to examine the social effects of forcing passengers into separate railway cars based upon race. As such, the issue was crafted to allow analysis only with regard to the extent of the police power of the Fourteenth Amendment.<sup>74</sup>

The deal with it theme evolved into a broader narrative characterizing those in minority positions as unnecessarily complaining, requesting too much and, in some instances demanding more than they were entitled to. The opinion makes clear that the Court was concerned most, if not only, with the white race's reaction to integrating the minority race.<sup>75</sup> To further that point of view, and to allow for the public audience to become characters in the story and consequently adopt that point of view, the Court played on the public's concerns that remained a part of civil discord after the Civil War and Reconstruction.<sup>76</sup> Putting the power into the hands of the people, the Court found "[l]aws permitting, and even requiring, [the] separation [of the races] in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the existence of their police power."<sup>77</sup>

In order to remove from the equation any legitimate interest on the part of the minority race, the Court injected fault into the analysis.<sup>78</sup> Any feelings of inferiority were the result of the minority race's inability to move forward.<sup>79</sup> Further, regarding reasonableness, the Court noted that the state is "at liberty to act with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order."<sup>80</sup> According to the Court, it was not within its power to make people feel

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

equal – the law already dictated equality. As such, the Court used social dicta to avoid social justice.

The societal narrative that this case furthered was that separate was, in fact, equal. As long as the minority race tangibly had its own of whatever was available to the white race, the two were on equal footing. The opinion failed, however, to discuss the effect on the minority race of having to sit in a separate railway car, the criminal penalties that could befall a member of that race for failing to follow the rules, the everyday feelings of living in fear of breaking the rules, or the potential difference in quality between the two positions. To the Court, quality and existence were synonymous. As long as a railway car was provided, all would be right and equal in the eyes of the law. Consequently, Plessy's holding reached further than the litigants and worked to re-legitimize segregation. Not only did many states which began integration during Reconstruction reverse course, but new laws designed to promote only the white race and keep the white race in voting power emerged throughout the country.<sup>81</sup> The societal effect of the Court's social dicta was all but crippling to the theory of equality.

Fifty-eight years later, a new Court, a new theme and a new point of view resulted in a change in the way the story of racial equality is told. The Brown Court focused almost exclusively on the societal effects of forced segregation on the quality of education received by those in the disadvantaged group.<sup>82</sup> The social dicta in Brown was the backbone of the downfall of "separate but equal."<sup>83</sup> Speaking directly to the importance of education, the Court noted that education was "perhaps the most important function of state and local governments . . . the very foundation of good citizenship[.]" and that it was "doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."<sup>84</sup> According to the Court, "[s]uch an opportunity, where the state had undertaken to provide it, is a right which must be made available

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<sup>81</sup> *Id.*

<sup>82</sup> *Brown*, 347 U.S. at 493

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

to all on equal terms.”<sup>85</sup> Maintaining a segregated learning environment garnered genuine feelings of inferiority:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.<sup>86</sup>

The Court was no longer telling the black race to just deal with it. Instead, the theme created by the Court was one of promoting equal opportunity. The Plessy Court had declared equality through what it considered to be equal outcome (i.e. – everyone gets to ride; everyone gets to their destination). The Brown Court took note of this fallacious proposition and focused instead on the quality of the ride. In other words, different seats offer different views of the scenery – and some scenery is by definition inferior. Therefore, denying black school children equal opportunity at education, by prohibiting them from sitting alongside white students in the classroom and within the school, offered them an inherently inferior view of the scenery – both in the course of their education and of the future. From an equal opportunity perspective, separate was not equal.

Selling this new judicial point of view on racial equality would not be easy. Legal, political and social complications were sure to follow this shift in narrative. Separate but equal was firmly rooted in the country’s social understanding of what was acceptable treatment under the Constitution. The Court, therefore, had a more difficult task than it had in Plessy of reaching the public and persuading it to align its collective point of view with that of the Court. That the Court’s decision was unanimous lent much to the broader acceptance by the public. If the differing points of view present among the justices could be unified for purposes of this

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 494.

decision, then the public could find some common ground in accepting the outcome. But the important effect of the social dicta in *Brown* was that the story told about racial equality would be forever changed. It was no longer a story about how the white race would continue to be inconvenienced with measure after measure attempting to equalize outcomes. It was no longer about fault of the minority race in pushing for something greater than it deserved. With *Brown*, the narrative of racial equality became about opportunity, fairness and an equal chance at success. Since these are values that touch the very nature of what it means to be human, the public's – or reader's – point of view was harmonized with the point of view of the Court. There was, of course, initial resistance to the *Brown* narrative.<sup>87</sup> But the opposition to this holding can be attributed more to the fact that the story would from that point forward include an analysis of the effect of prohibiting an equal chance to the minority race – not just a one-sided narrative where the minority race was forced to accept a fabricated and misleading notion of equality.

#### IV. Social Dicta and the Changing Face of Abortion Jurisprudence

A narrative based on a faulty misapplication of equality led to the downfall of *Plessy*. The refusal of the Court to recognize *Plessy*'s arguments and the effects segregated railway cars had on the minority population foreclosed a narrative equally entitled to discussion and analysis. After fifty-eight years, that narrative was finally heard when the Court changed the social dicta to adopt and include the point of view of the minority race. The same opportunity exists with regard to the abortion debate. An analysis of the social dicta in *Roe* and *Gonzales* demonstrates the Court's power in injecting extra-legal statements and its ability and desire to influence the public's perception of truth and justice.

##### A. *Roe v. Wade*

*Roe*, and its companion case, *Doe v. Bolton*, were initially filed as challenges to the abortion laws in the states of Texas and Georgia, respectively.<sup>88</sup> These cases asked the Court to decide whether the Constitution supported a woman's right to choose to terminate her pregnancy through abortion.<sup>89</sup> The Texas law prohibiting abortion except

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<sup>87</sup> See Civil Rights Movement Veterans, [www.crmvet.org](http://www.crmvet.org) (last visited February 11, 2013).

<sup>88</sup> *Roe*, 410 U.S. at 116; *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>89</sup> *Roe*, 410 U.S. at 116. *Doe*, 410 U.S. at 179.

when necessary to save the life of the pregnant woman was challenged by Roe, whose desire to abort was not connected to any life threatening condition.<sup>90</sup> Doe was filed by a married couple who claimed the wife was suffering from a disorder that caused her physician to recommend that she not become pregnant.<sup>91</sup> The Does claimed that if she should become pregnant, they would wish to terminate her pregnancy.<sup>92</sup> The Court found a fundamental right to abortion rooted in the right to privacy.<sup>93</sup> Although the Court found this right to abortion to be fundamental, it explained that it was not unfettered, and created a three stage analysis in an attempt to balance the interests of the pregnant woman in seeking an abortion with the interests of the state in regulating her right to do so.<sup>94</sup> According to this test:

- (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
- (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
- (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.<sup>95</sup>

This sliding scale of autonomy acknowledged the physician's medical judgment as the factor in determining the appropriateness of first trimester abortions and provided varying levels of acceptable state interference as the pregnancy continued into the second and third

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<sup>90</sup> *Id.* at 120. The Does claimed that if she should become pregnant, they would wish to terminate the pregnancy. *Id.*

<sup>91</sup> *Id.* at 421.

<sup>92</sup> *Id.* The Court found the Does were not appropriate plaintiffs as they presented no actual case or controversy. Determining that the Does' argument was speculative in nature, the Court noted "[t]heir alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place and all may not combine." *Id.* at 128.

<sup>93</sup> *Id.* at 153 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

<sup>94</sup> *Id.* at 164-65.

<sup>95</sup> *Id.* 164-65.

trimesters.<sup>96</sup>

Roe's social dicta, based in large part on social science-based reasoning, bolstered the right to privacy created in that case with regard to abortion decision-making, and focused the case law for thirty-four years on the interests of the pregnant woman. It stated:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. 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. All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>97</sup>

From a legal perspective, this social dicta was unnecessary to the holding of the case and inconsistent with the principles serving as the basis for that holding. To demonstrate the unnecessary nature of the dicta, one need only look to the general findings in the case. The Court had just determined through the right to privacy that a woman could choose to have an abortion for any reason or for no reason at all. Privacy in and of itself should have been sufficient. Moreover, when read plainly, the trimester test was a medical test. Each of the three phases focused on the appropriateness of the state regulating the doctor's ability to perform an abortion. The test

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<sup>96</sup> Stacy A. Scaldo, *Life, Death & the God Complex: The Effectiveness of Incorporating Religion-Based Arguments into the Pro-Choice Perspective on Abortion*, 39 N. Ky. L. Rev. 421, 423 (2012).

<sup>97</sup> *Id.* at 153.

left the abortion decision completely up to the doctor on behalf of the woman and her interest in the first trimester, allowed for some regulation on the part of the state in the interest of maternal health in the second trimester, and allowed for the greatest level of attempted restrictions by the state in the third trimester. Yet, even in the third trimester, Roe allowed for the doctor's medical judgment to override that of the state to preserve the life or health of the mother. The right to privacy and the trimester test provided sufficient guidance for the circumstances under which a woman would be able to exercise her right to choose – it was any circumstance she wished.

Although the unwanted motherhood dicta may have been unnecessary to the holding of Roe, it was vital to the theme the Court was looking to create and to the narrative the Court desired for the public to adopt. The Court needed this language to bolster the right to privacy. It would also prove crucial to the Court's success in turning what is an inherent quad-partite relationship and focus of abortion rights into a singular one.

There are intrinsically at least four major competing interests in play every time a woman chooses the abortion decision: (1) the woman, (2) her doctor, (3) the state and (4) the unborn child she is carrying. Three of these interests were given independent legal recognition in Roe. The woman's interest was identified and protected by finding a Constitutional right to privacy in choosing to have an abortion. The doctor's interests and the state's interests were acknowledged and balanced against each other via the establishment of the trimester test. It is only the unborn child's interest that was disregarded on an individual level. In order to have the public accept the casting away of such an inherently entrenched interest – after all, it is the unborn's life that is taken during an abortion – the Court was required to create an alternate, more sympathetic victim. First through a complete devaluation of the unborn's existence by finding it was not even entitled to personhood status and then by raising the pregnant woman to the level of a modern day martyr, the Court tapped into the public's need for tangible identification and turned the conversation to one completely focused on the pregnant woman and the punishment that would befall her if an abortion was not legally available. The unborn was relegated to a footnote in the trimester test, whose interests could only be furthered by the state, and only in the third trimester, if the physician did not find a life or health exception relevant to justify overriding it.<sup>98</sup>

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<sup>98</sup> See *United States v. Vuitch*, 402 U.S. 62 (1971) (finding, prior to the Court's decision in *Roe*, that "health" should be understood to include considerations of psychological as well as physical well-being).

By using the unwanted motherhood dicta, the Court created a theme based upon the right to privacy of an overbearing government intervening into the private lives of its citizens and prohibiting women from making a fundamental choice with regard to their future. This theme was a relatively easy sell, considering the rising generation of citizens lacking trust in their government. As a consequence, each person could envision themselves as potentially being the next victim of government overreaching.

In order to sell the theme in full, the Court created a narrative that would keep the public focused for over three decades on the trials and tribulations of unwanted motherhood. The Court's point of view was clear - women would not have to settle for unwanted motherhood. It was a woman's body, it was a woman's choice. Going forward, that would be the start and end of any abortion regulation that attempted to measure the right of the unborn against the right of the pregnant woman. But the Court's point of view permeated further into the point of view of the public and turned the readers of the opinion into its characters. The once discarded unborn was brought back into the analysis. Although personhood status had been denied and along with it any chance at a competing chance at life, the Court had one critical use for this fourth party - fault. The unwanted motherhood dicta used by the Court would be relevant and applicable to everyone. It was not just the pregnant woman who would be worse off if forced to have a baby she did not want. Instead, all would pay. Whether because a mother of an unwanted child suffered emotional, mental or physical impairment, she had additional child care costs, she was part of a family unable or unwilling to help or she would be forever stamped with an embarrassing social stigma, society would pay for that unwanted child over and over again. The unwanted unborn was made to be the scapegoat to be cast out of the group for the good of the whole. This unwanted motherhood dicta turned killing an unborn baby into a noble sacrifice by society. Lest anyone think the Court in *Roe* was not thinking about the unborn, think again.

In order to understand the full influence and longevity of the unwanted motherhood narrative, it is essential to trace it back to its *Roe*-based origins. Its importance within the opinion is evident, as the language is prominently placed just subsequent to the paramount holding of the case and comes directly after, and is intentionally linked to, the discussion of the right to privacy.<sup>99</sup> Additionally, while the opinion attached no reference to

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<sup>99</sup> *Id.*

the quoted language, the principle brief filed by Appellants (Roe, et. al) supported the unwanted motherhood dicta.<sup>100</sup> Comparing the related rights of personal privacy and physical integrity, Appellants argued that “[p]regnancy obviously does have an overwhelming impact on the woman. The most readily observable impact of pregnancy, of course, is that of carrying the pregnancy for nine months. Additionally there are numerous more subtle but no less drastic impacts.”<sup>101</sup> Appellants furthered the idea that the right to abortion was an important aspect of the right to privacy and relied on the Court’s holding in *Baird v. Eisenstadt*<sup>102</sup> in support of this right.<sup>103</sup> They noted that

*Baird* involved contraceptives unavailable to unmarried women; this case involves measures unavailable to all women. The impact of the two statutes is identical for the women affected. Moreover, the magnitude of the impact is substantial. When pregnancy begins, a woman is faced with a governmental mandate compelling her to serve as an incubator for months and then as an ostensibly willing mother for up to twenty or more years. She must often forego further education or a career and often must endure economic and social hardships. . . . The law impinges severely upon her dignity, her life plan and often her marital relationship.<sup>104</sup>

Appellants cited to an amicus brief filed by the New Women Lawyers, the Women’s Health and Abortion Project, Inc. and the National Abortion Action Coalition.<sup>105</sup> Amici’s legal arguments regarding the unconstitutionality of the statute at issue were based on the Fourteenth Amendment’s guarantees of life and liberty, equal protection, and the Eighth Amendment’s guaranty against cruel and unusual punishment.<sup>106</sup> All of these legal arguments were wrapped within the context of what they considered the perils of unwanted pregnancy:

[T]he status of pregnancy and motherhood severely restricts the life of a woman the way in which an unwanted pregnancy can

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<sup>100</sup> Brief for Appellants, *Roe v. Wade*, 410 U.S. 113 (No. 70-18).

<sup>101</sup> *Id.* at 105.

<sup>102</sup> 429 F.2d 1398 (1st Cir. 1970). In *Baird*, the court struck down a statute proscribing the distribution of contraceptives to unmarried women. *Id.*

<sup>103</sup> Brief for Appellants, *Roe v. Wade*, 410 U.S. 113 ((No. 70-18) at 106.

<sup>104</sup> *Id.* at 106-07.

<sup>105</sup> *See id.* at 105 n.86 (citing Motion for Permission to File Brief and Brief Amicus Curiae on Behalf of New Women Lawyers, Women’s Health and Abortion Project, Inc., National Abortion Action Coalition, *Roe v. Wade*, 410 U.S. 113 (Nos. 70-18, 70-40).

<sup>106</sup> *Id.*

unalterably change and even destroy her life . . . it is the woman who bears the disproportionate share of the de jure and de facto burdens and penalties of pregnancy, child birth and child rearing. Thus, any statute which denies a woman the right to determine whether she will bear those burdens denies her the equal protection of the laws. Carrying, giving birth to, and raising an unwanted child can be one of the most painful and longlasting punishments that a person can endure. Amici have argued that statutes that condemn women to share their bodies with another organism against their will, violate the Eighth Amendment's proscription against cruel and unusual punishment.<sup>107</sup>

The tribulations of an unwanted child, as amici described it, brought with it decreased opportunities in education, employment, social status and self-development.<sup>108</sup> Repeatedly calling unwanted motherhood a "punishment" on the pregnant woman, Amici argued that the punishment "condemns a woman to severe physical burden, pain and labor not only during pregnancy, but also through the birth process and after the child is born, imposing on her years of toil and loss of freedom."<sup>109</sup> Speaking particularly to the emotional and psychological pain unwanted motherhood could thrust upon a woman, Amici relied upon the work of Dr. Natalie Shainess, a psychoanalyst and psychiatrist who had focused her studies on feminine psychology.<sup>110</sup> According to Dr. Shainess, "a woman who does not want her pregnancy suffers depression through nearly the entire pregnancy and often that depression is extremely severe."<sup>111</sup> Further, "depression continues even after birth [and] may even go into psychotic states, and may result in permanent emotion[al] damage to the woman."<sup>112</sup>

The New Women Lawyer's Brief adopted these theories of Dr. Shainess and focused almost exclusively on the alleged mental and emotional suffering of unwanted motherhood. The clearest example of this argument came in the form of the following analogy:

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<sup>107</sup> Brief of Amicus Curiae on Behalf of New Women Lawyers, at 7.

<sup>108</sup> Brief of Amicus Curiae on Behalf of New Women Lawyers, at 27. Of course, the same argument ostensibly can be made for wanted pregnancies and children.

<sup>109</sup> Brief of Amicus Curiae on Behalf of New Women Lawyers, at 35. Amici noted the difference between married and unmarried women, stating that "[t]o deny an unmarried woman an abortion is even more obviously a punishment and an act of greater cruelty as she is totally alone, with *all* of the physical, financial and social burdens of raising a child."

*Id.*

<sup>110</sup> Brief of Amicus Curiae on Behalf of New Women Lawyers, at 38.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

A group of people are walking along a street. Half the group crosses; the remainder are stopped by a red light. Those stopped by the light are told the following:

“From now on, for about nine months, you are going to have to carry a twenty-five pound pack on your back. Now, you will have to endure it, whether you develop ulcers under the load whether your spine becomes deformed, no matter how exhausted you get, you and this are inseparable. Then, after nine months you may drop this load, but from then on you are going to have it tied to your wrist. So that, wherever you go this is going to be with you the rest of your life and if, by some accident, the rope is cut or the chain is cut, that piece of rope is always going to be tied to you to remind you of it.” Of course, this analogy is not complete. It does not include the extreme, sometimes excruciating pain and risk of death involved with the process of transferring the pack from your back to your wrist, nor does it fully describe the limitations placed on your liberty by having that load chained to your wrist for a substantial portion, if not all of your life. It does, however, begin to give some picture of the pain and burden of pregnancy and motherhood when both are involuntary.<sup>113</sup>

The unwanted motherhood language contained in the Roe opinion parallels that of the arguments made in these two amicus briefs; however, the Court set forth this language with no citation.<sup>114</sup> What’s more, the briefs cite only once to any data in support of the arguments made.<sup>115</sup> While it could be argued that the principles behind which the Court’s decision to overturn the ban on abortion stem directly from the conclusions of Dr. Natalie Shainess, the Court could not justify its formal written opinion on unwanted motherhood alone. Unwanted motherhood and its supporting arguments are unrelated to the concerns for the life and the health of the pregnant woman. These life and health assertions, while officially the reason why certain abortion regulations by and large have not survived constitutional scrutiny, are a red herring used to satisfy what would otherwise be unpalatable to a great majority of the public – that a woman could kill her unborn child simply because she did not feel like playing the part of mother, even if only biologically. Unwanted motherhood focuses exclusively on the woman, on her reaction to pregnancy, on her vision of

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<sup>113</sup> *Id.* at 34.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

carrying, giving birth to and raising a child, and on the effect those conditions would have on her otherwise uninterrupted life.

In retrospect, this narrative is remarkable. It has been strong enough to overcome competing rights challenges, remains despite advancing medical evidence and growing societal acknowledgment of personhood, and has even extended the mercy on society theme to include mercy on the unborn. And, it has survived the subsequent abortion regulation cases brought before the Court.<sup>116</sup> Unwanted motherhood has remained from Roe's privacy and trimester test, through Casey's liberty and the undue burden test, and even after Gonzales's acknowledgement of women's regret.<sup>117</sup>

#### B. *Gonzales v. Carhart*

The same year the Court claimed, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, that it was affirming the central tenets of Roe,<sup>118</sup> the public was confronted with the applied, real-life effects of

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<sup>116</sup> See, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Belotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Rust v. Sullivan*, 500 U.S. 173 (1991); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006); *Gonzales v. Carhart*, 550 U.S. 125 (2007).

<sup>117</sup> See *Casey*, 505 U.S. at 833. The unwanted motherhood dicta has such a profound effect on post-Roe abortion regulations that *Casey* was decided, in large part, to curb the right that was applied as unfettered after Roe. Further, the effects of unwanted motherhood were so strongly tied to maintain the right to abortion that Justice O'Connor noted in dicta the importance of Roe's mandate:

The sum of the precedential enquiry to this point shows Roe's underpinnings unweakened in any way affecting its central holding. While it has engendered disapproval, it has not been unworkable. An entire generation has come of age free to assume Roe's concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left Roe's central holding a doctrinal remnant. *Id.* at 860.

Further, as will be noted, the women's regret language contained in the *Gonzales* case, while possibly changing the narrative of abortion cases going forward, has not altogether overridden unwanted motherhood.

<sup>118</sup> See *Casey*, 505 U.S. at 846. The Court in *Casey* considered the "central tenets of Roe" to include: (1) "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the state"; (2) "the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health"; and (3) the State's "legitimate interests from the

unwanted motherhood. In 1992, Dr. Martin Haskell presented his paper, *Dilation and Extraction for Late Second Trimester Abortion*, at the National Abortion Federation Risk Management Seminar.<sup>119</sup> Haskell, who claimed at the time to have performed over 1000 of these procedures, described in detail the intact dilation and extraction procedure (D&X): the baby is pulled by the legs from the woman's body until every part but the head is delivered; a blunt instrument is jammed into the base of the baby's skull; the baby's brains are sucked out, causing the baby's skull to collapse; the head can then pass more easily through the uterus; finally, the placenta and any remaining parts of the baby are sucked out of the woman's body.<sup>120</sup> Largely in response to Haskell's paper and the media attention it received, Congress twice passed bans on the procedure by wide margins.<sup>121</sup> President Clinton vetoed the bill each time.<sup>122</sup> Although Congress's attempts to prohibit the procedure failed, as of 2000, thirty-one states had enacted some form of a ban on partial-birth abortion.<sup>123</sup> Nebraska's statute<sup>124</sup> was the

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outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Id.* It departed from the trimester test, determined that it was not part of the essential holding in *Roe*, and found that this trimester framework was not workable as it suffered from two basic flaws: "in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life." *Id.* at 873. In place of the trimester test, the plurality held in favor of an "undue burden" analysis. The Court held that "a law designed to further the State's interest in fetal life which imposes an undue burden on the woman's decision before fetal viability" is unconstitutional. *Id.* at 877. The Court described an "undue burden" as a state regulation that "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.*

<sup>119</sup> Haskell, Martin. *Dilation and Extraction for Late Second Trimester Abortion* (<http://www.sharonvilleclinic.com/uploads/6/2/0/0/62000039/idx.pdf>), presented September 13, 1992 at the National Abortion Federation Risk Management Seminar.

<sup>120</sup> See *id.*; see also American Pregnancy Association, *Surgical Abortion Procedures* (<http://americanpregnancy.org/unplannedpregnancy/surgicalabortions.html>), last visited February 1, 2013.

<sup>121</sup> Get bill numbers from Congress

<sup>122</sup> April 1996 with great fanfare; October 1997 late on a Friday afternoon.

<sup>123</sup> See Center for Reproductive Rights, *So-Called "Partial-Birth Abortion" Ban Legislation: By State*, February 2004. States enacting a ban included: Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wisconsin. *Id.* States that had not enacted bans included: California, Colorado, Connecticut, Delaware, Hawaii, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Texas, Vermont, Washington, and Wyoming. *Id.*

<sup>124</sup> See Neb. Rev. Stat. Ann. § 28-328(1) (Supp. 2000).

focus of the Court's first foray into the constitutionality of partial-birth abortion – *Stenberg v. Carhart*.<sup>125</sup>

The unwanted motherhood narrative reached its pinnacle in *Stenberg*. Instead of simply and solely basing its ruling that the statute was unconstitutional when applying the undue burden standard as outlined in *Casey*, the Court struck down the law for “two independent reasons.”<sup>126</sup> While it did find that the statute “‘impose[d] an undue burden on a woman's ability’ to choose a D&E abortion, thereby unduly burdening the right to choose abortion itself,”<sup>127</sup> the Court held first that the “law lack[ed] any exception ‘for the preservation of the . . . health of the mother.’”<sup>128</sup> Adding the health exception prong as a free standing requirement within the analysis was critical to furthering the woman-centered motif.<sup>129</sup> Had the Court struck down the statute based upon the undue burden test alone, the legislature could have redrafted the language to clarify, with specificity, which procedure or procedures it intended to ban. However, explicitly identifying the health exception as a separate prong to address before any undue burden analysis was to be engaged in officially gave the pregnant woman the right to an abortion for any reason at any time.

The Court's holding made clear just how far it was willing to go to protect unwanted motherhood. Despite *Roe's* use of the unborn as a tool to further its narrative of unwanted motherhood, the Court in *Roe* did acknowledge the state's interest in regulating on behalf of “potential life” at

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<sup>125</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000). *Stenberg* was asked to determine whether and to what extent a state would be able to ban the intact dilation and evacuation (D&E) procedure. *Id.* at 921-22. Unlike the D&X procedure, where “the surgeon grasps and removes a nearly intact fetus through an adequately dilated cervix,” in a D&E procedure, the physician reaches into the uterus of the patient and pulls parts of the baby out, dismembering these parts in order to be able to remove the remaining parts. *See Dilation and Extraction for Late Second Trimester Abortion, Presented at the National Abortion Federation Risk Management Seminar*, September 13, 1992, by Martin Haskill, M.D.

<sup>126</sup> *Stenberg*, 530 U.S. at 930.

<sup>127</sup> *Stenberg*, 530 U.S. at 930.

<sup>128</sup> *Id.* (quoting *Casey*, 505 U.S. at 880). That the Court discussed the health exception first was neither a coincidence nor a mistake. It noted that this newly explicit health exception prong would apply to more than just the ability to choose abortion. *Id.* at 931. Further, this prong would be extended to a pre-viability fetus as well as one post-viability. *See id.* at 930 (finding that because the “law requires a health exception in order to validate even a post-viability abortion regulation, it at a minimum requires the same in respect to pre-viability regulation”).

<sup>129</sup> Health had always been a concern to be balanced against the interests of the state. *See The Supreme Court, 1999 Term Leading Cases – Constitutional Law*, 114 Harv. L. Rev. 219, 220 (2000).

some point in the pregnancy.<sup>130</sup> *Casey* also noted, although incidentally, that the interest of the state could under certain circumstances be strong enough to preclude a woman from choosing an abortion late in her pregnancy.<sup>131</sup> But, in allowing the doctor's judgment with regard to the woman's health in terms of "physical, emotional, psychological, familial, and [ ] age" to preemptively trump any ensuing undue burden analysis, the Court in *Stenberg* solidified the woman's right to procure an abortion for any reason, at any stage of the pregnancy.<sup>132</sup> This is vital. If ever there was a time that the undue burden analysis would weigh in favor of the state and its regulation, it would conceivably be within the context of a partial-birth abortion. Whether a D&E, D&X or some other form of late term abortion procedure, the state's interest would reasonably be higher at a later stage and under the circumstances presented by postviability (or very late previability) abortion. While there could conceivably be a point when the undue burden test would not be able to fully support unwanted motherhood, the health exception, as pertaining to the physical, emotional, psychological, familial, or age-based well-being knows no limits on time or manner.

The *Stenberg* decision was released on June 28, 2000. Three years later, Congress passed the Partial-Birth Abortion Ban Act of 2003.<sup>133</sup> President George W. Bush, who had campaigned on this issue during the 2000 election, signed the Partial Birth Abortion Ban Act into law on November 5, 2003.<sup>134</sup> Within 48 hours of signing the bill, federal district courts in Nebraska, New York and San Francisco had granted temporary injunctions to abortion providers against enforcement of the ban.<sup>135</sup> All

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<sup>130</sup> See *Roe*, 435 U.S. at 150 ("In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.").

<sup>131</sup> See *Casey*, 505 U.S. at \_\_\_\_ ("In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.").

<sup>132</sup> See *Stenberg*, 530 U.S. at \_\_\_\_.

<sup>133</sup> 18 U.S.C. § 1531 (2003). The Act prohibits any physician from "knowingly perform[ing] a partial-birth abortion[.]" *Id.* While the Act includes an exception in order to save the life of the pregnant woman, it does not contain a corresponding health exception. See *id.* § 1531(a). Unlike the regulation struck down in *Stenberg*, Congress described the method of abortion with greater detail and clarity so as to not have any one procedure mistaken for another. See *id.* § 1531(b)(1)(A) & (B). The law required delivery to a specific anatomical landmark and an over act by the physician performed in addition to delivery that kills the baby. *Id.*

<sup>134</sup> See Joseph Curl, *Bush Signs Partial-Birth Ban; Vows to Defend Law on Abortion Method in Courts*, *The Washington Times*, Nov. 6, 2003. In signing the bill, Bush vowed to "vigorously defend [the] law against any who would try to challenge it in the courts."

<sup>135</sup> See Cynthia Dailard, *Courts Strike 'Partial-Birth' Abortion Ban; Decisions Presage Future Debates*, *The Guttmacher Report on Public Policy*, Vol. 7, No. 4, Oct. 2004 (noting

three courts rendered the ban unconstitutional, specifically finding that the law was flawed because it lacked a health exception.<sup>136</sup> These rulings were affirmed on appeal,<sup>137</sup> and the Nebraska case – *Gonzales v. Carhart*, made its way to the Supreme Court as the principle case in 2006.<sup>138</sup>

Although many believed the Act would be struck down as inconsistent with *Stenberg*, the Court in *Gonzales* upheld the regulation as a constitutional restriction on the right to abortion.<sup>139</sup> In so doing, the Court found that the statute neither imposed an undue burden nor required a health exception.<sup>140</sup> *Gonzales* included a parallel set of social dicta to that of *Roe*. However, this dicta was used to make a starkly different point than was made in the seminal case:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. *Casey, supra*, at 852-853, 112 S.Ct. 2791 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. *See* Brief for Sandra Cano et al. as *Amici Curiae*

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*Carhart v. Ashcroft*, 331 F.Supp.2d 805 (D. Neb. 2004), *National Abortion Federation v. Ashcroft*, *Planned Parenthood Federation of America v. Ashcroft*, 320 F.Supp.2d 957 (N.D. Cal. 2004)).

<sup>136</sup> *Id.*

<sup>137</sup> *See Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005); *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006).

<sup>138</sup> 550 U.S. 124 (2007).

<sup>139</sup> 550 U.S. at 152-53.

<sup>140</sup> *Id.* The Court found the Act clearly only prohibited the D&X procedure; did not prohibit the D&E procedure; distinguished the language of the federal statute from the Nebraska statute in *Stenberg* with regard to the anatomical landmarks required; and additional, fatal overt acts that would be necessary to trigger the statute. *Id.* Consequently, the law did not suffer from overbreadth. *Id.* The Court also held that lack of a health exception in the statute did not render it unconstitutional as there was medical uncertainty as to whether the D&X procedure was ever the safest abortion procedure. *Id.* at 166-67 (noting the language in *Stenberg* that an abortion regulation must contain an exception for the health of the pregnant woman if “substantial medical authority supports the proposition that banning a particular type of procedure could endanger women’s health”).

in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow. *See ibid.*<sup>141</sup>

Unlike the Court in *Roe*, the Court in *Gonzales* attributed the source of its reasoning to an amicus brief filed by Sandra Cano, the former ‘Mary Doe’ in *Roe*’s companion case, *Doe v. Bolton*.<sup>142</sup> Along with filing the brief, the other named amici provided affidavits describing the personal, emotional and psychological suffering they endured after having an abortion.<sup>143</sup> Cano, who did not have an abortion, described her role in the litigation and her regret from having been involved in the case.<sup>144</sup> In addition to noting the particular testimonies of the named amici throughout the brief, the language specifically cited by the Court in *Gonzales* states:

Dr. David Reardon, one of the world’s leading experts on the effects of abortion on women, further demonstrates the devastating psychological consequences of abortion. Dr. Reardon states that following temporary feelings of relief, there is emotional “paralysis” or post-abortion “numbness,” guilt, and remorse, nervous disorders, sleep disturbances, sexual dysfunction, depression, loss of self-esteem, self-destructive behavior such as suicide, thoughts of suicide, alcohol and drug abuse, chronic problems with relationships, dramatic personality changes, anxiety attacks, difficulty grieving, increased tendency toward violence, chronic crying, difficulty concentrating, flashbacks, and difficulty in bonding with later children.

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<sup>141</sup> *Id.* at 159.

<sup>142</sup> *See* Brief of Sandra Cano, the Former “May Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, *Gonzales v. Carhart*, 550 U.S. 124 (No. 05-380).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* Cano stated in her affidavit:

Although the courts understood that ‘May Doe’ was not my real name, what the courts did not know was that, contrary to the facts recited in my 1970 Affidavit, I neither wanted nor sought an abortion. I was nothing but a symbol in *Doe v. Bolton* with my experience and circumstances discounted and misrepresented. During oral arguments before the United States Supreme Court one of the Justices stated that it did not matter whether I was a real or fictitious person. This is where the Court was so very wrong. It did matter. I was a real person, and I did not want an abortion.

*Id.*

The real life experiences of the post-abortive women also confirm what the research has discovered. The women were asked: How has abortion affected you? Typical responses from their sworn Affidavits . . . included depression, suicidal thoughts, flashbacks, alcohol and/or drug use, promiscuity, guilt, and secrecy[.] Each of them made the “choice” to abort their baby, and they have regretted their “choices.” The emotional and psychological pain does not go away, and therefore, abortion is a short term solution with long term negative consequences.<sup>145</sup>

Despite citing to materials supporting the idea that some women regret their choice to have an abortion, the women’s regret dicta was not about women’s regret. Instead, the language contained in that paragraph worked to set up the theme of the case – respect for the sanctity of human life. The monumental nature of this thematic change cannot be understated. Even *Casey*’s reawakening with regard to the importance of the interests of the unborn was feckless from a practical perspective and overshadowed by the Court’s discussion of liberty and self-determination.<sup>146</sup> Conversely, *Gonzales*, although relying on *Casey* for precedential support, turned the interest in promoting, preserving or protecting the life of the unborn from theoretical lip service into practical application.

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<sup>145</sup> *Id.* at 22-24 (internal citations omitted). Amici later argued:

[I]n 1973 when the Supreme Court decided *Roe v. Wade* and *Doe v. Bolton*, abortion was illegal in most states and relatively rare. No evidence existed then regarding how widespread legalized abortion would actually affect women. The Court assumed that abortion would be good for women and made many non-evidence-based assumptions. The Court assumed abortion was like other medical procedures and as safe as childbirth because the long-term effects of abortion on women were unknown at the time. Based on the little evidence before it, a single affidavit from Norma McCorvey, the “Roe” in *Roe v. Wade*, the Court knew that unwanted pregnancies could put pressure on women and that women needed help and compassion in such situations. The Court had no evidence or experience on whether abortion would in fact help or hurt women in the long run. The evidence from post-abortive women now shows that abortion is merely a short-term “solution” with long term negative physical and psychological consequences.

*Id.* at 29.

<sup>146</sup> *See Casey*, 505 U.S. at 870:

[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

As previously noted, the social dicta that became the backbone of the *Gonzales* decision did not appear for the first time in this most recent case. Although *Roe* explicitly chose to focus on the woman, her struggle, her rights, and her consequences in laying the groundwork for thirty-four years of woman-centered jurisprudence, the Court acknowledged the “important and legitimate interest in protecting the potentiality of human life.”<sup>147</sup> The *Gonzales* Court stressed the importance of *Casey*’s emphasis on this interest and the need to clarify and return to the discussion what had been cast aside in cases after *Roe*.<sup>148</sup> Over a dozen times, it specifically acknowledged the life of the unborn in the context of the respect the law is required to have for it.<sup>149</sup>

To further support this theme, the Court placed great emphasis on the pain the unborn feels in being the subject of a partial-birth abortion.<sup>150</sup> In describing the procedure, the Court set the stage by noting the doctor, in performing the abortion, is “often guided by ultrasound.”<sup>151</sup> This is critical for the reader as it is a preliminary reminder that the physician can, often times, see a live baby moving inside of the woman’s uterus prior to

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<sup>147</sup> *Roe*, 410 U.S. at 162 (noting this interest is “separate and distinct” from the “important and legitimate interest in preserving and protecting the health of the pregnant woman”).

<sup>148</sup> *Gonzales*, 550 U.S. at 145-146, 157. Justice Kennedy wrote:

Whatever one’s views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion – that the government has a legitimate and substantial interest in preserving and promoting fetal life – would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

*Id.* at 145.

To implement its holding, *Casey* rejected both *Roe*’s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted. 505 U.S. at 875-876, 878, 112 S.Ct. 2791 (plurality opinion). On this point *Casey* overruled the holdings in two cases because they undervalued the State’s interest in potential life. See *id.* at 881 – 883, 112 S.Ct. 2791 (joint opinion) (overruling *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986), and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983).

*Id.* at 146.

*Casey* reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court’s precedents after *Roe* had “undervalue[d] the State’s interest in potential life.”

*Id.* at 157 (quoting *Casey*, 505 U.S. at 873).

<sup>149</sup> See *Gonzales*, 550 U.S. at 145, 146, 157, 158, 159, 160, 163.

<sup>150</sup> *Id.* at 135-140.

<sup>151</sup> *Id.* at 135.

commencing the abortion. The Court explained in graphic detail how the procedure is performed.<sup>152</sup> The clinical description was a chilling reminder of what had been considered a legal form of terminating a pregnancy.<sup>153</sup> The medical explanation of the partial-birth abortion procedure sufficiently instructs as to exactly what goes on during one of these procedures.<sup>154</sup> Despite this, the Court went further in an attempt to demonstrate its fetal pain acknowledgement and quoted the testimony of a nurse who witnessed Dr. Haskell perform a D&X procedure on a 26½-week-old baby in utero:

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.<sup>155</sup>

Furthering the theme that an abortion destroys a human life, the Court quoted testimony from various doctors with regard to how they performed these procedures so as to result in the fewest after-abortion problems for themselves and their staff members.<sup>156</sup> One doctor noted he would not perform a live-birth abortion on a baby in a certain stage of development “because ‘the objective of [his] procedure is to perform an

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<sup>152</sup> *Id.* at 138.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 138-39.

<sup>156</sup> *Id.* at 139-140.

abortion,’ not a birth.”<sup>157</sup> Another testified that he would “crush a fetus’ skull not only to reduce its size but also to ensure the fetus is dead before it is removed.”<sup>158</sup> He stated that doing this removed from the equation the possibility that his staff would have to deal with a baby with “some viability” or “movement of limbs.”<sup>159</sup>

The Court, through the detailed explanation of abortion procedures and personalized physicians’ methods was clearly looking to thrust the sanctity of human life theme into the forefront. The women’s regret social dicta begins with this acknowledgment when the Court first notes the “respect for human life.”<sup>160</sup> It circles back to this theme in a later part of the opinion. After emphasizing the importance of fully informing the pregnant woman of the parameters of the choice she is undertaking, the Court noted:

It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming human form.<sup>161</sup>

The effect of the Court’s social dicta and resulting theme is a likely shifting in the narrative of abortion jurisprudence. The Court has moved the legal discussion from a woman-centered analysis to a woman vs. baby competing rights analysis. The use of fetal pain and the Court’s description of the physicians’ decisions and actions before, during and after the partial-birth abortion procedures effectively drew the public, as the reader, into the opinion and provided an opportunity to adopt the court’s point of view on the matter. Here, the majority needed to go the extra mile on reality as a 5-4 decision is inherently a more difficult sell, especially when tackling a topic as divisive as abortion.<sup>162</sup> But the important part of this unparalleled shift is that the rights of the unborn have been

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<sup>157</sup> *Id.* at 139.

<sup>158</sup> *Id.* at 140.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 159.

<sup>161</sup> *Id.* at 159-60.

<sup>162</sup> *Id.* Note that the *Brown* decision was unanimous.

legally acknowledged as an interest worth protecting. Although this is a phenomenon not unfamiliar in common discourse, the Court has finally recognized it, and in so doing has fueled the conversation for the future. The Court's understanding of the baby has shifted – with it, its possible understanding of personhood.

### C. Parallels in Social Dicta Between *Roe* and *Gonzales*

Obviously, *Gonzales's* women's regret dicta provides a starkly different take on the abortion issue than *Roe's* unwanted motherhood language. Therefore, an argument could be made that these two theories are inconsistent and therefore one must be incorrect. In reality, they reflect two sides of the same coin. The data was no more reliable in either case. While studies have shown that many women don't regret having had an abortion<sup>163</sup>, unwanted motherhood does not have a destructive effect on all women's lives<sup>164</sup>. Women's regret is not any more of a problematic and unsupported theory than unwanted motherhood was. In fact, the *Gonzales* Court lent more credence to its reasoning than *Roe* did as *Gonzales* actually cites to authority for its position. *Gonzales* also acknowledged that there was no "reliable data" to support "women's regret." *Roe* set forth unwanted motherhood as a proven fact. As such, future courts accepted the idea of unwanted motherhood as it was, indeed, a proven fact, and acted accordingly for thirty-four years. The same has not been true of the use of women's regret. While only five years in the making, there has been a far more measured legal response to the theory.

### V. Social Dicta and the Effect of Women's Regret on Future Abortion Cases

The most pressing problem for the pro-choice movement is not that the *Gonzales* Court upheld a ban on D&X abortions despite the lack of a health exception. Most of the negative reaction to the case stems from the fact that the story has changed. The arguments the Court will entertain are balanced – more expansive – and the rights of the state in regulating abortion to protect the unborn have the potential to stand on equal footing with the rights of the woman to terminate her pregnancy. The fear and resentment this shift has created is obvious in the recent scholarship:

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<sup>163</sup> Abortion and the Null Hypothesis, Nancy Adler, *Arch Gen Psychiatry*.2000; 57: 785-86.

<sup>164</sup> Naomi Wolf, *Our Bodies, Our Souls*, *The New Republic*, Oct. 16, 1995, at 27

Th[e] substitution of Gonzales' "women's regret" rationale for Casey's "women's dignity and autonomous choice" rationale is grounded, not in "the actual experiences of real women affected by the partial-birth abortion ban," but in Justice Kennedy's "intuitive understanding of what women are feeling" and in the Court's belief that it "has a unique and solemn responsibility to define the essential nature of women's dignity." For many, this is nothing more than rank paternalism based on "an essentialist vision of motherhood."<sup>165</sup>

Just Kennedy then takes the opportunity to lapse into what appears to be an unconnected and completely unsubstantiated reflection about motherhood. There has been considerable discussion regarding the use of paternalistic language by Justice Kennedy throughout the majority opinion, and the way it "reflects ancient notions about women's place in the family and under the Constitution - - ideas that have long since been discredited."<sup>166</sup>

The contention that limiting women's rights to pursue alternatives to domesticity leaves everyone better off, including women themselves, retains persistent appeal. The claim resonates with powerful convictions about the primacy of women's maternal responsibilities and deep-seated doubts about the decisionmaking capacities of women seeking other choices, in ways that prompt legal authorities and advocates to dismiss further explanation or elaboration as unnecessary.<sup>167</sup>

These criticisms, while insightful, miss the point of the *Gonzales* opinion. Just like *Roe* and its progeny were not about the baby, *Gonzales* was not about the woman. The baby was placed at the forefront of the decision. Even the women's regret language was about the baby – not the woman. If women regret having abortions, the stage of pregnancy and the manner of abortion may or may not be connected to that regret. In any event, there is no reliable data that stage and manner are determinative as to whether women regret having had an abortion. But, to harp on this is to miss or misrepresent the point. And, to say that women's regret was

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<sup>165</sup> Ronald Turner, *Gonzales v. Carhart and the Court's 'Women's regret' Rationale*, 43 *Wake Forest L. Rev.* 1, 21 (2008).

<sup>166</sup> Laura J. Tepich, *Gonzales v. Carhart: The Partial Termination of the Right to Choose*, 636 *U. Miami L. Rev.* 339, 383 (2008).

<sup>167</sup> Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 *N.Y.U. L. Rev.* 1464, 1486 (2009).

providing a needless and paternalistic protective shield over women and their choices is to either misunderstand the purpose of the shift in narrative or to understand it far too well. As Justice Ginsburg stated in her dissent, the *Gonzales* decision stops not one abortion.<sup>168</sup> While this may be correct, it does hold constitutional a regulation on abortion that “expresses respect for the dignity of human life.”<sup>169</sup>

## VI. Conclusion

In *Casey*, Justice O’Connor concludes her discussion of how the Court exercises relevance by stating, “[T]he Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”<sup>170</sup> In that context, social dicta, the catalyst for theme creation and narrative formulation, seems to really only work, for purposes of longevity when it is either freeing a population from a previous prohibition, or reaffirming the need to maintain that freedom. *Roe*, like *Plessy* suffered from the start. *Plessy* attempted to claim that separate really was equal, but the language of the case itself refuted that principle. Likewise, *Roe* could have created a true balance, but instead, pushed too far to the woman’s interest, and led future courts to completely disregard the interest of the state on behalf of the fetus. *Gonzales*, in shifting the narrative back toward the baby, has restored a sense of balance to the abortion debate, and added a component to the issue that had been lacking in practice for thirty-four years. Only time will tell where this shift will take the Court in future abortion cases. Its next foray into this area cannot come quickly enough.

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<sup>168</sup> *Gonzales*, 550 U.S. at 181 (Ginsburg, dissenting) (noting that the Act “saves not a single fetus from destruction, for it targets only a *method* of performing abortion”).

<sup>169</sup> *Id.* at 157.

<sup>170</sup> 505 U.S. at 866.