

A REFLECTION ON PERSONHOOD AND “LIFE”

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INTRODUCTION

On November 8, 2011, voters in Mississippi will decide whether to enact Measure 26. If enacted, Measure 26 will amend the Mississippi Constitution to define “person,” as used in the Bill of Rights, as “every human being from the moment of fertilization, cloning or the functional equivalent thereof.”¹ Because the Bill of Rights provides that “[n]o person shall be deprived of life, liberty, or property without due process of law,”² an induced abortion arguably becomes an unconstitutional deprivation of the life of a fetus without due process of law. As such, Measure 26 has the potential to make abortions in the state of Mississippi illegal.³ In

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¹ See Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), *available at* <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>.

² MISS. CONST. art. III, § 14.

³ I say that Measure 26 only has the *potential* to make abortion illegal because the Bill of Rights is conventionally read as a limitation on the power of the government. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (“[T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”); *DeLoach v. State*, 722 So. 2d 512, 519 (Miss. 1998) (in context of whether Miranda warnings are required, “for private conduct to be turned into state action, there must be a clear nexus between the state or law enforcement and a private investigation”). Accordingly, the Bill of Rights prohibits the government from depriving persons of their due process rights; it does not prohibit private actors from making such deprivations. To the extent that an abortion would amount to a private actor depriving the fetus or embryo of its life without due process, the prohibition contained in the Bill of Rights would not apply. A more direct way to make abortion illegal would be to define “person” as “every human being from the moment of fertilization, cloning or the functional equivalent thereof” *within the state’s criminal*

this reflection, I consider the relationship between the concept of a “person” and the concept of a “life,” and I contemplate the status of fetal personhood and fetal “life” within the U.S. Constitution as interpreted by the Supreme Court. I conclude that Measure 26 potentially achieves what judicial recognition of “life” and its insertion into the undue burden standard achieve more indirectly—that is, the illegality of abortion. But first, an explanation of the concept of “life” is in order.

“Life,” as I understand it, is a powerful socio-cultural notion that is not properly recognized as synonymous with prosaic biological life, insofar as “life” has the profoundest of moral consequence, and the protection and veneration of it is a moral imperative.⁴ When it is asserted that abortion is wrong because the fetus is a “life,” the “life” referenced needs no definition: upon hearing the signifier, the hearer knows that what is being signified is distinct from mere biological life and dutifully conjures up notions of a precious, sacred entity that must be revered, respected, and protected.⁵ Yet, “life” acquires its power because it has no precise definition. It is an abstraction without content; it means *everything* that those who invoke it desire because it denotes nothing with precision. As explained by historian Barbara Duden:

Life itself is not an amoeba word, since it does not have any application as a technical term in scientific discourse. Unlike

code. See Miss. Initiative 26 (2011) (proposed MISS. CONST. art. III, § 33), available at <http://www.sos.ms.gov/Elections/Initiatives/Initiatives/Definition%20of%20Person-PW%20Revised.pdf>. If the criminal code is amended in this way, abortion will become understandable as the killing of a “person” and, consequently, punishable under the criminal homicide statute. MISS. CODE ANN. § 97-3-19 (2006).

⁴ I use quotation marks around “life” when I use the term to signify the “life” that has moral, theological, and/or spiritual significance. I do not use quotation marks when the term is being used to signify the relatively morally neutral capacity that all living biological organisms possess.

⁵ Professor Borgmann has helpfully distinguished between “thin” and “thick” conceptions of life. See Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551 (2009). She defines the “thin” conception of life as “the fact that a blastocyst, or embryo, or fetus, is a human organism that is in the process of developing into a full person.” *Id.* at 592. Counterpoised to this is the “thick” conception of life—a life that “carries a moral urgency and legitimacy.” *Id.* at 597. Borgmann’s “thick” conception of life corresponds to the “life” to which I refer.

zygote and *fetus*, it does not stem from the language of a disciplinary thought collective [T]he semantic trap into which the use of “a life” leads is not due primarily to its ambiguity but to its vapidness.⁶

While the Court in *Roe v. Wade*⁷ explicitly found that the fetus was not a “person” in the constitutional sense, it declined to find anything respecting the fetus’ moral status. In so doing, the Court rejected a construction of the fetus as a “life.” In subsequent cases, most notably in 2007’s *Gonzales v. Carhart (Carhart II)*,⁸ the Court appears to have reversed course; while the Court, in line with *stare decisis*, did not overturn *Roe*’s finding that the fetus is not a constitutional “person,” it seemed to embrace the notion of the fetus as a “life.” Conceptualizing the fetus as a “life” accomplishes what Measure 26 and the redefinition of the fetus as a “person” within the Mississippi Constitution’s Bill of Rights potentially accomplishes—the illegality of abortion.

I. THE FETUS IN *ROE*

The Court in *Roe* went to great lengths to remain agnostic on the question of the fetus’s moral status. While it definitively held that the fetus was not a “person” under the U.S. Constitution,⁹ it did not similarly hold that the fetus was not a moral entity deserving of some manner of deference. The Court professed not to answer this question,¹⁰ attempting to create an abortion jurisprudence around an agnosticism as to the fetus’s moral status.¹¹

⁶ BARBARA DUDEN, *DISEMBODYING WOMEN: PERSPECTIVES ON PREGNANCY AND THE UNBORN* 75 (1993); cf. Borgmann, *supra* note 5, at 586, 599 (describing “life” as “slippery” and noting the “vague” nature of the signifier “life” and describing it as a “code word”).

⁷ 410 U.S. 113 (1973).

⁸ 550 U.S. 124 (2007).

⁹ *Roe*, 410 U.S. at 158 (stating that the Court is persuaded that “the word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn”).

¹⁰ *Id.* at 159.

¹¹ Elsewhere, I have argued that abortion jurisprudence *ought* to be created around a moral agnosticism about the fetus. See generally Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915 (2010).

Roe owes much of its length to the Court's history of thought concerning the fetus¹²—a history that leads the Court to conclude that the fetus's moral status has been, since time immemorial, the subject of much debate and disagreement. In the face of thousands of years marked by the failure of the development of a moral consensus concerning the fetus, the Court refused to ensconce one particular version of fetal-moral ontology into American constitutional law; the corollary to this refusal was the Court forbidding individual states from ensconcing one version into state law.¹³ Hence, we arrive at the Court's eloquent, but seemingly forgotten, attestation of agnosticism:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.¹⁴

However, some argue that the Court in *Roe* protested too much about its desire not to answer the question about the fetus's moral status; they contend that it did just that in prohibiting states from proscribing abortion prior to fetal viability. For example, political philosopher Michael Sandel argues that despite *Roe*'s protestations that it was being neutral with respect to the fetus's moral status, it implicitly decided that the fetus was not an entity of moral consequence when it interpreted the Constitution to provide for a right to an abortion.¹⁵ He contends that it is similar to the way that one has tacitly decided that the slave is not a "person" in the constitutional sense when one permits slavery; analogously, one tacitly decides that the fetus is not a

¹² *Roe*, 410 U.S. at 130-47 (discussing the wide divergence of thinking about the fetus throughout history and noting the absence of a moral consensus in the U.S. on the issue).

¹³ *Id.* at 162 ("[W]e do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.").

¹⁴ *Id.* at 159.

¹⁵ See Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CALIF. L. REV. 521, 532 (1989) (arguing that the Court did not "bracket" the question of when life begins, but rather implicitly answered that it did not begin prior to viability).

morally-consequential entity, when one permits abortion.¹⁶ He concludes:

That the Court’s decision in *Roe* presupposes a particular answer to the question it purports to bracket is not an argument against its decision, only an argument against its claim to have bracketed the controversial question of when life begins. It does not replace Texas’ theory of life with a neutral stance, but with a different theory of its own.¹⁷

If Sandel is correct, and if *Roe* found, albeit implicitly, that the fetus is not a morally-consequential entity, then *Carhart II* represents the most dramatic of departures from this finding insofar as it not only finds (again, implicitly) that the fetus is a morally-consequential entity, but is a morally-consequential entity of the highest degree—a “life.”

II. “LIFE” IN *CARHART II*

In *Carhart II*, the Court upheld the federal Partial Birth Abortion Ban Act (PBA), which criminalized the D & X, or intact D & E, technique of performing second- and third-trimester abortions.¹⁸ The Court upheld the statute, despite its lack of a health exception¹⁹ (and despite the fact that the Court had struck down just four years earlier a similar bill in *Stenberg v. Carhart*²⁰), on the theory that it furthered the government’s interest in “protecting the life of the fetus that may become a child”²¹—a legitimate pursuit of the government per *Planned*

¹⁶ See *id.* (analogizing the purported bracketing of the question of the fetus’ moral status to the purported bracketing of the question of the morality of slavery offered by Stephen Douglas).

¹⁷ *Id.*

¹⁸ See *Gonzales v. Carhart (Carhart II)*, 550 U.S. 124, 133 (2007).

¹⁹ The Court justified upholding the ban, despite the lack of a health exception, on the fact that Congress found that there was disagreement among physicians as to whether an intact D & E was ever safer than a standard D & E. *Id.* at 162-63. Moreover, “[m]edical uncertainty does not foreclose the exercise of legislative power.” *Id.* at 164.

²⁰ *Stenberg v. Carhart*, 530 U.S. 914, 917-18 (2000).

²¹ *Carhart II*, 550 U.S. at 146; see also *id.* at 145 (noting that the government “has a legitimate and substantial interest in preserving and promoting fetal life”).

Parenthood of Southeastern Pennsylvania v. Casey's explicit directive.²²

One of the most blatant and unapologetic aspects about the Court's opinion in *Carhart II* is that it takes the fetus to be an entity deserving of the most profound of respect—a “life.” That the fetus is more—much more—than a biological entity sustained by the woman through biological processes is suggested by the “womb”²³ in which it resides prenatally, the “profound respect”²⁴ that states may show it, and the “profound” “anguish,” “sorrow,” “grief,” and “regret”²⁵ that women feel post-abortion. It is important to note that these are women who, but for their frequently uninformed actions,²⁶ will develop a “bond of love” with their fetus-cum-infant; this “bond of love,” notably, represents the apotheosis of “respect for human life.”²⁷

So, the question for the *Carhart II* majority is not whether constitutional protection ought to be afforded to a specific technique of ending fetal *biological* life; the question that the majority is adjudicating is whether to afford constitutional protection to a procedure that ends a “life.” It should not be surprising that the Court answered in the negative.

III. THE UNDUE BURDEN STANDARD

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court replaced the trimester framework articulated in *Roe* with the undue burden standard.²⁸ The undue burden standard requires reviewing courts to determine whether a

²² 505 U.S. 833, 871 (1992) (acknowledging “the interest of the State in the protection of potential life”).

²³ *Carhart II*, 550 U.S. at 147 (stating that “a fetus is a living organism while within the womb, whether or not it is viable outside the womb”).

²⁴ *Id.* at 157 (arguing that “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman”).

²⁵ *Id.* at 159-60 (“It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know . . .”).

²⁶ *Id.* at 159 (arguing that most doctors would choose not to tell women contemplating abortion exactly what the procedure entails because of the doctors’ concern with the women’s already fragile emotional state).

²⁷ *Id.* at 159 (arguing that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child”).

²⁸ 505 U.S. 833, 876-77 (1992).

regulation places a “substantial obstacle” in a woman’s path to an abortion prior to the viability of her fetus.²⁹ The standard represented a plurality of the Court’s dissatisfaction with states’ inability under the trimester framework to protect the fetal life sustained by the woman.³⁰ It was designed to enable states to demonstrate respect for fetal life—and encourage women to demonstrate this respect by carrying the fetus to term—at all stages of a woman’s pregnancy.³¹

The undue burden standard is a balancing test and, as a balancing test, requires reviewing courts to balance the woman’s liberty against the state’s interest. Thus, when a reviewing court determines that a regulation does not amount to an unconstitutional undue burden, the court essentially has found that the state’s interest outweighs the woman’s right to an abortion. Conversely, when a reviewing court determines that a regulation is an unconstitutional undue burden on the abortion right, the court essentially has found that the woman’s right outweighs the state’s interest.

To be plain, if fetal “life” is an element in a balancing test, it will necessarily outweigh the competing right or liberty against which it is balanced. This is because fetal “life” is the gravest of propositions; indeed, it is unmatched in its profundity. Accordingly, it is usually impossible that those who believe in it and believe the fetus to embody it will find that any other pursuit outweighs it. The woman’s interest in pursuing higher education or career advancement, in averting enduring poverty, in extricating herself from a physically or emotionally abusive relationship (or simply extricating herself from an unfulfilling relationship), in continuing or changing the trajectory her life has taken thus far, in avoiding single motherhood or welfare

²⁹ *Id.* at 878 (“An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”).

³⁰ *Id.* at 873 (finding that “a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life”).

³¹ *See id.* at 846 (noting that “the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child”).

dependency,³² in avoiding being maimed by continuing an otherwise wanted pregnancy,³³ in protecting, promoting, and preserving her own life—all of these interests pale in comparison to fetal “life.” Ultimately, with the “right” Court conducting the balancing, fetal “life” likely will be found to trump a woman’s right to an abortion altogether.

CONCLUSION

In attempting to accomplish the criminalization of abortion, Measure 26 potentially achieves what judicial recognition of “life” and its insertion into the undue burden standard achieve more circuitously. But, for many, this is no achievement at all.

³² I have argued elsewhere that when a woman’s pregnancy intersects with her poverty, and she must turn to the state for financial assistance during her pregnancy and subsequent parenthood, she becomes a problematized, discursively maligned figure. *See generally* KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (2011). We ought to take seriously a woman’s desire to terminate a pregnancy because she wants to avoid becoming the demonized “welfare queen” of political and popular discourse.

³³ *Carhart II*’s upholding of the federal PBA without a health exception arguably signals the waning of the requirement in *Roe* that the state’s pursuit of the protection of fetal life must yield to the woman’s interest in her own health, if not her life. *Roe v. Wade*, 410 U.S. 113, 158-59 (1973). If so, the state may require that a woman be maimed in order to carry a pregnancy to term. Indeed, there is no better way to describe the results produced by compelling women to undergo a standard D & E when a criminalized intact D & E is medically recommended. *See Stenberg v. Carhart*, 530 U.S. 914, 928-29 (2000) (noting that the D & X procedure that was ultimately banned by the federal PBA was safer than alternative procedures for women carrying pregnancies in which the fetus suffers from hydrocephaly, or for women who have uterine scars, or for whom the “induction of labor would be particularly dangerous”).