BABY M, MOTHERHOOD, FATHERHOOD, & THE EMERGING ANTIABORTION STRATEGY

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INTRODUCTION

In December, the Supreme Court heard oral arguments in *Dobbs v. Jackson Women's Health Organization,*[1] a case involving a challenge to Mississippi's fifteen-week pre-viability abortion ban. In her questions to the lawyers representing the Mississippi abortion clinic, Justice Barrett asked about safe-haven laws, which permit a mother to leave her newborn at a designated location such as a police or fire station without fear of legal consequences. Justice Barrett's questioning posited that the availability of safe-haven laws means that an unwanted pregnancy no longer raises the specter of forcing a woman to give up her education and career in the wake of an unplanned pregnancy that she is forced to carry to term. Justice Barrett's questioning shifted the central concern of the abortion right, from the right of bodily autonomy to the right to be free of unwanted parentage. This project will argue that while Justice Barrett's questions were nominally about safe-haven laws, her query reveals that the antiabortion movement's strategy to assert fathers' rights to veto abortion has gained purchase after decades of laying strategic groundwork.

This project will examine the historic origins and development of the fathers' rights antiabortion narrative by examining the 1988 *In re Baby M* case. While *Baby M* is a surrogacy case, the surrogate, Mary Beth Whitehead, was represented by Harold Cassidy who became the chief architect of the abortion regret narrative, and spent his career advancing a fathers' rights antiabortion litigation strategy. This project will reconsider the *Baby M* case in light of the unique historic moment in which it unfolded, against the backdrop of a burgeoning fathers' rights movement of the 1970's and '80's and a shifting antiabortion strategy. This historic and cultural context reveals the undercurrents of the case that reflect the emerging narrative of both fathers' rights and abortion regret in the seemingly innocuous disguise of a surrogacy contest. While the abortion regret syndrome gained purchase in the *Gonzales v. Carhart* case, this project will explore if the fathers' rights narrative may have also finally had its day in court in the *Dobbs* case. Drawing upon the historical record, this project will examine how the antiabortion movement drew upon both the fathers' rights strategy and the feminist equal protection arguments of the mid-1970's and 80's to craft the argument that fathers have the right to veto abortion if they are willing to step forward and relieve the pregnant woman of the burden of parenthood. Under this framing, the abortion right is not a right related to the indignity of being conscripted into an unwanted pregnancy, but rather the unwanted parentage is what becomes salient to the constitutional analysis. When abortion is recast as a concern over parentage instead of bodily autonomy, advancing the rights of putative fathers in the abortion context takes direct aim at eroding pregnant people's right to access abortion.

This paper proceeds in three parts. Part I sets forth the facts of the *Baby M* case. Part II examines the case as a contest over motherhood and fathers' rights in a historical moment when divorce rates were on the rise in the 1970's and '80's. During this period, men's rights groups were challenging maternal preferences in custody awards based on arguments that fathers have a unique emotional bond with children. The fathers' rights movement also called upon feminist equal protection arguments that were being employed to successfully challenge laws based on gendered stereotypes. This section of the paper examines how *Baby M* engaged narratives about motherhood

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[1] 945 F. 3d 265 (5th Cir. 2020), *cert. granted* 141 S. Ct. 2619 (U.S. May 17, 2021)(No. 19-1392).

and fatherhood that would become central to the antiabortion strategy to challenge the abortion right. The section examines the role of Ms. Whitehead's attorney, Harold Cassidy, who later founded the National Foundation for Life. Specifically, this section examines how Mr. Cassidy's arguments that Ms. Whitehead was experiencing severe emotional trauma at being separated from her baby developed into the woman-protective antiabortion narrative of abortion regret, the idea that abortion causes severe emotional trauma. During this period, he and his legal partner deployed a litigation strategy designed to assert the rights of putative fathers to veto abortion if they are willing to undertake parental responsibility. Thus, while *Baby M* is on its surface a case about surrogacy, Section II examines its significance at a critical moment in the antiabortion movement. Section III examines the impact of abortion regret and fathers' rights in abortion jurisprudence. The Supreme Court deployed an abortion syndrome argument when upholding the so-called partial birth abortion ban in *Gonzales v. Carhart*.[2] The fathers' rights narrative may have also become salient to the current conservative majority of the Supreme Court. Justice Barrett's questioning at oral argument suggests that the Court may be open to recasting the right of abortion from a right of bodily autonomy to a right to be free of unwanted parentage.

I THE BABY M CASE

[THIS SECTION WILL HAVE A DESCRIPTION OF THE BABY M CASE]

II BABY M AND THE CONTEST OVER MOTHERHOOD AND FATHERS' RIGHTS

a. Marybeth Whitehead and the Narrative of Motherhood

The theme of motherhood is threaded throughout the *Baby M* case.[3] The case garnered national attention and Mary Beth Whitehead was widely criticized in the media as a bad mother who was hysterical and unstable.[4] The New Jersey Supreme Court took notice of this negative media portrayal, noting in their opinion that "we do not know of, and cannot conceive of, any other case where a perfectly fit mother was expected to surrender her newly born infant, perhaps forever, and was then told she was a bad mother because she did not."[5] Feminists have also explored the themes of motherhood presented by the *Baby M* case.[6]

The court described the effect of relinquishing the newborn on Mrs. Whitehead, describing that she "realized almost from the moment of birth, that she could not part with this child. She had felt a bond with it even during pregnancy."[7] After giving the baby to the Sterns after leaving the

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[2] 550 U.S. 124, 158-59 (2007).

[3] *See discussion,* MELISSA MURRAY & KRISTIN LUKER, CASES ON REPRODUCTIVE RIGHTS AND JUSTICE 383-84 (West 2015) (describing the "two searing images of motherhood" presented by the court).

[4] *See discussion*, AREEN, SPINDELMAN, ET AL., TEACHER'S MANUAL, FAMILY LAW CASES AND MATERIALS (6th Edition) at 209 (describing that Whitehead "was often portrayed by the media as a hysterical, unstable woman, who could not keep a promise.).

[5] In re Baby M, 537 A. 2d 1227, 1259 (1988).

[6] *See e.g.* Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality,* 1990 WISC. L. REV. 297, 376-79 (describing that surrogacy arrangements challenge the "givenness of women's biological destiny" and the possibility of recognizing "emergent male efforts to claim a meaningful role in access to and nurture of children."); Pamela Laufer-Ukeles, *Essay, Approaching Surrogate Motherhood: Reconsidering Difference,* 26 VT. L. REV. 407, 436 (2002).

[7] 537 A. 2d 1227, 1236. Melissa Murray and Kristin Luker have observed that the Baby M court described that the "emotional connection between mother and child are first developed *in utero* during gestation." MURRAY & LUKER, *supra* note 3, at 383.

hospital, she "became deeply disturbed, disconsolate, stricken with unbearable sadness. She had to have her child. She could not eat, sleep, or concentrate on anything other than her need for her baby."[8] Her lawyer argued that the trauma of separation from her baby and the ensuing lower court order granting custody to the Sterns caused Mrs. Whitehead to act in erratic behavior for which she was judged harshly by the court in its decision to award custody to the Sterns.[9]

Elizabeth Stern was also negatively portrayed through the lens of motherhood, with the New Jersey Supreme Court questioning her reasons for foregoing pregnancy and turning to a surrogacy arrangement. While her stated reason for choosing not to bear a child was due to her multiple sclerosis diagnosis, the court observed, "[h]er anxiety appears to have exceeded the actual risk. . . .Nonetheless, that anxiety was evidently quite real."[10] The court took pains to note that in addition to Mrs. Stern's overblown fear of the health risks involved in a pregnancy[11] her inability to bear children was exacerbated by her decision to waited to start a family in order to pursue her professional goals of medical school and residency and the delay resulted in her need to turn to a surrogate.[12]

b. Harold Cassidy, Motherhood, and Abortion Regret

Mary Beth Whitehead's attorney in the case, Harold Cassidy, had spent much of his career working with a network of birth mothers who were trying to reunite with children they had given up for adoption.[13] His experience working with birth mothers led him to represent Whitehead in her fight to retain custody of the child she bore as a surrogate for the Sterns. Cassidy saw the case as an opportunity to put "the moral value of motherhood in the spotlight and create[] an image of a grieving mother" torn away from her child at birth through adoption and surrogacy. In the ensuing years he would draw upon this narrative forged in his work in adoption cases and the *Baby M* case to draw a parallel to abortion: that abortion harms women because they would come to regret their decision.[14] He has described that while he did not initially see the parallels between the trauma and regret of adoption, surrogacy, and abortion, his work in these cases and the *Baby M* surrogacy case led him to respect "the powerful, inherent instincts of women to love their children" and "their inability when they lose their children, to put it completely behind them" even when their children are embryos.[15]

Cassidy's argument that abortion harms women put him at the forefront of the new antiabortion narrative that was gaining traction during this period that shifted focus from protecting fetal life to protecting women from the harms of abortion.[16] The woman-protective antiabortion narrative claims

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[8] *Id.* at 1236. *See* MURRAY & LUKER, *supra* note 3, at 383 (describing the court's depiction Whitehead's longing for her daughter as a "visceral, primal—indeed animal-like—need that had to be sated.").

[9] *Id.* at 1239.

[10] In re Baby M, 537 A. 2d 1227, 1235.

[11] Those risks were not insignificant, and included, as the court points out, "blindness, paraplegia, or other forms of debilitation." Baby M at 1235.

[12] *Id.* at 1235.

[13] Sarah Blustain, *The Man Who Loved Women Too Much,* Mother Jones (Jan. 2011), https://www.motherjones.com/politics/2011/01/harold-cassidy-abortion-laws/ (profiling Harold Cassidy's career).

[14] *Id.*

[15] *Id.*

16. Sarah Blustain, *The Man Who Loved Women Too Much,* Mother Jones (Jan. 2011), https://www.motherjones.com/politics/2011/01/harold-cassidy-abortion-laws/ (describing that Cassidy's beliefs that abortion harms women has "put him at the forefront of the pro-life movement's biggest rebranding in recent memory."). *See generally* KARISSA HAUGEBERG, WOMEN AGAINST ABORTION: INSIDE THE LARGEST MORAL REFORM MOVEMENT OF THE TWENTIETH CENTURY 35-55 (2017) (describing the "invention of postabortion syndrome"); MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT, 145, 173-75 (2020)(describing the founding of Operation Outcry designed to substantiate the claim that abortion harms women); Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL OF RTS. J. 735, 750 (2018) (describing the reasons and influences that caused mainstream pro-life organizations in the mid- to late 1980's, after unsuccessful attempts to introduce fetal

that women who have abortions suffer psychological harm when they realize they have terminated a life of a human being.[17] Describing the harm as "abortion syndrome,"[18] antiabortion activists gathered stories and narratives of women who claimed that they were harmed by abortion, including "suicide attempts, sexual promiscuity, eating disorders, and drug and alcohol abuse."[19] Cassidy teamed up with Allan Parker to found Operation Outcry that has gathered thousands of declarations of women about how abortions have destroyed their lives.[20] Drawing upon "scientific" research and the testimonials of women who have undergone the procedure and later claim to regret their abortions, Cassidy and other abortion opponents sought to require onerous informed consent scripts that warned women of abortion's alleged harms.[21]

Cassidy drew upon the narrative of maternal regret that had dominated his work challenging adoption and surrogacy cases to argue that abortion causes women trauma by severing a mother's relationship with her unborn child. One of his first cases in which he applied his abortion regret argument was a New Jersey case two years after *Baby M*, *Loce v. New Jersey* in which a putative father sued the state for failing to stop his girlfriend from having an abortion.[22] Cassidy filed a supporting brief in which he argued that "[a] mother's relationship with her child during pregnancy is the most intimate, most unique, most important, and one most worthy of protection."[23] Indeed, Cassidy's brief cites to the holding in *Baby M* to support his argument that while "both parents are equal contributors to life, with equal obligations following birth," but the primary custodian of a baby is the mother if the parents disagree on custody because of the bond that is created by carrying the child to birth.[24] While the case was unsuccessful, it was the first in a litigation strategy to challenge abortion based on the same arguments he developed on behalf of Mary Beth Whitehead in *Baby M.* In 1997 he represented a 16-year-old girl in her suit against an abortion provider arguing that he had failed to obtain informed consent. The case, *Marie v. McGreevey*,[25] was brought by women who had undergone the abortion procedure and sued abortion providers in wrongful death on behalf of aborted fetuses for failure to give proper informed consent for abortion procedure. The lawsuit was unsuccessful but provided a platform for Cassidy's argument that abortion was harmful to women and that informed consent was necessary to protect women from the emotional and physical harms of abortion. In that year Cassidy founded the National Foundation for Life to support his litigation strategy in the Donna Santa Marie case and similar woman-protective cases.[26]

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personhood legislation in Congress, to change tac to stress woman-protective arguments but continued to stress fetal personhood with support of laws that criminalized drug use during pregnancy, for example.).

[17] *See*, Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions,* 3 U. ILL. L. REV. 991, 1012 (2007)(describing the woman-protective rationale that undergirds South Dakota restrictive abortion legislation).

18. *See id.* at 38.

19. HAUGEBERG, *supra* note 15, at 40 (describing an antiabortion tract, entitled *You Are Hurting,* that details that when a woman becomes pregnant, "the body machinery gears up to produce a child: The Maternal mind set begins to establish. Any thwarting of this natural process (such as an abortion) upsets the body ecology and scars the psyche of the would-be mother." *Id.* at 40-41).

[20] Blustain.

21. *See* Linda Greenhouse & Reva B. Siegel, Casey *and the Clinic Closings*, 125 YALE L.J. 1430, 1444-49 (2019); Linda Greenhouse, Opinion, *Why Courts Shouldn't Ignore the Facts About Abortion Rights*, N.Y. TIMES (Feb. 28, 2016), https://www.nytimes.com/2016/02/28/opinion/sunday/why-courts-shouldnt-ignore-the-facts-about-abortion-rights.html.

[22] Loce v. New Jersey, (1990).

[23] Krail, et al. v. New Jersey, Petition for Writ of Certiorari to the New Jersey Supreme Court, Oct. Term 1993, Brief in Support of Writ of Certiorari to New Jersey Supreme Court, at 36. Available at krailv.newjerseycertpetition.pdf (motherjones.com)

[24] Krail, et al. v. New Jersey, Petition for Writ of Certiorari to the New Jersey Supreme Court, Oct. Term 1993, Brief in Support of Writ of Certiorari to New Jersey Supreme Court, at 32, fn. 50.

[25] 314 F. 3d 136 (2002)(3rd Cir.)(holding women were unable to sue abortion providers in wrongful death on behalf of aborted fetuses for failure to give proper informed consent for abortion procedure).

[26] Blustain

In 2003, Cassidy helped South Dakota legislator Matt McCaulley draft a near total abortion ban based on a woman-protective rationale.[27] The bill passed in 2005 by the South Dakota legislature based on the woman-protective reasoning describes that "by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated" and required the doctor to advise the pregnant woman of all known medical risks of having an abortion, including "depression and related psychological distress and increased risk of suicide ideation and suicide."[28] A separate abortion bill passed in 2006 by the legislature stated that the purpose of that bill was "to fully protect the rights, interests, and health of the pregnant mother . . . and the mother's fundamental natural intrinsic right to a relationship with her child."[29] To gain support for the bill, Cassidy arranged for testimony during the committee hearing that included a rape victim who had an abortion at the urging of her family but later came to regret the abortion, describing it to committee members as a "second rape."[30] Cassidy himself testified and described his work assisting biological mothers who sought his help in adoption cases.[31] The bill was vetoed by the South Dakota governor but an informed consent law that required doctors to tell their patients that "abortion will terminate the life of a whole, separate, unique, living human being" was passed in 2005. When the law was unsuccessfully challenged in 2011 in *Planned Parenthood v. Rounds*, Harold Cassidy joined South Dakota's attorney general to defend the law before the Eighth Circuit Court of Appeals.[32]

The woman-protective anti-abortion argument was driven by a successful legislative and litigation[33] strategy based on a narrative that abortion deprives women of an "intrinsic right to maintain her relationship with her unborn child."[34] The next section describes how the narrative of fatherhood in *Baby M* drew a corollary to the motherhood narrative of the case. It describes that the fathers' rights claims in anti-abortion strategy has come to mirror the woman-protective anti-abortion narrative that essentialized women's intrinsic role as mothers.[35] The section describes a new emerging narrative that men's harms from abortion flow from their essential roles as the head of patriarchal family. The section examines how abortion opponents drew upon two movements, the fathers' rights movement of the late 1990's and a new narrative of men's abortion regret, to push for civil remedies against abortion providers. The civil remedies for putative fathers were based on arguments about men's

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[27] Blustain

28. H.B. 1166, 2005 Legis. Assemb., 80th Sess. (S.D. 2005). The bill was halted by preliminary injunction, see Planned Parenthood Minn. v. Rounds, 530 F.3d 724 (8th Cir. 2008) (en banc), and the preliminary injunction was vacated by Planned Parenthood Minn. v. Rounds, 686 F.3d 889, 906 (8th Cir. 2012) ("On its face, the suicide advisory presents neither an undue burden on abortion rights nor a violation of physicians' free speech rights.").

29. *Women's Health and Human Life Protection Act*, H.B. 1215, 2006 Legis. Assemb., 81st Sess. (S.D. 2006) (banning abortion except to save the life of the pregnant woman). The Women's Health and Human Life Protection Act was repealed by a state-wide referendum on November 7, 2006. *South Dakota Vote Against Abortion Ban*, 33 J. MED. ETHICS 123, 123 (2007). The earlier bill, House Bill 1166, provided that abortion "will terminate the life of a whole, separate, unique, living human being," and that the mental and physical health risks of abortion include depression and suicide ideation. S.D. H.B. 1166. The woman-protective anti-abortion legislation is based upon the premise that abortion harms women. *See* Siegel, *supra* , at 992.

[30] Cite to committee report.

[31] Blustain.

[32] Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds, 686 F. 3d 889 (2012) (8th Cir.)(finding that disclosure to patients seeking abortion of increased risk of suicide ideation and suicide is not misleading and does not place an undue burden on abortion rights and does not violate doctors' First Amendment free speech rights).

[33] For an excellent discussion of the pro-life attorney, Harrold Cassidy's, successful litigation strategy to establish both fetal personhood and abortion regret syndrome, see, Ziegler, Abortion and the Law in America, sura note __ at 107 (describing Cassidy forming the Culture of Life Leadership Coalition, a group of anti-abortion lawyers working to litigate cases on behalf of women suing abortion providers for wrongful death and emotional trauma from the procedure. *Id.* at 173-5); Sarah Blustain, *The Man Who Loved Women Too Much,* MOTHER JONES (Jan. 2011), https://www.motherjones.com/politics/2011/01/harold-cassidy-abortion-laws/ (profiling Harold Cassidy and his litigation strategy to represent women suing their abortion providers).

[34] ZIEGLER, ABORTION AND THE LAW IN AMERICA, sura note __ at 107.

[35] CITE

natural roles as the head of traditional patriarchal household and that abortion causes men trauma and regret because it causes them to break their natural impulse to protect their unborn child.

c. William Stern, Fatherhood, and the Foundations of Men's Abortion Syndrome

The *Baby M* court also described William Stern's interest in fatherhood presented by the case. The court noted that the Stern's decision to "forego having children of their own" had "special significance" for Mr. Stern whose family had been killed in the Holocaust and "as the family's only survivor, he very much wanted to continue his bloodline."[36] The court took up the constitutional issues presented by the case, noting that both parties argued that the state and federal constitutions support their basic claims.[37] Both parties argued that their claims were supported by the right of privacy related to family and intimacy, the right to procreate, and the rights that flow from the Fourteenth Amendment, the Ninth Amendment, and the penumbras of rights that are encompassed in the Bill of Rights.[38] The court framed the controversy as two equal and fundamental competing constitutional claims, describing right asserted by the Sterns as the right of procreation and that asserted by Mary Beth Whitehead is the right to companionship of her child.[39] The court noted that it did not need to reach the issue because it had restored Mary Beth Whitehead's parental rights, but noted in dicta that, to assert that Mr. Stern's right of procreation gives him the right to custody of Baby M "would be to assert that the constitutional right of procreation includes within it a constitutionally protected contractual right to destroy someone else's procreation."[40] The court concludes that where the competing claims involve the rights of a resulting child, different interests are at stake and "a person's rights of privacy and self-determination are qualified by the effect on innocent third persons of the exercise of those rights."[41] The court's dicta regarding fathers' rights in the case, while not central to its holding, touches upon the litigation and legislative strategy of the antiabortion movement that was beginning to take shape based on arguments of fathers' rights to veto abortion.

Two movements were influential in shaping the conservative policy agenda to advance fathers' rights during the 1980's and 90's when the *Baby M* case was being decided. In response to rising divorce rates in the 1970's and 80's, a conservative fathers' rights movement sought to reform child custody laws to secure legal recognition of the father-child relationship.[42] Fathers' rights advocates also seized on emerging feminist constitutional equality arguments that challenged sex-based stereotypes of the natural superiority of mothers as caregivers at a time when women sought to enter the workforce and higher education in record numbers.[43] The fathers' rights movement advanced arguments that revived historic constructions of fatherhood in an effort to re-establish the authority of men and preserve the power of patriarchy in the family at a time when the formal structure of marriage was in decline.[44]

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[36] *Id.* at 1235.
[37] *Id.* at 1253.
[38] *Id.* at 1253.
[39] *Id.* at 1253.
[40] *Id.* at 1254.
[41] *Id.* at 1254.
[42] *See discussion*, Dinner at 86-87 (describing the fathers' rights movement's goal of reforming child custody laws that favored maternal caregivers and arguing instead for laws that support the father-child relationship)
[43] Serena Meyeri (describing that in the early 1970's fathers seized upon the emerging constitutional equality principles to challenge the legal inferiority of unmarried fathers. Serena Meyeri Foundling Fathers at 2307; Deborah Dinner at ___
[44] Dinner at 87 ("The history of the fathers' rights movement is at once a liberation narrative and a story about the preservation of patriarchy within the family."); Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism,* 5 STAN. J. C.R. & C.L. 269, 283 (2009) (describing that marriage promotion efforts of

The fathers' rights litigation in the years after *Roe v. Wade* were brought by putative fathers against pregnant women and sought to assert the rights of putative fathers to block abortion based on arguments that cast pregnant women seeking abortion as bad mothers and casting men in the role of parents in a child custody dispute.[45] Through this litigation strategy, anti-abortion activists sought to frame abortion within the context of family and parentage rather than as an individual right of privacy and bodily autonomy. They argued that men's reproductive right to veto abortion flowed from their roles as fathers in traditional family to protect and provide for their children.[46] Anti-abortion advocate John Noonan decried that "the person seeking an abortion has become by federal fiat an anonymous, rootless individual without spouse, parents, or family."[47] For example, in 1973 in *Jones v. Smith*,[48] the court denied injunctive relief for an unwed father who sought to enjoin his partner from obtaining an abortion based on the argument that "the termination of a pregnancy illustrates and reflects the "unfitness of the mother" or "the abandonment" of the unborn child."[49] The court rejected the plaintiff's framing of the issue as one of parental rights, holding that the decision to terminate pregnancy is a personal decision for the mother and her physician. In a 1984 case, *Coleman v. Coleman*,[50] the father called upon William Blackstone to argue that as a father he had an obligation to defend his child, quoting 1 W. Blackstone, Commentaries , that '[t]he duty of parents to provide for the *maintenance* of their children is a principle of natural law. . . . By begetting . . . [the children, the parents] have entered into a voluntary obligation . . . [to preserve the life] they have bestowed, ... And thus the children will have the perfect *right* of receiving maintenance from their parents.'"[51] In others cases brought by fathers seeking to block abortions, the putative fathers presented evidence and arguments that framed the contest as one of parentage, with fathers presenting evidence that "demonstrates that he would be a responsible father who is capable and would adequately support the child"[52] against the woman's claim of bodily autonomy and decisional privacy. The role of fathers in the context of abortion was addressed by the Supreme Court in 1976 in Planned Parenthood of Central Missouri v. Danforth[53] which required doctors to seek a husband's consent for an abortion unless the pregnant woman's life was at risk.[54] An amicus brief filed by Americans United for Life (AUL) argued that men should have the right to weigh in on the abortion decision because of their changing role in the family in which they have assumed increased care giving and responsibility for childrearing, in short, they share emotional bonds with their unborn children.[55] The AUL brief addressed men's rights in spousal consent laws based on men's roles as parents, arguing that formal equality and men's equal roles in childrearing mean that fathers suffer psychological and social harm as the result of abortion and their reproductive rights should be recognized.[56] The Court rejected the argument, noting instead that

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the religious Right "advocate patriarchal family structures . . . where men serve as authority figures in the [marital] family.").

[45] Cite Ziegler article

[46] Ziegler Fathers Rights at 679.

[47] John Noonan, *Proposed Constitutional Amendment on Abortion at 70.;* Mary Ziegler, *Fathers Rights* _____ *at* _____.

[48] 278 So. 2d 339 (Fla. Dist. Ct. App. 1973).

[49] CITE

[50] 471 A.2d 1115 (1984).

[51] *Id.* at 1118.

[52] *Conn v. Conn,* 525 N.E.2d 612, 615 (Ind. Ct. App. 1988). *See also, Steinhoff v. Steinhoff*, 531 N.Y.S.2d 78 (Sup. Ct. N.Y. Nassau Cnty. 1988) (denial of husband's application for an order restraining any hospital from performing an abortion on wife based on his argument that he is "ready, willing and able to care for the child in the event of a live birth." *Id.* at 79).

[53] 428 U.S. 52 (1976).

[54] *Id.* at 58.

[55] *Id.* at 104-105.

[56] *Id.* at 104-105.

"Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor."[57] The courts in these cases consistently rejected the argument that fathers have a right to make decisions for a pre-viable fetus in against the right of bodily autonomy of the gestational parent. Civil remedy antiabortion laws make a similar claim—but aimed at the provider instead of the pregnant patient—to grant putative fathers the right to sue in wrongful death or on behalf of the fetal estate based on their status as the father of the fetus. This new strategy to allow putative fathers to sue abortion providers for their own harms and on behalf of the fetal estate is striking in that it at once seeks to anchor fetal personhood and reframe the abortion right as one involving parentage rather than bodily autonomy.

Reframing the abortion right as an issue of parentage recasts the competing claims of the parties as contests over custody and parental fitness. For example, in their fathers' rights litigation strategy, attorneys Jim Bopp and Richard Coleson sought to devalue the pregnant women's decision-making by presenting it as frivolous in relations to the fathers' interest in raising his unborn child. A case described earlier, John Smith sought to block his estranged girlfriend from seeking an abortion, the attorneys argued that Jane Doe's reasons for seeking an abortion were frivolous compared to his desire to raise his child.[58] In their brief to the court the attorneys argued that,

> Regardless of the mother's motivation, whether it be gender selection of her child, revenge or blackmail . . . she may obtain an abortion without any consideration of the father's interests. It matters not . . . what degree of bonding already occurring between the father and child, not his resources for providing for the child when born . . . Even in a situation where an unborn child is the only child that the father . . . . would be able to procreate . . . her right is absolute as against the father.[59]

Framing the abortion decision as a contest between parents shifts the arguments to balance the interests of parents. The ACLU pushed back on this rhetorical slippage, arguing that " every adult woman ha[d] the right to decide to have an abortion and to effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons."[60]

III *DOBBS*, ABORTION AS UNWANTED PARENTAGE, AND THE EMERGING FATHERS' RIGHTS ANTIABORTION NARRATIVE

Two themes undergird the *Baby M* case, the instinct of motherhood and the trauma of separating a mother and child, and the rights of fathers to maintain their bloodline through procreation and custody of their children. While these themes were nascent in the case, in the ensuing years they came to fruition and came to dominate the antiabortion strategy of the following decades with varying success. The Supreme Court echoed the woman-protective rationale when it upheld a ban on intact D & E abortion procedures in *Gonzales v. Carhart*[61] describing that abortion harmed women by breaking the bond between mother and child:

> Respect for human life finds an ultimate expression in the bond of love the mother

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[57] Planned Parenthood v. Danforth, 428 U.S. at 71.

[58] *See discussion* Ziegler Fathers' Rights at 694-95.

[59] Petition for Writ of Certiorari at 15, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837) at 6.

[60] Respondent's Brief in Opposition at 4-8, Smith v. Doe, 492 U.S. 919 (1988) (No. 88-1837) at 8. See discussion Ziegler Fathers Rights at 697-98.

61. Gonzales v. Carhart, 550 U.S. 124, 158-59 (2007).

> has for her child. . . . 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. Severe depression and loss of esteem can follow.[62]

While acknowledging that it lacks scientific "data" upon which to base its decision, the Court's opinion nevertheless sets forth the narrative that abortion harms women based on a description that calls upon fetal personhood.[63] The Court stated:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.[64]

The Court's description of the woman-protective rationale is steeped in language that reflects fetal personhood, indeed the harm to the patient flows from the regret of terminating the life of "a child assuming the human form."[65]

While the woman-protective rationale for restricting abortion has been adopted by the Supreme Court and influenced its decision in *Carhart,* it appears that the fathers' rights argument may have also gained traction in the Court's abortion analysis. In December, the Supreme Court heard oral arguments in *Dobbs v. Jackson Women's Health Organization,*[66] a case involving a challenge to Mississippi's fifteen-week pre-viability abortion ban. In her questions to the lawyers representing the Mississippi abortion clinic, Justice Barrett asked about safe haven laws, which permit a mother to leave her newborn at a designated location such as a police or fire station without fear of legal consequences. Justice Barrett's questioning posited that the availability of safe haven laws means that an unwanted pregnancy no longer raises the specter of forcing a woman to give up her education and career in the wake of an unplanned pregnancy that she is forced to carry to term. She asked,

> [B]oth *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the

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62. *Id.* at 159 (citation omitted). It is important to note that the Court's reliance on the psychological harm of abortion and regret arise not from intact dilation and evacuation ("D & E") procedure, the most common procedure for a second-trimester abortion, specifically, but from abortion itself and therefore has wider implications for extending beyond the intact D & E context, to abortion more generally. *See* Chris Guthrie, Carhart, *Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877, 879-80, 880 n.13 (2008) (arguing that states will use the psychology of regret from the *Carhart* decision to justify wide-ranging constraints on abortion rights generally).

63 Abortion regret that forms the basis of the women-protective anti-abortion ideology has not been backed by mainstream scientific findings, see e.g., Biggs MA, Upadhyay UD, McCulloch CE, Foster DG, *Women's mental health and well-being 5 years after receiving or being denied an abortion. A prospective, longitudinal cohort study* 74 *JAMA Psychiatry* 169 (2017) doi:10.1001/jamapsychiatry.2016.3478; American Psychological Association, *Abortion and Mental Health* (June 2018), https://www.apa.org/pi/women/programs/abortion/index (finding "no evidence sufficient to support the claim that an observed association between abortion history and mental health was caused by the abortion."); Vignetta E. Charles, et al., *Abortion and Long-Term Mental Health Outcomes: A Systemic Review of the Evidence,* 78 Contraception 436 (2008) https://pubmed.ncbi.nlm.nih.gov/19014789/ (finding that studies suggest "few, if any, differences between women who had abortions and their respective comparison groups," while "studies with the most flawed methodology" found negative effects.)

64. *Carhart*, 550 U.S. at 159-60. The Court further concluded that because women may not understand the full extent of their choice until later and would come to regret their decision, the answer was to ban the procedure outright rather than to require informed consent to the procedure. *See id.* at 159-60, 163.

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> ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy. Why don't the safe haven laws take care of that problem? It seems to me that it focuses the burden much more narrowly. There is, without question, an infringement on bodily autonomy, you know, which we have in other contexts, like vaccines. However, it doesn't seem to me to follow that pregnancy and then parenthood are all part of the same burden.[67]

Justice Barrett's questioning shifted the central concern of the abortion right, from the right of bodily autonomy to the right to be free of unwanted parentage. While Justice Barrett's questions were nominally about safe-haven laws, her query reveals that the antiabortion movement's strategy to assert fathers' rights to veto abortion has gained purchase after decades of laying strategic groundwork. Ms. Rikelman's response focuses on this issue, arguing that *Roe* and *Casey* did not just focus on the burdens of parenting, but on pregnancy itself which "imposes unique physical demands and risks on women" including their ability to care for other children and family members and their ability to work.[68]

While Justice Barrett's example involves state agencies and nameless adoptive parents taking the newborn to raise, the antiabortion movement has been arguing that *fathers* should have the right to relieve the pregnant woman of the burden of parenthood by stepping forward and agreeing to assume parental duties. The recasting of the abortion right reflected in Justice Barrett's line of questioning that posits that so long as there is a person willing to assume parental responsibility the woman's does not need access to abortion, opens the door to the fathers' right to veto abortion reflected in the civil remedy provisions cropping up in antiabortion legislation. Under this reasoning, it is not the indignity of being conscripted into an unwanted pregnancy and the risks of pregnancy and childbirth,[69] but the unwanted parentage that becomes salient to Justice Barrett's analysis. When abortion is recast as a concern over parentage instead of bodily autonomy, advancing the rights of putative fathers in the abortion context takes direct aim at eroding pregnant people's right to access abortion. What is more, invoking safe haven laws advances a false narrative of the role of adoption vis a vi the abortion right as research such as the Turn Away Study reveals that ninety percent of women who are denied abortion keep their children and they and their families slip further into poverty.[70] When putative fathers are permitted to step forward and assert parental rights, regardless of their relationship to the mother and with no exception for rape and incest, this reframing forces women to parent with men who may be a threat to their mental and physical health and safety.[71]

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[67] Dobbs v. Jackson Whole Woman's Health, Oral Argument transcript at 56-57, lines 10-25, line 1 (December 1, 2021).
[68] Dobbs v. Jackson Whole Woman's Health, Oral Argument transcript at 57, lines 17-24 (December 1, 2021). Indeed, she describes that it is seventy-five times more dangerous in Mississippi to give birth than it is to have a previability abortion and those risks are higher for women of color. Dobbs v. Jackson Whole Woman's Health, Oral Argument transcript at 57, lines 24-25, through 58 lines 1-4 (December 1, 2021).
[69] Footnote here about the stats in Mississippi cited by the attorneys
[70] Cite to turn away study and NY Mag article on False pretense of abortion
[71] This issue lies at the center of advocacy efforts to strip the ability of fathers to assert parental rights over children conceived through rape.

CONCLUSION

The *Baby M* case came before the New Jersey Supreme Court in 1988 as a surrogacy case that was a contest over "a new way of bringing children into a family." [72] However, the case also reflects and was driven by the unique historical context in which it unfolded. Specifically, a burgeoning fathers' rights movement was taking shape amidst a dramatic rise in divorce and a woman-protective anti-abortion narrative was replacing the fetal-protective narrative of the earlier generations of abortion opposition. Against this backdrop, the *Baby M* litigation was doing more than addressing the issues at the heart of a surrogacy contest. Rather, the case became a platform for forging ideas about motherhood, fatherhood, and regret that would dominate opposition to abortion in the coming decades and find its way into the Supreme Court's *Carhart* opinion. It appears that the fathers' rights narrative that was nascent in the case may have finally found purchase in the Supreme Court in the *Dobbs* case.

[72] Baby M at 1234.