Dear Students Enrolled in Family Law and Feminist Jurisprudence,

Happy New Year! I look forward to seeing all of you for our first class on Monday, January 13 at 4pm.

For our first class, please be prepared to discuss the Carhart case and excerpts from articles written by Mary Joe Frug and Katherine Franke. You may find both the case and the excerpts under the "Files" section of our Canvas webpage. Hard copies of the readings will also be available in the dean's suite beginning at noon on Thursday, January 9.

Please note that I have excerpted the Frug and Franke articles from the Feminist Jurisprudence casebook that I co-author. I will continue to do so throughout the semester, so you are not required to buy the book. If you ever want to look at the book as a whole, I have some extra copies in my office that you may borrow for a few hours.

I will post the syllabus and more readings over the weekend, and I will answer questions about the syllabus during our first class meeting. Please note that discussion will be a vital component of this course, so you will not be permitted to use laptops, cell phones, or other electronic devices during most class meetings (including the first class meeting).

Please let me know if you have any questions. Otherwise, I will see you on Monday!

LAR

Case Study:

Please analyze these case excerpts in light of the Frug and Franke excerpts, with special attention to pp. 7 and 12-14 below

SUPREME COURT OF THE UNITED STATES

ALBERTO R. GONZALES, ATTORNEY GENERAL, v. LEROY CARHART ET AL.

April 18, 2007

JUSTICE KENNEDY delivered the opinion of the Court.

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act), 18 U. S. C.§1531 (2000 ed., Supp. IV), a federal statute regulating abortion procedures. . . . We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.

* * *

I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in Stenberg, to discuss abortion procedures in some detail. Three United States District Courts heard extensive evidence describing the procedures. . . .

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU–486), to terminate the pregnancy. The Act does not regulate these procedures.

Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D&E" is the usual abortion method in this trimester. Although individual techniques for performing D&E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. The steps taken to cause dilation differ by physician and gestational age of the fetus. . . .

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultra-sound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely re-moved. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed.

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit.

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D&E. The medical community has not reached unanimity on the appropriate name for this D&E variation. It has been referred to as "intact D&E," "dilation and extraction" (D&X), and "intact D&X." For discussion purposes this D&E variation will be referred to as intact D&E. The main difference between the two procedures is that in intact D&E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D&Es are performed in this manner.

Intact D&E, like regular D&E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. . . .

In an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. One doctor, for example, testified:

> "If I know I have good dilation and I reach in and the fetus starts to come out and I think I can accomplish it, the abortion with an intact delivery, then I use my forceps a little bit differently. I don't close them quite so much, and I just gently draw the tissue out attempting to have an intact delivery, if possible."

Rotating the fetus as it is being pulled decreases the odds of dismemberment. A doctor also "may use forceps to grasp a fetal part, pull it down, and re-grasp the fetus at a higher level—sometimes using both his hand and a forceps—to exert traction to retrieve the fetus intact until the head is lodged in the [cervix]."

Intact D&E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. In the usual intact D&E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. Haskell explained the next step as follows:

> "'At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).
>
> "'While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it con-tact the base of the skull under the tip of his middle finger.
>
> "'[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
>
> "'The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.'"

This is an abortion doctor's clinical description. Here is another description from a nurse who witnessed the same method performed on a 26½-week fetus and who testified before the Senate Judiciary Committee:

> "'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 un-clasping, 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.'"

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." Still other

physicians reach into the cervix with their forceps and crush the fetus' skull. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it.

Some doctors performing an intact D&E attempt to remove the fetus without collapsing the skull. Yet one doctor would not allow delivery of a live fetus younger than 24 weeks because "the objective of [his] procedure is to perform an abortion," not a birth. The doctor thus answered in the affirmative when asked whether he would "hold the fetus' head on the internal side of the [cervix] in order to collapse the skull" and kill the fetus before it is born. Another doctor testified he crushes a fetus' skull not only to reduce its size but also to ensure the fetus is dead before it is removed. For the staff to have to deal with a fetus that has "some viability to it, some movement of limbs," according to this doctor, "[is] always a difficult situation."

D&E and intact D&E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D&E should occur in a hospital, can last as little as 6 hours but can take longer than 48. It accounts for about five percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about .07% of second-trimester abortions.

B

After Dr. Haskell's procedure received public attention, with ensuing and increasing public concern, bans on "'partial birth abortion'" proliferated. By the time of the Stenberg decision, about 30 States had enacted bans designed to prohibit the procedure. In 1996, Congress also acted to ban partial-birth abortion. President Clinton vetoed the congressional legislation, and the Senate failed to override the veto. Congress approved another bill banning the procedure in 1997, but President Clinton again vetoed it. . . . On November 5, 2003, President Bush signed the Act into law. It was to take effect the following day.

* * *

[T[he Act's language differs from that of the Nebraska statute struck down in Stenberg. The operative provisions of the Act provide in relevant part:

> "(a) Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is

endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself. This subsection takes effect 1 day after the enactment.

"(b) As used in this section—

"(1) the term 'partial-birth abortion' means an abortion in which the person performing the abortion—

"(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

"(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus; and

"(2) the term 'physician' means a doctor of medicine or osteopathy legally authorized to practice medicine and surgery by the State in which the doctor performs such activity, or any other individual legally authorized by the State to perform abortions: Provided, how-ever, That any individual who is not a physician or not otherwise legally authorized by the State to perform abortions, but who nevertheless directly performs a partial-birth abortion, shall be subject to the provisions of this section.

. . . . .

"(d)(1) A defendant accused of an offense under this section may seek a hearing before the State Medical Board on whether the physician's conduct was necessary to save the life of the mother whose life was endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself.

"(2) The findings on that issue are admissible on that issue at the trial of the defendant. Upon a motion of the defendant, the court shall delay the beginning of the trial for not more than 30 days to permit such a hearing to take place.

"(e) A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense under section 2, 3, or 4 of this title based on a violation of this section."

The Act also includes a provision authorizing civil actions that is not of relevance here.

C

The District Court in Carhart concluded the Act was unconstitutional for two reasons. First, it determined the Act was unconstitutional because it lacked an exception allowing the procedure where necessary for the health of the mother. Second, the District Court found the Act deficient because it covered not merely intact D&E but also certain other D&Es. The Court of Appeals for the Eighth Circuit addressed only the lack of a health exception. . . . It invalidated the Act.

* * *

II

* * *

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." . . .

III

* * *

C

We next determine whether the Act imposes an undue burden, as a facial matter, because its restrictions on second-trimester abortions are too broad. A review of the statutory text discloses the limits of its reach. The Act prohibits intact D&E; and, notwithstanding respondents' arguments, it does not prohibit the D&E procedure in which the fetus is removed in parts.

* * *

IV

Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional "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." The abortions affected by the Act's regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable. The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but previability, abortions. The Act does not on its face impose a substantial obstacle, and we reject this further facial challenge to its validity.

A

The Act's purposes are set forth in recitals preceding its operative provisions. A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." The Act expresses respect for the dignity of human life.

* * *

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant," and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide." The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. Glucksberg found reasonable the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia."

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. 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.

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed. 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.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

* * *

B

The Act's furtherance of legitimate government interests bears upon, but does not resolve, the next question: whether the Act has the effect of imposing an unconstitutional burden on the abortion right because it does not allow use of the barred procedure where "'necessary, in appropriate medical judgment, for [the] preservation of the . . . health of the mother.'" The prohibition in the Act would be unconstitutional, under precedents we here assume to be controlling, if it "subject[ed] [women] to significant health risks." . . . Here . . . whether the Act creates significant health risks for women has been a contested factual question. The evidence presented in the trial courts and before Congress demonstrates both sides have medical support for their position.

Respondents presented evidence that intact D&E maybe the safest method of abortion, for reasons similar to those adduced in Stenberg. Abortion doctors testified, for example, that intact D&E decreases the risk of cervical laceration or uterine perforation because it requires fewer passes into the uterus with surgical instruments and does not require the removal of bony fragments of the dismembered fetus, fragments that may be sharp. Respondents also presented evidence that intact D&E was safer both because it reduces the risks that fetal parts will remain in the uterus and because it takes less time to complete. Respondents, in addition, proffered evidence that intact D&E was safer for women with certain medical conditions or women with fetuses that had certain anomalies.

These contentions were contradicted by other doctors who testified in the District Courts and before Congress. They concluded that the alleged health advantages were based on speculation without scientific studies to support them. They considered D&E always to be a safe alternative.

There is documented medical disagreement whether the Act's prohibition would ever impose significant health risks on women. . . .

The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.

* * *

Respondents have not demonstrated that the Act, as a facial matter, is void for vagueness, or that it imposes an undue burden on a woman's right to abortion based on its overbreadth or lack of a health exception. For these reasons the judgments of the Courts of Appeals for the Eighth and Ninth Circuits are reversed.

It is so ordered.

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

In Planned Parenthood of Southeastern Pa. v. Casey, the Court declared that"[l]iberty finds no refuge in a jurisprudence of doubt." There was, the Court said, an "imperative" need to dispel doubt as to "the meaning and reach" of the Court's 7-to-2 judgment, rendered nearly two decades earlier in Roe v. Wade. Responsive to that need, the Court endeavored to provide secure guidance to "[s]tate and federal courts as well as legislatures throughout the Union," by defining "the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures."

Taking care to speak plainly, the Casey Court restated and reaffirmed Roe's essential holding. First, the Court addressed the type of abortion regulation permissible prior to fetal viability. It recognized "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." Second, the Court acknowledged "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." Third, the Court confirmed that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."

In reaffirming Roe, the Casey Court described the centrality of "the decision whether to bear . . . a child," to a woman's "dignity and autonomy," her "personhood" and "destiny," her "conception of . . . her place in society." Of signal importance here, the Casey Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman."

Seven years ago, in Stenberg v. Carhart, 530 U. S. 914 (2000), the Court invalidated a Nebraska statute criminal-izing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion."[1] With fidelity to the Roe-Casey line of precedent, the Court held the Nebraska statute unconstitutional in part because it lacked the requisite protection for the preservation of a woman's health.

[1] The term "partial-birth abortion" is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. The medical community refers to the procedure as either dilation &extraction (D&X) or intact dilation and evacuation (intact D&E).

Today's decision is alarming. It refuses to take Casey and Stenberg seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in Casey, between previability and postviability abortions. And, for the first time since Roe, the Court blesses a prohibition with no exception safeguarding a woman's health.

I dissent from the Court's disposition. Retreating from prior rulings that abortion restrictions cannot be imposed absent an exception safeguarding a woman's health, the Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices.

I

A

As Casey comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny."[2] "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." Those views, this Court made clear in Casey, "are no longer consistent with our understanding of the family, the individual, or the Constitution." Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. . . .

B

In 2003 . . . Congress passed the Partial-Birth Abortion Ban Act—without an exception for women's health. The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede.

Many of the Act's recitations are incorrect. For example, Congress determined that no medical schools provide instruction on intact D&E. But in fact, numerous leading medical schools teach the procedure. See Planned Parenthood, 320 F. Supp. 2d, at 1029; National Abortion Federation, 330 F. Supp. 2d, at

[2] Planned Parenthood of Southeastern Pa. v. Casey described more precisely than did Roe v. Wade the impact of abortion restrictions on women's liberty. Roe's focus was in considerable measure on "vindicat[ing] the right of the physician to administer medical treatment according to his professional judgment."

479. See also Brief for ACOG as Amicus Curiae 18 ("Among the schools that now teach the intact variant are Columbia, Cornell, Yale, New York University, Northwestern, University of Pittsburgh, University of Pennsylvania, University of Rochester, and University of Chicago.").

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. But the evidence "very clearly demonstrate[d] the opposite."

Similarly, Congress found that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." But the congressional record includes letters from numerous individual physicians stating that pregnant women's health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D&E carries meaningful safety advantages over other methods. No comparable medical groups supported the ban. In fact, "all of the government's own witnesses disagreed with many of the specific congressional findings."

C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of "much more extensive medical and scientific evidence . . . concerning the safety and necessity of intact D&Es." During the District Court trials, "numerous" "extraordinarily accomplished" and "very experienced" medical experts explained that, in certain circumstances and for certain women, intact D&E is safer than alternative procedures and necessary to protect women's health.

According to the expert testimony plaintiffs introduced, the safety advantages of intact D&E are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, or compromised immune systems.

Further, plaintiffs' experts testified that intact D&E is significantly safer for women with certain pregnancy-related conditions, such as placenta previa and accreta, and for women carrying fetuses with certain abnormalities, such as severe hydrocephalus.

* * *

Based on thoroughgoing review of the trial evidence and the congressional record, each of the District Courts to consider the issue rejected Congress' findings as unreasonable and not supported by the evidence. The trial courts concluded, in contrast to Congress' findings, that "significant medical authority supports the proposition that in some circumstances, [intact D&E] is the safest procedure."

The District Courts' findings merit this Court's respect. Today's opinion supplies no reason to reject those findings. Nevertheless, despite the District Courts' appraisal of the weight of the evidence, and in undisguised conflict with Stenberg, the Court asserts that the Partial-Birth Abortion Ban Act can survive "when . . . medical uncertainty persists." This assertion is bewildering. Not only does it defy the Court's longstanding precedent affirming the necessity of a health exception, with no carve-out for

circumstances of medical uncertainty; it gives short shrift to the records before us, carefully canvassed by the District Courts. Those records indicate that "the majority of highly-qualified experts on the subject believe intact D&E to be the safest, most appropriate procedure under certain circumstances."

* * *

II

A

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D&E sans any exception to safeguard a women's health. Today's ruling, the Court declares, advances "a premise central to [Casey's] conclusion"—i.e., the Government's "legitimate and substantial interest in preserving and promoting fetal life." But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a method of performing abortion. And surely the statute was not designed to protect the lives or health of pregnant women.

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D&E procedure. But why not, one might ask. Nonintact D&E could equally be characterized as "brutal," involving as it does "tear[ing] [a fetus] apart" and "ripp[ing] off" its limbs. "[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational."

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures—along with D&E by dismemberment—the Court says, saves the ban on intact D&E from a declaration of unconstitutionality. Never mind that the procedures deemed acceptable might put a woman's health at greater risk.

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. See, e.g., Casey, 505 U. S., at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code."); Lawrence v. Texas, 539 U. S. 558, 571 (2003) (Though "[f]or many persons [objections to homosexual conduct] are not trivial concerns but profound and deep convictions accepted as ethical and moral principles," the power of the State may not be used "to enforce these views on the whole society through operation of the criminal law." (citing Casey, 505 U. S., at 850)).

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer

from "[s]evere depression and loss of esteem."[3] Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D&E procedure.[4] The solution the Court approves, then, is not to require doctors to inform women, accurately and adequately, of the different procedures and

[3] The Court is surely correct that, for most women, abortion is a pain-fully difficult decision. See ante, at 28. But "neither the weight of the scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have. . . ." Cohen, Abortion and Mental Health: Myths and Realities, 9 Guttmacher Policy Rev. 8 (2006); see generally Bazelon, Is There a Post-Abortion Syndrome? N. Y. Times Magazine, Jan. 21, 2007, p. 40. See also, e.g., American Psychological Association, APA Briefing Paper on the Impact of Abortion (2005) (rejecting theory of a postabortion syndrome and stating that "[a]ccess to legal abortion to terminate an unwanted pregnancy is vital to safeguard both the physical and mentalhealth of women"); Schmiege & Russo, Depression and Unwanted First Pregnancy: Longitudinal Cohort Study, 331 British Medical J. 1303(2005) (finding no credible evidence that choosing to terminate anunwanted first pregnancy contributes to risk of subsequent depression); Gilchrist, Hannaford, Frank, & Kay, Termination of Pregnancy andPsychiatric Morbidity, 167 British J. of Psychiatry 243, 247–248 (1995) (finding, in a cohort of more than 13,000 women, that the rate ofpsychiatric disorder was no higher among women who terminated pregnancy than among those who carried pregnancy to term); Stodland, The Myth of the Abortion Trauma Syndrome, 268 JAMA 2078, 2079(1992) ("Scientific studies indicate that legal abortion results in fewerdeleterious sequelae for women compared with other possible outcomes of unwanted pregnancy. There is no evidence of an abortion trauma syndrome."); American Psychological Association, Council PolicyManual: (N)(I)(3), Public Interest (1989) (declaring assertions aboutwidespread severe negative psychological effects of abortion to be "without fact"). But see Cougle, Reardon, & Coleman, Generalized Anxiety Following Unintended Pregnancies Resolved Through Child-birth and Abortion: A Cohort Study of the 1995 National Survey ofFamily Growth, 19 J. Anxiety Disorders 137, 142 (2005) (advancingtheory of a postabortion syndrome but acknowledging that "no causalrelationship between pregnancy outcome and anxiety could be deter-mined" from study); Reardon et al., Psychiatric Admissions of Low-Income Women following Abortion and Childbirth, 168 Canadian Medical Assn. J. 1253, 1255–1256 (May 13, 2003) (concluding thatpsychiatric admission rates were higher for women who had an abor-tion compared with women who delivered); cf. Major, Psychological Implications of Abortion—Highly Charged and Rife with MisleadingResearch, 168 Canadian Medical Assn. J. 1257, 1258 (May 13, 2003) (critiquing Reardon study for failing to control for a host of differences between women in the delivery and abortion samples).

[4] Notwithstanding the "bond of love" women often have with their children, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity. See Casey, 505 U. S., at 891 ("[O]n an average day in the United States, nearly 11,000women are severely assaulted by their male partners. Many of these incidents involve sexual assault."). See also Glander, Moore, Michie-lutte, & Parsons, The Prevalence of Domestic Violence Among Women Seeking Abortion, 91 Obstetrics & Gynecology 1002 (1998); Holmes,Resnick, Kilpatrick, & Best, Rape-Related Pregnancy; Estimates andDescriptive Characteristics from a National Sample of Women, 175 Am.J. Obstetrics & Gynecology 320 (Aug. 1996).

their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.[5]

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Compare, e.g., Muller v. Oregon, 208 U. S. 412, 422–423 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal funct[ion]"); Bradwell v. State, 16 Wall. 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."), with United States v. Virginia, 518 U. S. 515, 533, 542, n. 12 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have . . . impeded . . . women's progress toward full citizenship stature throughout our Nation's history"); Califano v. Goldfarb, 430 U. S. 199, 207 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society."

B

In cases on a "woman's liberty to determine whether to [continue] her pregnancy," this Court has identified viability as a critical consideration. "[T]here is no line [more workable] than viability," the Court explained in Casey, for viability is "the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. . . .

[5] Eliminating or reducing women's reproductive choices is manifestly not a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies. See, e.g., World Health Organization, Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000, pp. 3, 16 (4th ed. 2004)("Restrictive legislation is associated with a high incidence of unsafe abortion" worldwide; unsafe abortion represents 13% of all "maternal" deaths); Henshaw, Unintended Pregnancy and Abortion: A Public Health Perspective, in A Clinician's Guide to Medical and Surgical Abortion 11, 19 (M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield eds. 1999) ("Before legalization, large numbers of women in the United States died from unsafe abortions."); H. Boonstra, R.Gold, C. Richards, & L. Finer, Abortion in Women's Lives 13, and fig. 2.2 (2006) ("as late as 1965, illegal abortion still accounted for an estimated . . . 17% of all officially reported pregnancy-related deaths";"[d]eaths from abortion declined dramatically after legalization").

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." Id., at 870.

Today, the Court blurs that line, maintaining that "[t]he Act [legitimately] appl[ies] both previability and postviability because . . . a fetus is a living organism while within the womb, whether or not it is viable outside the womb." Instead of drawing the line at viability, the Court refers to Congress' purpose to differentiate "abortion and infanticide" based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed.

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns." The Court's hostility to the right Roe and Casey secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." A fetus is described as an "unborn child," and as a "baby"; second-trimester, previability abortions are referred to as "late-term"; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." . . .

* * *

IV

* * *

In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court—and with increasing comprehension of its centrality to women's lives. When "a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue."

* * *

For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.

6. POSTMODERN FEMINISMS

Beginning in the late 1980's, feminist legal theorists began to engage with various forms of critical theory being developed and embraced by other parts of the academy. This theoretical engagement permitted feminist jurisprudence to explore new directions and new solutions to issues of women's inequality. Much of this work is difficult to categorize, but Ann Scales uses the umbrella term poststructuralism to refer to a "group of intellectual efforts" focused on "exposing and subverting supposed deep structures."[1] This section will describe legal feminists' engagement with one of those efforts, postmodernism.

MARY JOE FRUG, A POSTMODERN FEMINIST LEGAL MANIFESTO (AN UNFINISHED DRAFT[a])

105 Harv. L. Rev. 1045, 1046–52, 1055 (1992).

One "Principle"

The liberal equality doctrine is often understood as an engine of liberation with respect to sex-specific rules. This imagery suggests the repressive function of law, a function that feminists have inventively sought to appropriate and exploit through critical scholarship, litigation, and legislative campaigns. Examples of these efforts include work seeking to strengthen domestic violence statutes, to enact a model anti-pornography ordinance, and to expand sexual harassment doctrine.

The postmodern position locating human experience as inescapably within language suggests that feminists should not overlook the constructive function of legal language as a critical frontier for feminist reforms. To put this "principle" more bluntly, legal discourse should be recognized as a site of political struggle over sex differences.

This is not a proposal that we try to promote a benevolent and fixed meaning for sex differences. (See the "principle" below.) Rather, the argument is that continuous interpretive struggles over the meaning of sex differences can have an impact on patriarchal legal power.

Another "Principle"

In their most vulgar, bootlegged versions, both radical and cultural legal feminisms depict male and female sexual identities as anatomically determined and psychologically predictable. This is inconsistent with the semiotic character of sex differences and the impact that historical specificity has on any individual identity. In postmodern jargon, this

[1] Scales, Poststructuralism on Trial, in Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations 395, 396 (Martha Albertson Fineman et al. eds., 2009).

[a] Mary Joe Frug was murdered on April 4, 1991. She had not yet completed this article at the time of her death.

treatment of sexual identity is inconsistent with a decentered, polymorphous, contingent understanding of the subject.

Because sex differences are semiotic—that is, constituted by a system of signs that we produce and interpret—each of us inescapably produces herself within the gender meaning system, although the meaning of gender is indeterminate or undecidable. The dilemma of difference, which the liberal equality guarantee seeks to avoid through neutrality, is unavoidable.

* * *

II. Applying Postmodern "Principles": Law and the Female Body

A. Introduction

* * *

Regardless of how commonplace the constructed character of sex differences may be, particular differences can seem quite deeply embedded within the sexes—so much so, in fact, that the social construction thesis is undermined. When applied to differences that seem especially entrenched—differences such as masculine aggression or feminine compassion, or differences related to the erotic and reproductive aspects of women's lives, social construction seems like a clichéd, improbable, and unconvincing account of experience, an explanation for sex differences that undervalues "reality." This reaction does not necessarily provoke a return to a "natural" explanation for sex differences; but it does radically stunt the liberatory potential of the social construction thesis. One's expectations for law reform projects are reduced; law might be able to mitigate the harsh impact of these embedded traits on women's lives, but law does not seem responsible for constructing them.

* * * One of my objectives is to explain and challenge the essentializing impulse that places particular sex differences outside the borders of legal responsibility. Another objective is to provide an analysis of the legal role in the production of gendered identity that will invigorate the liberatory potential of the social construction thesis.

I have chosen the relationship of law to the female body as my principal focus. I am convinced that law is more cunningly disguised but just as implicated in the production of apparently intractable sex-related traits as in those that seem more legally malleable. Since the anatomical distinctions between the sexes seem not only "natural" but fundamental to identity, proposing and describing the role of law in the production of the meaning of the female body seems like the most convincing subject with which to defend my case. * * * I will argue that legal rules—like other cultural mechanisms—encode the female body with meanings. Legal discourse then explains and rationalizes these meanings by an appeal to the "natural" differences between the sexes, differences that the rules

themselves help to produce. The formal norm of legal neutrality conceals the way in which legal rules participate in the construction of those meanings.

The proliferation of women's legal rights during the past two decades has liberated women from some of the restraining meanings of femininity. This liberation has been enhanced by the emergence of different feminisms over the past decade. These feminisms have made possible a stance of opposition toward a singular feminine identity; they have demonstrated that women stand in a multitude of places, depending on time and geographical location, on race, age, sexual preference, health, class status, religion, and other factors. Despite these significant changes, there remains a common residue of meaning that seems affixed, as if by nature, to the female body. Law participates in creating that meaning.

I will argue that there are at least three general claims that can be made about the relationship between legal rules and legal discourse and the meaning of the female body:

1. Legal rules permit and sometimes mandate the terrorization of the female body. This occurs by a combination of provisions that inadequately protect women against physical abuse and that encourage women to seek refuge against insecurity. One meaning of "female body," then, is a body that is "in terror," a body that has learned to scurry, to cringe, and to submit. Legal discourse supports that meaning.

2. Legal rules permit and sometimes mandate the maternalization of the female body. This occurs with the use of provisions that reward women for singularly assuming responsibilities after childbirth and with those that penalize conduct—such as sexuality or labor market work—that conflicts with mothering. Maternalization also occurs through rules such as abortion restrictions that compel women to become mothers and by domestic relations rules that favor mothers over fathers as parents. Another meaning of "female body," then, is a body that is "for" maternity. Legal discourse supports that meaning.

3. Legal rules permit and sometimes mandate the sexualization of the female body. This occurs through provisions that criminalize individual sexual conduct, such as rules against commercial sex (prostitution) or same sex practices (homosexuality) and also through rules that legitimate and support institutions such as the pornography, advertising, and entertainment industries that eroticize the female body. Sexualization also occurs, paradoxically, in the application of rules such as rape and sexual harassment laws that are designed to protect women against sex-related injuries. These rules grant or deny women protection by interrogating their sexual promiscuity. The more sexually available or desiring a woman looks, the less protection these rules are likely to give her. Another meaning of "female body," then, is a body that is "for" sex with men, a body that

is "desirable" and also rapable, that wants sex and wants raping. Legal discourse supports that meaning.

These groups of legal rules and discourse constitute a system that "constructs" or engenders the female body. The feminine figures the rules pose are naturalized within legal discourse by declaration—"women are (choose one) weak, nurturing, sexy"—and by a host of linguistic strategies that link women to particular images of the female body. By deploying these images, legal discourse rationalizes, explains, and renders authoritative the female body rule network. The impact of the rule network on women's reality in turn reacts back on the discourse, reinforcing the "truth" of these images.

Contractions of confidence in the thesis that sex differences are socially constructed have had a significant impact on women in law. Liberal jurists, for example, have been unwilling to extend the protection of the gender equality guarantee to anatomical distinctions between female and male bodies; these differences seem so basic to individual identity that law need not—or should not—be responsible for them. Feminist legal scholars have been unable to overcome this intransigence, partly because we ourselves sometimes find particular sex-related traits quite intransigent. Indeed, one way to understand the fracturing of law-related feminism into separate schools of thought over the past decade is by the sexual traits that are considered unsusceptible to legal transformation and by the criticisms these analyses have provoked within our own ranks.

The fracturing of feminist criticism has occurred partly because particular sex differences seem so powerfully fixed that feminists are as unable to resist their "naturalization" as liberal jurists. But feminists also cling to particular sex-related differences because of a strategic desire to protect the feminist legal agenda from sabotage. Many feminist critics have argued that the condition of "real" women makes it too early to be post-feminist. The social construction thesis is useful to feminists insofar as it informs and supports our efforts to improve the condition of women in law. If, or when, the social construction thesis seems about to deconstruct the basic category of woman, its usefulness to feminism is problematized. How can we build a political coalition to advance the position of women in law if the subject that drives our efforts is "indeterminate," "incoherent," or "contingent"?

I think this concern is based upon a misperception of where we are in the legal struggle against sexism. I think we are in danger of being politically immobilized by a system for the production of what sex means that makes particular sex differences seem "natural." If my assessment is right, then describing the mechanics of this system is potentially enabling rather than disempowering; it may reveal opportunities for resisting the legal role in producing the radical asymmetry between the sexes.

I also think this concern is based on a misperception about the impact of deconstruction. Skeptics tend to think, I believe, that the legal

deconstruction of "woman"—in one paper or in many papers, say, written over the next decade—will entail the immediate destruction of "women" as identifiable subjects who are affected by law reform projects. Despite the healthy, self-serving respect I have for the influence of legal scholarship and for the role of law as a significant cultural factor (among many) that contributes to the production of femininity, I think "women" cannot be eliminated from our lexicon very quickly. The question this paper addresses is not whether sex differences exist—they do—or how to transcend them—we can't—but the character of their treatment in law.

* * *

[Frug then uses the example of anti-prostitution rules to discuss the ways that the regulation of prostitution, through law and "a network of cultural practices," terrorize and sexualize women. Prostitution is discussed in more detail in Chapter 4. Of particular note here are the ways such rules also relate to marriage and maternalization:]

* * * The terrorization of sex workers affects women who are not sex workers by encouraging them to do whatever they can to avoid being asked if they are "for" illegal sex. Indeed, marriage can function as one of these avoidance mechanisms, in that, conventionally, marriage signals that a woman has chosen legal sex over illegal sex.

* * * Regardless of whether a woman is terrorized or sexualized, there are social incentives to reduce the hardships of her position, either by marrying or by aligning herself with a pimp. In both cases she typically becomes emotionally, financially, physically, and sexually dependent on and subordinate to a man.

* * * I argue that the dominated female body does not fully capture the impact of anti-prostitution rules on women. This is because anti-prostitution rules also maternalize the female body, by virtue of the interrelationship between anti-prostitution rules and legal rules that encourage women to bear and rear children. The maternalized female body triangulates the relationship between law and the meanings of the female body. It proposes a choice of roles for women.

* * * The legal rules that criminalize prostitution are located in a legal system in which other legal rules legalize sex—rules, for example, that establish marriage as the legal site of sex and that link marital sex to reproduction by, for example, legitimating children born in marriage. As a result of this conjuncture, anti-prostitution rules maternalize the female body. They not only interrogate women with the question of whether they are for or against prostitution; they also raise the question of whether a woman is for illegal sex or whether she is for legal, maternalized sex.

NOTES ON POSTMODERN FEMINISMS

1. Based on the above excerpt, how would you define postmodernism? How would you define postmodern feminism? Jessica Knouse writes:

> Postmodern thinkers * * * view individual identity as a product of the existing socially constructed categories. The range of potential identities is limited by the scope of the available categories. Individuals cannot transcend their own perspective; they cannot think or feel without reference to externally constructed categories. * * *
>
> Because individual identity is considered to be entirely contingent upon socially constructed categories, understanding how these categories are created and manipulated is crucial. * * *
>
> * * *
>
> Postmodern feminists are concerned specifically with deconstruction of the male/female binary, because it privileges male sex roles, marginalizes female sex roles, and has the additional deleterious effect of limiting individuals to one of two potential roles, a choice predetermined by anatomical sex. The postmodern feminist goal is not simply to equalize power between the sexes or to redefine the existing sex roles. Rather, the goal is to destabilize the sex hierarchy such that the traditional categories—"man" and "woman"—are eventually rendered irrelevant to identity creation.

Knouse, Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotypes Through the Institution of Marriage, 16 Hastings Women's L.J. 159, 164–66 (2005). Do you think Frug would agree with this description? How might her conception of postmodern feminist legal theory differ from Knouse's?

2. Writing outside of law, Judith Butler has developed a nuanced account of gender construction, an account that questions whether gender can ever be deconstructed given its role in constituting our very notions of what is human:

> Simone de Beauvoir wrote in *The Second Sex* that "one is not born a woman, but rather *becomes* one." The phrase is odd, even nonsensical, for how can one become a woman if one wasn't a woman all along? And who is this "one" who does the becoming? Is there some human who becomes its gender at some point in time? * * *
>
> * * * The mark of gender appears to "qualify" bodies as human bodies; the moment in which an infant becomes humanized is when the question, "is it a boy or girl?" is answered. Those bodily figures who do not fit into either gender fall outside the human, indeed, constitute the domain of the dehumanized and the abject against which the human itself is constituted. If gender is always there, delimiting in advance what qualifies as the human, how can we speak of a human who becomes its gender, as if gender were a postscript or a cultural afterthought?

Butler, Gender Trouble: Feminism and the Subversion of Identity 111 (1990). If gender is always present, and always will be present, what is the point of analyzing gender construction? Will feminist legal theorists actually benefit from such an analysis?

3. Butler suggests that attention to gender construction may nonetheless be productive because such analysis reveals that "genders can be neither true nor false, but are only produced as the truth effects of a discourse of primary and stable identity," including legal discourse. Butler, above note 2, at 136. Butler agrees with Frug that feminists cannot "transcend" sex differences, but argues that feminists can expose the "imitative structure of gender itself" and the ways that "gender attributes * * * are not expressive but performative." Id. at 136, 141. In doing so, Butler believes feminists might be able to engage in gender performances that "enact and reveal the performativity of gender itself in a way that destabilizes the naturalized categories of identity and desire." Id. at 139. In particular, Butler invokes the concept of drag in order "to trace the moments where the binary system of gender is disputed and challenged, where the coherence of the categories are put into question, and where the very social life of gender turns out to be malleable and transformable." Butler, Undoing Gender 216 (2004).

What do you think of these possibilities? How do you perform your gender? How could you perform your gender with a difference, so that you are simultaneously complying with and resisting gender constructions? How might Frug's discussion of motherhood as "propos[ing] a choice of roles for women" provide an example of this simultaneous compliance and resistance?

4. What are the potential advantages of postmodern approaches to feminist legal theory? How might such approaches affect legal discourse? How might that discourse lead to substantive legal change? How do you think Frug would have developed her arguments if she had not met her untimely death?

TEXT NOTE: SEX-POSITIVE FEMINISM AND THIRD-WAVE FEMINISM

Postmodern feminism is also often assumed to embrace and promote the possibility of female sexual pleasure. By considering the ways that bodies and desire are constructed, and emphasizing that sex is never universally experienced, postmodernists implicitly reject a conception of sex acts as inherently dominating or subordinating. Indeed, postmodernists believe that sex acts, like gender, are also constructed through discourse.[2] As such, sexuality is not a "stubborn drive" that needs to be either controlled or liberated through law.[3] Instead, law plays a role in producing the very sexuality that it seeks to repress or liberate.

Some feminist legal theorists have asked whether feminists have also played a role in producing women's sexuality. Katherine M. Franke asks if feminist legal theorists "run any risk of constructing women as de-sexualized

[2] See, e.g., 1 Michel Foucault, The History of Sexuality: An Introduction 103–14 (Robert Hurley trans., Vintage Books 1990) (1978).

[3] Id. at 103.

dependency workers" by focusing so much of their analysis on women's roles as mothers.[4] She writes:

> Men have almost entirely colonized the domain of sexuality that is the excess over reproduction as for them and about them. Movies, advertising, and fashion are largely projections of male fantasy—what would it mean for women to appropriate some of this cultural excess? Just as we have accepted that sexual orientation is not merely a natural phenomenon, might we also want to explore the degree to which our passions, fantasies, secret and not so secret desires are products of the world we live in? * * *
>
> Surely legal feminists would want to theorize the *sexual* nature of human sexuality that is the "excess over or potential difference from the bare choreographies of procreation." Is there a reason why we have neglected to take notice of the fact that women are substantially more likely to be unhappy about their sex lives than are men? Is there something that we, as legal feminists, should be doing to address the fact that forty-three percent of women in the United States are suffering from diagnosable sexual dysfunction, symptomized by a lack of interest in sex, inability to achieve orgasm or arousal, and pain or discomfort during sex?
>
> We have done a more than adequate job of theorizing circumstances in which "no" is the right answer to a sexual encounter, but where are we on the conditions under which we would be inclined to say "yes"? * * *[5]

Sex-positive feminism also developed outside of postmodernism as a response to Catharine MacKinnon's feminist campaign against pornography. These feminists borrowed arguments from gay men committed to sex-liberation, among others.[6]

More recently, so-called third-wave feminists have embraced sexual pleasure as a fundamental aspect of their feminist platform. Among other things, they recognize the multifaceted nature of sex work and argue that women "should take charge of their own sexual satisfaction."[7] One of the most recent manifestations of third-wave feminism may be found in the popularity of "SlutWalks." As Deborah Tuerkheimer explains, these "rallies and web-based mobilization protest 'slut shaming,' victim blaming, and a rape culture that excuses sexual violence perpetrated by non-strangers," yet in doing so participants generally eschew both theory and law.[8]

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[4] Franke, Theorizing Yes: An Essay on Feminism, Law, and Desire, 101 Colum. L. Rev. 181, 204 (2001).

[5] Id. at 205–06.

[6] See, e.g., Ian Halley, Queer Theory by Men, 11 Duke J. Gender L. & Pol'y 7, 13–14 (2004).

[7] Bridget J. Crawford, Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure, 14 Mich. J. Gender & L. 99, 122, 152–55 (2007).

[8] Deborah Tuerkheimer, SlutWalking in the Shadow of the Law, 98 Minn. L. Rev. 1453, 1462–68 (2014).

NOTES ON SEX-POSITIVE AND THIRD-WAVE FEMINISM

1. Franke calls on feminist legal theorists to theorize the conditions under which women are inclined to say "yes" to a sexual encounter. Why does she consider this to be an important endeavor? Do you agree? How might feminist legal theory create more opportunities for women to say "yes" while also protecting women from harm? For some attempts at answering such questions, see Laura A. Rosenbury and Jennifer E. Rothman, Sex In and Out of Intimacy, 59 Emory L.J. 809 (2010); Deborah Tuerkheimer, SlutWalking in the Shadow of the Law, 98 Minn. L. Rev. 1453 (2014); Margo Kaplan, Sex-Positive Law, 89 N.Y.U. L. Rev. 89 (2014); Margo Kaplan, Rape Beyond Crime, 66 Duke L.J. 1045 (2017).

2. Jeannie Suk and Jacob Gerson more recently argue that feminist attempts to address campus sexual assault have created a "new sex bureaucracy," under which "sexual conduct that is voluntary, non-harassing, nonviolent, and does not harm others" is increasingly regulated. Suk and Gerson, The Sex Bureaucracy, 104 Cal. L. Rev. 881 (2016). How might attempts to address sexual harm also affect sexual pleasure? Suk and Gerson argue that regulation of "ordinary sex" is always problematic, but how might regulation improve "ordinary sex" or increase sexual pleasure? Susan Frelich Appleton and Susan Ekberg Stiritz defend "higher sex education," arguing that "such instruction has the potential to enhance students' sexual unfolding—preparing them for healthier and more pleasurable sexual futures." Appleton and Stiritz, The Joy of Sex Bureaucracy, 7 Cal. L. Rev. Online 49 (2016). Who do you think has a better argument? What interventions on college campuses might answer Franke's call for feminists to "theorize yes"?

3. Might concerns about the regulatory effects of law explain the absence of law in most SlutWalk activism? How might law reform become a part of SlutWalk platforms? How might SlutWalk participants both embrace and challenge the feminist legal theories discussed in this chapter?

4. Do you agree that male sexual fantasies dominate popular culture? Have younger feminists begun to shift sexual pleasure from a male domain to a more female-centered domain? In what ways is sexual pleasure still presumed to be a male domain? What legal strategies would you suggest for addressing many women's unhappiness with their sex lives?

5. Do you consider yourself a third-wave feminist? If so, is sexual pleasure an important part of your conception of feminism? What other issues do you care about most? How has this chapter changed your views of feminism, if at all?

KATHERINE M. FRANKE, THEORIZING YES: AN ESSAY ON FEMINISM, LAW, AND DESIRE

101 Colum. L. Rev. 181, 183–186 (2001).

I. The Repronormativity of Motherhood

Motherhood and its implications figure centrally in virtually all feminist agendas. However, for much of first and second wave legal feminism, issues of gender collapse quite quickly into the normative significance of our roles as mothers. Grounding feminist legal theory in object relations theory and demanding that women's participation in the wage labor market be compatible with our responsibilities as mothers are only two salient examples of how the legal feminist frame tends to collapse women's identity into motherhood. The centrality, presumption, and inevitability of our responsibility for children remain a starting point for many, if not most, legal feminists.

Consider two propositions: The overwhelming majority of women are heterosexual. The overwhelming majority of women are mothers. The degree to which social preferences and prohibitions—otherwise known as compulsory heterosexuality—contribute to the "fact" stated by the first proposition has become relatively accepted within feminist, and certainly queer, theory circles. Feminists have become, to varying degrees, sensitive to the technologies of power that steer, suggest, coerce, and demand that women be heterosexual and that abjection lies in the refusal of such a demand.

Yet the same cannot be said of the second proposition laid out above: Most women are mothers. Why is it that we are willing to acknowledge that heteronormative cultural preferences play a significant role in sexual orientation and selection of sexual partners, while at the same time refusing to treat repronormative forces as warranting similar theoretical attention? If you believe the statistics, women are more likely not to have borne a child in their lifetimes than to be lesbian. Is there any principled reason why legal feminists might not want to devote some attention to exposing the complex ways in which reproduction is incentivized and subsidized in ways that may bear upon the life choices women face? To ask such a question is to risk being labeled unfeminist. To suggest that we reconceptualize procreation as a cultural preference rather than a biological imperative, and then explore ways in which to lessen or at least modify the demand to conform to that preference, is to initiate a conversation within feminism that has been explicitly and curtly rejected by some legal feminists. However, it is a conversation that necessarily demands feminist discussants, for only by positing the possibility of female identity divorced from mothering can we make mothering ethically and politically intelligible. Surely mothering grounds the lives of many women, but that ground, once taken for granted, risks obscuring the figure of woman, whose identity extends beyond her role as mother.

Notwithstanding the prevalence of both childlessness and lesbianism, somehow reproduction continues to be regarded as more inevitable and natural than heterosexuality. That is to say, repronormativity remains in the closet even while heteronormativity has stepped more into the light of the theoretical and political day. Reproduction has been so taken for granted that only women who are not parents are regarded as having made a choice—a choice that is constructed as nontraditional, nonconventional, and for some, non-natural. In a telling switch, the issue of choice flips for lesbians, who are constructed as choosing motherhood, given that lesbians continue to have an identity understood as non-reproductive in nature. Similarly, the official story of reproduction as a natural drive is deeply racialized, as women of color have struggled against social forces that have at times coercively appropriated, and at other times coercively discouraged their reproduction in numerous ways. So too, in recent debates over welfare reform, poor mothers have been vilified for having borne children strategically. While a claim not borne out by any reliable studies, it has justified the punishment of women who reproduce for the wrong reasons.

Thus, reproduction raises numerous sticky normative questions, yet underexplored within feminism, with respect to choice, coercion, and policies that incentivize and disincentivize reproductive uses of women's sexual bodies-not only for women who occupy law's margins, such as lesbians and women of color, but also for women whose reproduction we regard as unproblematic.

NOTES ON GENDERED CHILDREARING

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6. Dorothy E. Roberts argues that black women's experiences of motherhood and the family contrasts with the feminist image of the home as oppressive for women. Roberts, Motherhood and Crime, 79 Iowa L. Rev. 95 (1993). First, the separate spheres ideology has never described black women's lives, as black mothers have always worked outside the home as well. Thus "black women have viewed work outside the home as an aspect of racial subordination and the family as a site of solace and resistance against white oppression." Id. at 131. Indeed, the mothering of black children, devalued by the majority community, may be seen as a "radical vocation." In addition, black women have a more communal notion of childrearing, as female relatives and friends help to raise each others' children. "Black women historically have practiced mothering in a way that overcomes some of the burdens of motherhood and holds the potential for the collective transformative action of mothers." Id. at 132.

What are the implications of Roberts' description of motherhood as a liberatory—even a political—experience? Do these implications pertain only to women of color? In what ways might the interests and attitudes of white and black, professional, middle-class, and working-class mothers, as well as

mothers receiving public assistance, differ with respect to the role of motherhood in a woman's life? In what ways might their interests be congruent? What lessons might our society draw from the more collective/communal childrearing practices described by Roberts? How do you think Kessler would answer that question?

7. One black writer, bell hooks, has criticized white middle-class feminists for having alienated poor and non-white women by attacking motherhood in the early years of the current women's movement and then for romanticizing motherhood in a new version of the 19th-century cult of domesticity. hooks, Revolutionary Parenting, in Feminist theory from margin to center 133–36 (1984). This romanticization is dangerous, in hooks' opinion, both because it "reinforce[s] central tenets of male supremacist ideology" and because it undermines women's involvement in other types of work at a time when many teenagers are bearing children rather than developing a connection to the world of work. Why do you think contemporary feminists may have "flip-flopped" in their views of mothering? Is what hooks describes as a new cult of domesticity the same as the 19th century variety (which exalted the role of the woman—at least the middle-class white woman—within the home, at the price of disqualifying her from playing any role in the public world), given that the new domesticity takes place in a context in which most women have entered the paid labor force?

How do you think hooks would respond to Franke's call for an interrogation of repronormativity? Franke emphasizes that only certain women—white, non-immigrant, financially secure women—are encouraged to reproduce. How might Franke and hooks work together to interrogate the emphasis on mothering in feminist legal theory?

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10. Several authors have suggested that mothering may offer a fruitful model for political and legal relationships. Sara Ruddick, for example, argues that the injection into public life of a mother's interests in preserving life, fostering growth, and loving attentively could transform society. Ruddick, Maternal Thinking (1989). Is this simply a new version of the suffragists' argument that giving the vote to women would lead to a new morality in public life? How is it different? Virginia Held points to the revolutionary potential of replacing the contractual paradigm underlying much of Western social and political thought (i.e., the foundation of the state through an original social contract hypothesized by philosophers such as Hobbes, Locke, and Rousseau, whereby rational individuals decided to trade the unlimited freedom of the state of nature for the security of the civil state) with a paradigm of the mother-child relationship as the primary social relationship—one which involves dependence, vulnerability, caring, and responsibility, rather than autonomy, self-interest, privacy, and the exercise of power. Held, Mothering versus Contract, in Beyond Self-Interest 287–304 (Jane J. Mansbridge ed., 1990). What might the social contract look like if it had been designed by women? Or by individuals who do not yet know what gender role they will be assigned to play in society? What social contract might the various theorists in Chapter 3

design? What different strategies might these theorists suggest for women now?

11. Franke encourages feminist legal theorists to question the "taken-for-grantedness" of motherhood, to "reconceptualize procreation as a cultural preference rather than a biological imperative." Indeed, the number of women who are not mothers or mothers-to-be has increased steadily in the past few decades. In 2016, 48.6% of women aged 15 to 44 did not have children, the highest percentage since the U.S. Census Bureau started tracking the data in 1976. U.S. Census Bureau, Fertility of Women in the United States: 2016 (May 4, 2017). Despite this trend, women who are childless by choice are often treated with scorn or suspicion. For example, members of the media commented extensively on the fact that Supreme Court Justices Sonia Sotomayor and Elena Kagan are both childless women. Some critics fear that female judges without children will not be able to relate to the 80% of American women who have (or plan to have) children; others are concerned that women who are not mothers lack certain qualities associated with childrearing, such as compassion or tolerance. Lisa Belkin, Judging Women, N.Y. Times Mag., May 17, 2010, at 11.

How might feminists recognize the role of childrearing in many women's lives without reinforcing repronormativity? Do feminist legal theorists contribute to the construction of women as mothers?