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Aborted Emotions: Regret, Relationality, and Regulation

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ABORTED EMOTIONS: REGRET, RELATIONALITY, AND REGULATION

*Jody Lynée Madeira**

ABSTRACT

Regret is a deeply contested emotion within abortion discourse. It is present in ways that we are both afraid of and afraid to talk about. Conventional pro-life and pro-choice narratives link regret to defective decision making. Both sides assert that the existence of regret reveals abortion's harmfulness or harmlessness, generating a narrow focus on the maternal-fetal relationship and women's "rights." These incomplete, deeply flawed constructions mire discourse in a clash between regret and relief and exclude myriad relevant relationships. Moreover, they distort popular understandings of abortion that in turn influence women, creating cognitive dissonance and perhaps distress for those with different lived experiences of abortion. Finally, these portrayals contribute to the silence and stigma surrounding abortion.

This Article contends that regret is more suggestive of women's deep reflection on the abortion decision and respect for the fetal relationship than of flawed decision making—signifying autonomy, not victimization. It explains why we view regret as an outcome of deficient decision making, how this conception misrepresents regret and confuses it with remorse, and why it prompts liberals and conservatives alike to devalue women's autonomy. This Article charts a course for reconceptualizing and ultimately decentering regret by discussing several common missteps in current constructions: (1) conflating regret with psychopathology, (2) confusing regret with remorse, (3) confining regret to the maternal-fetal relationship and women's self-commitment, (4) linking regret to deficient decision making, and (5) coupling regret and moral culpability. Finally, this Article discusses how correcting these errors reprioritizes autonomy and profoundly impacts abortion regulation.

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INTRODUCTION

In the years since *Gonzales v. Carhart*, we as legal scholars have spilled much ink lambasting the Supreme Court's infamous characterization of women's regret of "late-term" abortion. Justice Kennedy, writing for the majority, forged an unfortunate and indelible link between regret, grief, and fatally defective decision making:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . 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. . . . 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.¹

We have criticized the majority's shoddy use of social science research,² contested the opinion's misunderstanding of regret as a psychological concept, condemned its image of women as emotional reproductive decision makers, and censured its abandonment of trust in women's autonomous capacity.³ We have, in short, taken great pains to castigate all that is regrettable about this post-abortion regret construction. There are at least two key points, however, that have received insufficient analysis. First, regret is not merely an individual's introspective evaluation but a socially embedded, relationally mediated emotion. Second, regret is not simply an appraisal of past decisions' wrongness or flawed processes; it also can reflect a well-considered decision autonomously made. Regret is there in women's lived experiences of abortion, but not in ways that we should be afraid of, or afraid to talk about. Yet, current understandings of regret can wreak grievous harm, as in *Gonzales* or, perhaps more perniciously, in state legislation allowing women to sue abortion providers for emotional distress or regret following an abortion, even after signing an informed consent form, thereby codifying and legitimating "abortion regret."⁴

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1. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).
 2. See Allison Orr Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1257–60 (2012) (questioning the accuracy of "in house" fact-finding by the Supreme Court in *Carhart* and other abortion cases); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 254–57 (2009) (questioning the use of social science evidence in *Carhart*).
 3. See, e.g., Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255 (2011); Chris Guthrie, *Carhart, Constitutional Rights, and the Psychology of Regret*, 81 S. CAL. L. REV. 877 (2008); Rebecca E. Ivey, Note, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in Gonzales v. Carhart*, 94 VA. L. REV. 1451 (2008); Reva B. Siegel, Lecture, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008); Ronald Turner, *Gonzales v. Carhart and the Court's "Women's Regret" Rationale*, 43 WAKE FOREST L. REV. 1 (2008).
 4. An Iowa bill sponsored by Republican Greg Heartsill would allow a woman to sue an abortion provider "to recover damages for any . . . emotional distress . . . proximately caused as the result of the physician's negligence or failure to obtain informed con-

In popular understandings of abortion decision making, two contradictory mainstream narratives⁵—“pro-life” and “pro-choice”—profoundly influence our comprehension of the abortion decision-making process, what reasons and relationships should be accorded great weight, and what emotions should be felt most palpably. Pro-life and pro-choice narratives⁶ create an invidious dichotomy in our constructions of abortion decision making and women as decision makers; in the former, they are construed as victims, in the latter, autonomous decision makers.⁷ Both perspectives strategically use regret to indicate that abortion is harmful or harmless, yielding a tug-of-war between regret and relief.⁸ The pro-life narrative rejects relief while the pro-choice narrative shortchanges regret; the former claims women who abort experience a toxic emotional cocktail including regret, often jeopardizing mental health, while the latter contends women do not regret abortions, feel relief in lieu of regret, or are not clinically distressed.⁹ These stereotypical perspectives focus on two relationships—for pro-life narratives, the maternal-fetal relationship, and for pro-choice narratives, the woman’s relationship to her own needs, values, and life goals (as in the advocacy phrase “My Body, My Choice”)¹⁰—paying insufficient attention to other relationships with romantic partners, existing or future children, friends, family, religious leaders, and others whose opinions, needs, or fates inevitably influence the decision-making process. In short, both narratives mobil-

sent prior to an performance of the abortion.” H.R. 2098, 113th Cong. (Iowa 2014), *available at* <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=HF2098>. The language provides that “the signing of a consent form by the woman prior to the abortion shall not negate the cause of action.” *Id.*

5. These narratives are social scripts that function like stereotypes or caricatures. They are unlikely to represent the actual pro-life and pro-choice activist platforms, but instead represent the simplified understandings of these platforms that have trickled into popular culture. *See infra* note 13.
6. I use these terms because they are the terms traditionally chosen by both parties. *See* WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 3–4 (2003).
7. It may be controversial to refer to women as “victims” in either context, however, pro-life activists characterize women as victims in two senses: that their abortion choice is not an actual choice because the decision is coerced by others (from family members and friends to abortion providers who do not effectively educate women) and that abortion is traumatic for women. ZIAD W. MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS 143 (2008).
8. *See generally* Tracy A. Weitz et al., Editorial, *You Say “Regret” and I Say “Relief”: A Need To Break the Polemic About Abortion*, 78 *CONTRACEPTION* 87 (2008).
9. Katrina Kimport, *(Mis)Understanding Abortion Regret*, 35 *SYMBOLIC INTERACTION* 105, 106 (2012).
10. Jeannie Ludlow, *Sometimes, It’s a Child and a Choice: Toward an Embodied Abortion Praxis*, 20 *NWSA J.* 26, 35 (2008).

ize arguments and construct experiences around regret, using it to signal when and why decision-making processes are deficient and positioning regret so that it always reflects a lack of autonomy.

These narratives have an especially intense impact on the women making this decision, who can experience psychological or emotional dissonance or even distress upon discovering that their lived experience does not match either narrative. Unfortunately, this is the case for many, if not most, of women's lived experiences. To right regret, we must reassess its moral value, which is intertwined with the moral weight of the abortion event and the moral fitness of women who choose it.

Just because a woman experiences regret after her abortion does not mean she has made the wrong decision, was thinking solely of her own interests, has rejected the fetal relationship, or failed to exercise autonomy. Regret more likely signifies a woman's deep reflection upon the abortion decision, the value she placed upon the fetal relationship and other primary relationships in her life, and her decision's autonomous nature. We can better accommodate women's actual lived experience of the abortion decision through relational autonomy, expanding it beyond the stereotypical examples of women who later regret ending their pregnancies and women who terminate their pregnancies and feel relief. Significantly, a relational perspective accommodates various more nuanced (and more common) scenarios, including women who wanted to pursue the maternal-fetal relationship but on different terms; women who ended the maternal-fetal relationship to protect other relationships with the already born, unborn, or yet-to-be conceived; and women who recognize that something precious is lost and mourn fetal life but do not grieve the maternal relationship.

This Article makes several novel contributions. It contends that regret is more suggestive of women's deep reflection on the abortion decision and respect for the fetal relationship than of flawed decision making—signifying autonomy, not victimization. It explores both how we have developed this narrow view of regret as the outcome of deficient decision making and how current conceptions of autonomy warp our understandings of this emotion. It deconstructs mainstream pro-life and pro-choice understandings of regret and relationality, demonstrating how they mischaracterize women's diverse lived experiences and actually undermine women's autonomy. Applying a relational autonomy model, this Article identifies and corrects several mistakes in conventional regret constructions. While current pro-life and pro-choice scripts offer perspectives where women are *either* non-autonomous victims *or* autonomous agents, regret—viewed relationally—shows how women can be “both/and” or “neither/nor.” This Article explores these new strategies, focusing not on whether women should be labeled as victims or autonomous decision makers, but on how best to improve cultural, social,

political, and legal environments so that *more* women are *more* autonomous. Correcting these mistakes decenters regret and prioritizes autonomy—a tectonic shift with significant consequences for existing legal abortion regulations.

In Part I, this Article explains how most women’s lived experiences of the abortion decision are influenced by, but differ from, stereotypical pro-life and pro-choice conceptions of the abortion decision-making process. It then outlines how relational autonomy can correct these problems by contrasting this framework with a traditional liberal autonomy model, illustrating how relationality more effectively captures regret’s roles in the abortion decision. In Part II, this Article applies a relational model to expose several common mistakes: (1) conflating regret as an emotion with psychopathology, (2) confusing regret with remorse, (3) confining regret to the maternal-fetal relationship and women’s self-commitment, (4) coupling regret with deficient decision making, and (5) linking regret to moral culpability. Finally, this Article discusses how correcting these mistakes decenters regret and emphasizes autonomy, and it explores this project’s profound implications for existing abortion regulations.

I. IMPROVING REGRET: APPLYING A RELATIONAL CRITIQUE

A. *How Pro-Life and Pro-Choice Narratives Influence Women’s Experience of Abortion Decision-Making*

Popular understandings of how women make abortion decisions and with what consequences evolve from two mainstream narratives or “scripts” created from pro-life and pro-choice rhetoric. This Part explores how these scripts construct women as decision makers and influence women’s abortion decision making, how they misrepresent regret in ways that imperil women’s autonomy, and how a relational autonomy model can solve these problems. Although Part II will explore regret’s contours and associations with other emotions at greater length, regret is conventionally understood to be “a negative, cognitively based emotion” that reflects our awareness or belief that we would be better off at present if we had made a past decision differently.¹¹ Regret can prompt us to realize that we not only make mistakes but should learn from them, including by righting interpersonal wrongs or changing future behavior.

Social scripts refer to how we know what conduct is expected in particular social interactions and roles, from how we behave at a business din-

11. Marcel Zeelenberg, *Anticipated Regret, Expected Feedback and Behavioral Decision-Making*, 12 J. BEHAV. DECISION MAKING 93, 94 (1999).

ner to what it means to be a best friend.¹² These scripts function as stereotypes or caricatures, shortcuts to understanding and evaluation.¹³ We learn patterned heuristics¹⁴ by watching others' interactions and monitoring our own.¹⁵ These narratives "tell" us (consciously or unconsciously) what we need to do, and when and where.¹⁶ Like other behaviors, our "emotions are socially constructed, displayed, and managed in the context of the various social roles, memberships, identities, or categories that individuals occupy."¹⁷ These norms vary with our relationships and surroundings, and several may be in play simultaneously.¹⁸

While scripts reinforce norms and resolve conflict, their rigidity can create problems. For any particular social issue, there are "multiple, overlapping, and potentially conflicting emotional ideologies,"¹⁹ and we must choose which to adhere to, and how to negotiate tensions between them. In addition, if our emotions are at odds with a particular script, we may experience what Jaggar refers to as "outlaw emotions" or what Thoits terms "emotional deviance"—an "emotion that differs from what is expected,

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12. See generally SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* (1984); ROGER C. SCHANK & ROBERT P. ABELSON, *SCRIPTS, PLANS, GOALS AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURE* (1977).
 13. In schematic processing, we create stereotypes to help us organize information. Social scripts are akin to psychological schemas, such as group or event schemas, which are used as cognitive shortcuts and change according to individual experience. See H. ANDREW MICHENER ET AL., *SOCIAL PSYCHOLOGY* 109–11, 114 (5th ed. 2004). As McCormick observes: "Scripts can be likened to cartoon strips with two or more captioned scenes. . . . Like such cartoons, a script provides stereotyped information about how a cast of characters or actors may be expected to behave and the likely sequence of events." Naomi B. McCormick, *Sexual Scripts: Social and Therapeutic Implications*, 25 *SEXUAL & RELATIONSHIP THERAPY* 96, 98 (2010). See generally JEAN MATTER MANDLER, *STORIES, SCRIPTS AND SCENES: ASPECTS OF SCHEMA THEORY* (1984).
 14. "Heuristic" (noun), is defined as the "study or practice of heuristic procedure." "Heuristic" (adj.), is defined as "an aid to learning, discovery, or problem-solving by experimental and especially trial-and-error methods." *Heuristic Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/heuristic> (last visited Apr. 14, 2014).
 15. Jennifer J. Halpern, *Elements of a Script for Friendship in Transactions*, 41 *J. CONFLICT RESOL.* 835, 839 (1997); see also FISKE & TAYLOR, *supra* note 12; SCHANK & ABELSON, *supra* note 12.
 16. Halpern, *supra* note 15; see also FISKE & TAYLOR, *supra* note 12; SCHANK & ABELSON, *supra* note 12.
 17. Edward J. Lawler & Shane R. Thye, *Bringing Emotions into Social Exchange Theory*, 25 *ANN. REV. SOC.* 217, 224 (1999).
 18. *Id.*
 19. Peggy A. Thoits, *Emotion Norms, Emotion Work, and Social Order*, in *FEELINGS AND EMOTIONS: THE AMSTERDAM SYMPOSIUM* 359, 365 (Antony S. R. Manstead et al. eds., 2004).

conventional or obligatory to feel and display.”²⁰ For that reason, even well-socialized and “emotionally competent” persons must continuously work at ensuring their emotional reactions fit within social expectations through “emotion management.”²¹

The decision of whether or not to obtain an abortion is culturally portrayed as highly controversial and divisive.²² The bulk of social science research addressing women’s psychological responses to abortion has concluded that legal first-trimester abortions pose no psychological hazard for most women, although some experience regret, sadness, or guilt.²³ Instead, women frequently report feeling relief and happiness, and these positive emotions are experienced more intensely than negative emotions such as

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20. Peggy A. Thoits, *Emotional Deviance: Research Agendas*, in RESEARCH AGENDAS IN THE SOCIOLOGY OF EMOTIONS 180, 181 (Theodore D. Kemper ed., 1990); see also Alison M. Jaggar, *Love and Knowledge: Emotion in Feminist Epistemology*, in WOMEN, KNOWLEDGE, AND REALITY: EXPLORATIONS IN FEMINIST PHILOSOPHY 166, 180–84 (Ann Garry & Marilyn Pearsall eds., 2d ed. 1996) (discussing research on “outlaw emotions,” where individuals may escape established patterns of emotional control when placed in problematic social situations in which they discover it is impossible to feel the conventional emotions they know they are “supposed” to experience).
21. Jennifer Keys, *Running the Gauntlet: Women’s Use of Emotion Management Techniques in the Abortion Experience*, 33 SYMBOLIC INTERACTION 44 (2010) (citing Gretchen Peterson, *Cultural Theory and Emotions*, in HANDBOOK OF THE SOCIOLOGY OF EMOTIONS 114 (J.E. Stets & J.H. Turner eds., 2006)). For a general discussion of emotion management, see ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART: COMMERCIALIZATION OF HUMAN FEELING* (1983).
22. Cahn and Carbone describe the abortion controversy as “a polarizing debate where neither side accepts the legitimacy of the other’s position,” and assert that it “remains the family values issue least amenable to compromise.” NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* 95, 105 (2010). The abortion decision can be a tragic choice of the sort envisioned by Calabresi and Bobbitt in their classic volume of the same name. See GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 207 n.7 (1978) (discussing how access to abortion might cause some to support “abortion on demand”: “If inequalities of access based on differences in wealth and articulateness are perceived as serious enough, some, even many, become willing to endorse an absolute rule which eliminates those costs, even though it means that . . . they must live with results which they regard as objectionable. . . .”).
23. Katrina Kimport et al., *Social Sources of Women’s Emotional Difficulty After Abortion: Lessons From Women’s Abortion Narratives*, 43 PERSP. ON SEXUAL & REPROD. HEALTH 103 (2011); Nancy E. Adler et al., *Psychological Responses After Abortion*, 248 SCIENCE 41 (1990); Brenda Major & Catherine Cozzarelli, *Psychosocial Predictors of Adjustment to Abortion*, 48 J. SOC. ISSUES 121 (1992); Brenda Major et al., *Psychological Responses of Women After First-Trimester Abortion*, 57 ARCHIVES GEN. PSYCHIATRY 777 (2000) [hereinafter Major et al., *Psychological Responses*]; Brenda Major et al., *Attributions, Expectations, & Coping With Abortion*, 48 J. PERSONALITY & SOC. PSYCH. 585 (1985) [hereinafter Major et al., *Attributions*].

loss and other “internal concerns” or social disapproval and associated “external concerns.”²⁴

Abortion, too, is scripted by feeling rules;²⁵ its position in our worldviews is constructed through early exposure to certain religious, political, and familial stimuli as well as diverse influences encountered in maturity.²⁶ Pro-life and pro-choice scripts are certainly among these socializing forces. Though these scripts are radically different from one another, both are culturally embedded and respond to repronormative²⁷ gender roles.

According to the pro-life script, sex—a “sacred” act—should be restricted to marriage and family building; children are a “gift from God” to be joyously welcomed; women should adhere to traditional roles; and abortion is a sin that “destroys a human life and scars the mother with feelings of intense remorse and prolonged grief.”²⁸ Thus, pro-life literature warns women of the “inevitable onset of grief and despair.”²⁹ The pro-choice script, on the other hand, asserts that sex—a pleasurable act—is separate

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24. Women who experience regret and distress are most often younger, obtain abortions at later gestations, have a prior psychiatric history, oppose abortion, or were conflicted about the decision. Adler et al., *supra* note 23, at 41, 42 (reporting that two weeks after having first-trimester abortions, 76 percent of women felt relief, while only 17 percent reported feeling guilt); *see also* Nancy E. Adler et al., *Psychological Factors in Abortion: A Review*, 47 AM. PSYCHOLOGIST 1194 (1992) [hereinafter, Adler et al., *Psychological Factors*]; Catherine Cozzarelli et al., *Mental Models of Attachment and Coping with Abortion*, 74 J. PERSONALITY & SOC. PSYCHOL. 453 (1998); Major et al., *Psychological Responses*, *supra* note 23, at 777; Brenda Major & Richard H. Gramzow, *Abortion as Stigma Cognitive and Emotional Implications of Concealment*, 77 J. PERSONALITY & SOC. PSYCHOL. 735 (1999); Brenda Major et al., *Perceived Social Support, Self-Efficacy, and Adjustment to Abortion*, 59 J. PERSONALITY & SOC. PSYCHOL. 452 (1990) [hereinafter Major et al., *Perceived Social Support*].
25. Feeling rules are “standards used in emotional conversation to determine what is rightly owed and owing in the currency of feeling. Through them, we tell what is ‘due’ in each relation, each role.” HOCHSCHILD, *supra* note 21, at 18.
26. *See generally* Keys, *supra* note 21.
27. Repro-normativity is a set of normative assumptions about reproduction and reproductive actors: that women and men will be attracted to one another and form “conjugal relationships” to birth and raise children. Sue Kentlyn, *Reproduction*, in 1 ENCYCLOPEDIA OF MOTHERHOOD 1061, 1062 (Andrea O’Reilly ed., 2010). *See generally* Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 183–97 (2001) (discussing the repronormativity of motherhood).
28. Keys, *supra* note 21, at 44 (summarizing KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984)). This description identifies the pro-life movement with a religious worldview, a point that is supported by other social science research. *See, e.g.*, MUNSON, *supra* note 7, at 7 (“[T]he pro-life worldview often, although not universally, includes a strong commitment to religious faith. The common stereotype of the pro-life movement has it deeply enmeshed in religion—an outgrowth of conservative religious faith and commitment.”).
29. Keys, *supra* note 21, at 41.

from procreation, positions motherhood as a choice that should be well-timed and abortion as a woman's right, and characterizes clinical distress as an atypical response.³⁰ Yet, pro-choice tenets might not effectively counter pro-life principles. As Tracy Weitz asserts, "simply claiming that 'most women feel relief' ignores the complex emotional experiences of women seeking abortion and does not advance our overall goal of promoting women's health and well-being."³¹ Though these scripts merely reflect "anchor points" on a more complicated ideological spectrum,³² as caricatures they often obscure the complexity of activist discourse. Politicizing abortion and its associated emotions encourages "the minimization or exaggeration" of women's experience of painful emotions and distress.³³

Social science research has documented how profoundly these narrow pro-life and pro-choice scripts influence women's lived experience. Narratives, including others' life stories, can be powerful instruments of change.³⁴ Yet few social science researchers have interviewed women about their abortion experiences, instead using other, quantitative measures such as "clinical trials, psychometric scales and statistical analysis of population level databases."³⁵ In one of the most recent and thorough qualitative studies, Jennifer Keys interviewed women choosing abortion to assess how prior socialization to feeling rules affected their emotional experiences and decision making. She concluded that these contradictory abortion discourses profoundly and directly influence women's "ideas about what outcomes are normative and inevitable," affecting their perceptions of "situational cues, as well as their emotional goals, strategies, and outcomes."³⁶ Women are not only influenced by the feeling rules of their chosen script, but rather, they internalize both ideologies and are socialized into various other cultural norms regarding sex and motherhood to differing degrees.³⁷ For example, in one study, women who had considered or obtained abortions described certain social scripts that influenced their emotional experiences after abortion; women associated abortion with painful feelings and expected the abortion

30. *Id.* at 41, 44–45.

31. Weitz et al., *supra* note 8, at 87.

32. Keys, *supra* note 21, at 45.

33. Kimport et al., *supra* note 23, at 103.

34. For instance, Maxwell describes how the "life histories" of women who had abortions and shared their experiences with pro-life activists influenced pro-life rhetoric. CAROL J. C. MAXWELL, PRO-LIFE ACTIVISTS IN AMERICA: MEANING, MOTIVATION, AND DIRECT ACTION 144 (2002).

35. Weitz et al., *supra* note 8, at 88.

36. Keys, *supra* note 21, at 42, 47, 50.

37. *Id.* at 45.

to be a “difficult and horrible thing” even when they did not personally experience distress.³⁸

Women’s sexual responsibility is a prominent theme among pro-life and pro-choice abortion scripts, including both negative, “irresponsible” conduct (such as failing to provide contraception and having sex without anticipating potential consequences) and positive, “responsible” behavior (such as autonomous abortion decision making and opportunities for personal growth). In one study by Kimport, Foster, and Weitz, women felt “they [bore] all responsibility for conceiving, rearing, and supporting the child and responsibility for providing birth control; it was rare to cite a male partner’s failure to provide contraception, and this failure seemed not to trigger blame.”³⁹ These judgments illustrate that conduct leading up to and following from abortion can generate emotions typically associated with the procedure itself.⁴⁰

Research concludes that “either/or” scripts exert pervasive influence on women’s abortion decision making in conjunction with abortion jurisprudence and government regulation.⁴¹ The degree to which feeling rules influence individual women varies according to their abortion views. For some, adherence to a particular abortion script often “narrows” the feelings they deem permissible. Pro-life women can feel guilty when they do not feel shame over extramarital sex or do not experience maternal joy; pro-choice women can feel troubled if they experience emotions other than relief.⁴² Both may be afraid that “deviant” emotions will credit opposing views,⁴³ suggesting that scripts’ influence may even prompt some women to give “adapted” answers about their experiences and reactions.⁴⁴

In qualitative social science research, women employed emotion-management strategies, including scripts, to minimize exposure to stressful situations. They sought to limit their exposure to abortion cues, reaffirm their reasons for terminating a pregnancy, or debunk anti-abortion arguments.⁴⁵ Some women used alternative language to avoid or elicit abortion-related feelings, such as avoiding the phrase “killing it” or choosing self-punishing

38. A. Kero et al., *Wellbeing and Mental Growth: Long-Term Effects of Legal Abortion*, 58 SOC. SCI. & MED. 2559, 2563 (2004).

39. Kimport et al., *supra* note 23, at 105.

40. Keys, *supra* note 21, at 48, 63.

41. As Terry Maroney observes, “[b]eliefs about the prevalence or nature of emotional experiences, such as post-abortion regret, may affect the valuation of state interests and may be invoked to expand or limit individual rights.” Terry Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 857 (2009).

42. Keys, *supra* note 21, at 48, 64.

43. *Id.* at 48, 63–64.

44. Kero et al., *supra* note 38, at 2567–68.

45. Keys, *supra* note 21, at 50.

language such as “murder.”⁴⁶ Some women resisted personifying the fetus to decrease abortion’s emotional impact, while others tried to induce guilt and shame by thinking about fetal development and viewing ultrasounds.⁴⁷ At times these strategies broke down; one pro-choice participant indirectly apologized for affirming a tenet of the pro-life script when she said that the ultrasound image “gives it a face” and “I feel like a bitch saying it, but it changes things.”⁴⁸

Several women adopted a pragmatic “survival” mindset, attempting to put aside their feelings to get through the experience.⁴⁹ This mindset could include tuning out abortion rhetoric, adopting an unemotional outlook or becoming “numb,” and ceasing to ponder alternatives to abortion—problematic strategies for pro-life women and those conflicted about the abortion decision.⁵⁰ Finally, some women engaged in surface-acting (behaving falsely) at the abortion appointment, afraid that providers could interpret emotional displays as uncertainty, jeopardizing the abortion.⁵¹

Women who acknowledge complex emotional reactions are hard to find in current pro-life and pro-choice scripts and are hard to fit within these boundaries. We have a stunted symbolic vocabulary for circumstances that do not conform to these scripts and urgently need an expanded vernacular for expressing and acknowledging the “ineradicable uncertainty” that is central to abortion and reproductive decision making.⁵² Reproductive rights and medical technology discourses might proffer a metanarrative of women marching forward, but these linear narratives of progress do not apply to individual patients who feel at odds with their own lived experience.⁵³

A woman’s post-abortion relief does not mean other painful feelings have no place in her emotional landscape. Emotional responses to abortion are complex, and it is natural to be simultaneously satisfied with a particular decision and experience both painful and positive feelings.⁵⁴ In fact, it would be illogical for some women to not experience painful feelings because of the tendency for values and interests to clash in the abortion con-

46. *Id.* at 56.

47. *Id.* at 58.

48. *Id.* at 52.

49. *Id.* at 55.

50. *Id.* at 55–56.

51. *Id.* at 63.

52. Linda Layne, “How’s the Baby Doing?: Struggling with Narratives of Progress in a Neonatal Intensive Care Unit,” 10 *MED. ANTHROPOLOGY Q.* 624, 641 (1996).

53. In a related context, Layne notes that linear narratives of progress are ill-suited for the parents of infants in neonatal intensive care units who do not get better. *Id.*

54. Kero et al., *supra* note 38, at 2567.

text.⁵⁵ While most women do not experience abortion as traumatic, that does not mean that we should trivialize it and its consequences. We should work towards creating more open and flexible emotional scripts and feeling rules where women can be honest about all their emotional reactions, whether *from* or *related to* the procedure.⁵⁶ A relational autonomy model can help us further understand how and why current pro-life and pro-choice scripts proffer inadequate constructions of regret and can assist us in evolving new narratives of abortion decision making that accommodate more of women's diverse and complex emotional reactions and lived experiences.

B. Understanding Regret's Relational Roots

Autonomy, narrative, social scripts, and relationality are all important components of a relational autonomy model. This model recognizes that individuals are not lone rational agents in decision making, but actors embedded in social relations that mediate human existence, even bodily experience. Autonomy is a key decision-making value that is not exercised in isolation but is enabled by and through social interaction, including relationships.⁵⁷ Through narrative, relationships construct, structure, and bear

55. A. Kero & A. Lalos, *Ambivalence—A Logical Response to Legal Abortion: A Prospective Study Among Women and Men*, 21 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 81, 81 (2000).

56. Kero et al., *supra* note 38, at 2567–68.

57. As a “moral, political, and social ideal,” autonomy is a very broad term; the two constant features are that “autonomy is a feature of persons and that it is a desirable quality to have.” GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 6, 10 (Sydney Shoemaker et al. eds., 1988). Generally speaking, the ideal of personal autonomy refers to “self-direction and self-ownership” or “self-rule that is free from both controlling interference by others and from limitations, such as inadequate understanding, that prevent meaningful choice.” TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 58 (5th ed. 2001); DWORKIN, *supra*, at 6, 13. As such, it requires freedom and agency. *Id.*; see also MARINA OSHANA, *PERSONAL AUTONOMY IN SOCIETY*, at vii (2006). Many definitions posit that an autonomous individual acts both “competently” and from values or conditions that are authentic or perceived as “one’s own.” Thus, there are two types of conditions that are often included with definitions of autonomy: competency conditions and authenticity conditions. See ANDREW SNEDDON, *AUTONOMY* 26 (2013). Competency conditions are framed as including capacities as varied as rational thought, self-control, consideration of values, and ethical evaluation. See SHEILA A. M. MCLEAN, *AUTONOMY, CONSENT AND THE LAW* 18–19 (2010), for a description of the various conceptions of competency. Beauchamp and Childress rely on a definition of autonomy in which someone acts intentionally, with understanding, and without controlling interferences that determine their action. BEAUCHAMP & CHILDRESS, *supra*, at 59. Authenticity is often conflated with personal integration—the development of a consistent compass of valuation. Diana Tietjens Meyers, *Intersectional Identity and the Authentic Self*, in *RELATIONAL AUTONOMY: FEMINIST PER-*

upon autonomy. Social script theory clarifies how highly predictable narratives of events and roles create, communicate, and perpetuate patterned interactions that evolve into social norms. Relationality describes the conditions and practices under which people come to “own” a decision—whether or not they feel autonomous. Relationships can create conditions that support or stifle autonomy. Individuals’ autonomy is undermined when “choices” are forced upon them, when decisions are made by the clock or by default, when decisions are made arbitrarily without reflection and deliberation, and often when the individual feels alone and/or unsupported. Conversely, individuals’ autonomy is enhanced when a decision is well-supported, well-considered, actively made through human reflection, chosen after acknowledging and assessing personal values and needs as well as those of others, and made after maturation of perspectives and insights.

Yet our awareness of autonomy’s social grounding “coexists with a still powerful individualism within academic political theory and philosophy,”⁵⁸ and relationality is not a frequently used tool in our kit of “common sense” lay and professional theories.⁵⁹ Current legal conceptions of autonomy are rooted in the liberal autonomy model and its emphasis on the decision maker as a rational, self-controlled, and separate individual.⁶⁰ Here, autonomy is essential to one’s physical and mental integrity and full moral personhood; as autonomous individuals, we are doers and choosers; as nonautonomous individuals we become the insane, the infantile, and the socially dispossessed and disenfranchised. According to the liberal ideal, an autonomous adult makes choices according to a unified and coherent system of values and desires.⁶¹ Though socialized by interpersonal and institutional relationships to act “rationally,” she is presumed to exercise her capacities for action and choice without reference to social relationships, for therein lies coercion.⁶² According to liberal autonomy, our integrity purportedly derives from the coherence—the temporal stability—of our will.⁶³ We celebrate the self-determination and self-creation that ground our “deep

SPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 168, 172 (Catriona Mackenzie & Natalie Stoljar eds., 2000). The idea of “authenticity” as a predictable and coherent self is highly contested. *See id.* at 173–74.

58. JENNIFER NEDELSKY, *LAW’S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 9 (2011).

59. *Id.* at 36.

60. *Id.* at 115, 174, 277; *see also* SUSAN WILLIAMS, *TRUTH, AUTONOMY, AND SPEECH: FEMINIST THEORY AND THE FIRST AMENDMENT* 64 (Richard Delgado et al. eds., 2004); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 1 (1988) (discussing the separation thesis).

61. WILLIAMS, *supra* note 60, at 41–44.

62. *Id.*

63. *Id.* at 64.

attachment to freedom.”⁶⁴ To be free means to be separate from the other and therefore autonomous.⁶⁵

The law presumes an autonomous individual, sound of mind, is capable of making decisions on her own behalf so long as those choices do not harm others.⁶⁶ Choices arising from internal, personal, and private desires (or, in a Kantian approach, according to reason) are presumed autonomous barring evidence of incapacity. Choices arising from external, public, or even social forces are likely regarded as compelled or coerced and therefore not autonomous.⁶⁷ Law ostensibly protects citizens’ autonomy by erecting walls of rights around them, rendering the most perfectly autonomous individuals the most perfectly isolated.⁶⁸

In stark contrast to the solitary man of liberal autonomy, the socially constructed and relational self uses language to coordinate her life with others, explain her own subjectivities and encounter others’, and orient herself within everyday routines.⁶⁹ Although mainstream Western theory locates emotions deep within an individual’s psyche, relational theory houses them in relationships.⁷⁰ From this vantage point, rationality is a communicative and collaborative concept,⁷¹ and our perceptions and reflections are socially mediated, “shaped by, and responsive to, social recognition.”⁷²

Autonomy is particularly crucial to relational decision making. It is a form of subjectivity, and our decision-making abilities are influenced by our emotions and interpersonal relations. We learn self-esteem and self-trust in relationships; others’ recognition sustains our self-esteem and confidence, and our integrity depends on relational behaviors such as reliability and taking responsibility.⁷³ A relational autonomy model considers how autonomy is possible *through*, not *despite*, social interaction, explicating how relations shape the exercise and experience of autonomy and what relational qualities enhance or undermine it.⁷⁴ No one is fully autonomous at all times

64. NEDELSKY, *supra* note 58, at 121.

65. West, *supra* note 60, at 5.

66. See McLEAN, *supra* note 57, at 17–20.

67. WILLIAMS, *supra* note 60, at 41–42.

68. NEDELSKY, *supra* note 58, at 97–99.

69. PETER BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* 21 (1966).

70. See KENNETH J. GERGEN, *REALITIES AND RELATIONSHIPS: SOUNDINGS IN SOCIAL CONSTRUCTION* 211, 214, 219 (1994).

71. See *id.* at 218–19, 222, 223, 264–65.

72. Catriona Mackenzie, *Imagining Oneself Otherwise*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF*, *supra* note 57, at 143.

73. WILLIAMS, *supra* note 60.

74. See NEDELSKY, *supra* note 58, at 279.

and for all purposes; “autonomy exists on a continuum,” and we may be more autonomous during certain times or situations than others.⁷⁵

Humans form identities through their social, institutional, and ideological relationships, including “intimate relationships with parents and lovers, more distant relationships with teachers and employers, and social structural relationships, such as gender, economic relations, and forms of governmental power.”⁷⁶ Dependence and interdependence are fundamental parts of the human condition. A relational autonomy model is not grounded in control over one’s self and life trajectory. Instead, it asserts that control is illusory and does not encourage respectful interpersonal relations (though being “out of control” can indicate diminished autonomy and having others in control can remove autonomy altogether).⁷⁷ Instead of control, our autonomy is grounded in our “capacity for creative interaction” that encompasses “consciously formulating intentions and hopes and trying to shape one’s life. . . .”⁷⁸

Law structures relationships; it determines which interpersonal connections have privileged legal standing, favors certain relationships over others, and promotes or undermines certain core values such as autonomy.⁷⁹ The relationships that “count” for relational autonomy are not those legitimized by the state, but those an individual finds supportive of autonomous decision making. In relational autonomy, the seminal question is not which relationships count (that should be decided by individuals) but how we can encourage, foster, and, if necessary, legitimize relations that facilitate rather than undermine participants’ autonomy. The roles of the law in these processes are often opaque without a relational framework.⁸⁰

Narrative and social script theories articulate how cultural norms, practices, and routines construct certain relationships in ways that facilitate or undermine autonomy. Narratives sequence expressions and events in accordance with communal norms to create meaning across time.⁸¹ Narrative layers are temporal as well as situational; some layers extend deep within a given expressive moment, while others stretch between expressive moments. Relations and narrative are co-constructive because telling stories about our

75. *Id.* at 46, 288.

76. *Id.* at 4. Despite widespread recognition of the intense dependency and interconnectedness in childhood, Nedelsky observes, cultural willingness to acknowledge relational dependence “somehow seems to disappear for people over the age of twenty-one. It is as though once people are ‘formed,’ once they emerge as ‘rational agents,’ relationships are things they simply have or choose.” *Id.* at 20.

77. *Id.* at 46, 277.

78. *Id.* at 170, 292.

79. *Id.* at 65–66.

80. *Id.* at 72.

81. GERGEN, *supra* note 70, at 224.

identities, relationships, and values allows us to “claim our own characters—and discern those of other people. . . .”⁸² Since narrative interpretation and construction begin with a person’s experiences, values, and prior history, autonomy is not so much choosing as telling.⁸³ Exercising autonomy often triggers narration; we self-consciously revise or retell our stories in response to our need to make choices.⁸⁴

A relational model explores how relationships and associated emotions are “supposed to” and actually operate in social interactions and focuses on how social scripts are created, govern interactions, and are perpetuated or undermined. Moreover, this model helps to explain our reluctance to consider highly controversial decisions where several incompatible scripts are in play. Contentious issues are discomfiting precisely because they force us to confront uncomfortable tensions between morality and immorality, responsibility and irresponsibility—areas of social interdependency. Judith Butler refers to these circumstances as “precarious”—the condition of “living socially, that is, the fact that one’s life is always in some sense in the hands of the other.”⁸⁵ This acknowledgment entails both “exposure” to and “dependency” on others, known and unknown.⁸⁶

So far, this Article has focused on more conventional contrasts between liberal and relational models of autonomy or between pro-life and pro-choice scripts. However, one may also employ a different albeit related framework: examining the relationship between political truth claims⁸⁷ and autonomy in socially conservative (right) and socially liberal (left) circles.⁸⁸ This new framework focuses not on social scripts but on truth claims about autonomy’s nature and what that value means in the context of a legal right to abortion. But scripts and truth claims are not mutually exclusive. Social scripts encompass truth claims, even if in an incomplete, partial, and imperfect manner. Discussing abortion in terms of truth claims encourages us to think outside of the pro-life and pro-choice boxes and deepens our understandings of their constructions and contradictions.

82. WILLIAMS, *supra* note 60, at 165–66.

83. *Id.* at 149.

84. *See id.* at 149, 155.

85. JUDITH BUTLER, FRAMES OF WAR: WHEN IS LIFE GRIEVABLE? 14 (2009).

86. *Id.*

87. A truth claim is merely a statement that some condition is true; truth claims can be verified or falsified. JONATHAN LAVERY & WILLIAM HUGHES, CRITICAL THINKING: AN INTRODUCTION TO THE BASIC SKILLS 105 (2008). Truth claims also make claims about “shared realities” since “[t]o call something true is to imply that it (generally) can and should be accepted as a belief by the listener.” WILLIAMS, *supra* note 60, at 97.

88. I am indebted to June Carbone for her astute insights on this particular issue.

Pro-life and pro-choice scripts overlap with different understandings of autonomy's nature. The idea of autonomy in the abortion debate is slippery because it has two components. One is authenticity, the ability to choose one's own values and worldview.⁸⁹ Whether abortion is permissible, whether it is murder or ethically acceptable, is a contentious issue, depending in part on the source of one's values (e.g., religion or utilitarianism) and the moral status one ascribes to the beginning of a human life. The second component is the individual's ability to make a competent choice.⁹⁰ The current legal framework in the United States assumes a woman choosing an abortion acts autonomously in both senses. Essentially, the notion that a woman has a constitutional right to choose abortion under some conditions assumes both that a woman can elect an abortion as an acceptable choice (otherwise the state would have the right to outlaw it) and that she is capable of making this choice in particular circumstances.

One of the great ironies underlying the abortion debate is that both the right and left are skeptical about the human capacity for autonomy, albeit for different reasons. As Saletan observes, “[w]hereas liberals think of freedom as a prerequisite to sorting out one's values, conservatives think of values as a prerequisite to managing one's freedom.”⁹¹ Social conservatives, most of whom lean towards pro-life,⁹² often deny the possibility of autonomy in determining whether or not abortion is wrong.⁹³ They are likely to

89. The term “authenticity” is controversial. *See, e.g.*, Phillip Vannini & J. Patrick Williams, *Authenticity in Culture, Self, and Society*, in *AUTHENTICITY IN CULTURE, SELF, AND SOCIETY* 1, 1 (Phillip Vannini & J. Patrick Williams eds., 2009).

90. *See supra* note 57.

91. SALETAN, *supra* note 6.

92. *See, e.g.*, CAHN & CARBONE, *supra* note 22, at 94 (“[V]iews on abortion, at least in recent years, correspond with political preferences more generally.”); ROBERT SINGH, *CONTEMPORARY AMERICAN POLITICS AND SOCIETY: ISSUES AND CONTROVERSIES* 52 (2003) (identifying the pro-life movement with the Republican party and discussing the historical partisan polarization of abortion).

93. *See, e.g.*, Rick Santorum, *My Fight for Life*, *WALL ST. J.* (Jan. 23, 2012), http://online.wsj.com/article/SB10001424052970203718504577176641699224320.html?mod=WSJ_Opinion_LEADTop (“I believe that all life is precious. I know life begins at conception. I know that every person, every child conceived in the womb, has a right to life. I know that life is a right endowed by our Creator, that it is inalienable, laid down in the Declaration of Independence, and should be guaranteed under the Constitution. . . . Without its protection, no other rights matter.”). Santorum has also intimated that women who obtain abortions are somehow coerced or manipulated: “I grieve for the children lost and for the mothers who have been deceived by a society selling selfishness. I am thankful for the faithful workers around the country who serve at pro-life pregnancy centers providing women honest information and additional choices.” *Id.* This commitment to life might be so strong that it applies even in extreme cases such as rape. *See, e.g.*, *Piers Morgan Tonight: Interview with Rick Santorum* (CNN television broadcast Jan. 20, 2012), *available at* <http://>

see values in terms of right or wrong, divinely ordained, fixed rather than changing, rule-based rather than contextual.⁹⁴ The stereotypical pro-life script constructs the pregnant woman as a mother, the fetus as human life, and abortion as murder.⁹⁵ Within this worldview, an individual is autonomous so long as she can choose; the choice to “sin,” after all, is an act of will meriting punishment. Thus, values-based autonomy—the ability to determine right or wrong—is seen as an oxymoron, but act-specific autonomy—the ability to choose whether to do a certain action—is always presumed so long as the individual has free will in any meaningful sense.

Those on the left, including many but not all of those who are pro-choice, are also skeptical about autonomy.⁹⁶ Unlike the socially conservative right, however, they believe that the individual, not the state or the community, should determine which values matter. Accordingly, they oppose a governmental determination that abortion is immoral, either on the basis of religious views or a communal majority vote.⁹⁷ Because individuals should

transcripts.cnn.com/TRANSCRIPTS/1201/20/pmt.01.html (“As horrible as the way that that [sic] son or daughter and son was created, it still is her child. . . . I believe and I think the right approach is to accept this horribly created—in the sense of rape—but nevertheless a gift in a very broken way, the gift of human life, and accept what God has given to you.”).

94. This is substantiated by the research that Ziad Munson has conducted on the making of pro-life activists. See MUNSON, *supra* note 7, at 2 (recognizing the “dualistic worldview” regarding abortion and demonstrating this proposition’s truth with an interviewee’s statement that “[a]bortion is not about politics, is not about choice . . . it’s about truth and what is right and wrong.” (internal quotation marks omitted)).
95. See, e.g., CAHN & CARBONE, *supra* note 22, at 93.
96. This skepticism is related to Marxist concerns that “the working class is systematically and successfully indoctrinated with the values of the ruling class,” and accordingly related to theories of manipulative socialization and false consciousness. See generally Michael Mann, *The Social Cohesion of Liberal Democracy*, 35 AM. SOC. REV. 423, 435, 437 (1970) (finding empirical evidence of indoctrination of dominant values). Such a relation is evident in the work of scholars such as Catherine MacKinnon who draw on Marxist theory in critiquing liberalism. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 122 (1989) (stating that liberal idealism and Marxist theory “oversimplify . . . social reality”). It is also present in works such as Thomas Frank’s bestseller, *What’s the Matter With Kansas?*, that discuss “the manipulation of consent in American democracy.” Cynthia Willett, *False Consciousness and Moral Objectivity in Kansas*, 22 J. SPECULATIVE PHIL. 290, 291–94 (2008) (citing THOMAS FRANK, *WHAT’S THE MATTER WITH KANSAS?* (2004)) (discussing Frank’s initial observation that since the Reagan era “ordinary folk, once democrats and populists, now allow moral values to trump their economic interests and vote Republican” and his interpretation of this as an instance “false consciousness”).
97. See Caitlin E. Borgmann, *The Meaning of “Life”: Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 568 (2009) (“Liberals typically take the position that the morality of abortion . . . is a deeply personal, and often religious,

determine values and abortion's moral and ethical acceptability for themselves, the state should have no power to impose a particular perspective on those who do not share it. The conventional pro-choice script positions the fetus as "potential life, deserving perhaps of enhanced respect, but subject to the same balancing tests of advantages and disadvantages as other more prosaic decisions."⁹⁸ Yet, the left fears that majoritarian views might unduly influence individual decisions about abortion's moral status and about whether to choose abortion under particular circumstances.

Thus, the left simultaneously places greater significance on the individual's ability to choose her own values and make choices in accordance with them,⁹⁹ and is more skeptical about her capacity to do so.¹⁰⁰ The right does not share this skepticism; for them, an individual cannot autonomously determine what is morally "right" (that is fixed and immutable), but she can autonomously choose whether to do what is right. Therefore, the pro-choice left has a greater stake in monitoring the contexts in which individuals exercise autonomy than those on the right.

When considering how pro-life and pro-choice scripts map onto liberal and relational models of autonomy, further ironies appear. At first, the pro-life narrative appears to be more relational because it focuses on the maternal-fetal connection,¹⁰¹ the existence and value of which it portrays as

matter that each person should decide for herself."); *see also* GEORGE LAKOFF, *MORAL POLITICS: HOW LIBERALS AND CONSERVATIVES THINK* (2d ed. 2002) (arguing that in the liberal worldview, abortion is a matter of "individual responsibility, not government action"); Marcy Darnovsky, *Moral Questions of an Altogether Different Kind: Progressive Politics in the Biotech Age*, 4 *HARV. L. & POL'Y REV.* 99, 102 (2010) ("From the 1960s until the past few years . . . the dominant left and center view during these decades was liberal in the classical sense. . . . Moral and ethical values were seen as private concerns, unwelcome in the public sphere, and certainly not matters on which government policy should take sides."); JOHN RAWLS, *POLITICAL LIBERALISM* 98 (1993) (noting that a view is autonomous in part because it is "not simply presented as [a] moral requirement[] externally imposed" nor "required of us by other citizens whose comprehensive doctrines we do not accept"); Mark Warren, *Liberal Constitutionalism as Ideology: Marx and Habermas*, 17 *POL. THEORY* 511, 517 (1989) ("Liberal constitutionalism evokes not so much an abstract individualism . . . as it does the intimacy of human relations against the corrupting influences of power."); Larry Krasnoff, *Autonomy and Plurality*, 60 *PHIL. Q.* 673, 673 (2010); WILLIAMS, *supra* note 60, at 41–42.

98. CAHN & CARBONE, *supra* note 22, at 92.

99. *See* RAWLS, *supra* note 97.

100. The left is opposed not only to abortion restrictions, but also to "personhood" amendments that purport to give full juridical rights to embryos, even if these amendments would not directly impose any positive or negative legal obligations on anyone, simply because they believe that individuals should determine the morality of abortion and personhood for themselves. *See* Borgmann, *supra* note 97, at 555–56, 568.

101. *See supra* note 95; *see infra* note 111.

immutable. Because the right sees this relationship as incontrovertible, like abortion's immorality, its importance has nothing to do with a woman's autonomy (which is largely presumed). In other words, it is not an autonomous act for a woman to decide that, in her worldview, the fetal connection is sacrosanct and abortion is immoral. The fundamental question for the right is not how a woman comes to situate abortion and her relationship to the fetus in her worldview, but whether or not she decides to get the abortion. In reality, therefore, the right gravitates much more towards the liberal autonomy model.

At the same time, the left appears to be less relational and closer to the liberal autonomy model because it explicitly focuses on "choice." Because it recognizes how social relations can impact individual choices, however, it is actually much closer to relational autonomy. According to the left, whether abortion is right or wrong is up to the individual, and it is essential that she (not the state or social order) make this determination.¹⁰² Because the left is skeptical of whether she can make this determination free from influence or coercion, it questions the possibility of a "true" or "authentic" expression of autonomy, but realistically regards an imperfect determination as superior to one made by the state. The fundamental question for the left is not whether or not a woman chooses abortion, but how she comes to situate abortion within her worldview. Ironically, then, the pro-life right is regarded as closer to relational autonomy and the pro-choice left as closer to liberal autonomy, when in fact the opposite is true.

C. Scripting Regret

A relational conception of autonomy exposes latent controversies and reveals perspectives that the liberal individualistic model obscures. Examining lived experience, not theoretical discussion, best demonstrates relationality's usefulness; the allegation that we "mak[e] a decision about an individual neutrally or without any consideration of other people in the family is neither ethically coherent nor empirically supportable."¹⁰³

Currently, mainstream abortion social scripts create an invidious dichotomy, offering us a choice between a pro-life script portraying women as victims and a pro-choice script casting them as autonomous agents. Each script has different implications for autonomy—either condemning or championing women's decision-making capacity. These choices are inaccurate and insufficient; we need a script not where women are *either* one thing

102. See *supra* note 97.

103. See Kimberly Strong, Ian Kerridge & Miles Little, *Savior Siblings, Parenting and the Moral Valorization of Children*, *BIOETHICS* 5 (2012), available at <http://online-library.wiley.com.proxy.lib.umich.edu/doi/10.1111/j.1467-8519.2012.02001.x/pdf>.

or another, but one in which women can be “both/and,” or something else entirely.

Acknowledging that women’s choices are subject to constraints is not the same as conceding that they are not autonomous. The goal of applying a relational model is not to place women in one category or the other but to assess what changes will ensure women are more autonomous and less victimized. As decision makers, we are never fully autonomous; all decisions are situated within a complex, changing, and persistent network of constraints. In the abortion context, many of these difficulties are peripheral to reproductive decision making such as devalued caretaking roles, insufficient maternity leave, and a chronic shortage of high-quality but affordable child-care. Relational autonomy is but the first baby step towards changing some of these factors.

Critically, pro-choice organizations are aware of these rhetorical weaknesses. According to Ludlow, an academic and an experienced abortion care worker, there is “a hierarchy of abortion narratives from a political pro-choice perspective”: (1) “politically necessary” narratives (rape, incest and domestic violence; confrontations with antiabortion protesters; and the risks of illegal abortion); (2) “politically acceptable” narratives (contraceptive failure, fetal anomalies, financial constraints); and (3) “the things we cannot say” (multiple abortions, no contraceptive use, post-abortion grief, and economics of abortion care).¹⁰⁴ Most clinic experiences are in the third category.¹⁰⁵ Thus, our inability or unwillingness to acknowledge regret contributes to the “silence and stigma around abortion, even among pro-choice people.”¹⁰⁶ Through its recent “Not in Her Shoes” campaign,¹⁰⁷ Planned Parenthood attempts to switch the movement’s focus from pro-life and pro-choice labels that “limit the conversation”¹⁰⁸ to how abortion “is a deeply personal and often complex decision for a woman to make.”¹⁰⁹ The campaign highlights relationality, calling for “empathy” and asserting “deci-

104. Jeannie Ludlow, *The Things We Cannot Say: Witnessing the Traumatization of Abortion in the United States*, 36 WOMEN’S STUD. Q. 28, 29–30 (2008).

105. *Id.*

106. *Id.* at 30 (internal quotation marks omitted).

107. See *Not in Her Shoes*, PLANNED PARENTHOOD, http://www.ppaction.org/site/PageServer?pagename=pp_ppol_notinhershoes#.UyEG0PlSaQA (last visited Apr. 14, 2014).

108. See Anya Callahan, *Planned Parenthood Ditches “Pro-Choice” Label for Nuance*, GENERATION PROGRESS (Jan. 23, 2013, 12:06 AM), http://campusprogress.org/articles/planned_parenthood_ditches_pro-choice_label_for_nuance/; see also Katie Yoder, *Planned Parenthood Campaign Eliminates “Pro-Life,” “Pro-Choice” Language*, NEWSBUSTERS (Jan. 18, 2013, 2:55 PM), <http://newsbusters.org/blogs/katie-yoder/2013/01/18/planned-parenthood-campaign-eliminates-pro-life-pro-choice-language>.

109. *Not in Her Shoes*, *supra* note 107.

sions about whether to choose adoption, end a pregnancy, or raise a child must be left to a woman, her family, and her faith, with the counsel of her doctor or health care provider.”¹¹⁰

Both pro-life and pro-choice scripts explicitly or implicitly revolve, to a large degree, around the maternal-fetal relationship and consequently upon the fetus’s construction within social, cultural, political, and even medical milieus. In pro-life scripts, this relationship is front and center; the pregnant woman is a mother who is intimately connected to her fetus.¹¹¹ Pro-choice scripts highlight a woman’s relationship with her current and future selves.¹¹² Of course, these relations are only two of many connections women may appraise as less, equally, or more significant.¹¹³ As Linda Layne observes through her scholarship on miscarriage, the “distinction between a fetus and a baby is defined not by gestational development but through social relationships—the pregnant woman’s with her fetus, her family, and her community.”¹¹⁴

The maternal-fetal relationship is cumbersome because of debate over the fetus’s moral status. Confronting the distinction between abortion and

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110. *Id.* In response, NARAL Pro-Choice America reiterated its commitment to “pro-choice.” See NARAL Pro-Choice Am., *On the Language of Choice*, BLOG FOR CHOICE (Jan. 17, 2013, 4:35 PM), <http://www.blogforchoice.com/archives/2013/01/on-the-language.html>.
111. Glen A. Halva-Neubauer & Sara L. Zeigler, *Promoting Fetal Personhood: The Rhetorical and Legislative Strategies of the Pro-Life Movement After Planned Parenthood v. Casey*, 22 FEMINIST FORMATIONS 101, 108 (2010).
112. Women’s narratives about their abortions often resound with consciousness about actual past and future selves as well as curiosity about potential past and future selves. See, e.g., Alana Bibeau, *The Political is Personal, or God Bless America*, in ABORTION UNDER ATTACK 107–08 (Krista Jacob ed., 2006) (“What would it be like if I had carried the child to term? . . . I would have had to compromise my education, my career, or my parenting in order to work at providing a good life for myself and my child.”).
113. Significantly, a relational autonomy model does not assess a fetus’s status in abstract and absolutist terms of personhood—whether a fetus is “a person” or not “a person”—but in relative terms of relationality. SUSAN SHERWIN, NO LONGER PATIENT: FEMINIST ETHICS & HEALTH CARE 109 (1992). From this vantage point, unborn fetuses are obviously restricted in their ability to form and participate in a variety of social roles and relationships; every relationship in which they are involved is indirect and necessarily involves the pregnant woman. Thus, feminist relational autonomy posits a fetus has no absolute value; rather, the pregnant woman herself must determine what “social status and value” her fetus has and associated values will vary dramatically from woman to woman and may change for any particular woman throughout her pregnancy. *Id.* at 110–11.
114. Ludlow, *supra* note 10, at 42 (citing Linda Layne, “I Remember the Day I Shopped for Your Layette”: Consumer Goods, Fetuses, and Fetishism in the Context of Pregnancy Loss, in FETAL SUBJECTS, FEMINIST POSITIONS (Lynn M. Morgan & Meredith W. Michaels eds., 1999) [hereinafter Layne, *I Remember the Day*]).

other medical procedures, physician Lisa Harris asserts that, though the fetus's moral status is "reasonably the subject of much disagreement. . . . It is disingenuous to argue that removing a fetus from a uterus is no different from removing a fibroid."¹¹⁵ At times, this apparent reluctance to discuss the maternal-fetal relationship has led pro-choice advocates down rocky paths. After the Partial Birth Abortion Act's passage, for example, advocates first claimed the technique was "used rarely and largely in cases of fetal anomaly or death" instead of explaining why the procedure was safer than others, resulting in a "loss of credibility" and a loss of opportunity for public education.¹¹⁶ As a provider, Harris finds it problematic to situate a second-trimester abortion within pro-choice rhetoric employing "a practice of abstraction that tends to obliterate or to erase the realities of bloodiness and violence attached to abortion."¹¹⁷ This problem, however, may be largely rhetorical; clinic practices appear to be more flexible in accommodating women's needs. Clinic staff follow women's lead in calling fetuses "babies," allow women to hold fetal remains after a late-term procedure, and let women view fetuses and fetal tissue following procedures completed at earlier gestations.¹¹⁸ Few staff members and providers speak publicly about these practices, however, and so silence contributes to the problem and discussion framework.

Furthermore, both pro-life and pro-choice scripts have traditionally focused attention on rights-based discourse¹¹⁹ instead of conceptualizing the abortion decision as an embodied and relational event.¹²⁰ This focus does little to counter abortion stigmatization.¹²¹ Moreover, exercising a "right" to abortion is incidental to women's reasons for terminating their pregnancies; "most women do not decide to have abortions because they are, at that moment, exercising their rights. They have abortions because their lives are complicated."¹²² Perhaps it is surprising that pro-choice abortion scripts are not more tied to issues of family and social welfare. This might be a consequence of reactive politics,¹²³ and some might interpret such concerns as

115. Lisa H. Harris, *Second Trimester Abortion Provision: Breaking the Silence and Changing the Discourse*, 16 REPROD. HEALTH MATTERS 74, 75 (2008).

116. Ludlow, *supra* note 10, at 38–39.

117. Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355, 371 (1989).

118. Ludlow, *supra* note 10, at 40, 43, 45–46.

119. See SALETAN, *supra* note 6, at 4–7.

120. *See id.*

121. Jeannie Ludlow, *Love and Goodness: Toward a New Abortion Politics*, 38 FEMINIST STUD. 474, 475 (2012).

122. *Id.* at 476.

123. Amy Borovoy, *Beyond Choice: A New Framework for Abortion?*, DISSENT, Fall 2011, at 73, 77.

“ced[ing] this issue to the Right.”¹²⁴ Some pro-choice efforts to acknowledge the embodied qualities of the abortion decision have been met with sharp criticism from inside the movement,¹²⁵ and pro-choice scholars often acknowledge that such remarks are “risky” even as they make them.¹²⁶

Regret is a “persistent feature” in both pro-life and pro-choice scripts, situated as an emotion that is either actively present, palpable, and problematic (in the pro-life “victim” script) or invisible (in the pro-choice “autonomous agent” script).¹²⁷ These constructions are problematic for several reasons; for example, not all “victims” will experience regret, and some autonomous women will. We need to take a closer look at regret to understand why this is so.

Notwithstanding social science and medical research, pro-life activists persistently claim women do experience regret and strong emotional distress following the abortion procedure. This idea continues to gain currency, even supporting the Supreme Court’s holding in *Gonzalez v. Carhart*.¹²⁸ In contrast, regret is the elephant in the room within the pro-choice camp, which has not focused on regret on the grounds that it could “weaken their political position.”¹²⁹ Thus, what is needed is something neither side nor script currently offers:

We need to develop a new body of knowledge regarding what emotional support women want and need along with their abortion care. It should capture the lived and embodied experiences of women who have abortions alongside the clinical trials, psy-

124. *Id.* at 78.

125. For instance, Frances Kissling, the founder of Catholics for a Free Choice, published an article in 2004, calling for pro-choice activists to “acknowledge the moral value of a fetus—and the potentially painful reality of its loss.” Ludlow, *supra* note 10, at 29. She also urged the movement to develop a discourse that combined rights-based discourse with “exploration of how other values might also be respected, including the value of developing human life,” thus moving beyond the rather simplistic dichotomies that have characterized U.S. abortion discourse.” *Id.* Kissling was criticized by several leading pro-choice figures including Ellie Smeal (Feminist Majority Foundation), Susan Hill (National Woman’s Health Organization), and Rosalind Petchesky. *Id.* at 30. Joan Malin, CEO of Planned Parenthood of New York, has voiced concerns similar to Kissling’s. *Id.*

126. *See, e.g., id.* at 28, 42 (quoting Linda Layne as stating “feminists have avoided any discussion of fetuses for fear of adding fuel to the antiabortionists’ fire.”); *see also* Harris, *supra* note 115 (stating that some abortion issues such as “personal and psychological aspects,” “visual and visceral dimensions,” “violence inherent in abortion,” and providers’ “legitimate ethical and moral issues” with second trimester abortion that “may frankly be too dangerous for pro-choice movements to acknowledge”).

127. Kate Greasley, *Abortion and Regret*, 38 J. MED. ETHICS 705, 705 (2012).

128. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

129. Kimport et al., *supra* note 23, at 103.

chometric scales and statistical analysis of population level databases. To do this, we need to partner with the women themselves and not be afraid to acknowledge the full range of feelings women have about abortion.¹³⁰

Despite the obstacles they face, most women actually make decisions in a relationally autonomous manner. Research suggests the abortion decision is relational in at least two ways; the decision outcome affects women's relations with others (including already-born children, the fetus, and children born in the future), and women often consider others' viewpoints and how these viewpoints will be affected by their decisions.

Carol Gilligan's classic case study of abortion decision making, *In a Different Voice*, describes how women's moral judgment is oriented more towards empathy and compassion than men's, and how women construct moral problems as issues of care and responsibility instead of rights and rules.¹³¹ With abortion, the ideal of maternal (and feminine) self-sacrifice calls for a woman to earn redemption by giving birth to the child and giving him up for adoption or by keeping the child and raising him—in other words, to put the child's needs before her own.¹³² Gilligan asserts the abortion decision requires a woman to consider how these outcomes affect her and others and thus, “engages directly the critical moral issue of hurting.”¹³³ She posits women make this decision in a framework of “selfishness and responsibility”; inflicting harm is deemed “selfish and immoral” while care fulfills moral responsibility.¹³⁴ Women who obtain an abortion “for themselves” might be considered selfish and/or immoral for abdicating their moral roles and commitments and allegedly showing “insufficient concern for her child-to-be.”¹³⁵ Therefore, the pro-life and pro-choice scripts do not effectively capture the quality, complexity, or substance of the abortion decision-making process for most women.

Relational autonomy can help us to bridge the gap between cultural constructions and lived experience. Relationality describes the conditions and practices under which people come to experience a decision as their own, whether or not they feel autonomous. In abortion decision making, relationships can support or stifle autonomous decision making. An abortion decision is not autonomous if it is forced on a woman or made arbitrarily, without reflection and deliberation. Women who conceal their

130. Weitz et al., *supra* note 8.

131. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 73 (1982).

132. Appleton, *supra* note 3, at 323–24.

133. GILLIGAN, *supra* note 131, at 71.

134. *Id.* at 105.

135. Appleton, *supra* note 3, at 324.

pregnancies and act in secret do not exercise their full autonomous capacity, since relationally autonomous decision making necessitates communication and mobilizing communal networks—talking through an issue, considering others' opinions, and reflecting upon how outcomes will affect others.¹³⁶ This process of reflection and deliberation is inherently relational. Without a relational autonomy perspective, we only partially understand how growth or maturation occurs within decision making.

Finally, a relational autonomy model can explicate both regret's strategic functions within mainstream abortion scripts and its roles in lived experience. Pro-life and pro-choice scripts each use the concept of regret as a rhetorical tool to communicate the presence, absence, and strength of the maternal-fetal relation, transforming regret into a proxy for that connection. These elements are masked by a more traditional model of liberal autonomy, where the individual bears the weight of her decision alone.

II. REVISING REGRET: TOWARDS A NEW CONSCIOUSNESS OF ABORTION IN LIVED EXPERIENCE

Conventionally, regret is understood as “a negative, cognitively based emotion we experience when realizing or imagining our present situation would have been better, had we decided differently.”¹³⁷ It is “pervasive in daily life,” and is the second most commonly experienced emotion, after love.¹³⁸ It has several associated emotions: sorrow, grief, pain, dissatisfaction, longing, remorse, feeling that “we should have known better,” “sinking feelings,” feeling like “kicking ourselves,” and desires for second chances.¹³⁹ Regret can be supportive of relational autonomy; without it, our mistakes

136. *See supra* Part I.B.

137. Zeelenberg, *supra* note 11. Other definitions are in concurrence. E. Allen Farnsworth defines regret as “the sensation of distress that you feel on concluding that you have done something contrary to your present self-interest, something that does not accord with your present preferences.” Appleton, *supra* note 3, at 265 (citing E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 20 (1998)). Chris Guthrie notes, “regret is a painful feeling we experience upon determining that we could have obtained a better outcome if we had decided or behaved differently.” Guthrie, *supra* note 3, at 882. Finally, Terry Maroney states:

To say that a person ‘regrets’ something is to express that she has made a negative self-evaluation based on past voluntary action now judged to be an avoidable mistake, and that she has coupled that evaluation with a wish for an imagined reality that would have obtained had the action been different.

Maroney, *supra* note 41, at 892–93.

138. Colleen Saffrey et al., *Praise For Regret: People Value Regret Above Other Negative Emotions*, 32 *MOTIVATION & EMOTION* 46, 52 (2008).

139. Marcel Zeelenberg, *The Use of Crying Over Spilled Milk: A Note on the Rationality and Functionality of Regret*, 12 *PHIL. PSYCHOL.* 325, 327 (1999); Janet Landman,

would not be as painful, and we would be less likely to learn from them.¹⁴⁰ Motivated by regret, we may try to right wrongs through reparative behaviors such as apology, or we may decide to change our future behavior. People perceive regret as useful, with “a wide range of positive benefits” such as “placing past events in context, encouraging approach and avoidance behaviors, gaining insight into one’s own past behavior and current disposition, and also in facilitating smoother social relations.”¹⁴¹ Intense regret, however, can lead to pathological distress.¹⁴²

We can distinguish regret from several associated emotions and behaviors, including undoing, disappointment, remorse, and guilt.¹⁴³ The most relevant emotion for our purposes is remorse. Though regret is similar to remorse in that both are “painful and distressing emotions having to do with an unfortunate life event or transgression,” they are also different in numerous ways.¹⁴⁴ Regret has broader applicability and is wider in scope than remorse. We can regret another’s acts but we can feel remorse only for our own behavior.¹⁴⁵ In addition, we can feel regret for something morally innocuous, even virtuous, but we feel remorse for acts we deem morally wrong.¹⁴⁶ We can regret future actions that we must perform, but we feel remorse only for our past acts; similarly, genuine remorse entails an intent not to commit the same act in the future, but regret does not necessarily involve the same restrictions.¹⁴⁷

Regret’s exact meaning and implications are supplied by and within a number of institutions, cultures, and contexts, including pro-life and pro-choice scripts. Regret might reveal only that a decision was difficult or somehow problematic.¹⁴⁸ This assertion finds support in Susan Frelich-Appleton’s argument that courts deploy regret for various purposes across diverse reproductive contexts.¹⁴⁹ Certain conceptions of regret are cultivated for specific ends; exposed to these constructions, women “may be culturally conditioned or required to fit their subsequent reflections into a certain expressive framework, typically packaged in the language of regret.”¹⁵⁰

Regret: A Theoretical and Conceptual Analysis, 17 J. FOR THEORY SOC. BEHAV. 135, 137 (1987).

140. Zeelenberg, *supra* note 139, at 335.

141. Saffrey et al., *supra* note 138, at 46, 51–52.

142. *Id.*

143. *See generally* Landman, *supra* note 139.

144. *Id.* at 149.

145. *Id.*

146. *Id.*

147. *Id.*

148. Greasley, *supra* note 127, at 709.

149. Appleton, *supra* note 3, at 261.

150. Greasley, *supra* note 127, at 706.

Regret's malleability makes it versatile. It can be a proxy for psychopathology or emotion, signify a host of emotional difficulties surrounding unwanted pregnancy and abortion, and represent conflicts between the desires of the head and those of the heart.¹⁵¹ Conventional abortion scripts isolate and emphasize a few circumstances where women can experience regret, positioning these experiences as highly representative.¹⁵² This emphasis ignores and illegitimizes other aspects of lived experience, potentially disenfranchising the women who undergo such experiences. Sometimes women mourn the loss of a relationship the pregnancy embodied, not the "loss of the fetus for its own sake."¹⁵³ Regret may not even stem from attachment to pregnancy but can be "bigger than—or even distinct from—the experience of fetal loss."¹⁵⁴ Understandings of regret derived from ideological slogans and scripts are inappropriate tools for analysis and enlightenment. Rather, regret's content should be derived from women's lived experiences of abortion, the abortion decision itself, and the relational contexts in which the abortion decision is made. This conception of regret would provide a richer portrait of the relational, embedded, and embodied context in which women negotiate abortion.

Abortion narratives—case law and cultural scripts—commit several mistakes in constructing regret, all of which are intertwined. Two of these—mischaracterizing regret's intensity and conflating remorse with regret—are erroneous constructions of regret itself. These missteps are more tangential to relational autonomy but are entangled with four other mistakes: confining regret to the abortion decision, confining regret to the maternal-fetal relationship and women's self commitment, coupling regret with defective decisions making, and linking regret with moral culpability. The following sections will discuss each mistake in turn, explaining how each arises in abortion jurisprudence and/or conventional abortion scripts, how each is handled by liberal autonomy, and how each is corrected through closer attention to lived experience and a relational autonomy model.

A. Mistake 1: Conflating Regret with Psychopathology

The first common mistake is conflating the regret emotion with pathological distress, overinflating regret's intensity. Pro-life scripts assign a profound, even debilitating role to regret, claiming that women instinctually

151. Kimport, *supra* note 9, at 107.

152. *See supra* Part I.C.

153. Kimport, *supra* note 9, at 107.

154. *Id.* at 110.

and somewhat automatically experience attachment to their pregnancies.¹⁵⁵ They suggest that women who “reject” this relationship through abortion can experience “post-abortion syndrome” (PAS), comprised of psychological effects such as depression, grief, anxiety, low self-esteem, regret, remorse, and even suicidal thoughts.¹⁵⁶ Pro-choice scripts downgrade regret to an emotion felt rarely in comparison to relief and point to social science research suggesting abortion does not cause clinical distress.¹⁵⁷ This assertion is often boiled down to the idea that women feel relief in lieu of regret.¹⁵⁸ The lack of a consensus on the definition of regret in advocacy rhetoric and mental health research reflects our uncertainty of and discomfort with the boundary between emotion and pathology, reveals cultural assumptions about our ability to cope with relational loss, and demonstrates how the regret experience is mediated by other individuals and institutions.

Regret as an emotion versus a psychological condition is not so much a difference in kind but in intensity. If regret is used as proxy for relationality then the quality of the regret—what it is, how intensely it is felt—stands for the quality of the relationship to which it is constructed to correspond: the maternal-fetal bond. Regret’s categorization thus yields insights into how some relations are prioritized over others (e.g., the maternal-fetal relation outweighs a romantic liaison) and how scripts, not women, fix these relational hierarchies. These principles constrain the decision-making process. Women are aware of what cultural weight is assigned to various relationships and experience dissonance or even distress if they value them differently.¹⁵⁹

The debate over whether regret is an emotion or psychopathology reflects regret’s strategic use in pro-choice and pro-life script feeling rules. In the 1980s and 1990s, the pro-life movement focused explicitly on the fetus, often using fetal images to convey the fetus’s humanity, to depict existing life and relationships, and to document the gravity, inhumanity, and immorality of fetal termination.¹⁶⁰ Women’s embodied experience of the mater-

155. Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 AM. PSYCHOL. 863, 866 (2009).

156. *Id.*; see also Siegel, *supra* note 3, at 1658; Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008); David C. Reardon, *Abortion Decisions and the Duty to Screen: Clinical, Ethical, and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. CONTEMP. HEALTH L. & POL’Y 33, 65–66 (2003).

157. Kimport, *supra* note 9 (citing Patricia Wasielewski, *Post-Abortion Syndrome: Emotional Battles over Interaction and Ideology*, 18 HUMBOLDT J. SOC. RELATIONS 101 (1992)).

158. *Id.* at 105.

159. See Keys, *supra* note 21, at 42, 47, 50.

160. See, e.g., Siegel, *supra* note 3, at 1660.

nal-fetal relationship, its termination, and regret were secondary concerns. When pro-life activists felt the effectiveness of these advocacy efforts diminishing, they chose a “softer” focus: regret and the abortion’s impact on the woman.¹⁶¹

The deeper and more pervasive—and pathological—the regret experience, the more useful it becomes for pro-life narratives positing that women need help to recognize and respect the maternal-fetal relationship, to make the abortion decision, or to heal from it. This counters the idea that a close bond between woman and fetus is natural and automatic.¹⁶² Significantly, the pro-life script portrays women as victims whether or not they experience regret.¹⁶³ Regret’s absence intimates a woman did not know about the maternal-fetal relationship, did not consider it, and/or did not respect it, and therefore used flawed decision making to make the wrong choice. Regret’s presence, however, also indicates much the same thing. The only “right” choice is to continue, not sever, the maternal-fetal relationship. In pro-life scripts, regret has no role to play without abortion, because one “cannot” regret giving birth to a living child.¹⁶⁴

Conversely, the more regret resembles an emotion—temporary in duration and effect—the more useful it is for pro-choice perspectives. Here, regret’s absence indicates autonomous decision making, and its presence suggests non-autonomous decision making. Within the pro-choice script, the maternal-fetal relationship is not assigned any fixed moral worth,¹⁶⁵ and relationships are constructed as reciprocal ties between two humans. This characterization, however, ignores many women’s joy in pregnancy—a largely nonreciprocal relational attachment.¹⁶⁶ Pro-choice scripts also presume that a woman experiencing regret views her abortion as a mistake.¹⁶⁷

161. *Id.* at 1664–69.

162. *See, e.g.*, BARBARA ALMOND, *THE MONSTER WITHIN: THE HIDDEN SIDE OF MOTHERHOOD* (2010).

163. At times, women can literally be referred to as victims. *See, e.g.*, CHARLES J. STEWART, CRAIG ALLEN SMITH & ROBERT E. DENTON, JR., *PERSUASION AND SOCIAL MOVEMENTS* 263 (6th ed. 2012) (referring to a “former ‘victim’ of abortion” whose narrative is featured on the Feminists for Life website).

164. *See infra* Part II.B.

165. *See supra* note 7.

166. *See generally* TORI KROPP, *THE JOY OF PREGNANCY: THE COMPLETE, CANDID, AND REASSURING COMPANION FOR PARENTS-TO-BE* (2008) (providing women with information regarding pregnancy while simultaneously reminding pregnant women to relax and allow themselves to enjoy the experience).

167. For example, the Canadian group Pro Choice Action Network published a brochure that refutes the “common misconception” that “[w]omen who have abortions regret their mistake later” with the argument that “[a] few women may come to regret their abortion, but this should not be a reason to deny choice to all women.” PRO CHOICE ACTION NETWORK, *MISCONCEPTIONS ABOUT ABORTION* (2009), *availa-*

As an emotional concept, then, regret “remains fuzzy and loosely understood by both sides as a woman’s wish after the fact that she had never undergone the abortion procedure.”¹⁶⁸

Social science research concludes regret is an emotion distinguishable from psychopathology. As Major et al. observe, regret and other emotions are seen as “negative psychological experiences or reactions” to abortion, distinct from psychopathological conditions such as “major depression, generalized anxiety disorder, or posttraumatic stress disorder.”¹⁶⁹ The American Psychological Association’s report on mental health and abortion, published in 2008, also takes this position.¹⁷⁰ This distinction between regret and clinical distress is more than merely useful; rigorous mental health research must distinguish emotional reactions from pathological conditions. Dadlez and Andrews note, “[f]eeling regret is not a psychiatric condition,”¹⁷¹ and there is a “world of difference between a medically recognized ‘syndrome’ and ordinary feelings of regret or ambivalence.”¹⁷²

One expects conflating regret and clinical distress to be a pro-life strategy, especially for “documenting” PAS. This conflation transforms regret from an emotion into a behavioral justification¹⁷³ for choosing motherhood or adoption over abortion or for casting abortion as an irrational choice that harms women’s well-being.¹⁷⁴ Both characterizations overinflate regret’s likely intensity and significance, transforming regret from a “mere psychological or emotional reaction” to a “retrospective judgment about the wrongness of the abortion decision.”¹⁷⁵ It is surprising, then, that both pro-

ble at <http://www.prochoiceactionnetwork-canada.org/print-friendly/misconceptions.pdf>.

168. Kimport, *supra* note 9, at 106.

169. Major et al., *supra* note 155, at 869.

170. This is not surprising, as Brenda Major chaired the Task Force on Mental Health and Abortion. See BRENDA MAJOR ET AL., REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION (2008) (“In considering the mental health implications of abortion, it is crucial to distinguish between clinically significant mental disorders, such as major depression, generalized anxiety disorder, or posttraumatic stress disorder, and a normal range of negative emotions or feelings one might experience following a difficult decision, such as feelings of regret, sadness, or dysphoria. While the latter feelings may be significant, by themselves they do not constitute psychopathology.”).

171. Gail Erlick Robinson et al., *Is There an “Abortion Trauma Syndrome”?: Critiquing the Evidence*, 17 HARV. REV. PSYCHIATRY 268, 271 (2009).

172. Eva M. Dadlez & William L. Andrews, *Post-Abortion Syndrome: Creating an Affliction*, 24 BIOETHICS 445, 446 (2010).

173. Maroney, *supra* note 41, at 891 (“To say that a person—whether oneself or another—regrets (or is likely to regret) an event is to make a cognitive judgment about the attributes of that event.”).

174. Greasley, *supra* note 127.

175. *Id.* at 706 (emphasis removed).

choice advocacy organizations and mental health research often fail to effectively distinguish between these two concepts.

In their fact sheets and briefing papers, most pro-choice organizations do not differentiate between emotions and psychopathologies, often grouping them under the umbrella concept of “mental health” or “well-being.” Pro-choice publications usually categorize regret under the overarching, clinical-sounding term “mental health” issues. For example, a Guttmacher Institute advisory paper states “the highest-quality research available does not support the hypothesis that abortion leads to long-term mental health problems. Lingering post-abortion feelings of sadness, guilt, regret, and depression appear to occur in only a minority of women.”¹⁷⁶ Similarly, a publication by NARAL Pro-Choice America refers to “psychological well-being,” “depression,” “low self-esteem,” “mental health,” “psychological risks,” “psychological trauma,” “negative psychological responses,” and “mental disorders” without explaining these umbrella concepts, although it references studies that do differentiate regret and other emotions from clinical distress.¹⁷⁷

Other pro-choice sources suggest regret is equivalent to (and therefore potentially as problematic as) psychopathology. To illustrate, a National Abortion Federation fact sheet counters the “myth” that “many women come to regret their abortions later,” asserting that “[r]esearch indicates that relief is the most common emotional response following abortion” and states “psychological distress appears to be greatest before, rather than after, an abortion.”¹⁷⁸

Finally, a few publications refer to both regret and clinical distress as “emotion” or “emotional well-being” instead of as “mental health” issues. A Center for Reproductive Rights briefing paper, for instance, refers to women’s “emotional well-being” and states there is no scientific or medical evidence of PAS.¹⁷⁹ Similarly, a Planned Parenthood fact sheet conflates psy-

176. GUTTMACHER INST., GUTTMACHER ADVISORY: ABORTION AND MENTAL HEALTH (2011) (quoting Vignetta E. Charles et al., *Abortion and Long-term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 *CONTRACEPTION* 436, 439 (2008)), available at <http://www.guttmacher.org/media/evidencecheck/2011/01/31/Advisory-Abortion-Mental-Health.pdf>.

177. NARAL PRO-CHOICE AM., CONGRESS SHOULD NOT LEGITIMIZE THE MYTHICAL “POST-ABORTION SYNDROME” (2012), available at <http://www.pro-choiceamerica.org/media/fact-sheets/abortion-mythical-post-abortion-syndrome.pdf>.

178. SUSAN DUDLEY, NAT’L ABORTION FED’N, WOMEN WHO HAVE ABORTIONS (2003), available at http://www.pro-choice.org/about_abortion/facts/women_who.html.

179. CTR. FOR REPROD. RIGHTS, SETTING THE RECORD STRAIGHT: THE FACTS ON SOME POPULAR MYTHS ABOUT ABORTION 2 (2005), available at http://reproductiverights.org/sites/default/files/documents/pub_bp_tk_myths.pdf. Both that brief-

chopathology and “emotional problems,” emphasizing that most studies have concluded abortion is “a relatively benign procedure in terms of emotional effect—except when pre-abortion emotional problems exist or when a wanted pregnancy is terminated. . . .”¹⁸⁰ The fact sheet also includes regret¹⁸¹ under the category of an “emotional effect” along with several other emotional and clinical conditions such as “relief,” “adverse psychological effects,” “higher self-esteem,” “greater feelings of worth and capableness,” “fewer feelings of failure,” “psychological problems or regrets,” and “less distress or regret.”¹⁸²

But pro-choice organizations are not alone in conflating regret with clinical distress. Psychological and psychiatric research often includes both regret and clinical distress in reported outcomes and comingles them in results.¹⁸³ As Major observes, “[m]ost studies . . . fail to distinguish between clinically significant mental health outcomes (such as depression or psychosis) and feelings of sadness, loss, or regret, which, although unpleasant, do not necessarily signify a psychiatric disorder.”¹⁸⁴ For example, the authors of one psychological study speak of emotions and clinical symptomatology together, describing them in terms of negative and positive *reactions* differing

ing paper and another by the National Abortion Federation assert that research studies have “concluded that while some women may experience regret, sadness or guilt after an abortion, the overwhelming responses are positive feelings of relief and happiness.” *Id.*; see also RENE ALMELING & LAUREN TEWS, NAT’L ABORTION FED’N, POST-ABORTION ISSUES (1999), available at http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/post_abortion_issues.pdf.

180. Jon Knowles, *The Emotional Effects of Induced Abortion*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/resources/research-papers/emotional-effects-induced-abortion-6137.htm> (last updated Jan. 18, 2007).

181. *Id.* (“Up to 98 percent of the women who have abortions have no regrets and would make the same choice again in similar circumstances.”).

182. *See id.*

183. For example, one article states, “most women do not experience psychological problems or regret their abortion 2 years postabortion, but some do. Those who do tend to be women with a prior history of depression.” Major et al., *Psychological Responses*, *supra* note 23, at 777; see also Adler et al., *Psychological Responses*, *supra* note 23; Major et al., *supra* note 155, at 869; Greasley, *supra* note 127, at 706.

184. Major et al., *Psychological Responses*, *supra* note 23, at 777–78; see also Robinson et al., *supra* note 171; Adler et al., *Psychological Factors*, *supra* note 24, at 1197 (critiquing the methodological shortcomings of abortion research, including a disproportionate focus on negative outcomes and including a single question rating post-decision regret as a measure of a psychological disorder).

in severity.¹⁸⁵ Similarly, mental health researchers may imply a connection or parity between clinical distress and regret.¹⁸⁶

The reason for distinguishing regret from psychopathology is to produce more rigorous scientific research, not to omit emotion; as Major et al. assert, “[a]lthough sadness and regret are not psychological disorders, these feelings should not be dismissed.”¹⁸⁷ Regret and other emotions are unequivocally part of the constellation of mental health outcomes of abortion.¹⁸⁸ Although intense or severe reactions should receive professional attention, not every “negative” emotion is pathological; women “do not need to be protected from their emotional responses to abortion.”¹⁸⁹ Consistently differentiating regret from psychopathology also would make it harder to substantiate PAS.¹⁹⁰

Distinguishing regret from psychopathology supports relational autonomy by expanding the range of “normal” emotional reactions and by intimating women need not experience post-abortion clinical distress. This distinction provides more space for women to determine which relations are most important and how best to protect them, allowing women to value the fetal relationship as they wish. Thus, this distinction would ultimately bridge chasms between social scripts and lived experience—because few women experience intense post-abortion regret—most undergo an emotional reaction and not clinical distress.¹⁹¹ Thus, most women, their emotional reactions, and their relational valuations cannot be described as pathological. Women can acknowledge that something “good” was lost *even as* they affirm their abortions as the right decision.

To illustrate, let us compare two possible regret experiences. Anna becomes pregnant and decides against abortion even though her partner disagrees and leaves her; she regrets that relational loss even as she remains confident about her choice. Zoe becomes pregnant and chooses to terminate

185. Zoe Bradshaw & Pauline Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, 23 CLINICAL PSYCHOL. REV. 929, 930 (2003) (“Reviews of work prior to 1990 suggested that distress (such as depression, anxiety and guilt) occurred most frequently and was greatest before abortion. . . . Early studies also suggested that positive reactions were reported by the majority of women in the longer term, with relief frequently being described.”).

186. One article states that, “a recent study from the US has [sic] shown that most women do not experience psychological problems or regret their abortion 2 years post-abortion. . . . [A]mbivalent feelings did not necessarily imply that women and men regretted the abortion or experienced emotional distress.” Kero et al., *supra* note 38, at 2560.

187. Major et al., *Psychological Responses*, *supra* note 23, at 781.

188. See Major et al., *supra* note 155, at 869; Dadlez & Andrews, *supra* note 172, at 447.

189. Weitz et al., *supra* note 8, at 88.

190. See Dadlez & Andrews, *supra* note 172, at 446–47, 452.

191. See generally Major et al., *supra* note 155.

her pregnancy; she, too, regrets that relational loss even as she remains confident she chose well. A pro-life script would be more likely to classify Zoe's reaction as at least short-sighted and potentially pathological because of her apparent disregard for the fetal connection, while it is likely to regard Anna's loss as unfortunate but celebrate her presumed attachment to the fetus. From that perspective, Zoe appears to lack autonomy, and Anna appears to be autonomous. A pro-choice script would support both Anna and Zoe's right and ability to choose. Yet, these assumptions might be altogether false; Zoe might have chosen abortion *because* she thought that was the most responsible option for her fetus, and Anna might have chosen birth *because* she was too scared to do otherwise. A relational approach recognizes and accommodates these nuances.

B. Mistake 2: Confusing Regret and Remorse

The second common mistake within abortion jurisprudence and conventional abortion scripts is conflating regret with the related, yet distinct, emotion of remorse. Correcting this error does not require us to extricate regret's semantics from those of remorse, but to decouple regret from presumptions of mistake and/or moral culpability.

Gonzales v. Carhart is the first Supreme Court abortion case to explicitly link regret to abortion; Justice Kennedy infamously married regret to gore and flawed decision making.¹⁹² Prior cases implicitly couple regret and abortion by allowing states to "educate" women about additional concerns in the name of informed consent so as to make the best decisions possible—in other words, decisions they are *least likely to regret*.¹⁹³ One of the purposes of informed consent is to avoid harm and promote autonomy—thereby obviating regret—through active, engaged, and informed participation in decision making.¹⁹⁴ In *Carhart*, Kennedy defines regret as a woman's "grief" and "sorrow" over a gruesome procedure effecting the loss of a previous relationship—her maternal bond with the "unborn child"—and juxtaposes regret against a "bond of love."¹⁹⁵ Ironically, the opinion simultaneously highlights isolation and relation, emphasizing both women's individualized regret experience and the maternal-fetal relationship. When this relationship is terminated by abortion, regret supposedly ensues because the woman is left alone *and* lonely, bereft of the fetal bond.

192. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

193. *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 445 (1983); *see also id.* at 423 n.5.; *cf.* *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 764 (1986).

194. *See, e.g.*, BEAUCHAMP & CHILDRESS, *supra* note 57, at 77.

195. *Carhart*, 550 U.S. at 159.

Carhart constructs regret very differently than social science research. In *Carhart*, regret is a negative emotion to be minimized and if possible avoided, a reaction from which women must be protected. In other models, however, regret is part of critical judgment, and an inescapable human experience.¹⁹⁶ Through this lens, the Supreme Court's view of regret is myopic. The reaction that *Carhart* and activist scripts discuss actually is *remorse*, not regret. This entanglement of regret and remorse is a consequence of not applying relational autonomy to abortion decision making.

Unlike remorse, regret need not imply that someone has acted badly and thus does not inherently entail defective action.¹⁹⁷ Implicit in *Carhart* is an image of women who procure a "partial-birth abortion" as morally culpable because they voluntarily "chose" to abort their "later-term" child through such a "gruesome"¹⁹⁸ procedure, producing "grief" and "sorrow,"¹⁹⁹ feelings of remorse. By confusing remorse and regret, the majority ironically ascribes more autonomy to women who obtain intact D & X²⁰⁰ abortions (or, perhaps, *all* abortions)²⁰¹ than it likely intends; women who feel remorse would own the abortion as their own voluntary decision and acknowledge it was morally wrong. Explicitly, the Court's reasoning is that women must be protected from their "regret"²⁰² (really, remorse) because they cannot comprehend the emotional consequences of undergoing intact D & X or do not know what the procedure entails. This proposition is

196. Thomas Gilovich & Victoria Husted Medvec, *The Experience of Regret: What, When, and Why*, 102 PSYCHOL. REV. 379, 380 (1995).

197. MARTHA NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 43 (1986).

198. See Appleton, *supra* note 3, at 265 (stating the Court used the Cano amicus brief to "bolster the opinion's earlier paragraphs on the brutality and gruesomeness of the abortion procedure it calls 'intact D & E.'").

199. *Carhart*, 550 U.S. at 159–160.

200. In intact D & X abortions, more controversially termed "partial-birth" abortions, a physician attempts to remove the fetus intact. See *Carhart*, 550 U.S. at 136–38.

201. Legal scholars have noted *Carhart's* reasoning appears to extend beyond "partial-birth" abortion; Susan Frelich Appleton observes that, by relying upon the Cano amicus brief (which describes the trauma and distress of 178 women who underwent an abortion as well as the experiences of Sandra Cano, the plaintiff "Mary Doe" from the companion case to *Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973)), "the Court both overshoots and undershoots its mark. The opinion implicates all abortions, not just those banned by the challenged statute; yet it also fails to take into account what could be learned from the full range of judicial treatments of regret in other reproductive settings." Appleton, *supra* note 3, at 265.

202. *Carhart*, 550 U.S. at 159.

shockingly improbable, given the level of “informed consent” currently mandated by state governments.²⁰³

A relational autonomy model reveals not only that there are at least two different emotions—regret and remorse—at play, but also how they are strategically used in distinct ways and play singular roles in abortion scripts. The liberal autonomy model emphasizes maintaining or regaining control of one’s life. In an unwanted pregnancy, the goal of regaining control can set the woman in opposition to her fetus, as this goal can include regaining control over one’s body, necessitating the fetus’s removal. In a relational autonomy model, the critical issue is not control or domination; we cannot compel good decisions from women by foreclosing options, fixing relational hierarchies, or scripting emotions. These actions undermine, rather than enhance, relational autonomy.

Moreover, control is not often compatible with pregnancy, much to the despair of women who seek it or seek to avoid it.²⁰⁴ Control is central for conventional attributions of responsibility; it is harder to hold a woman responsible for something that was not within her power to change.²⁰⁵ As a bodily process, pregnancy is rarely within a woman’s control. Abstinence is an unrealistic and unworkable permanent solution for most adults,²⁰⁶ and

203. For a current list of state regulations in force throughout the United States, see *State Center: State Facts About Abortion*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/sfaa.html> (last visited Apr. 14, 2014).

204. Pregnancy is “dominated by involuntary movements and noncontrolled processes.” SARA HEINÄMAA, TOWARD A PHENOMENOLOGY OF SEXUAL DIFFERENCE: HUSSERL, MERLEAU-PONTY, BEAUVOIR 131 (2003). For instance, experiences of infertility, unwanted conception, and pregnancy complications can all lead to feelings of bodily failure and a lack of control. See M. Christina Alcalde, *‘To Make It Through Each Day Still Pregnant’: Pregnancy, Bed Rest, and the Disciplining of the Maternal Body*, 20.3 J. GENDER STUD. 209, 210, 212 (2011); Arthur L. Greil, NOT YET PREGNANT: INFERTILE COUPLES IN CONTEMPORARY AMERICA 54, 55, 73–74, 80–83, 96–98 (1991) (discussing women’s perceived lack of control over infertility and efforts to regain control through fertility treatment); Caroline Lundquist, *Being Torn: Toward a Phenomenology of Unwanted Pregnancy* 23 HYPATIA 136, 142 (2008) (“Pregnancy epitomizes this dreadful ambiguity; the pregnant subject, willingly or unwillingly, is seized by an alien teleology.”).

205. See generally JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY (1999).

206. Abstinence as a form of sex education has abysmal “user-failure” rates; users do not comport with its “basic tenet . . . do not have sex,” leading to the adage “vows of abstinence break far more easily than latex condoms.” Katherine Carroll, Note, *Children’s Lives as a Political Battleground: The Plague of Abstinence Only Education*, 3 DEPAUL J. FOR SOC. JUST. 41, 49 (2009); see also MICHAEL J. HARTWIG, THE POETICS OF INTIMACY AND THE PROBLEM OF SEXUAL ABSTINENCE (2010) (concluding that long-term abstinence is harmful).

no other method of birth control is perfectly effective.²⁰⁷ Control and responsibility fix our attention on the circumstances in which pregnancies begin—a vantage point useful in helping to prevent future unwanted pregnancies but not so much for dealing with existing ones. In an unwanted pregnancy, we should not seek to hold a woman responsible for her actions, but encourage her to make responsible choices. Relational autonomy offers a more realistic, flexible, and compassionate alternative: instead of demanding control, we should use creative resources to respond to an unforeseen event. Under this model, regret can signify autonomous choice—a creative, thoughtful, considered, reflexive, and subjective exercise.

Regret and remorse also bear upon women's embedded and embodied statuses. In pro-life scripts, a woman who does not feel regret or remorse is at best misguided and not autonomous and at worst something of a moral monster.²⁰⁸ In pro-choice scripts, a woman who does feel regret or remorse seems at best confused and non-autonomous and at worst a traitor to women's rights or feminism.²⁰⁹ These scripts simultaneously demand too much from women and give them too little credit. Normatively insisting on a certain emotional reaction—regret or remorse, no regret or remorse—backs some women into corners of unrealistic, unfamiliar, and uncomfortable characterizations, producing wariness, discomfort, fear, and defensiveness.²¹⁰ With more emotional space, women are not laced into the one-size-fits-all affective corset sewn by current abortion scripts. A relational autonomy model, on the other hand, posits that autonomy is always partial, choice is always constrained, and no fixed relational value or hierarchy exists. While we can improve decisional opportunities or options, we can never remove all constraints. In a relational model, remorse that indicates deficient decision making actually prompts us to recognize what went wrong and evolve new perspectives, spurring growth in our capacity for au-

207. See Appleton, *supra* note 3, at 295–96; see also Diana Mansour, Pirjo Inki & Kristina Gemzell-Danielsson, *Efficacy of Contraceptive Methods: A Review of the Literature*, 15 EUROPEAN J. CONTRACEPTION & REPROD. HEALTH CARE 4, 7 (2010) (charting the efficacy of various methods of birth control). Vasalgel, a long-acting but reversible new method of male birth control, is reportedly “100% effective” and completed in clinical trials in India but is awaiting large-scale funding to begin American clinical trials. Bill Gifford, *The Revolutionary New Birth Control Technique*, WIRED, Apr. 26, 2011, available at http://www.wired.com/magazine/2011/04/ff_vasectomy/all/1; Dave Smith, *New Male Birth Control is 100 Percent Effective, Completely Reversible*, INT'L BUS. TIMES, May 7, 2012, available at <http://www.ibtimes.com/new-male-birth-control-procedure-100-percent-effective-completely-reversible-study-697179>.

208. See Keys, *supra* note 21, at 41–42.

209. See *supra* Part I.B.

210. See *supra* notes 41–44.

tonomy. The model also enhances our understandings of how emotions are mediated by social relations that might trigger, intensify, or quell feelings.

Explicating the lived experience of the abortion decision—how women and their choices are socially embedded, physically embodied, and relationally mediated—also reveals the invidious “real life” consequences of confusing regret with remorse. Social scripts fail to distinguish between situations involving regret and those involving remorse, creating a terrible and unfortunate muddle. For example, take three hypotheticals involving sex and unplanned pregnancy:

- (a) A pregnant twenty-five-year-old woman has an abortion and is confident that it was the right decision. When she is thirty-two she learns that she is unable to conceive biological children.
- (b) A pregnant twenty-five-year-old woman has an abortion after rape despite deep conviction that it violates her religious beliefs. She later believes that this decision was wrong.
- (c) A pregnant twenty-five-year-old woman plans to keep her pregnancy. Her boyfriend gives her the abortion pill Cytotec and tells her it is amoxicillin that she must take for an infection. Believing him, she takes one Cytotec pill and unwittingly aborts the pregnancy.²¹¹

In hypothetical (a), the woman is likely to feel regret, whereas in (b), she is likely to feel remorse and indeed might feel remorse even if she experienced relief. In hypothetical (c), the abortion can be traced not to the woman’s consciously chosen actions but to a deceitful partner; she very may well feel remorse because, although she did not intend the abortion, it nonetheless took place through her actions. The pro-life script ties sex to procreation and procreative actions and so links “responsibility” for pregnancy to both pregnancy as a physical state and consensual sexual activity that can engender conception, intimating that the women in (a) and (b) should feel responsibility and regret. The pro-choice script, however, links sex to pleasure, not procreation;²¹² under these rules, we do not attribute “responsibility” or regard these women as morally duty-bound to experience regret.

211. See, e.g., Katherine Hobson, *OB-GYNs Told to Look for ‘Reproductive Coercion’*, NPR (Jan. 23, 2013, 5:02 PM), <http://www.npr.org/blogs/health/2013/01/23/170088786/ob-gyns-told-to-look-for-reproductive-coercion>.

212. See *supra* Part I.B.

C. Mistake 3: Confining Regret to the Abortion Decision

The third mistake is confining the regret experience to the abortion decision instead of situating it within a broader temporal context potentially beginning long before the unwanted pregnancy and potentially ending long after. The moment of the abortion decision comes to define women considering abortion; *Carhart's* central character is the “mother who comes to regret her choice to abort.”²¹³ The (over)emphasis of this event echoes liberal autonomy’s emphases on choice, individualism, and control. Tying regret to the abortion decision overlooks that women can feel regret beforehand, potentially influencing decision making. It also mischaracterizes “choice” as a moment in time when in fact it is a process women experience with varying emotions and complete in varying time periods.²¹⁴

Regret is equally likely to arise from events other than the abortion decision. An unwanted pregnancy can suggest a lack of control, a failure of responsibility, and an inability to direct one’s life course—all factors potentially correlated with flawed autonomy.²¹⁵ In addition, it reinforces the connection between regret and defective decision making. In qualitative studies, women often report remorse or disappointment with getting pregnant in the first place and discuss lapses of responsibility or control. One research participant viewed her pregnancy as “a failure to care for and protect both other and self.”²¹⁶ A perceived lack of responsibility could also stem from problems procuring contraception. Another participant felt “helpless and powerless” because she could not afford contraception, thought she needed parental consent, felt unable to withstand her boyfriend’s harassing requests for sex, and was afraid he would break off the relationship if she refused. Thus, this young woman believed that “she became pregnant because no one was willing to help.”²¹⁷

Acknowledging that the abortion decision, like its maker, is socially embedded obliges us to consider a thickness of relations not only when the decision is made, but also through time, before and after the decision. Though isolated by social scripts, the abortion decision is only one event in a trajectory of relationships, interactions, and decisions stretching up to and beyond the choice. Associated emotions, including regret, are not fused only to the abortion decision but are also embedded in social scripts and specific

213. *Gonzales v. Carhart*, 550 U.S. 127, 159 (2007).

214. *See supra* Part I.A.

215. *See* Lundquist, *supra* note 204, at 142.

216. GILLIGAN, *supra* note 131, at 94.

217. *Id.* at 109.

human interactions, and may pervade this entire trajectory.²¹⁸ As Maroney asserts:

Abortion is, for most, a heavy-heart event; that much is safe to generalize. . . . [a woman who terminates her pregnancy] may be angry or resentful at having been impregnated and put in the position of having to choose; she may be fearful of the effect an unwanted child would have on her life; she may be embarrassed by failing to prevent the pregnancy; she may be anxious about the medical procedure; she may feel hurt that others did not support her in the way she wanted; she may feel sadness that she did not feel capable of having a child at that moment.²¹⁹

A relational perspective broadens our focus from the abortion decision standing alone to an extended survey of events.

Recognizing that women can experience regret before deciding illustrates that regret is different from and can accompany remorse. Regret can infuse several other events and relationships surrounding a triggering incident. Even if one can identify regret's initial "cause," it cannot be isolated from its social context.²²⁰ If a woman simultaneously regrets having to make the abortion decision and affirms that abortion was the right choice, her regret experience may bleed into associated events. Emotions related to one issue or event seep into other moments and contexts; they cannot be neatly attached to and confined within discrete incidents, so that we feel regret only when we think of its specific cause.

Disentangling remorse from regret prompts us to analyze how the abortion decision is connected to other behaviors and relationships. While an unwanted pregnancy and abortion decision can generate painful emotions, we cannot presume that these emotions spring from only one source. Research concludes emotional distress following abortion is more often related to an unwanted pregnancy than its termination.²²¹ As one female par-

218. Significantly, many women's reactions to abortions are heavily influenced by national culture. Women may have very different reactions in countries where abortions are a more routine form of birth control, few obstacles are present, and stigma is diminished. See generally Henry P. David, *Abortion in Europe, 1920–1991: A Public Health Perspective*, 23 *STUD. FAM. PLAN.* 1 (1992). Yet, when abortion is banned, contraceptives are unavailable, stigma and guilt can be heightened. See generally Mary Boyle & Jane McEvoy, *Putting Abortion in Its Social Context: Northern Irish Women's Experiences of Abortion in England*, 2 *HEALTH* 283 (1998).

219. Maroney, *supra* note 41, at 897–98.

220. See *supra* Part I.A. for a description of how feeling rules are embedded in social contexts.

221. Kero et al., *supra* note 38, at 2568.

participant remarked, “I was not glad that I was faced with an unwanted, unplanned pregnancy, however [sic] I am glad that I made the decision to have an abortion.”²²² Again, a woman’s ambivalent feelings about an abortion do not always translate into regretting the abortion or emotional distress.²²³ Broadening regret’s experiential frame incorporates past and future events and opportunities, reveals how a women may recognize other non-abortive options as valuable but not viable, and illustrates why no choice may seem entirely “good.”

D. Mistake 4: Limiting Regret to the Maternal-Fetal Relationship and Women’s Self-Commitment

The fourth mistake is confining regret to two relationships: the maternal-fetal relationship and women’s commitment to self-care²²⁴ and well-being. The maternal-fetal relationship gives the abortion decision its pragmatic and moral weight. Each is necessary for the other’s existence; the physical maternal-fetal relationship is a precursor to the abortion decision, which determines that relationship’s continued active existence.

Both pro-life and pro-choice scripts are explicitly or implicitly responsive to valuations of the maternal-fetal relationship. This relationship is front and center in the pro-life script; the pregnant woman is a mother intimately connected to her fetus, and its singular importance is conveyed partially through regret/remorse.²²⁵ In pro-choice scripts, the maternal-fetal relationship is more “hidden”; pregnant women are not referred to as “mothers,” and a woman is advised to consider her relationship with herself.²²⁶ In reality, these relations are only two out of many possible connections women may appraise as less, equally, or more significant.²²⁷ As Linda Layne observes, the “distinction between a fetus and a baby is defined not by gestational development but through social relationships—the pregnant woman’s with her fetus, her family, and her community.”²²⁸

The pro-life script has a much more complete, consistent, and inflexible picture of how this relationship should be handled than its pro-choice counterpart. Cases of rape, incest, or maternal physical health aside,²²⁹ there

222. West, *supra* note 60, at 32.

223. Kero et al., *supra* note 38, at 2560.

224. This would include a self-relationship, including dedication to values and achieving life goals.

225. Halva-Neubauer & Zeigler, *supra* note 111.

226. Ludlow, *supra* note 10, at 31.

227. See *supra* note 113.

228. Ludlow, *supra* note 10, at 42 (citing Layne, *I Remember the Day*, *supra* note 114).

229. These controversial cases are not often the subject of conventional scripts, and more social conservatives would permit abortion in those circumstances. See WALTER SIN-

is a clear, objective choice—birth—that is right, and another—abortion—that is wrong. Here, the maternal-fetal relationship becomes a monumental force inspiring reverence that turns women's gaze away from abortion and towards birth. The pro-life script grounds the maternal-fetal relationship's importance in personhood, constructing it as a tie between two unique, though not separate, people. If the fetus is a person, it is no great leap of logic to consider it a child that the mother would not harm.

This narrow construction, however, actually shrinks and weakens the maternal-fetal relationship in two ways. First, it ignores how this relationship acquires power not only from its participants' identities but from the crucial roles it plays across so many vastly different reproductive contexts, including birth, adoption, and assisted reproduction. The role of the mother in the maternal-fetal relationship is continuously in flux in each pregnancy and across prenatal contexts and extends beyond the pregnant woman herself to others who enjoy different maternal roles, such as intended adoptive mothers. To acknowledge the maternal-fetal relation is to celebrate, at a minimum, both the fetus *and* the pregnant woman.

Second, this construction opposes the maternal-fetal relationship to women's self-commitment, setting a "choice" and a "child" against one another. This is a false contrast; these relationships are inherently interdependent. Each is in tension with yet enriches the other, irrespective of whether a woman terminates her pregnancy. The pro-life script posits that a woman's most significant commitment is to her fetus. Consequently, it suggests either that pursuing the maternal-fetal relationship will deepen or enrich the woman's self-relationship or that the woman's self-relationship should be subordinated or denied in favor of the fetus. In contrast, the pro-choice script prioritizes the woman's commitment to herself, asserts there is nothing inherently remorseful about obtaining an abortion, and celebrates freedom of choice, but is necessarily vague about whether a commitment to the fetus exists and how profound that commitment is or should be (that is left to the woman), implying only that the woman need not prioritize it above all else. Because it embraces a woman's subjective valuation of the maternal-fetal relationship, the pro-choice script is largely silent as to its worth, and this silence may be taken as weakness.

Moreover, in each script, the interplay between regret and the maternal-fetal relationship has profound implications for the autonomy ascribed

NOTT-ARMSTRONG & ROBERT FOGELIN, UNDERSTANDING ARGUMENTS 387 (2010) (stating that many people who oppose abortion permit it "when it is necessary to save the life of the mother" and that "[m]any pro-life conservatives admit that abortion is also justified when the pregnancy results from rape or incest"). These are the same situations in which some states provide public funding for abortion. See *infra* note 303.

to the woman as decision maker. In the pro-life script, regret signals that a woman did not act autonomously. A woman who chooses abortion is presumed to deprioritize the fetal relation because of deficient decision making (insufficient information, ignorance about the sacred nature of the maternal-fetal bond, etc.), rendering her a victim. A woman can demonstrate an expanded capacity for autonomy if she later experiences regret and is motivated to acknowledge her mistake. In contrast, the pro-choice script posits that a woman is an autonomous decision maker and usually does not (and normatively should not) feel regret, presumably because she makes good choices. Here, regret could result from numerous autonomy-crushing reasons such as insufficient reflection, co-optation into gendered stereotypes, or junk science. Critically, both of these scripts differ from a woman's lived experience of an abortion decision, where she is embedded in a complex web of associations beyond the maternal-fetal connection and is free to assign different values and priorities to them all.²³⁰

Fettering regret to both the abortion decision and the maternal-fetal relationship produces contradictions, not clarity. The maternal-fetal relationship is not confined to the abortion decision, nor does it derive all of its meaning from that context. Women's attitudes towards their pregnancies—wanted and unwanted—are not static and evolve and change over time. A pregnancy that is wanted can become unwanted, and vice versa. Nor is abortion an outcome for only unwanted pregnancies.²³¹

A relational model illustrates why current pro-life social scripts seem more compelling than their pro-choice counterparts. Counterfactuals demonstrate how regret's semantic, emotional, social, and cultural content and capital can vary with reproductive context. Comparing pro-life and pro-choice counterfactuals is practically impossible, an apples-to-oranges endeavor: "Anti-abortion advocates have managed to frame the debate in strictly moral terms, basically life versus lifestyle, which can make opposing arguments sound hollow and legalistic."²³²

The pro-life counterfactual is immediately recognizable in advocacy literature—a lonely woman wanders solemnly by schools or through playgrounds, considering her past and the child who might have been born. But

230. See *supra* note 113.

231. The most obvious example of women who choose to abort wanted pregnancies is in the case of fetal anomaly. See Jeffrey S. Dungan & Lee P. Shulman, *Abortion for Fetal Abnormalities or Maternal Conditions*, in *MANAGEMENT OF UNINTENDED AND ABNORMAL PREGNANCY: COMPREHENSIVE ABORTION CARE* 302 (Maureen Paul et al. eds., 2009).

232. Andrew Rosenthal, *Does It Mean Anything That a Record Low Are 'Pro-Choice'?*, N.Y. TIMES TAKING NOTE BLOG (May 23, 2012, 3:12 PM), <http://takingnote.blogs.nytimes.com/2012/05/23/does-it-mean-anything-that-a-record-low-are-pro-choice/>.

pro-choice rhetoric lacks a culturally viable counterfactual; obvious candidates feature women who give birth and experience differences in career, lifestyle, or marital quality. The woman who pushes a stroller and mourns a lost career is simply not as culturally compelling. A powerful counterfactual opposes the maternal-fetal relationship to a woman's self-commitment, counterposes "killing" a "child" to "killing" a career, and compares regret over *not* having a child to regret over *having* a child.²³³ These are difficult comparisons in Western culture where there is a "parental duty to affirm the life of her child" that renders parental regret inappropriate.²³⁴ Mothers can of course experience regret but are under a cultural and social imperative not to acknowledge it.²³⁵ Perhaps more effective pro-choice counterfactuals would focus on how abortions took place before *Roe*²³⁶ and would occur if *Roe* were overturned, redirecting attention from abortion to preventing unwanted pregnancy.²³⁷

A relational conception of regret broadens the range of relationships that women can normatively consider in the abortion decision, legitimates and accommodates a more complex emotional experience, and allows women to prioritize and assign value to a multiplicity of relationships. It adjusts to women's actual lived experiences, making room for women who want to pursue the maternal-fetal relationship but on different terms; women who end the maternal-fetal relationship to protect other relationships with the already born, unborn, or yet-to-be conceived; or women who recognize that something precious is lost and mourn the potential for life but do not grieve the maternal relation. If women choose abortion and thereafter experience regret, that does not mean they made the wrong decision or that they did not appreciate the maternal-fetal relationship, assign value to it, or reject it. A woman might elect not to continue this relation *because* she cherishes it. One can cherish a relationship that one terminates in the particular as well as in the abstract. For instance, a single mother with a child with special needs and a full-time job who unexpectedly becomes pregnant may view her decision to abort as the most loving and responsible act towards her fetus when she knows she lacks the time, physical and emotional energy, and money to parent.

233. Greasley, *supra* note 127, at 709, 710.

234. *Id.* at 709.

235. This attitude is implicit in profound judicial reluctance to recognize "wrongful life" causes of action in torts, where one or both parents sue a doctor or hospital for failing to provide information about the fetus or pregnancy that would have allowed the woman to have an abortion. *See, e.g.,* Procanik by Procanik v. Cillo, 478 A.2d 755 (N.J. 1984). *See generally* ALMOND, *supra* note 162.

236. *See* Waldo L. Fielding, *Repairing the Damage, Before Roe*, N.Y. TIMES (June 3, 2008), <http://www.nytimes.com/2008/06/03/health/views/03essa.html>.

237. CAHN & CARBONE, *supra* note 22, at 175-76.

E. Mistake 5: Coupling Regret with Deficient Decision Making

The fifth mistake, coupling regret with deficient decision making, is intertwined with the others; together, these missteps explain how certain choices to abort are seen as “defective,” and why these defects warrant regret. Regret’s intensity—its status as emotion or pathology—signals deficiency, and the overwhelming importance placed on the maternal-fetal relationship grounds its seriousness. Confining regret to the abortion decision isolates this moment, making it easier to classify a choice as right or wrong.

In the pro-life script, regret is a “damned if you do feel it, damned if you don’t” experience. This script legitimates regret only when women choosing abortion come to appreciate it as “wrong.” They offer respite to a woman who acknowledges her “mistake” but not to women who believe abortion is the “right” choice but anticipate regret for having to make it. Anticipatory regret that does not deter a woman from abortion is viewed as false because “genuine” regret supposedly prompts a woman to change her mind. As a pro-life ideal, regret is a redemptive emotion—cathartic, cleansing, and purifying. A woman who does not feel after the fact that she has committed a grave error or who felt this way before the abortion but proceeded anyways is not entitled to redemption.

Conversely, pro-choice scripts and feeling rules have taken a reactionary position on regret, making little to no room for it lest it legitimize the pro-life platform.²³⁸ The pro-choice script counters the pro-life construction with assertions that women feel relief and/or little to no distress,²³⁹ but it does not explain what regret can mean or couple it to autonomous capacity. Left unchallenged, the quality of the abortion decision acquires an absolutist gloss, becoming a choice between “right” and “wrong” in which wrongness connotes ignorance, immaturity, and even immorality.

Ultimately, the narrow understandings of regret and the abortion decision found within pro-life and pro-choice scripts and *Carhart* have a terrible consequence. They obscure the unfortunate truth that sometimes a woman feels that there is no wholly “right” outcome to a certain decision, and that she must choose an option that is “right” only in that it is less objectionable

238. See SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 152–53 (1991) (arguing that the pro-choice movement’s “ability to bring about social change has been constructed since 1973 by the need to respond to countermovement activities and successes with largely reactive and single-issue goals and tactics.”); see also SALETAN, *supra* note 6, at 2 (“Liberals haven’t won the struggle for abortion rights. Conservatives have.”).

239. See *supra* Part II.A.

than others.²⁴⁰ In *The Fragility of Goodness*, Martha Nussbaum observes that certain decisions are tragic because they present no “right” choice; faced with these decisions, one sacrifices something of value however one chooses.²⁴¹ In this context, regret is an honest reaction to a good outcome that was lost but that *had* to be lost for one reason or other. From this perspective, both the Supreme Court, pro-life, and pro-choice activists have altogether mischaracterized regret. Accordingly, we must decouple regret from the notion that one has made a “wrong” decision. Sometimes, regret is an inevitable and *healthy* response to understanding the moral and relational stakes of particular decisions—in short, a sign of autonomous decision making.

Many women might find this “healthy” regret response to be true of their lived experience of the abortion decision.²⁴² The circumstances out of which and in which abortion decisions are made are critical factors in determining how women experience it. As Weitz notes, “[i]n all of the discussions about abortion and mental health, we must never lose track of context. Women are likely to have complicated feelings about the aspects of their lives that led up to the abortion decision: sex, contraception, partnership status, economic conditions, motherhood potential, etc.”²⁴³

Coupling regret to defective decision making also affects how we see the pregnant woman as a decision maker. The Supreme Court’s image of the woman as a reproductive decision maker has changed over time from *Roe v. Wade* to *Carhart*, marking the devolution, not the evolution, of autonomous capacity. In *Roe*, the Supreme Court consigns the decision to the doctor in consultation with his female patient.²⁴⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey* states that, as between the woman and her husband, the woman must prevail because the pregnancy implicates her body.²⁴⁵ *Carhart*, however, removes both the woman and her doctor from the decision-making process altogether; the Supreme Court steps into the breach to protect women from an onslaught of negative emotion.²⁴⁶

240. See generally LESLIE CANNOLD, *THE ABORTION MYTH: FEMINISM, MORALITY, AND THE HARD CHOICES WOMEN MAKE* (Wesleyan Univ. Press 2000) (explaining how, for some women, abortion is not only a moral response, but it might be the only moral response). See also Ludlow, *Child and a Choice*, *supra* note 10, at 27 (discussing the complexities of choice); Phillip Mitsis, *Seneca on Reason, Rules and Moral Development*, in *PASSIONS & PERCEPTIONS: STUDIES IN HELLENISTIC PHILOSOPHY OF MIND* 285, 307 (Jacques Brunschwig & Martha C. Nussbaum eds., 1993).

241. NUSSBAUM, *supra* note 197, at 34–35.

242. Maroney, *supra* note 41, at 898.

243. Weitz et al., *supra* note 8, at 88.

244. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

245. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 895–96 (1992).

246. *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007).

According to *Carhart*, the problem with abortion decision making is not merely “the subsequent rise of second thoughts but rather the absence of full knowledge that would have been available at the outset.”²⁴⁷ *Carhart* presumes women do not know the effects of the “late-term” abortion procedure upon a fetus, are not effective in obtaining this information from their doctors, or do not carefully think through their decision and its ramifications. All these assumptions reinforce insidious gender stereotypes of women as “ignorant, naïve . . . and emotionally fragile if not psychologically unfit” and “co-opt . . . the premise of voluntary action underlying the usual understandings of regret.”²⁴⁸ Here, regret paralyzes subjects instead of positioning or repositioning them in relation to their decision. Such assertions also conflict with the idea that women are more relationally adept than men, implying that those who choose abortion must be somehow unnatural.²⁴⁹

These points have not been identified in the plethora of published legal scholarship addressing regret since *Carhart*. Critical articles have focused on whether women experience regret as well as on the most egregious parts of the opinion itself: “[T]he majority opinion’s paternalism, its use of gender stereotypes, its reliance on unfounded generalizations, its misuse of informed consent doctrine, its misunderstanding of psychological learning, and its analytical overkill.”²⁵⁰ While these conclusions are laudable, we can and must go further. The most relevant article to date, Chris Guthrie’s insightful article “*Carhart*, Constitutional Rights, and the Psychology of Regret,” rehabilitates regret and corrects inaccuracies in the *Carhart* opinion, but even it does not go far enough. Guthrie takes the Supreme Court to task for its “fundamental misunderstanding” of the psychology of regret.²⁵¹ He draws upon psychological research to show that the Supreme Court has misunderstood regret by overlooking regret aversion (that a decision maker will seek to avoid regret in making decisions), regret overestimation (that a

247. Appleton, *supra* note 3, at 267.

248. *Id.* at 267, 268.

249. The idea that women are more concerned with intimate relationships than men has been the subject of much theoretical and empirical scholarship. This was the premise behind the bestseller *Men are From Mars, Women are From Venus*. JOHN GRAY, MEN ARE FROM MARS, WOMEN ARE FROM VENUS (1992). It also is explicit within the work of Carol Gilligan. See generally GILLIGAN, *supra* note 131. See also ALICE H. EAGLY, SEX DIFFERENCES IN SOCIAL BEHAVIOR: A SOCIAL-ROLE INTERPRETATION (1987); Alice H. Eagly & Wendy Wood, *The Origins of Sex Differences in Human Behavior: Evolved Dispositions Versus Social Roles*, 54 AM. PSYCHOL. 408, 412–13 (1999); David L. Vogel et al., *Confirming Gender Stereotypes: A Social Role Perspective*, 48 SEX ROLES 519, 519–20 (2003).

250. Appleton, *supra* note 3, at 262.

251. See generally Guthrie, *supra* note 3.

decision maker tends to overestimate regret's intensity and duration), regret dampening (that a decision maker has psychological tactics to minimize/dampen experienced regret), and regret learning (that a decision maker learns to make better future choices from the experience of regret).²⁵²

Adopting a relational perspective, however, provides a useful meta-framework for the psychological research Guthrie cites and refocuses our attention from the abortion decision to the social and relational contexts in which it is situated. At one point, Guthrie links post-decision regret to the likelihood women will try to avoid related regrets in the future, noting they "might select different sexual partners, alter the sexual behavior they engage in with their partners, use birth control, and so on."²⁵³ This assertion, while on-point, describes a behavioral change that does not merely follow from the abortion decision or even from undergoing the procedure but instead is a product of the entire sequence of pregnancy management events and relationships culminating in the abortion capstone.

A relational perspective would focus not on whether women feel regret or why regret is useful, but on why some women experience regret and which relational priorities are at stake (such as a partner's opinion, the existence of other children and the pregnancy's effect upon those relations, social expectations, etc.). It would query which relationships support autonomous decision making, and how these characteristics can be fostered by law, other institutions, and individuals.

The consequences of painting regret with a broader brush are explicated by Susan Frelich Appleton in her recent article "Reproduction and Regret," which examines several models of regret across numerous reproductive contexts.²⁵⁴ She asserts that, because abortion requirements and procedures are "products of state laws, reinforced by cultural constructs," the state helps to create and sustain abortion regret through abortion regulations.²⁵⁵ According to Appleton, "such laws both reflect and shape social forces that become part of the background for the emotional experience, with abortion decisions having 'unusual cultural salience.'²⁵⁶ Thus, she concludes:

Gonzales [v. Carhart]'s promise that law can rescue the vulnerable among us from feelings of regret fails to acknowledge the role of both law and culture in creating reasons why we experience such feelings in the first place, just as it fails to acknowledge how

252. *Id.* at 881.

253. *Id.* at 902.

254. *See, e.g.,* Appleton, *supra* note 3, at 267.

255. *Id.* at 316–18.

256. *Id.* at 318.

the abortion options that remain often present greater risks and trauma than the procedure proscribed.²⁵⁷

An explicitly relational analysis shows why this is so; by acknowledging the co-constructed roles of both law and culture, relationality demonstrates these institutions are just one layer in a series of nested relations that construct, regulate, and mediate our bodily experience and social interactions.

Disentangling regret from defective decision making requires delving into what it means to consent to an abortion—an inquiry plunging right into the center of the maelstrom of social scripts, state regulations, informed consent protocols, a woman’s lived experience of pregnancy, her emotions, and her relations with partner, peers, family, community, institutions, culture, and government. Consent to the abortion decision should not be seen as a switch either flipped on or off; instead it is more like a spectrum, ranging from an unreserved consent to consent shaded by doubts to tentative consent to refusal shaded by doubts to affirmative refusal.

Abortion has a number of ugly truths. One of them is that many abortions are prompted by social conditions, social scripts, and social pressures that have removed a robust safety net of formal and informal supports that should exist and, in fact, do exist in other, primarily European, countries.²⁵⁸ Abortions are disproportionately higher among low-income women and women of color.²⁵⁹ This is a good indicator that at least some women are electing abortion because they feel they cannot materially provide for the child they would bear.²⁶⁰ Thus, analogizing to Robin West’s theory of “consented but unwanted sex,”²⁶¹ we can discuss the “consented but unwanted abortion.” I use this term knowing that a “wanted abortion” may lack coherence for women who are not considering abortion.

According to West, “consented but unwanted sex” occurs when heterosexual females consent to sex they do not desire in diverse relationships, to satisfy diverse needs, and with diverse motivations.²⁶² Certain harms are in-

257. *Id.*

258. See generally Jane Waldfogel, *International Policies Toward Parental Leave and Child Care*, 11 *CARING FOR INFANTS & TODDLERS* 99 (2001) (highlighting the variety of child care-related supports in Europe, versus the relatively minimal supports offered in the United States).

259. STANLEY K. HENSHAW & KATHRYN KOST, GUTTMACHER INST., *TRENDS IN THE CHARACTERISTICS OF WOMEN OBTAINING ABORTION, 1974–2004*, at 1, 15 (2008), available at <http://www.guttmacher.org/pubs/2008/09/23/TrendsWomenAbortions-wTables.pdf>; see also Ludlow, *supra* note 10, at 27.

260. Ludlow, *supra* note 10, at 27; see also Ludlow, *supra* note 104, at 33.

261. Robin West, *Sex, Law and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 236 (Alan Wertheimer & William Miller eds., 2008).

262. *Id.*

herent risks of consented sex, such as disease and unwanted pregnancy, and other types of harms *can* result but are not inevitable.²⁶³ West contends women are not necessarily harmed by consenting to unwanted sex for diverse reasons such as love or “to cement trust, or to express gratitude.”²⁶⁴ But when sexual activity is both unwanted *and* unwelcome it is more likely to harm women, damaging their “personhood, autonomy, integrity and identity.”²⁶⁵ Such sex is physically invasive; damages self-sovereignty; alienates a woman from her desires and pleasures; thwarts a “unified identity”; trivializes conceptions of self, injuries, and importance in the world; threatens the “largeness” of self and ambitions; and ultimately imperils autonomy.²⁶⁶

Borrowing on this concept, a consented but unwanted abortion seems like an oxymoron. We would expect a woman to consent to an abortion because she “wants” it, but there is a difference between choosing an outcome out of affirmative desire and choosing an outcome because it appears to be the least harmful in a pool of toxic choices. Women who agree to a consented but unwanted abortion might choose differently if circumstances were other than what they are—if they had a healthy fetus, more economic resources, greater flexibility with employment or education, or stronger social supports to make parenthood a workable option. For some women, at some times, a consented abortion will be unwanted but still welcome because of the trade-offs a woman is ready to make; for other women, at other times, it will be unwanted *and* unwelcome.²⁶⁷

Like unwanted and unwelcome sexual activity, an abortion that is consented but unwanted and unwelcome harms women. This kind of abortion is likely unwelcome because women may perceive it terminates the potential for a new life and for new relationships. It does not matter if women feel they must choose it to best safeguard the futures of themselves, significant others, unborn fetuses, or other interests. Its harm lies in that it irrevocably terminates a potential for life that these women valued.²⁶⁸ Women in

263. *Id.* at 237.

264. *Id.* at 239.

265. *Id.* at 234.

266. *Id.* at 238.

267. I do not include in the “unwanted and unwelcome” category the situation where a woman with a “wanted” pregnancy elects abortion after learning her fetus is unhealthy from prenatal testing. While this woman does not want to end her pregnancy, she decides to forego this relationship but will try to conceive at a later time. I would describe this abortion as “consented but unwanted” because the woman is not willing to continue a problematic pregnancy.

268. See David J.H. Greenwood, *Beyond Dworkin’s Dominions: Investments, Memberships, The Tree of Life, and the Abortion Question*, 72 TEX. L. REV. 559, 601 (1994) (“[T]he loss and pain of an abortion is the loss of a child that someone wanted, even if only

these circumstances experience the most emotional distress from regret, remorse, guilt, shame, mourning, trauma, and other painful and negative emotions.²⁶⁹ I do not mean to suggest that we make any decision without constraints; all choices face some restrictions, and few, if any, of us make decisions in ideal circumstances. Nonetheless, we should identify and work to eliminate constraints with unjust consequences, particularly based on distinctions of race, gender, and class.²⁷⁰

Recognizing the category of “consented but unwanted” abortion acknowledges women’s decisions are necessarily affected by relational considerations (e.g., existing social and personal supports, effects of the pregnancy and birth on self and others, and so on). It suggests the outcome might have been different if key changes in relational supports were made (improved access to child care, increased social support for single women raising children, etc.). Women can autonomously choose to obtain a consented but unwanted and unwelcome abortion; however, that is a decision they should not have to make and perhaps would not have to make given a different environment. Increased social support would enable different choices. The reasons women give for abortion are suggestive of women’s continued oppression and the devaluation of birth, childhood, and caretaking roles.²⁷¹ By opting for consented but unwanted and unwelcome abortion, women are coopted into perpetuating these social ills, bowing to constraints they lack the power to change.

Autonomous decisions deserve respect. As evidence of autonomy, regret also deserves space and respect within culture, law, and women’s lived experience. A relational autonomy model can help to create and preserve this respectful space. Women’s decisions could be *more* autonomous if legal regulations supported the decision-making process by enacting “serious changes in the social circumstances in which the [abortion] choice is made.”²⁷² Yet, I assert, these choices are *still* autonomous in a relational

on an instinctual level . . . , or that we wish someone wanted, if only on that same instinctual level.”).

269. See *supra* notes 21–23 and accompanying text.

270. See, e.g., Ludlow *supra* note 10, at 27; see generally RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* (2002); RICKIE SOLINGER, *WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE* (2000); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1998).

271. See Susan Sherwin, *Relational Autonomy and Global Threats*, in *BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW* 13, 18 (Jocelyn Downie & Jennifer J. Llewellyn eds., 2012).

272. *Id.* Sherwin might regard these decisions as an example of agency but not autonomy, since “agency” refers to decision making in a situation where a person chooses an option that is most reasonable for her under prevailing conditions but that is incom-

sense when they are made self-consciously, engaging with others' perspectives.²⁷³

F. Mistake 6: Linking Regret with Moral Culpability

The sixth and final mistake has to do with confusing causal responsibility and moral responsibility. Abortion is not a morally indifferent act,²⁷⁴ and awareness of this is intertwined with the construction of regret as remorse, and its links to the maternal-fetal relationship and defective decision making. Pro-life and pro-choice scripts restrict our conceptions of *which dimensions* of abortion are morally problematic, focusing almost exclusively on the morality of *providing* abortion while overlooking the moralities of *accessing* and *delivering* abortion.²⁷⁵

Scripts can yoke regret to moral culpability through a dialectic of control and responsibility—tenets of liberal autonomy and individualism.²⁷⁶ But both “control” and “responsibility” must be deconstructed and problematized; otherwise, we fail to distinguish between causal and moral responsibility. Whereas causal responsibility refers to sex as a cause of pregnancy, moral responsibility relates to blaming, shaming, or punishing individuals for their sexual and reproductive decisions.²⁷⁷ Ideally, every woman would be causally responsible for her abortion because she chose it autonomously; assigning causal responsibility does *not require* one to subjectively evaluate and assign moral weight to a particular choice. Causal responsibility merely links the woman's choice to her abortion decision; one would have to invoke moral responsibility to label the abortion a mistake and hold a woman morally culpable through guilt, shame, and punishment.²⁷⁸

While the pro-life script holds women who consent to sex liable for all consequences, conflating causal and moral responsibility, the pro-choice script seems to champion causal responsibility to the extent it portrays abortion as a choice, but remains relatively mute on moral responsibility, as under liberal theory, women must determine abortion's moral status for

patible with the overall interests of her social group and thus ultimately her own interests. *Id.* These decisions are “reasonable for individuals” but “disastrous for groups.” *Id.* at 19.

273. See Jennifer Nedelsky, *The Reciprocal Relationship of Judgment and Autonomy: Walking in Another's Shoes and Which Shoes to Walk In*, in BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW, *supra* note 271, at 35, 46–54 (explaining the importance of self-consciousness in judgment).

274. RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 34–35 (1993).

275. SHERWIN, *supra* note 113, at 100.

276. See *supra* Part I.B.

277. FISCHER & RAVIZZA, *supra* note 205, at 2.

278. *Id.*

themselves.²⁷⁹ A more affirmative statement to that effect, however, might be stronger than silence.

Both causal and moral responsibility flow from control: here, a woman's ability to make an alternative choice.²⁸⁰ A person can have "a certain sort of control without having the sort of control that involves alternative possibilities."²⁸¹ The extent to which one believes causal and moral responsibility overlap is influenced by our beliefs about the relationship of sex to pregnancy and biology. Sex is necessary, but not sufficient, for pregnancy. Pregnancy, in turn, is arbitrarily determined by myriad factors—ovulation cycles, gamete quality, uterine lining, body temperature, hormonal levels, and so on.²⁸² While women have control over whether they engage in sex, they do not have that same degree of control over whether they become pregnant, and the idea that one should exercise "control" over consensual sex through abstinence places too high a burden on adults.²⁸³ Women can take the birth control pill or insist their partners use a condom, but they cannot will the egg not to descend or refuse a sperm permission to penetrate the egg's wall. They can take the "morning after" pill, but they can't conclusively prevent an embryo from implanting. Women's success in attempting to avoid or ensure pregnancy is inherently uncertain.

This is not the sort of control that is traditionally associated with moral responsibility.²⁸⁴ What "responsibility" exists lies with the laws of nature, because reproduction, like many bodily processes and statuses, is heavily regulated by systems other than our conscious will. This lack of control decouples causal responsibility from moral responsibility. If sex were both necessary and sufficient for pregnancy, causal responsibility would generate moral responsibility. But because it is not, holding someone causally responsible does not mean that they are also morally responsible and does not justify moral culpability, blame, or punishment.

From this vantage point, the pro-life script's vision of sexual knowledge, control over consequences, moral responsibility, and the immorality of terminating fetal life²⁸⁵ is far too narrow. Relational autonomy focuses on a

279. *See supra* Part I.

280. FISCHER & RAVIZZA, *supra* note 205, at 20.

281. *Id.* at 32.

282. *See generally* JEAN M. TWENGE, *THE IMPATIENT WOMAN'S GUIDE TO GETTING PREGNANT* (2012).

283. *See* Appleton, *supra* note 3, at 295–96.

284. *See* FISCHER & RAVIZZA, *supra* note 205, at 21 (noting that we associate control with moral responsibility).

285. *See* Maroney, *supra* note 41, at 893. Maroney observes that women who experience post-abortion regret define themselves as mothers, their fetuses as children, and abortion as murder. *Id.* These categories carry a great deal of moral weight for women who perceive that they, as mothers, have murdered their children. *Id.*

more expansive question—whether it is irresponsible, even immoral, to birth a child one cannot provide for or who will jeopardize one’s ability to care for others.²⁸⁶ Conceptualizing “responsibility” as carrying a pregnancy is shortsighted. “Responsibility” starts in pregnancy but continues through adoption or parenthood; it is a multi-decade, and likely lifelong, process, not a forty-week fling.²⁸⁷ In this light, abortion becomes “an important moral or life decision that may be *compelled* by life circumstances and existing obligations.”²⁸⁸ Regret, in turn, may indicate “a conflict of responsibilities in which it may be perfectly clear which responsibility prevails—pre-existing commitment over commitments not yet made—and yet terribly painful to refuse to accept the new responsibility.”²⁸⁹

G. Decentering Regret, Changing Legal Landscapes

Ironically, correcting all of these conventional regret mistakes would not yield a “new” model of regret *per se*. Regret’s current prominence is a direct consequence of these missteps. Fixing all of these conventional mistakes does not help us to *reconceptualize* regret, it enables us to *decenter* it. Regret in and of itself does not merit this much of our time and attention, but promoting autonomy does. We care so much about regret because it is currently constructed as inconsistent with or antithetical to autonomy;²⁹⁰ these mistakes are not so much issues of regret as issues of autonomy. These constructions of regret merely mask autonomy’s significance. Ultimately, regret is like a pesky knot in the neck muscle; it is painful, but the more you knead it and work it over, the more readily it should dissipate and eventually disappear. Autonomy, then, is critical to working through regret.

This project—reconceptualizing and decentering regret and prioritizing autonomy—has clear normative implications for abortion regulations,

286. According to Greenwood, “one must carefully consider before accepting the responsibilities of a new one,” focusing “not on the fetus as an individual being, but on the parents’ family.” Greenwood, *supra* note 268, at 599. Cahn and Carbone provide an excellent example, stating that the prototypical left or “blue” family was “appalled” that seventeen-year-old Bristol Palin was pregnant and engaged to the teenage father because “a 17-year-old, married or not, is not ready for parenthood.” CAHN & CARBONE, *supra* note 22, at 9. These are not formulated as “overarching moral principles—thou shalt not have a child for whom one is not prepared to provide optimal circumstances—but in terms of instrumental values.” *Id.* at 41; *see also* Greenwood, *supra* note 268, at 599 (noting that it is “immoral—not just inconvenient—to carry a pregnancy to term when the potential parents are unable or unwilling to then raise the child properly”).

287. *See* Greenwood, *supra* note 268, at 598–99.

288. *Id.* at 600.

289. *Id.*

290. *See supra* Part I.B.

including public and private abortion funding, waiting periods, mandated information disclosures, mandated counseling, and spousal and parental notification. While few of these restrictions are entirely supportive or destructive of autonomy on their face, most can be implemented in several ways, each of which impact autonomy differently. Relational autonomy evaluates abortion regulations within a broader context of social institutions and practices,²⁹¹ querying whether, how, and when these requirements support relational autonomy.

Courts have long wrestled with autonomy's meaning in abortion, how to balance it against competing interests, and how best to effectuate it. Abortion jurisprudence cedes this decision to the woman in consultation with her physician.²⁹² The *Roe* majority acknowledged pregnancy's physical consequences and mental effects—its lived experience—as well as parenthood's mental, physical, and emotional burdens.²⁹³ Subsequent cases affirmed women's authority to choose even as they altered this process by permitting states to attempt to persuade women otherwise.²⁹⁴ *Carhart*, however, forecloses a woman's choice to undergo a certain procedure and thus determines, controls, and dominates—and undermines and damages—her autonomy. Once again, conventional scripts are more of a hindrance than a help. The pro-life script insists on erecting every possible obstacle to abortion, and the pro-choice script counters by demanding all be eliminated.²⁹⁵ The truth lies in between. People will disagree on how best to effectuate autonomy; while most Americans favor legal abortion, they disagree on which restrictions are necessary.²⁹⁶

291. See SHERWIN, *supra* note 113, at 99.

292. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

293. *Roe*, 410 U.S. at 153.

294. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 423 n.5, 445 (1983).

295. See *supra* Part I.A.

296. For the first time, most Americans favor legal abortion; Gallup polling data from January 2013 found that 52 percent felt abortion should be legal under certain circumstances and 69 percent favored twenty-four-hour waiting periods. Ashley Parker, *40 Years After Roe v. Wade, Thousands March to Oppose Abortion*, N.Y. TIMES (Jan. 25, 2013), <http://www.nytimes.com/2013/01/26/us/politics/40-years-after-roe-v-wade-thousands-march-to-oppose-abortion.html?action=click&module=Search®ion=searchResults&mabReward=cseSort%3Aw&curl=http%3A%2F%2Fquery.nytimes.com%2Fsearch%2Fsite%2F%23%2F40%2Byears%2Bafter%2Broe%2Bv%2Bwade%2F&r=0> (last visited Apr. 14, 2014). A Pew poll reported that 63 percent opposed completely overturning *Roe*, results “largely consistent with surveys taken over the past two decades.” *Id.*

This discussion presumes autonomy is our goal—a controversial assumption in and of itself.²⁹⁷ One can promote many other and perhaps inconsistent values, such as protecting fetal life or giving women complete freedom of choice. The threshold question is whether we need to assist women in autonomous decision making (*not* whether we need to evaluate it—as in *Carhart*), and if so, how. In liberal autonomy, needing assistance is in tension with autonomy; a decision maker seeking help implicitly concedes to a weakness, and the more aid she receives, the more likely her autonomy is imperiled.²⁹⁸ In relational autonomy, however, individuals can be more or less autonomous in certain contexts and are encouraged to become more autonomous by consulting others and considering their needs. Here, assistance can enhance, not impugn, autonomy.²⁹⁹ To say that a woman is in the best position to make this choice is not to say that she occupies a perfect or ideal position—the very circumstances of her pregnancy are constraints—but to acknowledge that no one else has the authority to make the choice for her.³⁰⁰ Assisting autonomy is a wonderful thing if it is done well—fairly, respectfully, and accurately.

In America, abortion is an isolated medical procedure. Clinics are difficult for many to access and procedures may be difficult for many to afford or banned outright, while other women's health care services are widely available.³⁰¹ This isolation and marginalization evidences a lack of respect for women's decisions and autonomy³⁰² as well as the powerful consequences of conventional regret mistakes—confusing regret with remorse, focusing on the maternal-fetal relationship, and coupling regret to deficient decision making and moral culpability. Funding abortion only in certain, rather extraordinary circumstances—saving maternal life or preventing a “substantial and irreversible impairment of a major bodily function,” rape, incest, and fetal impairment—intimates that these are the only “good” or

297. Rick Santorum, 'It Takes a Family' (NPR radio broadcast Aug. 4, 2005) quoted in David Boaz, *Rick Santorum v. Limited Government*, CATO AT LIBERTY (January 2, 2012, 4:09 PM), <http://www.cato.org/blog/rick-santorum-v-limited-government> (“This whole idea of personal autonomy . . . I don't think most conservatives hold that point of view. . . . I think most conservatives understand that individuals can't go it alone. That there is no such society that I am aware of, where we've had radical individualism and that it succeeds as a . . . culture.”).

298. See *supra* Part I.B.

299. See *id.*

300. SHERWIN, NO LONGER PATIENT, *supra* note 113, at 101–102.

301. See, e.g., Adam Sonfield, *Abortion Clinics and Contraceptive Services: Opportunities and Challenges*, 14 GUTTMACHER POL'Y REV. 2 (2011), available at <https://www.guttmacher.org/pubs/gpr/14/2/gpr140202.html>.

302. See CANNOLD, *supra* note 240, at xxxiii (stating that the D & X controversy “displays the public's—and the politicians'—distrust of women's capacity to think and act morally”).

“morally acceptable” reasons for abortion and that these reasons intersect with women’s victimization.³⁰³ This Section will focus on spousal and parental notification, mandated informational disclosures, counseling, and waiting periods.

Under relational autonomy, a woman should be free to value relationships for herself and determine how to use these resources in decision making. Requirements that women notify certain individuals impose relational hierarchies on women, forcing them to include these connections in certain ways. These regulations reveal lawmakers’ assumptions about which relationships are most impacted by abortion, which merit attention, and which may bear upon the abortion decision (implicitly to prevent it). They pass regulations requiring women to inform spouses and parents, but not unmarried partners, religious leaders, or primary doctors.³⁰⁴ Spousal notification provisions run counter to relational autonomy by forcing women to prioritize certain relationships that are marital³⁰⁵ and overwhelmingly heterosexual³⁰⁶ and to include their partners in certain ways.³⁰⁷ These are exercises in control and dominance, not respect and empathy. To its credit, the Su-

303. As of February 1, 2013, thirty-two states followed the federal standard of providing Medicaid funding for abortion in life endangerment, rape and incest. *See State Policies in Brief: State Funding of Abortion Under Medicaid*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf (last updated Feb. 1, 2014). Eight states restricted private insurance coverage of abortion, but twenty-three states restrict coverage in plans that will be offered through the insurance exchange under the Patient Protection and Affordable Care Act. *See State Policies in Brief: Restricting Insurance Coverage of Abortion*, GUTTMACHER INST., available at http://www.guttmacher.org/statecenter/spibs/spib_RICA.pdf (last updated Feb. 1, 2014).

304. For example, § 3209 of the Abortion Control Act, the Pennsylvania legislation at issue in *Casey*, required married women to notify their husbands of their plans prior to obtaining an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

305. During oral arguments in *Casey*, Justice O’Connor asked Ernie Preate, counsel for the respondent, to confirm that the statutory provision at issue did not require notification to fathers who were not also husbands, then later asked, “why not require notice to all fathers?,” terming that portion of the statute “a curious sort of a provision.” Transcript of Oral Argument at *25–26, *Casey*, 505 U.S. 833 (No. 91–744, 91–902), 1992 WL 691955, at *9.

306. It is less likely, but still possible, that a pregnant woman in a same-sex couple would have to notify her wife that she intended to get an abortion; her wife, however, might only have a stake in the abortion decision equivalent to the husband’s if the couple had undergone IVF, with the non-pregnant wife providing the egg.

307. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (“It seems manifest that, ideally, the decision to terminate a pregnancy should be one concurred in by both the wife and her husband. No marriage may be viewed as harmonious or successful if the marriage partners are fundamentally divided on so important and vital an issue.”).

preme Court has recognized that notification cannot ensure marital harmony.³⁰⁸

Research suggests, however, that women find most relations supportive. While *Casey* highlights the “one percent of women” who were pregnant and in abusive marital relationships, the majority opinion states the “vast majority” of women consult their husbands about the decision.³⁰⁹ In one recent study, nearly all women seeking abortion had told someone their decision, that in 82 percent of cases women had told their male partners, that in 87 percent of the cases where women told their partners the partners were supportive of their decision, and that fewer than 1 percent of women cite pressure from a partner or parent as the most important reason for their abortion.³¹⁰

In some ways, however, spousal notifications are relational; they recognize men have a different relationship to abortion than women and that men ascribe varying degrees of biological and emotional import to the choice and to the fetus.³¹¹ Spousal notification requirements may falsely presume the husband’s interest is protective and that his intent is to delay or prevent the abortion, not compel it. Abortion case law references the “devoted and protective”³¹² husband’s interest in fetal safety.³¹³

The question of spousal notification was largely settled in *Casey*, which found it unconstitutional because of its tragic implications for women in abusive marriages.³¹⁴ Lawmakers, however, have not implemented other more useful relational supports beyond notification, such as prenatal child support. Regulations could permit a pregnant woman to establish paternity through amniocentesis,³¹⁵ and require biological fathers to provide prenatal

308. *Danforth*, 428 U.S. at 71 (“[I]t is difficult to believe that the goal of fostering mutuality and trust in a marriage, and of strengthening the marital relationship and the marriage institution, will be achieved by giving the husband a veto power exercisable for any reason whatsoever or for no reason at all.”).

309. *Casey*, 505 U.S. at 888, 894.

310. Diane Greene Foster et al., *Attitudes and Decision Making Among Women Seeking Abortions at One U.S. Clinic*, 44 PERSP. ON SEXUAL & REPROD. HEALTH 118, 121 (2012).

311. This is a useful endeavor, we do not want to focus only on the “problematic construction of women as reproductive decisionmakers [and] . . . leave unexplored the construction of men as reproductive decisionmakers—the implied but essential antithesis that shapes the stereotype.” Appleton, *supra* note 3, at 324–25.

312. *Danforth*, 428 U.S. at 69.

313. *Casey*, 505 U.S. at 898.

314. *See Casey*, 505 U.S. at 897–98.

315. *See* VICTOR A. BERNSTAM, CRC HANDBOOK OF GENE LEVEL DIAGNOSTICS IN CLINICAL PRACTICE 76 (1992) (explaining that molecular genetic fingerprinting is a “simple, reliable, and accurate method for prenatal paternity testing when performed on material routinely obtained at amniocentesis, or on chorionic villus samples”).

child support. This perhaps would conflict with liberal opposition to legal regulations forcing pregnant women to act so as to avoid harming fetuses (e.g., forced C-sections).³¹⁶ Under current schemes, women are part of the maternal-fetal relationship from conception, but men are fathers only after birth and a paternity test.³¹⁷

Parental notification³¹⁸ raises many of these same issues, though judicial bypass³¹⁹ theoretically allows minors to remove parental relationships from their decision-making processes. However, parental notification also raises different concerns. Minors' autonomous capacity is different from adults', and some minors will be too immature to make this decision alone and even to seek help.³²⁰ In addition, parental notification regulations often require "evaluating" the minor's autonomy according to criteria such as intelligence and emotional stability—guidelines that are subjective, hard to apply, and sometimes must be proven by clear and convincing evidence.³²¹ Relational autonomy helps ensure that a minor knows the consequences—physical, emotional, and relational—of abortion, and acknowledges that fit parents will ideally be part of the decision-making process. Judicial bypass procedures can support relational autonomy as do exceptions for minors in medical emergencies or non-supportive parental relationships characterized by abuse, assault, incest, and neglect. Yet much evidence suggests these proceedings can be forums for assigning moral culpability and voyeurism, requiring minors to disclose intensely personal details to a complete

316. See, e.g., *In re A.C.*, 573 A.2d 1235 (D.C. 1990).

317. However, in most states, women can recover prenatal expenses not paid by insurance through retroactive child support or some other mechanism. See, e.g., DEL. CODE ANN. tit. 13, § 513(a)(3) (West 2012); MICH. COMP. LAWS ANN. § 722.712.2(1) (West 2012).

318. As of February 1, 2013, thirty-eight states required parental involvement in a minor's abortion decision (most often that one parent be notified or provide consent), and thirty-seven of these states had an alternative judicial bypass procedure. See *State Policies in Brief: Parental Involvement in Minors' Abortions*, GUTTMACHER INST., http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf (last updated Feb. 1, 2014).

319. Judicial bypass laws allow minors to obtain abortions without parental involvement. See generally Alexandra Rex, Note, *Protecting the One Percent: Relevant Women, Undue Burdens, and Unworkable Judicial Bypasses*, 114 COLUM. L. REV. 85 (2014).

320. See generally Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?: Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop"*, 64 AM. PSYCHOL. 583 (2009).

321. *State Policies in Brief: Parental Involvement in Minors' Abortions*, *supra* note 318.

stranger.³²² Minors can find bypass hearings stressful, even traumatic, and are unlikely to find them helpful in their decision-making processes.³²³

In a related vein, one pro-life organization, Americans United for Life, has recently proposed model legislation as part of its “Women’s Protection Project” that would allow third parties to sue providers, clinics, and state officials for emotional damages from abortions.³²⁴ Significantly, the legislation leaves undefined the “person” who may seek redress, including family members or even unrelated parties. Among other invidious effects, such as suborning the provider-patient relationship, this legislation is a blatant attempt to not only bankrupt providers but also to create standing for others to assert emotional distress claims and thus to act upon a fetal “relationship.” Of course, partners, children, family members, friends, and even larger groups can all potentially assert various “relationships” with women’s fetuses such that something is at stake if women abort. Optimally, women would determine how best to weigh each claim. But there is currently a clear and judicially recognized³²⁵ difference between those connections and legally protected relations that grant a party standing to take part in or recover damages as a result of the abortion decision. Like spousal and parental notification laws, this model legislation effects an end run around women’s judgments about who should be involved in the abortion decision and how, effectively rendering women invisible by allowing others to assert and act upon fetal “relations.” Again, women themselves are the best judges of what relations are most important and merit consideration.

Mandatory waiting periods, counseling, and informational disclosures³²⁶ are ostensibly enacted to protect the ingredients of autonomous decision making: time, information, and a chance to speak to a neutral expert. However, many kinds of regulations effectively obstruct or misinform women’s decisions, rather than support them. A twenty-four-hour waiting period does not seem to undermine women’s autonomy on its face, pro-

322. See Carol Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT’L J.L. POL’Y & FAM. 305, 308–315 (2006); Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 433–437 (2009) [hereinafter Sanger, *Decisional Dignity*].

323. Sanger, *Decisional Dignity*, *supra* note 322, at 447–450. See generally J. SHOSHANNA EHRLICH, WHO DECIDES?: THE ABORTION RIGHTS OF TEENS 130–37 (2006).

324. AM. UNITED FOR LIFE, WOMEN’S PROTECTION PROJECT 79–83 (2013), available at <http://www.aul.org/wp-content/uploads/2014/01/WWP-full.pdf> (discussing enforcement options for state abortion laws); see also Jessica Mason Pieklo, *New Model Laws Would Let Third Parties Sue for Emotional Damages from Abortions*, RH REALITY CHECK (Dec. 10, 2013, 4:56 PM), <http://rhrealitycheck.org/article/2013/12/10/new-model-laws-would-let-third-parties-sue-for-emotional-damages-from-abortions/>.

325. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895–96 (1992) (stating that woman need not notify her husband before obtaining an abortion).

326. See *supra* note 318.

vided there are emergency exceptions. In practice, however, waiting periods can be harmful, as when clinic scarcity requires women to either make multiple long-distance journeys to abortion clinics or stay overnight.³²⁷ An alternative would be to allow women to access counseling and mandated information disclosures at more convenient locations like women's health clinics or, optimally, their homes.

Similarly, counseling and mandated informational disclosures³²⁸ do not inherently undermine women's autonomy; the problem lies in their implementation. Counseling may support relational autonomy when it is optional and the counselor is truly unbiased. Similarly, information disclosures can support relational autonomy when scientifically accurate, objective, and presented neutrally. Unbiased information covering standard procedural details and risks is normally part of informed consent, and additional information—e.g., telling women that they cannot be coerced into choosing abortion—may prove helpful to some. However, information disclosures undermine autonomy when their content is derived from junk science or is presented as emotionally inflammatory.³²⁹ These practices mislead, emphasize negative information, distract from pertinent issues, and perpetuate conventional regret mistakes (conflating regret with remorse/pathological distress and narrowly focusing on the maternal-fetal relationship). For instance, women should not be informed that “regret” is a “serious psychological effect” akin to depression in state-mandated abortion counseling.³³⁰ Information on personhood can also be problematic if it is described in isolationist, liberal autonomy terms (e.g., the fetus is a unique and separate person); under relational autonomy, personhood is a social category involving personality, communal interaction, and biological integrity.³³¹ Harmful information disclosures and counseling alike transform a supportive care provider relationship into a propaganda opportunity and undermine trust in providers.³³² Moreover, mandated disclosures, like waiting periods, should

327. Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 31–33 (2012).

328. See *supra* note 326.

329. See generally Vandewalker, *supra* note 327, at 13–33.

330. Dadlez & Andrews, *supra* note 172, at 447 (quoting M. Hinojosa, *NOW Transcript – Show 329*, PBS (July 20, 2007), <http://www.pbs.org/now/transcript/329.html>) (reporting women are told that “(s)ome women have reported serious psychological effects . . . including depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts . . .”).

331. SHERWIN, NO LONGER PATIENT, *supra* note 113.

332. See, e.g., Deborah J. Oyer, Letter to the Editor, *Playing Politics with the Doctor-Patient Relationship*, NEW ENG. J. MED. (June 14, 2012), <http://www.nejm.org/doi/full/10.1056/NEJMc1205009>. Oyer observes:

be used to actually encourage reflection and not as opportunities for harassment, and should be made as accessible and convenient as possible.

CONCLUSION

So many aspects of women's lived abortion experience are mediated by or experienced in terms of relationships, which are in turn encapsulated by scripts. For all they smooth our social interactions, social scripts and emotion feeling rules also have negative consequences; one might say their strength is their weakness. While these heuristics help us to conceptualize and evaluate actors, decisions, emotional stakes, and outcomes, they often do so by rendering them black and white. When we are socialized by these scripts and unconsciously apply them, we also come to see individuals and issues as black and white. These simplified constructions have placed new and unwelcome constraints on women's reproductive freedoms: the freedom to feel certain emotions and recognize their role in decision making, the freedom to acknowledge the relationality of one's decision-making processes, and the freedom to make difficult decisions the way one feels they should be made.

This is not to say we should (or could) rid ourselves of such heuristic shortcuts. Such a task would be tilting at windmills.³³³ Like emotion, social scripts play an inevitable and potentially useful role in decision making even as they inherently constrain it. Instead, we must critically deconstruct these scripts and confront their most problematic assumptions and representations. We must recognize that scripts and feeling rules are not objective and immutable but subjective cultural constructions perpetually in flux. A relational perspective ensures a more expansive and visible social space to women's voices and bodies and greater respect for their experience. We are more likely to be citizens among social scripts than subjects of them. Our goal should not be to reconcile the pro-life and pro-choice perspectives but rather to challenge their narrowness and absolutism, both making room for women's lived experiences and rendering it more difficult for advocates on both sides to "proffer simplistic solutions."³³⁴ These new, more complex scripts could situate abortion as a type of mothering decision within a more

Many laws have undermined the doctor—patient relationship—mandating that doctors say things to patients that are blatantly untrue, requiring that specific tests be performed whether the doctor thinks they are necessary or not, and requiring waiting periods regardless of whether the woman and her doctor think she is confident in her decision.

Id.

333. See MIGUEL DE CERVANTES, DON QUIXOTE 58–64 (Edith Grossman trans., 2005).

334. Ludlow, *supra* note 10, at 28–29.

inclusive continuum and reconcile compassion for women with concern for fetuses.³³⁵

The idea that regret may be felt not only following decisions made wrongly but also after decisions made rightly—including those where a woman must choose the least objectionable of several bad options—illustrates why regret is a perilous frame through which to view reproductive decision making. Individuals and institutions with political, social, and cultural capital make use of regret to draw conclusions and support judgments about the (im)morality and (ir)rationality of a woman's decision to obtain an abortion. Regret inevitably piggybacks upon individual beliefs about these issues; as Maroney notes, “[a]bsent a set of beliefs identifying the abortion as a grave moral harm marking her as an extremely bad actor, she is not likely to regret the abortion but rather the circumstances surrounding or necessitating it.”³³⁶

If “regret reveals the importance of self-knowledge to self-definition,”³³⁷ relationality illustrates that self-knowledge and self-definition are not just introspective processes but social processes mediated by relationships. Regret, like any other emotional response, is “shaped by and responsive to the estimations and responses of others.”³³⁸ It seems problematic to advise women they should consider only certain relationships (to the fetus, to the self) and only in particular ways (prioritizing one while deemphasizing the other). But this is exactly how we are socialized.

Thus, regret may be an “especially unsuitable yardstick” for gauging whether a decision has been autonomously made.³³⁹ We strive to make decisions in ways we judge will maximize well-being for ourselves and/or others, not to avoid regret *per se*.³⁴⁰ Although avoiding regret is ideally a consequence of making decisions that maximize well-being, we will inevitably make some mistakes. Usually, regret is not incapacitating; it is not as if “experiencing regret . . . [is] so bad for a person, and so ruinous, that absolutely ensuring its avoidance is a consideration which trumps all other reasons in favour of a course of conduct.”³⁴¹

A relational model helps us to focus on autonomy and understand how various socialization mediums—social scripts, jurisprudential rulings, and regulatory climates—create an oppressive environment and impair au-

335. *Id.* at 43.

336. Maroney, *supra* note 41, at 898.

337. MacKenzie, *supra* note 72, at 140.

338. *Id.*

339. Greasley, *supra* note 127.

340. *Id.* at 710–11.

341. *Id.*

tonomy.³⁴² In abortion decision making, women are impacted on multiple levels. Current abortion scripts handicap socialization; yet without effective socialization we cannot develop, exercise, and utilize our imaginative/creative skills and abilities to make autonomous decisions. This in turn undermines our ability to identify and consider options and decision-making strategies. We must be mindful, however, lest we confuse autonomous decisions with perfect decisions. We “must acknowledge that women will sometimes make mistakes in moral judgment.”³⁴³ But these women will receive much more social support in a culture embracing relationality than in one that does not. Most importantly, relational autonomy steps away from domination and control, affirming that the probability that mistakes will be made does not give us the authority to overrule women’s autonomous judgments and decisions. It focuses not on invidious either/or distinctions—black/white, pro-life/pro-choice—but on the both/and, the in-between, the shades of gray comprising lived experience. ✽

342. Catriona MacKenzie & Natalie Stoljar, *Autonomy Refigured*, in *RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF*, *supra* note 57, at 22.

343. SHERWIN, *supra* note 113, at 102.