Atmospherics: Abortion Law and Philosophy

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> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. (*Gonzales*: xx)

> From the positivists the realists take the insistence on concrete data. . . . The profession at large still shows, at times, the influence of the natural law. . . ." (Llewellyn 1934: 212)

> While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. . . . Severe depression and loss of esteem can follow. . . . (*Gonzales*: xx)

> Police officers with cadaver-sniffing dogs, shovels and a backhoe dug in the backyard of a home Monday where the bodies of four infants have been found since last week. The police say the infants belong to Christy L. Freeman, 37, a taxi company owner and mother of four. Ms. Freeman has been charged with murder in the death of one of the infants, a male fetus in the 26th week of gestation found in a vanity under a bathroom sink. (AP Report 2007: A15)

In 1934, Karl N. Llewellyn published a lively essay trumpeting the dawn of legal realism, "On Philosophy in American Law." The charm of his defective little piece is its style and audacity. A philosopher might be seduced into reading Llewellyn's essay by its title; but one soon learns that by "philosophy" Llewellyn only meant "atmosphere." (Llewellyn 1934: 206) His concerns were the "general approaches" taken by practitioners, who may not even be aware of having general approaches. (Ibid) Llewellyn paired an anemic concept of philosophy with a pumped-up conception of law. Llewellyn's "law" included anything that reflects the "ways of the law guild at large" – the ways of judges, legislators, regulators, and enforcers. (Ibid)

Whether atmospherics conform to coherent sets of theoretical ideas of the sort a Richard Posner or Ronald Dworkin might defend was not Llewellyn's question. Yet he credited intellectual judges and scholars, especially Oliver Wendell Holmes, Roscoe Pound and Benjamin Cardozo, with roles in making the embrace of realism headier than a law guild's unconscious groping for solutions. (Ibid: 210-12). A story could be told (but not here) about academic philosophy's contributions to American law. Contemporary philosophers have modestly contributed logical and conceptual clarity; economists and statisticians may have contributed more.

Llewellyn argued that the legal philosophies implicit in American legal practice had been natural law, positivism and realism, each adopted in response to felt needs of a time. We must reckon with many other implicit "philosophies" to understand the workings of the law guild, not the

least of which has been racism. Others, maternalism and paternalism, my foci here, persist in American law, despite women's progress toward equality. Both maternalism and paternalism were strikingly present in a recent decision of the U.S. Supreme Court, *Gonzales v. Carhart*, upholding the federal Partial-Birth Abortion Ban Act.

I.

Natural law, Llewellyn said, was adopted in response to the needs of a new nation lacking precedents of its own and short on hospitality for the tradition of British law. Unashamed reliance upon "right reason" was an expression of the founding generation's self-confidence and rebellion against British rule. (Ibid: 206-07) Like natural law, racism and maternalism/paternalism were conceptual "needs" of a newly independent federation of slaveholding patriots intent on dominating the swatches of North America grabbed from the Indians. White women, slaves and indigenous Americans did not immediately benefit from the atmospherics of divinely inspired natural law. The original constitution defined non-whites out of full citizenship, and overlooked women altogether.[1]

Positivism bloomed in the late 19th century, Llewellyn argued. Capitalist industrialism called for pragmatic law-making, especially within private law. Positivism legitimates rules put into place by the sovereign. Stressing allegiance to rules and precedent, positivism fostered stability more than justice. Natural law had been unkind to the powerless, and positivism was, too. Complemented by racism, raw "buccaneer" self-interest, as Llewellyn called it, spelled major trouble. For example, West coast towns and cities passed laws to eliminate the competition from their Chinese immigrant communities – laws prohibiting laundries built of wood and carrying things on poles. The Chinese were rounded up and their property confiscated or burned. In principle, legal positivism is a two-way street. Indeed, some Chinese immigrants who sued for restitution under positive law theories of tort and contract won. (Pfaelzer 2008) Although the letter of law strictly applied sometimes helps the little guys, law will be manipulated by Power to serve the interests of Power. Positivism in the air may help explain *Plessy v. Ferguson*. The Supreme Court read the law of equal protection ungenerously, so as virtually to re-enslave southern blacks through demeaning segregation.

According to Llewellyn, realism evolved in response to the needs of the 20th century. The little guys organized and flexed muscle. Popular movements – labor, farm workers, and small business among them – demanded policies of protection and reform. The gospel of realism teaches that law is an instrument of power that can be educated with hard fact and marshaled through politics for social improvement and a more complete democracy. From its cynical (Holmes) and ethical (Pound) variants, and its sociological roots, realism emerged (with the help of Cardozo) to enable the legal system to solicit "more exact knowledge" for policy-making. (Llewellyn 1934: 212) Realism suits us as a nation of pragmatists compelled to govern the powerful and the powerless alike, Llewellyn contended. In 1934 realism had found "yet little echo among judges"; nonetheless, it came into its own as Llewellyn predicted because it was "much closer than any others to the actual behavior of the better bar." (Ibid) The realist atmospheric survives in progressive legal theory and

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[1] See Article 1, Section 2: "Representatives and direct taxes shall be apportioned among the several states which may be included within this union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other Persons."

mainstream legal practice. But positivism is a vital sibling and natural law is good for an occasional cameo.

II.

The big three philosophies – natural law, positivism and realism – have never exhausted the atmospherics of American law. It is implausible to reduce to only three all of the "philosophies" immanent in the ways of the law guild. Moralism, for example, was evident in Anthony Comstock's legal innovations targeting pornography, contraception and abortion. Llewellyn neglected the challenge to moralistic paternalism embodied both by Margaret Sanger's battle against Comstock-era laws and the successful reform movement for women's suffrage. Outside the shadows, there are no women in Llewellyn's story of American legal philosophy, not even when he describes the push for democratizing reforms in the early 20th century. Maternalism and paternalism are major atmospherics, especially noteworthy for the injustice they have, and continue, to do. Women are dragged down by the law's implicit paternalism (its tendency to control the lives of individuals, nominally for their own good) and maternalism (its assumption that bearing children and caring for others is the natural and optimal role of women).

In *Gonzales v. Carhart* the U.S. Supreme Court upheld a federal abortion prohibition. Congress enacted a Partial-Birth Abortion Ban Act, signed into law by President George W. Bush in 2003. Under the ban, physicians can be punished for knowingly performing an abortion using techniques labeled "partial-birth abortion." Congress was attempting to bring an end to a class of procedures that second- and third-trimester abortion providers sometimes term D&X (short for "dilation and extraction") or intact D&E (short for "intact dilation and evacuation").[2] Written by Justice Anthony Kennedy, the majority opinion in *Gonzales* is mired in the atmospherics of maternalism and paternalism. Justice Kennedy's maternalism and paternalism do not countenance the possibility that a sane and ethical woman could knowingly approve the destruction of her living fetus once it has been coaxed halfway through her cervix.

The Partial-Birth Abortion Ban Act criminalizes abortions in which a living viable or living non-viable fetus is killed after its head or abdomen passes from the womb through the cervix. The Act includes an exception for abortions necessary to save the lives of pregnant women, but no exception for women's health. Abortion-rights advocacy groups went to court to oppose the "partial-birth" ban.[3] They feared the Act would set the nation on a slippery slope toward the re-criminalization of most abortions. They also feared that authorities could interpret the Act to prohibit medically safe best practices. The Act's opponents maintained before the Supreme Court that the Act was unconstitutionally vague, like the Nebraska law the Court struck down a few years earlier in *Stenberg vs. Carhart*. Opponents further argued that by proscribing medically safe and popular D&E abortions of non-viable fetuses and by not including a maternal health exception, the Act imposed an "undue burden" on the woman's right to choose, in violation of *Planned Parenthood v. Casey*.

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[2] The terminology is confusing. See http://en.wikipedia.org/wiki/Intact_dilation_and_extraction, last visited August 29, 2007.

[3] *Gonzales v. Carhart* and *Gonzales v. Planned Parenthood* were joined as *Gonzales v. Carhart*. See 2007 WL 1135596.

Since *Roe v. Wade,* women in the United States have enjoyed a right against categorical criminalization of medically safe abortions. At least one million U.S. women obtain "surgical" or "medical" abortions each year from professional health care providers. Typical abortions are $300 "surgical" abortions obtained in the first-trimester of pregnancy. Most surgical abortions involve inserting a device through the woman's cervix and suctioning the contents of the uterus. In a "medical" abortion a woman who is one to two months pregnant ingests prescribed drugs (usually methotrexate and mifepristone) that cause her fetus to be expelled from her body over a period of days in a manner akin to a natural spontaneous miscarriage.

The essential holding of *Roe v. Wade* was affirmed in 1992 in *Planned Parenthood v. Casey*. But *Casey* also held that government may establish abortion restrictions, including waiting periods, that do not "unduly burden" the right to elect abortion.[4] Even before *Casey*, the Court had concluded that states and the federal government may express through their laws and policies a preference for childbearing over abortion.[5] States may assert an interest in protecting the life from the moment of conception and may regulate abortion in the interest of women's health. Abortion "privacy" is being replaced by abortion paternalism.

The *Gonzales* Court held 5 to 4 that the Partial-Birth Abortion Ban Act is constitutionally valid. Justice Kennedy reasoned, first, that the Act is not unconstitutionally vague since "Doctors performing D&E will know that if they do not deliver a living fetus to an anatomical landmark they will not face criminal liability." (*Gonzales*: xx) Second, the Act is not unduly burdensome because it does not prohibit most or all abortions and cannot be read to do so. The Act proscribes only those D&E abortions performed both intentionally (not accidentally) and by killing an intact fetus whose head (or abdomen) has been delivered past the cervix. Justice Kennedy acknowledged that *Casey* upheld *Roe*. Yet, under the holding of *Casey*, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." (Ibid: xx) Justice Kennedy further argued that the Act does not require a health exception because there are alternatives to the banned procedure. The Court noted that neither an injection to induce vaginal expulsion of a non-viable living fetus, nor surgery to remove the non-viable fetus, is banned by the Act.

III.

Kennedy's opinion is striking for the extent of its paternalism and maternalism. According to the justice, "Respect for human life finds an ultimate expression in the bond of love the mother has for her child." (Ibid: xx) Might respect for human life find another ultimate expression in deference governments shows toward the morally autonomous decisions adult women and their partners make about their own lives and families? Kennedy takes the ascribed "bond of love" to explain why women must surely go a little crazy after an abortion and especially a partial-birth abortion.

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[4] See *Planned Parenthood v. Danforth* and *Hodgson* (upholding parental notice requriements).

[5] See *Webster* and *Rust*.

Kennedy had no hard data to support his maternalist assumptions. But in a superficially realist spirit of adjudication-guided-by-data Kennedy provided two medical professionals' descriptions of "partial-birth" abortion. The first was a clinical account of the abortionist's technique:

> The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it …through the cervix and vagina… .The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. . . . Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed. . . . (Ibid: xx)

The second account of abortion was a more feminine narrative, appropriately sincere and tender-hearted. He quoted a nurse who witnessed a procedure to abort a 26-week old "baby" performed by a Dr. W. Martin Haskell:

> Dr. Haskell went in with forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms – everything but the head. The doctor kept the head right inside the uterus. . . . The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp. . . . He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had just used. (Ibid: xx)

Justice Kennedy was working on emotions, as much as offering facts. He was inviting readers to share his belief that the intact D&E or D&X procedures on living fetuses are ghoulish, something a true "mother" would recoil at discovering her physician had done to her unborn "child." In Kennedy's words:

> 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. (Ibid: xx)

Justice Kennedy knows that "mothers" voluntarily seek out physicians to fatally abort their children. Yet, he wants to believe they are naturally tender on matters relating to children. Kennedy surmises that "mothers" would likely be disturbed by partial-birth abortion and unwilling to consent to the D&X procedure if properly disclosed by a physician. There are many reasons to doubt this assumption. First of all, a woman whose belly is swollen with a pregnancy knows what lies therein

(namely, a living human form); and she knows that there are only a limited number of ways to remove it. When abortion was illegal, a desperate woman might insert coat hangers and knitting needles through her own cervix to kill her fetus. She might fling herself down flights of stairs toward the same end. Women understand basic anatomy and are grateful that modern physicians can safely do what they themselves cannot safely do on their own. Women generally understand, I would submit, that after the first trimester of pregnancy, the body of a fetus (baby) has to be physically removed or made to come out on its own, through a small opening. Women know that physicians do not use lasers beams to neatly and painlessly vaporize the unwanted unborn.

Second, a woman might rationally believe that the D&X procedure is the best and safest procedure available for the termination of a pregnancy she believes is vitally important to herself or loved ones. This belief may override any tendency toward squeamishness. A woman may regard a partial-birth abortion as a lesser of two evils, if an evil at all. Women's morality of killing as applied to abortion is like men's morality of killing applied to war – subtle and contextual.

Third, women are not especially squeamish about surgical procedures. Women elect cosmetic procedures on their own bodies that are extremely risky, invasive and gruesome to witness and describe. Women authorize invasive heart, brain and transplant surgeries on their children, disabled spouses and elderly parents, when they believe removing the top of a skill, sawing open a sternum or taking out a liver, is the best option. Women are accustomed to blood and tissue exiting their vaginas, as part of the menses. Some women prefer untidy, painful drawn-out medical abortions despite the requirement that they examine bloody discharge from their own bodies to look for the expelled embryo.

It is not the culture of medicine for physicians to be as explicit with patients as they are with one another. Still, health-care consumers appreciate fully informed consent. Many people, male and female, who discover that their consent to a medical procedure was not fully informed are angry or unhappy. The common law validates these reactions by recognizing that a procedure performed without informed consent is battery and medical negligence. We do not ordinarily think that we should ban elective or medically necessary surgical procedures because they could potentially be performed without fully informed consent. We typically demand fully informed consent instead. Yet Justice Kennedy seemed to reason that the possibility that physicians will not spell out the details of the D&X abortion technique is a reason to ban the technique altogether.

IV.

She a mother and the sole woman on the Supreme Court after the retirement of Justice Sandra Day O'Connor, Justice Ruth Bader Ginsburg could see through Kennedy's analysis. She recognized Kennedy's maternalism and paternalism for what they are. "This way of thinking," she wrote in an animated dissent, "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." She appropriately cited the discredited *Muller v. Oregon*, which upheld "protective" legislation imposing work-hour limitations on women in view of the supposed "physical structure and a proper discharge of her maternal funct[ion]." (*Muller*: 422-23) Ginsburg also cited the infamous *Bradwell v. State*, in which the Supreme Court upheld an Illinois statute denying women the right to practice law. Citing (his conception of) natural law, Justice Bradley concurred in *Bradwell*:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother." (*Bradwell*: 141)

Bradwell rather than *Casey* is the real precedent for Justice Kennedy's analysis in *Gonzales*. Justice Kennedy was sadly out of step with the times and with court decisions of recent decades that disallow "archaic and overbroad generalizations . . . such as assumptions as to [women's] dependency" (*Califano*: 207) and "overbroad generalizations" about the "talents, capacities, or preferences" of women that "have . . . impeded . . . women's progress toward full citizenship stature throughout our Nation's history." (*U.S. v. Virginia*: 543, n.12) Kennedy seemed to miss the egalitarian strand of *Casey*, which he repeatedly cited to support restrictions on abortion. Justice Ginsburg made the point:

> Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped … on her own conception of her spiritual imperatives and her place in society." Casey, 505 U. S., at 852. See also id., at 877 (plurality opinion) ("[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."). (*Gonzales*: xx)

Kennedy set aside realism's call for progressive reforms and scientific data in favor of natural law's self-evident metaphysic of true womanhood. Maternalism and paternalism demands unselfish motherhood and, for women, the guidance of male superiors. It is notable that the Partial Birth Abortion Ban Act criminalizes the conduct of abortionists, but not their female patients who are presumed to be uninformed or misinformed and therefore innocent. But women seeking abortions are probably no less informed that women seeking other medical procedures. They should not be presumed victims of cruel-minded clinicians wielding scissors of destruction. They should get no free pass from complicity and responsibility.

V.

Paternalism insults pregnant women, who make life-shaping choices every day. Women decide whether to place senile parents in a nursing home and pull the plug on their life support. Women decide whether to authorize experimental surgery for their children, and whether to prefer mastectomy to lumpectomy for themselves. Lawmakers should not suppose that special paternalistic intervention is needed in the abortion context that is not needed elsewhere when important decisions must be made. Where are all the guardians of women's safety when they are being sold risky variable-rate mortgages?

Today, American society seems prepared to presume women's competence to run their own lives and run for president; but abortion opponents rush to assume that women's psychological health must be in jeopardy if they abort. True women must naturally regret abortions, find them depressing. Women must therefore be discouraged from abortion, led to alternatives like horses to water. Ginsburg's dissent in *Gonzales* broke through all the tired, twisted 19th century nonsense of

women's health.

Of course a small minority of women bent on terminating the lives of their fetuses may well need paternalistic intervention. Women with mental illnesses, for example, may be unable to manage pregnancy on their own. A 37-year old business-woman with four living children, Christy Freeman hid four dead fetuses on her property. Freeman may have intentionally caused four separate stillborn births. Or maybe products of natural miscarriages were a kind of fetish for her disjointed maternalism. The four corpses were discovered after Freeman, covered with bruises and showing signs of having given birth, appeared at a hospital near her Ocean City, Maryland home without a baby. Police discovered a recently deceased 26-week old male fetus in Freeman's home wrapped in a towel under her bathroom vanity, another in her Winnebago, and two others wrapped in plastic in a trunk. Freeman was charged with the murder of the recently deceased male fetus, although she:

> told police she had delivered a deformed baby, which she called "gloopity glop," and that she had flushed the fetus down the toilet. According to the charging documents, though, the baby was a "viable fetus/infant," with hands, feet and facial features. ("Investigators")

A minority of women need to be protected from self-harm and cruelty. We can reject maternalism and paternalism in abortion law without denying this reality. Some unfortunate women like Christy Freeman need serious help making choices and coping with the consequences of their choices, but the Court should not water-down *Roe v. Wade* on their account.

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