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2010

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### Repository Citation

Hill, B. Jessie, "Dangerous Terrain: Mapping the Female Body in *Gonzales v. Carhart*" (2010). *Faculty Publications*. 76.

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# DANGEROUS TERRAIN: MAPPING THE FEMALE BODY IN *GONZALES V. CARHART*

B. JESSIE HILL\*

The body occupies an ambiguous position within the law. It is, in one sense, the quintessential object of state regulatory and police power.<sup>1</sup> The body is the object that the state acts both upon and for; the body of the individual may, indeed, be subject to regulation and even physical intrusion in the name of the state's power and duty to protect the health and safety of the "body politic."<sup>2</sup> At the same time, the body is often constructed<sup>3</sup> in legal discourse as the site of personhood—our most intimate, sacred, and inviolate possession—implying that it is in some sense beyond the reach of the law.<sup>4</sup>

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<sup>1</sup> See, e.g., Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605 (1986) ("[T]he normative world building which constitutes 'Law' is never just a mental or spiritual act. A legal world is built only to the extent that there are commitments that place bodies on the line. . . . [T]he interpretive commitments of officials are realized, indeed, in the flesh."); Carl F. Stychin, *Body Talk: Rethinking Autonomy, Commodification and the Embodied Legal Self*, in FEMINIST PERSPECTIVES ON HEALTH CARE LAW 211, 214–15 (Sally Sheldon & Michael Thomson eds., 1998) (explaining that "in order for the law to function at all it must first and foremost have a hold over bodies") (quoting PHENG CHEAH, ET AL., THINKING THROUGH THE BODY OF LAW xv (1996) (internal quotation marks omitted)).

<sup>2</sup> See, e.g., Wendy E. Parmet, *From Slaughterhouse to Lochner: The Rise and Fall of the Constitutionalization of Public Health*, 40 AM. J. LEGAL HIST. 476, 494–96 (1996) (discussing the constitutionality of mandatory vaccination).

<sup>3</sup> The term "constructed" is used advisedly here, with the intention of drawing on a large body of critical theory that conceives of various types of discourse, including legal discourse, as rhetorically creating a particular reality as much as it describes that reality. It suggests, moreover, that there is nothing natural or inevitable about how discourses such as legal discourse talk about bodies. See generally ALAN HYDE, BODIES OF LAW 3–4 (1997) (describing the act of discursively constructing the body in law); cf. Stychin, *supra* note 1, at 213 (noting that bodies "have been culturally 'produced' by discourses such as law in different ways").

<sup>4</sup> HYDE, *supra* note 3, at 89–90; Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 198–201 (1995).

The inherent tension between these two concepts of the body permeates the law, but it is perhaps nowhere more prominent than in the constitutional doctrine pertaining to abortion. Abortion is one of the most heavily regulated medical procedures in the United States, and yet it is at the same time the subject of relatively robust constitutional privacy protections—often even treated as synonymous with the word “privacy” itself.<sup>5</sup>

This brief Article focuses on the rhetoric of the body in abortion law and more specifically on how the Supreme Court’s language constructs the female body in the recent case of *Gonzales v. Carhart*,<sup>6</sup> which upheld the federal Partial Birth Abortion Ban Act (“PBABA”)<sup>7</sup> against a constitutional challenge.<sup>8</sup> A number of commentators have already remarked on the troubling rhetoric employed by Justice Kennedy’s majority opinion in that case, primarily because of its paternalistic and sentimental view of motherhood.<sup>9</sup> But the focus of this Article is on the often overlooked, yet equally striking, language of the Court’s opinion that graphically describes and details the regulated abortion procedure itself.

Part I of this Article briefly explains the background of *Gonzales*, describing both the “partial-birth” abortion law at issue in that case and the relevant constitutional doctrine. Part II then delves into the language of the opinion, with a particular emphasis on the technical portions of the Court’s opinion detailing the abortion procedure and explaining how that procedure is regulated by the challenged law. Part II draws from that rhetoric several themes: disappearance, dismemberment, and displacement of borders. These themes intertwine to construct the female body as a sort of geographical space, a dangerous terrain that not only permits but also requires regulation. Although these themes in part reflect the insights of many other feminist scholars and the motifs that they, too, have uncovered in abortion regulation and rhetoric, this Article contends that *Gonzales*

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<sup>5</sup> See, e.g., Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS. L. REV. 715, 739–41 (2010) (noting that in political discourse, the “right to privacy” is basically synonymous with the right to choose abortion).

<sup>6</sup> 550 U.S. 124 (2007) (*Carhart II*). This Article will also discuss the Supreme Court’s earlier “partial-birth” abortion case, *Stenberg v. Carhart*, 530 U.S. 914 (2000) (*Carhart I*), but the emphasis will be on the unusual rhetoric of the more recent (and therefore probably more important) case.

<sup>7</sup> 18 U.S.C.A. § 1531(a) (West 2010).

<sup>8</sup> *Carhart II*, 550 U.S. at 168.

<sup>9</sup> See *infra* note 29 and sources cited therein.

represents a uniquely literal and uniquely visual representation of those concepts. Indeed, this Article argues that the notions of disappearance, dismemberment, and displacement of borders are united by their association with this case's uniquely graphic—that is to say visual—approach. Part III concludes with some brief reflections on the meaning of the Court's language in the context of abortion law in general.

### I. THE LEGISLATIVE AND DOCTRINAL BACKDROP

In *Gonzales v. Carhart*, a 5–4 decision written by Justice Anthony Kennedy, the U.S. Supreme Court upheld the federal Partial Birth Abortion Ban Act of 2003 against constitutional challenge.<sup>10</sup> The federal PBABA imposes criminal and civil penalties—including up to two years' imprisonment—on any physician performing a particular abortion procedure.<sup>11</sup> The regulated procedure is known medically as “dilation and extraction,” “D&X,” “intact dilation and evacuation,” or “intact D&E,” but is often referred to, in more politically charged terms, as “partial-birth abortion.”<sup>12</sup> That procedure is defined in the Act as:

deliberately and intentionally vaginally deliver[ing] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and . . . perform[ing] the overt act, other than completion of delivery, that kills the partially delivered living fetus.<sup>13</sup>

Because the procedure may be used as early as sixteen weeks' gestation, the ban thus has both pre-viability and post-viability

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<sup>10</sup> *Carhart II*, 550 U.S. at 168.

<sup>11</sup> Partial Birth Abortion Ban Act, 18 U.S.C.A. §§ 1531(a), 1531(c) (2009). In order to be covered by the PBABA, the abortion must be one “in or affecting interstate or foreign commerce.” 18 U.S.C.A. § 1531(a) (West 2010).

<sup>12</sup> *Carhart II*, 550 U.S. at 136–37; Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 440 n.2 (S.D.N.Y. 2004); Gail Glidewell, Note, “*Partial Birth*” Abortion and the Health Exception: Protecting Maternal Health or Risking Abortion on Demand?, 28 FORDHAM URB. L.J. 1089, 1095 (2001) (explaining the politically charged nature of the term “partial-birth abortion”).

<sup>13</sup> 18 U.S.C.A. § 1531(b)(1)(A)–(B) (West 2010).

application.<sup>14</sup> Importantly, numerous medical authorities confirm—though the Government disputed—that the procedure is safer than the available alternatives for women with certain medical or physiological conditions.<sup>15</sup>

The plaintiffs had challenged the law on several grounds, but the *Gonzales* Court considered only three alleged flaws. First, the law lacked an exception allowing the procedure to be performed where necessary to preserve the health of the woman; second, it was void for vagueness in its description of the regulated procedure; and third, it imposed an undue burden on the abortion right because it was written so broadly as to sweep within its prohibition the most common second-trimester abortion procedure, known simply as dilation and evacuation (D&E).<sup>16</sup> The Court rejected all of those claims, at least insofar as they were presented in the context of a facial challenge, and kept the federal ban in place.<sup>17</sup>

In doing so, however, the Court was not writing on a blank slate. The Supreme Court had already resolved nearly identical questions, in a nearly identical case, quite differently seven years earlier. In *Stenberg v. Carhart*, by a 5–4 vote (with Justice Kennedy in dissent), the Court had held Nebraska’s “partial-birth abortion” law unconstitutional due to the overbroad language of its prohibition and its lack of a health exception.<sup>18</sup> When the Nebraska ban fell, so did numerous other states’ laws by implication, as they, too, contained one or both of those flaws.<sup>19</sup> The federal law was thus in some sense a response to the Court’s holding in *Stenberg*, though not exclusively motivated by that opinion.<sup>20</sup> Congress had passed similar bills in 1996 and 1997, but they were met with vetoes by President Clinton.<sup>21</sup> Perhaps enraged by the Court’s holding in *Stenberg*, but also likely emboldened by the election of Republican President George W.

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<sup>14</sup> *Stenberg v. Carhart*, 530 U.S. 914, 927 (2000) (*Carhart I*).

<sup>15</sup> *Carhart II*, 550 U.S. at 162–63; *Carhart I*, 530 U.S. at 936.

<sup>16</sup> *Carhart II*, 550 U.S. at 143–45; see generally *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992) (plurality op.) (holding that an abortion regulation is unconstitutional if it imposes an undue burden on the exercise of the abortion right).

<sup>17</sup> *Carhart II*, 550 U.S. at 167–68.

<sup>18</sup> *Carhart I*, 530 U.S. at 937–38.

<sup>19</sup> *Carhart II*, 550 U.S. at 140 (citing *Carhart I*, 530 U.S. at 995–96 & nn. 12–13 (Thomas, J., dissenting)).

<sup>20</sup> *Id.* at 141.

<sup>21</sup> *Id.* at 140–41.

Bush, who had stated his support for the law during the presidential campaign,<sup>22</sup> as well as by the likelihood—soon come to fruition—that that President would have the opportunity to appoint at least one Supreme Court Justice,<sup>23</sup> Congress tried again and finally succeeded in passing a federal “partial-birth” abortion ban in 2003.<sup>24</sup> That ban contained more precise language describing the forbidden procedure than the unconstitutional Nebraska ban. But rather than including a health exception and thereby fully complying with the Supreme Court’s holding in *Stenberg*, Congress included a long list of “findings” purporting to demonstrate that the health exception was not needed.<sup>25</sup>

Given this background, commentators have remarked upon the apparent inconsistencies in the Supreme Court’s decision in the second “partial-birth” abortion case.<sup>26</sup> First, despite the Supreme Court’s clear holding in *Stenberg* that the ban was unconstitutional without a health exception, Congress did not include a health exception in the 2003 Act. The Supreme Court nonetheless upheld the Act in *Gonzales* without explicitly overruling *Stenberg*.<sup>27</sup> Second, despite the fact that the Court had struck the statute on its face in *Stenberg*, it asserted the inappropriateness of a facial

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<sup>22</sup> Glidewell, *supra* note 12, at 1089.

<sup>23</sup> In 2006, Justice Sandra Day O’Connor retired. Her vote had been critical in striking down the Nebraska ban in *Stenberg v. Carhart*, and her replacement Samuel Alito was widely understood to be more likely to vote to uphold the federal PBABA. *See, e.g., Supreme Court Considers Federal Ban on Disputed Abortion Procedure*, USA TODAY, Nov. 8, 2006, available at [http://www.usatoday.com/news/washington/judicial/2006-11-08-scoturs-abortion\\_x.htm](http://www.usatoday.com/news/washington/judicial/2006-11-08-scoturs-abortion_x.htm).

<sup>24</sup> *Carhart II*, 550 U.S. at 141. For a useful overview of the history and background of the federal PBABA, see David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, 2007 SUP. CT. REV. 1, 2–5.

<sup>25</sup> Partial-Birth Abortion Ban Act of 2003, 108th Cong., Pub. L. No. 108-105 at \*2 (2006).

<sup>26</sup> *See, e.g.,* Caitlin Borgmann, *Judicial Evasion and Disingenuous Legislative Appeals to Science in the Abortion Controversy*, 17 J.L. & POL’Y 15, 26–27 (2008); B. Jessie Hill, *A Radically Immodest Judicial Modesty: The End of Facial Challenges to Abortion Regulations and the Future of the Health Exception in the Roberts Era*, 59 CASE W. RES. L. REV. (forthcoming 2010); Maya Manian, *Rights, Remedies, and Facial Challenges*, 36 HASTINGS CONST. L.Q. 611, 616 (2009).

<sup>27</sup> *See* Manian, *supra* note 26, at 616.

challenge in the nearly identical later case without convincingly distinguishing *Stenberg*.<sup>28</sup>

In addition, commentators have remarked upon Justice Kennedy's rhetoric. In particular, many scholars were troubled by the passage in which Justice Kennedy invoked the "bond of love the mother has for her child" as a basis for concluding that some women are likely to regret their abortion decision.<sup>29</sup> According to the Court, this potential for regret in turn justifies protecting women from their choice to terminate a pregnancy, since:

[i]t 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.<sup>30</sup>

As Justice Ginsburg rightly points out in her *Gonzales* dissent, this language draws on archaic and discredited stereotypes about women's roles in society—casting the woman as a "mother" who will, almost by nature, regret the decision to reject a relationship with her "child."<sup>31</sup> It also raises the question why Justice Kennedy did not—in light of his concerns about women's lack of knowledge about the intact D&E procedure—advocate "requir[ing] doctors to inform women, accurately and adequately, of the different procedures and their attendant risks" rather than "depriv[ing] women of the right to make an autonomous choice, even at the expense of their safety."<sup>32</sup>

The paternalistic and romanticized sentiment conveyed by Justice Kennedy's flowery language is no doubt troubling for its implications regarding his, and the Court's, attitude toward the meaning of the abortion

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<sup>28</sup> See Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L.J. 773, 778 (2009).

<sup>29</sup> *Carhart II*, 550 U.S. at 159. For critical commentary on this language, see, for example, Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 423, 426 (2007); Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 254–62 (2009); and Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Expression*, 56 EMORY L.J. 815, 837–38 (2007).

<sup>30</sup> *Carhart II*, 550 U.S. at 159–60.

<sup>31</sup> *Id.* at 185 (Ginsburg, J., dissenting).

<sup>32</sup> *Id.* at 184 (Ginsburg, J., dissenting).

decision and the conditions under which it is often made.<sup>33</sup> But there is another aspect of this language that is striking—namely, the way it invokes, amid its linguistic flourishes, the image of the “doctor . . . pierc[ing] the skull and vacuum[ing] the fast-developing brain of [the] unborn child” who, like an actual child, “assume[s] the human form.” This graphic—indeed, horrifying—image of a “child” having its brain suctioned out while the unknowing mother absently permits this crime to occur echoes the Court’s earlier description of the intact D&E procedure itself. The Court’s language in the “bond of love” passage almost obsessively repeats and re-enacts the earlier description using the same graphic, almost voyeuristic style. It is to that earlier description that this Article now turns.

## II. DISAPPEARANCE, DISMEMBERMENT, AND DISPLACEMENT OF BOUNDARIES: THE COURT’S RHETORIC IN *GONZALES V. CARHART*

The graphically explicit, at times even gory, language of the so-called “partial-birth abortion” cases is challenging for both readers and scholars. Even the most pro-choice of readers may find themselves wanting to avert their eyes from the page. Indeed, the Court, in both cases, issued perfunctory apologies for the necessity of its graphic detail: in *Stenberg*, the Court asserted that it “must describe and then discuss several different abortion procedures.”<sup>34</sup> Acknowledging that its “discussion may seem clinically cold or callous to some, perhaps horrifying to others,” the Court nonetheless regretfully explained that “[t]here is no alternative way . . . to acquaint the reader with the technical distinctions among different abortion methods and related factual matters, upon which the outcome of this case depends.”<sup>35</sup> The “technical detail” in which the Court discusses the abortion procedures is thus unavoidable and required by the nature of the case itself.<sup>36</sup> The *Gonzales* Court’s apology was briefer, incorporating by

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<sup>33</sup> See, e.g., David A. Grimes, *The Continuing Need for Late Abortion*, 280 JAMA 747, 748–49 (1998) (discussing the reasons, such as serious maternal illness or severe fetal anomalies, why abortions are sometimes performed after twenty-one weeks’ gestation).

<sup>34</sup> *Stenberg v. Carhart*, 530 U.S. 914, 923 (2000) (*Carhart I*).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* It perhaps bears noting, however, that the Court has previously considered a challenge to a ban on a method of abortion without finding it necessary to describe the procedure in graphic detail. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75–79 (1976) (holding unconstitutional a ban on the saline amniocentesis method of abortion).

reference its earlier excuse: “The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in *Stenberg*, to discuss abortion procedures in some detail.”<sup>37</sup> Yet it is possible that there is something more to this language than mere necessity. Drawing on that intuition, this Part engages in a close reading of *Gonzales*’ description of the prohibited abortion act itself.

The description of intact D&E itself, after the preliminary apology for what follows and some verbal hemming and hawing about the proper terminology, occupies approximately three pages of the U.S. reporter.<sup>38</sup> Immediately preceding this relatively lengthy medical exposition are very brief descriptions of the most common first-trimester procedures: one sentence each is spent explaining vacuum aspiration and medical abortion, and a lengthier (almost two pages) description of dilation and evacuation. Dilation and evacuation is the most common second-trimester abortion method, which bears some resemblances to the intact D&E procedure, both in terms of the nature of the procedure itself and the disturbing quality of the Court’s depiction of it.<sup>39</sup> After the Court’s medical description of intact D&E, a short one-paragraph summary notes the less-commonly used techniques of induction, hysterotomy, and hysterectomy.<sup>40</sup>

The Court’s language combines a highly technical delineation of the procedure with emotionally evocative passages. The Court juxtaposes medical terminology and quotations from scientific materials with far less technical, more inflammatory language. For example, the Court quotes first from physicians’ descriptions of how they perform the intact D&E. Thus, the Court explains that “in an intact D&E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body,” rather than removing it in parts, as in a standard D&E.<sup>41</sup> Because breech positioning of the fetus makes intact removal easier, the fetus may be rotated if it is not already in that position; then “the fetus’ head lodges in the cervix, and

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Like the PBABA, the ban at issue in *Danforth* was challenged on the ground that it threatened maternal health; it was not challenged on the ground that the law’s description of the banned procedure was vague or overbroad, however. *Id.*

<sup>37</sup> *Gonzales v. Carhart*, 550 U.S. 124, 134 (2007) (*Carhart II*).

<sup>38</sup> *Id.* at 137–40.

<sup>39</sup> *Id.* at 135–36.

<sup>40</sup> *Id.* at 140.

<sup>41</sup> *Id.* at 137.

dilation is insufficient to allow it to pass.”<sup>42</sup> The Court then proceeds to quote from one physician’s clinical description, aimed at an audience of practitioners, in which a detailed process is set forth for inserting a suction tube into the fetus’s cranium, removing brain tissue, and collapsing the skull to remove the fetus intact.<sup>43</sup>

The Court follows this highly technical discourse with a description “from a nurse who witnessed the same method on a 26-1/2 week fetus and who testified before the Senate Judiciary Committee.”<sup>44</sup> The latter remarks use the term “baby” throughout and describe “[t]he baby’s little fingers . . . clasping and unclasping” and “his little feet . . . kicking,” until the doctor “stuck the scissors in the back of his head,” causing it to “startle” or “flinch, like a baby does when he thinks he is going to fall,” and then “sucked the baby’s brains out” with a suction tube, causing “the baby” to go “completely limp.”<sup>45</sup> The doctor then “threw” the “baby,” placenta, and instruments into a pan.<sup>46</sup> The opinion then returns to a brief description of technical variations on the described procedure, one in which the fetus’ cranial contents may not be entirely suctioned out, and one in which the skull is separated from the body and removed separately. Moreover, the opinion juxtaposes the medical language of “extract[ing] the fetus” with “ripping it apart,” and the medical language of “disarticulat[ion]” with the gory and evocative “decapitat[ion].”<sup>47</sup> The juxtaposition and alternation of the technical, jargon-filled medical discourse with this more emotional lay discourse seems to give them equal descriptive status and power in the Court’s opinion, as if each is struggling for control of the relevant narrative,

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<sup>42</sup> *Id.* at 137–38.

<sup>43</sup> *Carhart II*, 550 U.S. at 138 (quoting H.R. Rep. No. 108-58, at 3 (2003) (quoting Martin Haskell, M.D., *Dilation and Extraction for Late Second Trimester Abortions*, Presented at the National Abortion Federation Risk Management Seminar (September 13, 1992), in *SECOND TRIMESTER ABORTION: FROM EVERY ANGLE* 27, 30-31 (1992))).

<sup>44</sup> *Id.* at 137–39.

<sup>45</sup> *Id.* (quoting H.R. Rep. No. 108-58, at 3 (2003)).

<sup>46</sup> *Id.* Perhaps because they would have detracted from the persuasive force of the witness’s words, the Court omitted the last two lines of the nurse’s testimony, in which she claimed, “I saw the baby move in the pan. I asked another nurse, and she said it was just reflexes. . . . That baby boy had the most perfect angelic face I think I have ever seen in my life.” H.R. Rep. No. 108-58, at 3 (2003).

<sup>47</sup> *Carhart II*, 550 U.S. at 137, 139.

or perhaps such that each reinforces the authority of the other.<sup>48</sup> Moreover, the coupling of different rhetorical styles in the Court's description can be viewed as a kind of repetition or duplication of the central act described in the opinion, figured as a kind of murderous surgery, or a medicalized murder. Indeed, this murder is repeated again and again throughout the Court's opinion—both in Justice Kennedy's repeated references to it<sup>49</sup> and, as described below, in the Court's description of the woman's body, which dismembers that body and causes it to disappear.

The foregoing account may be contrasted somewhat with that of *Stenberg v. Carhart*, which, though also highly technical, occupies less than two full pages and consists primarily of paraphrasing of testimony put on by the plaintiffs and the descriptions of the procedure by the American College of Obstetricians and Gynecologists ("ACOG").<sup>50</sup> The *Stenberg* Court summarized the procedure dryly as follows:

[I]t begins with induced dilation of the cervix. The procedure then involves removing the fetus from the uterus through the cervix "intact." . . . The intact D&E proceeds in one of two ways, depending on the presentation of the fetus. If the fetus presents head first (a vertex presentation), the doctor collapses the skull; and the doctor then extracts the entire fetus through the cervix. If the fetus presents feet first (a breech presentation), the doctor pulls the fetal body through the cervix, collapses the skull, and extracts the fetus through the cervix. The breech extraction version of the intact D&E is also known commonly as "dilation and extraction," or D&X.<sup>51</sup>

The *Stenberg* Court then noted a slight variation on the procedure, which requires the physician to convert the fetus to breech presentation in all cases, and included the equally impersonal ACOG description of that

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<sup>48</sup> Cf. Rosalind Pollack Petchesky, *Fetal Images: The Power of Visual Culture in the Politics of Reproduction*, 13 FEMINIST STUD. 263, 266–67 (1987) (discussing the two abortion texts—one scientific and one moral—that comprise the antiabortion film *The Silent Scream* and suggesting that the medical aspects "both obscure[] and reinforce[] a coded set of messages that work as political signs and moral injunctions").

<sup>49</sup> *Carhart II*, 550 U.S. at 137–40, 159–60.

<sup>50</sup> *Stenberg v. Carhart*, 530 U.S. 914, 927–28 (2000) (*Carhart I*).

<sup>51</sup> *Id.* at 927 (citations omitted) (quoting *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1105 (D. Neb. 1998) (citing testimony of plaintiff and plaintiff's expert)).

version.<sup>52</sup> Though less lengthy and less emotive than the *Gonzales* Court's opinion, the *Stenberg* Court's description nonetheless again replicates its simultaneously graphic and highly technical language.

There is something disturbing about this highly technical, highly detailed description of the abortion procedure—perhaps more disturbing than the emotional description, precisely because of its seemingly objective cast. It calls to mind what Rosalind Petchesky has called a “panoptics of the womb,” a space in which everything is visible and therefore subject to regulation or management from an impersonal distance.<sup>53</sup> The Court's excruciatingly detailed, step-by-step narrative of a medical procedure as it unfolds inside the woman's body possesses a uniquely visual, almost photographic quality: it appears to be at once objective and objectifying. It is a linguistic manifestation of the law's extraordinary degree of regulation

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<sup>52</sup> In particular, the ACOG description includes the following four steps: “1. deliberate dilatation of the cervix, usually over a sequence of days; 2. instrumental conversion of the fetus to a footling breech; 3. breech extraction of the body excepting the head; and 4. partial evacuation of the intracranial contents of a living fetus to effect vaginal delivery of a dead but otherwise intact fetus.” *Id.* at 928 (quoting American College of Obstetricians and Gynecologists Executive Board, Statement on Intact Dilatation and Extraction (Jan. 12, 1997)).

<sup>53</sup> Petchesky, *supra* note 48, at 277. The term “panoptics” comes from Michel Foucault's discussion of the panopticon, a prison design invented by Jeremy Bentham, in which it is possible to observe each prisoner at all times without the prisoner knowing whether she is being watched. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 200–03 (2d ed. 1995). Professor Petchesky was writing about the impact of fetal ultrasound imaging on the political culture surrounding abortion—an issue which has as much resonance today as in the 1980s, when her article was published. *See, e.g.*, Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 U.C.L.A. L. REV. 351 (2008) (analyzing the recent spate of state laws requiring women to view a fetal ultrasound before an abortion); *see also infra* text accompanying notes 111–115.

and management of this one particular medical procedure.<sup>54</sup> As discussed below, it also serves to justify that intensive regulation.<sup>55</sup>

Yet despite the graphic and seemingly thorough quality of the Court's description, the woman herself barely makes an appearance: the various methods of abortion are described as transactions that occur almost exclusively between the "doctor" and the "fetus." In approximately seven pages of the *United States Reports* devoted to these descriptions in *Gonzales*, the word "woman" appears only five times and only once in connection with the intact D&E procedure itself.<sup>56</sup> The words "fetal" and "fetus," by contrast, appear a total of forty-one times in those seven pages; the word "doctor," thirty-one times.<sup>57</sup> Thus, the procedure "begins with dilation of *the cervix*."<sup>58</sup> Then, "the doctor extracts the fetus in a way conducive to pulling out its entire body."<sup>59</sup> The place whence the fetus is extracted is not mentioned; the fetus, but not the woman, possesses a body in the Court's rhetoric. At several points, the fetus's head is described as being lodged in "the cervix," but the fetus is never described as being

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<sup>54</sup> See, e.g., Joshua E. Perry, *Partial Birth Biopolitics*, 11 DEPAUL J. HEALTH CARE L. 247, 253 (2008) ("Abortion is the biopolitical example *par excellence*—'a medical procedure every aspect of which is heavily regulated.'") (quoting John T. Parry, "Society Must Be [Regulated]": *Biopolitics and the Commerce Clause* in *Gonzales v. Raich*, 9 LEWIS & CLARK L. REV. 853, 872 (2005)). It is, of course, particularly problematic that this extensive apparatus of regulation is being deployed in a way that threatens women's health for the benefit of purported state interests in the highly general concept of "the dignity of [unborn] human life" and "the effects on the medical community and on its reputation caused by the practice of partial-birth abortion," *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007) (*Carhart II*), rather than in a way that promotes greater public and personal health and safety, see Perry, *supra* at 256–57.

<sup>55</sup> See *infra* text accompanying notes 68–100.

<sup>56</sup> *Carhart II*, 550 U.S. at 134–40. Nor does the word "mother" appear at all in that passage as a substitute for "woman." The word "patient" appears twice: once in connection with standard D&E, *id.* at 135 (noting that the amount of dilation during a D&E is not uniform "and a doctor does not know in advance how an individual patient will respond"), and once in a direct quote from a physician's description of the procedure. *Id.* at 136 ("With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.").

<sup>57</sup> *Id.* at 134–40.

<sup>58</sup> *Id.* at 137 (emphasis added); see also *id.* at 137 ("[S]ome doctors . . . may attempt to dilate the cervix to a greater degree.").

<sup>59</sup> *Id.*

removed from the “woman’s body” or the “woman” herself.<sup>60</sup> Indeed, the Court says only that the fetus “pass[es] through” or “is removed.”<sup>61</sup> It is as if the woman is a mere bystander or perhaps not present at all.<sup>62</sup> The female body is not so much a corporeal entity as a geographic space in which the drama plays out between the fetus and the doctor.<sup>63</sup>

Yet, the *Gonzales* Court is not alone in erasing the woman from the scene. Although the Court was substantially more solicitous of women’s rights and health in *Stenberg v. Carhart*, and though the Court began its opinion by speaking in general terms about women’s equality,<sup>64</sup> the word “woman” does not appear even one time in the Court’s similarly lengthy description of abortion methods in that case. One might thus attribute the

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<sup>60</sup> *Id.* at 137–39.

<sup>61</sup> *Id.* at 139, 140. The Court’s description in *Gonzales* may be contrasted with the lower court’s description in *Planned Parenthood Fed’n v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *aff’d* 435 F.3d 1163 (9th Cir. 2006), *rev’d sub nom.* *Gonzales v. Carhart*, 550 U.S. 124 (2007) (*Carhart II*). Though the district court’s opinion on the constitutionality of the federal PBABA in that case occupied roughly eighty pages of the *Federal Supplement*, the court spent only one page describing the procedure itself. *Id.* at 964. In that description, the court explained that “the woman’s cervix is dilated . . . ; the physician inserts forceps into the woman’s uterus [and possibly repositions the fetus]; the fetus is extracted intact through the cervix and vagina until its head . . . is lodged at the cervical opening, or os; and . . . drains brain tissue . . . to the point at which it [the fetal head] can be extracted from the uterus.” *Id.* (emphasis added). The *Planned Parenthood* description thus contained more personal language (“the woman’s cervix”; “the woman’s uterus”), while still including some of the impersonal, detached language described above (“the cervix and vagina”; “the uterus”).

<sup>62</sup> *Cf.* Petchesky, *supra* note 48, at 277 (describing how fetal imaging transforms the pregnant woman into “the ‘site’ of the fetus, a passive spectator in her own pregnancy”).

<sup>63</sup> Other commentators have remarked on the disappearance of the woman, as well as her configuration as a mere environment for the fetus, in reproductive law and rhetoric. See, e.g., Drucilla Cornell, *Dismembered Selves and Wandering Wombs*, in LEFT LEGALISM/LEFT CRITIQUE 337, 348 (Wendy Brown & Janet Halley eds., 2002); Isabel Karpin, *Legislating the Female Body: Reproductive Technology and the Reconstructed Woman*, 3 COLUM. J. GENDER & L. 325, 327–28, 335, 343–47 (1992); Elizabeth Reilly, *The “Jurisprudence of Doubt”: How the Premises of the Supreme Court’s Abortion Jurisprudence Undermine Procreative Liberty*, 14 J.L. & POL’Y 757, 774–76 (1998); cf. HYDE, *supra* note 3, at 83 (noting that in *Roe v. Wade*, 410 U.S. 113 (1973), “the pregnant woman involved in the case has, discursively, no body at all”); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1443–44 (1992) (explaining that constitutional privacy doctrine fails to acknowledge the impact of laws “on the physical bodies of . . . actual, empirical individuals”).

<sup>64</sup> *Stenberg v. Carhart*, 530 U.S. 914, 920–21 (2000) (*Carhart I*).

disappearance of the woman to the Court's adoption of medical discourse rather than to conscious choice.<sup>65</sup> Relatedly, the federal PBABA uses the word "woman" only once, in one subsection, to clarify that "[a] woman upon whom a partial-birth abortion is performed may not be prosecuted under this section, for a conspiracy to violate this section, or for an offense . . . based on a violation of this section."<sup>66</sup> The "woman" is mentioned, in other words, only to exclude her from the statute's scope, as if the woman herself is not really the object of regulation; the "mother," on the other hand, makes repeated appearances in the statutory language.<sup>67</sup> Unlike the Court's descriptive language, then, the skewed rhetoric of the federal statute seems to result from a conscious political choice.

Moreover, the drama being played out between doctor and fetus is configured at the outset by the Court's language as a brutal, criminal act—a murder. The Court's opinion, like the Act itself, repeatedly uses various forms of the word "kill" to describe the doctor's actions.<sup>68</sup> In addition, the Court embraces the PBABA's term "overt act," which may suggest the criminal law of assault or conspiracy. Indeed, the reader cannot help but notice as well that what is occurring is mayhem and dismemberment, a "decapitati[on]" and "disarticulat[ion]."<sup>69</sup> This mayhem echoes Justice Thomas's dissent in *Stenberg*, in which he worries that a doctor, in order to circumvent the literal language of a "partial-birth" abortion prohibition that is written too narrowly, may "plung[e] scissors into the fetus' heart" in order to cause the fetus to die before it is fully enough extracted from the woman's uterus, or "chop[] off two fetal toes prior to completing the delivery" so that the State cannot argue "that the fetus was otherwise intact."<sup>70</sup> Such vivid imagery is difficult to read, exceeding the degree of

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<sup>65</sup> Cf. EMILY MARTIN, *THE WOMAN IN THE BODY: A CULTURAL ANALYSIS OF REPRODUCTION* 58–67 (1987) (analyzing how the woman is described in medical discourse as largely passive in or irrelevant to the process of giving birth).

<sup>66</sup> 18 U.S.C.A. § 1531(e) (West 2010).

<sup>67</sup> 18 U.S.C.A. §§ 1531(a), (b)(1)(A), (c)(1), (d)(1) (West 2010).

<sup>68</sup> 18 U.S.C.A. §§ 1531(a), (b)(1)(A), (b)(1)(B) (West 2010); *Carhart II*, 550 U.S. at 136, 139, 140.

<sup>69</sup> *Gonzales v. Carhart*, 550 U.S. 124, 139 (2007) (*Carhart II*).

<sup>70</sup> *Carhart I*, 530 U.S. at 1002 (Thomas, J., dissenting).

disturbing detail one is likely to find even in Supreme Court cases describing actual crimes of violence.<sup>71</sup>

After the graphic description of a criminal act, in which the woman herself is missing—she is just the frame, background, or terrain for this intensive description of what actually occurs inside her—the Court moves on to consider the “operation and effect” of the Act. Because the plaintiffs have made claims of vagueness and overbreadth, the Court must then decide which procedures are actually covered by the law. The Court’s rhetoric here, too, is strange and troubling, re-invoking many of the thematic elements just described.

First, the Court, again adopting the language of the Act, talks about “partial-birth abortion” as a procedure in which the fetus is killed once it is almost entirely “outside the body of the mother.”<sup>72</sup> This language manifests several themes that have appeared in existing feminist critiques of abortion law and “pro-life” rhetoric. Most obviously, saying that the fetus is largely “outside the body of the mother” grants the fetus a certain autonomy, as if it has already been born.<sup>73</sup> It also makes the woman unwillingly into a

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<sup>71</sup> Although the Author has not completed a comprehensive study of the language used in such cases—and comparisons are difficult to make in any case—it appears that the degree of gruesome detail in Supreme Court cases dealing with capital punishment, for example, rarely if ever equals or exceeds that found in *Gonzales*. For example, in *Uttecht v. Brown*, 551 U.S. 1 (2007), a death penalty case decided in the same Term as *Gonzales*, Justice Stevens’s dissent reprimands the Court (whose opinion was written again by Justice Kennedy) for “open[ing] its opinion with a graphic description of the underlying facts of respondent’s crime, perhaps in an attempt to startle the reader or muster moral support for its decision.” *Id.* at 35 (Stevens, J., dissenting). Yet the actual language to which Justice Stevens objects is as follows: “Respondent Cal Coburn Brown robbed, raped, tortured, and murdered one woman in Washington. Two days later, he robbed, raped, tortured, and attempted to murder a second woman in California.” *Id.* at 4–5. This language—which constitutes the full extent of the Court’s description of the underlying crimes—is substantially less detailed and visual than that of the *Gonzales* opinion. Justice Kennedy’s description of the underlying crime and resulting injuries to the victim is somewhat more graphic, however, in *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2646–47, 2648 (U.S. 2008), in which the Court held that the death penalty could not constitutionally be imposed for the rape of a child alone, *id.* at 2650–51.

<sup>72</sup> *Carhart II*, 550 U.S. at 148 (“[W]e agree, that if an abortion procedure does not involve the delivery of a living fetus to one of these ‘anatomical ‘landmarks’”—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply.”).

<sup>73</sup> See, e.g., Cornell, *supra* note 63, at 347–48; Petchesky, *supra* note 48, at 270, 272; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Regulation of Abortion and Questions of Equal Protection*, 44 STAN. L. REV. 261, 289–90, 325–27 (1992).

“mother,” since she has in some sense already given birth.<sup>74</sup> And it suggests that what is occurring here is murder or infanticide rather than an abortion. Indeed, this latter idea encapsulates precisely exactly what “partial-birth” abortion ban proponents argue: that the procedure may be regulated because it happens outside the woman’s body and therefore is more akin to infanticide than abortion.<sup>75</sup> Indeed, Justice Kennedy’s dissent in *Stenberg* had cited an American Medical Association fact sheet that suggests an ethical distinction between intact D&E and regular D&E because in the former procedure the fetus is “killed *outside* of the womb.”<sup>76</sup>

Perhaps even more importantly, though, the Court’s language is also plainly inexact, and even inaccurate. The technical description of the intact D&E abortion procedure has clearly indicated that the fetus must in fact be partially outside the woman’s cervix, but not outside her “body.”<sup>77</sup> Though the Court seems strangely loath to acknowledge it, there is, technically, something between the woman’s cervix and the outside world—namely, her vagina. And indeed, the Court’s opinion in *Stenberg*, like the statute at issue in that case, had described the fetus not as being

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<sup>74</sup> Cf. Sally Sheldon, “Who Is the Mother to Make the Judgment?”: *The Constructions of Woman in English Abortion Law*, 1 FEMINIST LEGAL STUD. 3, 9, 12–13, 15–17 (1993) (describing various ways in which British abortion legislation assumes motherhood to be woman’s normal role); Siegel, *supra* note 73, at 311–14, 327–28 (identifying the assumption of motherhood as women’s natural destiny in both the early anti-abortion movement and popular contemporary anti-abortion arguments). Women are often referred to as “mothers” in abortion cases. See, e.g., *Roe v. Wade*, 410 U.S. 113, 163–64 (1973) (discussing the “State’s important and legitimate interest in the health of the mother,” the fetus’s “capability of meaningful life outside the mother’s womb,” and the necessity of a health exception “to preserve the life or health of the mother”).

<sup>75</sup> See, e.g., *Planned Parenthood of Cent. N.J. v. Farmer*, 220 F.3d 127, 143 (3d Cir. 2000); see also *Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 620–21 (4th Cir. 2005) (discussing a constitutional challenge to a state statute that outlawed “partial birth infanticide,” defined as “any deliberate act that (i) is intended to kill a human infant who has been born alive, but who has not been completely extracted or expelled from its mother, and that (ii) does kill such infant, regardless of whether death occurs before or after extraction or expulsion from its mother has been completed”).

<sup>76</sup> *Stenberg v. Carhart*, 530 U.S. 914, 963 (2000) (*Carhart I*) (Kennedy, J., dissenting) (citations omitted). The fact sheet did not, however, suggest that the fetus is killed outside the woman’s *body*. As discussed at greater length below, this particular elision is peculiar to the PBABA and the *Gonzales* opinion.

<sup>77</sup> See *supra* text accompanying notes 42, 58–60.

outside the *body* but rather as being delivered “into the vagina” prior to fetal demise.<sup>78</sup>

Several factors may explain the apparent linguistic confusion. First, the Court is apparently adopting the language that Congress used in the PBABA.<sup>79</sup> Congress’s choice to describe the fetus as “outside the body of the mother” in the PBABA was most likely a deliberate political choice, as opposed to being motivated by a lack of anatomical familiarity. It is indeed unsurprising that Congress would want to cast the fetus as autonomous. Describing the fetus as outside the woman’s body and therefore practically already born makes the procedure seem more like infanticide; thus, Congress’s language was no doubt geared toward garnering political points, rousing sympathy for the fetus, and making the courts more likely to uphold the law. Second, the anatomical distances are, indeed, rather small in absolute terms. Since there is not a large physical difference between a fetus being “outside the body” and “outside the cervix,” perhaps the Court’s language can be considered slightly imprecise rather than flatly incorrect.<sup>80</sup> But surely these explanations are not entirely persuasive. The Supreme Court, like most courts, is generally fairly attentive to the language it uses. Particularly in this case, the Court has described the relevant abortion procedure in excruciating detail, with an invasive and almost microscopic degree of precision.<sup>81</sup> And of course, there was no shortage of medical information in the record.<sup>82</sup> The subsequent imprecision regarding the location of the cervix—this slippage in vocabulary—is therefore surprising.

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<sup>78</sup> *Carhart I*, 530 U.S. at 938–40 (quoting Neb. Rev. Stat. Ann. § 28-326(9) (LexisNexis 1999)); see also *id.* at 940 (“Both procedures [D&E and intact D&E] can involve the introduction of a ‘substantial portion’ of a still living fetus, through the cervix, into the vagina.”).

<sup>79</sup> 18 U.S.C.A. § 1531(b)(1)(A) (West 2010).

<sup>80</sup> According to one standard medical textbook, the length of the anterior vaginal wall is usually between six and eight centimeters, and the posterior vaginal wall usually varies in length between seven and ten centimeters. F. GARY CUNNINGHAM, ET AL., *WILLIAMS OBSTETRICS* 17–18 (22d ed. 2005). A sixteen-week fetus is approximately twelve centimeters long from crown to rump; a twenty-week fetus measures approximately sixteen centimeters along the same dimension, and a twenty-four-week fetus—that is, a fetus on the borderline of viability—has a crown-to-rump length of approximately twenty-three centimeters. *Id.* at 80. Thus, depending on the size and gestational age of the fetus, it could be largely within the vaginal canal.

<sup>81</sup> See *supra* text accompanying notes 34–51.

<sup>82</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (*Carhart II*) (noting that the two lower court trials lasted two weeks and three weeks, respectively); *id.* at 189–90 (Ginsburg, J., dissenting) (noting that the record contains “hundreds and hundreds of pages”

Indeed, the Court's substitution of "body" for "vagina" is an odd synecdoche. Here, the uterus comes to stand for the woman as a whole and its border, the cervix, stands for the outer edge of her body.<sup>83</sup> Moreover, the Court has seemingly designated everything beyond the cervix, including the birth canal itself, as public, not belonging to the woman but outside of her, and therefore as properly subject to regulation. This image resonates with the Court's assertion of its own authority to "draw[] boundaries to prevent certain practices that extinguish life and are close to actions that are condemned"—even, apparently, when the boundaries are within the woman's body.<sup>84</sup> Thus, the vagina, like the woman herself, is either absent from the Court's field of vision, or, more likely, the vagina is missing from the discourse on what takes place within the woman's body because the vagina is not part of that body—it is a separate entity that is eminently public rather than profoundly private.<sup>85</sup>

A final feature of the Court's discourse that bears noting is its repeated invocation of "anatomical landmarks," a term which, unlike the phrase "outside the body," does not appear in the PBABA legislation itself.<sup>86</sup> This term also did not appear in *Stenberg*, but it was used in the lower courts and appears to have been adopted from the Government's briefs.<sup>87</sup> The Court uses the medical term "anatomical landmarks" to refer to the part of the fetal body beyond which the fetus must be removed in

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of medical evidence); *see generally* *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 852–1001 (D. Neb. 2004) (summarizing massive amounts of medical evidence presented at trial in the lower court); *id.* at 852 (noting that twenty-three physician witnesses testified at the PBABA trial).

<sup>83</sup> *Cf.* Cornell, *supra* note 63, at 347, 350 (discussing the reduction of woman to her womb and to the maternal function in abortion law).

<sup>84</sup> *Carhart II*, 550 U.S. at 158.

<sup>85</sup> Interestingly, Alan Hyde has characterized the vagina in precisely this way, although his analysis draws on Fourth Amendment search-and-seizure case law rather than abortion jurisprudence: "[T]he vagina, as Freudians would predict, is often constructed as a lack, a gap, empty, an absence," he explains, and "as a fetishized body part separate from the body"; the vagina, moreover, is "the least private, most specularized" body part, one which is "uniquely searchable." HYDE, *supra* note 3, at 165.

<sup>86</sup> *Carhart II*, 550 U.S. at 148–56.

<sup>87</sup> *See, e.g.*, *Planned Parenthood Fed'n v. Gonzales*, 435 F.3d 1163, 1178 (9th Cir. 2006) (referencing the Government's argument regarding "the use of a 'specific anatomic landmark'" in the PBABA statute); Brief of Petitioners, *Gonzales v. Planned Parenthood Fed'n*, 550 U.S. 124 (2007) (No. 05-1382), 2006 WL 2282123 at \*11, \*31–33, \*37.

order to trigger the prohibitions of the Act; in other words, the Act criminalizes an abortion only if the fetus has been removed “from the body of the mother” while intact up to a certain point, such as up to the head if the fetus has a vertex (head-first) presentation, or past the fetus’s navel if the fetus is breech (feet-first).<sup>88</sup> The term “anatomical landmark,” then, seems to refer to these important locations on the fetal body, but in a sense it also refers to the woman’s body, since those anatomical parts of the fetus must be past a particular anatomical part of the woman’s body—the cervix. Thus, the Court’s language again casts the body as a geographic space, punctuated by “landmarks.” But as with the phrase “outside the body,” the Court’s use of the term “anatomical landmark” also highlights the fact that the new line that the Court has drawn in *Gonzales v. Carhart*—a line demarcating activity that can be criminalized from that which cannot—was not drawn at viability, as it always has been since *Roe v. Wade*,<sup>89</sup> but rather at a place inside the woman’s body.<sup>90</sup> As Justice Ginsburg argued in her dissent, the Court seems to be blurring the line between pre- and post-viability fetuses by drawing the line of legality not based “on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed.”<sup>91</sup>

From this close reading of the Court’s language in *Gonzales v. Carhart*, three primary themes emerge. The first and most obvious is disappearance: the woman disappears from the scene and provides merely a backdrop for the drama that occurs inside her. She herself has no personhood, no sacred self,<sup>92</sup> no corporeality.<sup>93</sup> Her vagina is absent, for all intents and purposes, and even her cervix is arguably but a “landmark.” She

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<sup>88</sup> *Carhart II*, 550 U.S. at 148.

<sup>89</sup> 410 U.S. 113 (1973).

<sup>90</sup> *Id.* at 163–64; see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

<sup>91</sup> *Roe*, 410 U.S. at 186 (Ginsburg, J., dissenting). According to Justice Ginsburg, the Court also blurred this line by suggesting that the fetus is “a living organism while in the womb, whether or not it is viable outside the womb.” *Id.*

<sup>92</sup> *Cf.* McClain, *supra* note 4, at 195 (noting that “notions of sacredness and sanctity undergird the legal protection of inviolability . . . in the contexts of bodily integrity and personal autonomy”).

<sup>93</sup> *Cf.* HYDE, *supra* note 3, at 87–88 (observing that privacy jurisprudence constructs the body as an abstract entity of personhood and bearer of rights); Thomas, *supra* note 63, at 1459–60 (critiquing the primacy of personhood interests over interests in corporeal integrity in privacy jurisprudence).

is constructed as the geographic terrain on which the drama between the fetus and the doctor plays out.

The second theme is dismemberment. The semi-autonomous fetus, which “assum[es] the human form,”<sup>94</sup> is brutally murdered as the largely irrelevant, verbally absent woman stands by and provides the backdrop for this horrific act. Constructing the woman’s body as the backdrop for such a criminal act seems to justify, if not call for, surveillance and regulation. The Court, Congress, and even the reader cannot be expected to passively accept the repetition of this crime, even if the woman, constructed at best as a victim herself,<sup>95</sup> does so.<sup>96</sup>

Yet the destruction and dismemberment of the fetus, so graphically described, also afflict the woman herself. Indeed, it is perhaps inevitable that such a detailed description of the abortion procedure taking place within the woman’s body would result in a verbal fragmentation of the woman that reduces her to the various elements of her reproductive anatomy. Those elements of her anatomy are not even attributed specifically to her but instead labeled “the cervix,” “the uterus,” and so on. She is thus just a collection of pieces, not unified into one whole person or woman to whom those pieces can be said to belong. Indeed, Drucilla Cornell has described the denial of the right to abortion in general as an assault on women’s bodily integrity and therefore as “a symbolic dismemberment of a woman’s body,” but this turn of phrase has perhaps never had such obvious and literal application until the Court’s opinion in *Gonzales*.<sup>97</sup>

Finally, the Court’s language displaces the boundaries of the woman’s body. It renders completely public even those body parts one might think of as profoundly private. In this sense, too, the woman’s body lacks integrity in the sense that the law, not the woman herself, controls its very borders—the divide between what is inside and outside the body,

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<sup>94</sup> *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007) (*Carhart II*).

<sup>95</sup> *Id.* at 159–60 (imagining the post-abortion “grief” and “sorrow” that the woman would experience upon discovering the nature of the intact D&E procedure).

<sup>96</sup> Perhaps, then, the woman lacks “integrity” in the moral sense as well.

<sup>97</sup> Cornell, *supra* note 63, at 342; see also Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327, 327–28 (1991) (arguing that American privacy jurisprudence “allows the state to conceptually sever [the woman’s] womb” and advocating for an approach to reproductive rights that centers on bodily integrity).

between what is private and what is publicly exposed.<sup>98</sup> If the Court constructs her vagina as somehow “outside the body,” and if her cervix and uterus become, generically, “the cervix” and “the uterus,” then they cannot belong to her in the sense that our private bodies belong to us.<sup>99</sup> At a minimum, women’s bodies become validly subject to regulation by the state. To return to the dichotomy presented at the beginning of this Article,<sup>100</sup> the Court’s language firmly pushes the body out of the domain of the private, that which is most sacred and intimate and tied to personhood, and into the domain of regulation, control, and state power. It therefore not only resonates with but also justifies the increasingly intense government regulation of the abortion procedure.

All three of these themes—disappearance, dismemberment, and displacement of boundaries—are, moreover, united by the uniquely visual (or graphic)<sup>101</sup> style that animates the Court’s rhetoric. The graphic quality of the Court’s description of the intact D&E procedure is evidence of the Court’s strongly visual orientation.

The mechanism of sight draws to mind a number of associations, many of which dovetail with the motifs that this Article has identified in *Gonzales*’ rhetoric. Peter Brooks, for example, has explained that seeing and observing are not merely passive but at times aggressive endeavors; they may imply hostility and objectification.<sup>102</sup> The gaze, as discussed in literary and cultural theory, is often fragmenting and dismembering, particularly when it focuses on the female body.<sup>103</sup> The verbal fragmentation that characterizes the Court’s “descriptive prose” in *Gonzales* is perhaps “inherent to vision itself,” caused “in cinema, [by] the movement

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<sup>98</sup> Cf. Cornell, *supra* note 63, at 362 (emphasizing that bodily integrity includes the ability to protect the boundary between what is inside and outside the body and to control what is publicly exposed); Neff, *supra* note 97, at 350 (describing denial of an abortion as “the state [entering] the woman’s body, seiz[ing] control, and establish[ing] an adversarial relationship between the woman and her womb”).

<sup>99</sup> Cf. McClain, *supra* note 4, at 202 (describing privacy and bodily integrity as “self-belonging”); see generally Stychin, *supra* note 1, at 223–24.

<sup>100</sup> See *supra* text accompanying notes 1–5.

<sup>101</sup> The etymology of the word “graphic,” after all, relates to the idea of a drawing or picture as well as a writing.

<sup>102</sup> PETER BROOKS, *BODY WORK: OBJECTS OF DESIRE IN MODERN NARRATIVE* 89–90 (1993).

<sup>103</sup> *Id.* at 92–93 (discussing the fragmented, metonymizing gaze of the narrator in 19th-century realist fiction).

of the camera and of bodies in and out of the space it frames” and “in literature, [by] the linear nature of the signifier, which means that an image or idea cannot be presented at once but must rather unfold in sentences.”<sup>104</sup> Indeed, Alan Hyde has noted, in discussing the public indecency case *United States v. Biocic*,<sup>105</sup> that the court’s verbally “breaking up” of a woman’s body into parts “emphasizes the viewpoint of the gazer (with power) that homes in on particular parts of the body, in a kind of visual fetishism in which ‘the historically unnameable parts of the female body come to stand for the rest of it.’”<sup>106</sup>

Yet the gaze may also be associated with the death or disappearance of the body it holds: “[s]till photography may be the one exercise of vision in which the body can be held as a whole, because it is held motionless: which may suggest why . . . it has a particular kinship with death. The photographic gaze can see the body whole only by killing it.”<sup>107</sup> Like most visual representations, the Court’s description is also distancing and objectifying: “[f]or sight, in contrast to the other senses, has as its peculiar property the capacity for detachment, for objectifying the thing visualized by creating distance between knower and known.”<sup>108</sup> This objectifying aspect of vision, too, may be associated with the ultimate passivity of the object viewed. Vision may simply reinforce the perspective, the subjective

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<sup>104</sup> *Id.* at 102.

<sup>105</sup> 928 F.2d 112 (4th Cir. 1991).

<sup>106</sup> HYDE, *supra* note 3, at 133–34 (quoting HELENA MICHIE, *THE FLESH MADE WORD: FEMALE FIGURES AND WOMEN’S BODIES* 141 (1987)). See generally Amy Adler, *Performance Anxiety: Medusa, Sex, and the First Amendment*, 21 *YALE J.L. & HUMAN.* 227, 246–47 (2009) (discussing visual fetishism in the Medusa myth and its relationship to anxiety about female sexuality).

<sup>107</sup> BROOKS, *supra* note 102, at 102. The gaze is also associated with both death and dismemberment in the Medusa myth. As interpreted by Sigmund Freud, the myth of Medusa—who turned men to stone when they looked at her—represents the male fear of castration evoked by the sight of the female genitalia, which is in a sense already “castrated” in the Freudian narrative. Adler, *supra* note 106, at 238–242. Medusa was killed by Perseus, who looked at her through the reflection of his shield and was thereby able to back up and behead her by using her reflection as a guide. *Id.* at 240. The Medusa myth has been interpreted by feminist scholars to suggest that according to this mythology, women must be placed in their proper role as object, not subject, of the gaze, *id.* at 248–250. It is noteworthy that Medusa’s assumption of the role of visual object (in the reflection in Perseus’ shield) is closely associated, temporally and causally, with her own death.

<sup>108</sup> Petchesky, *supra* note 48, at 275.

agency of the gazer rather than the presence of the gazed-upon.<sup>109</sup> Finally, vision is closely associated with the transgression or displacement of borders, particularly the border between the public and the private. One may think of the voyeur's gaze as it violates the privacy taken for granted by its object. Of course, that privacy is most often associated with sexual modesty, the imperative of keeping the most sexual body parts hidden. It is precisely those sexual body parts that are implicated in the Court's description and, in a sense, thrown open to public view. The themes of dismemberment, disappearance, and displacement of borders thus arise from the graphic, visual nature of the Court's prose.

### III. GRAPHIC LANGUAGE AND REGULATORY POWER

The final Section of this Article considers briefly what might be behind the Court's unusual and troubling language in *Gonzales v. Carhart*.<sup>110</sup> In particular, this Section attempts to provide an explanation as to why the Court chose the language it did and what, if anything, we can conclude from *Gonzales*' rhetoric about the future of abortion jurisprudence in the Supreme Court.

First, however, it must be acknowledged that not all aspects of the Court's language described above are unique to Justice Kennedy's opinion in *Gonzales*. This Article has focused on that specific opinion because it is the most recent and most jurisprudentially important pronouncement on abortion rights in the United States. In addition, the Supreme Court exercises a unique influence on our culture, arguably helping to shape the ways in which individuals view the sorts of hot-button social issues it addresses.<sup>111</sup> But as explained above, some of the Court's terminology may be found in lower court cases and older Supreme Court cases, and some of it has been culled from briefs and from the challenged statute itself.<sup>112</sup> Perhaps most troublingly, it seems that the Court has at times adopted the anti-abortion rhetoric that has often dominated public discourse surrounding

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<sup>109</sup> Cf. Brooks, *supra* note 102, at 90–91 (describing how the gaze may truly “reflect the observer” rather than the object of observation).

<sup>110</sup> 550 U.S. 124 (2007) (*Carhart II*).

<sup>111</sup> See generally Robert C. Post, Foreword, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (arguing that “constitutional law both arises from and in turn regulates culture”).

<sup>112</sup> See *supra* notes 64–87 and accompanying text.

the use of the intact D&E procedure.<sup>113</sup> But to recognize that the Supreme Court's language in *Gonzales* is often borrowed is not to deny the fact that language was chosen by its author, nor is it to deny the power of that language to construct a particular reality.

Moreover, it is not clear that the disturbing nature of the intact D&E procedure can or should be explained away, papered over, or domesticated for the reader. It does not serve the pro-choice cause to pretend that abortion, particularly late-term abortion, is not a morally fraught, often tragic event. The fact that it is often necessary does not mean that its complexities should go unacknowledged.<sup>114</sup>

It nonetheless seems worthwhile to ask what the reader is to make of the graphic language of *Gonzales*. In particular, how can the challenging rhetoric of this case be contextualized and given significance within the body of abortion jurisprudence? Many of the themes that this Article has uncovered in the Court's *Gonzales* rhetoric, after all, are not entirely new. Feminist critics have long noted the disappearance of the woman in abortion law and rhetoric, as well as the ways in which abortion regulation tends to render the borders of the female body permeable and violable and to turn the private body into a public space subject to government control.<sup>115</sup> Yet it is hard to think of a case in which those themes were more dramatically and graphically represented by the Court's rhetoric than in *Gonzales*.

But what further sets *Gonzales* apart is its uniquely visual character. The driving perspective of the Court's opinion is the visual one, a perspective that has arguably come to dominate the abortion rights debate.<sup>116</sup> For example, as Carol Sanger has observed, fetal imagery is a ubiquitous but relatively recent phenomenon that has nonetheless virtually taken center stage in the political debate over abortion.<sup>117</sup> The dominance of the visual may be related to the dramatic improvements in medical technology in general and reproductive technology specifically, which have, according to Professor Carol Smart, increased the field of medical and legal

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<sup>113</sup> See *supra* notes 75–76 and accompanying text.

<sup>114</sup> See generally Grimes, *supra* note 33, at 748–49 (discussing the reasons why abortions are sometimes performed after twenty-one weeks' gestation).

<sup>115</sup> See sources cited *supra* notes 63, 74, and 99.

<sup>116</sup> See Sanger, *supra* note 53, at 355–58, 407.

<sup>117</sup> *Id.* at 353–58.

intervention in women's bodies, ever finding new body parts and functions that can be subject to regulation.<sup>118</sup>

Indeed, the faculty of sight is also in some ways a symbol of modern regulatory power. For Michel Foucault, the acts of seeing and observing are forms of knowing and therefore dominating the body.<sup>119</sup> The figure of the panopticon, discussed above, represents for Foucault micro-management, intensive regulation, and social control of individuals and their bodies.<sup>120</sup> It is a space in which bodies can be subordinated without the use of actual physical violence or confrontation. Much as the Court's language in *Gonzales* figuratively dismembers and murders the woman's body and opens the door in multiple ways for even more intrusive regulation of the abortion procedure, the Court has turned women's bodies into an object of state regulation and even physical harm without violence or even the threat of violence—indeed, without even imposing criminal sanctions on the women themselves.<sup>121</sup> Moreover, the panopticon is a form of observation and control that is “democratically controlled,” thereby allowing the exercise of power on the individual to be “supervised by society as a whole”—represented here by the federal legislative branch.<sup>122</sup>

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<sup>118</sup> CAROL SMART, *FEMINISM AND THE POWER OF LAW* 96–97 (1989). Professor Smart notes that much of this regulation may appear liberalizing and benevolent, but it is still intrusive. *Id.* at 97.

<sup>119</sup> See FOUCAULT, *supra* note 53, at 200–09 (discussing visibility and its relation to power in the panopticon).

<sup>120</sup> *Id.* at 200–01. The term “panopticon,” of course, comes from the Greek words meaning “all” (*pan-*) and “seeing” or “observing” (*-opticon*).

<sup>121</sup> *Id.* at 203. Indeed, Foucault also points out that the panopticon functions as a sort of laboratory, “a privileged place for experiments on men.” *Id.* at 204. One might argue that the Court's decision in *Gonzales* even submits women's bodies to a form of medico-legal experimentation: the Court's holding that the medical reasons for seeking the intact D&E procedure must be tested on an as-applied basis, *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007) (*Carhart II*), suggests that the Court envisions a sort of case-by-case decision-making process to determine which women with which medical conditions will be entitled to seek the procedure. It may not be a complete stretch to say that this is a sort of experiment, in which real women will suffer while courts determine the constitutional applications of the federal law.

<sup>122</sup> FOUCAULT, *supra* note 53, at 207; *cf.* HYDE, *supra* note 3, at 140 (describing how female bodies are constructed as inherently threatening to the public in the Supreme Court's nude dancing cases).

#### IV. CONCLUSION

This Article has analyzed in some detail the Supreme Court's language in *Gonzales v. Carhart*<sup>123</sup> and attempted to draw from that language some common themes, demonstrating how the concepts of disappearance, dismemberment, and displacement of boundaries organize the Court's construction of the female body. All of these thematic elements, which are largely consequences of the Court's graphic, visual rhetoric, combine to justify intense regulation of the abortion procedure. This type of intense regulation is perhaps best exemplified by the "partial-birth" abortion ban itself, but it may also be observed in other abortion regulations, such as mandatory ultrasound requirements, exacting and intrusive legislative or administrative regulation of abortion providers (so-called TRAP laws), and extensive informed consent requirements.<sup>124</sup> Given the Supreme Court's approach in *Gonzales*, there is every reason to believe that this degree of regulation is here to stay.

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<sup>123</sup> 550 U.S. 124 (2007) (*Carhart II*).

<sup>124</sup> See, e.g., B. Jessie Hill, *Reproductive Rights as Health Care Rights*, 18 COLUM. J. GENDER & L. 501, 530–49 (2009) (discussing such laws).