

Stereotyping and the new Women-protective Antiabortion Movement

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Abstract

The anti-abortion movement has started to shift from fetal-focused to women-protective justifications for the regulation of abortion. Both justifications depend on the stereotype that pregnant women are mothers, but the stereotype in the new women-protective antiabortion movement operates in a new and harmful way. In the old fetal-focused antiabortion movement, the stereotype is prescriptive: pregnant women are stereotyped as mothers who *should* protect their unborn children. The hostile enforcement of this stereotype restricts women's access to the public sphere and preserves the traditional patriarchal power structure in society. In the new women-protective antiabortion movement, the stereotype is descriptive: pregnant women are stereotyped as mothers who will *always* protect their unborn children. The benevolent enforcement of this stereotype undermines women's competence as decision makers and restricts women's agency before the law. The new women-protective antiabortion movement results in discrimination against women under articles 12 and 16 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), but the novel women-protective element of the new antiabortion movement renders articles 12 and 16 inapplicable. Under article 5(a) of CEDAW, however, the women-protective antiabortion argument can be dismantled by naming the stereotype operating in the new movement and identifying how discrimination flows from that stereotype. The Canadian example of Bill C-484, the *Unborn Victims of Crime Act*, is used to illustrate the value of naming gender stereotypes when advocating for women's equality. By exposing the stereotype operating in Bill C-484, it is shown that non-abortion initiatives can indirectly support the new antiabortion movement through the perpetuation of the descriptive motherhood stereotype.

1. The Traditional Movement: Fetal-focused Justifications for Regulating Abortion

A. History of the ‘Right-to-life’ Movement

Traditionally, anti-abortion efforts have advocated for the abolition or restriction of abortion to protect the ‘life’ of the fetus. Opponents of abortion have called for the prohibition or restriction of abortion because they believe that abortion results in the death of an unborn child. This reasoning dates back to the Pythagoreans of ancient Greece, who subscribed to the belief that “abortion is wrong because the embryo is the moral equivalent of the child it will become.”¹ This theory was largely mainstreamed to the public during the ‘right-to-life’ movement of the late 19th century. The movement, made up primarily of physicians, developed the claim that abortion at any time during a pregnancy was murder.² Launched by the American Medical Association in 1861, this aggressive campaign against abortion undermined the underlying public tolerance for abortion that existed during the early 19th century.³ By 1900, both the United States and Canada had laws prohibiting abortion at any stage of pregnancy.⁴ The fetal-protectionist arguments advanced by the traditional anti-abortion movement in the early 19th century continue to flourish today.

Although the protection of fetal life was invariably a motivation for the right-to-life movement, the movement also made strong, negative statements about women who chose to have abortions. A movement based on the assertion that the fetus is a child has the obvious consequence of depicting the pregnant woman carrying the fetus as the child’s mother. Consequently, as anti-abortion doctors from the 19th century noted, characterizing abortion as murder not only implicates pregnant women in the killing of an unborn child, but also implicates

¹ *Encyclopedia of Religion and Ethics*, ed. James Hastings (New York: Scribner’s, 1961), Vol.6, pp.54-56 **cited in** Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984) at 11.

² Kristin Luker, *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984) at 14.

³ James C. Mohr, *Abortion in America* (New York: Oxford University Press, 1978) pp.147.

⁴ *Supra* note 2 at 15 **and** *The Criminal Code*, 1892 R.S.C., c.162, s.47 at s.273

them as mothers participating in the killing of *their own* unborn child, a reprehensible and unnatural act.⁵ Thus, the restrictive anti-abortion laws and fetal-protective arguments developed in the 19th century fostered a unique animosity toward pregnant women who had abortions.

B. The Role of Stereotyping in the Fetal-Focused Movement

The fetal-focused movement declarations about the moral and legal culpability of women who choose to have abortions depend on stereotyping of pregnant women. In particular, the movement depends on the stereotype that pregnant women are already mothers. The fetal-focused movement asserts that the fetus is an unborn child that needs protection from abortion, and the existence of a child necessarily requires the existence of a mother, in this case the pregnant woman carrying the fetus. Thus, the assertion that the fetus is an unborn child necessarily perpetuates the stereotype that pregnant women are already mothers.

Women's unique and heightened culpability flows from the unique manner in which the mother stereotype operates: as a *prescriptive* stereotype. The stereotype that pregnant women are mothers is used in the fetal-focused movement to indicate how pregnant women, as mothers, *should* behave. In particular, pregnant women are stereotyped as mothers and thus prescribed to behave like mothers. Advocates in the fetal focused movement "argued for the criminalization of abortion on the grounds that human life deserves protection from the moment of conception...[and] with equal fervor...argued for the criminalization of abortion to ensure that women performed their proper roles as wives and mothers."⁶ Thus, access to abortion was to be restricted to ensure that pregnant women embraced their stereotyped roles of motherhood.

⁵ Supra note 2 at 129.

⁶ Reva Siegel, "The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions" [2007] U.Ill.Law Rev. 991 at 1002.

The prescriptive stereotype operates to prescribe pregnant women to behave like mothers in their treatment of their unborn children. Mothers are viewed as naturally nurturing and caring and are expected to always prioritize their child's needs. Pregnant women, as mothers, are being prescribed to act the same way: i.e. prioritize their unborn child's needs. Pregnant women who choose to have an abortion are prioritizing other areas of their lives (their careers, education, relationships, etc.) above the life of their unborn child and are viewed as rejecting the prescriptive stereotype. Because they are rejecting the stereotyped mother role that is touted as 'natural,' pregnant women who have abortions are labeled as 'unnatural' and 'immoral.' These pregnant women do not fit within the predominant social perception of how pregnant women *should* behave (as mothers) and are consequently punished. By perpetuating this prescriptive stereotype, therefore, the fetal-focused movement is able to create culpability of those pregnant women who choose to have abortions.

Evidence of the prescriptive nature of the stereotype is found in much of the fetal-focused movement's rhetoric. For example, doctors arguing for the criminalization of abortion in the 19th century viewed a "woman's reasons for seeking an abortion as egotistic derogations of maternal duty"⁷ and an "abandonment of maternal and child-care duties to selfish and personal ends".⁸ A pregnant woman was viewed to have a 'maternal duty' to her unborn child and women who derogated from this duty were labeled selfish and egotistical. They failed to conform to the prescribed role of motherhood and were punished by being publically labeled as self-centered and egotistical. By perpetuating this prescriptive stereotype, the fetal-focused movement created public disdain for women who had abortions. This has had the effect of restricting women's

⁷ Supra note 6 at 1001.

⁸ Supra note 3 at 165-166.

access to abortion by deterring women from getting abortions and by creating public pressure on the legislature to limit women's access to abortions.

C. Hostile Stereotyping: the Harms

The prescriptive nature of the mother stereotype operating in the fetal-focused antiabortion movement is directly linked to the harms experienced women. In particular, the harms experienced by women flow from the *enforcement* of the prescriptive stereotype operating in the movement. The fetal-focused antiabortion rhetoric illustrates that the prescriptive stereotype that 'pregnant women are mothers and should behave like mothers' is enforced through very hostile means. Pregnant women are not gently encouraged to behave like mothers. Women are degraded, humiliated and persecuted into behaving like mothers. The hostile enforcement of this prescriptive stereotype thus has had the effect of deterring women from accessing abortion services and punishing those who do.

One means of enforcing the prescriptive stereotype is to establish public hostility towards women who had abortions. This has often been facilitated through the publicized opinions of anti-abortion medical professionals. For example, one doctor from the 19th century claimed, "Is it not arrant laziness, sheer, craven, culpable cowardice which is at the bottom of this base act?...Have you the right to choose an indolent, selfish life, neglecting the work God has appointed you to perform?"⁹ Pregnant women who did not accept their motherhood duties by prioritizing other areas of their life ahead of the life of their 'unborn child' were portrayed as 'lazy', 'cowardly', and 'indolent'. Yet another doctor, in a *Report* submitted to the Iowa State Medical Society, described pregnant women who have abortions as women who "for selfish and

⁹ Augustus K. Gardner, "Physical Decline of American Women" in J.S.Redfield ed., *Augustus K. Gardner, Conjugal Sins Against the Laws of Life and Health* 225 (1870) **cited in** Reva Siegel, "The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions" [2007] U.Ill.Law Rev. 991 at 1001.

personal ends, butcher or poison their children.”¹⁰ The fetuses of pregnant women were openly referred to as women’s children and abortion was seen as a means for pregnant women to ‘butcher’ and ‘poison’ them. Thus, pregnant women were overtly equated to mothers and abortion was overtly equated to the murder of one’s own child. The humiliating and degrading tone of these excerpts and the brutal language used by medical professionals illustrates how public animosity toward women who had abortions was developed by the fetal-focused antiabortion movement. By publicly shaming women who chose to have abortions, the public has forcefully encouraged pregnant women to conform to the prescribed role of motherhood and the well being of their unborn children ahead of everything else. Creating a fear of being publicly labeled selfish ‘butchers’ who have chosen to poison and murder their own children has served to forcefully deter women from getting abortions.

Women have also been forcefully encouraged to conform to the prescriptive motherhood stereotype by hostile government policies. Government policies that restrict women’s access to abortion often force women to identify the reasons why they were too immature, irresponsible or emotionally unstable to have a child.¹¹ These policies portray abortion as an option for women who are emotionally or psychiatrically disturbed. Women who choose to have abortions under these regimes are consequently seen as:

rejecting her ‘feminine’ capacity to nurture others and to put their needs ahead of her own. The provision of abortion services was an indication to the doctor that ‘shame’ and ‘guilt’ were called for....Her emotional unfitness for motherhood marked her as an ‘unnatural woman’¹²

¹⁰J.C. Stone, “Report on the Subject of Criminal Abortion,” *Transactions for the Iowa State Medical Society*, I (1871), 34 **cited in** James C. Mohr, *Abortion in America* (New York: Oxford University Press, 1978) p.169.

¹¹ Gail Kellough, *Aborting Law: An Exploration of the Politics of Motherhood and Medicine* (Toronto: University of Toronto Press, 1996) at p.112.

¹² *Ibid.*

Abortion services designed in this way assert that ‘normal’ women do not qualify for an abortion. Women who want an abortion must therefore identify the ways that they are unfit to have their child; they are forced to identify the reasons why they are ‘unnaturally’ unable to nurture and provide for their child and put their child’s needs first. This is a degrading and humiliating process. In addition, abortion services under these regimes are often provided by physicians who believe that only pregnant women who were unfit and unnatural women should qualify for an abortion and thus women who seek abortions under these regimes are often treated extremely poorly by physicians.¹³ The humiliation and degradation that results from these regimes has the effect of deterring women who might otherwise have needed an abortion from accessing an abortion under these regimes and publicly shaming those who do.

Some governments have taken these restrictive laws further and enacted criminal laws in an effort to prevent women from obtaining abortions. For example, in 1860, Connecticut enacted a criminal law that made “the woman herself guilty of a felony for soliciting an abortion, for permitting one upon herself by others, or even for attempting one upon herself.”¹⁴ In Canada, a similar provision was adopted in the 1892 Criminal Code, which stated that,

every woman is guilty of an indictable offense and liable to seven years’ imprisonment who... unlawfully administers to herself or permits to be administered to her any drug or other noxious thing, or unlawfully uses on herself or permits to be used on her any instrument or other means whatsoever with intent to procure a miscarriage.¹⁵

Not only do women who seek abortions face public humiliation and shaming, but under these regimes, many women who sought abortions also face criminal prosecution. With the introduction of these criminal laws, abortion was no longer portrayed as just as a moral wrong, but was established as a legal wrong. Women became criminally culpable for the death of their

¹³ Ibid.

¹⁴ Supra note 3 at 165-166.

¹⁵ *The Criminal Code*, 1892 R.S.C., c.162, s.47 at s.273.

unborn children. With criminal law having been historically reserved as one of the most hostile and serious means of deterrence, women who sought abortions had to contend with possible prison sentencing and face the negative stigmas associated with being labeled a criminal. Not only were pregnant women who had abortions seen by the public as unnatural mothers, but the law made a legal statement that they were criminally culpable for their rejection of motherhood. The use of criminal law, therefore, was used as an extreme means of enforcing the prescriptive motherhood stereotype by making a very strong statement that pregnant women should never prioritize other interests ahead of the life of her unborn child.

The hostile enforcement of the prescriptive motherhood stereotype resulting from the fetal-focused antiabortion movement has caused women much harm. Women have been degraded, humiliated and even jailed for seeking abortions. Women have been denied their right to access to healthcare and their right to control their bodies. In addition, the fetal-focused antiabortion movement and the resultant enforcement of the prescriptive motherhood stereotype have resulted in additional, subtler harms: the restriction of women's access to the public sphere and the preservation of traditional patriarchal power in society.

The hostile nature of the enforcement of the prescriptive stereotype operating in the antiabortion movement illustrates how these additional harms have manifested. In an article about the nature of descriptive and prescriptive gender stereotypes, Peter Glick and Susan T. Fiske suggest that inter group relations become hostile only when the social system is unstable, in a way that might allow for the mobility of the lower status group.¹⁶ A reduction in social mobility, therefore, can be the consequence of a hostile enforcement of a prescriptive stereotype. For women in the fetal-focused antiabortion movement, the hostile enforcement of the

¹⁶ Peter Glick and Susan T. Fiske, "Sexisms and Other 'Isms': Interdependence, Status, and the Ambivalent Content of Stereotypes," in W.B. Swann, Jr., L.A., *Gender Science of Janet Taylor Spence* (Washington D.C.: American Psychological Association, 1999) at 203.

prescriptive motherhood stereotype has thus resulted in the preservation of traditional patriarchal power structures and a male-dominated social hierarchy.

In the ‘right-to-life’ anti-abortion context of the 19th century, the power relationship between men and women movement was characterized by the belief that, as the reproducers of children, women’s “‘duties as a citizen’ were to remain chaste within marriage and to procreate - to provide heirs/citizens/soldiers/slaves/workers-but not to rule either in the city or the household.”¹⁷ Women’s primary duty in society was thus viewed as childbearing. The ability to terminate a pregnancy, however, gave women the power to shirk her childbearing ‘duties’ and prioritize other social roles instead. Women who could control the timing of their children were no longer chained to the home by child-care responsibilities. With abortion, women could move into the public sphere. Not surprisingly, men who had traditionally dominated the public realm felt threatened by abortion as it represented a means for women to infringe on traditional male roles. Indeed, the physicians of the right-to-life movement “were deeply afraid of being betrayed by their own women...most doctors were bitterly and stridently decrying...the unwillingness of American wives to remain in their ‘places’ bearing and raising children.”¹⁸

In response to a threat to the traditional power structure, the fetal-focused antiabortion movement provided a means of ensuring that women stay in their traditional maternal roles. By perpetuating a stereotype that pregnant women are mothers and should always behave as mothers, the fetal-focused movement affirmed the traditional gender hierarchy. It provided a means of socially compelling women who became pregnant to forfeit other opportunities and resign themselves to the home. In addition, it provided a means of deterring non-pregnant women from pursuing non-maternal roles, by asserting that pregnancy (including future

¹⁷ Rosalind Pollack Petchesky, *Abortion and Woman’s Choice* (Boston: Northeastern University Press, 1985) at 69.

¹⁸ *Supra* note 3 at 168.

pregnancy) should always be a woman's priority, rendering pursuit of an advanced education or a career futile. Women who rejected this traditional maternal role were labeled as 'unnatural' by the fetal-focused antiabortion movement and faced public dissent. Thus, women were further blocked from accessing the public sphere, and women's value was further reduced to their ability to bear children. The prescriptive motherhood stereotype operating in the fetal-focused antiabortion movement suggested that anything a woman does beyond childbearing is inconsequential and inferior to her maternal obligations.

2. The New Movement: Women-protective Justifications for Regulating Abortion

A. History of 'Women-Protective' Movement

Recently, the anti-abortion movement has begun to shift its focus from protecting the life of the 'unborn' to protecting women. The women-protective antiabortion asserts that abortion results in the termination of a unique bond between a pregnant woman and her unborn child and that this process is inherently harmful to the woman. It is argued that abortion should be highly regulated or prohibited to prevent women from suffering this harm. The movement asserts a dual claim: one, women are not making an informed choice when they get abortions (they are either tricked or pressured); and two, abortion is inherently harmful to women.¹⁹ The women-protective anti-abortion movement supports major legal restrictions on access to abortion to protect women from being coerced or tricked into choosing this inherently 'harmful' procedure.

The assertion that abortion harms women and that woman need protection from abortion has been quietly spreading for decades,²⁰ but has recently been gaining more political traction. In

¹⁹ South Dakota Task Force to Study Abortion, *Report of the South Dakota Task Force to Study Abortion* (December 2005) online: Vote Yes for Life <http://www.voteyesforlife.com/docs/Task_Force_Report.pdf> at 54.

²⁰South Dakota Task Force to Study Abortion, *Report of the South Dakota Task Force to Study Abortion* (December 2005) online: Vote Yes for Life <http://www.voteyesforlife.com/docs/Task_Force_Report.pdf> at 54. **cited in** Reva

2005, the South Dakota legislature voted to create a *South Dakota Task Force to Study Abortion* to study the state's interest in prohibiting abortion; over half of the *Report of the South Dakota Task Force* (40 of 72 pages) explains the state's interest in prohibiting abortion to protect women.²¹ The *Report* has been described as the “most comprehensive government account of the arguments and evidence for protecting women from abortion”²² and is thus a useful tool for understanding the new women-protective anti-abortion movement.

The *Report* determined that women who decide to have an abortion are not making an informed voluntary decision, finding that 1) many women submit to pressure from the father of the child, their parents, and other family members to have an abortion even though they themselves do not want one; 2) women are not informed about the physical and psychological risks associated with abortion; and 3) women are not informed that abortions will result in the death of the woman's already existing child.²³ The *Report* goes on to suggest that even if these disclosures were made, women would still be unable to make an informed decision, because “such oral representations are not an effective substitute for the mother seeing her child through ultrasound or holding her child in her arms”.²⁴ The *Report* suggests that “no matter what a clinic tells a client or however great her expertise, the abortion procedure *inherently* lacks consent because a pregnant woman cannot make a truly informed decision to give up a relationship with a child until *after* the child is born”²⁵. The *Report* suggests that women can never fully understand what relationship they are giving up until they give birth to their child. Thus, women

Siegel, “The Right's Reasons: Constitutional Conflict and the Spread of Woman Protective Anti-Abortion Argument” (2008) 57 Duke L.J. at 103.

²¹ Reva Siegel, “The Right's Reasons: Constitutional Conflict and the Spread of Woman Protective Anti-Abortion Argument” (2008) 57 Duke L.J. at 103.

²² Reva Siegel, Sarah Blustain, “Mommy Dearest? Woman-Protective Anti-Abortion Argument” (October 2006) American Prospect at 22.

²³ Supra note 19 at 37.

²⁴ Ibid at 55.

²⁵ Supra note 6 at 1010 (emphasis in original).

are suggested to be *incapable* of giving informed consent to an abortion, as they can never fully understand what they are consenting to.

The *Report* also discussed the harms that abortion is claimed to cause. The physical harms include infection, hemorrhage, infertility²⁶ and breast cancer.²⁷ Perhaps more significant, however, are the mental harms that are claimed to result from abortion. These harms include bipolar disorder, depression, increased substance abuse, post-traumatic stress syndrome (PTSD) and suicide.²⁸ Some in the women-protective anti-abortion movement even claim that a specific form of PTSD exists for women who have undergone abortion, a disorder identified as ‘post-abortion syndrome’ (PAS).

Some of the mental harms that are said to flow from abortion are claimed to affect *every* woman who has an abortion. As the founder of the PAS concept stated, “guilt and abortion have virtually become synonymous. It is superfluous to ask whether patients experience guilt; it is axiomatic that they will.”²⁹ Thus, there is an assertion that abortion has harms that are inherent to the practice itself; every woman who has an abortion is suggested to experience these harms. The *Report* depends on the assertion that a mother’s bond with a child begins very early in the pregnancy and that “the traumatic disruption of this attachment bond by abortion is detrimental to the health of the mother even when the termination of pregnancy is the presumptive desired result”.³⁰ Thus, even when a woman thinks that she wants an abortion, it is suggested that the

²⁶ Supra note 19 at 48.

²⁷ Ibid. at 52.

²⁸ Ibid. at 42-44.

²⁹ *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong. 329-39 (1981)* (testimony of Vincent Rue) **cited in** Reva Siegel, “The Right’s Reasons: Constitutional Conflict and the Spread of Woman Protective Anti-Abortion Argument” (2008) 57 *Duke L.J.* at 117.

³⁰ Anne Speckhard, “Traumatic Death in Pregnancy: The Significance of Meaning and Attachment” in *Death and Trauma*, Charles R. Figley, Brian E. Bride & Nicholas Mazza (eds.) (London: Taylor & Francis, 1996) p.75 **cited in** South Dakota Task Force to Study Abortion, *Report of the South Dakota Task Force to Study Abortion* (December 2005) online: Vote Yes for Life <http://www.voteyesforlife.com/docs/Task_Force_Report.pdf> at 54.

very nature of the process (termination of the bond between mother and unborn child) will result in psychological damage to the woman. Doctors in the *Report* testified that “trauma is evident within the mother when these attachments are broken. Grief and post-traumatic stress after abortion is common.”³¹ The *Report* asserts that abortion will always be harmful to women because it severs a natural bond between mother and child, an intrinsically harmful act that implicates a mother in the death of her child.

The women-protective anti-abortion argument therefore rests on the claim that women are never able to make an informed choice to have an abortion. It asserts that women are incapable of understanding that an abortion results in the death of their already existing child; they are incapable of understanding the nature of the mother-child relationship they are forfeiting until they see their child born. Those women who ‘choose’ abortion are thus being misled or being pressured against their will, to the detriment of their physical and mental health. To protect women from the harms ‘intrinsic’ to abortion, the women-protective antiabortion movement suggests that access to abortion be prohibited or severely restricted.

B. The Role of Stereotyping in the Women-Protective Movement

The new women-protective movement depends on the same stereotype as the old fetal-focused movement: that all pregnant women are mothers. In the new movement, pregnant women are said to have a unique mother-child relationship with their unborn child; the harm that flows from abortion results from the severance of this mother-child relationship. Thus, pregnant women are again stereotyped as mothers. However, the stereotype in the new movement operates in an entirely different way than in the old fetal-focused movement. In the old movement, the

³¹ Dr. Shuping testimony **considered in** South Dakota Task Force to Study Abortion, *Report of the South Dakota Task Force to Study Abortion* (December 2005), online: Vote Yes for Life <http://www.voteyesforlife.com/docs/Task_Force_Report.pdf> at 54.

stereotype was prescriptive: all pregnant women are mothers and *should* behave like mothers by prioritizing the well being of their children. Pregnant women who choose not to behave like mothers (by getting an abortion) are punished through humiliation, degradation, and criminal prosecution.

In the new women-protective movement, the prescriptive element of the motherhood stereotype is absent. Instead, the stereotype operating in the new movement is a *descriptive* stereotype. Pregnant women are not labeled as mothers who *should* behave as mothers do; pregnant women are labeled as mothers who will *always* behave as mothers do. As the *South Dakota Task Force Report* stated:

it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.³²

It is assumed that a pregnant woman is a mother who has an overriding maternal instinct to prioritize the well being of their children. The stereotype in this new movement is descriptive, describing how women *are* instead of who they *should be*. The descriptive stereotype asserts that a pregnant woman *is* protective and nurturing of her unborn children, instead of asserting that a pregnant woman *should be* protective and nurturing of her children (as in the old fetal-focused movement). As Professor Siegel notes, the “argument for protecting women against abortion turns on the claim about women’s nature. Women who have abortions are mistaken or misled or coerced or pressured into decision they do not want to make...because abortion violates women’s nature as mothers”³³ The stereotype that all pregnant women are mothers is descriptive, as it

³² Supra note 19 at 47.

³³ Supra note 6 at 1013.

attempts to describe a pregnant woman's fundamental nature instead of prescribing her to behave in a certain way.

A comparison of the rhetoric used in the old movement with the rhetoric used in the new movement illustrates the shift from prescriptive stereotyping to descriptive stereotyping. In the old fetal-focused movement, pregnant women were prescribed to behave like mothers. Because abortion represented a rejection of this prescribed motherhood, doctors condemned abortion as the "abandonment of maternal and child-care duties to 'selfish and personal ends'".³⁴ Under the old movement, women who had abortions were selfishly rejecting their maternal duties when they *ought to* have embraced their maternal duties. Pregnant women who had abortions were rejecting the prescriptive stereotype of motherhood.

In the new movement, however, women are not told that they are mothers and *should* behave as mothers do. Instead, they are told that they are mothers and will *always* behave as mothers do. As the *Report* comments:

the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this relationship, in its unselfish nature, and, in its role in the survival of the human race, is the touchstone and core of all civilized society.³⁵

A pregnant woman's identity is inseparable from a mother's identity. As a mother, a pregnant woman will always choose to protect and nurture her children. The stereotype that pregnant women are mothers simply *describes* how pregnant women will behave. This is compared with the old fetal-focused movement, where the stereotype that pregnant women are mothers *prescribes* how pregnant women should behave.

³⁴ Supra note 3 at 165-166.

³⁵ Supra note 19 at 67.

Still other rhetoric in the new movement provides evidence of the descriptive nature of the stereotype. In the *Report*, the task force asserts that:

it is so far outside the normal conduct of a mother to implicate herself in the killing of her own child. Either the abortion provider must deceive the mother into thinking the unborn child does not yet exist, and thereby induce her consent without being informed, or the abortion provider must encourage her to defy her very nature as a mother to protect her child.³⁶

In the women-protective antiabortion movement, all pregnant women are assigned a maternal identity (descriptive motherhood stereotype). Abortion is a procedure that requires a pregnant woman to violate this maternal identity. Thus, a pregnant woman who ‘chooses’ to have an abortion must be being tricked or pressured, as it is inconceivable that a mother could ‘choose’ to violate her maternal nature and harm her child.

C. Benevolent Stereotyping: the Harms

The shift to women-protective arguments has altered the way in which the anti-abortion movement harms women. The motivation for the shift from fetal-focused to women-protective arguments, however, was based less on harms and more on garnering public support for the antiabortion cause. Following a study in the 1990’s on popular opinion of the anti-abortion movement in the United States, Jack Willke, head of the National Right to Life Committee, explained that the general public “felt that pro-life people were not compassionate to women and that we were only ‘fetus lovers’...We had to convince the public we were compassionate to women.”³⁷ The success of the women’s rights movement had made the fetal-focused cause outdated and unattractive. The public was unsympathetic to a cause that forced women, through

³⁶ Ibid at 56.

³⁷ J.C. Willke, “Life Issues Institute Is Celebrating Ten Years with a New Home,” *Life Issues Connector* (Life Issues Institute, Cincinnati, Ohio), Feb. 2001, at 4, online: Life Issues <<http://www.lifeissues.org/connector/01feb.html>> cited in Reva Siegel, “The Right’s Reasons: Constitutional Conflict and the Spread of Woman Protective Anti-Abortion Argument” (2008) 57 Duke L.J. at 129.

humiliation, degradation and criminal prosecution, to keep an unwanted pregnancy. The anti-abortion movement's answer to re-gaining support was to develop a campaign that showed how restricting or abolishing abortion was in the interests of women's well being.

Although the new women-protective movement may have the effect of garnering more support for the anti-abortion cause, the shift to women-protective arguments also altered the type of harms experienced by women. As discussed above, the harms of the fetal-focused movement flowed from the hostile restriction of women to their maternal roles. Pregnant women were forced through humiliation, degradation and criminal prosecution into behaving like 'mothers' and prioritizing their unborn children over other aspects of their life. Women who became pregnant were forcefully told they should shift their focus to their children and away from other areas of their life, such as their education or careers. Women were thus forced to return to the home when they became pregnant, keeping women from accessing the male dominated public sphere. Thus, restriction of abortion through the hostile enforcement of the prescriptive motherhood stereotype helped preserve the traditional gender power structure in society.

In the new movement, however, the operation of a different motherhood stereotype means that women experience a different harm. In the old movement, women who had abortions were reprimanded, and viewed as choosing "for selfish and personal ends, [to] butcher or poison their children."³⁸ Pregnant women in the old movement were denigrated and insulted into submission. This is starkly different than the language used in the new movement, which is benevolent and kind. When describing pregnant women considering abortion in the *South Dakota Task Force Report*, it was stated that "a mother's unique relationship with her child during pregnancy is one of the most intimate and important relationships, worthy of protection. The history and tradition of our nation has recognized this relationship as one that has intrinsic

³⁸Supra note 10 at 169.

beauty and benefit to both the mother and the child”.³⁹ The new women-protective anti-abortion movement speaks about women in a positive and respectful tone. Women in the new movement are not bullied and harassed into behaving like mothers, but are instead rewarded and praised for their natural instinct to behave like mothers. They are not blamed for the death of their unborn child; instead, they are praised for their unyielding reserve to protect their unborn child, especially in the face of the outside pressure and trickery that might eventually lead them to get an abortion.

The implications of the shift from hostile attitudes to benevolent attitudes are better understood after examining Glick and Fiske’s perspective on gender stereotypes. With respect to hostile stereotyping, Glick and Fiske note that:

Male structural power, which creates high status for men and low status for women, fosters *hostile sexism*: unfavorable attitudes toward women that justify men’s higher status. Hostile sexism can be viewed as a manifestation of the competitive drive.⁴⁰

This ‘hostile sexism’ exists in the hostile enforcement of the prescriptive stereotype operating in the old, fetal-focused movement. Women were being viewed as a threat to the traditional patriarchal structural power, so women were forced, through hostile means, to remain in their traditional maternal roles. The stereotype that pregnant women *should* be good mothers operated to force women into their social lower status. This stereotype was born out of the competition created between men and women.

The new women-protective antiabortion movement has adopted a more benevolent attitude toward pregnant women. With respect to benevolent stereotyping, Glick and Fiske suggest that,

³⁹ Supra note 19 at 55.

⁴⁰ Supra note 16 at 211.

men's dependence on women (which in turn, makes women a valuable resource for men) fosters *benevolent sexism*: attitudes toward women that are subjectively positive for the sexist. These include feelings of protectiveness toward the women, the belief that men should provide for the woman.⁴¹

In the new women-protective movement, pregnant women are viewed benevolently because they are depicted as nurturing and caring mothers. They are no longer viewed as a threat to men's patriarchal power; the descriptive motherhood stereotype eliminates a woman's ability to *choose* to behave as something other than a mother. When pregnant women do get abortions, therefore, they are not questioning or challenging the traditional patriarchal power structure as they were in the old fetal-focused movement. Instead, pregnant women are being forced or tricked into doing something they do not want to do. Thus, pregnant women who have abortions are not treated with hostility, but with protective benevolence. Society depends upon pregnant women's maternal behavior for the successful development of the future generation and a pregnant woman's connection with her child must therefore be protected. Pregnant women are respected and cherished for their ability to carry and nurture children. In the new women-protective movement, men and society are encouraged to respect and protect a women's ability to carry and nurture children.

This benevolent and protective attitude should not be interpreted as harm-free for women. Glick and Fiske note that benevolent sexism may involve positive attitudes toward women, but that these sexist beliefs also "reflect very traditional and controlling presumptions about women, such as 'the weaker sex', and thus they are in need of men's protection".⁴² This statement by Glick and Fiske illuminates the harm that flows from the descriptive motherhood stereotype operating in the new women-protective movement; women in the new movement are treated as

⁴¹ Supra note 16 at 211.

⁴² Supra note 16 at 211.

being weak and in need of protection, instead of being treated as equal citizens capable of making decisions for themselves. Women's ability to bear children is respected, but their ability to make decisions is undermined. Women are portrayed as too weak to resist the 'pressure' and 'trickery' of doctors, spouses and parents who want them to have abortions. They are treated as too confused to understand the nature of abortion. The women-protective movement suggests that women's obvious inability to make the 'right' decision indicates that someone else should make the decision for them.

In the new antiabortion movement, therefore, a grave harm results. The new women-protective movement does not tell pregnant women that they should not choose to have abortions, but instead tells women that they are incapable of choosing to have abortions. The new women-protective abortion asserts that in the context of abortion, women are incompetent decision makers. With respect to a woman's ability to choose to have an abortion, the *Report* notes that:

this method of waiver of the mother's rights expects far too much of the mother. It is so far outside of the normal conduct of a mother to implicate herself in the killing of her own child. Either the abortion provider must deceive the mother into thinking the unborn child does not yet exist, and thereby induce her consent without being informed, or the abortion provider must encourage her to defy her very nature as a mother to protect her child.⁴³

Pregnant women are treated benevolently for being nurturing and caring toward their unborn children, but they are also portrayed as weak and susceptible to trickery and pressure from the abortion-provider and others. This benevolent sexism operates as Glick and Fiske suggest: the attitude toward women is positive, but it is based on ideas of women's inferiority with respect to decision-making abilities.

⁴³ Supra note 19 at 56.

By perpetuating the descriptive motherhood stereotype, the women-protective movement is able to expropriate women's decision-making capabilities. Siegel notes that the *Report*, when describing the women-protective anti-abortion movement, "took as a statement of biological and psychological fact that a mother's connection to her unborn baby was more authentic than her own statement of desire to not be pregnant".⁴⁴ A pregnant woman's presumed maternal instincts are seen as more authoritative than her stated reasons for not keeping a pregnancy. The new movement consequently undermines pregnant women as decision-makers; their competence as equal citizens with a right to make decisions regarding their bodies is expropriated. As Siegel notes, the women protective argument uses "traditions of gender-paternalist argument that justify restrictions on women's agency as needed to protect women from coercion and free women to be mothers".⁴⁵ The use of the descriptive motherhood stereotype thus allows the women-protective antiabortion movement to imply that the high incidence of abortion is not an indication that women want abortions but instead an indication that women are being constantly tricked or pressured into 'killing their children'. To protect pregnant women from this 'harm', the women-protective movement suggests that pregnant women should never be given the choice of abortion.

The undermining of pregnant women's decision-making capabilities is evident in the women-protective antiabortion rhetoric. As the South Dakota legislature that created the task force noted, "a woman seeking to terminate the life of her unborn child may be subject to pressures which can cause an emotional crisis, undue reliance on the advice of others, clouded

⁴⁴ Supra note 22 at 23.

⁴⁵ Supra note 21 at 128.

judgment, and a willingness to violate conscience to avoid those pressures”.⁴⁶ Pregnant women considering abortion are described as incompetent decision makers because they are emotional, easily influenced and exercise bad judgment when taking advice from others; because of their inability to make an informed they need to be protected from ‘choosing’ abortion. The *Report* also relied on the testimonies of women who have had abortions to develop the descriptive stereotype that all pregnant women are mothers and thus need to be protected from the ‘choice’ of abortion. With respect to these testimonies, the *Report* found that,

women were not told the truth about abortion, were misled into thinking that nothing but ‘tissue’ was being removed, and related that they would not have had an abortion if they were told the truth...the overwhelming majority of women testified that they would never have considered an abortion if it were not legal. Their testimony revealed that they feel that the legalization of abortion simply gave a license to others to pressure them into a decision they otherwise would not have made.⁴⁷

This statement attempts to establish that pregnant women, as mothers, would never choose to have an abortion if they could be made to understand that abortion would implicate them in the ‘death’ of their own child. The women-protective antiabortion movement has used these testimonies to establish the claim that legalization of abortion is not helping women; instead, legalization of abortion is enabling others to pressure women into getting abortions they do not want. To protect women, therefore, abortion should be made illegal, so that women can be *protected* from being pressured or tricked into getting abortions. Women are incompetent decision makers and need the law to make the decision for them. The new women-protective antiabortion movement thus represents a new harm to women: the perpetuation of the descriptive motherhood stereotype that all pregnant women are mothers that will *always* choose to protect

⁴⁶ H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005) cited in S.D. Codified Laws s. 34-23A-1.4 (2006) **cited in** Reva Siegel, “The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions” [2007] U.Ill.Law Rev. 991 at 1032.

⁴⁷ Supra note 19 at 21.

their child allows for the limitation of women's decision-making capabilities and the undermining of women's competence and agency before the law.

D. Gender Discrimination in the Women-Protective Movement: CEDAW

To dismantle the women-protective antiabortion argument and show that the resulting restriction of women's access to abortion unjustifiably harms women, it is helpful to place the women-protective antiabortion movement into a concrete legal rights framework. Despite the women-protective antiabortion movement's claim to be 'pro-woman,' it has been shown thus far that the women-protective movement undermines pregnant women's decision-making capabilities and restricts their autonomy. Placing these broad claims of women's autonomy and agency rights into a widely accepted legal rights framework lends legitimacy to rights claims and helps articulate exactly how the women-protective movement is harmful to women and what response is appropriate.

The international regime for eliminating discrimination against women provides an appropriate legal framework for understanding and responding to the rights threatened by the women-protective antiabortion movement. The women-protective antiabortion movement asserts that pregnant women are incompetent decision makers with respect to their pregnancy; pregnant women are too emotional, too confused and too easily pressured to make an informed decision regarding their pregnancy.⁴⁸ Thus, other persons are expected to make informed decisions on pregnant women's behalves. Only women's decision making capabilities are undermined and only women's autonomy is denied; therefore, the new antiabortion movement's 'protection' of pregnant women can be understood as a form of discrimination against women. The international framework for eliminating discrimination against women is thus an appropriate mechanism for

⁴⁸ Supra note 46.

understanding how women's rights are threatened by the women-protective antiabortion movement.

Under the *Convention on the Elimination of All Forms of Discrimination Against Women* ("CEDAW"), States have an obligation to eliminate all forms of discrimination against women.⁴⁹ CEDAW is an international treaty that guarantees women equality and freedom from discrimination by private actors and the state in both the public and private realms.⁵⁰ CEDAW articles describe areas in which discrimination against women has been identified; the articles describe state's obligations to eliminate that discrimination. Articles 12 and 16, for example, guarantee women freedom from discrimination in healthcare and family planning and obligate states to eliminate discrimination against women in these realms. Examining the ways in which the women-protective antiabortion movement contravenes CEDAW's articles and discriminates against women provides a means of identifying the movement as a serious threat to women's equality and a means of dismantling the antiabortion movement's claim that their cause benefits women.

Article 12 of CEDAW guarantees women equality with respect to healthcare.⁵¹ CEDAW General Recommendation 24 states that article 12 requires "all health services...be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice".⁵² Thus, article 12 of CEDAW establishes a concrete right to autonomy, informed consent and choice with respect to health services. Without the choice of abortion, women are being denied these rights. Pregnant women are treated as incapable of

⁴⁹ Convention on the Elimination of All Forms of Discrimination Against Women, G.A Res. 34/180, 34 U.N. GAOR Supp. (No.467) at 193, U.N. Doc A/34/46 at Article 2(f).

⁵⁰ Andrew Byrnes, "The Convention on the Elimination of All Forms of Discrimination against Women" in W. Benedek et al., eds., *Human Rights of Women: International Instruments and African Experiences* (London; New York: Zed Books, 2002), 119 at 120.

⁵¹ *Ibid.* at Article 12.

⁵² Committee on the Elimination of Discrimination against Women, General Recommendation No.24, CEDAW, 20th Sess., UN Doc.A/54/38/Rev.1, chapter I (1999) at para.31(e).

acting autonomously, incapable of giving informed consent and incapable of making informed decisions. The women-protective movement suggests that their incapacities flow directly from their pregnant state; the denial of their rights is a direct consequence of being female. This treatment of pregnant women as ‘incapable’ is thus a form of discrimination against women, contravening article 12 of CEDAW.

Article 16 of CEDAW guarantees women equality in family life; women have “the right to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights”.⁵³ The women-protective antiabortion movement suggests that women’s access to abortion be eliminated or severely restricted. Because abortion enables women to decide when not to have children, the restriction of women’s access to abortion denies women their right to decide freely the number and spacing of children. Thus, the restriction or elimination of access to abortion suggested by the women-protective antiabortion movement constitutes discrimination against women and contravenes article 16 of CEDAW.

Despite these apparent contraventions of CEDAW articles 12 and 16, the novel women-protective element of the new antiabortion movement can be argued to render articles 12 and 16 inapplicable; the women-protective element can establish that the new antiabortion movement does not constitute discrimination against women. The women-protective argument depends on the assertion that pregnant women are mothers and behave as mothers. The women-protective movement thus contends that if pregnant women were fully informed of the true nature of abortion and were free from outside pressure, their maternal instincts would prevent them from ever choosing abortion. Article 12, then, is argued to not apply; abortion is paralleled to acts that people can never and will never consent to and, as such, denial of abortion services does not

⁵³ Supra note 49 at Article 16(e).

deny women a right to informed choice and consent, as it is a denial of a service to which women would never have consented.

Article 16 can also be argued to not apply, as abortion under the women-protective antiabortion movement is viewed as an illegitimate means of controlling family size; fully informed pregnant women, as mothers, would never consider abortion a means of controlling her family size, just as mothers of already born children would never consider killing one of their children a legitimate means of controlling her family size. Thus, denial of abortion services does not constitute an infringement of women's right to control family size, as women do not view abortion as a legitimate means of controlling family size. Thus, the novel women-protective element of the antiabortion movement renders articles 12 and 16 inapplicable and the gender discrimination claimed to exist in violation of these articles is eliminated.

In addition to claiming that article 12 and 16 do not apply to access to abortion, the women-protective movement can use the women-protective element of their argument and women's human rights language in CEDAW to strengthen their claim that abortion should be abolished. They can suggest that the procedure of abortion is discriminatory against women and violates women's rights under Article 12 because abortion denies women their right to informed consent and autonomy. The movement suggests that abortion providers always deny women the right to informed consent because they do not properly inform women that abortion will result in the 'death' of her already existing child.⁵⁴ They also suggest that women who choose abortion are pressured and coerced against their will by family members, friends and abortion providers.⁵⁵ Thus, the women-protective movement is able to turn CEDAW around and use article 12 to argue for the prohibition of abortion in the name of protecting women's rights. Consent and

⁵⁴ Supra note 19 at 56.

⁵⁵ Ibid.

autonomy rights rhetoric is therefore of little use in dismantling the women-protective antiabortion movement's 'pro-woman' claim.

Because of this circularity of consent and autonomy rights arguments, it is more useful to examine discrimination against women operating in the new antiabortion movement in the context of stereotyping. In asserting that women can not consent to abortion, the women-protective movement depends on the stereotype that all women are mothers and will consequently always choose to protect their unborn child. Thus, the discrimination against women operating in the new movement can be suggested to flow from the reliance on a harmful gender stereotype. The effect, or *harm*, of relying on this stereotype is a limitation of pregnant women's autonomy and informed consent rights, but the 'discrimination against women' itself flows from the use of a discriminatory gender stereotype.

Discrimination flowing from gender stereotypes is addressed in CEDAW under article 5(a); states are obligated to take all appropriate measures to "modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of...practices which are based on...stereotyped roles for men and women".⁵⁶ The women-protective movement depends on a stereotyped role of 'pregnant women as mothers'. This stereotype perpetuates the idea that women, upon becoming pregnant, will shift their life focus to that of protecting their children, with all other concerns becoming inferior. Pregnant women, therefore, are reduced to a maternal identity or role. Siegel notes that the *Report*, when describing the women-protective anti-abortion movement, "took as a statement of biological and psychological fact that a mother's connection to her unborn baby was more authentic than her own statement of desire to not be pregnant".⁵⁷ The motherhood stereotype asserts that pregnant women are first and

⁵⁶ Supra note 53 at para.5(a).

⁵⁷ Supra note 22 at 23.

foremost mothers, so any ‘choice’ of abortion by a pregnant woman can only be the result of trickery or pressure. A pregnant woman’s maternal role is suggested to dominate, making any non-maternal identity secondary. Because this stereotyped role affects women’s rights to autonomy and agency by reducing their identities to motherhood, it represents discrimination against women under article 5(a) and the stereotype must be eliminated.

Identifying this gender stereotype as the source of discrimination against women poses serious difficulties for the women-protective movement. If the stereotype were eliminated as required by CEDAW, the women-protective antiabortion argument breaks down. The movement can no longer claim that no pregnant woman would ever choose abortion; such an assertion depends on the stereotype that pregnant women, as mothers, will always prioritize the well being of their ‘unborn child’. Without stereotyping pregnant women as mothers, but instead as women with the potential for motherhood, it is conceivable that a pregnant woman might prioritize something above her future maternal role. This possibility of pregnant women prioritizing something above their maternal role would indicate that women are capable of freely choosing abortion; pregnant women who have abortions are not mothers ‘violating’ their maternal nature and thus are not being forced or tricked into getting abortions. Women-protective antiabortion groups can still argue that the informed consent rules are inadequate or that pregnant women face outside pressure to have abortions, but absent the stereotype, the solution to these problems is not the abolition of abortion. Instead, the solution is better informed consent procedures and better safeguards against women being pressured when making decisions. By using Article 5(a) of CEDAW to link the stereotype operating in the women-protective movement to the discrimination against women resulting from the movement, the women-protective antiabortion

argument is dismantled and rendered ineffective. After applying a stereotyping framework, the women-protective antiabortion movement can no longer claim to be ‘pro-women’.

3. Identifying and Naming the Stereotype: The Example of Canadian Bill C-484

As the shift continues in the anti-abortion movement from a fetal-focus to a woman-protective focus, those advocating for women’s reproductive rights and for gender equality have an interest in examining the ways in which this new women-protective movement might be advanced. Identifying and naming the stereotype that operates in this new women-protective movement is an important first step in limiting the threat that this new antiabortion movement poses to women’s equality.

The stereotype operating in the new women-protective movement presumes that pregnant women are mothers and behave as mothers. Because the new women-protective anti-abortion movement depends on this stereotype, the perpetuation of this stereotype in other initiatives will further the antiabortion cause. Thus, initiatives that do not directly restrict access to abortion may in fact restrict access to abortion if they help perpetuate the pregnant mother stereotype. By *naming* the gender stereotypes operating in the new women-protective abortion movement, women’s rights advocates will be able to identify those initiatives that might indirectly limit women’s access to abortion through the perpetuation of those same stereotypes.

To understand the value of naming the stereotype in the new women-protective anti-abortion movement, consider a seemingly innocuous parliamentary private member’s bill in Canada: Bill C-484. The Bill has since been withdrawn, but it is likely that Bills like it may be

introduced in the future. The Bill's title was the *Unborn Victims of Crime Act*,⁵⁸ summarized by parliament as follows:

“This enactment amends the Criminal Code by making it an offense to injure, cause the death of or attempt to cause the death of a child before or during its birth while committing or attempting to commit an offense against the mother.”⁵⁹

Bill C-484 was presented as a response to the problem of violence against pregnant women. By creating a separate offense for an assault that results in the ‘death’ of the unborn child, the Bill purported to prevent assaults on pregnant by elevating the penalty faced by assaulters. On its face, the Bill appeared to be a pro-woman, anti-violence measure.

Despite being touted as ‘pro-women,’ Bill C-484 was quickly criticized by pro-choice groups for granting legal rights to the fetus and threatening women’s access to abortion. The Society of Obstetricians and Gynecologists of Canada expressed its concern over the law, explaining that “the Bill can only be interpreted as giving the foetus *in utero* legal status at conception...It begins the process of establishing (criminal) sanctions for doctors, nurses or others, including the pregnant woman herself, whose actions might affect those ‘new rights’.”⁶⁰ The concerns expressed by the SOGC reflect the concerns of opponents of the old fetal-focused antiabortion movement. The SOGC was concerned that this Bill would grant the fetus legal rights, which would allow for the prosecution of pregnant women, among others, who chose to ‘kill’ the fetus through abortion; the Bill was suggested to have an implicit motive of establishing culpability of pregnant women who interfered with fetal rights through abortion. Thus, pro-

⁵⁸ Bill C-484, *An Act to amend the Criminal Code (injuring or causing the death of an unborn child while committing an offense)*, 2nd Sess., 39th Parl., 2007, online: Parliament of Canada <<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3127600&file=4>>

⁵⁹ Ibid. at ‘Summary’.

⁶⁰ Society of Obstetricians and Gynecologists of Canada, *SOGC Position Statement: Bill C-484, Unborn Victims of Crime Act* (23 June 2008), online: SOGC <<http://www.sogc.org/media/pdf/statements/medBillC484.pdf>> at p.1.

choice groups feared that the Bill would help advance the fetal-focused antiabortion movement's cause of limiting access to abortion to protect the right to life of the fetus.

The SOGC's fears are not unfounded. Examining the language used and the legal rights created therein, Bill C-484 appears to implicitly trumpet the fetal-focused antiabortion movement's cause. The fetus is referred to as a child, and the offense is defined as any act that causes the injury or death of that child. This grants the fetus legal rights that could be used against pregnant women who choose to have an abortion. Bill C-484 does, however, contain a clause that specifically exempts pregnant women from prosecution:

- (7) For greater certainty, this section does not apply in respect of
(a) conduct relating to the lawful termination of the pregnancy of the mother of the child to which the mother has consented;⁶¹

Pro-choice advocates have suggested that this clause is not sufficient to protect pregnant women from prosecution, and the fetal rights created in this Bill will lay the groundwork for the development of fetal protection laws that will allow for the policing and prosecution of pregnant women.⁶² However, this argument relies heavily on pro-choice groups' ability to identify an ulterior motive of the Bill. Pro-choice groups must do significant work to show that this Bill is not about protecting women from violence, but about creating fetal rights that will one day be used to prosecute women in the abortion context. This must be accomplished in the face of the Bill's explicit reassurance that it does not apply to women who consent to a termination of pregnancy.⁶³ Developing the argument that Bill C-484 is designed to protect fetuses and not women is thus daunting.

⁶¹ Supra note 58 at s.238.1(7)(a).

⁶² See personal correspondence with Lynn Paltrow (13 October 2008) on National Advocates for Pregnant Women, *Lessons from the US Experience with Unborn Victims of Violence Laws* for a discussion of the way that laws that intend to protect pregnant women have been used to prosecute pregnant women in the United States.

⁶³ Supra note 58 at s.238.1 (7)(a).

Instead of trying to establish that the Bill has an implicit fetus-protection motive, pro-choice groups might do better to accept that this Bill is about protecting pregnant women. Pro-choice groups could then turn their attention to the ‘women-protective’ element of the Bill and expose the negative effect this element might have on women’s reproductive rights. In particular, pro-choice groups could expose the stereotypes that are operating in this Bill to illustrate how a Bill that purports to protect pregnant women from violence could be used to ‘protect’ women from abortion.

Bill C-484 supports the stereotype that pregnant women are mothers. The fetal rights created by the Bill establish that the fetus is a child, and thus necessarily establish that the pregnant woman is a mother. The Bill states that “every person who...causes the death of a child during birth or any stage of development before birth while committing or attempting to commit an offense against the *mother of the child*”.⁶⁴ Granting the fetus the identity of a child helps the assertion that the pregnant woman is the *mother* of that child. By necessity, one can only be a mother when one has a child. The Bill uses fetal rights and maternal language to indicate that pregnant women are mothers, perpetuating the pregnant mother stereotype.

Having established that pregnant women are mothers, the Bill goes on to establish that an assault on a pregnant woman that results in the ‘death’ or ‘injury’ of her unborn child contains a separate offense from the assault itself. This suggests that the pregnant woman suffers two harms when assaulted: one resulting from the assault on herself (addressed by assault provisions in the Canadian *Criminal Code*) and another resulting from the ‘injury’ or ‘death’ of the fetus (addressed by the new provision). For causing the first harm, the perpetrator would be charged with assault and be “liable to imprisonment for a term not exceeding five years”.⁶⁵ For causing

⁶⁴ Supra note 58 at s.238.1 (1) (emphasis added).

⁶⁵ *Criminal Code*, R.S.C., 1985, c. C-46, s.266(a).

the second harm, the perpetrator would be charged with causing the ‘death’ or ‘injury’ of a fetus and be “liable to imprisonment for life”.⁶⁶ The disparity between the penalties for the assault and for causing a woman to lose her pregnancy is a legal indication that the loss a woman suffers from a lost pregnancy is graver than the harm suffered from an assault itself. Relying on the stereotype that pregnant women are mothers who behave as mothers, this new harm can be understood as the harm experienced by a mother when she loses an already born child. When a pregnant woman’s ‘unborn’ child is injured or dies, pregnant women, as mothers, suffer the same harm as mothers with born children suffer when their child is injured or harmed. Thus, the ‘protection’ being offered to pregnant women by Bill C-484 is protection from the separate and arguably graver harm that mothers experience when they lose an already born child.

The stereotype being perpetuated in Bill C-484 is the same stereotype operating in the women-protective antiabortion movement. Both the Bill and the antiabortion movement assert that pregnant women are mothers and, as mothers, suffer a grave harm when their ‘unborn child’ is killed. Both try to protect women from this harm by preventing the severance of the connection between pregnant mother and unborn child. Bill C-484 protects pregnant women through tough criminal sanctions for those who ‘kill’ their unborn child in an assault. The women-protective antiabortion movement protects pregnant women through the abolition of abortion, which prevents pregnant women from being coerced or tricked into ‘killing’ their unborn child. Thus, both Bill C-484 and the women-protective antiabortion movement perpetuate the same pregnant mother stereotype and both use this stereotype to establish that women need to be protected from the grave harm that results when the mother-unborn child connection is severed.

⁶⁶ Supra note 58 at s.238.1(1)(b).

By perpetuating the same gender stereotype and establishing a new legally recognizable harm suffered by women who lose their pregnancy, Bill C-484 is indirectly supporting the antiabortion movement. Those in the women-protective antiabortion movement can say that Bill C-484 legally identifies pregnant women as mothers who suffer a legally recognizable harm when they lose their pregnancies. These antiabortion groups can use Bill C-484 as evidence that the law requires that pregnant women be protected from acts that sever the connection between mother and child, which could be extended to include abortion. Antiabortion groups do not need to twist Bill C-484 into a Bill that creates a legal obligation to protect the fetus, as would be required by those in the fetal-focused antiabortion movement. Instead, women-protective antiabortion groups could draw on the women-protective nature of the Bill and draw parallels to the ‘women-protective’ nature of their own movement, strengthening their claim that limiting or abolishing access to abortion is in women’s best interests.

When using Bill C-484 for legal support for restricting or prohibiting access to abortion, the women-protective antiabortion movement is not hindered by clause 7(a) of Bill C-484 (the abortion exemption clause). The women-protective movement can argue that pregnant women can never consent to abortion, because doing so would be contrary to their maternal instincts to protect and nurture their child. Thus, the abortion clause in Bill C-484 is ineffectual, as there will be no situation in which a “lawful termination of pregnancy...to which the mother has consented”⁶⁷ exists. As mothers, pregnant women will never consent to the intentional death of their child. This clause, therefore, does not represent a check on the women-protective antiabortion movement’s ability to use Bill C-484 to limit women’s access to abortion. Conversely, those in the fetal-focused movement are limited by clause 7(a). To succeed, the fetal-focused movement must show that the fetal rights created by the Bill should overpower a pregnant woman’s right to

⁶⁷ Supra note 58 at s.238.1 (7)(a).

consent to an abortion established by clause 7(a). They must show that clause 7(a) should be struck down because it violates a fetus' right to life; they must ask that the parliamentary directive be struck down based on a balancing of rights argument. This is a much more difficult argument than an argument that leaves a parliamentary directive intact but renders it ineffectual, as with the legal argument that could be used by the women-protective antiabortion movement.

The *Report of the South Dakota Task Force* illustrates how the gender stereotypes perpetuated by initiatives like Bill C-484 have already been used in the United States to further the women-protective antiabortion movement. The *Report* refers to laws in South Dakota that recognize the unborn child as a separate human being; criminal conduct that results in the death of that child is homicide, and tortious conduct resulting in the death of the child is wrongful death.⁶⁸ These initiatives are similar in nature to Bill C-484 in that they create a separate offense for the 'death' of an unborn child. The *Report* uses these laws as legal evidence that pregnant women are mothers and, because they are mothers, they suffer a separate and grave harm when they lose a pregnancy. As the *Report* notes, the laws provide that when an unborn child dies as a result of tortious conduct, "the wrongful death damages are awarded based upon the loss of the relationship a mother has with her unborn child. The loss is measured over the natural life span of the relationship, as it would have otherwise continued to exist throughout the lives of mother and child".⁶⁹ Thus, the *Report* found that 'unborn victims' laws were not relevant because they recognize fetal life; instead, these laws are relevant because they recognize pregnant women as mothers and identify a distinct legal harm suffered by pregnant women that results from the loss of the mother-unborn child relationship. The harm experienced by pregnant women who lose a

⁶⁸ SDCL 22-16-1 and *Wiersma v. Mapleleaf Farms*, 543 N.W. 2d 787 (SD 1996) cited in South Dakota Task Force to Study Abortion, *Report of the South Dakota Task Force to Study Abortion* (December 2005) online: Vote Yes for Life <http://www.voteyesforlife.com/docs/Task_Force_Report.pdf> at 54.

⁶⁹ *Supra* note 19 at 54.

pregnancy should be equated to the harm experienced by a mother losing a child. Thus, laws that perpetuate the same motherhood stereotype as the women-protective antiabortion movement can be used as legal evidence that women's access to abortion should be restricted or abolished.

The example of Bill C-484 thus illustrates that understanding and naming the stereotypes that are perpetuated by the women-protective antiabortion movement can help pro-choice advocates identify the way in which non-abortion initiatives can be used to further the antiabortion cause. By naming the stereotype and identifying the way that the stereotype operates in seemingly non-abortion initiatives, pro-choice advocates will be in a much stronger position to advocate for women's rights. In particular, pro-choice advocates would do well to carefully consider the gender stereotypes being used in the budding women-protective antiabortion movement. This movement represents a grave threat to women's autonomy and decision making rights and yet is proving attractive to the public because of its purported 'pro-women' sentiments. By identifying and exposing the stereotypes operating in the movement, it is hoped that we can better expose the anti-women effects of the new 'pro-woman' antiabortion movement.