

**AMICUS BRIEF**

**PREPARED BY**

**THE CENTER FOR REPRODUCTIVE RIGHTS**

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**RED ALAS (RED DE ACADÉMICAS DEL DERECHO)**

**AND**

**GÓMEZ-PINZÓN, LINARES, SAMPER, SÚAREZ, VILLAMIL ABOGADOS S.A.**

**PRESENTED BEFORE**

**THE COLOMBIAN CONSTITUTIONAL COURT**

**(CASE NO. D 5764)**

**PRESIDING JUDGE DR. ALVARO TAFFUR**

**EDIFICIO DEL PALACIO DE JUSTICIA DE BOGOTÁ, D.C.  
CALLE 12 No. 7-65  
BOGOTÁ  
COLOMBIA**

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## **I. Introduction**

The issue presented before the honorable Constitutional Court of Colombia in this case – whether the categorical ban on abortion in Article 122 of the Colombian Penal Code is constitutional – raises a question of first impression for this Court that involves the most fundamental rights of life, health and dignity.

Constitutional courts and legislatures of many countries around the world have considered this important question on numerous occasions over the last several decades. *Amici* in this case respectfully submit that these countries’ consistent practices treating the rights of women in the context of abortion provides a useful guide for this Court’s analysis of this important issue.

*Amici* respectfully submit this brief to provide this Court with an overview of the constitutional decisions on abortion by courts of several civil law and common law countries. These countries, with their different legal systems and socio-political histories, differ in how they analyze the issue of abortion, the kinds of safeguards they have instituted to protect the women’s rights and the state’s interest in protecting potential life, and the extent to which they have found abortions to be permissible. Despite their differences, however, all permit abortion in at least three specific situations: (1) where pregnancy poses a threat to the life or health of the pregnant woman; (2) where the fetus suffers from physical and/or serious mental defects; and (3) where the pregnancy resulted from rape. Failing to recognize these three exceptions falls below the minimum standards that have been widely accepted as necessary to protect a woman’s fundamental rights to life, health and dignity.

In order to be most helpful to this Court, this brief focuses on the court decisions that first addressed the issue of abortion in each of these countries.<sup>1</sup> These decisions represent the paradigmatic models of analysis found in European civil law and common law courts.

*Amici* respectfully request that in analyzing the constitutionality of Article 122 of the Penal Code, this Court refer to the consistent findings of other constitutional courts as persuasive authority for finding that the Constitution of Colombia permit, at a minimum, exceptions to the categorical criminalization of abortion in order to protect women’s fundamental rights to life, health, privacy, and personal dignity.

## **II. Recent Trends in Legal Reform Approaches to Abortion**

The vast majority of abortion laws around the world explicitly permit abortion under certain circumstances. The abortion laws adopted by 68 countries—including most of those in Europe, as well as the United States, Canada and Australia—permit a woman to terminate a pregnancy without restriction as to reason or, in some cases, on broad therapeutic, social and economic grounds. Sixty-nine countries explicitly permit abortion when a pregnancy poses a threat to a woman’s life or physical health and another 20 countries also permit consideration of a woman’s mental health. Of the 157 countries that permit abortion either broadly or restrictively, 87 permit

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<sup>1</sup> Abortion laws have subsequently been liberalized by the courts or legislatures in all countries except for Portugal.

abortion when a pregnancy results from rape.<sup>2</sup> These statutory approaches implicitly weigh the rights of the pregnant woman more heavily than the state's interest in protecting potential life.

It is also worth noting that the last 20 years have seen a decisive trend in favor of the liberalization of abortion laws. At least 27 countries, including Belgium, Germany, Guyana, Spain, and Switzerland, have significantly liberalized their abortion laws.<sup>3</sup> Only a handful of countries have legally curtailed women's access to abortion during this period.<sup>4</sup>

### **III. Foreign Courts**

The constitutional courts of the countries reviewed in this brief have adopted several different models of analysis in addressing the constitutionality of abortion. The majority of courts in Europe have balanced the protection of the potential life of the fetus against the woman's fundamental rights to life, health and dignity. These courts have done so by instituting safeguards to protect the fetus's interests<sup>5</sup> but allowing the decriminalization of abortion in certain circumstances that deeply affect the woman's rights.

Britain and Australia, two common law countries, have not engaged in the same constitutional balancing test used by other countries—a consequence of their lack of a formal constitutional source of rights—but have reached much the same result as their European counterparts. The courts of Britain and Australia continue to accept a general criminal framework for abortion, but have recognized that necessity is a legitimate defense against prosecution. Exercising their common law authority to interpret the law, however, these courts have found that a narrow interpretation of the criminal defense of necessity does not sufficiently protect the rights of a woman where the continuation of the pregnancy threatens her life or health. In order to ensure that the rights of the woman are adequately protected, these courts have interpreted the defense of necessity broadly, expanding the types of circumstances that fall under the definition of necessity. In practice, these broad interpretations of the necessity exception have allowed women broad access to abortion.

Finally, France and the United States expressly recognize a woman's right to an abortion and permit her to choose to terminate a pregnancy within its first stages. Today, French law permits

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<sup>2</sup> Center for Reproductive Rights, *The World's Abortion Laws 2005* (Wallchart, 2005).

<sup>3</sup> Anika Rahman, Laura Katzive & Stanley Henshaw, *A Global Review of Laws on Induced Abortion, 1985–1997*, 24 *Int'l Fam. Plan. Persp.* 56–64 (1998); Center for Reproductive Rights, *Abortion and the Law: 10 Years of Reform* (2005).

<sup>4</sup> *Id.*

<sup>5</sup> In most countries, laws require women to obtain mandatory pre-abortion counseling and medical certification of the need for the abortion and encourage the continuation of the pregnancy by providing the woman with education, health services, and economic support. For example, the Portuguese Constitutional Court noted that the requirement to protect the fetus should be primarily fulfilled by non-penal methods, including education, counseling, health services, and economic support. Tribunal Constitucional de Portugal [TCP] [Constitutional Court], May 29, 1985, ((Diário da República [D.R.], No. 85, p. 5844). In a German decision of 1993 (BverfGE 88, 203 (F.R.G.)), the Court held that a pre-abortion counselor should decide when the counseling was complete and certify it as such. Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 *Am. J. Comp. L.* 273, 284 (1995).

a woman to decide whether to have an abortion in the first twelve weeks of pregnancy,<sup>6</sup> and courts have upheld this legislation based on a woman's right to freedom. The United States Supreme Court recognizes that the right to abortion is encompassed in the right to privacy and precludes the government from creating undue burdens on access to abortion prior to fetal viability. While the courts of these countries have placed comparatively greater emphasis on the woman's rights in considering abortion in the early stages of pregnancy, their decisions implicitly or expressly recognize state interests in protecting the potential life of the fetus, and reflect a compromise between those interests and the rights of the pregnant woman.

## **A. Consideration of interests**

Decisions from the majority of European courts emphasize the need to reconcile the state's interest in protecting potential life with the rights of the pregnant woman. Although these courts have strongly affirmed the State's interest in protecting the fetus, they have recognized that fetal interests are not absolute and cannot categorically trump the fundamental rights of the woman. These courts have applied a balancing test to determine whether the pregnancy poses a serious danger to the woman that would warrant an exception to a general ban on abortion. They have consistently upheld as constitutional exceptions to the general ban on abortion where the continuation of pregnancy would seriously jeopardize the woman's rights to life and health, dignity, or self-determination.

The courts and legislatures of these countries have recognized the following situations as posing sufficiently severe burdens on the woman's fundamental rights to justify exceptions to the general criminalization of abortion: (1) a threat to the pregnant woman's life or health; (2) severe physical or mental impairment of the fetus; or (3) pregnancy that results from rape.

### **1. Italy**

In 1975, the Constitutional Court of Italy held that a categorical ban on abortion was unconstitutional and that a woman has a constitutional right to abortion where pregnancy causes serious and medically certifiable danger to the pregnant woman's health.<sup>7</sup> Despite acknowledging that the fetus had "a constitutional right to protection," the Court found that the categorical ban on abortion violated the woman's constitutionally guaranteed right to health.

The Court held that the rights of the fetus cannot automatically be prioritized over those of the woman. Instead, they must be balanced:

[T]he constitutionally protected interest in the conceived one can collide with other interests that enjoy constitutional protection. Consequently, the law cannot give the first interest [fetal interests] complete and absolute prevalence, denying the second interest an adapted protection. This is precisely the constitutional

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<sup>6</sup> The French law calculates fetal age from the presumed date of conception. The gestational age limit is thus 14 weeks from the last menstrual period. Code de la santé publique (nouvelle partie législative) art. 2212-1.

<sup>7</sup> Corte costituzionale [Corte cost.] [Constitutional Court], 18 feb. 1975, n.27, 1762, Racc. uff. corte cost., 201, Giur. It. I, 1, 1416 (Italy). (All translations from Italian by Heloisa Griggs).

violation in this instance, which in the Court's view invalidates the current penal sanction for abortion.<sup>8</sup>

Significantly, the Court emphasized that the weight accorded to the rights to life and health of a fully developed person are more substantial than the state's duty to protect the potential life of the fetus: "[T]here is no equivalence between the right not only to life, but also to health of someone who already is a person, such as the mother, and safeguarding the embryo that has yet to become a person."<sup>9</sup>

Thus, according to the Constitutional Court of Italy, the fetus's potential for life cannot outweigh the right to life and health of a fully developed human being.

## 2. Germany

While Germany's law on abortion now permits the procedure without restriction as to reason,<sup>10</sup> the German Constitutional Court has for three decades emphasized the fetus's constitutional right to life. Moreover, the Constitutional Court has declared that the state has a duty to protect that fetal life. The Court has made clear that its approach is based on the strong affirmation of the constitutional right to life, which was included in the Basic Law (German Constitution) as a rejection of the traumatic experience of genocide during World War II:

The express incorporation into the Basic Law of the self-evident right to life—in contrast to the Weimar Constitution—may be explained principally as a reaction to the “destruction of life unworthy of life,” to the “final solution” and “liquidations,” which were carried out by the National Socialistic Regime [Nazi] as measures of state.<sup>11</sup>

Despite its strong protection of fetal interests, the German Constitutional Court has also recognized that such interests must be weighed against the rights of the pregnant woman. As a result, the Constitutional Court has protected the legislature's authority to permit abortions that protect the pregnant woman's right to life and health or alleviate other significant burdens on the rights of the woman, such as those arising from pregnancies involving serious fetal impairment or resulting from rape.

In a 1975 case, the German Constitutional Court recognized that the right to life of the fetus could not be extinguished in an ordinary case of pregnancy. The Court declared that fetuses are within the meaning of Article 2 of the Basic Law, which guarantees that “[e]veryone has the right to life and bodily integrity,” and held that the right to life of the fetus was therefore

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<sup>8</sup> *Id.* at 204.

<sup>9</sup> *Id.* at 205. In 1978, Parliament passed an abortion reform bill that permitted abortion in the first trimester on the grounds of fetal impairment, rape, incest, and a broad range of economic, health, and personal conditions that would be affected by the unwanted pregnancy.

<sup>10</sup> Penal Code, art. 218 (C.H. Beck, 1997) (unofficial translation, emphasis added).

<sup>11</sup> *Entscheidungen des Bundesverfassungsgerichts [BverfGE] 39, 1 (F.R.G.)* (explaining that life exists “in any case, from the 14<sup>th</sup> day of conception”) *translated in* Robert E. Jonas & John D. Gorby, trans., *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 *John Marshall J. Prac. & Proc.* 605, 637 (1976).

constitutionally protected.<sup>12</sup> The Court held that in an ordinary case of pregnancy, a woman's right to self-determination, without more, was insufficient to override the fetus's right to life.<sup>13</sup>

Despite prohibiting purely elective abortions, the Court also recognized that abortion would be permissible where the pregnancy would seriously compromise the woman's fundamental interests. The Court emphasized that the rights of the pregnant woman, just as the rights of the fetus, must "be viewed in their relationship to human dignity, the center of the value system of the constitution."<sup>14</sup>

In assessing the balance between the human dignity of the fetus and the woman, the Court carved out certain circumstances where abortions would be permissible. Specifically, the Court held that where a woman's life and health are endangered, "her own 'right to life and bodily inviolability' [] is at stake, the sacrifice of which cannot be expected of her for the unborn life."<sup>15</sup> The Court also held that the state's duty to protect life is not violated if it allows abortions in cases where pregnancy would impose "other extraordinary burdens for the pregnant woman."<sup>16</sup> The Court specifically declared that cases of fetal impairment, pregnancy that results from rape, and other "social or emergency" situations qualified as such extraordinary burdens.<sup>17</sup> The Court held that: "the general social situation of the pregnant woman and her family can produce conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favor of the unborn life cannot be compelled with the means of the penal law. . ."<sup>18</sup> The Court explains:

The decisive viewpoint is that in all of these cases another interest equally worthy of protection, from the standpoint of the constitution, asserts its validity with such urgency that the state's legal order cannot require that the pregnant woman must, under all circumstances, grant precedence to the right of the unborn.<sup>19</sup>

Thus, the Court recognized that strong protection of the right to life of the fetus could not categorically impose significant physical and economic burdens on the woman or her family.<sup>20</sup>

It is important to note that since this time, the Court has upheld the expansion of legislative language regarding the right to abortion, reaffirming at the same time the obligation of the state

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<sup>12</sup> *Id.* at 638 (Court citing the Basic Law).

<sup>13</sup> *Id.* at 644.

<sup>14</sup> *Id.* at 643 (citation omitted).

<sup>15</sup> *Id.* at 648.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The Constitutional Court reaffirmed this decision in 1993 in upholding a law that changed the third party determination of exceptions to a system of mandatory counseling. In BverfGE 88, 203 (F.R.G.), the Court again recognized that the fetus had the right to life, but held that woman's human dignity, right to life and health, and right to develop her personality justified allowing her to choose to terminate a pregnancy within twelve weeks of conception where such pregnancy: (1) would create a serious danger to her life or health; (2) resulted from sex crimes; (3) would result in a child with severe birth defects, or (4) would create a situation of personal necessity comparable in intensity to the demands created by the first three enumerated exceptions. Neuman, *supra* note 5, at 279-82.

to protect potential life. In 1993, the Court decided that legislative power should permit abortion during the first 12 weeks of pregnancy and should permit the pregnant woman to make the final decision, provided that she participate in counseling services and that there be a waiting period before the procedure.<sup>21</sup> In response, the legislative body approved a new law in 1995 which decriminalizes all abortions during the first trimester, in accordance with certain procedural requirements.<sup>22</sup>

### 3. Spain

In 1983, a bill was introduced in Spain that would allow abortions, subject to certain time constraints, in cases where the pregnancy: (1) posed a serious danger to the life or health of the woman; (2) resulted from rape; or (3) would result in a child with serious impairment.<sup>23</sup> The bill was challenged as violating the fetus's constitutional right to life and physical and moral integrity.

The Spanish Court found that the fetus, although not a person, is a "legal good protected by . . . our constitution."<sup>24</sup> Despite the strict protection afforded to the fetus, however, the Court found that "the protection [of the fetal good] is [not] absolute, because as happens in the case of all the goods and rights recognized constitutionally, in certain situations they can and should be subject to limitations . . . ." The Court emphasized that "[the fetus's] rights cannot prevail unconditionally over the rights of the woman, nor can her rights take absolute primacy over the life of the "one to be born."<sup>25</sup> Thus, the rights of the pregnant woman and those of the fetus must be balanced to determine the constitutionality of the abortion under certain circumstances.

Where a pregnancy threatened a woman's life, the Court found that her right to life precluded forcing her to carry the fetus to term:

[I]f the life of the 'one to be born' were protected unconditionally, the life of the unborn would be more protected than the life of the already born [the mother], and the mother would be penalized for defending her right to life. . . . [T]hus, the prevalence of the mother's life is constitutional.<sup>26</sup>

The Court found further that an exception based on a grave threat to a woman's physical and mental health was a justifiable protection of the woman's constitutional rights to life and physical integrity: "[T]hat the mother's health takes precedence is not unconstitutional either, especially when taking into consideration that the requirement that she make such an important and difficult

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<sup>21</sup> *Id.* at 282–283, 285.

<sup>22</sup> Nanette Funk, *Abortion Counseling and the 1995 German Abortion Law*, 12 Conn. J. Int'l L. 51–52 (1996) (Grosse Mehrheit für das neue Abtreibungsrecht. Fristenregulung mit Beratungspflicht beschlossen, Frankfurter Allgemeine Zeitung, June 30, 1995).

<sup>23</sup> 12 ANNUAL REVIEW OF POPULATION LAW 37–38 (Reed Boland ed., 1985).

<sup>24</sup> Sentencia del Tribunal Constitucional [STC] [Constitutional Court], Apr. 11, 1985 (B.O.E., No. 53) (Spain), available at [http://www.boe.es/g/es/bases\\_datos\\_tc/doc.php?coleccion=tc&id=SENTENCIA-1985-0053](http://www.boe.es/g/es/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1985-0053). (All translations from Spanish done by Frances Mejía).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

sacrifice to her health under the threat of penal sanction can be considered inadequate [to motivate such a sacrifice].”<sup>27</sup>

In the case of fetal impairment, the Court framed its analysis in terms of the burden imposed on the woman and her existing family, and held that such a burden would “exceed [] what normally can be asked of a mother and a family. This statement takes into account the exceptional situation parents find themselves in, and, especially the mother, whose situation is made worse in many cases because of the insufficiency of state and social welfare . . . .”<sup>28</sup>

The Court further found that the exception based on conception through rape affirmed the woman’s constitutional right to dignity, which the Court described as “intimately linked” with the constitutional provisions protecting the free development of the personality (art. 10); the right to physical and moral integrity (art. 15); the right to liberty of ideas and beliefs (art. 16); and the right to honor, personal and family privacy and the right to one’s own self-image (art. 18.1).<sup>29</sup> The Court emphasized the need to ensure that the woman not be forced to suffer the consequences of a violent act that had already profoundly offended her personal dignity:

It is enough to consider that the gestation has its origin in the commission of an act not only contrary to the woman’s will, but realized by overcoming her resistance through violence, damaging in a major way her personal dignity and the free development of her personality . . . . It is manifest that to obligate her to put up with the consequences of an act of such nature is not something that can be asked of her.<sup>30</sup>

#### **4. Portugal**

Despite its relatively restrictive stance on abortion, the Constitutional Court of Portugal has likewise consistently upheld laws permitting abortions under limited circumstances that implicate the fundamental rights of the pregnant woman. The Court has held that while the fetus has a constitutional right to protection, this right is limited and cannot outweigh the fundamental rights of living persons, such as a woman’s right to life, health and dignity.

In 1984, the Portuguese General Assembly enacted a law waiving prosecution for abortion where there was: (1) fetal impairment; (2) danger to the woman’s life or serious and irreversible damage to the woman’s physical or mental health; or (3) pregnancy resulting from rape.<sup>31</sup> Upon a request made by the President, the Court assessed the constitutionality of the new law and held it was constitutional.<sup>32</sup>

In 1985, after the law had come into force, the Court was again asked to review the law and reaffirmed its constitutionality.<sup>33</sup> In balancing the rights of the fetus and the rights of the woman,

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Eclusão da Ilicitude em Alguns Casos de Interrupção Voluntária da Gravidez, Lei no. 6/84 (1984, 6).

<sup>32</sup> TCP, Mar. 19, 1984, (D.R., No. 25, p. 2982) (Port.).

<sup>33</sup> TCP, May 29, 1985, (D.R., No. 85, p. 5844) (Port.).

the Court emphasized that the rights of living persons must be accorded greater weight than the protection given to the fetus prior to birth:

The protection that is owed to the right of each man to his life is not directly applicable, nor on the same level, as prenatal life in the uterus. This distinction is very important, especially with respect to conflicts with other rights or constitutionally protected interests. While it is difficult to imagine that there could be another right, which when in collision with the right to life may justify sacrificing this right to life, we can picture situations where the constitutionally protected good, which is prenatal life, has to give way where it conflicts, not only with other constitutional values or goods, but above all with certain fundamental rights (specifically the rights of a woman to life, health, good name and reputation, dignity, voluntary maternity, etc.).<sup>34</sup>

In a subsequent case, the Court explained that the balance between the rights of the woman and fetus depends, in part, on the length of the pregnancy. The Court held that the “the state has a great duty to protect the fetus the closer it is to being born.”<sup>35</sup> The Court found that the right of the fetus would generally prevail in the last few weeks of pregnancy, but the woman could be given greater autonomy to choose to have an elective abortion in the first weeks of pregnancy.<sup>36</sup> Significantly, the Court held that the constitution does not require the criminalization of abortion in the first ten weeks of pregnancy.<sup>37</sup>

The consistent findings by the courts of Italy, Germany, Spain, and Portugal exemplify how the Constitutional Court of Colombia can support the state’s interest in potential life, and at the same time recognize that such an interest cannot be used to categorically trump the fundamental rights of the pregnant woman. As a fully formed human being, the woman possesses fundamental rights to life, health and dignity that must be respected as well. At a minimum, in cases of pregnancy that threaten maternal life or health, involve seriously impaired fetuses, or result from rape, all of these courts consistently accord the woman’s constitutional rights greater weight than the fetal interests and allow the woman to terminate the pregnancy.

#### **B. Courts in Common and Civil Law Countries Have Held That a Narrow Interpretation of the Criminal Defense of Necessity Does Not Sufficiently Protect the Rights of a Woman**

In countries that accept a criminal framework for abortion, “necessity” is sometimes recognized as a defense to abortion under general principles of criminal law. Courts in both civil law and common law countries have expressly held that a narrow defense of necessity, which requires a woman to show an immediate and serious threat to her life, is inadequate to safeguard the fundamental rights of the woman. The Italian Constitutional Court, for example, held that a defense of necessity is insufficient to protect maternal health and required the creation of

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<sup>34</sup> *Id.*

<sup>35</sup> TCP, Apr. 18, 1998, (D.R., No. 288, ¶ 47) (Port.), *available at* <http://www.tribunalconstitucional.pt/tc/acordaos/19980288.html>.

<sup>36</sup> *Id.* ¶ 49.

<sup>37</sup> *Id.* ¶ 43.

safeguards specific to the situation of the pregnant woman in order to ensure protection of maternal health.<sup>38</sup> Courts in the United Kingdom and Australia have likewise rejected a narrow interpretation of necessity. Instead of rejecting the defense of necessity outright, as did the Constitutional Court of Italy, these courts have exercised their judicial authority as common law courts to define expansively the principle of “necessity” in the context of abortion so as to permit abortion in most circumstances.

### **1. The Constitutional Court of Italy Has Expressly Held that the Defense of Necessity is an Insufficient Safeguard to Protect a Woman Against Serious Threats to Her Health**

In 1975, the Constitutional Court of Italy found that the defense of necessity contained in the Italian Criminal Code, which required an immediate and serious threat, did not provide a sufficient safeguard for women where the pregnancy posed a serious danger to the pregnant woman’s health:

The condition of the pregnant woman is particular and is not adequately protected by a norm of general applicability such as article 54 of the Criminal Code, which demands not only that the damage or danger be serious and absolutely inevitable, but also that it be a present danger or damage. While the damage or danger of continuing a pregnancy may be foreseen, it is not always immediate.<sup>39</sup>

Because the type of threat posed by a continued pregnancy might not meet the immediacy requirement of the necessity defense as defined by the Criminal Code, the Court required the creation of protections specific to the types of risks a pregnancy may pose. Moreover, the Court expressly found that the defense of necessity was conceptually inappropriate to apply to the abortion context. According to the Court, acceptance of the necessity defense would misconstrue the relative weight of the pregnant woman’s rights to life and health and the right of the fetus to protection:

[A]rticle 54 of the Criminal Code [on necessity] presupposes an equivalency between the good violated by the author of the offense in order to protect another good. However, there is no equivalence between the right not only to life, but also to health of someone who already is a person, such as the mother, and safeguarding the embryo that has yet to become a person.<sup>40</sup>

Because the woman’s health must be accorded greater weight than the fetal interests, the Constitutional Court of Italy held that the defense of necessity was inappropriate to consider in the analysis of the permissibility of abortion where the woman’s life or health is threatened.

### **2. Common law Courts Have Interpreted the Defense of Necessity Expansively to Permit Abortion in Most Circumstances**

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<sup>38</sup> Corte cost., 18 feb. 1975, n.27, Racc. uff. corte cost., 204–205 (Italy).

<sup>39</sup> *Id.*

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

Unlike the majority of European courts, which have employed a test that balances the rights of the fetus and the woman to carve out explicit and limited exceptions to the criminalization of abortion, common law courts in Britain and Australia have analyzed the abortion question within the general principles of criminal law. This difference in approach can be explained, in part, by the absence of a written constitution in the United Kingdom and a formal declaration of rights in the Australian Constitution. Despite these differences in constitutional design, these countries reached the same conclusions as their European counterparts through the reinterpretation and expansion of criminal law principles. These common law courts have accepted that the general criminal defense of necessity can sufficiently protect the rights of the woman, but have redefined the defense of necessity in the abortion context so that it applies to a wide range of circumstances. These courts have expressly held that the defense of necessity as applied in the abortion context is not limited to circumstances posing an immediate threat to a woman's physical life or health. Rather, the defense has been interpreted broadly enough to include threats to the mental health and socio-economic well-being of the woman. In practice, this necessity defense permits abortions in virtually all circumstances.

The expansive interpretation of the criminal defense of necessity in the context of abortion was first addressed by a British lower court over six decades ago.<sup>41</sup> In 1938, a doctor notified the authorities that he planned to perform an abortion in a London hospital for a fourteen-year-old girl who had been raped by soldiers. He was subsequently criminally prosecuted for violating a statute that banned all abortions except when necessary to preserve a woman's life.

In providing the jury with instructions on whether an abortion performed under such circumstances could fall within the statute's necessity exception, the trial judge emphasized the difficulty of distinguishing between a threat to physical life and a threat to health: "But is there a perfectly clear line of distinction between danger to life and danger to health? I should have thought not. I should have thought that impairment of health might reach a stage where it was a danger to life."<sup>42</sup> The judge concluded that if:

[T]he probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman.<sup>43</sup>

The jury exculpated the doctor of the criminal charges and considered the psychological effects of the rape on the victim to be sufficiently severe.

A series of lower court cases following *R v. Bourne* sought to clarify and further define conditions under which abortion could be justified under the defense of necessity. The courts have repeatedly recognized that the pregnancy must pose a threat to life, but that the threat can manifest itself as a danger to both the physical and mental well-being of the woman.<sup>44</sup> Although

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<sup>41</sup> See *R. v. Bourne*, 3 All E.R. 615 (1938) (Eng.).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> In *R v. Newton* for example, a doctor was charged and convicted for performing an unlawful abortion. In the instructions to the jury, the Court stated that:

the defense of necessity has been developed by the courts, the legislature has since adopted a statute defining exceptions where abortion is permitted. These statutory exceptions reflect the full range exceptions adopted by the U.K. courts.<sup>45</sup>

Similarly, in Australian state courts, the principle of necessity has likewise been used as a defense to the crime of abortion, and this principle has been interpreted broadly to include both mental and physical dangers to the woman.<sup>46</sup> In *R v. Davidson*,<sup>47</sup> the Supreme Court of Victoria considered the prosecution of a Melbourne doctor accused of carrying out abortions and who asserted the defense of necessity. Like the British courts, the Supreme Court expressly rejected limiting the principle of necessity to circumstances posing a danger to the woman's life and instead recognized that the defense of necessity could be based on serious risks to both the physical and mental health of the woman, so long as such risks are more severe than those inherent in normal pregnancy.<sup>48</sup> The Court found that in order to determine the abortion performed was unlawful, the Crown must establish that the accused did not honestly believe on reasonable grounds that the act done was either proportionate or necessary to preserve the pregnant woman from a serious threat to her life or physical or mental health. The burden lies with the prosecution to disprove at least one of the elements of necessity, thereby making criminal convictions difficult to obtain.

In subsequent cases, Australian courts have relied on the *Davidson* analysis of the necessity defense and have expanded the circumstances that give rise to the defense. In *R v. Wald*, a case arising from New South Wales,<sup>49</sup> the jury acquitted five defendants who had been charged with performing unlawful abortions. In the instructions to the jury, the judge applied the principle of necessity but expanded the definition of "serious danger to mental health" to allow the jury to consider socio-economic factors:

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The law about the use of instruments to procure miscarriage is this: "such use of an instrument is unlawful unless the use is made in good faith for the purpose of preserving the life or health of the woman." When I say health I mean not only her physical health but also her mental health. 5 *Crim. L. Rev.* 469 (1958) (quoting *R. v. Newton* Central Criminal Court (1958) (Eng.) (unreported)).

<sup>45</sup> In practice, this legislation allows women in Britain to have virtually unrestricted access to abortion within the first twenty-four weeks of pregnancy. The statutory exceptions are:

1. Where continuing the pregnancy would involve a risk of injury to the physical or mental health of the woman greater than if the pregnancy were terminated (subject to twenty-four week limit);
2. Where continuing the pregnancy would involve a risk of physical or mental health injury to any existing children greater than if pregnancy were terminated (subject to twenty-four week limit);
3. Risk of grave permanent injury to the pregnant woman's physical or mental health;
4. Risk to the life of the pregnant woman;
5. If child were to be seriously handicapped if it were born.

See Kerry Peterson, *Abortion Laws: Comparative and Feminist Perspectives in Australia, England and the United States*, 2 *Med. L. Int'l* 77, 84–85 (1996) (describing U.K. Abortion Act (1967), amended by Human Fertilisation and Embryology Act (1990)).

<sup>46</sup> In Australia, abortion is regulated by individual states through statutes, judicial interpretation of statutes, and the common law. *Id.* at 88.

<sup>47</sup> *R v. Davidson* (1969) V.R. 667 (Austl.).

<sup>48</sup> *Id.* at 671 (stating that "[the principle of necessity] should not be confined to danger to life but should apply equally to danger to physical or mental health provided it is a serious danger not being merely the normal dangers of pregnancy and childbirth").

<sup>49</sup> *R v. Wald* (1971) 3 D.C.R. (NSW) 25 (Austl.).

In my view it would be for the jury to decide whether there existed in the case of each woman any economic, social or medical ground or reason which in their view could constitute reasonable grounds upon which an accused could honestly and reasonably believe there would result a serious danger to her physical or mental health.<sup>50</sup>

The New South Wales Court of Appeal in *CES v. Superclinics (Aust) Pty Ltd* likewise adopted a broader defense of necessity that included threats to the mental health of the woman arising from the adverse socio-economic consequences of the pregnancy.<sup>51</sup> One judge emphasized that a doctor can consider the social and economic consequences that the woman would endure after the pregnancy in determining whether a woman's mental health would be seriously endangered by continuing a pregnancy:

Having acknowledged the relevance of other economic or social grounds which may give rise to such a belief, it is illogical to exclude from consideration, as a relevant factor, the possibility that the patient's psychological state might be threatened *after* the birth of the child, *e.g.*, due to the very economic and social circumstances in which she will then probably find herself.<sup>52</sup>

In conclusion, whether through repudiation of the necessity defense, as by the Italian courts, or through the broad expansion of the necessity defense, as by the common law courts, courts in civil law and common law countries have made clear that limiting abortions to cases where there exists an immediate physical threat fails to give sufficient weight to fundamental rights of mental and physical health of the woman.

### **C. France and the United States Expressly Recognize a Woman's Right to an Abortion**

Unlike the majority of European and Commonwealth countries, France and the United States place greater emphasis on the autonomy of the woman to choose to have an abortion without medical supervision or threat of criminal sanction in the early stages of pregnancy. Like the majority, however, their analyses reflect recognition of state interests in protecting the potential life of the fetus, and a constitutional balance required between those interests and the rights of the woman. French courts have upheld the constitutionality of legislation that permits a woman to decide for herself whether to have an abortion in the first weeks of pregnancy, finding that such legislation is constitutionally based on the woman's right to freedom and respects a balance between safeguarding human dignity – impliedly, that of the fetus – and the woman's autonomy. The United States specifically recognizes the right to have an abortion as part of the broader constitutional right to privacy, and applies a balancing test to determine the scope of the right to abortion.

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<sup>50</sup> *Id.* at 29.

<sup>51</sup> *CES v. Superclinics (Aust) Pty Ltd* (1995) 38 N.S.W.L.R. 47.

<sup>52</sup> *Id.*

## 1. France: A Woman May Decide Whether to Have an Abortion Within the First Trimester Based on Her Determination of Whether Pregnancy Would Cause Her Distress

In 1975, the Constitutional Court, the body in France that examines the constitutionality of statutes, upheld the constitutionality of the Voluntary Interruption of Pregnancy Act, which decriminalized abortion up to the tenth week of pregnancy if the continuation of pregnancy would cause the woman distress.<sup>53</sup> Distress was not defined by the act, and the determination that the pregnancy would cause distress was left to the discretion of the woman.<sup>54</sup> After the tenth week, the act allowed an abortion to be performed in cases of necessity if: (1) the continuation of the pregnancy constituted a serious risk to the woman's life or health or (2) in the case of fetal defects.<sup>55</sup>

Opponents of the law argued that the law was unconstitutional because the fetus should be protected under the constitutional guarantees of life and protection of the health of children.<sup>56</sup> The Preamble to the 1958 Constitution states that "every human being . . . possess[es] sacred and inalienable rights,"<sup>57</sup> and the Preamble to the 1946 Constitution states that the nation "guarantees protection of health to all, notably to children, and mothers."<sup>58</sup>

The Constitutional Court rejected these arguments and held that the act was not contrary to any French constitutional provision.<sup>59</sup> By inference, the constitutional right of health applies only to children who have already been born.<sup>60</sup> The Court rejected the arguments based on the right to life of the fetus, explaining that the law guarantees respect for all human life, but that such respect is subject to limitations.<sup>61</sup> The Court held that the autonomy of women to choose to have an abortion was protected under her right to freedom.

In a subsequent 2001 decision upholding a law that raised the period during which a pregnancy may be voluntarily terminated from ten to twelve weeks, the Constitutional Court reaffirmed its prior holding, explaining: "[W]here the pregnant woman is, because of her condition, in a situation of distress, the Act has not . . . destroyed the balance that the Constitution requires

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<sup>53</sup> *Abortion*, 24 Int'l & Comp. L.Q. 587, 587-88 (1975) [hereinafter *Abortion*] (discussing Conseil constitutionnel [Cons. const.] [Constitutional Court], Jan. 15, 1975, D. 1975, Jur. 529, note Léo Hamon (Fr.)). The Act consisted largely of a new chapter in the Public Health Code. French Penal Code art. 317 provides for the prosecution of the crime of abortion.

<sup>54</sup> Bartha M. Knoppers et al., *Abortion Law in Francophone Countries*, 38 Am. J. Comp. L. 889, 904 (1990) (discussing Public Health Code art. 162-1).

<sup>55</sup> *Id.* at 905.

<sup>56</sup> *Id.*

<sup>57</sup> *Translated in* Mary Ann Glendon, *Abortion and Divorce Law in Western Europe* 162 n.34 (1987).

<sup>58</sup> *Id.*

<sup>59</sup> *See* Cons. const., Jan. 15, 1975, D. 1975, Jur. 529, ¶ 11, note Léo Hamon (Fr.) *translated and available at* <http://www.conseil-constitutionnel.fr/langues/anglais/a7454dc.pdf>.

<sup>60</sup> H. Patrick Glenn, *The Constitutional Validity of Abortion Legislation: A Comparative Note*, 21 McGill L.J. 673, 677 (1975).

<sup>61</sup> *See* Cons. const., Jan. 15, 1975, D. 1975, Jur. 529, ¶ 9, note Léo Hamon (Fr.) *translated and available at* <http://www.conseil-constitutionnel.fr/langues/anglais/a7454dc.pdf>.

between safeguarding human dignity against any form of deterioration and the freedom of women[.]”<sup>62</sup>

The Court found that the requirement of distress was “intended to exclude any fraud against the law and, more generally, any denaturing of the principles that it laid down, and these principles include ‘respect for the human being from the beginning of its life . . . .’”<sup>63</sup> Thus, under French law, the woman is placed in the position of safeguarding the dignity of the fetus.

## **2. The United States Considers Abortion to be a Right Included in the Right to Privacy**

The United States recognizes a specific right to abortion as part of the broader right to privacy. U.S. courts have held, however, that this right to privacy is not unlimited and depends on the strength of the state’s interest in protecting the potential life of the fetus and the health of the pregnant woman. Thus, despite its alternative substantive analysis, the United States is similar to the other European countries in its use of a balancing test to determine the scope of access to abortion.

In its first major abortion case, *Roe v. Wade*,<sup>64</sup> the U.S. Supreme Court found that the constitutional “right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>65</sup> The Court considered the physical, mental, and socioeconomic harm the state might cause a pregnant woman by denying her the choice to have an abortion:

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.<sup>66</sup>

However, the Court also concluded that the “privacy right involved . . . cannot be said to be absolute.”<sup>67</sup> The Court sought to balance the competing interests of the pregnant woman, the state’s interest in maternal health, and the state’s interest in prenatal life: “[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.”<sup>68</sup>

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<sup>62</sup> Cons. const., June 27, 2001, D. 2001, Jur. 74, ¶ 5, note Bertrand Mathieu (Fr.), *translated and available at* <http://www.conseil-constitutionnel.fr/langues/anglais/a2001446dc.pdf>.

<sup>63</sup> *Id.*

<sup>64</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>65</sup> *Id.* at 153.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 153–54.

<sup>68</sup> *Id.*

In *Planned Parenthood v. Casey*,<sup>69</sup> the Supreme Court reaffirmed the right of a pregnant woman to have an abortion and more fully articulated the interests of the state and the woman that must be balanced:

It must be stated at the outset and with clarity that *Roe*'s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.<sup>70</sup>

Although the Supreme Court recognized that the State may legitimately limit access to abortions late in the gestation period, after fetal viability, the Court emphasized that states may not place an "undue burden" on the woman's right to choose to abort a nonviable fetus. An undue burden is defined as "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>71</sup>

*Casey* emphasizes the special liberty interests of women that are affected by pregnancy. The Court noted that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>72</sup> The Court emphasized that:

Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.<sup>73</sup>

#### **IV. Conclusion**

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<sup>69</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>70</sup> *Id.* at 845–46.

<sup>71</sup> *Id.* at 877.

<sup>72</sup> *Id.* at 856.

<sup>73</sup> *Id.* at 852.

In their decisions on the legality of abortion, the courts in civil and common law countries examined in this brief have reasoned a balance between the rights of the pregnant woman and the state's interest in protecting potential life. While countries may differ from each other and over time on the legality of discretionary abortion, all countries examined have found that protection of the fundamental rights of women require a set of core grounds on which abortion must be legal. The minimum set of circumstances where, by consensus, abortion should be allowed are situations where there is: (1) a threat to the life or health of the pregnant woman; (2) serious physical and/or mental defects of the fetus; and (3) pregnancy resulting from rape.

For the foregoing reasons, *Amici* respectfully urge this Constitutional Court to require, at a minimum, the creation of this core set of exceptions to Colombia's categorical criminalization of abortion.