

# REPRODUCTIVE TECHNOLOGY

International & Comparative Law  
Supplement

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### *Comparative Right to Benefits of Scientific Progress*

An individual's right to receive the benefits of scientific progress and/or technology has been enshrined in international human rights instruments. Article 12 of the Convention to Eliminate All Forms of Discrimination against Women (CEDAW) provides that "State Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." Moreover, CEDAW establishes that States Parties must ensure to women "appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation." Unfortunately, the promises of CEDAW have not been realized for many women around the world, who are unable to access contraceptives and medical technology and services to ensure safe childbirth. Similarly, access to affordable, life-saving drugs for women living with HIV/AIDS has eluded scores of women globally.

Access to these technologies will greatly enhance—and sometimes save—many women's lives. Moreover, avoidable deaths due to complications from pregnancy and childbirth deprive women of their "right to life," as guaranteed within international human rights instruments. Much maternal mortality and morbidity is preventable through the provision of contraceptives, access to safe abortion services for unwanted pregnancies, access to routine prenatal care for wanted pregnancies, availability of skilled attendance during labor and delivery, availability of emergency obstetric care when necessary, and accessibility of postpartum care and family planning. States have an obligation to provide these services and technology in accordance with international human rights law.

Furthermore, under article 15 of the International Covenant on Economic, Social, and Cultural Rights, States Parties must "recognize the right of everyone ... to enjoy the benefits of scientific progress and its applications." Read together with article 12, which establishes that "[e]very human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity" and clarifies that this right entails "the right to control one's health and body, including sexual and reproductive freedom," then one can locate a right of persons to receive the benefits of technology that could improve their reproductive and sexual lives. The scientific progress to which individuals arguably have rights includes, but is not limited to, assisted reproductive technologies—like in vitro fertilization (IVF), controlled ovarian hyperstimulation (COH), intrauterine insemination (IUI), gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT). These technologies are often the only methods that will enable infertile persons to biologically reproduce. The interests of states in avoiding altogether the ethical issues raised by some of the technologies—through the proscription or criminalization of assisted reproductive technology—does not alone justify the denial of the human right of infertile persons to receive the benefits of this science. The following articles and cases provide some insight into this conflict.

## The art of medicine

### Conscientious commitment

In some regions of the world, hospital policy, negotiated with the health ministry and police, requires that a doctor who finds evidence of an unskilled abortion or abortion attempt should immediately inform police authorities and preserve the evidence. Elsewhere, religious leaders forbid male doctors from examining any part of a female patient's body other than that being directly complained about. Can a doctor invoke a conscientious commitment to medically appropriate and timely diagnosis or care and refuse to comply with such directives?

We have become familiar with the opposite stance of conscientious objection: the conviction, commonly based on religion, that provision of, for example, contraception, contraceptive sterilisation, abortion, access to reproductive technology, and pain control by life-shortening means goes against a health-care provider's ethical values. Indeed, objection is properly accommodated in law and ethics provided that objectors refer their patients to suitable and accessible providers who do not object.

Religion has no monopoly on conscience, however. History, both distant and recent, shows how health-care providers and others, driven by conscientious concerns, can defy laws and religious opposition to provide care to vulnerable, dependent populations. They might also defy

the medical establishment. Pioneers of the birth control movement were not doctors, and were opposed by medical, state, and religious establishments. As long ago as 1797, Jeremy Bentham advocated means of birth control, and in the following century, John Stuart Mill was briefly imprisoned for distributing birth control handbills. Charles Bradlaugh and Annie Besant were similarly prosecuted, in 1877, for selling pamphlets about birth control.

Religious opposition fuelled prosecution of proponents of family planning well into the 20th century. In 1915, Margaret Sanger, an American nurse who worked in the ghettos of New York and espoused the cause of birth control, fled prosecution to the UK, where she met and motivated an English botanist, Marie Stopes. The momentum towards popular and political acceptance of family planning generated by these courageous pioneers, who defied the power of organised religion, conservative convention, and at first the medical establishment, rewarded their conscientious commitment. Nevertheless, until 1969, the Canadian Criminal Code penalised the spread of knowledge of contraceptive means as a crime against morality, and family planning initiatives remain under attack particularly from the Roman Catholic Church hierarchy.

An historic instance related to the similarly abhorred practice of abortion occurred in the UK, in 1938, after the Ministry of Health and the Home Office set up the Inter-Departmental (Birkett) Committee on Abortion to address "the reduction of maternal mortality and morbidity arising from this cause". Aleck Bourne, a consultant obstetrician at St Mary's Hospital, London, terminated the early pregnancy of a 14-year-old gang-rape victim and informed the Birkett Committee of the realities of conscientious abortion. He was subsequently prosecuted for criminal abortion at the Central Criminal Court in London, the Old Bailey, and the judgment resulting in his acquittal remains an influential landmark in Commonwealth jurisprudence establishing the legality of therapeutic abortion.

Sir Dugald Baird advanced abortion techniques in the less-pressured legal environment of Scotland, and Dorothea Kerslake pioneered vacuum aspiration abortion in Newcastle-upon-Tyne, strongly influencing a Canadian physician, Henry Morgentaler. Practising in Montreal, Morgentaler spoke out against the restrictive abortion law and practice in Canada, and felt conscientiously bound to assist the often desperate, disadvantaged women who then flocked to him for treatment. Not satisfying the demanding conditions of the Canadian Criminal Code, he was prosecuted, but at his trial, in 1973, a jury found him not guilty of unlawful abortion. However, in 1975, the Supreme Court upheld his conviction on the Quebec Court



Marie Stopes, a pioneer of birth control

of Appeal's exceptional reversal of the jury's acquittal, and he was sentenced to 18 months' imprisonment. After 10 months in jail, he was released for retrial after a Criminal Code amendment to prohibit any future appeal court reversal of a jury acquittal. At retrial, the Quebec Jury again acquitted, without appeal.

On relocating his clinic to Ontario, Morgentaler was further prosecuted, in 1984, for conspiracy to perform unlawful abortion. The jury acquitted him, and when the Ontario Court of Appeal ordered his retrial, he appealed to the Supreme Court of Canada. Invoking provisions of the 1982 Canadian Charter of Rights and Freedoms, the Supreme Court's five-to-two judicial majority accepted his claim that the Criminal Code abortion restrictions violated women's human rights, and declared them unconstitutional and void. The Chief Justice of Canada ruled that "[f]orcing a woman, by threat of criminal sanction, to carry a fetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person". In finding this violation to exceed what is justifiable in a free and democratic society, the Supreme Court vindicated Morgentaler's conscientious objection to compliance with the discredited law. Abortion is now regulated as any other medical procedure in Canada, without specific criminal liability.

Conscientious commitment to ethical practice and the wellbeing of patients continues to inspire some physicians' non-compliance with religious practices required by some hospitals. For instance, they treat patients immediately when spontaneous abortion is threatened, even though some Catholic hospitals' ethics committees prohibit uterine aspiration while fetal heart tones are present, requiring physicians to delay urgent care and risk patients' infection and heavy blood loss, or to transport patients to non-Catholic care facilities.

Many other instances can be cited over time and place. Physicians in South Africa would admit and treat patients in an emergency notwithstanding prohibitions of the apartheid laws. Physicians in Pakistan have declined to take part in amputations and corporal punishment of offenders authorised by the enactment of strict Sharia law. Practitioners of in-vitro fertilisation in Italy have decided not to transfer grossly abnormal embryos, although Italian legislation requires transfer of all embryos created in vitro and prohibits cryopreservation.

Physicians' compliance in the Netherlands with the requests of terminally ill patients for pain relief by administration of fatal doses of drugs has come to be accepted by the national courts, legislature, medical profession, and law enforcement agencies. Nevertheless, it remains contentious. Popular opinion is divided in the USA over the activities of Jack Kevorkian, who assisted patients' suicide and was recently released from imprisonment for



Henry Morgentaler defied Canada's restrictive laws on abortion

second degree murder. Similarly, medical and legal opinion in the UK is still divided over the 1957 acquittal of murder of John Bodkin Adams. He gave increasingly high doses of morphine to his patients to relieve their pain, knowing that the drug, on reaching toxic concentrations, was likely to precipitate death. Several patients had transferred their care to him for his pain-control reputation, and left him generous bequests in their wills. The prosecution alleged that he had deliberately killed patients for mercenary reasons. His defence was that his motivation was only to control pain effectively when others would not, perhaps for fear of prosecution.

The judge at the Lewes Assizes, who went on, as Lord Devlin, to become a leading English jurist of his age, instructed the jury that deliberately shortening life constitutes murder. However, he added: "that does not mean that a doctor who is aiding the sick and the dying has to calculate in minutes, or even in hours, and perhaps not in days or weeks, the effect upon a patient's life of the medicines which he administers or else be in peril of a charge of murder...he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the measures he takes may incidentally shorten life." He summarised that one would not say that the doctor caused the death, but that death was caused by the condition that justified the treatment. This clarification of the law, which perhaps influenced the jury to acquit, is now well accepted.

Conscientiously committed practitioners often need courage to act against prevailing legal, religious, and even medical orthodoxy, following the honourable medical ethic of placing patients' interests above their own.

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Further reading  
Cook RJ, Dickens BM, Fathalla MF. Reproductive health and human rights: integrating medicine, ethics, and law. Oxford: Oxford University Press, 2003.

**AMICUS CURIAE  
IN SUPPORT OF PETITION 12.361  
ADMITTED BY THE  
Inter-American Commission on Human Rights  
on March 11, 2004**

The Center for Reproductive Rights, an independent international non-governmental legal advocacy organization, submits this brief in support of the petition presented by Dr. Gerardo Trejos Salas in representation of the patients of doctors Gerardo Escalante Lopez and Delia Ribas and the company that acquired medical equipment for practice of in vitro fertilization (IVF) in Costa Rica, in opposition to Decision No. 2000-02306 by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica, prohibiting the use of IVF techniques (the Decision) and admitted by the Inter-American Commission on Human Rights in March 2004.

This brief will show that the decision by the Constitutional Chamber of the Supreme Court of Justice violates the American Convention on Human Rights (American Convention) and the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), as well as other international human rights treaties ratified by Costa Rica. First, we will demonstrate that human rights treaties recognize rights that protect access to treatment of infertility. Second, this brief will show that access to these treatments does not constitute a violation of the American Declaration nor of the American Convention, nor international treaties such as the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights.

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Numerous regional and international documents approved by consensus by the international community in the last three decades recognize the possibility for persons and families to make decisions about their reproductive lives as one of their most basic and fundamental rights. Various international human rights treaties recognize rights that seek to guarantee reproductive autonomy and access to services for reproductive health. Consequently, prohibiting the use of IVF techniques denies infertile persons access to methods which make possible the realization of this right.

**I. THE DECISION OF THE CONSTITUTIONAL SUPREME COURT OF  
COSTA RICA VIOLATES THE RIGHT OF REPRODUCTIVE AUTONOMY  
AND THE RIGHT TO REPRODUCTIVE HEALTH CARE**

**The guarantee of access to In Vitro Fertilization techniques is in accordance with international human rights law**

The Decision of the Constitutional Chamber of the Constitutional Supreme Court of Costa Rica prohibiting the use of IVF techniques violates the human rights of Costa Rica's citizens. Laws that restrict infertility treatments, such as IVF, oppose international guarantees protecting the right to health, intimacy and reproductive autonomy, the right to physical integrity, the right to form a family and the right to benefit from scientific progress.

**A. The Rights to Intimacy and Reproductive Autonomy**

The right to make reproductive decisions free from interference is rooted in the right to privacy and the right to plan one's family.<sup>1</sup> The Inter-American Commission of Human Rights has taken into consideration an analysis of the concept of privacy developed by the jurisprudence on Article 8 of the European Convention on Human Rights and Fundamental Freedoms, to interpret the concept of privacy protected by Article 11 of American Convention, in connection with the right to integrity. In this regard, the Commission interpreted the right of privacy established in Article 11 of American Convention as follows:

"The right to privacy guaranteed... covers, in addition to the protection against publicity, the physical and moral integrity of the person. The object of Article 11, as well as of the entire Convention, is essentially to protect the individual against arbitrary interference by public officials... the right to privacy guarantees that each individual has a sphere into which no one can intrude, a zone of activity which is wholly one's own."<sup>2</sup> (emphasis added)

The right to privacy, therefore, protects persons from state influence over their personal lives. It includes protection of decisions related to the sexual and reproductive life of persons which have a direct impact over their integrity, such as the decision to form a family.

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<sup>1</sup> The life and privacy of family are protected by the following: the Universal Declaration of Human Rights, adopted Dec. 10, 1948, G.A. Res. 217A (III), at 71, art. 12, U.N. Doc A/810 (1948) [hereinafter Universal Declaration]; the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21<sup>st</sup> Sess., Supp No. 16, at 52, art. 17, U.N.Doc A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter Civil and Political Rights Covenant]; the American Convention on Human Rights, signed Nov. 22, 1969, O.A.S.T.S. No. 36, art. 11, O.A.S. Off. Rec. OEA/Ser.L/V/II.23., doc. 21 rev. 6 (entered into force July 18, 1978) [hereinafter American Convention]; the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed Nov. 4, 1950, 213 U.N.T.S. 222, art. 8(I) (entered into force Sept. 3, 1953).

<sup>2</sup> X and Y v. Argentina, Case 10.506, Report No. 38/96, Inter-Am. C.H.R., para. 91, OEA/Ser.L/V/II.95, doc. 7 rev. (1997) (emphasis added).



The right to reproductive autonomy is, likewise, based on the right to plan one's own family, the right to be free from interference into one's reproductive decisions, and the right to be free from all forms of violence and coercion that may affect a woman's sexual and reproductive life. This right has been defined in international instruments as the right to determine "freely and responsibly" the number and spacing of children, and to have access to information and the means necessary for exercising this right.<sup>3</sup> This includes the possibility of access to measures for birth control as well as to improve fertility. Therefore, the state must abstain from imposing obstacles which obstruct the exercise of this right.

## **B. The Right to Form a Family**

This right has been articulated not only as the right to get married, but also as the right to have children with the person of one's choice.<sup>4</sup> Various international human rights instruments, such as the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), recognize and protect the family as the fundamental group unit of society.<sup>5</sup>

In this context, the CEDAW establishes in Article 16 the right of women "...to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."<sup>6</sup> Moreover, the ICESCR affirms, "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."<sup>7</sup>

The right to plan one's own family originates from a state obligation not to interfere in reproductive options, which include the possibility to have access to all different options for contraception, as well as to necessary services that enable persons to

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<sup>3</sup> *Programme of Action of the International Conference on Population and Development*, Cairo, Egypt, Sept. 5-13, 1994, para. 7.2, U.N. Doc. A/CONF.171/13/Rev.1 (1995) [hereinafter *ICPD Programme of Action*]. See ch. VII about bases for action and measures which must be adopted by governments in relation to reproductive health and rights, which include treatment on infertility. See also *Convention on the Elimination of All Forms of Discrimination against Women*, adopted Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34<sup>th</sup> Sess., Supp. No. 46, at 193, art. 16, U.N. Doc. A/34/46 (entered into force Sept. 3, 1981) [hereinafter *CEDAW*].

<sup>4</sup> Human Rights Committee, *General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Article 23)*, 39<sup>th</sup> Sess. (1990), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 28 (1994).

<sup>5</sup> See e.g., Universal Declaration, *supra* note 1, art. 16; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR, Supp. No. 16, at 49, art. 10, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter *Economic, Social and Cultural Rights Covenant*]; Civil and Political Rights Covenant, *supra* note 1, art. 23; CEDAW, *supra* note 3, arts. 10, 12, 14.

<sup>6</sup> CEDAW, *supra* note 3, art. 16.

<sup>7</sup> *Economic, Social and Cultural Rights Covenant*, *supra* note 5, art. 10.

have children. When Costa Rica, as a signatory state of these international treaties, denies a person the option to have access to methods to improve fertility, it interferes with the rights of its citizens to decide on a matter that has fundamental implications for their lives and their families.

The Decision adopts a clearly contradictory position when it recognizes the existence of fundamental rights to form a family and to privacy, and at the same time allows breaches on these rights in the face of the possible loss of the preembryo or embryo.<sup>8</sup> The balance of interests between citizens with obligations, rights and duties, and potential life needs to be reasonable; that is, the right of a man and a woman to form a family must prevail over other state interests that can be safeguarded by clear regulations on IVF techniques, as is done in all countries that allow these techniques. In this respect, the Decision of the Constitutional Chamber of the Supreme Court of Costa Rica prohibiting IVF violates the rights of Costa Rican citizens to make decisions freely and responsibly in relation to their reproductive lives.

Finally, in order to guarantee citizens the full enjoyment and exercise of this right, Costa Rica must create and maintain the conditions necessary for allowing women to make autonomous decisions with respect to their reproductive capacity.

### C. The Right to Reproductive Health Care

Health is composed of physical, mental and social dimensions; infertility, for those who desire children, diminishes their mental and social well-being, which may have physical repercussions on their health.<sup>9</sup> The right to reproductive health care is recognized by the Protocol of San Salvador, which in Article 10 recognizes the right of all persons to enjoy the highest possible standard of physical and mental health. Member States recognize health as a "public good" and establish a number of measures for the fulfillment of this right—including the obligation to satisfy health needs of the population by preventing and treating diseases of different kinds.<sup>10</sup>

<sup>8</sup> The Decision cites article 51 of the Constitution, article 23 of the Civil and Political Rights Covenant, and article 17 of the American Convention, among others.

<sup>9</sup> REBECCA COOK ET AL., *REPRODUCTIVE HEALTH AND HUMAN RIGHTS: INTEGRATING MEDICINE, ETHICS, AND LAW*, 311 (2003). In this sense, different international instruments include mental health in the general definition of health. Universal Declaration, *supra* note 1, art. 25, para. 1; Economic, Social and Cultural Rights Covenant, *supra* note 5, art. 12, para. 1; *Beijing Declaration and the Platform for Action, Fourth World Conference on Women*, Beijing, China, Sept. 4-15, 1995, para. 96, U.N. Doc. A/CONF.177/20 (1995) [hereinafter *Beijing Declaration and Platform for Action*]; African Charter on Human and Peoples' Rights, adopted June 27, 1981, art. 16, O.A.U. Doc. CAB/LEG/67/3, rev. 5, 21 I.L.M. 58 (1982) (entered into force October 21, 1986); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", Nov. 17, 1988, O.A.S.T.S. No. 69, reprinted in *BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM*, O.A.S. Off. Rec. OEA/Ser.L.V/II.82 doc. 6 rev. 1, at 67, art. 10 (1992) (entered into force Nov. 16, 1999) [hereinafter *Protocol of San Salvador*]; *Vienna Declaration and Program of Action, World Conference on Human Rights*, Vienna, Austria, June 14-25, 1993, para. 41, U.N. Doc. A/CONF.157/23 (1993).

<sup>10</sup> Protocol of San Salvador, *id.*, art. 10.

The right to health is reiterated in the ICESCR, ratified by Costa Rica, which establishes in Article 12.1, "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." The Committee on Economic, Social and Cultural Rights, in charge of monitoring compliance with this commitment by member states to the ICESCR, has established that "states have the obligation to respect the right to health, in particular by abstaining themselves from denying or limiting equal access to all persons... and by abstaining from imposing discriminatory practices in relation to women's health status and needs."<sup>11</sup>

According to the above statements, states have the duty not only not to impose obstacles, but also to eliminate barriers to access and procurement of health services. The right to reproductive health care gives rise, therefore, to an obligation by the state of Costa Rica to respect and protect the right to access to reproductive services, including IVF techniques, which implies eliminating existing legal barriers that impede access to such techniques.

The Cairo Programme of Action, signed by 179 countries at the International Conference on Population and Development, further gives meaning to reproductive health, stating that "reproductive health entails the capacity... to procreate, and the freedom to decide whether or not, when, and how often to do it."<sup>12</sup>

The Beijing Declaration and Platform for Action, which also refer to the right to reproductive health, specifically recognize that implicit in this right is the capacity to reproduce and to be informed, and to have access to methods that regulate fertility, and to appropriate health services that provide couples with the best options to have a healthy baby.<sup>13</sup> This generates an obligation not to put obstacles before infertile persons trying to access IVF techniques. When infertile persons are denied the opportunity to access those services, they are also denied their right to reach the highest attainable level of health.

The actions carried out by the Constitutional Chamber of the Supreme Court of Justice of Costa Rica clearly violate the obligations to respect and protect the right to health, because denying Costa Rican citizens the right to form a family endangers their physical, mental and social well-being.

#### **D. The Right to Enjoy the Benefits of Scientific Progress**

The Protocol of San Salvador in Article 14 states: "member states to the present protocol recognize the right of everyone to enjoy the benefits of scientific and technological progress."<sup>14</sup> Similarly, Article 15 of the ICESCR recognizes "the right of every person to enjoy the benefits of scientific progress and its applications."<sup>15</sup> In this

<sup>11</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, 22<sup>nd</sup> Sess., para. 34, U.N. Doc. E/C.12/2000/4 (2000).

<sup>12</sup> ICPD Programme of Action, *supra* note 3, para. 7.2.

<sup>13</sup> Beijing Declaration and Platform for Action, *supra* note 9, paras. 96, 109(h).

<sup>14</sup> Protocol of San Salvador, *supra* note 9, art. 14.

<sup>15</sup> Economic, Social and Cultural Rights Covenant, *supra* note 5, art. 15.

respect, Costa Rica must guarantee that women have specific knowledge of information about scientific and technological progress, and must abstain from imposing legal obstacles that could impede access to those services. In this regard, according to the CEDAW Committee, "the obligation to respect those rights requires member states to refrain from obstructing action taken by women in pursuit of their health goals."<sup>16</sup> Access to IVF, as a technique of assisted reproduction, must therefore be respected as an integral part of the rights and reproductive decisions that those treaties are designed to protect.

Paragraph 7.16 of the Cairo Programme of Action exhorts states to include services "for prevention and appropriate treatment of infertility" among the provisions of health services.<sup>17</sup> IVF is specifically mentioned in paragraph 7.17, which establishes that "In-vitro fertilization techniques should be provided in accordance with appropriate ethical guidelines and medical standards."<sup>18</sup>

By prohibiting the use of IVF techniques, the state of Costa Rica clearly violates the right of its citizens to make informed and responsible decisions with respect to reproductive matters. These international treaties' stipulations require that Costa Rica respond to the health needs of all women, including those who desire to have children. For this reason, Costa Rica has an obligation to respect, protect and guarantee access to technological advances and to allow its citizens to benefit from the potential favorable effects of the proposed procedures and available options in assisted reproductive technologies.

## **II. THE SUPREME COURT OF COSTA RICA MISTAKENLY INTERPRETED INTERNATIONAL DOCUMENTS ON WHICH IT BASES ITS ARGUMENTS**

The Decision refers to a series of international human rights treaties, such as the American Declaration on the Rights and Duties of Man (American Declaration), the American Convention on Human Rights (American Convention), the Convention on the Rights of the Child, and the ICCPR, arguing that these instruments provide absolute protection of the fertilized egg. An examination of these texts provides no such legal support.

### **A. IVF techniques do not violate the American Declaration nor the American Convention**

The Constitutional Chamber states that the right to life is absolute. However, the Chamber's interpretation of the American Declaration and American Convention contradicts these instruments' legislative history and the original meaning intended by their authors.

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<sup>16</sup> Committee on the Elimination of Discrimination Against Women, *General Recommendation 24: Women and Health*, 20<sup>th</sup> Sess., para. 14, U.N. Doc. A/54/38/Rev.1 (1999).

<sup>17</sup> ICPD Programme of Action, *supra* note 3, para. 7.16.

<sup>18</sup> *Id.*, para. 7.17.

The history of the writing of the American Convention establishes that the expression "[the right to life] will be protected by the law and, in general, from the moment of conception...", used in the cited paragraph, was not intended to dictate national-level policy with respect to reproductive health, including assisted reproductive technologies.

Furthermore, the interpretation of human rights norms must take into account the broader objectives of the legal instrument in question. The interpretation of human rights norms that guarantee rights must be integral and systematic. In this regard, Article 29 of the American Convention, on "Restrictions Regarding Interpretation," ensures that international norms are interpreted harmoniously. Article 29(b) reads:

"No provision of this Convention shall be interpreted as:  
restricting the enjoyment or exercise of any right or  
freedom recognized by virtue of the laws of any State Party  
or by virtue of another convention to which one of the said  
states is a party."

At stake in this proceeding is the enjoyment of Costa Rican citizens of essential rights recognized by international human rights treaties. IVF, which aims to increase the possibility of conception, is an option that contributes to the exercise of the legitimate right to form a family, the right to privacy, and the right to health, among others. Article 4.1's use of the phrase "in general, from the moment of conception" does not preclude states from taking all necessary measures to protect the legitimate rights of its citizens, including the right to health and the right to form a family. Indeed, the Convention, along with other international human rights treaties, requires states to take such measures.

In 1981, the Inter-American Commission on Human Rights interpreted the right to life in the case of *Baby Boy*.<sup>19</sup> In this case, the Commission considered whether the United States Supreme Court's decision to legalize abortion, in the case of *Roe v. Wade*, violated the right of the fetus to life. Based on the legislative history of the American Declaration, the Commission rejected the idea that the right to life starts from the moment of the conception. The Commission also stated that the authors of the Convention considered including language that would have established in a clear manner that the right to life exists absolutely from the moment of conception, but they chose not to adopt such language.<sup>20</sup> Furthermore, in this case the Commission concluded that the words "in general" were incorporated in Article 4.1 as an agreement with those member states whose national laws allow abortion and the death penalty.<sup>21</sup> Based on this legislative history, none of these two instruments can be interpreted as if conferring an absolute right to life from the moment of conception.

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<sup>19</sup> "Baby Boy," Resolution No. 23/81, Case 2141, Inter-Am. C.H.R., OAS/Ser.L/V/II.54 doc. 9 rev. 1 (1981).

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

<sup>21</sup> *Id.*

## **B. IVF techniques do not violate the Convention on the Rights of the Child**

The Constitutional Chamber interprets the Convention on the Rights of the Child (CRC) as if it bestows legal rights from the moment of conception. The Court once again does not recognize the legislative history, which shows that the authors of the CRC, on many occasions, refused attempts by Italy and various Latin American countries to recognize the right to life "from the moment of conception."<sup>22</sup> The preamble declaration, which recognizes legal protection "before and after birth," is considered by the international legal community as a non binding political declaration, in particular because it is not reaffirmed within the text of the Convention.<sup>23</sup> The CRC contains minimal references about the beginning of life as to define the moment in which an entity acquires human rights. In fact, the language of the CRC is intentionally general about when rights before birth are given.<sup>24</sup> The possible dismissal of fertilized ova through IVF techniques in no manner violates the CRC. Access to IVF, when it is appropriately regulated in accordance with ethical standards, as the government of Costa Rica did through Executive Decree No. 24029-S, does not violate international human rights standards.

## **C. IVF techniques do not violate the International Covenant on Civil and Political Rights**

The ICCPR refused to define the moment of conception as the beginning of life.<sup>25</sup> Certain proposals affirming that human life begins at the moment of conception were excluded from the stipulation of the right to life in Article 6.<sup>26</sup> Moreover, the ICCPR lacks explicit stipulations about when life starts.

The Human Rights Committee, which monitors the compliance of member states with the ICCPR, has never interpreted the right to life defined in Article 6 as giving protection to the unborn, even in instances where member states were exhorted to interpret the right in a broad manner. On the contrary, in the cases where women's lives are at risk because of an absolute prohibition of abortion, the Human Rights Committee has stated:

"The criminalization of all abortion, with the severe penalties imposed by the legislation in force except where the mother's life is in danger, gives rise to serious problems, especially in the light of unchallenged reports on the serious impact on maternal mortality of clandestine abortions and the lack of information on family planning. The State party has the duty to adopt the necessary

<sup>22</sup> Stanford J. Fox, *The United Nations Convention on the Rights of the Child and United States Abortion Law*, 1 ANN. SURV. INT'L & COMP. L. 15, 16 (1995).

<sup>23</sup> HENRY STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 167, 169, 177 (1996).

<sup>24</sup> *Id.* at 167.

<sup>25</sup> Jill M. Bracken, *Respecting Human Rights in Population Policies: An International Customary Right to Reproductive Choice*, 6 IND. INT'L & COMP. L. REV. 197, 229 (1996).

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

measures to guarantee the right to life (art. 6) of pregnant women who decide to interrupt their pregnancy, by providing the necessary information and resources to guarantee their rights..."<sup>27</sup>

In addition, the Human Rights Committee, in General Observation 28, asks State Parties to eliminate any interference in the exercise of the right of women to privacy in the field of reproductive health.<sup>28</sup> The Committee has identified women's lack of access to health services, particularly to reproductive health services, as a violation of Article 3, which guarantees the right of women and men to equality.<sup>29</sup>

Therefore, arguments outlined by the Constitutional Chamber that IVF techniques violate stipulations of the ICCPR, are erroneous. The ICCPR does not give fertilized ova the right to life.

## CONCLUSION

The international community, including the government of Costa Rica, has committed itself to formulate laws and policies aimed to protect and promote the health and well-being of the population. Furthermore, the State is obligated to respect human rights commitments assumed by having ratified international treaties and laws, which include respect of the right to health, the right to privacy and to reproductive autonomy, the right to physical integrity, the right to form a family and the right to benefit from scientific progress. In addition, at the international level there are no instruments that, in their text, legislative history or jurisprudence, allow the state to bestow absolute protection to the fertilized ovum.

In conclusion, the arguments contained in the Constitutional Chamber decision are medically and legally unfounded, and represent a grave threat to the enjoyment of basic human rights by Costa Rican women.

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New York, December 10, 2004

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<sup>27</sup> *Concluding Observations of the Human Rights Committee: Guatemala*, 72<sup>nd</sup> Sess., 1954<sup>th</sup> mtg., para. 19, U.N. Doc. CCPR/CO/72/GTM (2001).

<sup>28</sup> Human Rights Committee, *General Comment 28: Equality of rights between men and women (Art.3)*, 68<sup>th</sup> Sess., 1834<sup>th</sup> mtg., para. 20, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

<sup>29</sup> See, e.g., *Concluding Observations of the Human Rights Committee: Ecuador*, 63<sup>rd</sup> Sess., 1692<sup>nd</sup> mtg., para. 11, U.N. Doc. CCPR/C/79/Add.92 (1998); *Concluding Observations of the Human Rights Committee: Poland*, 66<sup>th</sup> Sess., 1779<sup>th</sup> mtg., para. 11, U.N. Doc. CCPR/C/79/Add.110 (1999).



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## Ethical and legal issues in reproductive health Assisted reproduction developments in the Islamic world

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### Abstract

A November 2000 workshop organized by the International Islamic Center for Population Studies and Research, Al-Azhar University, Cairo, considered use of assisted reproduction technologies (ART) in the Islamic world. The workshop reinforced a 1997 recommendation that a Standing Committee for Shari'a Medical Ethics be constituted to monitor and assess developments in ART practice. Among issues the workshop addressed were equitable access to services for infertile couples of modest means, and regulation of standards of equipment and personnel that ART centers should satisfy to gain approval to offer services. Acceptable uses of preimplantation genetic diagnosis were proposed, and follicular maturation research in animals, including in vitro maturation and in vitro growth of oocytes, was encouraged, leading to human applications. Embryo implantation following a husband's death, induced postmenopausal pregnancy, uterine transplantation and gene therapy were addressed and human reproductive cloning condemned, but cloning human embryos for stem cell research was considered acceptable. © 2001 International Federation of Gynecology and Obstetrics. All rights reserved.

**Keywords:** Assisted reproduction; Access to services; Preimplantation genetic diagnosis; Follicular maturation; Embryo implantation following husband's death; Postmenopausal pregnancy; Uterine transplantation; Gene therapy; Reproductive cloning; Stem cell research.

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## **1. Introduction**

In November 2000, a workshop organized by the International Islamic Center for Population Studies and Research at Al-Azhar University in Cairo, Egypt, addressed ethical implications of new and prospective assisted reproduction technologies according to the Islamic tradition. This was the third meeting the Center has organized on issues in reproduction, the original being a conference on the ethics of research in human reproduction, in 1991 [1] and the second a seminar on technologies for treatment of infertility, in 1997 [2]. The November 2000 workshop was concerned with rising rates of infertility among Muslim populations, and the challenge of employing new and prospective reproductive and genetic technologies for relief consistently with religious and enacted laws.

Several techniques for the relief of infertility and to avoid the risk of transmission of deleterious genes that have evolved outside the Muslim world, particularly third-party sperm donation and more recently ovum and embryo donation, are unacceptable inside. A central feature of Muslim identity and family structure is authenticity of lineage. Individuals' family names often disclose their paternity, and adoption into families and family names is not acceptable. Equally, sperm donation fractures links of family genetic lineage, and is analogous to adultery and condemned. As against this, however, the capacity of preimplantation genetic diagnosis (PGD) to identify embryos for implantation that do not possess pathological features was welcomed as a development that would facilitate a couple at risk of transmission of harmful genes to conceive a healthy child of their own. The workshop gave guarded approval in considering the case of the parents in Colorado, USA who were unable to find a bone marrow donor suitable for their 6-year-old daughter who was at risk of death from *Franconi anemia*. They therefore contributed their ova and sperm for in vitro fertilization, and one of the several resulting embryos tested by PGD was found not to have the anemia, and also to be a compatible donor for their daughter. The embryo was successfully implanted, resulting in birth of a

son whose umbilical cord provided blood cells that were transplanted into his sister. This procedure gave her an 85–90% chance of recovery from the disease.

The workshop considered a variety of innovative and potential reproductive technologies, including several dependent on transplantation and genetic diagnosis and understanding. Attention was given to technical, ethical and religious aspects of several variants of what generically is described as in vitro fertilization (IVF), including PGD for sex and other selection, cryopreservation of ovarian tissue and British Fertility Society recommendations on the matter, cryopreservation of gametes, testicular tissue and embryos, post-menopausal pregnancy, in vitro maturation and growth of oocytes and uterine transplantation, including the basis of limitation of this practice recently introduced in Saudi Arabia. The workshop's concluding recommendations were based on full discussion of the implications of application of these various present and prospective techniques in the Muslim world.

## **2. Standing Committee for Medical Ethics**

The first recommendation of the workshop was to endorse creation of a Standing Committee for *Shari'a Medical Ethics* as recommended by the 1997 seminar, [3] which would monitor scientific developments in assisted reproductive technology (ART), consider their religious and social implications, and address the means to inspire and monitor appropriate research that is respectful of the needs and interests of infertile couples. The composition and terms of reference of the committee were recommended to be wide, reflecting the fact that 'Islam is not monolithic, and a diversity of views in bioethical matters does exist. This diversity derives from the various schools of jurisprudence, the different sects within Islam, differences in cultural background and different levels of religious observance' [4]. Composition of the committee should include representatives of religious views, whose role might overlap that discharged by lawyers in purely secular ethics committees, and of social views, bearing in mind

the plurality of societies in which Islam is observed. In addition, members should include those familiar with public and private sector health facility administration, health professional licensure, and practical and economic realities of commonly experienced family life, and include equitable representation of both sexes.

### 3. Equitable access

The workshop recommended that means be established to provide access to ART centers to poor families who require the services that these centers offer. Islam considers it a major duty of families to have children and rear them in religious faith, and means are required to facilitate discharge of this duty by impoverished families. Such means might include provision of services at governmental and university institutions, establishment of charitable projects (Zakat Contribution), and appropriate collaboration with drug companies and other commercial enterprises committed to causes of social justice. Arrangements might also be considered by which private ART centers, perhaps as a condition of state licensure, would be required to offer a proportion of their services at no cost or very low cost to recipients. For instance, governmental or other subsidies might be paid to private ART centers where public facilities are few, or fees private centers charge to those with adequate means to pay might include a surcharge to fund services for patients unable to pay the full, or any, fees.

Concerns of equitable access to ART go beyond economic equity. The professional skills and sophisticated equipment that are required to establish an ART center make centers few in number in most countries, and largely concentrated in major private centers. Residents of rural areas often find services they can afford, geographically inaccessible. The challenge of taking ART services to rural areas appears almost insurmountable. More should be done to prevent infertility in rural areas, and clinical care of treatable infertility should be promoted, but equitable provision of ART to overcome irreversible infertility among rural and remote populations presents a continuing challenge.

### 4. Regulation of ART centers

The capacity of ART centers to produce effective results, measured in terms of 'take-home babies,' depends on them being adequately equipped with personnel and technical resources, and on maintaining appropriate performance standards. In addition to explanations offered by ART practitioners of levels of technical proficiency that ART centers must achieve, the workshop heard how the Egyptian Medical Syndicate, in collaboration with the national Ministry of Health, proposes to regulate ART centers and staff to ensure continuing compliance with conditions of licensure. Rules will address, among other things, proper conditions for cryopreservation of gametes and embryos, elimination of risks of sperm mixing and misidentification, and qualifications and experience of clinic leadership.

The workshop affirmed the importance of a national or other appropriate licensing body for each country adopting and applying rigid regulations for the establishment and maintenance of ART centers, including approval of their location, equipment and categories of personnel. The body should have authority to ensure that centers observe professional standards of operation, and that they respect and protect the rights of all of their patients. The workshop also recommended that licensing bodies should develop guidelines for best clinical practices that centers should be required to observe. Several participants also urged that central bodies should be entitled to receive and publish ART centers' outcome data.

### 5. Preimplantation genetic diagnosis (PGD)

The workshop recognized the importance of PGD, but was guarded about its use on non-medical grounds such as sex-selection or family balancing, considering that each case should be treated on its own merits. The medical application of PGD was seen as marking progress in the field of ART, and as a welcome alternative to prenatal diagnosis that results in abortion. Muslims have not accepted the opinion the Roman

Catholic church adopted in 1869 that human life be considered to begin at conception, but adhere to the view that human life requiring protection commences two to three weeks from conception and uterine implantation. Accordingly, decisions not to attempt implantation of embryos produced in vitro on grounds that they show serious chromosomal or genetic anomalies, such as aneuploidy, cystic fibrosis, muscular dystrophy or hemophilia, are acceptable. PGD is encouraged, where feasible, as an option to avoid clinical pregnancy terminations of couples at exceptionally high risk.

More contentious is non-medical PGD, particularly for purposes of sex selection. Sex selection technologies have been condemned on the ground that their application is to discriminate against female embryos and fetuses, so perpetuating prejudice against the girl child [5] and social devaluation of women. For instance, the Convention on Human Rights and Biomedicine of the Council of Europe provides that '[t]he use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided' [6]. The workshop endorsed the condemnation of such discrimination and devaluation, but considered that universal prohibition would itself risk prejudice to women in many present societies, especially while births of sons remain central to women's well-being. Family balancing was considered acceptable, for instance where a wife had borne three or four daughters and it was in her and her family's best interests that another pregnancy should be her last. Employing PGD to ensure the birth of a son might then be approved, to satisfy a sense of religious or family obligation and to save the woman from increasingly risk-laden pregnancies. The workshop considered that an application for PGD for sex selection should be disfavored in principle, but resolved on its particular merits.

#### 6. Follicular maturation research

The workshop recommended that research in animal models be advanced on follicular maturation,

in vitro maturation of oocytes (IVM) and in vitro growth of oocytes (IVG). Further, it recommended that, with due caution, such research be undertaken with human patients who are suitable for the procedure and able to provide their own free and informed consent, where medical conditions warrant. The culturing to maturity of immature oocytes by IVG was estimated probably to take over 6 months with human primordial follicles, while IVM might be achieved with fully grown oocytes collected from unstimulated follicles in little more than a day. However, a combination of immature oocyte cryopreservation, IVG and IVF will make oocyte banking feasible, for instance to avoid the need for women's repeated induced superovulation, and so reduce not only the cost of IVF but also the physical and psychological stress on patients, and on service providers.

#### 7. Embryo implantation following husband's death

Workshop participants enjoyed a vigorous, principled debate on whether a couple's preserved embryo could properly be implanted in a wife after her husband's death. The strict view was that marriage ends at death, and procuring pregnancy in an unmarried woman is forbidden by religious laws, for instance on children's rights to be reared by two parents, and on inheritance. After due time, the widow might remarry, but could not then bear a child that was not her new husband's. An opposing view, advanced as reflecting both Islamic compassion and women's interests as widows, was that a woman left alone through early widowhood would be well and tolerably served by bearing her deceased husband's child, through her enjoying companionship, discharge of religious duties of childrearing, and later support. Unable itself to resolve the conflicting views, the workshop recommended that the question be forwarded to the Islamic Research Council regarding whether an ART center could agree to a widow's request for thawing and implantation of an embryo created while her husband was alive.

The Grand Mufti of Cairo, in a personal communication with Professor Serour, stated that

permission had once been given for embryo implantation in a wife following her husband's death, based on the circumstances of the particular case. However, this should not be taken as a generalization, and each case should be considered on its own merits.

### 8. Postmenopausal pregnancy

Related to the last issue of ovum preservation is the prospect this opens of postmenopausal pregnancy, but here the workshop was able to agree on its recommendation. Its agreement marked a point of development, since earlier the possibility of postmenopausal pregnancy was considered dependent on ovum donation, which was disapproved in principle at the 1991 conference [7], and the 1997 seminar similarly found that '[p]regnancy ... after menopause is extremely dangerous for both mother and child, also involving a third party and, accordingly, is unacceptable in the Muslim world' [8]. Neither the 1991 nor 1997 meetings took account of the prospect of cryopreservation and in vitro growth if necessary of a woman's own ovum for IVF and postmenopausal implantation. The 2000 workshop considered this as a still remote but feasible prospect, and shaped its recommendation accordingly.

The workshop considered the special care necessary for the safe induction and completion of pregnancy in a woman who was of advanced, or beyond normal, childbearing years, and of the easier case where premature menopause affects a woman who would otherwise be of suitable maternal age. The workshop took account of children's needs of parents likely to survive at least into their mid-adolescence. It accordingly recommended that research efforts be concentrated on the prevention of premature menopause and that postmenopausal pregnancy be permissible to attempt in exceptional cases justified by maintenance of integrity of a child's genetic parentage, the pressing nature of the circumstances, the relative safety to mother and child, and parental capacity to discharge childrearing responsibilities.

### 9. Uterine transplantation

The workshop recommended that research in uterine transplantation in animals could go forward. However, if and when it should prove to be safe and effective for possible use in humans, within approved transplantation guidelines, further consideration of the use of this procedure should be referred to the Islamic Research Council for discussion. An issue would be whether such transplantation would violate the prohibition against third-party involvement in a married couple's reproduction. Involvement might not be as personal as gamete donation or surrogate motherhood, but may not simply be analogous to, for instance, anonymous kidney donation that enables a person to survive and become a parent, due to the influence the uterine environment may have on the child's biological development and personality.

Less novel but worthy of serious attention are conditioning issues of donors' competent, free and informed consent to total hysterectomy, their tissue compatibility with potential recipients, and their child-bearing or postmenopausal status. A menopausal uterus can function normally under hormonal stimulation and, once transplanted into a recipient without rejection, could receive an ovum released by the recipient and fertilized by her husband in the normal way. A mother might thereby donate to her daughter to allow birth of her grandchild. The workshop was aware of an apparently abusive and disastrous pioneering attempt at uterine transplantation in Saudi Arabia, [9] illustrating the potential for exploitation of donors, and also considered recipients' indications for the procedure. These would include congenital absence of the uterus, extreme uterine hypoplasia, previous medically compelled hysterectomy, destruction of the endometrium by infection such as tuberculosis, and excessive curettage following dilation and curettage.

### 10. Cloning

The workshop condemned reproductive cloning for creation and birth of a new person who would

be the genetic twin of one born previously, but it encouraged research in non-reproductive cloning, particularly for stem cell creation, study and research intended for human benefit. Encouragement was not limited by recognition that use of deliberately created embryos is likely to be involved. Study and research were anticipated to have a beneficial impact on reproduction, in that understanding of the origins of genetic defects in embryonic and fetal development would facilitate prevention and correction of defects, and, when prevention or correction were impossible, selection of healthy gametes, embryos and fetuses, such as by PGD. Islam allows abortion on the ground of severe fetal abnormality.

Some workshop members were sympathetic to consideration of reproductive cloning of cells of a childless sterile man if his wife was willing so to bear the child, to permit discharge of religious duties and relieve family distress and risk of marriage breakdown through the wife's right of divorce. There would be no violation of the rules against third-party involvement or against confusion of lineage. However, the genetic father would be the husband's father, introducing problems of his consent and perhaps of inheritance laws. On balance, it was considered premature to recommend departure from the prevailing condemnation of reproductive cloning.

#### **11. Gene therapy**

Allied with stem cell research is the prospect of gene therapy [10]. Progress in somatic cell gene therapy, which alters the genes only of a treated patient, has suffered recent setbacks, and germline gene therapy, which would affect all future generations of a patient's offspring, remains little short of universally condemned and prohibited. The workshop recognized that genetic alteration of embryos before their cells have reached differentiation, that is while they are still totipotent, would constitute germline manipulation. The workshop found that little would be added to reiterate prevailing condemnation, and offered less of a recommendation than an observation. The workshop stated that gene therapy is a devel-

oping area that may be used with ART in the future. It is critical that its use be clearly beneficial, focused on alleviating human suffering.

The focus on therapeutic applications would exclude purely cosmetic uses and goals of enhancement of non-pathological conditions. Alleviation of genetic diseases and pathological conditions alone would exclude such applications as to make people who would be within the normal range of physique, capacity and aptitude taller, stronger, more likely to achieve athletic success or to be more intelligent or artistically sensitive or gifted. The background concept was that gene therapy might be legitimate, not to promote advantage or privilege, but to redeem genetically or otherwise physiologically inherited disadvantage.

#### **12. Promotion of research**

The workshop's concluding recommendation had a compound aspect. Observing that research is essential for the progress of ART, the workshop strongly encouraged that research be undertaken, but within a proper ethical framework. Reflecting the unstructured ethical governance of research in several of the countries from which ART practitioners at the workshop had come, participants recommended that countries should each form a national research ethics committee to which any proposed research involving the use of gametes or embryos outside the body should be submitted for prior review and approval. The national committee should be balanced to include appropriately qualified scientific, religious and other members, including lay members able to represent the interests of potential subjects of research, who primarily would be women, and their communities. Other areas of ART research were recommended to be reviewed by local institutional or other ethics review committees.

This conclusion amplified a major thrust of the initial 1991 conference organized by the International Islamic Center for Population Studies and Research at Al-Azhar University, which launched the first such local ethics review committee in the region at the university. The workshop's recommendations built on this foundation to propose

that national research ethics committees could be constituted by drawing on the experience that members of local ethics review committees had acquired. This would provide investigators and their institutions with a common resource for ethics consultation, and offer concerned officials and residents of countries an assurance of ethical oversight of particularly sensitive ART research proposals.

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### ***Right to Receive and Impart Information***

A person's right to receive and impart information – relating to reproductive health or otherwise – has been acknowledged in many international human rights instruments. Article 10 of CEDAW recognizes that a central aspect of women's rights to educational equality is "access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning." Article 13 of the Convention on the Rights of the Child provides that "[t]he child shall have the right to freedom of expression; this right shall include freedom to seek, receive, and impart information and ideas of all kinds." Moreover, Article 9 of the African Charter specifically states that "[e]very individual shall have the right to receive information."

The right to receive and impart information is essential to guaranteeing that individuals are informed of their range of options concerning reproductive health and healthcare. In order for reproductive rights to exist not simply in theory, women must be made aware of the universe of contraceptives to which they can avail themselves, the availability of safe abortion, and their right to receive the benefits of scientific progress and to consent to experimentation. Their right to this information must be respected by governments that might otherwise prefer to justify withholding information on religious, moral, or even economic grounds. Moreover, although parents have a right to direct the upbringing of their children, parental rights must not negate the minors' right to receive information. States often must perform a delicate balancing of the competing rights of minors and their parents. In the following cases, compare how the right to receive and impart information is balanced against other interests.

CONSEIL DE L'EUROPE COUNCIL OF EUROPE COUR EUROPÉENNE DES DROITS DE  
L'HOMME EUROPEAN COURT OF HUMAN RIGHTS

**CASE OF KJELDSSEN, BUSK MADSEN AND PEDERSEN v. DENMARK**

7 December 1976

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**PROCEDURE**

1. The case of Kjeldsen, Busk Madsen and Pedersen was referred to the Court by the European Commission of Human Rights (hereinafter referred to as "the Commission"). The case originated in three applications (nos. 5095/71, 5920/72 and 5926/72) against the Kingdom of Denmark lodged with the Commission in 1971 and 1972 by Viking and Annemarie Kjeldsen, Arne and Inger Busk Madsen, and Hans and Ellen Pedersen, all parents of Danish nationality....

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**AS TO THE FACTS**

14. The applicants, who are parents of Danish nationality, reside in Denmark.... All three couples, having children of school age, object to integrated, and hence compulsory, sex education as introduced into State primary schools in Denmark by Act No. 235 of 27 May 1970, amending the State Schools Act (... hereinafter referred to as "the 1970 Act"). [All the applicants had asked that their children be exempted from compulsory sex education; all of their requests for exemption had been denied.]

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***Sex education***

19. In Denmark, sex education in State schools has been a topic of discussion for thirty-five years. As early as 1945, sex education was introduced in the State schools of Copenhagen and several institutions outside the capital copied this example. Nevertheless, the Minister of Education spoke against compulsory sex education when the question was raised in 1958.

In 1960, the Curriculum Committee published a "Guide to teaching in State schools" which distinguished between instruction on the reproduction of man and sex education proper. The Committee recommended that the former be integrated in the biology syllabus while the latter should remain optional for children and teachers and be provided by medical staff. The Committee also advised that guidelines for schools be drawn up on the contents of, and the terminology to be used in, sex education.

In a Circular of 8 April 1960, the Minister of Education adopted the Committee's conclusions: as from the school year 1960/61 reproduction of man became a compulsory part of biology lessons whereas an official guide issued by the Ministry, dating from September 1961,



specified that only those children whose parents had given their express consent should receive sex education proper.

20. The Danish Government, anxious to reduce the disconcerting increase in the frequency of unwanted pregnancies, instructed a committee in 1961 to examine the problem of sex education .... The setting up of such a committee had been urged, among others, by the National Council of Danish Women ... under the chairmanship of Mrs. Else-Merete Ross, a Member of Parliament, and by the Board of the Mothers' Aid Institutions .... Every year the latter bodies received applications for assistance from about 6,000 young unmarried mothers of whom half were below twenty years of age and a quarter below seventeen. In addition, many children, often of very young parents, were born within the first nine months after marriage. Legal abortions, for their part, numbered about 4,000 every year and, according to expert opinions, illegal abortions about 15,000 whereas the annual birth rate was hardly more than 70,000.

21. In 1968, after a thorough examination of the problem, the above-mentioned committee, which was composed of doctors, educationalists, lawyers, theologians and government experts, submitted a report (No. 484) entitled "Sex Education in State Schools" .... Modelling itself on the system that had been in force in Sweden for some years, the committee recommended in its report that sex education be integrated into compulsory subjects on the curriculum of State schools. However, there should be no obligation for teachers to take part in this teaching.

The report was based on the idea that it was essential for sexual instruction to be adapted to the children's different degrees of maturity and to be taught in the natural context of other subjects, for instance when questions by the children presented the appropriate opportunity. This method appeared to the committee particularly suited to prevent the subject from becoming delicate or speculative. The report emphasised that instruction in the matter should take the form of discussions and informal talks between teachers and pupils. Finally it gave an outline of the contents of sex education and recommended the drawing up of a new guide for State schools.

22. In March 1970, the Minister of Education tabled a Bill before Parliament to amend the State Schools Act. The Bill provided, inter alia, that sex education should become obligatory and an integrated part of general teaching in State primary schools. In this respect, the Bill was based on the recommendations of the committee on sex education, with one exception: following a declaration from the National Teachers' Association, it did not grant teachers a general right of exemption from participation in such instruction.

The Bill had received the support not only of this Association but also of the National Association of School and Society representing on the national level education committees, school boards and parents' associations, and of the National Association of Municipal Councils.

Section 1 para. 25 of the 1970 Act, which was passed unanimously by Parliament and became law on 27 May 1970, added "library organisation and sex education" to the list of subjects to be taught, set out in Section 17 para. 6 of the State Schools Act. Accordingly the latter text henceforth read as follows (Bekendtgørelse No. 300 of 12 June 1970):

"In addition to the foregoing, the following shall also apply to teaching in primary schools:

road safety, library organisation and sex education shall form an integral part of teaching in the manner specified by the Minister of Education.

..."

The Act entered into force on 1 August 1970. As early as 25 June, a Circular from the Minister of Education ... had advised municipal councils, school commissions, school boards, teachers' councils and headmasters of schools outside Copenhagen "that further texts, accompanied by new teaching instructions, on sex education would be issued". The Circular specified that "henceforth, parents (would) still have the possibility of exempting their children from such education and teachers that of not dispensing it".

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24. ...[T]he Minister of Education laid down [an] Executive [in] 8 June 1971.... The Executive Order - which applied to primary education and the first level of secondary education in State schools outside Copenhagen - was worded as follows:

#### "Section 1

(1) The objective of sex education shall be to impart to the pupils knowledge which could:

(a) help them avoid such insecurity and apprehension as would otherwise cause them problems;

(b) promote understanding of a connection between sex life, love life and general human relationships;

(c) enable the individual pupil independently to arrive at standpoints which harmonise best with his or her personality;

(d) stress the importance of responsibility and consideration in matters of sex.

(2) Sex education at all levels shall form part of the instruction given, in the general school subjects, in particular Danish, knowledge of Christianity, biology (hygiene), history (civics) and domestic relations. In addition, a general survey of the main topics covered by sex education may be given in the sixth and ninth school years.

#### Section 2

(1) The organisation and scope of sex education shall be laid down in or in accordance with the curriculum. Assistance in this respect is to be obtained from the Guide issued by the State Schools' Curriculum Committee.....

(2) Restrictions may not be imposed upon the range of matters dealt with in accordance with sub-section 1 so as to render impossible the fulfilment of the purpose of sex education.

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### Section 3

(1) Sex education shall be given by the teachers responsible for giving lessons on the subjects with which it is integrated in the relevant class and in accordance with the directives of the principal of the school. If it is not clear from the curriculum which subjects are linked to the various topics to be taught, the class teachers shall distribute the work, as far as need be, in accordance with the recommendation of the teachers' council; this latter opinion must be approved by the school board pursuant to section 27 para. 5 of the School Administration Act.

(2) A teacher cannot be compelled against his will to give the special instruction in the sixth and ninth years referred to in the second sentence of section 1 para. 2.

### Section 4

(1) The present Order shall come into force on 1 August 1971.

(2) At the same time the right of parents to have their children exempted from sex education given at school shall cease. They may nevertheless, on application to the principal of the school, have them exempted from the special instruction referred to in the second sentence of section 1 para. 2.

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26. The objectives set out in the Executive Order of 8 June 1971 were identical with those of the Guide, except that the latter contains an addition to the effect that schools must try to develop in pupils openness with regard to the sexual aspects of human life and to bring about such openness through an attitude that will make them feel secure.

27. The principle of integration, provided for in paragraph 2 of section 1 of the Executive Order, is explained as follows in the Guide:

"The main purpose of integration is to place sex guidance in a context where the sexuality of man does not appear as a special phenomenon. Sexuality is not a purely physical matter ... nor is it a purely technical matter .... On the other hand it is not of such emotional impact that it cannot be taken up for objective and sober discussion. ... The topic should therefore form an integral part of the overall school education ..."

28. As for the definition of the manner and scope of sex education (section 2 para. 1 of the Executive Order), the Guide indicates the matters that may be included in the State school curricula.

In the first to fourth years instruction begins with the concept of the family and then moves on to the difference between the sexes, conception, birth and development of the child, family planning, relations with adults whom the children do not know and puberty.

The list of subjects suggested for the fifth to seventh years includes the sexual organs, puberty, hormones, heredity, sexual activities (masturbation, intercourse, orgasm), fertilisation, methods of contraception, venereal diseases, sexual deviations (in particular homosexuality) and pornography.

The teaching given in the eighth to tenth years returns to the matters touched on during the previous years but puts the accent on the ethical, social and family aspects of sexual life. The Guide mentions sexual ethics and sexual morals; different views on sexual life before marriage; sexual and marital problems in the light of different religious and political viewpoints; the role of the sexes; love, sex and faithfulness in marriage; divorce, etc.

29. The Guide advocates an instruction method centred on informal talks between teachers and children on the basis of the latter questions. It emphasises that "the instruction must be so tactful as not to offend or frighten the child" and that it "must respect each child's right to adhere to conceptions it has developed itself". To the extent that the discussion bears on ethical and moral problems of sexual life, the Guide recommends teachers to adopt an objective attitude; it specifies:

"The teacher should not identify himself with or dissociate himself from the conceptions dealt with. However, it does not necessarily prevent the teacher from showing his personal view. The demand for objectivity is amplified by the fact that the school accepts children from all social classes. It must be possible for all parents to reckon safely on their children not being influenced in a unilateral direction which may deviate from the opinion of the home. It must be possible for the parents to trust that the ethical basic points of view will be presented objectively and soberly."

The Guide also directs teachers not to use vulgar terminology or erotic photographs, not to enter into discussions of sexual matters with a single pupil outside the group and not to impart to pupils information about the technique of sexual intercourse (section 2 para. 3 of the Executive Order).

The applicants claim, however, that in practice vulgar terminology is used to a very wide extent. They refer to a book by Bent H. Claësson called "Dreng og Pige, Mand og Kvinde" ("Boy and Girl, Man and Woman") of which 55,000 copies have been sold in Denmark. According to them it frequently uses vulgar terminology, explains the technique of coitus and shows photographs depicting erotic situations.

30. On the subject of relations between school and parents, the Guide points out, inter alia:

"In order to achieve an interaction between sex education at the school and at home respectively, it will be expedient to keep parents acquainted with the manner and scope of the sex education given at school. Parent class meetings are a good way of establishing this contact between school and parents. Discussions there will provide the opportunity for emphasising the objective of sexual instruction at the school and for making it clear to parents that it is not the school's intention to take anything away from them but rather ... to establish co-operation for the benefit of all parties. It can also be pointed out to parents that the integrated education allows the topic to be taken up exactly where it arises naturally in

the other fields of instruction and that, generally, this is only practicable if sex education is compulsory for pupils. ... Besides, through his contacts with the homes the class teacher will be able to learn enough about the parents' attitude towards the school, towards their own child and towards its special problems. During discussions about the sex education given by the school, sceptical parents will often be led to realise the justification for co-operation between school and home in this field as well. Some children may have special requirements or need special consideration and it will often be the parents of these children who are difficult to contact. The teacher should be aware of this fact. When gradually the teacher, homes and children have come to know each other, a relationship of trust may arise which will make it possible to begin sex education in a way that is satisfactory to all parties."

31. The Executive Order No. 313 of 15 June 1972, which came into force on 1 August 1972, repealed the Executive Order of 8 June 1971. The new Order reads:

### **"Section 1**

(1) The objective of the sex education provided in Folkeskolen shall be to impart to the pupils such knowledge of sex life as will enable them to take care of themselves and show consideration for others in that respect.

(2) Schools are therefore required, as a minimum, to provide instruction on the anatomy of the reproductive organs, on conception and contraception and on venereal diseases to such extent that the pupils will not later in life land themselves or others in difficulties solely on account of lack of knowledge. Additional and more far-reaching goals of instruction may be established within the framework of the objective set out in sub-section (1) above.

(3) Sex education shall start not later than in the third school year; it shall form part of the instruction given in the general school subjects, in particular Danish, knowledge of Christianity, biology (hygiene), history (civics) and domestic relations. In addition, a general survey of the main topics covered by sex education may be given in the sixth or seventh and in the ninth school years.

### **Section 2**

The organisation and scope of sex education shall be laid down in or in accordance with the curriculum. If the special instruction referred to in the second sentence of section 1 para. 3 is provided, a small number of lessons shall be set aside for this purpose in the relevant years.

### **Section 3**

(1) Sex education shall be given by the teachers responsible for giving lessons on the subjects with which it is integrated in the relevant class and in accordance with the directives of the principal of the school. If it is not clear from the curriculum which subjects are linked to the various topics to be taught, the class teachers shall distribute the work, as far as need be, in accordance with the recommendation of the teachers' council; this latter opinion must be approved by the school board pursuant to section 27 para. 5 of the School Administration Act.

(2) A teacher cannot be compelled against his will to give the special instruction referred to in the second sentence of section 1 para. 3. Nor shall it be incumbent upon the teacher to impart to pupils information about coital techniques or to use photographic pictures representing erotic situations.

#### Section 4

On application to the principal of the school, parents may have their children exempted from the special instruction referred to in the second sentence of section 1 para. 3.

..."

32. In a Circular of 15 June 1972 ...., the Minister of Education stated that the aim of the new Executive Order was to enable local school authorities and, consequently, parents to exert greater influence on the organisation of the teaching in question. In addition, sex education, which "remains an integral part of school education, which is to say that it should form part of the instruction given in obligatory subjects", was to have a more confined objective and place greater emphasis on factual information.

The Circular pointed out that henceforth sex education could be postponed until the third school year....

33. ...[T]he Christian People's Party tabled an amendment according to which parents would be allowed to ask that their children be exempted from attending sex education. This amendment was rejected by 103 votes to 24.

34. Although primary education in private schools must in principle cover all the topics obligatory at State schools (paragraph 18 above), sex education is an exception in this respect. Private schools are free to decide themselves to what extent they wish to align their teaching in this field with the rules applicable to State schools. However, they must include in the biology syllabus a course on the reproduction of man similar to that obligatory in State schools since 1960 (paragraph 19 above).

35. The applicants maintain that the introduction of compulsory sex education did not correspond at all with the general wish of the population. A headmaster in Nyborg allegedly collected 36,000 protest signatures in a very short space of time. Similarly, an opinion poll carried out by the Observa Institute and published on 30 January 1972 by a daily newspaper, the Jyllands-Posten, is said to have shown that, of a random sample of 1,532 persons aged eighteen or more, 41 per cent were in favour of an optional system, 15 per cent were against any sex education whatsoever in primary schools and only 35 per cent approved the system instituted by the 1970 Act.

According to the authors of two articles, published in 1975 in the medical journal Ugeskrift for Læger and produced to the Court by the Commission, the introduction of sex education has not, moreover, brought about the results desired by the legislator. On the contrary indeed, the number of unwanted pregnancies and of abortions is said to have increased substantially between 1970 and 1974. The Government argue that the statistics from 1970 to

1974 cannot be taken as reflecting the effects of legislation whose application in practice began only in August 1973.

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#### PROCEEDINGS BEFORE THE COMMISSION

44. All the applicants maintained that integrated, and hence compulsory, sex education, as introduced into State schools by the 1970 Act, was contrary to the beliefs they hold as Christian parents and constituted a violation of Article 2 of Protocol No. 1 (P1-2).

In their written pleadings on the merits, Mr. and Mrs. Kjeldsen also invoked Articles 8, 9 and 14 (art. 8, art. 9, art. 14) of the Convention.

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#### AS TO THE LAW

##### I. ON THE ALLEGED VIOLATION OF ARTICLE 2 OF PROTOCOL No. 1 (P1-2)

49. The applicants invoke Article 2 of Protocol No. 1 (P1-2) which provides:

"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

50. ...[The Court notes that] the second sentence of Article 2 (P1-2) must be read together with the first which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching.

...

The second sentence of Article 2 (P1-2) aims in short at safeguarding the possibility of pluralism in education which possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised....

51. The Government pleaded ... that the second sentence of Article 2 (P1-2), assuming that it governed even the State schools where attendance is not obligatory, implies solely the right for parents to have their children exempted from classes offering "religious instruction of a denominational character".

The Court does not share this view. Article 2 (P1-2), which applies to each of the State's functions in relation to education and to teaching, does not permit a distinction to be drawn

between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme.

52. ...The right set out in the second sentence of Article 2 (P1-2) is an adjunct of this fundamental right to education (paragraph 50 above). It is in the discharge of a natural duty towards their children - parents being primarily responsible for the "education and teaching" of their children - that parents may require the State to respect their religious and philosophical convictions. Their right thus corresponds to a responsibility closely linked to the enjoyment and the exercise of the right to education.

On the other hand, "the provisions of the Convention and Protocol must be read as a whole" (above-mentioned judgment of 23 July 1968, *ibid.*, p. 30, para. 1). Accordingly, the two sentences of Article 2 (P1-2) must be read not only in the light of each other but also, in particular, of Articles 8, 9 and 10 (art. 8, art. 9, art. 10) of the Convention which proclaim the right of everyone, including parents and children, "to respect for his private and family life", to "freedom of thought, conscience and religion", and to "freedom ... to receive and impart information and ideas".

53. ...[T]he second sentence of Article 2 of the Protocol (P1-2) does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature.

The second sentence of Article 2 (P1-2) implies on the other hand that the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions. That is the limit that must not be exceeded. Such an interpretation is consistent at one and the same time with the first sentence of Article 2 of the Protocol (P1-2), with Articles 8 to 10 (art. 8, art. 9, art. 10) of the Convention and with the general spirit of the Convention itself, an instrument designed to maintain and promote the ideals and values of a democratic society.

54. In order to examine the disputed legislation under Article 2 of the Protocol (P1-2), interpreted as above, one must, while avoiding any evaluation of the legislation's expediency, have regard to the material situation that it sought and still seeks to meet.

The Danish legislator, who did not neglect to obtain beforehand the advice of qualified experts, clearly took as his starting point the known fact that in Denmark children nowadays discover without difficulty and from several quarters the information that interests them on sexual life. The instruction on the subject given in State schools is aimed less at instilling knowledge they do not have or cannot acquire by other means than at giving them such



knowledge more correctly, precisely, objectively and scientifically. The instruction, as provided for and organised by the contested legislation, is principally intended to give pupils better information; this emerges from, inter alia, the preface to the "Guide" of April 1971.

Even when circumscribed in this way, such instruction clearly cannot exclude on the part of teachers certain assessments capable of encroaching on the religious or philosophical sphere; for what are involved are matters where appraisals of fact easily lead on to value-judgments. The minority of the Commission rightly emphasised this. The Executive Orders and Circulars of 8 June 1971 and 15 June 1972, the "Guide" of April 1971 and the other material before the Court (paragraphs 20-32 above) plainly show that the Danish State, by providing children in good time with explanations it considers useful, is attempting to warn them against phenomena it views as disturbing, for example, the excessive frequency of births out of wedlock, induced abortions and venereal diseases. The public authorities wish to enable pupils, when the time comes, "to take care of themselves and show consideration for others in that respect", "not ... [to] land themselves or others in difficulties solely on account of lack of knowledge" (section 1 of the Executive Order of 15 June 1972).

These considerations are indeed of a moral order, but they are very general in character and do not entail overstepping the bounds of what a democratic State may regard as the public interest. Examination of the legislation in dispute establishes in fact that it in no way amounts to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour. It does not make a point of exalting sex or inciting pupils to indulge precociously in practices that are dangerous for their stability, health or future or that many parents consider reprehensible. Further, it does not affect the right of parents to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions.

Certainly, abuses can occur as to the manner in which the provisions in force are applied by a given school or teacher and the competent authorities have a duty to take the utmost care to see to it that parents' religious and philosophical convictions are not disregarded at this level by carelessness, lack of judgment or misplaced proselytism. However, it follows from the Commission's decisions on the admissibility of the applications that the Court is not at present seized of a problem of this kind (paragraph 48 above).

The Court consequently reaches the conclusion that the disputed legislation in itself in no way offends the applicants' religious and philosophical convictions to the extent forbidden by the second sentence of Article 2 of the Protocol (P1-2), interpreted in the light of its first sentence and of the whole of the Convention.

Besides, the Danish State preserves an important expedient for parents who, in the name of their creed or opinions, wish to dissociate their children from integrated sex education; it allows parents either to entrust their children to private schools, which are bound by less strict obligations and moreover heavily subsidised by the State (paragraphs 15, 18 and 34 above), or to educate them or have them educated at home, subject to suffering the undeniable sacrifices and inconveniences caused by recourse to one of those alternative solutions.

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## II. ON THE ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 2 OF PROTOCOL No. 1 (art. 14+P1-2)

56. The applicants also claim to be victims, in the enjoyment of the rights protected by Article 2 of Protocol No. 1 (P1-2), of a discrimination, on the ground of religion, contrary to Article 14 (art. 14) of the Convention. They stress that Danish legislation allows parents to have their children exempted from religious instruction classes held in State schools, whilst it offers no similar possibility for integrated sex education (paragraphs 70, 80 and 171-172 of the Commission's report).

The Court first points out that Article 14 (art. 14) prohibits, within the ambit of the rights and freedoms guaranteed, discriminatory treatment having as its basis or reason a personal characteristic ("status") by which persons or groups of persons are distinguishable from each other. However, there is nothing in the contested legislation which can suggest that it envisaged such treatment.

Above all, the Court, like the Commission (paragraph 173 of the report), finds that there is a difference in kind between religious instruction and the sex education concerned in this case. The former of necessity disseminates tenets and not mere knowledge; the Court has already concluded that the same does not apply to the latter (paragraph 54 above). Accordingly, the distinction objected to by the applicants is founded on dissimilar factual circumstances and is consistent with the requirements of Article 14 (art. 14).

## III. ON THE ALLEGED VIOLATION OF ARTICLES 8 AND 9 (art. 8, art. 9) OF THE CONVENTION

57. The applicants, without providing many details, finally invoke Articles 8 and 9 (art. 8, art. 9) of the Convention taken together with Article 2 of Protocol No. 1 (art. 8+P1-2, art. 9+P1-2). They allege that the legislation of which they complain interferes with their right to respect for their private and family life and with their right to freedom of thought, conscience and religion (paragraphs 54, 55, 72, 89 and 170 of the Commission's report).

However, the Court does not find any breach of Articles 8 and 9 (art. 8, art. 9) which, moreover, it took into account when interpreting Article 2 of Protocol No. 1 (P1-2) (paragraphs 52 and 53 above).

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### FOR THESE REASONS, THE COURT

1. Holds by six votes to one that there has been no breach of Article 2 of Protocol No. 1 (P1-2) or of Article 14 of the Convention taken together with the said Article 2 (art. 14+P1-2);

2. Holds unanimously that there has been no breach of Articles 8 and 9 of the Convention taken together with Article 2 of Protocol No. 1 (art. 8+P1-2, art. 9+P1-2).

COURT (PLENARY)

CASE OF OPEN DOOR AND DUBLIN WELL WOMAN v. IRELAND

*(Application no. 14234/88; 14235/88)*

JUDGMENT

STRASBOURG

29 October 1992

## PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 24 April 1991, and on 3 July 1991 by the Government of Ireland ("the Government"), within the three-month period laid down in Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in two applications against Ireland lodged with the Commission under Article 25 (art. 25) on 10 August and 15 September 1988. The first (no. 14234/88) was brought by Open Door Counselling Ltd, a company incorporated in Ireland; the second (no. 14235/88) by another Irish company, Dublin Well Woman Centre Ltd, and one citizen of the United States of America, Ms Bonnie Maher, and three Irish citizens, Ms Ann Downes, Mrs X and Ms Maeve Geraghty.

... The object of the request and the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by Ireland of its obligations under Articles 8, 10 and 14 (art. 8, art. 10, art. 14) and also, in the case of the application, to examine these issues in the context of Articles 2, 17 and 60 (art. 2, art. 17, art. 60).

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## AS TO THE FACTS

### I. Introduction

#### A. The applicants

9. The applicants in this case are (a) Open Door Counselling Ltd (hereinafter referred to as Open Door), a company incorporated under Irish law, which was engaged, inter alia, in counselling pregnant women in Dublin and in other parts of Ireland; and (b) Dublin Well Woman Centre Ltd (hereinafter referred to as Dublin Well Woman), a company also incorporated under Irish law which provided similar services at two clinics in Dublin; (c) Bonnie Maher and Ann Downes, who worked as trained counsellors for Dublin Well Woman; (d) Mrs X, born in 1950 and Ms Maeve Geraghty, born in 1970, who join in the Dublin Well Woman application as women of child-bearing age. The applicants complained of an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland by way of non-directive counselling (see paragraphs 13 and 20 below).

Open Door and Dublin Well Woman are both non-profit-making organisations. Open Door ceased to operate in 1988 (see paragraph 21 below). Dublin Well Woman was established in 1977 and provides a broad range of services relating to counselling and marriage, family planning, procreation and health matters. The services offered by Dublin Well Woman relate to every aspect of women's health, ranging from smear tests to breast examinations, infertility, artificial insemination and the counselling of pregnant women.

10. In 1983, at the time of the referendum leading to the Eighth Amendment of the Constitution (see paragraph 28 below), Dublin Well Woman issued a pamphlet stating inter alia that legal advice on the implications of the wording of the provision had been obtained and that "with this wording anybody could seek a court injunction to prevent us offering" the non-directive counselling service. The pamphlet also warned that "it would also be possible for an individual to seek a court injunction to prevent a woman travelling abroad if they believe she intends to have an abortion".

## B. The injunction proceedings

### 1. Before the High Court

11. The applicant companies were the defendants in proceedings before the High Court which were commenced on 28 June 1985 as a private action brought by the Society for the Protection of Unborn Children (Ireland) Ltd (hereinafter referred to as S.P.U.C.)....

12. S.P.U.C. sought a declaration that the activities of the applicant companies in counselling pregnant women within the jurisdiction of the court to travel abroad to obtain an abortion were unlawful having regard to Article 40.3.3° of the Constitution which protects the right to life of the unborn (see paragraph 28 below) and an order restraining the defendants from such counselling or assistance.

13. No evidence was adduced at the hearing of the action which proceeded on the basis of certain agreed facts. The facts as agreed at that time by Dublin Well Woman may be summarised as follows:

- (a) It counsels in a non-directive manner pregnant women resident in Ireland;
- (b) Abortion or termination of pregnancy may be one of the options discussed within the said counselling;
- (c) If a pregnant woman wants to consider the abortion option further, arrangements will be made by the applicant to refer her to a medical clinic in Great Britain;
- (d) In certain circumstances, the applicant may arrange for the travel of such pregnant women;
- (e) The applicant will inspect the medical clinic in Great Britain to ensure that it operates at the highest standards;
- (f) At those medical clinics abortions have been performed on pregnant women who have been previously counselled by the applicant;
- (g) Pregnant women resident in Ireland have been referred to medical clinics in Great Britain where abortions have been performed for many years including 1984.

The facts agreed by Open Door were the same as above with the exception of point (d).

14. The meaning of the concept of non-directive counselling was described in the following terms by Mr Justice Finlay CJ in the judgment of the Supreme Court in the case ...:

"It was submitted on behalf of each of the Defendants that the meaning of non-directive counselling in these agreed sets of facts was that it was counselling which neither included advice nor was judgmental but that it was a service essentially directed to eliciting from the client her own appreciation of her problem and her own considered choice for its solution. This interpretation of the phrase 'non-directive counselling' in the context of the activities of the Defendants was not disputed on behalf of the Respondent. It follows from this, of course, that non-directive counselling to pregnant women would never involve the actual advising of an abortion as the preferred option but neither, of course, could it permit the giving of advice for any reason to the pregnant women receiving such counselling against choosing to have an abortion."

15. On 19 December 1986 Mr Justice Hamilton, President of the High Court, found that the activities of Open Door and Dublin Well Woman in counselling pregnant women within the jurisdiction of the court to travel abroad to obtain an abortion or to obtain further advice on abortion within a foreign jurisdiction were unlawful having regard to the provisions of Article 40.3.3<sup>o</sup> of the Constitution of Ireland.

He confirmed that Irish criminal law made it an offence to procure or attempt to procure an abortion, to administer an abortion or to assist in an abortion by supplying any noxious thing or instrument (sections 58 and 59 of the Offences against the Person Act 1861 - see paragraph 29 below). Furthermore, Irish constitutional law also protected the right to life of the unborn from the moment of conception onwards.

An injunction was accordingly granted...

## 2. Before the Supreme Court

16. Open Door and Dublin Well Woman appealed against this decision to the Supreme Court which in a unanimous judgment delivered on 16 March 1988 by Mr Justice Finlay CJ rejected the appeal.

The Supreme Court noted that the appellants did not consider it essential to the service which they provided for pregnant women in Ireland that they should take any part in arranging the travel of women who wished to go abroad for the purpose of having an abortion or that they arranged bookings in clinics for such women. However, they did consider it essential to inform women who wished to have an abortion outside the jurisdiction of the court of the name, address, telephone number and method of communication with a specified clinic which they had examined and were satisfied was one which maintained a high standard.

17. On the question of whether the above activity should be restrained as being contrary to the Constitution, Mr Justice Finlay CJ stated:

"... the essential issues in this case do not in any way depend upon the Plaintiff establishing that the Defendants were advising or encouraging the procuring of abortions. The essential issue in this case, having regard to the nature of the guarantees contained in Article 40, s.3, sub-s.3 of the Constitution, is the issue as to whether the Defendants' admitted activities were assisting pregnant women within the jurisdiction to travel outside that jurisdiction in order to have an abortion. To put the matter in another way, the issue and the question of fact to be determined is: were they thus assisting in the destruction of the life of the unborn?

I am satisfied beyond doubt that having regard to the admitted facts the Defendants were assisting in the ultimate destruction of the life of the unborn by abortion in that they were helping the pregnant woman who had decided upon that option to get in touch with a clinic in Great Britain which would provide the service of abortion. It seems to me an inescapable conclusion that if a woman was anxious to obtain an abortion and if she was able by availing of the counselling services of one or other of the Defendants to obtain the precise location, address and telephone number of, and method of communication with, a clinic in Great Britain which provided that service, put in plain language, that was knowingly helping her to attain her objective. I am, therefore, satisfied that the finding made by the learned trial Judge that the Defendants were assisting pregnant women to travel abroad to obtain further advice on abortion and to secure an abortion is well supported on the evidence ..."

The Court further noted that the phrase in Article 40.3.3<sup>o</sup> "with due regard to the equal right to life of the mother" did not arise for interpretation in the case since the applicants were not claiming that the service they were providing for pregnant women was "in any way confined to or especially directed towards the due regard to the equal right to life of the mother ...".

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19. As to whether there was a constitutional right to information about the availability of abortion outside the State, the court stated as follows:

"The performing of an abortion on a pregnant woman terminates the unborn life which she is carrying. Within the terms of Article 40.3.3<sup>o</sup> it is a direct destruction of the constitutionally guaranteed right to life of that unborn child.

It must follow from this that there could not be an implied and unenumerated constitutional right to information about the availability of a service of abortion outside the State which, if availed of, would have the direct consequence of destroying the expressly guaranteed constitutional right to life of the unborn. As part of the submission on this issue it was further suggested that the right to receive and give information which, it was alleged, existed and was material to this case was, though not expressly granted, impliedly referred to or involved in the right of citizens to express freely their convictions and opinions provided by Article 40, s.6, sub-s.1 (i) of the Constitution, since, it was claimed, the right to express freely convictions and opinions may, under some circumstances, involve as an ancillary right the right to obtain information. I am satisfied that no right could constitutionally arise to obtain information the purpose of the obtaining of which was to defeat the constitutional right to life of the unborn child."

20. The court upheld the decision of the High Court to grant an injunction but varied the terms of the order as follows:

"... that the defendants and each of them, their servants or agents be perpetually restrained from assisting pregnant women within the jurisdiction to travel abroad to obtain abortions by referral to a clinic, by the making for them of travel arrangements, or by informing them of the identity and location of and the method of communication with a specified clinic or clinics or otherwise."

....

21. Following the judgment of the Supreme Court, Open Door, having no assets, ceased its activities.

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### C. Subsequent legal developments

[S.P.U.C. also won an injunction restraining students from publishing or distributing in student publications "information concerning the identity and location of abortion clinics outside the jurisdiction."]

### D. Evidence presented by the applicants

26. The applicants presented evidence to the Court that there had been no significant drop in the number of Irish women having abortions in Great Britain since the granting of the injunction, that number being well over 3,500 women per year. They also submitted an opinion from an expert in public health (Dr J.R. Ashton) which concludes that there are five possible adverse implications for the health of Irish women arising from the injunction in the present case:

1. An increase in the birth of unwanted and rejected children;
2. An increase in illegal and unsafe abortions;
3. A lack of adequate preparation of Irish women obtaining abortions;
4. Increases in delay in obtaining abortions with ensuing increased complication rates;
5. Poor aftercare with a failure to deal adequately with medical complications and a failure to provide adequate contraceptive advice.

In their written comments to the Court, S.P.U.C. claimed that the number of abortions obtained by Irish women in England, which had been rising rapidly prior to the enactment of Article 40.3.3<sup>o</sup>, had increased at a much reduced pace. They further submitted that the number of births to married women had increased at a "very substantial rate".

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## II. RELEVANT DOMESTIC LAW AND PRACTICE CONCERNING PROTECTION OF THE UNBORN

### A. Constitutional protection

28. Article 40.3.3<sup>o</sup> of the Irish Constitution (the Eighth Amendment), which came into force in 1983 following a referendum, reads:

"The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

...

### B. Statutory protection

29. The statutory prohibition of abortion is contained in sections 58 and 59 of the Offences Against the Person Act 1861. Section 58 provides that:

"Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of a felony, and being convicted thereof shall be liable, [to imprisonment for life] ..."

Section 59 states that:

"Whoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanour, and being convicted thereof, ..."

30. Section 16 of the Censorship of Publications Act 1929 as amended by section 12 of the Health (Family Planning) Act 1979 provides that:

"It shall not be lawful for any person, otherwise than under and in accordance with a permit in writing granted to him under this section

(a) to print or publish or cause or procure to be printed or published, or

(b) to sell or expose, offer or keep for sale or

(c) to distribute, offer or keep for distribution,

any book or periodical publication (whether appearing on the register of prohibited publications or not) which advocates or which might reasonably be supposed to advocate the procurement of abortion or miscarriage or any method, treatment or appliance to be used for the purpose of such procurement."

31. Section 58 of the Civil Liability Act 1961 provides that "the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive".

32. Section 10 of the Health (Family Planning) Act 1979 re-affirms the statutory prohibition of abortion and states as follows:

"Nothing in this Act shall be construed as authorising -

(a) the procuring of abortion,

(b) the doing of any other thing the doing of which is prohibited by section 58 or 59 of the Offences Against the Person Act, 1861 (which sections prohibit the administering of drugs or the use of any instruments to procure abortion) or,

(c) the sale, importation into the State, manufacture, advertising or display of abortifacients."

#### C. Case-law

33. Apart from the present case and subsequent developments (see paragraphs 11-25 above), reference has been made to the right to life of the unborn in various decisions of the Supreme Court ....

#### PROCEEDINGS BEFORE THE COMMISSION

36. In their applications (nos. 14234 and 14235/88) lodged with the Commission on 19 August and 22 September 1988 the applicants complained that the injunction in question constituted an unjustified interference with their right to impart or receive information contrary to Article 10 (art. 10) of the Convention. Open Door, Mrs X and Ms Geraghty further claimed that the restrictions amounted to an interference with their right to respect for private life in breach of Article 8 (art. 8) and, in the case of Open Door, discrimination contrary to Article 14 in conjunction with Articles 8 and 10 (art. 14+8, art. 14+10).

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#### AS TO THE LAW

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52. To sum up, the Court is able to take cognisance of the merits of the case as regards all of the applicants.

### III. ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

53. The applicants alleged that the Supreme Court injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed the rights of the corporate applicants and the two counsellors to impart information, as well as the rights of Mrs X and Ms Geraghty to receive information. They confined their complaint to that part of the injunction which concerned the provision of information to pregnant women as opposed to the making of travel arrangements or referral to clinics (see paragraph 20 above). They invoked Article 10 (art. 10) which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

54. In their submissions to the Court the Government contested these claims and also contended that Article 10 (art. 10) should be interpreted against the background of Articles 2, 17 and 60 (art. 2, art. 17, art. 60) of the Convention the relevant parts of which state:

#### Article 2 (art. 2)

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

#### Article 17 (art. 17)

"Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

#### Article 60 (art. 60)

"Nothing in [the] Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

A. Was there an interference with the applicants' rights?

55. The Court notes that the Government accepted that the injunction interfered with the freedom of the corporate applicants to impart information. Having regard to the scope of the injunction which also restrains the "servants or agents" of the corporate applicants from assisting "pregnant women" (see paragraph 20 above), there can be no doubt that there was also an interference with the rights of the applicant counsellors to impart information and with the rights of Mrs X and Ms Geraghty to receive information in the event of being pregnant.

To determine whether such an interference entails a violation of Article 10 (art. 10), the Court must examine whether or not it was justified under Article 10 para. 2 (art. 10-2) by reason of being a restriction "prescribed by law" which was necessary in a democratic society on one or other of the grounds specified in Article 10 para. 2 (art. 10-2).

B. Was the restriction "prescribed by law"?

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## 2. Court's examination of the issue

59. This question must be approached by considering not merely the wording of Article 40.3.3° in isolation but also the protection given under Irish law to the rights of the unborn in statute law and in case-law (see paragraphs 28-35 above).

It is true that it is not a criminal offence to have an abortion outside Ireland and that the practice of non-directive counselling of pregnant women did not infringe the criminal law as such. Moreover, on its face the language of Article 40.3.3° appears to enjoin only the State to protect the right to life of the unborn and suggests that regulatory legislation will be introduced at some future stage.

On the other hand, it is clear from Irish case-law, even prior to 1983, that infringement of constitutional rights by private individuals as well as by the State may be actionable (see paragraph 35 above). Furthermore, the constitutional obligation that the State defend and vindicate personal rights "by its laws" has been interpreted by the courts as not being confined merely to "laws" which have been enacted by the Irish Parliament (Oireachtas) but as also comprehending judge-made "law". In this regard the Irish courts, as the custodians of fundamental rights, have emphasised that they are endowed with the necessary powers to ensure their protection (ibid.).

60. Taking into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their role as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable (See the *Sunday Times v. the United Kingdom* judgment of 26 April 1979, Series A no. 30, p. 31, para. 49). This conclusion is reinforced by the legal advice that was actually given to Dublin Well Woman that,

in the light of Article 40.3.3°, an injunction could be sought against its counselling activities (see paragraph 10 in fine above).

The restriction was accordingly "prescribed by law".

C. Did the restriction have aims that were legitimate under Article 10 para. 2 (art. 10-2)?

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63. The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime since, as noted above (paragraph 59), neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction involved any criminal offence. However, it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum (see paragraph 28 above). The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect....

D. Was the restriction necessary in a democratic society?

64. The Government submitted that the Court's approach to the assessment of the "necessity" of the restraint should be guided by the fact that the protection of the rights of the unborn in Ireland could be derived from Articles 2, 17 and 60 (art. 2, art. 17, art. 60) of the Convention. They further contended that the "proportionality" test was inadequate where the rights of the unborn were at issue. The Court will examine these issues in turn.

1. Article 2 (art. 2)

65. The Government maintained that the injunction was necessary in a democratic society for the protection of the right to life of the unborn and that Article 10 (art. 10) should be interpreted *inter alia* against the background of Article 2 (art. 2) of the Convention which, they argued, also protected unborn life. The view that abortion was morally wrong was the deeply held view of the majority of the people in Ireland and it was not the proper function of the Court to seek to impose a different viewpoint.

66. The Court observes at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2 (art. 2). The applicants have not claimed that the Convention contains a right to abortion, as such, their complaint being limited to that part of the injunction which restricts their freedom to impart and receive information concerning abortion abroad (see paragraph 20 above).

Thus the only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals as explained above (see paragraph 63). It follows from this approach that the Government's argument based on Article 2 (art. 2) of the

Convention does not fall to be examined in the present case. On the other hand, the arguments based on Articles 17 and 60 (art. 17, art. 60) fall to be considered below (see paragraphs 78 and 79).

## 2. Proportionality

67. The Government stressed the limited nature of the Supreme Court's injunction which only restrained the provision of certain information (see paragraph 20 above). There was no limitation on discussion in Ireland about abortion generally or the right of women to travel abroad to obtain one. They further contended that the Convention test as regards the proportionality of the restriction was inadequate where a question concerning the extinction of life was at stake. The right to life could not, like other rights, be measured according to a graduated scale. It was either respected or it was not. Accordingly, the traditional approach of weighing competing rights and interests in the balance was inappropriate where the destruction of unborn life was concerned. Since life was a primary value which was antecedent to and a prerequisite for the enjoyment of every other right, its protection might involve the infringement of other rights such as freedom of expression in a manner which might not be acceptable in the defence of rights of a lesser nature.

The Government also emphasised that, in granting the injunction, the Supreme Court was merely sustaining the logic of Article 40.3.3<sup>o</sup> of the Constitution. The determination by the Irish courts that the provision of information by the relevant applicants assisted in the destruction of unborn life was not open to review by the Convention institutions.

68. The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable ....

It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them ....

However this power of appreciation is not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

69. As regards the application of the "proportionality" test, the logical consequence of the Government's argument is that measures taken by the national authorities to protect the right to life of the unborn or to uphold the constitutional guarantee on the subject would be automatically justified under the Convention where infringement of a right of a lesser stature was alleged. It is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights. However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions. To accept the Government's pleading on this point would amount

to an abdication of the Court's responsibility under Article 19 (art. 19) "to ensure the observance of the engagements undertaken by the High Contracting Parties".

70. Accordingly, the Court must examine the question of "necessity" in the light of the principles developed in its case-law .... It must determine whether there existed a pressing social need for the measures in question and, in particular, whether the restriction complained of was "proportionate to the legitimate aim pursued".

71. In this context, it is appropriate to recall that freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

72. While the relevant restriction, as observed by the Government, is limited to the provision of information, it is recalled that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion. Furthermore, the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman's health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.

73. The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a "perpetual" restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of *The Attorney General v. X and Others* and by the concession made by the Government at the oral hearing that the injunction no longer applied to women who, in the circumstances as defined in the Supreme Court's judgment in that case, were now free to have an abortion in Ireland or abroad.

74. On that ground alone the restriction appears over broad and disproportionate. Moreover, this assessment is confirmed by other factors.

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77. In addition, the available evidence, which has not been disputed by the Government, suggests that the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing themselves of customary medical supervision after the abortion has taken place (see paragraph 26 above). Moreover, the injunction may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information (see paragraph 76 above). These are certainly legitimate factors to take into consideration in assessing the proportionality of the restriction.

3. Articles 17 and 60 (art. 17, art. 60)

78. The Government, invoking Articles 17 and 60 (art. 17, art. 60) of the Convention, have submitted that Article 10 (art. 10) should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn which enjoys special protection under Irish law.

79. Without calling into question under the Convention the regime of protection of unborn life that exists under Irish law, the Court recalls that the injunction did not prevent Irish women from having abortions abroad and that the information it sought to restrain was available from other sources (see paragraph 76 above). Accordingly, it is not the interpretation of Article 10 (art. 10) but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad.

#### 4. Conclusion

80. In the light of the above, the Court concludes that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued. Accordingly there has been a breach of Article 10 (art. 10).

#### IV. ALLEGED VIOLATIONS OF ARTICLES 8 AND 14 (art. 8, art. 14)

[The Court refused to consider whether the injunction also violated the "right to respect for private life" under Article 8, nor the question of whether the injunction "discriminated against women since men were not denied information 'critical to their reproductive and health choices'". The Court did not consider it "necessary to examine these complaints" in light of the fact that it had already found a breach of Article 10.]

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#### FOR THESE REASONS, THE COURT

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3. Holds by fifteen votes to eight that there has been a violation of Article 10 (art. 10);
4. Holds unanimously that it is not necessary to examine the remaining complaints;
5. Holds by seventeen votes to six that Ireland is to pay to Dublin Well Woman, within three months, IR£25,000 (twenty-five thousand Irish pounds) in respect of damages;
6. Holds unanimously that Ireland is to pay to Open Door and Dublin Well Woman, within three months, in respect of costs and expenses, the sums resulting from the calculation to be made in accordance with paragraphs 90, 93 and 94 of the judgment;
7. Dismisses unanimously the remainder of the claims for just satisfaction.



## DISSENTING OPINION OF JUDGE CREMONA

There are certain aspects in this case which merit special consideration in the context of the "necessary in a democratic society" requirement for the purposes of Article 10 para. 2 (art. 10-2) of the Convention.

Firstly, there is the paramount place accorded to the protection of unborn life in the whole fabric of Irish public policy, as is abundantly manifest from repeated pronouncements of the highest judicial and other national authorities.

Secondly, this is in fact a fundamental principle of Irish public policy which has been enshrined in the constitution itself after being unequivocally affirmed by the direct will of a strong majority of the people by means of the eminently democratic process of a comparatively recent national referendum.

Thirdly, in a matter such as this touching on profound moral values considered fundamental in the national legal order, the margin of appreciation left to national authorities (which in this case the judgment itself describes as wide), though of course not exempt from supervision by the Strasbourg institutions, assumes a particular significance. As has been said by the Court on other occasions -

(a) "it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals" so that "the view taken of the requirements of morals varies from time to time and from place to place, especially in our era, characterised as it is by a far-reaching evolution of opinions on the subject" (*Müller and Others v. Switzerland* judgment of 24 May 1988, Series A no. 133, p. 22, para. 35; and see also *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 22, para. 48); and

(b) "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than an international judge to give an opinion on the exact content of these requirements as well as on the necessity of a restriction or penalty intended to meet them" (*ibid.*).

I think this assumes particular importance in the present case in view of the popular expression in a national referendum. The interference in question is in fact a corollary of the constitutional protection accorded to those unable to defend themselves (i.e. the unborn) intended to avoid setting at nought a constitutional provision considered to be basic in the national legal order and indeed, as the Government put it, to sustain the logic of that provision.

Fourthly, there is also a certain proportionality in that the prohibition in question in no way affects the expression of opinion about the permissibility of abortion in general and does not extend to measures restricting freedom of movement of pregnant women or subjecting them to unsolicited examinations. It is true that, within its own limited scope the injunction was couched in somewhat absolute terms, but what it really sought to do was to reflect the general legal principle involved and the legal position as then generally understood.

I am convinced that any inconvenience or possible risk from the impugned injunction which has been represented as indirectly affecting women who may wish to seek abortions, or any practical limitation on the general effectiveness of such injunction cannot, in the context of the case as a whole, whether by themselves or in conjunction with other arguments, outweigh the above considerations in the overall assessment.

In conclusion, taking into account all relevant circumstances and in particular the margin of appreciation enjoyed by national authorities, I cannot find that the injunction in question was incompatible with Article 10 (art. 10) of the Convention. In my view it satisfied all the requirements of paragraph 2 (art. 10-2) thereof. There was thus no violation of that provision.

### ***Right to the Benefits of Scientific Progress: State Regulation of Medical Technology and Techniques***

Some of the earlier cases in this module explored the question of whether the individual has a positive right to receive the benefits of scientific progress or medical technology. A positive right to the benefits of science would answer the question of whether an individual also has a *negative* right to not be denied the benefits of scientific progress or medical technology. To fully realize the right, the answer must be an affirmative one. However, the U.S. Supreme Court's decision in *Gonzales v. Carhart* implies that a person's negative right to not be denied the benefits of science may be limited by the state's interest in demonstrating its respect for fetal life, as well as its interest in protecting women from the possibility of a regretted decision to terminate a pregnancy. The Court held the proscription of a certain technique for performing an abortion (called "intact D&X abortion") was constitutional because "[i]t is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form." Moreover, the Court stated that its prohibition of this specific technique for effectuating a woman's right to an abortion "expresses respect for the dignity of human life."

However, there is an argument to be made that, while the Court considered the "dignity" of the fetus, it ignored the "dignity" of the woman burdened with an unwanted pregnancy. Indeed, while the "right to dignity" of men and women is recognized in several human rights instruments, any "right to dignity" that the fetus may have has not been similarly recognized. In the following article, Professor Reva Siegel argues that, had the Court in *Gonzales v. Carhart* considered the dignity interests of the woman, the case might have been decided differently.

(Cite as: 127 S.Ct. 1610)

*Edited – Footnotes may differ from original*

Supreme Court of the United States  
Alberto R. GONZALES, Attorney General,  
Petitioner,

v.

Leroy CARHART et al.  
Alberto R. Gonzales, Attorney General, Petitioner,  
v.

Planned Parenthood Federation of America, Inc., et  
al.

Nos. 05-380, 05-1382.

Argued Nov. 8, 2006.  
Decided April 18, 2007.

413 F.3d 791, 435 F.3d 1163, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion, in which SCALIA, J., joined. GINSBURG, J., filed a dissenting opinion, in which STEVENS, SOUTER, and BREYER, JJ., joined.

Justice KENNEDY delivered the opinion of the Court.

These cases require us to consider the validity of the Partial-Birth Abortion Ban Act of 2003 (Act), 18 U.S.C. § 1531 (2000 ed., Supp. IV), a federal statute regulating abortion procedures. . . . We conclude the Act should be sustained against the objections lodged by the broad, facial attack brought against it.

\* \* \*

I

A

The Act proscribes a particular manner of ending fetal life, so it is necessary here, as it was in Stenberg, to discuss abortion procedures in some detail. . . . We refer to the District Courts' exhaustive opinions in our own discussion of abortion procedures.

Abortion methods vary depending to some extent on the preferences of the physician and, of course, on the term of the pregnancy and the resulting stage of the unborn child's development. Between 85 and 90 percent of the approximately 1.3 million abortions

performed each year in the United States take place in the first three months of pregnancy, which is to say in the first trimester. . . . The most common first-trimester abortion method is vacuum aspiration (otherwise known as suction curettage) in which the physician vacuums out the embryonic tissue. Early in this trimester an alternative is to use medication, such as mifepristone (commonly known as RU-486), to terminate the pregnancy. . . . The Act does not regulate these procedures.

Of the remaining abortions that take place each year, most occur in the second trimester. The surgical procedure referred to as "dilation and evacuation" or "D & E" is the usual abortion method in this trimester. . . . Although individual techniques for performing D & E differ, the general steps are the same.

A doctor must first dilate the cervix at least to the extent needed to insert surgical instruments into the uterus and to maneuver them to evacuate the fetus. . . . The steps taken to cause dilation differ by physician and gestational age of the fetus. . . . A doctor often begins the dilation process by inserting osmotic dilators, such as laminaria (sticks of seaweed), into the cervix. The dilators can be used in combination with drugs, such as misoprostol, that increase dilation. The resulting amount of dilation is not uniform, and a doctor does not know in advance how an individual patient will respond. In general the longer dilators remain in the cervix, the more it will dilate. Yet the length of time doctors employ osmotic dilators varies. Some may keep dilators in the cervix for two days, while others use dilators for a day or less. . . .

After sufficient dilation the surgical operation can commence. The woman is placed under general anesthesia or conscious sedation. The doctor, often guided by ultrasound, inserts grasping forceps through the woman's cervix and into the uterus to grab the fetus. The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed. A doctor may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety,

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though sometimes removal is completed with fewer passes. Once the fetus has been evacuated, the placenta and any remaining fetal material are suctioned or scraped out of the uterus. The doctor examines the different parts to ensure the entire fetal body has been removed. . .

Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier. Other doctors refrain from injecting chemical agents, believing it adds risk with little or no medical benefit. . .

The abortion procedure that was the impetus for the numerous bans on "partial-birth abortion," including the Act, is a variation of this standard D & E. . . . The medical community has not reached unanimity on the appropriate name for this D & E variation. It has been referred to as "intact D & E," "dilation and extraction" (D & X), and "intact D & X." . . . For discussion purposes this D & E variation will be referred to as intact D & E. The main difference between the two procedures is that in intact D & E a doctor extracts the fetus intact or largely intact with only a few passes. There are no comprehensive statistics indicating what percentage of all D & Es are performed in this manner.

Intact D & E, like regular D & E, begins with dilation of the cervix. Sufficient dilation is essential for the procedure. To achieve intact extraction some doctors thus may attempt to dilate the cervix to a greater degree. This approach has been called "serial" dilation. . . . Doctors who attempt at the outset to perform intact D & E may dilate for two full days or use up to 25 osmotic dilators. . .

In an intact D & E procedure the doctor extracts the fetus in a way conducive to pulling out its entire body, instead of ripping it apart. . .

Rotating the fetus as it is being pulled decreases the odds of dismemberment. . . . A doctor also "may use forceps to grasp a fetal part, pull it down, and re-grasp the fetus at a higher level-sometimes using both his hand and a forceps-to exert traction to retrieve the fetus intact until the head is lodged in the [cervix]." Carhart, 331 F.Supp.2d, at 886-887.

Intact D & E gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation. . . . In the usual intact D & E the fetus' head lodges in the cervix, and dilation is insufficient to allow it to pass. . . . Haskell explained the next step as follows:

" 'At this point, the right-handed surgeon slides the fingers of the left [hand] along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).

" 'While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contact the base of the skull under the tip of his middle finger.

" '[T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.

" 'The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.' " H.R.Rep. No. 108-58, p. 3 (2003).

\* \* \*

Dr. Haskell's approach is not the only method of killing the fetus once its head lodges in the cervix, and "the process has evolved" since his presentation. Planned Parenthood, 320 F.Supp.2d, at 965. Another doctor, for example, squeezes the skull after it has been pierced "so that enough brain tissue exudes to allow the head to pass through." App. in No. 05-380, at 41; see also Carhart, *supra*, at 866-867, 874. Still other physicians reach into the cervix with their forceps and crush the fetus' skull. Carhart, *supra*, at 858, 881. Others continue to pull the fetus out of the woman until it disarticulates at the neck, in effect decapitating it. These doctors then grasp the head with forceps, crush it, and remove it. . .

Some doctors performing an intact D & E attempt to remove the fetus without collapsing the skull. . . .

D & E and intact D & E are not the only second-trimester abortion methods. Doctors also may abort a fetus through medical induction. The doctor medicates the woman to induce labor, and contractions occur to deliver the fetus. Induction, which unlike D & E should occur in a hospital, can

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last as little as 6 hours but can take longer than 48. It accounts for about five percent of second-trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks. Doctors turn to two other methods of second-trimester abortion, hysterotomy and hysterectomy, only in emergency situations because they carry increased risk of complications. In a hysterotomy, as in a cesarean section, the doctor removes the fetus by making an incision through the abdomen and uterine wall to gain access to the uterine cavity. A hysterectomy requires the removal of the entire uterus. These two procedures represent about .07% of second-trimester abortions...

\* \* \*

## II

... Whatever one's views concerning the *Casey* joint opinion, it is evident a premise central to its conclusion—that the government has a legitimate and substantial interest in preserving and promoting fetal life—would be repudiated were the Court now to affirm the judgments of the Courts of Appeals.

[1] *Casey* involved a challenge to *Roe v. Wade*, 410 U.S. 113 (1973). The opinion contains this summary: "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 the 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. These principles do not contradict one another; and we adhere to each." 505 U.S., at 846 (opinion of the Court).

Though all three holdings are implicated in the instant cases, it is the third that requires the most extended discussion; for we must determine whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child.

\* \* \*

We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." 505 U.S., at 879 (plurality opinion). It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878. On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id.* at 877. *Casey*, in short, struck a balance. The balance was central to its holding. We now apply its standard to the cases at bar.

\* \* \*

## IV

... The question is whether the Act ... imposes a substantial obstacle to late-term, but previability, abortions ....

### A

... A description of the prohibited abortion procedure demonstrates the rationale for the congressional enactment. The Act proscribes a method of abortion in which a fetus is killed just inches before completion of the birth process. Congress stated as follows: "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." ... The Act expresses respect for the dignity of human life.

Congress was concerned, furthermore, with the effects on the medical community and on its reputation caused by the practice of partial-birth abortion. The findings in the Act explain: "Partial-birth abortion ... confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child, whom he or she had just delivered, all but the head, out of the womb, in order to end that life." Congressional Findings (14)(J), *ibid.*

\* \* \*

Casey reaffirmed these governmental objectives. The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. A central premise of the opinion was that the Court's precedents after Roe had "undervalue[d] the State's interest in potential life." 505 U.S., at 873 (plurality opinion); see also id., at 871. . . . [The premise] that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting Casey's requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

The Act's ban on abortions that involve partial delivery of a living fetus furthers the Government's objectives. No one would dispute that, for many, D & E is a procedure itself laden with the power to devalue human life. Congress could nonetheless conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition. Congress determined that the abortion methods it proscribed had a "disturbing similarity to the killing of a newborn infant" . . . and thus it was concerned with "draw[ing] a bright line that clearly distinguishes abortion and infanticide." . . . The Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. Glucksberg found reasonable the State's "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia." 521 U.S. at 732-35 & n. 23.

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. Casey, supra, at 852-853 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.

See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow. See *ibid.*

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. See, e.g., Nat. Abortion Federation, 330 F.Supp.2d. at 466, n. 22 ("Most of [the plaintiffs'] experts acknowledged that they do not describe to their patients what [the D & E and intact D & E] procedures entail in clear and precise terms"); see also id., at 479.

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. Casey, supra, at 873 (plurality opinion) ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions. The medical profession, furthermore, may find different and less shocking methods to abort the fetus in the second trimester, thereby accommodating legislative demand. The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion.

It is objected that the standard D & E is in some respects as brutal, if not more, than the intact D & E, so that the legislation accomplishes little. What we have already said, however, shows ample

justification for the regulation. Partial-birth abortion, as defined by the Act, differs from a standard D & E because the former occurs when the fetus is partially outside the mother to the point of one of the Act's anatomical landmarks. It was reasonable for Congress to think that partial-birth abortion, more than standard D & E, "undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world." Congressional Findings (14)(K), in notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 769. There would be a flaw in this Court's logic, and an irony in its jurisprudence, were we first to conclude a ban on both D & E and intact D & E was overbroad and then to say it is irrational to ban only intact D & E because that does not proscribe both procedures. In sum, we reject the contention that the congressional purpose of the Act was "to place a substantial obstacle in the path of a woman seeking an abortion." 505 U.S., at 878 (plurality opinion).

\* \* \*

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

... Of signal importance here, the *Casey* Court stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect "the health of the woman."

Seven years ago, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), the Court invalidated a Nebraska statute criminalizing the performance of a medical procedure that, in the political arena, has been dubbed "partial-birth abortion." <sup>FNI</sup> With fidelity to the *Roe-Casey* line of precedent, the Court held the Nebraska statute unconstitutional in part because it lacked the requisite protection for the preservation of a woman's health. *Stenberg*, 530 U.S., at 930; cf. *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 327 (2006).

<sup>FNI</sup> The term "partial-birth abortion" is neither recognized in the medical literature nor used by physicians who perform second-trimester abortions. . . . The medical community refers to the procedure as either dilation & extraction (D & X) or intact dilation and evacuation (intact D & E). . . .

Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously. It tolerates, indeed applauds, federal intervention to ban nationwide a procedure found necessary and proper in certain cases by the American College of Obstetricians and Gynecologists (ACOG). It blurs the line, firmly drawn in *Casey* between previability and postviability abortions. And, for the first time since *Roe*, the Court blesses a prohibition with no exception safeguarding a woman's health.

\* \* \*

## I

### A

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny." 505 U.S., at 869, (plurality opinion). See also *id.*, at 852 (majority opinion). "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." *Id.*, at 896-897 (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). Those views, this Court made clear in *Casey*, "are no longer consistent with our understanding of the family, the individual, or the Constitution." 505 U.S., at 897. Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." *Id.*, at 856. Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." *Ibid.* Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature. . . .

In keeping with this comprehension of the right to reproductive choice, the Court has consistently required that laws regulating abortion, at any stage of pregnancy and in all cases, safeguard a woman's health. . . .

We have thus ruled that a State must avoid subjecting women to health risks not only where the pregnancy itself creates danger, but also where state regulation forces women to resort to less safe methods of abortion. . . . Indeed, we have applied the rule that abortion regulation must safeguard a woman's health



(Cite as: 127 S.Ct. 1610)

to the particular procedure at issue here—intact dilation and evacuation (D & E).

In *Stenberg*, we expressly held that a statute banning intact D & E was unconstitutional in part because it lacked a health exception, 530 U.S., at 930, 937. We noted that there existed a “division of medical opinion” about the relative safety of intact D & E, *id.*, at 937, but we made clear that as long as “substantial medical authority supports the proposition that banning a particular abortion procedure could endanger women’s health,” a health exception is required, *id.*, at 938.

\* \* \*

## B

In 2003, a few years after our ruling in *Stenberg*, Congress passed the Partial-Birth Abortion Ban Act—without an exception for women’s health. See 18 U.S.C. § 1531(a) (2000 ed., Supp. IV). The congressional findings on which the Partial-Birth Abortion Ban Act rests do not withstand inspection, as the lower courts have determined and this Court is obliged to concede. . . .

Many of the Act’s recitations are incorrect. . . . For example, Congress determined that no medical schools provide instruction on intact D & E. . . . But in fact, numerous leading medical schools teach the procedure. . . .

More important, Congress claimed there was a medical consensus that the banned procedure is never necessary. . . . But the evidence “very clearly demonstrate[d] the opposite.” *Planned Parenthood*, 320 F.Supp.2d, at 1025. See also *Carhart*, 331 F.Supp.2d, at 1008–1009. . . .

Similarly, Congress found that “[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures.” . . . But the congressional record includes letters from numerous individual physicians stating that pregnant women’s health would be jeopardized under the Act, as well as statements from nine professional associations, including ACOG, the American Public Health Association, and the California Medical Association, attesting that intact D & E carries meaningful safety advantages over other methods. . . . No comparable medical groups supported the ban. In fact, “all of the government’s own witnesses disagreed with many of the specific congressional

findings.” *Id.*, at 1024.

## C

In contrast to Congress, the District Courts made findings after full trials at which all parties had the opportunity to present their best evidence. The courts had the benefit of “much more extensive medical and scientific evidence concerning the safety and necessity of intact D & Es.” . . .

During the District Court trials, “numerous” “extraordinarily accomplished” and “very experienced” medical experts explained that, in certain circumstances and for certain women, intact D & E is safer than alternative procedures and necessary to protect women’s health. . . .

\* \* \*

. . . The trial courts concluded, in contrast to Congress’ findings, that “significant medical authority supports the proposition that in some circumstances, [intact D & E] is the safest procedure.” . . .

## II

### A

The Court offers flimsy and transparent justifications for upholding a nationwide ban on intact D & E *sans* any exception to safeguard a women’s health. Today’s ruling, the Court declares, advances “a premise central to [*Casey*’s] conclusion”—i.e., the Government’s “legitimate and substantial interest in preserving and promoting fetal life.” . . . But the Act scarcely furthers that interest: The law saves not a single fetus from destruction, for it targets only a *method* of performing abortion. . . . [T]he Court upholds a law that, while doing nothing to “preserv[e] . . . fetal life,” . . . bars a woman from choosing intact D & E although her doctor “reasonably believes [that procedure] will best protect [her].” *Stenberg*, 530 U.S. at 946 (STEVENS, J., concurring).

As another reason for upholding the ban, the Court emphasizes that the Act does not proscribe the nonintact D & E procedure. See *ante*, at 1637. But why not, one might ask. Nonintact D & E could equally be characterized as “brutal,” *ante*, at 1633, involving as it does “tear[ing] [a fetus] apart” and “ripp[ing] off” its limbs, *ante*, at 1620–1621, 1621–

1622. "[T]he notion that either of these two equally gruesome procedures ... is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational." *Stenberg*, 530 U.S., at 946-947 (STEVENS, J., concurring).

Delivery of an intact, albeit nonviable, fetus warrants special condemnation, the Court maintains, because a fetus that is not dismembered resembles an infant. But so, too, does a fetus delivered intact after it is terminated by injection a day or two before the surgical evacuation, or a fetus delivered through medical induction or cesarean. Yet, the availability of those procedures—along with D & E by dismemberment—the Court says, saves the ban on intact D & E from a declaration of unconstitutionality. Never mind that the procedures deemed acceptable might put a woman's health at greater risk. . . .

Ultimately, the Court admits that "moral concerns" are at work, concerns that could yield prohibitions on any abortion. . . . Notably, the concerns expressed are untethered to any ground genuinely serving the Government's interest in preserving life. By allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent. See, e.g., *Casey*, 505 U.S., at 850 ("Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.") . . .

Revealing in this regard, the Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from "[s]evere depression and loss of esteem." <sup>FN7</sup> Because of women's fragile emotional state and because of the "bond of love the mother has for her child," the Court worries, doctors may withhold information about the nature of the intact D & E procedure. <sup>FN8</sup> The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. . . . Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety. <sup>FN9</sup>

<sup>FN7</sup>. The Court is surely correct that, for most women, abortion is a painfully difficult decision. But "neither the weight of the

scientific evidence to date nor the observable reality of 33 years of legal abortion in the United States comports with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have ... ." Cohen, *Abortion and Mental Health: Myths and Realities*, 9 *Guttmacher Policy Rev.* 8 (2006); see generally Bazelon, *Is There a Post-Abortion Syndrome?* *N.Y. Times Magazine*, Jan. 21, 2007, p. 40. See also, e.g., American Psychological Association, *APA Briefing Paper on the Impact of Abortion* (2005) (rejecting theory of a postabortion syndrome and stating that "[a]ccess to legal abortion to terminate an unwanted pregnancy is vital to safeguard both the physical and mental health of women"); Schmiede & Russo, *Depression and Unwanted First Pregnancy: Longitudinal Cohort Study*, 331 *British Medical J.* 1303 (2005) (finding no credible evidence that choosing to terminate an unwanted first pregnancy contributes to risk of subsequent depression); Gilchrist, Hannaford, Frank, & Kay, *Termination of Pregnancy and Psychiatric Morbidity*, 167 *British J. of Psychiatry* 243, 247-248 (1995) (finding, in a cohort of more than 13,000 women, that the rate of psychiatric disorder was no higher among women who terminated pregnancy than among those who carried pregnancy to term); Stodland, *The Myth of the Abortion Trauma Syndrome*, 268 *JAMA* 2078, 2079 (1992) ("Scientific studies indicate that legal abortion results in fewer deleterious sequelae for women compared with other possible outcomes of unwanted pregnancy. There is no evidence of an abortion trauma syndrome."); American Psychological Association, *Council Policy Manual: (N)(I)(3), Public Interest* (1989) (declaring assertions about widespread severe negative psychological effects of abortion to be "without fact"). But see Cougle, Reardon, & Coleman, *Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth*, 19 *J. Anxiety Disorders* 137, 142 (2005) (advancing theory of a postabortion syndrome but acknowledging that "no

causal relationship between pregnancy outcome and anxiety could be determined" from study); Reardon et al., *Psychiatric Admissions of Low-Income Women following Abortion and Childbirth*, 168 *Canadian Medical Assn. J.* 1253, 1255-1256 (May 13, 2003) (concluding that psychiatric admission rates were higher for women who had an abortion compared with women who delivered); cf. Major, *Psychological Implications of Abortion-Highly Charged and Rife with Misleading Research*, 168 *Canadian Medical Assn. J.* 1257, 1258 (May 13, 2003) (critiquing Reardon study for failing to control for a host of differences between women in the delivery and abortion samples).

FN8. Notwithstanding the "bond of love" women often have with their children, not all pregnancies, this Court has recognized, are wanted, or even the product of consensual activity. See *Casey*, 505 U.S., at 891. ("[O]n an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault."). See also Glander, Moore, Michielutte, & Parsons, *The Prevalence of Domestic Violence Among Women Seeking Abortion*, 91 *Obstetrics & Gynecology* 1002 (1998); Holmes, Resnick, Kilpatrick, & Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 *Am. J. Obstetrics & Gynecology* 320 (Aug. 1996).

FN9. Eliminating or reducing women's reproductive choices is manifestly *not* a means of protecting them. When safe abortion procedures cease to be an option, many women seek other means to end unwanted or coerced pregnancies. See, e.g., World Health Organization, *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion and Associated Mortality in 2000*, pp. 3, 16 (4th ed. 2004) ("Restrictive legislation is associated with a high incidence of unsafe abortion" worldwide; unsafe abortion represents 13% of all "maternal" deaths); Henshaw, *Unintended Pregnancy and Abortion: A Public Health Perspective*, in *A Clinician's Guide to Medical and Surgical*

*Abortion* 11, 19 (M. Paul, E. Lichtenberg, L. Borgatta, D. Grimes, & P. Stubblefield eds. 1999) ("Before legalization, large numbers of women in the United States died from unsafe abortions."); H. Boonstra, R. Gold, C. Richards, & L. Finer, *Abortion in Women's Lives* 13, and fig. 2.2 (2006) ("as late as 1965, illegal abortion still accounted for an estimated ... 17% of all officially reported pregnancy-related deaths"; "[d]eaths from abortion declined dramatically after legalization").

This way of thinking reflects ancient notions about women's place in the family and under the Constitution-ideas that have long since been discredited. Compare, e.g., *Muller v. Oregon*, 208 U.S. 412, 422-423 (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal function"); *Bradwell v. State*, 16 Wall. 130, 141, (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. ... The paramount destiny and mission of woman are to fulfil [I] the noble and benign offices of wife and mother."), with *United States v. Virginia*, 518 U.S. 515, 533, 542, n. 12 (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have ... impeded ... women's progress toward full citizenship stature throughout our Nation's history"); *Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" (internal quotation marks omitted)).

Though today's majority may regard women's feelings on the matter as "self-evident," this Court has repeatedly confirmed that "[t]he destiny of the woman must be shaped ... on her own conception of her spiritual imperatives and her place in society." *Casey*, 505 U.S., at 852. See also *id.*, at 877, 112 S.Ct. 2791 (plurality opinion) ("[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."); *supra*, at 1641 - 1642.

B

\* \* \*

One wonders how long a line that saves no fetus from destruction will hold in face of the Court's "moral concerns. The Court's hostility to the right Roe and Casey secured is not concealed. Throughout, the opinion refers to obstetrician-gynecologists and surgeons who perform abortions not by the titles of their medical specialties, but by the pejorative label "abortion doctor." . . . A fetus is described as an "unborn child," and as a "baby," second-trimester, previability abortions are referred to as "late-term"; and the reasoned medical judgments of highly trained doctors are dismissed as "preferences" motivated by "mere convenience." Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act. . . .

\* \* \*

IV

\* \* \*

In sum, the notion that the Partial-Birth Abortion Ban Act furthers any legitimate governmental interest is, quite simply, irrational. The Court's defense of the statute provides no saving explanation. In candor, the Act, and the Court's defense of it, cannot be understood as anything other than an effort to chip away at a right declared again and again by this Court-and with increasing comprehension of its centrality to women's lives. . . .

\* \* \*

For the reasons stated, I dissent from the Court's disposition and would affirm the judgments before us for review.

# THE YALE LAW JOURNAL

REVA B. SIEGEL

## Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*

**ABSTRACT.** This essay on the law and politics of abortion analyzes the constitutional principles governing new challenges to *Roe*. The essay situates the Court's recent decision in *Gonzales v. Carhart* in debates of the antiabortion movement over the reach and rationale of statutes designed to overturn *Roe*—exploring strategic considerations that lead advocates to favor incremental restrictions over bans, and to supplement fetal-protective justifications with woman-protective justifications for regulating abortion. The essay argues that a multi-faceted commitment to dignity links *Carhart* and the *Casey* decision on which it centrally relies. Dignity is a value that bridges communities divided in the abortion debate, as well as diverse bodies of constitutional and human rights law. *Carhart* invokes dignity as a reason for regulating abortion, while *Casey* invokes dignity as a reason for protecting women's abortion decisions from government regulation. This dignity-based analysis of *Casey/Carhart* offers principles for determining the constitutionality of woman-protective abortion restrictions that are grounded in a large body of substantive due process and equal protection case law. Protecting women can violate women's dignity if protection is based on stereotypical assumptions about women's capacities and women's roles, as many of the new woman-protective abortion restrictions are. Like old forms of gender paternalism, the new forms of gender paternalism remedy harm to women through the control of women. The new woman-protective abortion restrictions do not provide women in need what they need: they do not alleviate the social conditions that contribute to unwanted pregnancies, nor do they provide social resources to help women who choose to end pregnancies they otherwise might bring to term. The essay concludes by reflecting on alternative—and constitutional—modes of protecting women who are making decisions about motherhood.

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### III. DIGNITY AS A CONSTRAINT ON WOMAN-PROTECTIVE JUSTIFICATIONS FOR ABORTION RESTRICTIONS

There is deep tension between the forms of decisional autonomy *Casey* protects and woman-protective justifications for restricting women's access to abortion. In what follows, this essay explores the status of the woman-protective justification for abortion restrictions after *Carhart*.

*Casey* mentions woman-protective justifications for abortion restrictions in passing,<sup>195</sup> while *Carhart* invokes these concerns in the much remarked upon passage that opens this essay.<sup>196</sup> The Court's gender-paternalist observations in *Carhart* have drawn wide notice, and plainly signal receptivity to woman-protective antiabortion argument.<sup>197</sup> Yet the Court stops well short of adopting this rationale as a justification for restricting access to abortion under *Casey*.

The most significant constitutional questions about the gender-paternalist justification for abortion restrictions arise, not from the brevity of the Court's discussion in *Carhart*, but instead from *Carhart*'s reliance on *Casey*. *Carhart* takes its authority from *Casey*, and as analysis to this point should make clear, the woman-protective rationale for restricting abortion is in deep and direct conflict with forms of dignity *Casey* protects.

From the standpoint of the Constitution's dignity commitments, fetal-protective and woman-protective justifications for restricting abortion importantly differ.<sup>198</sup> Fifth and Fourteenth Amendment cases decided since the

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195. *Casey*, 505 U.S. at 882 ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.").

196. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007); see *supra* text accompanying note 16.

197. See *supra* note 24 (Leslee Unruh expressing delighted reaction to *Carhart*); *supra* note 113 (The Justice Foundation citing the success of its Operation Outcry affidavits in persuading Justice Kennedy) and 115 (Harold Cassidy memo discussing court's receptivity to woman-protective rationale).

198. Doctrine clearly differentiates regulation of abortion undertaken for the purpose of protecting the unborn and for protecting women. The case law does not sufficiently address the ways that fetal-protective regulation of abortion may also be based on judgments about women. See Siegel, *supra* note 93 (drawing on history of nineteenth-century campaign to criminalize abortion and contraception to show how judgments about protecting the unborn also entail judgments about women); see also *supra* note 159 (theological and political sources asserting "respect for life" and the "dignity" of life which link opposition to abortion and support for traditional sex and family roles). That said, the cases are clear in tying

1970s treat as weighty the state's interest in protecting potential life, but treat as deeply suspect the state's interest in restricting women's choices for the claimed purpose of protecting them—and treat as *especially* suspect gender-paternalist claims in the tradition of *Muller v. Oregon*<sup>199</sup> that would impose protective restrictions on women in order to free them to be mothers.<sup>200</sup> While *Casey* and *Carhart* do not articulate specific doctrinal limits on the woman-protective justification for restricting abortion, as we have seen, these doctrinal limits can be derived from core principles of both the substantive due process and the equal protection cases.<sup>201</sup>

This Part examines, first, what the Court has affirmatively said about the gender-paternalist justification for abortion restrictions in *Carhart*. It then considers limitations on gender-paternalist justifications for abortion restrictions that flow from the Court's substantive due process and equal protection case law. These limitations become apparent as we examine presuppositions about the rights holder that the substantive due process and equal protection cases share, and the traditions of regulating women's family roles that these two bodies of constitutional law repudiate. This inquiry reveals deep connections between the forms of dignity *Casey* protects and the equal protection cases.

The modern constitutional canon prohibits laws that restrict women's autonomy for the putative purpose of protecting women and freeing women to be mothers. Justifications for restricting abortion to protect women that are advanced by advocates of South Dakota's proposed abortion ban, and the State Task Force Report on which it relies, are gender-paternalist in just this way. These woman-protective justifications for restricting abortion deny women forms of dignity that both *Casey* and the modern equal protection cases protect.

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government's prerogative to restrict abortion to the regulatory purpose of protecting potential life.

199. 208 U.S. 412 (1908).

200. See *UAW v. Johnson Controls*, 499 U.S. 187, 205-06 (1991) (ruling that fetal-protective restrictions on the employment of fertile women violate the pregnancy discrimination amendment to federal employment discrimination laws, citing an article that ties such policies to the sex-based labor protections upheld in *Muller*, and observing that "[w]ith the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself"); see also *infra* note 191 and accompanying text.

201. On the intertwining of liberty and equality values in the substantive due process cases, and equality-based arguments for the abortion right founded on various clauses including the Equal Protection Clause, see *supra* note 133.

*A. Woman-Protective Discourse and Counter-Signals in Carhart*

There is no doubt that the Court's discussion of post-abortion regret and its reference to the Operation Outcry affidavits in *Carhart* signal receptivity to antiabortion advocacy and the abortion-hurts-women claim. It is not simply that the Court upholds the Partial-Birth Abortion Ban Act in terms that make abortion restrictions harder to challenge.<sup>202</sup> At numerous junctures, the *Carhart* decision speaks in an idiom that is distinctly responsive to the antiabortion movement. The opinion employs the discourse of female "depression" and "regret," and the movement-inflected usage of a "choice [that] is well informed."<sup>203</sup> The opinion also makes disparaging reference to "[a]bortion doctors,"<sup>204</sup> insistently refers to a woman who has had an abortion as a "mother,"<sup>205</sup> and provocatively shifts in its description of antenatal life from "the life of the fetus that may become a child,"<sup>206</sup> to the "unborn child,"<sup>207</sup> "infant life,"<sup>208</sup> and "baby,"<sup>209</sup> and finally again to the fetus. In speaking of women's regret, referring to women who have had abortions as mothers, and discussing the unborn child, *Carhart's* use of the antiabortion movement's idiom communicates the Court's receptivity to the movement's claims, without deciding questions of law.

202. *Cf. Gonzales v. Carhart*, 127 S. Ct. 1610, 1641-43, 1650-52 (2007) (Ginsburg, J., dissenting) (protesting the majority's ruling on the health exception and facial challenges).

203. *Carhart*, 127 S. Ct. at 1635 (majority opinion) (Kennedy, J.). The antiabortion movement has given the discourse of informed choice a specialized meaning in the abortion context. In antiabortion usage, a well-informed choice is a choice *against* abortion. For the development of this form of talk as a movement strategy, see *supra* Section I.B. See also Siegel, *supra* note 15, at 1031 ("The [South Dakota] Task Force Report expresses its moral judgments about abortion in the language of informed consent, describing decisions against abortion as 'informed' and depicting decisions to have abortion as mistaken or coerced. When the Report advocates laws that encourage more 'informed' abortion decisions, it is calling for laws that limit abortion . . .").

204. *Carhart*, 127 S. Ct. at 1635.

205. *Id.* at 1627, 1630 (describing the "partial-birth abortion" procedure by reference to the body of the "mother"); *id.* at 1634 ("It is self-evident that a mother who comes to regret her choice to abort must struggle with grief . . .").

206. *Id.* at 1633.

207. *Id.* at 1634.

208. *Id.*

209. *Id.* at 1622. Justice Ginsburg documents and protests the majority opinion's apparently deliberate blurring of the description of antenatal and postnatal life. See *id.* at 1650 (Ginsburg, J., dissenting).



Language of this kind certainly signals sympathy for the claims of the antiabortion movement, even as it leaves unclear the extent to which the Justices in the majority share the beliefs of the antiabortion movement. In a constitutional democracy, when the Court interprets guarantees that are the focal point of decades of social movement conflict, responsive interpretation of this kind is commonplace and serves a variety of system goods. It communicates that the Court has respectfully engaged with a movement's claims and recognizes as serious the point of view from which the claims emanate. Engaging with movement claims in this way helps establish the Court's authority and engenders in advocates the expectation that the Court may one day recognize movement claims that to this point in time the Court has not. Nothing prevents the Court from responding in like fashion to multiple claimants in a constitutional conflict, in one opinion establishing its authority with a movement *and* its agonist.<sup>210</sup>

Thus, before we assess the discussion of post-abortion regret in *Carhart*, we should also take account of the many ways that *Carhart* reasons within the logic and idiom of the abortion rights movement. Most prominently, *Carhart* applies *Casey*. Justice Kennedy understands *Casey* to require protection for ordinary second-trimester abortions, and *Carhart* construes the Partial-Birth Abortion Ban Act to protect these standard second-trimester procedures, applying "[t]he canon of constitutional avoidance [to] extinguish[] any lingering doubt as to whether the Act covers the prototypical D & E procedure. '[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"<sup>211</sup> Thus *Carhart* reaffirms protection for second-trimester abortions.

But *Carhart*'s allegiance to *Casey* runs deeper. Not only does the Court protect second-trimester abortions, it presents itself as respecting women's decisional autonomy even as to the procedures the Partial-Birth Abortion Ban Act regulates. *Carhart* does not offer itself as limiting a woman's decision whether or when to end a pregnancy. To the contrary, the Court decides the case as if the only question in issue was the question of the medical *method* by which doctors would effectuate a woman's abortion decision; the Court

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210. See *supra* note 152 (discussing this dynamic in the *Casey* decision); cf. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1546-47 (2004) (discussing how cases enforcing *Brown* establish their authority by appeal to a principle of ambiguous import that commands the allegiance of Americans with very different views about how *Brown* should be enforced).

211. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007) (citation omitted); see also Priscilla J. Smith, *Is the Glass Half-Full?: Gonzales v. Carhart and the Future of Abortion Jurisprudence*, 2 HARV. L. & POL'Y REV. (ONLINE) (2008), [http://www.hlpronline.com/Smith\\_HLPR.pdf](http://www.hlpronline.com/Smith_HLPR.pdf).

authorizes regulation of the abortion procedure to the extent it does not pose an undue burden on women's decision making.<sup>212</sup>

The Partial-Birth Abortion Ban Act is incrementalist regulation, and *Carhart* upholds it as such, reasoning about the statute in a framework that presupposes the abortion right. As antiabortion critics of the incrementalist strategy emphasize, *Carhart* upholds the statute while discussing constitutional and unconstitutional methods of performing second-trimester abortions in vivid detail, involving the Court in approving how doctors are to perform an act that would be infanticide, if the Court itself did not view the distinction between pregnancy and birth as absolutely fundamental in determining the act's ethical and legal character. It is because *Carhart* compares but so fundamentally distinguishes abortion and infanticide that absolutist antiabortion critics condemn *Carhart* as "Naziesque" and the "devil's" work, and vilify the movement strategy that produced the ruling and antiabortion advocates who now celebrate it.<sup>213</sup> Indeed, the Court understands the law it is upholding in *Carhart* as *clarifying* the distinction between abortion and infanticide.

The *Carhart* decision is remarkable for the ways that it manages to express meanings and messages of the antiabortion movement within an abortion-rights framework. The opinion emphasizes the importance of expressing respect for life and affirming dignity as life *as part of the practice of abortion*. The Court upholds a statute that requires abortion providers to perform abortions in ways that express respect for human life, without endeavoring to prevent women from obtaining an abortion.<sup>214</sup> The opinion's gender paternalism seems to be similarly expressive in character. *Carhart* speaks of protecting women from decisions they might regret while upholding a statute that the Court presents as constraining *doctors'* decisions about how to perform an abortion, not women's decisions about whether to have an abortion. By signaling in this

212. *Carhart*, 127 S. Ct. at 1633 ("The third premise, that the State, from the inception of the pregnancy, maintains its own regulatory interest in protecting the life of the fetus that may become a child, cannot be set at naught by interpreting *Casey's* requirement of a health exception so it becomes tantamount to allowing a doctor to choose the abortion method he or she might prefer. Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.") (emphasis added).

213. Two such passionate critiques of the *Carhart* opinion include the protests of Rev. Philip L. "Flip" Benham (former national director of Operation Rescue who claims to have saved Norma McCorvey), see *supra* note 51, and of Brian Rohrbough (President, Colorado Right to Life), see *supra* notes 54-55 and accompanying text.

214. See *supra* text accompanying notes 157-161.

fashion, the Court provided *Roe*'s opponents an exhilarating moment of recognition—which, as we will see, has encouraged the movement to act in South Dakota and beyond—within the very same opinion in which the Court reaffirmed the *Casey* framework as governing the regulation of abortion.

There is, of course, a possibility, turning on events beyond the reach of this analysis, that *Carhart* could be a station on the way to *Roe*'s overruling. Without confidence in anyone's capacity to engage reliably in such long-term political forecast, I instead read *Carhart* to restrict abortion as *Casey* did, altering the law of abortion in order to create opportunities, within an abortion-rights regime, for *Roe*'s opponents to express moral opposition to the practice.

The status of *Carhart*'s observations concerning post-abortion regret can be described in more conventional doctrinal terms. The Court may have discussed claims of post-abortion regret that some women might experience if their doctors employed the abortion method Congress banned; but the Court did not discuss, much less sanction, the kind of restrictions on women's decisionmaking that the authors of the amicus brief on behalf of Sandra Cano advocate.<sup>215</sup>

*Casey* and *Carhart* each base the state's interest in restricting abortion on the state's interest in protecting potential life; and the undue burden framework that Justice Kennedy adopted in *Casey* and applied in *Carhart* focused on the state's concern about protecting potential life.<sup>216</sup> While *Roe* recognized a state interest in regulating abortion in the interest of protecting maternal health,<sup>217</sup> the state interest in protecting maternal health that *Roe* recognized was based on an understanding of maternal health that bears no connection to the post-abortion syndrome (PAS) and coercion claims the antiabortion movement is now making, as advocates of PAS and coercion

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215. The Cano brief argued that the Partial-Birth Abortion Ban Act should be upheld because "after thirty-three years of real life experiences, postabortive women and Sandra Cano, 'Doe' herself, now attest that abortion hurts women and endangers their physical, emotional, and psychological health." Brief of Sandra Cano et al., *supra* note 15, at 5. The brief cited the findings of the South Dakota Task Force at length, *id.* at 17-21, and relied on a collection of affidavits to support the proposition that "abortion hurts women emotionally and psychologically, and therefore, abortion should be banned to protect the health of the mother." *Id.* at 20-21. One of the coauthors of the brief, Allan E. Parker, Jr., helped to form the Justice Foundation in 1993, which has joined with Harold Cassidy to represent Norma McCorvey and Sandra Cano, in seeking to reopen their cases. See *supra* note 95-97 and accompanying text.

216. See *supra* Section II.B.

217. *Roe v. Wade*, 410 U.S. 113, 162 (1973).

claims are themselves quick to assert.<sup>218</sup> Given the normative universe ~~separating the understanding of the state's "interest in preserving and~~ protecting the health of the pregnant woman"<sup>219</sup> in *Roe* and many of the premises and claims of the new gender-paternalist arguments for restricting abortion now appearing in constitutional litigation, the gender-paternalist rationale for restricting abortion requires much closer scrutiny.

Advocates of the gender-paternalist rationale for restricting abortion oppose the rights *Roe* and *Casey* grant women by advancing a descriptive claim. As Part I shows, antiabortion advocates now assert that women seeking abortions are vulnerable, dependent, and confused, and need restrictions on abortion to protect them from coercion and their own mistaken decision making and to free them to fulfill their natures as mothers.<sup>220</sup> From this (highly contested) descriptive claim, advocates wish courts to refashion the abortion right, premised on a "new" view of the rights holder as ascriptively dependent—a move that would neatly reinstate the picture of women as constitutional persons that *Casey* and the modern sex discrimination cases repudiate.

The woman-protective justification for abortion restrictions violates the very forms of dignity *Casey* protects. Analyzing these constitutional limitations uncovers deep connections between the forms of dignity *Casey* protects and the equal protection sex discrimination cases. Woman-protective justifications for abortion restrictions would reinstate a legal regime that addresses women as ascriptively dependent—reviving forms of gender paternalism that the Court and the nation repudiated in the 1970s.

#### *B. Ascriptive Autonomy and Dependence: Gender Paternalism Old and New*

What picture of the rights-holder do *Roe* and *Casey* presuppose? As *Casey* emphasizes in reaffirming the abortion right and in striking down the spousal notice provision, *Roe* and its progeny rest on views of women that the modern constitutional order embraced as it recognized adult women as competent to make decisions *sui juris*, and as it repudiated the understanding of women as

218. The antiabortion movement claims that the *Roe* Court did not understand post-abortion syndrome and coerced abortions, and that the evidence the movement is presenting thus warrants reopening *Roe* on a claim of change facts. See *McCorvey v. Hill*, 385 F.3d 846, 850-52 (5th Cir. 2004) (Jones, J., concurring); see also *supra* note 95-97 and accompanying text.

219. *Roe*, 410 U.S. at 162.

220. See *supra* Part I; *infra* notes 247-258 and accompanying text.

dependent on their husbands that prevailed at common law and for much of our constitutional tradition.<sup>221</sup>

*Roe* emancipated women from the hazards and humiliations of a "therapeutic" abortion regime<sup>222</sup> during the same decade in which the nation was beginning to repudiate common law and constitutional traditions that allowed government to impose family roles on women and to exclude them from participation in the market and public sphere. The decision to emancipate women from doctor's authority was in part a decision to emancipate doctors from the hazards of random prosecutions; in part it reflected concern about the hazards to women of illegal abortions. But also in deep and increasing measure, the abortion right was articulated and defended as part of a transformation in the terms of membership of women in the constitutional community.<sup>223</sup> Whatever the Burger Court understood about the connection

221. See Subsection II.C.2. This process begins with legislative reform of the common law marital status rules during Reconstruction, continues through the enfranchisement of women in the progressive era, and culminates in the late twentieth century with the flowering of equal protection and associated civil liberties for women.

222. Before *Roe*, the legal system prohibited abortion except as doctors therapeutically permitted the procedure, requiring women to plead with doctors to diagnose them as too physically or psychologically infirm to become a mother; the alternative, especially for women who lacked resources, was to risk illegal and unsafe abortions. On the gendered logic of the therapeutic abortion, see Siegel, *supra* note 93, at 273, 365 & n.414. At the time of *Roe*, there was widespread concern about the disparities in access that the therapeutic abortion regime produced across class and about the threat that "back alley" abortions posed to women of all classes. In this era, the equality argument for abortion was first of all understood as concerned with wealth equality, then sex equality. See Reva B. Siegel, *Siegel, J., Concurring, in WHAT ROE V. WADE SHOULD HAVE SAID* 63, 63-85 (Jack Balkin ed., 2003) (rewriting *Roe* as a sex equality opinion); see also MARK A. GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* 42-43, 76 (1996) (demonstrating that prior to *Roe*, abortion bans were haphazardly enforced and coexisted with a "gray market" in safe abortions that provided "affluent white women with de facto immunities from statutory bans on abortion" and that socioeconomic power and access to the "gray market" for abortion services mitigated the negative effects of bans upon women of privilege, while simultaneously forcing poor women and women of color to risk dangerous procedures to obtain the same result). *Roe* freed women from these forms of subjection by declaring women competent to make the decision whether to end a pregnancy themselves.

223. See GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 274-75 (2005) ("[A]bortion rights feminist groups . . . had come to frame restrictive abortion laws as an unjust oppression forced upon women."); LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* (2002); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 118, 120 (1984) ("Once they [women] had choices about life roles, they came to feel that they had a right to use abortion in order to control their own lives. . . . The demand for repeal of all abortion laws was an attack on both the segregated labor market and the cultural expectations about women's roles."). For feminist claims that the abortion right was

between its equal protection decisions and its substantive due process decisions in the 1970s, by the decade's end social conflict over sex equality and reproductive rights converged to make the nexus painfully clear.<sup>224</sup>

These struggles are not merely *Casey*'s background but instead are woven into the substance of the decision. The Court issued *Casey* after some two decades in which the nation passionately debated the social meaning and practical stakes of the abortion decision for women. If *Casey* reflects community concern about protecting potential life, it also reflects community concern about respecting the autonomy and equality of women.

At multiple points in the decision, *Casey* reflects deep appreciation of the connections between the equal protection and substantive due process decisions that may not have been clear to the Court in the 1970s.<sup>225</sup> As we have seen, *Casey* reaffirms the abortion right, specifically denying to government the prerogative to impose customary family roles on women, and applies the undue burden framework, specifically renouncing common law traditions that made women the ascriptive dependents of men.<sup>226</sup>

This history helps define the forms of dignity and autonomy *Casey* protects. The abortion right was articulated and defended over a several decade period in which women were resisting the power of the state to impose family-role based restrictions on their civic freedom. Just as a history of segregation imbues classification by race with dignitary meaning, so, too, a history of legally imposed family roles helps make family-role based restrictions on women's freedom reverberate with dignitary affront, raising issues of respect as well as questions of immense practical significance for women.

Sometimes these customary, common-law, and constitutional restrictions on women's freedom were justified in terms that denigrated women's competence, but often they were justified paternalistically, as redounding to women's benefit. A special tradition of gender paternalism played a role in

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a sex equality right and tied to claims concerning the conditions in which women worked, raised children, and other activities of citizenship, see Siegel, *supra* note 133, at 826. See also *id.* at 831 ("[*Casey*] expressed constitutional limitations on abortion laws in the language of . . . equal protection sex discrimination opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of its liberty cases.").

224. See Post & Siegel, *supra* note 152, at 418-20; Siegel, *supra* note 68, at 1369, 1393-1400; Siegel, *supra* note 133, at 827 ("[Opponents of the Equal Rights Amendment] mobilized opposition by framing abortion and homosexuality as potent symbols of the new family form that ERA would promote.").

225. For discussion and survey of the large body of literature observing these features of the decision, see Siegel, *supra* note 133, at 833 n.63.

226. See *supra* Subsection II.C.2.

rationalizing family-role based limitations on women's civic freedom. For centuries, law employed descriptive claims about women's vulnerability and dependence to justify a regime of "protection" that imposed legal disabilities on women and so made women into ascriptive dependents of their husband and the state.<sup>227</sup> Cases beginning with *Frontiero* condemn these sex-specific limitations on women's freedom.<sup>228</sup>

Paradigmatically, these gender-paternalist restrictions claimed to free women from male coercion, often for the express purpose of enabling women to fulfill their natures as wives and mothers. For example, the common law of coverture, which *Frontiero* repudiated, restricted married women's ability to act as independent legal agents, whether to file suit, sign contracts, or be held accountable for crimes.<sup>229</sup> This regime of ascriptive disabilities was commonly justified by descriptive claims about women's vulnerability. Thus, "when a married woman came before the criminal court, the law started from the assumption that she had an inevitably malleable nature, and it attributed her crime, not to her own exercise of will, but to the influence exerted by her husband's will."<sup>230</sup> Depriving women of legal capacity was said to protect women from male coercion.

The telling, and morally problematic, feature of this tradition of gender paternalism was its habit of redressing male dominance by laws that empowered men and disempowered women. Instead of protecting women from coercion by restricting the dominating husband, the common law invoked the putatively benign purpose of protecting women as a rationale for depriving women of legal agency, rationalizing gender hierarchy in the

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227. Cf. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 878 (1994) ("[W]here descriptive autonomy refers to the actual condition of persons and views autonomy as partial and contingent, ascriptive autonomy marks a moral right to personal sovereignty. Where descriptive autonomy is an ideal that can be promoted or protected, sometimes through paternalistic legislation, ascriptive autonomy signifies a right to respect that is incompatible with much if not all paternalism.").

228. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

229. See *id.* at 684; 1 WILLIAM BLACKSTONE, COMMENTARIES \*431 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage . . . If the wife be injured in her person or her property, she can bring no action for redress without her husband's concurrence, and in his name, as well as her own: neither can she be sued, without making the husband a defendant. . . . And therefore all deeds executed, and acts done, by her, during her coverture, are void, or at least voidable."); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127 (1995).

230. Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 32 (1994). The classic summary of the legal fiction of marital unity resides in 1 WILLIAM BLACKSTONE, COMMENTARIES \*431. See *supra* note 229.

discourse of protection.<sup>231</sup> This common law model served as a foundation for women's roles in a wide variety of settings. Similar stories about women's family roles and women's vulnerability to coercion justified women's exclusion from voting, jury service, and other acts of collective self-governance.<sup>232</sup> Women were too weak to be entrusted with legal agency to act autonomously, and the male will to control was too powerful to be constrained by law:

If the husband is brutal, arbitrary, or tyrannical, and tyrannizes over her at home, the ballot in her hands would be no protection against such injustice, but the husband who compelled her to conform to his wishes in other respects would also compel her to use the ballot if she possessed it as he might please to dictate.<sup>233</sup>

Denying women the vote thus protected them from male coercion: "[W]hat remedy would be found for the inflictions . . . which [women] would suffer at home for that exercise of their right which was opposed to the interests or prejudices of their male relations?"<sup>234</sup>

Protecting women from male coercion was one justification for restricting women's legal agency: it had the salutary effect of preserving natural family roles in which the husband was to govern and represent the wife. Another powerful tradition of gender paternalism justified limitations on women's agency as freeing women to inhabit their natural family roles. Thus, denying women the right to practice law freed them to serve in their natural capacity as wives and mothers.<sup>235</sup> Protective labor legislation restricting the hours and jobs

<sup>231</sup> States preserved the status roles of marriage, even as they reformed the common law of coverture. See Siegel, *supra* note 229, at 2127-32 (describing the interpretation of earning statutes that ostensibly abolished coverture by giving wives rights in their labor, yet preserved family roles by refusing to give wives rights in their household labor); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2169-75 (1996) (tracing the modernization of marital status roles and showing how they were transformed yet preserved in the way the law enforced companionate understandings of marriage).

<sup>232</sup> See Siegel, *supra* note 145, at 983-87 (exploring connections between the common law of coverture and the justifications for women's disfranchisement).

<sup>233</sup> *Id.* at 995 (quoting S. REP. NO. 48-399, pt. 2, at 6-7) (emphasis omitted) (describing the argument of members of the Senate Woman Suffrage Committee who opposed the Sixteenth Amendment on grounds that enfranchising women would not protect them from domestic violence and would merely exacerbate marital conflict).

<sup>234</sup> L.P. BROCKETT, *WOMAN: HER RIGHTS, WRONGS, PRIVILEGES, AND RESPONSIBILITIES* 248 (Books for Libraries Press 1970) (1869).

<sup>235</sup> See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (denying a female petitioner license to practice law in Illinois because she was a married woman and



in which women might work freed women to perform their natural role as mothers.<sup>236</sup>

It is this common law and public law tradition that the modern constitutional canon specifically rejects.<sup>237</sup> It repudiates the picture of women's roles and capacities long employed to justify gender-paternalist restrictions on women's freedom, and it repudiates the classic form of protection the common-law tradition offered women, in which restricting women's agency was the means chosen to protect and free them: "an attitude of 'romantic

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noting that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life"); *In re Goodell*, 39 Wis. 232, 244-46 (1875) (denying the motion of a female to be admitted to the bar for the practice of law in the state of Wisconsin and noting that "it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours").

236. In *Muller v. Oregon*, 208 U.S. 412, 421 (1908), the United States Supreme Court upheld an Oregon statute placing maximum hours restrictions on women as an appropriate measure to protect women's health and reproductive capacity, noting that long hours may result in "injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care." See also Judith Olans Brown et al., *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, 6 U.C.L.A. WOMEN'S L.J. 457, 470-77 (1996) (arguing that protective labor legislation was animated by concern over preserving women's fertility and reproductive usefulness).

237. See *Frontiero v. Richardson*, 411 U.S. 677, 684-85 (1973) ("There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage. Indeed, this paternalistic attitude became so firmly rooted in our national consciousness that, 100 years ago, a distinguished Member of this Court was able to proclaim: 'Man is, or should be, woman's protector and defender. . . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.' *Bradwell v. State*, 16 Wall. 130, 141 (1873) (Bradley, J., concurring). As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes . . ."). Title VII cases repudiate gender-paternalist limits on women's freedom, as well. See *Int'l Union v. Johnson Controls*, 499 U.S. 187, 211 (1991) (holding that company may not exclude all women with the capacity to become pregnant from certain positions and noting that "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities. . . . It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make"); *Dochard v. Rawlinson*, 433 U.S. 321, 335 (1977) ("In the usual case, the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself.").

paternalism' which, in practical effect, put women, not on a pedestal, but in a cage.<sup>238</sup>

In the modern constitutional tradition, it does not state a constitutionally cognizable reason for imposing substantial, sex-specific restrictions on women's freedom to argue that women lack competence to make legally responsible choices; that the best way to protect women against male coercion is to restrict women's choices; or that it is in women's interest for government to restrict their choices to free them to assume their natural roles as mothers.<sup>239</sup> Longstanding custom and common law traditions may give arguments premised on gender-stereotypic conceptions of women's roles and capacities a ring of common sense to some; by reason of this very same tradition, however, they inflict deep dignitary affront to others.

More to the point, several decades of sex discrimination cases starting with *Reed* and *Frontiero* insist that the state may not regulate women on the basis of stereotypic, group-based generalizations, but must proceed on the basis of individualized determinations wherever possible, and where not, must satisfy some form of least-restrictive means inquiry to ensure that sex-based restrictions are substantially related to important governmental ends and are not "used, as they once were . . . to create or perpetuate the legal, social, and economic inferiority of women."<sup>240</sup>

Justice Ginsburg and a growing community of scholars have long argued that this body of equality law governs abortion restrictions.<sup>241</sup> Respecting women's choices about whether and when to become a mother simultaneously vindicates autonomy and equality values<sup>242</sup>—values integral to respecting

238. *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

239. See Siegel, *supra* note 15, at 996 (quoting equal protection cases).

240. *United States v. Virginia*, 518 U.S. 515, 534 (1996) (citation omitted).

241. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199-201 (1992); Siegel, *supra* note 133, at 828-29 (recounting history of sex-equality arguments for the abortion right, in the period before and after the ERA campaign). For my equality analysis of fetal-protective abortion restrictions, see Siegel, *supra* note 93, and Siegel, *supra* note 222. For my equality analysis of woman-protective abortion restrictions, see Siegel, *supra* note 15.

242. See Siegel, *supra* note 15, at 1050 ("The history of South Dakota's abortion ban illuminates a fundamental question at the heart of the abortion debate, a question at the heart of the Fourteenth Amendment's equal protection and substantive due process jurisprudence, a question that lives at the intersection of liberty and equality concerns: whether government respects women's prerogative and capacity to make choices about motherhood."). Some scholars view the substantive due process cases as guaranteeing women equal citizenship in

human dignity that this essay explores, in cases ranging from *Lawrence* and *Casey* to *Parents Involved* and *J.E.B.*

For this reason, it was to the Court's substantive due process and equal protection cases that *Carhart's* dissenting justices appealed in protesting the Court's decision to uphold the Partial-Birth Abortion Ban Act. Justices Ginsburg, Breyer, Souter, and Stevens understand the right *Roe* and *Casey* protect as a right grounded in constitutional values of autonomy and equality:

As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's "control over her [own] destiny. . . . "There was a time, not so long ago," when women were "regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution." Those views, this Court made clear in *Casey*, "are no longer consistent with our understanding of the family, the individual, or the Constitution." Women, it is now acknowledged, have the talent, capacity, and right "to participate equally in the economic and social life of the Nation." Their ability to realize their full potential, the Court recognized, is intimately connected to "their ability to control their reproductive lives." Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.<sup>243</sup>

In opening her dissenting opinion on these terms, Justice Ginsburg is appealing to Justice Kennedy in the name of commitments they both share.<sup>244</sup> In the next case, if not this, the dissenters seem to be saying to Justice Kennedy, you will recognize abortion restrictions that violate women's dignity and encroach upon "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."

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matters concerning the regulation of abortion, while others argue that the equal protection cases properly apply. See Siegel, *supra* note 133, at 824-26.

243. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) (citations omitted).

244. *Cf. id.* at 1649 (Ginsburg, J., dissenting) (citing Justice Kennedy's opinion in *Casey* as contrary to his reasoning in *Carhart*).

C. *Claims on Which Woman-Protective Justifications for Abortion Restrictions Rest*

There are some, at least in the antiabortion movement, who credit this possibility. But not Harold Cassidy, who has played a leading role in advancing woman-protective argument, in South Dakota and elsewhere.<sup>245</sup> Cassidy argues that the best way to move the Court to adopt a ban on abortion is to argue, as he did in a suit with Allan Parker that sought to re-open *Roe*, that women lack competence to make responsible choices about abortion; that restricting women's legal and practical capacity to choose abortion will protect women against coercion, as well as their own confusion about what is in their own and their family's interest; and that restricting women's ability to make choices concerning their own lives and the lives of their existing family members will free them to assume their roles as mothers.<sup>246</sup> When Harold Cassidy explains woman-protective antiabortion argument, he typically emphasizes claims about women's capacity and claims about women's roles:

It took the experimentation with abortion to disprove the central fundamental question or fundamental assumption of *Roe*, and the fundamental assumption that there can be a known, there can be a voluntary, there can be an informed waiver of the mother's interest. It took the experience of millions of women, who now have come forward, and said, "I didn't know what I was doing. I wasn't told the truth."

Walk away from it, and live with it, and forget about it. She can't forget, she can't live with it, and it's not just an unnatural act, it is an unnatural, evil act. And for the men of this nation, and the seven male judges who created this, who think that women can deny that they are women, they can deny that they are mothers, without consequence, is not only ignorant, it's cruel.<sup>247</sup>

Litigation documents from the suit to reopen *Roe* and *Doe* express Cassidy and Parker's belief that the affidavits would present the Court with a new understanding of women's decisional capacity in matters concerning abortion:

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245. See *supra* notes 94-99 and accompanying text.

246. See *supra* note 96; *infra* text accompanying notes 247-248, *infra* notes 268, 270 and accompanying text (quoting litigation documents, a memorandum, and interviews).

247. EWTN, *supra* note 89 (Cassidy discussing the Donna Santa Marie tort suit against an abortion provider).

The United States Supreme Court in *Roe* and *Casey* assumed that abortion would be a voluntary choice. Rather than being the result of a knowing, voluntary, dignity-enhancing woman's choice, the attached Women's Affidavits from more than a thousand women who have had abortions reveal that abortion is almost always the result of pressure or coercion from sexual partners, family members, abortion clinic workers, abortionists, or circumstances. Of course, women are intelligent beings capable of making rational, informed decisions. However, it is difficult in a pressured pregnancy situation to make a rational, informed decision under such extreme circumstances with so little truthful information provided.<sup>248</sup>

Similar arguments dominate the South Dakota Task Force Report, the legislative history for the ban the state's voters considered in 2006 and will consider again this year.<sup>249</sup> Relying on the Operation Outcry affidavits, the South Dakota Task Force asserted it received the testimony of 1950 women, reporting that "[v]irtually all of them stated they thought their abortions were uninformed or coerced or both."<sup>250</sup> The Report asserted that women who have abortions could not have knowingly and willingly chosen the procedure and must have been misled or pressured into the decision by a partner, a parent, or even the clinic—because "[i]t is so far outside the normal conduct of a mother to implicate herself in the killing of her own child."<sup>251</sup> The Report asserted that a woman who is encouraged "to defy her very nature as a mother to protect her

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248. Memorandum of Law in Support of Rule 60 Motion, *supra* note 95, at 17, 22-23 ("The attached Affidavit testimony of more than a thousand women who actually had abortions shows the unproven assumption of *Roe* that abortion is 'a woman's choice' is a lie. The 'choice,' a waiver of a constitutional right to the parent-child relationship, requires a voluntary decision with full knowledge. In addition to being coerced, women are also lied to and misled."); see also Brief in Support of Rule 60 Motion for Relief from Judgment, *supra* note 95, at 34 ("Under the assumptions of *Roe* and *Casey*, women were to be 'free' to make their own decision about whether to abort or carry a child to birth. This assumes that they are free from pressure or coercion, and that their physician has provided them with complete and adequate knowledge of the nature of abortion and its long term consequences. The women who have experienced abortion testify in sworn Women's Affidavits how they were not informed of the consequences." (citation omitted)).

249. See *supra* text at notes 20, 100-107.

250. SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20, at 31, 38; cf. *id.* at 21-22 ("We find the testimonies of these women an important source of information about the way consents for abortions are taken . . ."). The Report relies heavily on the affidavits and repeatedly cites them as evidence.

251. *Id.* at 56.

child,<sup>252</sup> is likely to "suffer[] significant psychological trauma and distress."<sup>253</sup> It thus recommended that the state ban abortion to preserve "the pregnant mother's natural intrinsic right to her relationship with her child, and the child's intrinsic right to life."<sup>254</sup> (The chair of the South Dakota Task Force on Abortion, an obstetrician who opposes abortion, resigned from the Task Force and repeatedly spoke out against the Report because of its disrespect of scientific facts and method.<sup>255</sup>)

The preamble of South Dakota's 2005 "informed consent" statute enacts the Task Force Report's claims about women's decisional capacity into law.<sup>256</sup> The statute is based on an official legislative finding:

The Legislature finds that procedures terminating the life of an unborn child impose risks to the life and health of the pregnant woman. The Legislature further finds that 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 judgment, and a willingness to violate conscience to avoid those pressures.<sup>257</sup>

South Dakota's stated rationale for intervening in women's decisionmaking is based on generalizations about women as a class that sound in familiar

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252. *Id.* at 56.

253. *Id.* at 47-48. \*Openly rejecting the findings of numerous government and professional associations, the Task Force found that women who abort a pregnancy risk a variety of life-threatening illnesses ranging from bipolar disorder, post-traumatic stress disorder, and suicidal ideation, to breast cancer. *Id.* at 42-46, 52.

254. *Id.* at 67.

255. See Siegel, *supra* note 22, at 139-40 (discussing decision of the chair of the South Dakota Task Force on Abortion, who opposes abortion, to resign and speak out against the report because of its failure to conform with scientific facts, method, and authority); see also *supra* note 81 (citing public health authorities that repudiate post-abortion syndrome).

256. H.B. 1166, 2005 Leg., 80th Sess. 3 (S.D. 2005) (codified in S.D. CODIFIED LAWS § 34-23A-1.4 (2005)), available at <http://legis.state.sd.us/sessions/2005/1166.htm>.

257. *Id.* The statute further states:

The Legislature therefore finds that great care should be taken to provide a woman seeking to terminate the life of her unborn child and her own constitutionally protected interest in her relationship with her child with complete and accurate information and adequate time to understand and consider that information in order to make a fully informed and voluntary consent to the termination of either or both.

S.D. CODIFIED LAWS § 34-23A-1.4 (2005); see *infra* note 259 (quoting statute).

stereotypes about women's capacity and women's roles<sup>258</sup>—here barely cloaked in public health frames. These gender-conventional convictions—that women are too weak or confused to make morally responsible choices and need law's protection to free them to be mothers—are here used to justify an "informed consent" script between doctor and patient designed to frighten and shame a woman into choosing to carry a pregnancy to term.<sup>259</sup>

258. A popular antiabortion tract authored by the leader of the nineteenth-century criminalization campaign derided women's capacity to make decisions about abortion, suggesting that pregnant women were especially prone to hysteria:

If each woman were allowed to judge for herself in this matter, her decision upon the abstract question would be too sure to be warped by personal considerations, and those of the moment. Woman's mind is prone to depression, and, indeed, to temporary actual derangement, under the stimulus of uterine excitation, and this alike at the time of puberty and the final cessation of the menses, at the monthly period and at conception, during pregnancy, at labor, and during lactation . . .

Is there then no alternative but for women, when married and prone to conception, to occasionally bear children? This, as we have seen, is the end for which they are physiologically constituted and for which they are destined by nature. . . . [The prevention and termination of pregnancy] are alike disastrous to a woman's mental, moral, and physical well-being.

STORER, *supra* note 93, at 74-76; cf. E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DETROIT REV. MED. & PHARMACY 119, 145 (1867) (citing "the intimate relation between the nervous and uterine systems manifested in the various and frequent nervous disorders arising from uterine derangements," i.e., "hysteria," and "the liability of the female, in all her diseases, to intercurrent derangements of these functions," as factors that "might justly lead us to expect that violence against the physiological laws of gestation and parturition would entail upon the subject of such an unnatural procedure a severe and grievous penalty"). See generally Siegel, *supra* note 93, at 311 n.199 (surveying physiological arguments in nineteenth-century antiabortion literature and observing that "physiological arguments were used to attack the concept of voluntary motherhood in two ways. In addition to arguing that women's capacity to bear children rendered them incapable of making responsible choices in matters concerning reproduction, Storer (and others) claimed that women would injure their health if they practiced abortion or contraception or otherwise willfully resisted assuming the role of motherhood.").

259. The law directs doctors to tell women that an abortion "will terminate the life of a whole, separate, unique, living human being," and that "the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota," and directs the doctor to provide the woman seeking an abortion:

A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including: (i) Depression and related psychological distress; (ii) Increased risk of suicide ideation and suicide; . . . (iv) All other known medical risks to the physical health of the woman, including the risk of infection, hemorrhage, danger to subsequent pregnancies, and infertility.

In addition to the limitations of the First Amendment,<sup>260</sup> *Casey* imposes dignity-respecting constraints on such "informed consent" dialogues. Whatever its putative protective purpose, "informed consent" counseling that provides a woman false counsel—for example that having an abortion may increase her risk of breast cancer<sup>261</sup>—is an undue burden on a woman's

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S.D. CODIFIED LAWS § 34-23A-10.1(i)(b), (c) & (e) (2005). Given that the doctor is to communicate this information, inquire whether the patient understands, and record any questions she has, under the sanction of the criminal law, it is not at all clear what freedom a doctor has to deviate from the message provided in the statute and the Task Force Report that is its legislative history. S.D. CODIFIED LAWS § 34-23A-10.1 (S.D. 2005).

260. See *Casey*, 505 U.S., at 884 ("To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." (citation omitted)); see also *supra* note 164 (discussing authorities who address the First Amendment concerns raised by "informed consent" regulation of abortion).

261. Kansas requires that women receive a state-produced pamphlet at least twenty-four hours before having an abortion which lists breast cancer among the long-term risks of abortion:

Several studies have found no overall increase in risk of developing breast cancer after an induced abortion, while several studies do show an increase [sic] risk. There seems to be consensus that this issue needs further study. Women who have a strong family history of breast cancer or who have clinical findings of breast disease should seek medical advice from their physician irrespective of their decision to become pregnant or have an abortion.

Kansas Dep't of Health and Env't, *If You Are Pregnant*, available at <http://www.driller.com/bk1.html> (last visited May 5, 2008). Whereas the pamphlet claims there is consensus about the need for more study, both the National Cancer Institute and the World Health Organization have concluded after extensive study that abortion is not associated with an increased risk of breast cancer. The more recent and better-designed studies have consistently shown no link between abortion and the risk of breast cancer. See sources cited *supra* note 81.

In Texas, the physician must inform a woman seeking an abortion "when medically accurate" of several medical risks, including "the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer." Tex. Health & Safety § 171.012 (1), available at <http://tlo2.tlc.state.tx.us/statutes/hs.toc.htm>. This is at best misleading because medical research indicates that it is never medically accurate to inform a woman of an increased risk in breast cancer. It is not clear how much discretion a doctor truly has. To the extent that physicians are required to inform women that an abortion may increase the risk of breast cancer, the state is requiring the provision of false information.

Doctors are required to inform patients that they have the right to view state-created pamphlets, which also describe a possible link between abortion and an increased risk of breast cancer. The pamphlets state:

Your chances of getting breast cancer are affected by your pregnancy history. If you have carried a pregnancy to term as a young woman, you may be less likely to get breast cancer in the future. However, you do not get the same protective effect



decision. So, too, an "informed consent" dialogue that misleads women unduly burdens their decision making: Misleading can occur, not only when government "persuades" by leading a woman to believe facts that are not true,<sup>262</sup> but *also* when government offers women counsel that invites reliance because it resembles the speech of counseling professionals but breaches

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if your pregnancy is ended by an abortion. The risk may be higher if your first pregnancy is aborted.

While there are studies that have found an increased risk of developing breast cancer after an induced abortion, some studies have found no overall risk. There is agreement that this issue needs further study. If you have a family history of breast cancer or clinical findings of breast disease, you should seek medical advice from your physician before deciding whether to remain pregnant or have an abortion. It is always important to tell your doctor about your complete pregnancy history.

Texas Dep't of State Health Svcs., *Woman's Right to Know: After an Abortion*, (Dec. 17, 2007) <http://www.dshs.state.tx.us/wrtk/after-abortion.shm>. It is medically untrue that the risk of breast cancer "may be higher if your first pregnancy is aborted." It is also false that "there is agreement that this issue needs further study." *Id.*

262. For example, a pamphlet that suggests that infertility is a risk of a first trimester abortion impermissibly misleads women who are not at risk. The state-created pamphlet that Texas requires physicians to make available to women seeking an abortion describes the risks an abortion poses to future childbearing:

The risks are fewer when an abortion is done in the early weeks of pregnancy. The further along you are in your pregnancy, the greater the chance of serious complications and the greater the risk of dying from the abortion procedure. Some complications associated with an abortion, such as infection or a cut or torn cervix, may make it difficult or impossible to become pregnant in the future or to carry a pregnancy to term.

Some large studies have reported a doubling of the risk of premature birth in later pregnancy if a woman has had two induced abortions. The same studies report an 800 percent increase in the risk of extremely early premature births (less than 28 weeks) for a woman who has experienced four or more induced abortions. Very premature babies, who have the highest risk of death, also have the highest risk for lasting disabilities, such as mental retardation, cerebral palsy, lung and gastrointestinal problems, and vision and hearing loss.

Texas Dep't of State Health Services, *supra* note 261. This information may be true, but it is certainly misleading: medical research shows that abortions performed in the first trimester do not pose an increased risk to future fertility. See Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL. REV. 6, 11 (2007); FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS, REPORT TO HOUSE COMM. ON GOV. REFORM (2006). Texas also requires doctors "when medically accurate" to inform patients of "the potential danger to a subsequent pregnancy and of infertility." Tex. Health & Safety § 171.012 (1), *supra* note 261. If this risk is disclosed to all women seeking abortions, it would certainly be misleading as this danger is only applicable to a certain (small) class of women who have abortions.

fiduciary responsibilities ordinarily imposed on those who counsel—for example, by counseling women in ways that distract them from the balance of considerations that a reasonable person in the woman's position might deem relevant.<sup>263</sup>

But these are ordinary applications of the undue burden framework. The undue burden framework we considered in Part II of this essay was premised on the assumption—shared by *Casey* and *Carhart*—that the purpose of abortion restrictions was to protect the unborn and express respect for life. *Casey* authorized government to persuade women to continue a pregnancy to advance government's interest in potential life—not to promote an interest in sex-role conformity.

None of the Court's abortion decisions uphold a law that restricts women's decision making for the kinds of reasons that the South Dakota Task Force Report offers: that women lack capacity to make decisions about abortion or that the abortion decision is against women's "nature." Woman-protective

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<sup>263</sup> In Minnesota, physicians are required to inform women seeking an abortion that they have the right to review state-created materials that includes a section on "The Emotional Side of Abortion." See Minnesota Dep't of Health, *If You Are Pregnant: Information on Fetal Development, Abortion, and Alternatives*, available at [www.health.state.mn.us/wrtk/wrtk-handbook.pdf](http://www.health.state.mn.us/wrtk/wrtk-handbook.pdf). The pamphlet provides no information about the "emotional side" of childbirth, however, and does not at all discuss the risk of post-partum depression or any other emotional or mental health effects of carrying a pregnancy to term:

Each woman having an abortion may experience different emotions before and after the procedure. Women often have both positive and negative feelings after having an abortion. Some women say that these feelings go away quickly, while others say they last for a length of time. These feelings may include emptiness and guilt as well as sadness. A woman may question whether she made the right decision. Some women may feel relief about their decision and that the procedure is over. Other women may feel anger at having to make the choice. Women who experience sadness, guilt or difficulty after the procedure may be those women who were forced into the decision by a partner or family member, or who have had serious psychiatric counseling before the procedure or who were uncertain of their decision.

Counseling or support before and after your abortion is very important. If family help and support is not available to the woman, the feelings that appear after an abortion may be harder to adjust to. Talking with a professional and objective counselor before having an abortion can help a woman better understand her decision and the feelings she may experience after the procedure. If counseling is available to the woman, these feelings may be easier to handle.

Remember, it is your right and the doctor's responsibility to fully inform you prior to the procedures. Be encouraged to ask all of your questions.

*Id.*; cf. Texas Dep't of State Health Svcs., *supra* note 261 (comparing the "emotional side of an abortion" and the "emotional side of birth").

antiabortion argument makes up over half of the lengthy Task Force Report,<sup>264</sup> which in turn is the basis for the state's 2005 informed consent statute, the abortion ban that South Dakota voters rejected in 2006, and the abortion ban that voters in the state will consider this fall.<sup>265</sup> It is Harold Cassidy's view that it is precisely the Report's woman-protective argument that will establish the constitutionality of the state's current proposed ban in the eyes of Justice Kennedy.

In a debate posted on an Operation Rescue website, James Bopp of the National Right to Life Committee, a strong proponent of incrementalism, has warned that sending the Court bans on abortion might push Justice Kennedy to join the *Carhart* dissenters who believe such bans to violate the constitutional guarantees of both liberty and equality.<sup>266</sup> The opposing

<sup>264</sup> See SOUTH DAKOTA TASK FORCE REPORT, *supra* note 20.

<sup>265</sup> See *supra* note 101 (discussing the ban's relation to the Task Force Report); see also *supra* note 20 (woman-protective argument in endorsements for the ban that are posted on the Web site of the group leading the initiative campaign for the ban).

<sup>266</sup> See Legal Memorandum from James Bopp, Jr. & Richard E. Coleson on Pro-life Strategy Issues 3, 6 (Aug. 7, 2007), available at <http://personhood.net/docs/BoppMemorandum1.pdf> (arguing that "now is not the time to pass state constitutional amendments or bills banning abortion," and that "[e]schewing incremental efforts to limit abortion where legally and politically possible makes the error of not saving some because not all can be saved. It also makes the strategic error of believing that the pro-life issue can be kept alive without such incremental efforts"). The memo argues:

But if the U.S. Supreme Court, as presently constituted, were to actually accept a case challenging the declared constitutional right to abortion, there is the potential danger that the Court might actually make things worse than they presently are. The majority might abandon its current "substantive due process" analysis (i.e., reading "fundamental" rights into the "liberty" guaranteed by the Fourteenth Amendment against infringement without due process) in favor of what Justice Ginsberg [sic] has long advocated—an "equal protection" analysis under the Fourteenth Amendment. In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the dissent, written by Justice Ginsberg, in fact did so. See *id.* at 1641 (Ginsberg, J., joined by Stevens, Souter, and Breyer, JJ.) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."). If this view gained even a plurality in a prevailing case, this new legal justification for the right to abortion would be a powerful weapon in the hands of pro-abortion lawyers that would jeopardize all current laws on abortion, such as laws requiring parental involvement for minors, waiting periods, specific informed consent information, and so on. A law prohibiting abortion would force Justice Kennedy to vote to strike down the law, giving Justice Ginsberg the opportunity to rewrite the justification for the right to abortion for the Court. This is highly unlikely in a case that decides the constitutionality of such things as PBA bans, parental involvement laws, women's right-to-know laws, waiting periods, and other

position is staked out by Cassidy, who played a leading role in developing the state's unimplemented 2004 and 2006 abortion bans, the ban that will appear on the state's 2008 ballot, as well as its "informed consent" statute.<sup>267</sup> A memo credited to Cassidy and Samuel Casey ridicules Bopp's objections and exhorts South Dakotans to renew their drive to ban abortion, arguing that Justice Kennedy's opinion in *Carhart* suggests that he is open to reversing *Roe* and *Casey* with a showing of new facts about women's need for protection.<sup>268</sup> The

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legislative acts that do not prohibit abortion in any way, since Justice Kennedy is likely to approve such laws.

*Id.* at 3-4.

267. See *supra* notes 95-97 and accompanying text.

268. See Legal Memorandum from Samuel B. Casey & Harold J. Cassidy to Members of the South Dakota Pro-Life Leadership Coalition on the Proposed 2008 South Dakota Abortion Bill 9 (Oct. 10, 2007), available at <http://operationrescue.org/pdfs/Legal%20Memo%20&%20Proposed%20South%20Dakota%20Abortion%20Bill%20%2810-10-2007%29.pdf>. Analyzing Justice Kennedy's position on *Roe*, the memo observes:

The joint opinion in *Casey* expressly states that if *Roe* was in error—and clearly Kennedy had thought that it was—that error only went to the "weight to be given to the state's interest in fetal life." *Casey*, 505 U.S. at 855. But, the Justices writing the joint opinion held that if that is the only error or consequence of the error, it was insufficient to justify overturning *Roe* because that error did not affect the "women's liberty." *Id.* Kennedy and O'Connor were bothered by the perception that protecting the unborn child by banning abortion was at the expense of the liberty interests of the women; and the perception that to do so was anti-women.

Woman-protective argument is responsive to this diagnosis, precisely because it offers a claim of changed facts and thus provides Justice Kennedy the opportunity to back away from *Roe* and *Casey* without appearing to be "anti-women":

The entire approach that South Dakota has adopted and advances will satisfy the *Casey* stare decisis analysis. This legal and factual analysis has, especially with the witness of the women who have had abortions, and the professionals and pregnancy help centers that care for them, the power to persuade members of the Court that the *Casey* stare decisis analysis has been satisfied.

There will be those who will argue that we can't win Justice Kennedy back to where he was between 1989 and 1992; that his vote in *Gonzales v. Carhart* was simply his asserting the compromise he thought he struck with Justices O'Connor and Souter in the *Casey* case.

However, we know that he knows *Roe* was wrongly decided. He wrote with passion in *Gonzales* about the harm abortion causes women. He demonstrated a predisposition and receptiveness to proof about such harm. More importantly, perhaps, he wrote with passion about the beauty of the bond between mother and child: "Respect for human life finds an ultimate expression in the bond of love the mother has for her child." *Gonzales*, 127 S.Ct. 1610, 1634 (2007). Justice Kennedy retained his powerful pro-motherhood language despite a bitter attack by Justice Ginsberg [*sic*].

memo dismisses concerns about Justice Kennedy's receptivity to the equal protection claim, several times referring to equal protection concerns as "ridiculous" and "silly."<sup>269</sup>

The memo's dismissal of the equal protection claim reflects a view of women that Cassidy regularly expresses in legal fora and other venues in which he is advancing his antiabortion arguments.<sup>270</sup> Cassidy's conception of

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It was not a coincidence that Justice Kennedy cited to the "friend of the court" brief of Sandra Cano (the "Doe" in *Doe v. Bolton*) which related the experiences of post abortive women. Of all the Justices on the Court, perhaps Justices Kennedy and Roberts would be most receptive to South Dakota's women's interest analysis.

*Id.* at 10.

269. See Cassidy, *supra* note 268, at 18 ("We do understand that Justice Ginsberg [sic] does agree with Riva [sic] Siegel that the *Roe v. Wade* analysis should be discarded and replaced with her equal protection violation analysis. But there is no credible evidence that [other Justices] would fully adopt that analysis. . . . More importantly, the Equal Protection analysis would not be worse for us because it is a ridiculous argument. If Mr. Bopp's willing Court that he sees coming in the future would swat away the *Roe* analysis on any reasoning, they surely would swat away Ginsberg's [sic] silly equal protection argument. Actually, Ginsberg [sic] pressing that equal protection argument might be good for our objectives. Justice Kennedy surely did not join her dissent in *Gonzales*, and clearly thinks it is ridiculous. If he thought it could be the law of the land, it is one more reason, along with all of the good facts and law South Dakota gives him, to go back to his old position of striking down *Roe*.").

270. See, e.g., text accompanying *supra* notes 245-248. In a recent interview, Cassidy observed:

I'm going to say something that may be controversial: There is crisis thinking. I don't care how smart a woman is, I don't care how responsible she is, how in control of her life, there's something about that particular circumstance of pregnancy. The decision has got to be one she can live with for her entire life, and the woman in that position is very vulnerable. It may not be popular to say that, but it is the reality. And part of the problem of abortion is that it is more about what we would like a woman to do than what she is really wired and capable of doing. To have a policy built on a premise that a woman can kill her own child and that it's okay is terrible.

....

There are women who think they are informed, and later find out that they are not informed. And that phenomenon comes in many degrees. There can be women, and there are some, surely, who make a decision that is informed, and it is voluntary, and even they will find out later that it's not. They're not liberated by it; they're enslaved by the experience. In fact, in many ways they were enslaved by the experience before they made this so-called free and informed decision, because there is a culture and society and sexual partners who have come to expect her to be able to perform or to act in a certain way, and those expectations have enslaved her. Not only have they enslaved her in terms of her ability to get an abortion, but also to behave in ways that lead to the pregnancy in the first place.

protecting women is fundamentally at odds with the understanding of women's dignity on which the modern constitutional order rests. A ban statute based on the South Dakota Task Force Report on Abortion violates, not only *Casey*, but the Court's equal protection cases, which prohibit laws "protecting" women in this way.<sup>271</sup>

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Sarah Blustein, *The Right Not To Choose: TAP Talks to Prominent Anti-Abortion Lawyer Harold Cassidy*, AM. PROSPECT, Apr. 13, 2007, [http://www.prospect.org/cs/articles?article=the\\_right\\_not\\_to\\_choose](http://www.prospect.org/cs/articles?article=the_right_not_to_choose).

271. See Siegel, *supra* note 15, at 1078 (analyzing South Dakota's 2006 abortion ban and the woman-protective arguments of the state task force report on which it was based, and concluding that "prohibiting abortion for this purpose violates the Equal Protection Clause. South Dakota cannot use the criminal law to ensure that its female citizens choose and act like women should").

It does not help that ban statutes such as South Dakota's, which deny women the capacity to make decisions in matters of motherhood, often exempt women from responsibility for seeking an abortion. South Dakota's past and current proposed bans would impose criminal liability on abortion-providers only and would not criminalize the conduct of women who seek or obtain an abortion. See Initiative Petition, An Act To Protect the Lives of Unborn Children, and the Interests and Health of Pregnant Mothers, § 13, available at <http://www.voteeyesforlife.com/docs/Petition.pdf> ("Nothing in this Act subjects the pregnant woman upon whom any abortion is performed or attempted to any criminal conviction and penalty for an unlawful abortion."); see also H.B. 1215, 2006 Leg., 81st Sess. § 4 (S.D. 2006) (repealed 2006) (same). The Partial-Birth Abortion Ban Act at issue in *Carhart* similarly assigns liability for performing intact dilation and extraction abortion procedures only to doctors. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531(e) (2000) ("A woman upon whom a partial-birth abortion is performed may not be prosecuted under this section . . ."). Before *Roe*, many statutes prohibiting abortion imposed liability on doctors but did not criminalize the conduct of women who underwent abortion procedures. See *Roe v. Wade*, 410 U.S. 113, 151 (1973) ("[I]n many States . . . the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another.").

A large number of leaders in the antiabortion movement have recently defended the view that criminal abortion statutes should not impose liability upon women who have abortions. *One Untrue Thing*, NAT'L REV., Aug. 1, 2007, <http://article.nationalreview.com/?q=ZjkwNWQ4ZDQ2NTIjNDg4MjUyYWIxZWQ6NDVjMTkxYjg#more>. (quoting seventeen antiabortion activists, including Clarke Forsythe, president of Americans United for Life, who asserts that "the woman is the second victim of abortion" and that "the purpose behind that [antiabortion] law was not to degrade women but to protect them"). The view that law should control women's abortion decisions without imposing criminal sanctions on women who seek abortions seems widely shared in the antiabortion movement. In short documentary video clip that appeared on the internet in 2007, antiabortion protesters are asked, "What should happen to women who would get abortions, if abortions were to become illegal?" YouTube Video, *Libertyville Abortion Demonstration*, [http://www.youtube.com/watch?v=Uk6t\\_rdOkwo](http://www.youtube.com/watch?v=Uk6t_rdOkwo). The protesters react with surprise to the question, responding variously, "I haven't thought about that one," "Pray for them," and "I don't have an answer for that." *Id.*

Modern case law enforcing constitutional guarantees of liberty and equality for women emerged precisely as the Court repudiated the understanding that government could single out women as a group and impose limitations on their capacity to make life choices in order to protect women and ensure that women would fulfill their natural roles as wives and mothers.<sup>272</sup> Justice Ginsburg voices just this constitutional objection to woman-protective antiabortion argument:

This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited. Compare, e.g., *Muller v. Oregon* (1908) ("protective" legislation imposing hours-of-work limitations on women only held permissible in view of women's "physical structure and a proper discharge of her maternal funct[ion]"); *Bradwell v. State* (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[] the noble and benign offices of wife and mother.") with *United States v. Virginia* (1996) (State may not rely on "overbroad generalizations" about the "talents, capacities, or preferences" of women; "[s]uch judgments have . . . impeded . . . women's progress toward full citizenship stature throughout our Nation's history"); *Califano v. Goldfarb*, (1977) (gender-based Social Security classification rejected because it rested on "archaic and overbroad generalizations" "such as assumptions as to [women's] dependency" . . .).<sup>273</sup>

The new gender paternalism is in fact the old gender paternalism: laws (1) based on stereotypes about women's capacity and women's roles that (2) deny women agency (3) for the claimed purpose of protecting women from coercion and/or freeing them to be mothers. Gender paternalism of *this* kind violates the very forms of dignity that *Casey*—and the equal protection cases—protect.

South Dakota's efforts to reverse *Roe* challenge far more than the Court's substantive due process decisions. The state's effort to use law to enforce traditional conceptions of women's capacities and roles strikes at modern understandings of women's citizenship. These understandings are not simply embodied in *Roe* or *Casey*; they inhere in the equal protection cases, and

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272. See Section III.B.

273. *Gonzales v. Carhart*, 127 S. Ct. 1610, 1649 (2007) (Ginsburg, J. dissenting) (citations omitted).

beyond the case law, are rooted in the norms and forms of community from which these decisions emerged.<sup>274</sup> For this reason, even as the Court's decisions play a role in limiting woman-protective antiabortion argument,<sup>275</sup> constitutional limits on woman-protective antiabortion argument do not depend solely on the authority of the Court's past decisions. To the contrary, the Constitution's dignity-based constraints on woman-protective antiabortion argument are alive in the forms of normative appeal we make on one another, today, inside and outside of courts of law. Should the Supreme Court adopt the modes of reasoning about women expressed in the South Dakota Task Force Report, far more than the abortion right would be in jeopardy.

There are, in short, deep constitutional objections to abortion restrictions based on the woman-protective arguments we have examined. But these constitutional debilities are not the only problem with the claim. The woman-protective antiabortion argument is itself confused, about the capacities of women who consider abortion and the forms of community support that might be responsive to their needs. Women who consider abortion may be in great need, but the remedy that woman-protective antiabortion argument offers does not address those needs.

Of the millions of women who have or consider abortions, many become pregnant without wanting to; it is not responsive to their needs to deny access to abortion "as birth control" without teaching young men and women about contraception, as South Dakota would.<sup>276</sup> Of the millions of women who have

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274. See *supra* notes 187-188 and accompanying text.

275. See, e.g., Section I.A. (discussing the debate between incrementalists and absolutists in the antiabortion movement); *supra* note 98 (discussing incrementalist efforts to block abortion restrictions in South Dakota); *supra* note 266 (quoting memorandum of James Bopp, cautioning antiabortion community against adopting absolutist abortion restrictions that might move Justice Kennedy to join *Carhart's* dissenting Justices in imposing equal protection limitations on abortion regulation); Section II.B (discussing how the case law allows government to express respect for life in a form that respects women's decisional autonomy); Subsection II.C.1. (discussing how *Casey* restricts incrementalist informed consent regulation to forms that respect women's decisional autonomy); Section III.A (discussing the ways *Carhart* recognizes fetal-protective and woman-protective discourse as part of an abortion-rights framework).

276. Voteyesforlife.com urges voters to support the proposed ban to stop abortion "as birth control." Vote Yes For Life, *supra* note 101 ("[T]his bill prohibits abortions used as birth control."). But the leader of the group supporting the ban opposes public education about birth control. The Task Force specifically refused to include a recommendation supporting sexual education when recommending that the state ban abortion, leading to the resignation of its antiabortion chairwoman. See *supra* note 186; see also Siegel, *supra* note 22, at 138. Many of the groups that oppose abortion now advocate abstinence education. See Post & Siegel, *supra* note 152, at 412-24 & n.232.



or consider abortions, some are mentally ill. It is not responsive to their needs to offer them coerced motherhood rather than counseling—nor is it respectful to regulate the decision making of capable women as if they were mentally ill.<sup>277</sup> Of the millions of women who have or consider abortions, some are in abusive relations or lack resources to care for their existing family. It is not responsive to their needs to offer them coerced motherhood rather than the resources and support that would allow them to choose motherhood without harm to themselves and their loved ones.

The new gender paternalism does not merely generalize or stereotype. Like the old gender paternalism, the new gender paternalism points to social sources of harm to women—abuse, poverty, or work/family conflict—and offers control of women as the answer.<sup>278</sup> Women in need deserve better.

Consider the woman-protective claim in light of this information from the Guttmacher Institute:<sup>279</sup>

- (1) *One-Third of American Women Will Have an Abortion.* “At least half of American women will experience an unintended pregnancy by

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277. Social scientists report that preexisting psychiatric illnesses, depression, and psychosis often predict post-pregnancy mental health difficulties, regardless of pregnancy outcome. Anne C. Gilchrist, Philip C. Hannaford, Peter Frank & Clifford R. Ray, *Termination of Pregnancy and Psychiatric Morbidity*, 167 *BRITISH J. PSYCHOL.* 243, 247 (1995); Sarah Schmiede & Nancy Felipe Russo, *Depression and Unwanted First Pregnancy: Longitudinal Cohort Study*, 331 *BMJ* 1303, 1306 (2005); Laurie Schwab Zabin, Marilyn B. Hirsch & Mark R. Emerson, *When Urban Adolescents Choose Abortion: Effects on Education, Psychological Status, and Subsequent Pregnancy*, 21 *FAM. PLAN. PERSPS.* 248, 248 (1989); G. Zolse & C.V.R. Blacker, *The Psychological Complications of Therapeutic Abortion*, 160 *BRITISH J. PSYCHOL.* 742, 742 (1992).

This group of women with preexisting psychiatric illness deserves support. But isolating women with preexisting psychiatric illness and requiring them involuntarily to continue pregnancies they wish to end, or subjecting them to government pressure to do so, hardly responds to their needs, or the needs of others dependent on them. Bearing a child—or another child—may well exacerbate mental health problems, and certainly will if the women are pushed into bearing an unwanted child without appropriate counseling and material support.

If pregnant women with preexisting psychiatric illnesses need help, it is counseling that is genuinely open to finding the path that best suits a woman and her family. Making this group of vulnerable women the target of regulation that expresses views about the morality of abortion violates their dignity—just as pointing to women with psychiatric illness as a reason for regulating the decisions of all women violates their dignity.

278. Consider, for example, the efforts of David Reardon, *see supra* notes 73, 87, 91-92 and accompanying text, and Harold Cassidy, *see supra* notes 95-101 and accompanying text. The common law also protected women by restricting their agency. *See supra* text accompanying note 231.

279. *See* GUTTMACHER INST., *FACTS ON INDUCED ABORTION IN THE UNITED STATES* (2008), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html).

- age 45, and, at current rates, about one-third will have had an abortion.<sup>280</sup>
- (2) *60% Have Children*. "About 60% of abortions are obtained by women who have one or more children."<sup>281</sup>
  - (3) *The Abortion Rate is Higher Among Poor Women*. "The abortion rate among women living below the federal poverty level (\$9,570 for a single woman with no children) is more than four times that of women above 300% of the poverty level (44 vs. 10 abortions per 1,000 women)."<sup>282</sup>
  - (4) *There Are a Few Common Reasons Women Have an Abortion*. "The reasons women give for having an abortion underscore their understanding of the responsibilities of parenthood and family life. Three-fourths of women cite concern for or responsibility to other individuals; three-fourths say they cannot afford a child; three-fourths say that having a baby would interfere with work, school or the ability to care for dependents; and half say they do not want to be a single parent or are having problems with their husband or partner."<sup>283</sup>
  - (5) *Age*. "Fifty percent of U.S. women obtaining abortions are younger than 25; Women aged 20-24 obtain 33% of all abortions, and teenagers obtain 17%."<sup>284</sup>
  - (6) *Use of Contraception*. "Forty-six percent of women who have abortions had not used a contraceptive method during the month they became pregnant."<sup>285</sup>

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<sup>280</sup> *Id.* (citing Rachel K. Jones et al., *Repeat Abortion in the United States*, Occasional Report No. 29 (2006), available at <http://www.guttmacher.org/pubs/2006/11/21/or29.pdf>; Stanley K. Henshaw, *Unintended Pregnancy in the United States*, 30 FAMILY PLANNING PERSPECTIVES 24 (1998); Guttmacher Instit., *State Facts About Abortion*: New York, 2006, [http://www.guttmacher.org/pubs/sfaa/new\\_york.html](http://www.guttmacher.org/pubs/sfaa/new_york.html)) (last visited May 5, 2008).

<sup>281</sup> *Id.*

<sup>282</sup> *Id.* (citing Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 226 (2002), available at <http://www.guttmacher.org/pubs/journals/3422602.pdf>).

<sup>283</sup> *Id.* (citing Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEXUAL & REPROD. HEALTH 110 (2005), available at <http://www.guttmacher.org/pubs/journals/3711005.html>).

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* (citing Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Contraceptive Use Among U.S. Women Having Abortions in 2000-2001*, 34 PERSP. ON SEXUAL & REPROD. HEALTH 294 (2002)).