

Law 101

An Introduction to Domestic
and International Legal Terms

**CENTER
FOR
REPRODUCTIVE
RIGHTS**

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Affidavit – A written statement made voluntarily, made under oath and sworn to before a notary public or someone authorized to take oaths (like a County Clerk).

Amicus Curiae - Latin for "friend of the court," an organization or group of individuals permitted by a court to participate in a case although they are not one of the litigants. The typical role of an Amicus is to file a brief that adds a perspective not otherwise before the Court. For example, CRR might file an amicus brief in a privacy case to explain how the decision in that case would impact abortion rights, even though the case does not involve abortion.

Appeal (v.) – A request to a higher court to review the decision of a lower court based on the “record” (see below) that was presented in the lower court. A party has a right to appeal to one appellate court. No new evidence is admitted on appeal. The appellant must usually file a “notice of appeal,” and then a brief making his or her arguments about why the lower court’s decision was incorrect. The other party (respondent or appellee) usually files a responsive brief countering these arguments. The appellant then can counter that response with a final (“reply”) brief. Argument is often presented orally to the appeals court (though not necessarily), which may affirm the original ruling, reverse it, send it back to the trial court, or reverse in part and affirm in part.

Appeal (n.) - The name for the process of appealing, as in "she has filed an appeal."

Appellant - The party who appeals a trial court decision it has lost

Appellee - The name used for the party who has won at the trial court level, when the loser, (appellant) has appealed the decision to a higher court.

“As-applied” Challenge – There is much academic dispute about the difference between an “as-applied” and a “facial” challenge to a law. In its simplest terms, though, an “as applied” challenge is a challenge to a particular application or applications of a law or policy, rather than a challenge to the law or policy itself. A law or policy could be constitutional “on its face,” i.e., based on a reading of the law or policy, but still may be applied unconstitutionally. For example, though Alabama has a parental involvement law that is constitutional “on its face”, because it has a judicial bypass procedure in the law, it may be unconstitutional “as applied,” because Alabama judges rarely grant judicial bypasses or do so in an inconsistent manner. As applied challenges are usually more difficult and fact-intensive cases.

Cert. Petition or Petition for a Writ of Certiorari - A party who wants the U.S. Supreme Court to review a decision of a federal court or of a state Supreme Court must file a "petition for a writ of certiorari." While parties in federal court have a right to have their appeal heard by one of the United States Courts of Appeals (also known as “Circuit Courts”), parties have no similar right to be heard by the U.S. Supreme Court. The Court chooses the cases it wants to hear by either granting or denying the “cert. petition.”

Complaint - The first document filed with the court by a person or entity claiming legal rights against another. The party filing the complaint is usually called the plaintiff and the party against whom the complaint is filed is called the defendant.

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Deposition – The taking and recording of testimony of a witness under oath, by the opposing party, before a court reporter in a place away from the courtroom before trial.

Discovery – The efforts of a party to a lawsuit and its attorneys to “discover” information before trial through depositions of parties and potential witnesses, written demands for production of documents, interrogatories (questions and answers written under oath), requests for admissions.

En Banc -- Fr. "by the full court" "in the bench" or "full bench." When all the members of an appellate court hear an argument, they are sitting en banc. Refers to court sessions with the entire membership of a court participating rather than the usual quorum. U.S. courts of appeals usually sit in panels of three judges, but may expand to a larger number in certain cases. They are then said to be sitting en banc.

Enjoin (v.) - For a court to order that someone either do a specific act, cease a course of conduct or stop doing a certain act. The resulting order is called an injunction.

Expert Witness – A person who is a specialist in a subject who may present her/his expert opinion without having been a witness to any occurrence relating to the lawsuit or criminal case. It is an exception to the rule against giving an opinion in trial, provided that the expert is qualified by evidence of her/his expertise, training and special knowledge.

Facial Challenge – As noted above in the discussion of “as-applied challenge,” there is much academic dispute about the difference between an “as-applied” and a “facial” challenge to a law. But in its simplest terms, a “facial challenge” is a challenge in which a plaintiff asks a court to strike down a law in its entirety claiming that the law as it is written “on its face” is manifestly unconstitutional. This is in contrast to an “as applied” challenge, see above.

Injunction – An order of a court that most commonly requires that an entity stop doing something and refrain from doing that thing in the future and/or, more rarely, demands that the entity take some particular action.

Interrogatories – A set of written questions to a party to a lawsuit asked by the opposing party as part of the pre-trial discovery process.

Judgment – The final decision by a court in a lawsuit, criminal prosecution, or appeal from a lower court's judgment.

Merits – Referring to a judgment, decision or ruling of a court based upon the facts presented in evidence and the law applied to that evidence. A judge decides a case "on the merits" when he/she bases the decision on the fundamental issues and considers technical and procedural defenses as either inconsequential or overcome. Example: An attorney is two days late in filing a set of legal points and authorities in opposition to a motion to dismiss. Rather than dismiss the case based on this technical procedural deficiency, the judge considers the case "on the merits" as if this mistake had not occurred.

Motion - A formal request made to a judge for an order or judgment.

Motion to Compel – A request that the judge order the other side to answer discovery.

Order - Every direction or mandate of a judge or a court which is not a judgment or legal opinion (although both may include an order) directing that something be done or that there is prohibition against some act.

Permanent Injunction - A final order of a court that a person or entity refrain from certain activities permanently or take certain actions until completed. A permanent injunction is distinguished from a “preliminary” injunction which the court issues pending the outcome of a lawsuit or petition asking for the “permanent” injunction.

Plurality Opinion – When no single opinion in a case in an appellate court is supported by a majority of the Justices, the opinion in support of the Judgment that has the most votes is called the “plurality opinion.”

Preliminary Injunction – An injunction (see above), issued by a court in the early stages of a lawsuit, maintaining the status quo until the court makes a final ruling on the merits of a lawsuit. In order for the preliminary injunction to issue, the plaintiff must make a showing that, among other things, without the injunction the plaintiff will suffer irreparable injury, and that s/he has a likelihood of success on the merits.

Standing -The right to file a lawsuit. A plaintiff must have “standing” to sue. In the simplest of terms, this means that the plaintiff has suffered actual injury, is alleging that the defendant is the “cause” of the injury, and is asserting a claim and request for relief that will “redress” the injury.

Stay - A court-ordered suspension of a court’s judgment, usually granted pending appeal of the judgment itself.

Strict Scrutiny –Refers to the highest degree of constitutional protection that is applied to restrictions on “fundamental rights,” like the right to free speech. When a law or policy is subjected to “strict scrutiny,” the state must establish that the law or policy is narrowly tailored to serve a compelling state interest, the most difficult test to meet. *Roe v. Wade* held that restrictions on the right to choose abortion were subjected to strict scrutiny. But the Supreme Court abandoned the strict scrutiny standard for the right to choose in *Planned Parenthood v. Casey*.

Summary Judgment – When a party establishes through submission of sworn statements and/or admissions of the opponent, that there are no genuine issues of material fact that are in dispute and that the party is entitled to judgment as a “matter of law”, the court will grant “summary judgment,” avoiding a trial on the legal issues decided. A summary judgment is based upon a motion by one of the parties that contends that all necessary factual issues are settled or so one-sided they need not be tried. The motion is supported by declarations under oath, excerpts from depositions which are under oath, admissions of fact and other discovery, as well as a legal argument (points and authorities), that argue that there are no triable issues of fact and that the settled facts require a summary judgment for the moving party. The summary judgment process is designed to eliminate the need to try factual issues that are already settled.

Temporary Restraining Order - A temporary restraining order (TRO) is issued for the same reasons as a preliminary injunction, i.e., to maintain the status quo where the party requesting the TRO is likely to succeed on the merits. However, TROs can be granted without notice to the opposing party and last for a short period of time, usually 15 days at the most.

Undue Burden – The standard of judicial scrutiny—weaker than strict scrutiny—applied to restrictions on abortion, established in *Planned Parenthood v. Casey*, and which opened the door to numerous onerous restrictions, such as waiting periods that serve no medical purposes and are only intended to dissuade women from exercising their right to choose abortion. To establish that a regulation of abortion constitutes an “undue burden,” and is therefore unconstitutional, plaintiffs must establish that the regulation places a substantial obstacle in the path of women seeking abortions.

Domestic Glossary – Common Phrases/Terms Used

Biased Counseling – As used in the context of our work, biased counseling is state-mandated information that is intended to discourage a woman from choosing abortion and that is often irrelevant, unnecessary, misleading, or medically inappropriate. Statutes mandating biased counseling often are accompanied by delay periods of 24 or 48 hours and often require that the information be given by a physician, not simply a trained counselor, nurse, or other health practitioner. Biased counseling and mandatory delay requirements serve no actual health purpose and are intended only to discourage abortion as an option.

Crisis Pregnancy Center (CPC) – Throughout the United States (and all over the Internet), antiabortion groups have set up "crisis pregnancy centers." These centers follow a format that is deliberately designed to misinform and mislead young women. Going by the names such as Crisis Pregnancy Center, Pregnancy Aid, Birth Right, Open Door, or Pregnancy Counseling Center, these groups want to be a woman's first contact when she thinks she might be pregnant, so they can talk her out of considering abortion. Antiabortion pregnancy centers are listed in the yellow pages under "abortion alternatives" and they do not provide abortion. Many offer free pregnancy tests but do not have any medical staff on site, no doctors, no nurses, no nurse practitioners. Most antiabortion centers will not give out information by phone, they insist you come into their office. Many women have reported waiting up to an hour for the results of a pregnancy test and being forced to watch antiabortion videos while they wait surrounded by antiabortion propaganda. Many of these centers are operated by churches or religious organizations.

Emergency Contraceptive (EC) – Sometimes called the "morning after pill," EC prevents pregnancy after unprotected sex via a course of hormonal contraceptive pills taken in one- or two-dose regimens. Note the difference between medical abortion, which ends an already established pregnancy, and emergency contraception, which prevents pregnancy. EC is most effective if taken within 24 hours after unprotected sex; however, it can be effective for up to five days.

FACE – Freedom of Access to Clinic Entrances Act. Passed by Congress, it imposes criminal and civil penalties on anyone who uses force or the threat of force to obstruct, intimidate or interfere with someone who is providing or receiving reproductive health services.

Judicial Bypass/Waiver – A judicial authorization for an abortion, which allows minors to "bypass" forced parental involvement laws.

Mandatory Delay – As used in our work, "mandatory delay" refers to a requirement that a woman delay her abortion a certain number of hours or days after receiving or being offered state-mandated information (biased counseling) designed to discourage abortion. Mandatory delays and biased information requirements serve no actual health purpose and are intended only to discourage abortion as an option.

Medical Abortion – Medical abortion is a safe and effective non-surgical method of terminating early pregnancy using certain medications taken orally or through injections. There are currently two methods of medical abortion: mifepristone, formerly known as RU-486, and methotrexate. Both drugs must be used in combination with misoprostol in order to stimulate uterine contractions, which aids in expelling the fertilized egg. Note the difference between medical abortion, which ends an already established pregnancy, and emergency contraception, which prevents pregnancy.

Parental Involvement Laws – As used in our work, this term refers to laws requiring young women to notify or obtain the consent of one or both parents in order to obtain an abortion.

Refusal Clause – Sometimes referred to as “conscience clauses,” a refusal clause allows entities or individuals that can demonstrate a religious objection to providing some type of service or medication—in our work, either contraceptives or provision of abortion—may escape a requirements to do so.

TRAP – Targeted Regulation of Abortion Providers. TRAP laws attempt to regulate the medical practices or facilities of doctors who provide abortions by imposing burdensome requirements that are different and more stringent than regulations applied to comparable medical practices. Regulations can range from the width of doorways to hourly air exchange rates.

International Glossary

Admissibility - The term used to describe the official decision of an international or regional human rights body to accept or decline to hear a case that has been submitted to it. This decision does not address the case on the merits. Rather, the body usually examines whether appropriate domestic legal remedies have been exhausted (see Exhaustion of Domestic Remedies, below) and whether other jurisdictional thresholds have been met.

African Charter on Human and Peoples' Rights (1981) - International human rights treaty of the African Union. Primary enforcement mechanisms are the African Commission on Human and Peoples' Rights and the African Court. Ratified by 53 members of the African Union.

African Court of Human Rights -- African Court on Human and Peoples' Rights: A newly formed court constituted under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998) which entered into force in January 2004 and is intended to compliment the African Commission on Human and Peoples' Rights. The Court has a mandate to receive individual complaints when the state in question has accepted its competency to hear such complaints, as well as to issue advisory opinions in certain circumstances.

American Convention on Human Rights (1969) - International human rights treaty signed at the Organization of American States. The first binding instrument in the inter-American system on human rights. Compliance monitored by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. Ratified by 25 members of the Organization of the American States. *The United States has signed, but not ratified this treaty.*

Beijing Conference - United Nations Fourth World Conference on Women.

Beijing Declaration and Platform for Action - Consensus document adopted by 189 nations participating in the Beijing Conference. Important because it reinforced and extended further positive language in the Cairo Programme.

Cairo Conference -- The United Nations International Conference on Population and Development (ICPD) was held from 5-13 September 1994 in Cairo, Egypt. During this two week period world leaders, high ranking officials, representatives of non-governmental organizations and United Nations agencies gathered to agree on a Programme of Action

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Cairo Programme of Action - Programme of Action of the United Nations International Conference on Population and Development (ICPD): Consensus document adopted by 179 nations participating in the International Conference on Population and Development. First inter-governmental agreement to explicitly define “reproductive rights”.

Comparative Law - The study of the differences and similarities between the legal standards (constitutional, legislative, jurisprudential, regulatory or customary) of several countries or legal systems.

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)- International treaty codifying states’ duties to eliminate discrimination against women. Has provisions related to reproductive health and rights issues. Ratified by 167 countries. *The U.S. has signed, but not ratified, CEDAW.*

CEDAW Committee - UN Treaty Monitoring Body (see below) charged with monitoring states, parties or implementation of CEDAW. States that have ratified CEDAW report to the Committee every four years.

Convention on the Rights of the Child (1989) - International treaty upholding the human rights of children. It is the most widely ratified treaty in the world. Ratified by 195 countries. *The U.S. has signed, but not ratified, this treaty:* The U.S. is the only country other than Somalia that has not ratified it.

Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (1984) – Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984): The Convention against Torture entered into force in 1987. It defines torture and requires states parties to take legislative, administrative, judicial and other measures to combat torture in all territories under its jurisdiction, barring war and conflict as a justification for torture at any time. The Treaty Monitoring Body formed pursuant to the Convention to monitor states parties’ compliance is the Committee against Torture. Ratified by 138 countries. *The U.S. has both signed and ratified the Convention.*

Council of Europe - The European human rights system, of which 44 European states are members. Not to be confused with the European Union, the primarily economic regional body of Europe of which 25 countries of Europe are member states. All members of the EU are members of the Council of Europe.

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Customary Law/Customary International Law - When there is a very consistent pattern among nations on a particular normative issue it is called customary international law or a customary international norm, and it attains the force of international law (for example, that countries should outlaw executing mentally incompetent people or prohibit official torture.) A written document or treaty does not have to exist on the subject matter for a norm to become customary law.

Economic, Social and Cultural Rights Committee - UN treaty monitoring body that Monitors states' compliance with the ICESCR (Covenant on Economic, Social and Cultural Rights). States that have ratified the ICESCR report to this body every five years.

“European Convention on Human Rights” (1950) - European Convention for the Protection of Human Rights and Fundamental Freedoms. European treaty that codified the 1948 Universal Declaration on Human Rights. Basis for the Council of Europe and the European human rights system which is widely regarded as the strongest human rights system due to the wide accession to the treaty and compliance with its terms. Primary enforcement mechanism of the Convention is the European Court of Human Rights. Ratified by 45 countries of the Council of Europe.

European Court of Human Rights (ECHR) - The current incarnation of the European Court of Human Rights was instituted on November 1, 1998, as a means to systematize the hearing of human rights complaints from Council of Europe member states. The court's mission is to enforce the European Convention on Human Rights.

Exhaustion of Domestic Remedies - The requirement in international human rights law that an aggrieved party must first exhaust all available legal remedies at the national level before applying for remedies to an international or regional body.

Fact-finding - A methodology employed to expose human rights violations by extensive investigation and interviewing of concerned officials and alleged victims, seeking accountability from responsible parties, identifying and securing a remedy for those whose rights have been violated, and helping to develop an effective advocacy strategy. Fact-finding methodology is an internationally accepted form of documenting human rights violations.

Human Rights Committee - UN treaty monitoring body charged with monitoring states' compliance with the International Covenant on Civil and Political Rights (ICCPR). States that have ratified the ICCPR report to this body every five years.

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Human Rights Law - Body of laws, both domestic and international, intended to promote and protect human rights. Based on the principle that states have an obligation to respect the human rights of people within their territory, and that other nation states and the international community have the right and the responsibility to ensure that this obligation is observed.

International Covenant on Civil and Political Rights (ICCPR) (1966) - International treaty protecting individuals' civil and political human rights. Ratified by 152 countries. *The U.S. has both signed and ratified the ICCPR.*

International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
This treaty, together with the Universal Declaration of Human Rights and the international Covenant on Civil and Political Rights, make up the International Bill of Human Rights. In accordance with the Universal Declaration, the Covenants recognize that the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights. Ratified by 149 countries. *The U.S. has signed, but not ratified, the treaty.*

International Convention on the Elimination of All Forms of Racial Discrimination
International treaty upholding individuals' human rights to be free of discrimination on the basis of race. Ratified by 169 countries. *The U.S. has both signed and ratified the treaty.*

ICPD Programme of Action - Consensus document adopted by nations participating in the International Conference on Population and Development. First explicit intergovernmental agreement that explicitly recognized reproductive rights and their basis in established human rights.

Inter-American Commissions on Human Rights (IACHR) - The IACHR is an autonomous organ of the Organization of American States (see below). Its mandate is found in the Charter of the OAS and the American Convention on Human Rights and relates to promoting the observance and defense of human rights. In particular, its seven independent members accept individual complaints pursuant to the American Convention on Human Rights, attempt to reach a friendly settlement and, failing that, may decide to bring a case to the Inter-American Court of Human Rights.

Inter-American Court on Human Rights -- The Court also operates under the auspices of the OAS and derives its mandate from the American Convention on Human Rights. It began operating in 1979, following entry into force of the Convention and has seven independent judges. Among other things, the Court hears complaints against states prosecuted by the IACHR, which acts on behalf of complainants who have alleged violations of the Convention.

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International Law - Body of legal rules and norms that are decided and enforced by nation states at the international level. Based on treaties, customary law and general principles of law.

Jurisprudence - Law developed by judicial or quasi-judicial bodies.

NGO - Non-governmental organization.

Norms (legal norms, international norms) - Legal standards, such as constitutional Provisions or legislation. “Hard norms” are binding international treaty provisions. “Soft norms” are the many interpretative and non-binding statements, for example, by treaty monitoring bodies, that can contribute to an understanding and greater compliance with reproductive rights.

Organization of American States - The OAS is an inter-governmental body composed of 35 countries in the Western Hemisphere, including the United States. All members must ratify the Charter of the Organization of American States. The OAS’ mandate is to strengthen cooperation and advance common interests, including democracy and human rights. It functions in a manner similar to the United Nations.

Protocol on the Rights of Women in Africa (200) - Protocol to the African Charter on Human and People’s Rights (see above) which guarantees a wide range of women’s civil and political rights as well as economic, social and cultural rights. The Protocol explicitly guarantees the right to health and reproductive rights of women.

Treaty Monitoring Bodies (TMBs) - United Nations committees which monitor governmental compliance with the major UN human rights treaties. While the TMBs are not judicial bodies, they influence governments by issuing specific observations about states’ progress and compliance with human rights obligations. They also issue General Recommendations which are not specific to any one country but which provide specific guidance on how states can better implement a provision or provisions of a treaty. In certain circumstances, some TMBs also have a mandate to decide government responsibility for individual complaints of violations.

United Nations International Conference on Population and Development – The United Nations International Conference on Population and Development (ICPD) was held from 5-13 September 1994 in Cairo, Egypt. During this two week period world leaders, high ranking officials, representatives of non-governmental organizations and United Nations agencies gathered to agree on a Programme of Action.

United Nations Fourth World Conference on Women – Global conference on women’s rights held in Beijing in 1995. Sometimes referred to as “FWCW” and “Beijing Conference.”

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Universal Declaration of Human Rights (1948) - UN human rights instrument at the foundation of modern international human rights law. The UDHR is not a treaty. It was adopted as a U.N. General Assembly Resolution in 1948 and is now regarded as legally binding in all U.N. member states.

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Background: Domestic Reproductive Rights Law

Overview of Supreme Court Decisions on Abortion and the Right to Privacy

The Decision in Roe v. Wade

On January 22, 1973, the United States Supreme Court struck down a Texas law criminalizing abortion and held that a woman has a constitutional right to choose whether to terminate her pregnancy.¹ *Roe v. Wade* (“*Roe*”) placed women’s reproductive choice alongside other fundamental constitutional rights, such as freedom of speech and freedom of religion, by conferring upon it the highest degree of constitutional protection, known as “strict scrutiny.”

Finding a need to balance a woman’s right to privacy with the state’s interest in protecting potential life, the Supreme Court in *Roe* established a framework for evaluating restrictions on abortion. The Court required the state to justify any interference with the abortion decision by showing that it had a “compelling interest” in doing so and that restrictions on abortions performed before fetal viability were limited to those that narrowly and precisely promoted real maternal health concerns.² After the point of viability, the state was free to ban abortion or take other steps to promote its interest in protecting fetal life. Even after that point, however, the state’s interest in the viable fetus had to yield to the woman’s right to have an abortion to protect her life and health.

Although a landmark ruling, the *Roe* decision was consistent with earlier Supreme Court cases recognizing a right of privacy that protects intimate and personal decisions from governmental interference, including those affecting child-rearing, marriage, procreation, and the use of contraception. The decision was far from radical; it was the logical extension of the Court’s decisions on the right to privacy dating back to the turn of the century. In finding that the constitutional right to privacy encompasses a woman’s right to choose whether or not to continue a pregnancy, the Supreme Court continued a long line of decisions that rejected government interference in life’s most personal decisions.

The 7-2 decision in *Roe* had an immediate and profound effect on the lives of American women. Before *Roe*, it is estimated that “between 200,000 and 1.2 million illegally induced abortions occur[red] annually in the United States.”³ After *Roe*, abortions were no longer relegated to back alleys, and women instead had strong legal protection for obtaining abortions.

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¹ *Roe v. Wade*, 410 U.S. 113 (1973).

² “Viability” is the point in pregnancy at which the fetus is able to survive indefinitely outside the woman’s body.

³ Willard Cates, Jr. and Robert W. Roach, “Illegal Abortions in the United States: 1972-74,” 8 FAM. PLAN. PERSP. 86, 92 (1976) (footnote omitted).

The Backlash

The erosion of *Roe*'s protections began immediately. Well-funded abortion opponents pressed state and federal lawmakers to enact a wide range of restrictive abortion laws attempting to directly or indirectly reverse *Roe*'s protection of women's reproductive choices. Many states adopted requirements that married women involve their husbands in their abortion choice, requirements that young women consult their parents in their abortion decisions, restrictions on abortion coverage in state Medicaid programs and state employee health plans, bans on the performance of abortions in public hospitals, requirements that women wait for a certain period of time, usually 24 hours, after receiving certain state-scripted and biased information before obtaining an abortion ("mandatory delay/biased counseling" laws), and bans on abortion procedures.

Supreme Court Decisions Post-Roe: Chipping Away at the Right to Choose

Lawsuits challenging the constitutionality of these restrictions provided the Supreme Court with numerous opportunities to dilute the fundamental right to choose abortion. It wasn't long before the Court abandoned full protection for the right. Just three years after *Roe*, the seven-justice *Roe* majority was reduced to six in a decision striking down parental consent, spousal consent, and a ban on saline abortions in *Planned Parenthood v. Danforth*.⁴ Four years later, the balance shifted when five Justices held in *Harris v. McRae*⁵ that the denial of Medicaid funding for abortion did not "interfere" with women's rights to make reproductive decisions, and that the state could promote fetal life throughout pregnancy by discriminatory funding. This effectively deprived poor women of their right to choose.

In addition to weakening *Roe*'s protection for low-income women, the Court acted to compromise young women's reproductive rights. In *Bellotti v. Baird*,⁶ a plurality of the Court outlined a general scheme that would meet constitutional muster for states imposing parental consent requirements. As a consequence, over 30 states today require either parental notice or consent for a minor seeking an abortion.

While the Court endorsed lesser constitutional protections for the right to abortion for low-income women and minors, a tenuous majority of the Court continued to invalidate restrictions on the rights of adult, non-indigent women, such as the 24-hour waiting period, biased informed consent, and second-trimester hospitalization requirements in *City of Akron v. Akron Center for Reproductive Health*.⁷ The majority Court also continued to adhere to the trimester framework of *Roe*, under which a woman's life and health must predominate even after fetal viability, in *Colautti v. Franklin*⁸ and *Thornburgh v. American College of Obstetricians and Gynecologists*.⁹

⁴ 428 U.S. 52 (1976).

⁵ 448 U.S. 297 (1980).

⁶ 443 U.S. 622 (1979).

⁷ 462 U.S. 416 (1983).

⁸ 439 U.S. 379 (1979).

In 1988, President Reagan appointed a new Justice to the Court, leaving many to believe that *Roe* would be overturned by a new Court majority. Yet, when *Webster v. Reproductive Health Services*¹⁰ was decided in 1989, although Chief Justice Rehnquist's plurality opinion expressed the view that *Roe* was wrongly decided, a majority of Justices declined to overrule *Roe* explicitly, finding that the issue of the validity of *Roe* itself was not properly before them. The *Webster* plurality did, however, invite states to pass laws banning abortion to test *Roe* so that the Court would be able to directly address the issue. Soon thereafter, the territory of Guam and two states, Louisiana and Utah, enacted statutes criminalizing virtually all abortions. These statutes were blocked, albeit with great reluctance by some federal judges.

After *Webster*, in *Ohio v. Akron Center for Reproductive Health*,¹¹ a six-Justice majority upheld a one-parent notification statute that also contained a provision for a burdensome and potentially lengthy judicial procedure by which a minor could obtain a judge's permission to bypass the parental notification requirement ("judicial bypass"). In *Hodgson v. Minnesota*,¹² the Court invalidated as "unreasonable" a statute that required minors to notify both parents, with no judicial bypass option.

In the early 90's, with the retirement of two Justices, the overturning of *Roe* was a serious threat again. Additionally, anti-choice state legislatures were continuing to pass restrictions on abortion that had already been declared unconstitutional. For example, Mississippi, North Dakota, and Pennsylvania re-enacted mandatory delay and biased consent requirements previously invalidated by the Court in *Akron* and *Thornburgh*; and Pennsylvania went beyond these other states by imposing a spousal notice requirement (without a judicial bypass) for married women.

In 1992, when the Supreme Court granted review of a challenge to the Pennsylvania statutes, *Planned Parenthood v. Casey*,¹³ the parties once again asked the Court either to overrule *Roe* or re-affirm it. Despite the urging of the plaintiffs to retain "strict scrutiny" as the test for abortion regulations, the Court issued an opinion re-affirming *Roe*'s "core holding"—that states may not ban abortions or interfere with a woman's ultimate decision to terminate a pregnancy—but eliminating *Roe*'s trimester framework. In its place, the Court established an "undue burden" standard, which allowed states to regulate abortion prior to viability based on the state's interest in maternal health and potential life so long as those regulations did not impose an "undue burden."¹⁴ The Court explained, "[a] finding of an undue burden is a shorthand for the

⁹ 476 U.S. 747 (1986).

¹⁰ 492 U.S. 490 (1989).

¹¹ 497 U.S. 502 (1990).

¹² 497 U.S. 417 (1990).

¹³ 505 U.S. 833 (1992).

¹⁴ More specifically, the Court stated, "The fact that a law which serves a valid purpose . . . has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. *Casey*, 505 U.S. at 874. Revised September 25, 2004

conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹⁵ Under this new standard, the Court upheld Pennsylvania’s mandatory delay/informed consent law, but struck down the spousal notice requirement because it imposed a substantial obstacle for a “large fraction” of married women who would not otherwise notify their husband.

In 2000, in the most important decision since *Casey*, the Court struck down a Nebraska ban on so-called “partial-birth abortion” in a 5-4 vote. The decision in *Stenberg v. Carhart*¹⁶ held that the Nebraska ban violated the Supreme Court precedents *Roe* and *Casey* in two ways. First, the Court held that the Nebraska ban was unconstitutional because it failed to include an exception—required by *Roe* and *Casey*—to preserve the health of the woman. Second, the Court held that the ban was written so broadly that it banned the safest and most common procedure used starting as early as 12 weeks of pregnancy and thus imposed an undue burden on a woman’s ability to choose an abortion. Although the decision was heralded as a reaffirmation of the core principle of *Roe*, the narrow vote, and in particular, Justice Kennedy’s dissent on the issue of the health exception, was cause for alarm.

Conclusion

It is clear that in the years since *Roe* was decided, there have been cutbacks in the scope of its protection for women’s right to choose abortion. Most significantly, the Court’s 1992 decision in *Casey* made two profound changes: it reduced the level of judicial scrutiny given to laws that restrict abortion and eliminated *Roe*’s trimester system, which outlined the changing balance between a woman’s right to choose abortion and the state’s interest in regulating the procedure as a pregnancy progresses. Yet the *Casey* decision reaffirmed the central holding of *Roe* that women have a constitutionally protected right to abortion, which is the basis for abortion rights today. However, as demonstrated by the close vote in *Carhart*, the right to abortion may be in jeopardy, especially if one or more new anti-choice Justices are appointed to the Court. Such an event might shift the current, precarious Court balance, making it more likely that *Roe* would be overturned.

The Justices of the Supreme Court

William H. Rehnquist, Chief Justice	Appointed by President Reagan 1986
John Paul Stevens	Appointed by President Ford 1975
Sandra Day O’Connor	Appointed by President Reagan 1981
Antonin Scalia	Appointed by President Reagan 1986
Anthony M. Kennedy	Appointed by President Reagan 1988
David Hackett Souter	Appointed by President Bush 1990
Clarence Thomas	Appointed by President Bush 1991
Ruth Bader Ginsburg	Appointed by President Clinton 1993
Stephen G. Breyer	Appointed by President Clinton 1994

¹⁵ *Casey*, 505 U.S. at 877.

¹⁶ 530 U.S. 914 (2000).

Background: International Human Rights Law

International Human Rights Standards

In the aftermath of World War II, the existing nation states of the world agreed to be part of a new world organization – the United Nations – that established member states’ obligation to respect and promote the human rights of their own citizens and of all human beings. Modern human rights law began with the formulation of the Universal Declaration of Human Rights (UDHR), and its adoption as a U.N. General Assembly Resolution in 1948. It is now regarded as legally binding on all U.N. member states.

International human rights treaties grew out of the UDHR. They provide the best legal foundation for women’s reproductive rights. These treaties contain “hard” norms; that is, legal standards to which nearly every world government has legally bound itself. These treaties are not perfect, to be sure, but in theory they are broad enough to be interpreted so as to provide adequate legal protections for reproductive rights. And because they are legally binding, they should be powerful enough tools for advocates confronting regressive laws at the national level.

Examples of binding treaties include: the International Covenant on Civil and Political Rights (ICCPR), ratified by 152 countries; the International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by 148 countries; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by 167 countries; and the Convention on the Rights of the Child (CRC), ratified by 195 countries. There are also key regional human rights treaties, including: the European Convention on Human Rights (ratified by 45 countries of the Council of Europe); the American Convention on Human Rights (ratified by 25 members of the Organization of American States); and the African Charter on Human and People’s Rights (ratified by 53 members of the African Union).

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The human rights guaranteed under one or more of these treaties that are key to establishing the legal foundation for reproductive rights are:

- The right to life, liberty and security;
- The right to health, reproductive health and family planning;
- The right to decide the number and spacing of children;
- The right to consent to marriage and to equality in marriage;
- The right to privacy;
- The right to be free from discrimination on specified grounds;
- The right to be free from practices that harm women and girls;
- The right to not be subjected to torture or other cruel, inhuman or degrading treatment or punishment;
- The right to be free from sexual violence; and
- The right to enjoy scientific progress and to consent to experimentation.

Supplementing the binding norms set forth in human rights treaties, and often contributing to the development of future binding norms, are a variety of “soft” norms. These non-binding norms include the interpretations of human rights treaty-monitoring committees, rulings of international tribunals, resolutions of inter-governmental political bodies, agreed conclusions in international conferences, and reports of U.N. special rapporteurs. Examples of soft norms also include the conclusions agreed to at two major international conferences in the 1990s at which reproductive rights were identified specifically as part of human rights: the International Conference on Population and Development in Cairo (ICPD, 1994) and the Fourth World Conference on Women in Beijing (1995).

Some of the rights listed above may at first glance seem removed from the Center’s immediate mandate. In fact, we use the above standards to support our legal arguments that the following reproductive rights are protected under international human rights law:

- The right to have a safe, legal abortion;
- The right of adolescents to access reproductive health services and information; to autonomy in reproductive decision-making; and to freedom from harmful practices, such as child marriage and female genital mutilation;
- The right to reproductive and sexual health care free of discrimination, coercion and violence, addressing, in particular: (i) the HIV/AIDS epidemic’s impact on women; (ii) quality of care issues; and (iii) overly-zealous “population control” strategies;
- The right to carry a pregnancy to term in safety; and
- The right to freedom from reproductive crimes protected under international human rights and humanitarian law, namely: (i) forced pregnancy; and (ii) involuntary sterilization.

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It cannot (yet!) be said that there is universal agreement that countries are bound under international human rights law to protect the rights listed above. It can certainly be argued (and we do!) that *some* level of legal protection for those rights is available under human rights law in most circumstances.

The most controversial of the rights listed above is women's right to have a safe, legal abortion. As the Center's abortion laws map shows, abortion remains illegal in many countries, particularly low-income countries, and is restricted in various ways in many countries, including, of course, the United States. At the same time, human rights bodies have increasingly recognized that the most restrictive abortion laws clearly violate women's rights to life and health, indicating greater acceptance that abortion is a right, at least in some circumstances. Adolescent reproductive rights also are very controversial internationally. However, there have been great strides in recognizing that given the implications for adolescents' health and well-being, that some legal protection for their right to access information and services exists (although how well implemented this right is varies). The exact contours and limits on all of the rights above are still evolving. A major part of our International Legal Program strategy (see our Strategic Plan) involves an effort to test those contours and limits using the mechanisms available for enforcement of human rights.

Enforcement of International Human Rights

There are a variety of international and regional human rights bodies charged with overseeing compliance with one or more international or regional human rights treaties. These bodies are the first stop in the enforcement of international standards. Enforcement under international law (and even under domestic law in some cases) can be a challenge. While states often agree on paper to comply with international standards, they do not necessarily comply when the issue is "real" for them (think of nuclear test ban treaties...).

Because human rights law relates to how the state treats those within its territory – traditionally, a matter of "national sovereignty" – enforcement can be especially challenging. For the most part, "shaming" states is what ultimately motivates them to comply with a judgment against them by a human rights body. The shaming may be compounded by diplomatic condemnation, by the media, or through NGOs at home publicizing their governments' refusal to comply. In some instances, the international bodies that created the applicable regional or international human rights system (i.e., the Council of Europe, the Organization of American States and the United Nations) have various means at their disposal to induce compliance – economic or diplomatic sanctions, the use of force (such as when genocide occurs) or further investigation and publicity by that body (the Security Council or General Assembly authorizes a special commission or representative to do a more exhaustive report, for example).

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As is the case with domestic judicial systems, human rights bodies act as enforcers of the legal standards found in the treaties. In particular, in some circumstances, these bodies are empowered to adjudicate individual complaints filed by an aggrieved person or persons against his/her/their government. The government in question must have agreed to the body's jurisdiction over individual complaints filed against it – either by ratifying the relevant human rights treaty or by ratifying a separate protocol or addendum to the treaty that deals with the filing of individual claims.¹⁷

The following bodies are among the most important of existing human rights bodies, in part because they are empowered to hear individual claims and thus are the primary international venues for generating authoritative interpretations. They are essential to establishing whether existing human rights treaty provisions adequately protect and ensure reproductive rights. They also are the five bodies on which our international litigation strategy is focused.

- The Inter-American Commission and Court of Human Rights (IACHR);
- The European Court of Human Rights (ECHR);
- The African Court of Human Rights;
- The CEDAW Committee (under the Convention on the Elimination of All Forms of Discrimination against Women); and
- The Human Rights Committee (under the International Covenant on Civil and Political Rights).

How does the United States fit into international human rights, including reproductive rights?

After World War II, the U.S. was, generally speaking, a major supporter of codifying the international human rights principles found in the UDHR. Despite the complicating geopolitics of the Cold War period, the U.S. supported efforts to develop and create enforcement mechanisms through human rights treaties. However, the U.S. had generally chose not to bind itself, following a policy of American “exceptionalism” that continues to this day.

Over time, the U.S. has signed and ratified some of the major human rights treaties, namely:

¹⁷ States that ratify a human rights treaty are usually subject to a “softer” form of enforcement in which a human rights body periodically examines states’ overall compliance with the treaty in question. Its examination is usually based on a report filed by the state and supplemented with information from non-governmental organizations (often called “shadow reports”) and other credible sources the body may consult (U.N. agencies, credible news media, etc). The body issues “concluding observations” or “recommendations” that tend to be regarded in that way – as recommendatory, not binding. On the other hand, in general, states tend to comply with the *specific* findings, conclusions or opinions the bodies’ generate in the case of individual complaints.

- The International Covenant on Civil and Political Rights (ICCPR);
- The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and
- The International Convention on the Elimination of All Forms of Racial Discrimination.

The U.S. has signed, but NOT ratified (and thus is not legally bound to) the following major human rights treaties:

- The International Covenant on Economic, Social and Cultural Rights;
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);
- The Convention on the Rights of the Child; and
- The American Convention on Human Rights (the main human rights treaty of the Organization of American States of which the U.S. is a member and major supporter).

Even in the case of the treaties the U.S. has ratified, it has sought to limit the treaties' legal effect. For example, the U.S. has not agreed to the Optional Protocol to the ICCPR which would allow the filing of individual complaints against the U.S. for violations of that treaty if domestic remedies are first exhausted. The U.S. also tends to enter legal "reservations" to human rights treaties that expressly limit their domestic legal effect. Finally, the Supreme Court has held that international treaties are "non-self-executing" (i.e., in most instances, not enforceable in U.S. courts absent specific authorizing legislation). The above factors mean that there are limited legal bases for using international human rights law to remedy reproductive rights violations in the U.S. context.