A TEN-YEAR RETROSPECTIVE
REPRODUCTIVE RIGHTS AT THE START OF THE 21ST CENTURY:
Global Progress, Yet Backpedaling on Gains in U.S.

CENTER FOR REPRODUCTIVE RIGHTS

I. INTRODUCTION

During the first decade of the 21st century, emerging international legal standards provided broad support for reproductive health as a right essential to the freedom and self-determination of women, recognized maternal mortality as a human rights violation, and established public funding as an essential tool in securing access to reproductive health in practice.

But as the international legal foundations for reproductive rights grew increasingly robust, developments in the United States regrettably moved in the opposite direction. With its 2007 decision in *Gonzales v. Carhart*, the Supreme Court discarded decades of precedent requiring abortion restrictions to include a health exception, signaling that women's health is no longer a paramount concern for the Court. Then, at the close of the decade, healthcare reform efforts sparked a vicious national debate about funding and insurance coverage for abortions, indicating that the United States may miss a critical opportunity to lead this growing international recognition of the centrality of reproductive rights to the freedom of women.

II. 2000-2010: A TIME OF INCREASING HOPE FOR REPRODUCTIVE RIGHTS AROUND THE WORLD

The last decade saw groundbreaking decisions from national courts and legislatures around the world, as well as regional and international human rights bodies. Emerging norms in these decisions include a wide range of human rights – the right to equality, dignity, heath, autonomy, freedom from cruel and degrading treatment, and non-discrimination. This important new legal framework provides increasingly robust protection for women's health and reproductive self-determination internationally.

Abortion rights gain traction globally

Over the last decade, countries around the world have recognized that abortion bans deny women their fundamental human rights. In 2005, Ethiopia expanded its abortion law to permit abortions in cases of rape, incest, or fetal impairment, as well as where a woman lacks the capacity to raise a child due to a physical or mental infirmity or her status as a minor. In 2006, the Constitutional Court of Colombia struck down as unconstitutional a total abortion ban, finding it infringed upon a range of rights protected by Colombia's constitution and international human rights treaties. According to the Colombian court, abortion must be permitted when a

Every year,
maternal mortality claims **536,000** women's lives. **99%** of these deaths occur in developing countries.†

5 million women
are hospitalized each year for treatment of abortion-related complications.

Worldwide,
48% of all induced abortions are unsafe. More than **95%** of abortions in Africa and Latin America are performed under unsafe circumstances.*

215 million
women in the developing world have an unmet need for modern contraceptives. In the least developed countries, the rate of unmet need for contraception is as high as **25%.***

Stat Sources:
† *The Millennium Development Goals Report 2009*
* *Guttmacher Institute, Facts on Induced Abortion Worldwide, October 2009*

pregnancy threatens a woman's life or her physical or mental health, and in cases of rape, incest, or grave fetal malformations incompatible with life outside the womb.

Notably, the Colombian abortion decision was grounded in the right to dignity, the right to free development of the individual, and the rights to life, health, and bodily integrity. The court also acknowledged that other fundamental rights, such as the right to work and the right to education, are impacted by women's ability to control their reproductive lives. As the court explained, "women's sexual and reproductive rights have finally been recognized as human rights." The court further stated that "sexual and reproductive rights emerge from the recognition that equality in general, gender equality in particular, and the emancipation of women and girls are essential to society. Protecting sexual and reproductive rights is a direct path to promoting the dignity of all human beings, and a step forward in humanity's advancement towards social justice."

Women's right to abortion in certain circumstances also became grounded in a broader range of fundamental human rights. In *K.L. v. Peru* (2005), the U.N. Human Rights Committee held that denying a woman a therapeutic abortion constitutes cruel, inhuman, and degrading treatment. K.L., a Peruvian adolescent carrying a fetus with the fatal anomaly anencephaly, was denied a therapeutic abortion despite the legality of abortion for health reasons under Peruvian law, and her doctor's recommendation that she terminate the pregnancy to preserve her physical and mental health.

In its first abortion decision, the Human Rights Committee ruled that Peru violated K.L.'s right to be free from cruel, inhuman, and degrading treatment under Article 7 of the International Covenant on Civil and Political Rights. The Committee found that Article 7 relates not only to physical pain but also to mental suffering and government officials could have foreseen that denying K.L. an abortion would cause her pain, distress, and ultimately the deep depression that beset her after delivery. This framework for protecting reproductive freedom provides a compelling foundation for redressing the suffering that results when a woman is denied a therapeutic abortion.

A growing consensus that gender equality requires reproductive freedom

Lack of access to family planning is generally understood as a violation of the right to health. However, treaty-monitoring bodies have also recognized that the ability to access contraceptives impacts gender equality and that lack of access constitutes a form of gender discrimination. In its General Comment 28, issued in 2000, the Human Rights Committee discussed women's right to equality in exercising privacy rights, with particular reference to their reproductive lives and functions.

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has also categorized lack of access to contraceptives as a form of discrimination against women. For example, in its 2006 Concluding Observations to the Philippines, the CEDAW Committee expressed concern about, among other things, "high fertility rates, inadequate family planning services, the low rates of contraceptive use and the difficulties of obtaining contraceptives."

Internationally, family planning is increasingly being understood in terms of equality and non-discrimination, in addition to women's health.

Maternal mortality violates women's basic human rights

High rates of maternal mortality have increasingly been recognized as violating women's rights. This is reflected in the June 2009 resolution of the UN Human Rights Council on "Preventable Maternal Mortality, Morbidity, and Human Rights." UN treaty-monitoring bodies have also called upon governments to ensure women's access to maternal healthcare and to abolish social practices that negatively impact women's health. Nearly all of the treaty monitoring bodies have expressed concern regarding maternal health and recommended that State parties implement measures to improve it. For instance, in 2008, the CEDAW Committee expressed concern about Ecuador's high incidence of maternal mortality and noted with concern that "the magnitude of unsafe abortion in the country and its effects on maternal mortality are under recorded and unknown."

III. PAIRING RIGHTS WITH ACCESS: ABORTION FUNDING AROUND THE WORLD

Twenty-one countries in Europe ensure that disadvantaged women have access to abortion services by providing funding. Over the past decade, national courts and governments throughout the world have increasingly followed suit, recognizing that the right to abortion cannot be genuinely assured without access to abortion services for all women. Following its landmark constitutional decision, Colombia now provides funding for the range of permissible abortion services. Mexico City and Nepal provide funding for poor women as an element of the abortion right itself, and South Africa similarly ensures access by providing free abortion care at designated state hospitals and clinics.

Mexico City and Nepal's policies exemplify the emerging tendency to buttress abortion rights by providing funding to make services accessible. In 2007, as part of Mexico City's measure to legalize abortion, legislators sought to make abortion available to all women, including those who could not afford to pay for the procedure. The law now provides access to abortion for ten million women in Mexico City and its suburbs as well as to residents of Mexico who travel to Mexico City.

In 2009, the Supreme Court of Nepal ordered the government to create a fund to ensure access to abortion. Abortion was legalized under Nepalese law in 2002, but no provision was made for funding at that time. Nepalese women faced numerous barriers to obtaining an abortion, including a limited number of providers and prohibitive costs. In response, Nepal's Supreme Court ordered the government to enact a comprehensive abortion law to guarantee women access to safe and affordable abortion services. The Court's ruling specifically required the creation of a fund to cover the cost of abortion for rural and poor women. The fund must include enough resources to meet the demand for abortion services and to educate the public and health service providers about the abortion law. With this ruling, the court took concrete steps to address the disparity that existed between a legal right and the ability of all women – not just the privileged – to access that right.

IV. A SHARP CONTRAST: NARROWER RIGHTS AND A VICIOUS FUNDING DEBATE IN THE U.S.

The *Carhart* cases: Supreme Court signals women's health and autonomy are no longer a priority

At the beginning of the decade, in *Stenberg v. Carhart* (2000), the U.S. Supreme Court struck down an abortion procedure ban that failed to provide exceptions to preserve a woman's health. Seven years later, in *Gonzales v. Carhart*, the Court upheld a similar ban despite the absence of a health exception.

In her dissent, Justice Ginsberg referred to the decision as "alarming" because it refused to seriously consider precedent, failed to safeguard women's health, and "reflected ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited." Justice Ginsberg reminded the court that "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." Justice Ginsberg's understanding of the right to abortion and to access abortion services is in keeping with international norms. Unfortunately, a majority of the United State Supreme Court disagreed, signaling that women's autonomy is no longer a paramount concern for the Court.

Healthcare reform extends discriminatory funding restrictions into the private insurance market

In the United States, the constitutional right to abortion is undermined not only by restrictive legislation, but also by bans on the use of public funds, facilities, and employees for abortions, and restrictions on insurance coverage for abortions. Recent healthcare reform efforts sparked a fierce debate over the status of funding restrictions and insurance coverage for abortion, revealing that the U.S. remains divided on abortion funding, in contrast to emerging international norms.

Congress and state legislatures may seek to impose restrictions on access to abortion, subject to review by the courts. Federal funding for abortions is only permitted in cases of rape or incest, or where an abortion is necessary to save a woman's life when it is endangered by a physical disorder, injury, or illness. States may opt to provide their own funding for abortion services above and beyond federal funds, and 17 states currently do. However, 12 states restrict abortion coverage in health insurance plans for public employees, and 5 states require policyholders to purchase a separate policy rider or forego abortion coverage in their private insurance plans.

As health care reform legislation was debated in Congress at the end of 2009 and the beginning of 2010, the issue of insurance coverage for abortions ignited controversy and became a stumbling block for much broader reform efforts. Bitter and acrimonious national debate centered on language introduced by Senator Ben Nelson (D-NE), requiring policyholders desiring abortion coverage to pay two separate premiums – one payment for the bulk of the policy coverage, and a separate payment for the part of the policy that covers abortions. The provisions also impose onerous accounting procedures on policy providers, ostensibly to ensure that federal funds are kept segregated from funds that go towards abortion coverage. Proponents claimed these provisions maintain the "status quo" – referring to the federal funding ban imposed by the Hyde Amendment, an appropriations rider that Congress renews every year.

In reality, the provisions take the existing federal funding ban and extend it even further, into the private insurance market.

This will increase the number of women for whom financial barriers present a serious obstacle to obtaining a legal medical procedure. It will also stigmatize abortion by requiring policyholders to jump through an unnecessary hoop in order to obtain abortion coverage. Even worse, policy providers, faced with cumbersome accounting requirements, may opt to cease providing abortion coverage at all – effectively denying millions of women access to a constitutional right.

Ultimately, the healthcare bill passed with a razor thin margin – and only after Rep. Stupak and his followers secured President Obama's promise to issue an executive order affirming restrictions against taxpayer money going to abortions. By promoting misleading interpretations of the Nelson language, these legislators managed to obtain an executive order that further entrenches the misguided and stigmatizing Hyde Amendment strictures within national policy.

This recent debate over insurance coverage for abortions makes it painfully obvious that the United States has failed to keep up with international norms on abortion rights and must re-examine its funding policies if it is to continue its leadership on women's rights and autonomy.

V. CONCLUSION

The last decade has seen some setbacks in the area of reproductive rights in the United States. The Supreme Court's decision in *Gonzales v. Carhart* raises the concern that the constitutional right to abortion is vulnerable to assault. Meanwhile, the abortion debate sparked by healthcare reform reveals that the American public and their representatives have not achieved consensus on the issue of abortion funding.

Internationally, however, funding for abortion services has increasingly been recognized as a necessary tool for ensuring access to a fundamental human right. Moreover, the legal foundations for reproductive rights have grown more robust, with decisions by international bodies and national courts acknowledging bases in rights to equality, dignity, health, autonomy, freedom from cruel, inhuman, or degrading treatment, and non-discrimination.