# TOWARD
# A MORE CIVILIZED SOCIETY:
### Reproductive Freedom as an American Value

Transcript of the presentation *About Face: The United States in full retreat on abortion rights while other countries make surprising advances*, held on November 13, 2007 with speakers David Cole, Professor of Law at Georgetown University Law Center, and Nancy Northup, President of the Center for Reproductive Rights. The panel was moderated by Roberta Schneiderman, Emeritus Board Member of Planned Parenthood of New York City.

**ROBERTA SCHNEIDERMAN:**
Good evening and thank you for coming. I'm Roberta Schneiderman and I welcome you here tonight on behalf of myself and my husband, Irv Schneiderman, as well as for Planned Parenthood of New York City, our Board Chair, Laura Philips, and our President, Joan Malin. I also hope that you can stay after our presentation for the reception to meet and talk with our speakers.

This program tonight is the ninth in a series that we call *Toward a More Civilized Society*, which began back in 1999. The idea then and throughout has been to create a forum for prominent leaders and thinkers to come together and discuss the idea of choice in its broader context – not simply a medical procedure or a narrow women's issue but part of a society that is tolerant, open, and inclusive, and where religious beliefs of all sorts – and no religious beliefs – are also accepted.

We were hoping that these forums would also help us move away from the very hardened partisan divide of this issue, and we try very hard to be apolitical. Our first speaker in this series was a Republican – a pro-choice Republican – Governor Thomas Kean of New Jersey. But, what we wanted to happen didn't happen. The issue of choice now in our country is a point of conflict and rage, and we are not vaguely optimistic at this point. The most positive vision about choice is now abroad, in both faraway places and the most unexpected places. This evening is really more a time of reckoning to find out where we are. Sadly, the idea of "Toward a More Civilized Society" is still very much only "toward."

Tonight, David Cole will talk to us about the situation here at home. Nancy Northup will then follow him and talk about the situation abroad and far away. We'll then take questions from the audience.

David Cole is a Professor of Law at Georgetown University Law Center, the Legal Affairs Correspondent for The Nation, a regular contributor to The New York Review of Books, and is perhaps better known to many of you through his comments on All Things Considered, which we get here in New York through WNYC. Before Georgetown, David was a staff member at the Center for Constitutional Rights, where he is now a volunteer attorney. As such, he has litigated significant first amendment cases, including those related to reproductive rights, and just this past Friday morning argued a major case on rendition before the Second Circuit. David is a graduate of Yale Law School; his recent book, Less Safe, Less Free: Why America is Losing the War on Terror, has just been published by The New Press.

**DAVID COLE:**

Thank you, Roberta. "Less Safe, Less Free" could be the beginning of a title for almost anything today. It could be "Less Safe, Less Free: Reproductive Choice after *Gonzalez v. Carhart*." Someone also suggested "Less Safe, Less Free: Ten Years into Marriage." You could come up with anything.

When Roberta asked me to address you on the topic of choice, I thought it might be a relief from my usual topics these days, which is terrorism, national security, and civil liberties. But the more I read about the *Gonzalez* decision, the scarier this became. What it portends for reproductive choice, I think, is terrifying enough. I believe that the rationales that Justice Kennedy uses for the majority opinion seem to have no obvious stopping point, but what it portends for individual rights protections more generally is even more terrifying.

The Court has now shown itself willing to overrule 5-4 decisions in which Justice O'Connor was the deciding vote. As many of you know, Justice O'Connor was the deciding vote on virtually all the 5-4 decisions that protected individual rights in the last ten to fifteen years. And, the Court is willing to dissimulate in doing so – in other words, to effectively overrule prior decisions without saying and admitting that it is doing precisely that. Some of you may remember that Chief Justice Roberts spoke very grandly during his nomination hearings before the Senate Judiciary Committee about respect for

precedent, *stare decisis*, and minimalism. But, when you read a decision like *Gonzalez,* you have to wonder where that went once Roberts was appointed.

At present, the only check on this is Justice Kennedy, the author of the majority opinion in *Gonzalez*. He is not a radical conservative, but just a conservative, which distinguishes him from the other four radical conservatives on the Court: Justice Scalia, Justice Thomas, Chief Justice Roberts, and Justice Alito. So everything depends – at least in the short-term – on Justice Kennedy.

That's scary enough after you read *Gonzalez*. But over the long term, of course, it's not Justice Kennedy that is going to be determinative. Roberta said we're trying to be apolitical here. But if a Republican President gets to replace Justice Stevens, the oldest justice on the court, or Justice Ginsberg, or Justice Souter, there will be a solidly conservative five-vote majority to not only restrict *Roe* and *Casey* and the reproductive choice that they protect, but to cut back on a whole range of important and fundamental constitutional rights.

What I'd like to do this evening is to briefly discuss the *Gonzalez v. Carhart* decision and its backdrop, and then make three points. First, the impact of *Gonzalez* in the long term ultimately depends as much on <u>us</u> as it does on the Court. Secondly, we should recognize that the battle over reproductive choice is largely a political one and not a legal one, even though the point of *Roe* was to make choice an individual constitutional right and not a matter of political legislative battle. In fact, it has remained a political battle and is likely to be a political battle for the foreseeable future, even if *Roe* is not further eroded.

Thirdly, I think we need to expand our framework when we talk about reproductive choice so that the focus is not on abortion itself. That's where our opponents want the focus to be. They want the focus to be on abortion, and, as the partial birth abortion debate illustrates, on the specific procedures and gruesome realities. I think we would do better by expanding the focus on the whole range of policies that affect women's autonomy – and reproductive freedom and choice more generally. This would include work/family issues, parental leave, health care, sex education, insurance coverage for contraception, and the like.

Let me start by briefly outlining the *Gonzalez* decision. For many of you this is unnecessary, but for some it might be helpful. At issue in *Gonzalez v. Carhart* was a federal law banning a particular method of abortion used in some second trimester – and, with some dispute – maybe some third trimester situations, called intact D&E or intact dilation and evacuation. The procedure is a gruesome one in which the fetus is partially extracted and then the skull is crushed so that the full fetus can be removed from the womb. The more common form of D&E, which is the most traditional form of second-trimester abortion, is non-intact D&E. This is also a gruesome procedure in which the body of the fetus is dismembered in the womb and then the parts are extracted thereafter.

The federal law at issue in *Gonzalez v. Carhart* bans intact D&E, which is the more rare procedure – or at least that's what the Court said – and, it significantly does not include an exception for situations in which doctors determine that the health of the mother requires intact D&E. Traditionally, the Court has held that even where it is permissible for a state to ban abortion, it always has to maintain an exception for the life and health of the mother. However, in this situation, Congress expressly did not include an exception for the health of the mother.

Seven years prior to *Gonzalez*, the Supreme Court had narrowly struck down a similar law from Nebraska in its *Stenberg* decision, precisely because it didn't include an exception for the health of the mother. Justice O'Connor provided the fifth vote in a 5-4 majority. Justice Kennedy wrote an impassioned dissent and reportedly felt betrayed and tricked. He felt that he had gone along in *Casey* to uphold *Roe*, but he did not think it would go this far. Seven years later, the only real difference is that O'Connor has been replaced by Justice Alito. And, Justice Kennedy writes another impassioned decision – not as a dissent this time but as the majority.

While there is some medical disagreement about whether this particular method of abortion is medically necessary for the particular circumstances of some women, the weight of medical authority, however, is clearly on the side that it is medically necessary. In the first partial birth abortion decision regarding the Nebraska law, the Court cited the substantial medical opinion that the procedure is sometimes necessary for the health of the mother, and that the Constitution requires that this choice be left to the woman and her doctor. The Court reasoned that it would be risky to prohibit that procedure and therefore the woman should be able to choose. If it's unclear whether a procedure is necessary, that is usually enough risk to require that a health exception permit women to use this procedure. As Cilla Smith (who argued

the *Gonzalez v. Carhart* case on behalf of the Center for Reproductive Rights) said, the rule is that when there is doubt, the "tie" usually goes to the woman.

This time around there was the same medical disagreement. The medical establishment has said that in some instances, D&E – specifically intact D&E – is necessary for the health of the woman. However, Congress this time was able to find a few people, most of whom had never performed an intact D&E, to say that it's not necessary. So, the Court now says that in light of this disagreement we should defer to Congress – and not to the woman and her doctor.

Congress said that it's never necessary for the health of the woman to have this kind of abortion procedure, contrary to the record. Congress also said that no medical school even trains people in this procedure – also flatly contrary to the record. But Congress can make whatever findings it wants to. It doesn't have to actually listen to the evidence that is presented to it. Anyone who's attended a Congressional hearing knows that most of the time when you are offering evidence or testimony, there are no Representatives or Senators present. They're too busy raising money back home, so they have a few aides present to listen. So, it's not exactly the best way of finding facts. But Justice Kennedy in this decision said that if there is some disagreement about this procedure, the "tie" now goes to Congress.

The reaction to *Gonzalez*, I think, is interesting. Usually in a case like this, everybody tries to spin it to their advantage to declare some sort of victory. However, both sides in this case declared defeat. Not quite, but close to that. The pro-choice side certainly declared that this was a terrible, terrible defeat. And the pro-life said this was at most a very minor victory.

Pro-choice advocates know that this was the first decision to uphold a criminal ban on a second trimester abortion since *Roe v. Wade* established the right to abortion, and that it signaled a willingness on the part of the newly constituted Roberts Court to strip back protections of *Roe* that were affirmed in *Casey*.

As noted by Michael Paulson, a pro-life advocate and law professor, the law at issue banned only a particular method of abortion, and not abortion itself, so it would not save the life of a single fetus. Which is true. In fact, Paulson emphasizes that the Court upheld the ban only because it did not prohibit women from obtaining abortions, and said that an as-applied challenge was available if, in a particular case, this ban had the effect of banning the safest form of abortion for a woman. So, Paulson says, no

big deal, and at the end of the day it doesn't save the life of a single unborn child, which is presumably their goal.

So, which is it? Is it a huge defeat or a minor victory? I think that really depends on what is done with it in the future, and it's very, very difficult to predict that. I personally gave up predicting what the Supreme Court would do in the future around the time of *Bush v. Gore.* I repeatedly predicted that the Court would never get involved in the case, they would never stop the recount, they would never interfere in such a political matter, and certainly would not vote along party lines. As it turns out, I was wrong on every one of those predictions, so I've stopped predicting. But the reality here is that Paulson is right in stating that this does not actually save the life of any unborn child or fetus, and it is also the case as some have pointed out that this is a rarely used procedure. So the direct consequences are not terribly great.

However, the reasoning that Justice Kennedy used in upholding this criminal ban on a method of abortion is deeply troubling, and potentially very, very dangerous to the principles that underlie *Roe* and *Casey*. Just to review, those principles that the Court established are that the right to choose abortion is a constitutionally protected right, pre-viability, for first and second trimester abortions. They also said that the government has a legitimate interest in protecting the health of the mother and the potential life of the fetus, but cannot impose an undue burden, as Justice O'Connor put it, on a woman's right to choose to terminate her pregnancy pre-viability. Even in post-viability situations where the government may ban abortion, the ban must be subject to an exception for the life and health of the mother. This is what *Roe* and *Casey* together essentially stand for.

What does *Gonzalez* do to these principles? First of all, it upholds an outright ban on a pre-viability method of abortion – not post-viability where they had said some bans are appropriate, but pre-viability. Second, it ignores the substantial medical evidence that was offered that procedure is necessary in some instances for some women, and therefore does not require a health exception.

Third – and I think that this is the most offensive part of the opinion – it recognizes the government's interest in protecting women from their own regret, including language about the special bonds between women and their children. Basically, Justice Kennedy asserts the very kinds of stereotypes about women that had in the past led to invalidation of legislation based on these stereotypes as a violation of

the equal protection clause. He says that since there is some evidence (but not particularly reliable evidence) that some women regret having abortions after the fact, surely we should protect those women. Of course, this law doesn't protect those women by providing them with more information so they might make a more informed choice, but instead, protects those women by denying them the right to choose this method, even where their doctor tells them that this is the safest method to use.

Fourth, the decision permits, and this is also deeply troubling, a prohibition that Michael Paulson argues saves not one fetus, and is ultimately defended in the name of community notions of morality. Remember, in *Roe* and *Casey* the Court said the only legitimate government interests are protecting the health of the woman and the life of the fetus. Well, this decision does neither. It doesn't protect the life of the fetus, and it certainly doesn't protect the health of the woman. But Justice Kennedy said that it may protect the sensibilities of those in the community who believe that D&E is a procedure itself laden with the power to devalue human life, and therefore implicates ethical and moral concerns. Basically, he states that moral opposition to abortion is now a legitimate state interest, serving neither the interest of protecting the health of the woman or the interest of protecting the life of the fetus.

Justice Kennedy wrote the decision in *Lawrence v. Texas*, which struck down a ban on consensual homosexual sex, stating that the majority may not use the power of the State to enforce its moral view on the whole society through the operation of the criminal law. And yet that's exactly what he upheld in *Gonzalez* – restricting abortion in the name of morality, protecting women from the regret that they might otherwise face, and deferring to the legislature whenever they can find some kook doctor who will say that there's no danger to women's health. All of this could have revolutionary implications for restrictions on the right to choose.

There's no stopping point on any of these. If the community thinks it's immoral to do an intact D&E, why wouldn't they also think it's immoral to do a non-intact D&E? And, why wouldn't they also think it's immoral to do any form of abortion? If women sometimes regret having intact D&E abortions, surely they also sometimes regret having non-intact D&E abortions, or first trimester abortions, and so on and so on. The notion of deference to Congress in the context of a fundamental constitutional right is also very, very dangerous.

So that said, what can we say about the future? As I suggested at the outset, I think the first thing to say is that in the short term everything turns on Justice Kennedy. And, it may well be that Justice Kennedy doesn't want to go much further. After all, Justice Kennedy did join the majority in *Casey*. He is unlikely, I think, given his particular role right now, to want to go back beyond *Casey.*

Jan Crawford Greenburg, who covers the Supreme Court, wrote a very interesting piece in her blog about talking to Kennedy right after the first *Carhart* decision came out, in which he clearly felt that he had been betrayed in some way. Maybe this is just one sort of peculiar idea of Justice Kennedy's, and he's not willing to go much further, so there's no obvious logical stopping point. But Justice Kennedy is the stopping point. So, in the short term, maybe we're okay. Maybe. Over the long term, of course, it depends, as I suggested earlier, on who replaces Kennedy or any of the four moderate to liberal justices on the Court.

The rationale that Kennedy has now put out there will certainly be employed by the anti-choice movement – to argue in favor of very, very restrictive informed consent, waiting periods, all kinds of restrictions designed to make it difficult or impossible for women to get abortions. Those rationales are now there, and can be employed by other justices and other majorities to move the Court significantly to the right on this subject. That, of course, depends on us, and depends in particular on who is the next President in the shortest term. Over the long term, what are viewed as acceptable or unacceptable restrictions on reproductive choice – from a cultural standpoint – will have a very significant impact on how far the Court would be willing to go, even with another conservative voice.

This leads to my second point, that the right to abortion is a political struggle. Precisely because we won a legal constitutional right in *Roe*, the anti-choice movement had the harder struggle afterward. But, because of *Roe*, their constituents were more motivated, and we have instead been on the defensive seeking to keep as much of *Roe* as we can. The fragility of the Court's five-vote majority at this point ought to disabuse us of any comfort about being on the defensive, and should, I think, make it clear that this is a political battle. As much as we would like this right to be **instantiated** so that it is not subject to political struggle, it is and will be such.

We need to engage in that political battle, both at the level of retail politics – such as who will be the next President – but also at the level of cultural politics, public education, lobbying, and the like about

the role that this decision plays in the meaningful equality that women are able to achieve in this society. Justice Ginsberg does a tremendous job in her dissent in *Carhart* in developing that theme. If we just taught about her dissent in high schools and colleges across the country, it would be incredibly important.

My final point is that we need to think about reproductive choice more broadly. The focus on the moment of abortion is the anti-choice movement's strongest ground. I remember the first time I heard a discussion about the partial birth abortion statute, and thought, "All that they have to do is describe the procedure and they've won." And, I think that to a certain extent that's true. I think the more that the debate and the discussion is focused on abortion, the more difficult it is for us to prevail.

The decision to terminate a pregnancy is a difficult one for everyone that I've known who has made that decision, but it doesn't mean that it ought not be a right. It means that we need to think about how we talk about it – maybe differently. And – I borrow heavily here from my wife Nina Pillard who teaches at Georgetown Law School and has written an excellent Law Review article on this called "Other Reproductive Choices" – we need to draw the camera back and expand the field of vision to talk more broadly about all the factors that make reproductive choice meaningful and accessible for women in the United States today.

Some things we might consider taking on are challenging state-sponsored sex education that reinforces stereotypical notions of male and female roles in sex, including abstinence-only sex education. This state-sponsored sex education instantiates the very sex role stereotyping that the Court has held invalidates all kinds of federal and state laws. And yet, here we are providing it to young people at a particularly important time in their developmental lives. Second, we must challenge comprehensive health plans that fail to cover prescription contraception as a denial of equality to women.

Third, and most significantly I think, we need to look at the whole range of work/family issues that are critical to deal with if we are going to make it possible for women to have truly meaningful reproductive choices and equality in the world at large. This includes things like paid leave to care for dependents; affordable and subsidized child care; extended school days for children; better part-time jobs; and reversing the trend toward longer work weeks. The Supreme Court recognized that these kinds of issues are central to women's equality in a case called *Nevada v. Hibbs*, which upheld the Family Medical

Leave Act on the grounds that it was permissible as a way to try to restore the balance between men and women in the work force by providing everybody, not just women, but everybody with a guaranteed leave to care for dependents. The reason it affected women and responded to inequality for women was because women tend to be the ones who do the majority of dependent care. But, the sex neutral response was one that was designed to both protect women's jobs and also encourage men to take these leaves as well.

Judge Learned Hand, probably the greatest judge never to be on the Supreme Court, once said that constitutional rights are only as strong as the people who stand up for them. I salute Planned Parenthood of New York City, the Center for Reproductive Rights, and those in this room for standing up for a woman's right to choose – perhaps the most important decisional right a woman has in her life. It is only through our efforts that we will maintain that right as a meaningful constitutional protection for generations to come. Thank you.

**ROBERTA SCHNEIDERMAN:**
Thank you very much, David.

In introducing Nancy Northup, I'm going to quote from something she said recently that ties right into our topic tonight. She was interviewed by the press a very short time after the *Gonzalez* decision, and her response was, "This is a backwards step, and out of step with the rest of the world."

Nancy Northup is President of the Center for Reproductive Rights. Under her leadership, the Center filed a very well-publicized case against the Food and Drug Administration for failing to make emergency contraception (EC) available over the counter. They were ultimately forced to do this. It was not released over the counter but is now "behind the counter" without a prescription. But it was as a result of this case that the FDA was finally forced to come up with documents and to go ahead and release EC. Also, another very prominent case in which the Center prevailed was in the first abortion case ever brought before the United Nations Human Rights Committee.

Prior to joining CRR, Nancy was with the Brennan Center for Justice of NYU Law School, where she was founding director of the Democracy Program. Nancy is a graduate of Columbia Law School, and now teaches a seminar there in reproductive rights.

**NANCY NORTHUP:**
Thank you, Roberta.

David gave us the setup from the United States and where we are today, and talked about widening the lens in this country to include the broader array of reproductive rights issues. I'm going to talk, too, about widening the lens to take us beyond the borders of the United States to see what's happening elsewhere, because when we broaden that lens there is good news in what is happening in transnational law around recognizing abortion as a human right. There's been a movement internationally for decades about recognizing reproductive rights as human rights but more recently also about recognizing abortion within the human rights framework.

A few weeks ago I was traveling to London for a maternal mortality conference – a global conference on the continued high rate of women's deaths worldwide related to pregnancy, now nearly 500,000 annually. My son said to me, "Well, what are you going to be talking about at this conference?" When I told him that I was going to talk about abortion as a human rights issue, I got "the look," as in "You know, Mom, this time you've gone too far."

It's not surprising that my son would give me the look. Although he grew up in my house, he nevertheless lives in a culture that is shaped by the kind of cases that David was talking about. I knew he wasn't going to believe me. So, we went to Google and did a search on "abortion as a human right." You can all go home tonight and do this yourselves. One of the first things that comes up is about a Brazilian conference a couple of years ago on abortion as a human right called "Possible Strategies in Unexplored Territory." The second thing you'll read about abortion as a human right is from Peru and Colombia. Then you get to a whole bunch of blogging on "Amnesty International Mulls Abortion Rights Crusade." Another thing I'm going to touch on is that some major human rights groups have taken up abortion as a human rights issue. You can go further on Google and see some of the other cases we're going to talk about today.

Of course, you will soon come to the stumbling block, which is number six right now on Google: "Fox News, US to UN: Abortion Not a Human Right." So, that is what we're up against and are going to be working with, and I think that it brings an opportunity for us to widen our perspective.

It's hard to fully describe the international law situation and what's been happening in abortion in a brief presentation. But, I'd like to talk about three aspects of international law and how they relate to our issue.

One of those is **international law treaties** – agreements that governments have said they're going to abide by. In this case we're talking about human rights treaties. That's sort of the law on the books. Then there are the political institutions that are interpreting those laws and trying to get governments to go along with them. In that case, we have the UN human rights bodies that monitor the treaties. There are regional human rights treaties in the Americas as well as in Europe and Africa. In some instances you can bring cases to those bodies and try to get judgments for individual people. So, we'll consider the political structures that give human rights some life.

But the third area that really ties in to what David was talking about is human rights as a discourse – as a way that people organize and assert their rights, think of themselves, and what they're entitled to. And that is also very important.

Sometimes people say, "Oh, God! The UN and those treaties" and "who cares – and what are you going to get anyway?" In some ways, I'll be telling you today where we're going as a matter of law. But it's also where we're going as a matter of talking to people about their rights, mobilizing around them, and changing the conversation so that you get 27 Google hits on "abortion as a human right."

To tell the story, any story, which actually is also what David said, begins with the facts. In any kind of brief, you're going to read the facts first. And it usually should be that when you're done reading the facts, you've won or you've lost, before getting to the law. One of the reasons why abortion has come to be seen as a human rights issue around the world is that the facts out there are well-known and compelling – facts that we have lost connection with here in the United States since the legalization of abortion with *Roe v. Wade*.

Some of these facts and numbers deal not only with abortion but with pregnancy in general. Because of the health care system in the United States, we forget how challenging to women's life and health pregnancy itself can be. As I had mentioned, about 500,000 women a year die worldwide in connection

with pregnancy. Those rates are almost entirely in the global south and in poor countries. In a place like Afghanistan, women now face a 1 in 6 lifetime risk of dying from pregnancy-related causes; this compares to 1 in 5,000 in the United Kingdom. This is completely related to the kind of obstetrical care women can get. So you have a whole sense of the risks that can come with pregnancy.

We teach that pregnancy is *sui generis* to the human condition and thus *sui generis* to the law. Even for those of us who think about these issues all the time, it's a very unusual thing. It's not a disease-- but it can kill you. It's not a disease -- but it can present huge life threatening consequences. So it begins around the world with the real picture of women who don't have access to health care in connection with their pregnancy. That means some women will need to access abortion for the very reasons of their health. Secondly, one of the leading causes of maternal death worldwide is unsafe abortion; 70,000 women die each year in connection with unsafe abortion. In countries such as Kenya, where abortion is illegal, statistics show that it is a leading cause of maternal death.

As you look around the world, the need for abortion can stem from other rights violations, such as sexual assault and rape in connection with war and general instability. Other factors include a lack of access to contraception, and lack of access to sex education. Because of these facts, women seek abortions – about 46 million abortions worldwide every year. About half of those, nearly 20 million, take place in countries where it is illegal and unsafe. We know that the law does not affect women's decisions that are so central to their lives. These facts on abortion have made countries deal with this issue, and have made the human rights system deal with it, because when countries go before UN human rights committees, they have to answer to the fact that women in their countries are dying of completely preventable deaths because of unsafe abortion.

So, Chapter One is the facts, the real world, and the genesis of the whole thing. Chapter Two is the development of policy agreements that started happening in the early 1990s at these global UN conferences. The first was a conference in Cairo in 1994 on population and development, followed by a conference on women the next year in Beijing. For the first time at these two international conferences, the governments of the world recognized reproductive rights generally as human rights. And, for example, at Cairo they also began to tread into the area of saying there's a problem with unsafe abortion. As a result, 179 governments, including the United States, signed on to what they called the Programme

of Action coming out of this UN conference at Cairo. It urged governments to "deal with the health impact of unsafe abortion as a major public health concern."

At the 1995 conference, they again recognized the problem, that "unsafe abortions threaten the lives of a large number of women" and "represent a grave public health problem as it is primarily the poorest and youngest who take the highest risks." A conference document, which the US signed onto, urged governments to "consider reviewing laws containing putative measures against women who have undergone illegal abortions." So you have this global consensus affirming that reproductive health is important to women; that women are dying and ending up with lifelong health risks; and that something must be done about this.

So we now come to the next chapter, Chapter Three, the global women's rights movement. It began to say, “We've got these nice policy statements out of these conferences. Let's see if we can get these regional and international human rights treaties interpreted in a way that will allow us to start moving toward recognizing reproductive rights, including abortion rights, as ones that governments must protect and respect and fulfill out of these treaties.”

So, we are doing here what lawyers do, which is that we're reading things broadly. There's just one treaty in the world that actually addresses abortion, which is the Protocol on the Rights of Women in Africa. This treaty from the Organization of African States went into force in 2005, and says that state parties shall take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, and incest, and where the continued pregnancy endangers the mental and physical health of the mother, or the life of the mother or the fetus. It is not surprising that we have in one of the most recent human rights documents an explicit recognition that abortion should be treated as a right.

But, when we look to the other treaties, we look to a whole constellation of rights that are in them. And so we look at the woman's right to life (for the reasons that I've just talked about); the right to health; the right to equality and non-discrimination; the right to be free from cruel and degrading treatment; the right to dignity, to bodily integrity, to liberty, self-determination and privacy, and freedom of conscience. Different treaties recognize these rights, and we have been pressing the committees to come up with interpretations that will support abortion rights within the protections of those treaties.

How do you do that? In two different ways. The treaty monitoring bodies at the regional level and at the UN level will issue general recommendations on compliance. And, countries have to come before the UN committees periodically to report on how they are doing and how they are complying. For example, the U.S. is party to some of the human rights treaties, including the UN Covenant on Civil and Political rights. So in 2006, the U.S. had to show up with its report card of how it was doing on civil and political rights. The committee then engages in a discussion about whether they think they're doing well or not. Groups like the Center for Reproductive Rights and all kinds of nongovernmental organizations around the world also write to the committee and say, "we'd like to raise a few issues around how the United States in that case is doing." Some of those groups are going to write about Guantanamo, and some of the groups like ours are going to write about the global gag rule. This begins an engagement on the issues.

Recently, CEDAW (the Committee on the Elimination of Discrimination Against Women), which oversees international women's rights treaties, has said that discrimination on the basis of health care that only women need is sex discrimination. They haven't said it yet about abortion, but they've said this generally. They've also recognized that the governments who have agreed to this treaty should ensure that measures are taken to prevent coercion in regard to fertility and reproduction, and to ensure that women are not forced to seek unsafe medical procedures, such as illegal abortion, because of the lack of appropriate services in regard to fertility control. So, you start having some of these general observations.

One of the things that the Center for Reproductive Rights does with its partners around the world is point out to the committees what the maternal deaths rates are in Peru and in Kenya, and what the situation is on the ground. So, we've had concluding observations from the UN committees. For example, regarding Poland, expressing deep concern about the threat posed to women's health and lives by that country's abortion laws, and calling upon Poland to liberalize them. And, expressing concern about the high maternal mortality rates in Kenya, caused in large part by a high number of unsafe or illegal abortions.

This was the chapter in which the global women's rights community started bringing these treaties to monitoring bodies, asking them to start putting out statements, educating them, filing things with them, having briefings with them, and focusing on why it is so critical to recognize abortion as a human right.

Now we want to really test the strength of these committees, asking them to not just put out statements saying "can you work on this?", but actually bringing cases to see if they will actually enforce and hold the governments accountable.

I'll talk about a few of those cases that have been successful. One of them that Roberta mentioned in her opening remarks was *K.L. v Peru*, which we brought with our partners before the UN Human Rights Committee and is linked to a treaty to which the United States is a party. This case began in 2001 and involved a young woman who was 17 years old who found that that she was carrying an anacephalic fetus, or a fetus growing without a forebrain. Although Peru is very restrictive in its abortion laws, there is an exception for therapeutic abortions. Her doctor recommended one, but she was unable to get one because the health care system basically refused on personal objection grounds. Because of this, she was forced to carry the baby to term. It died inevitably within days of birth, and the woman suffered severe depression and some other major health concerns.

We took this case to the committee, and the committee ruled for the first time in an abortion case. It ruled that it was a violation not just of the woman's right to privacy, but also said that it was cruel and degrading treatment. Well, that's a different kind of framing of the issue than we hear in the U.S. all the time. The committee found so because they said that her depression and emotional distress were foreseeable, and thus the state's refusal to permit her to obtain a therapeutic abortion caused her suffering. The committee also said that Peru had to work on remedying its inability of women to access those exceptions to the abortion law there. This case laid the groundwork to help build and organize in Peru, and this continues to go on. The government has been quite difficult in complying.

There was also a case this year regarding a Polish woman that was brought before the European Court of Human Rights. This woman had serious eye problems, and her doctor told her to terminate her pregnancy or face potential blindness. Three other doctors confirmed that she needed to have an abortion. While Polish law permits abortion for health reasons, she was denied a health certificate to terminate. She was forced to carry the pregnancy to term, and her eyesight deteriorated precipitously.

The Court of Human Rights subsequently said that governments have an obligation to make sure that exceptions to abortion laws can be accessed by women. This is significant because basically the Court was saying these rights can't be illusory. They have to be real, and there has to be a way for women to get access.

The third case I want to talk about was at the regional level and included a settlement with the Mexican Government, which we worked on with our partners in Mexico. This involved a 13-year-old girl who became pregnant after being raped during a break-in at her home. The girl and her parents sought to terminate the pregnancy through an exception to Mexico's abortion laws involving rape. But this request was denied, and the girl was detained at the hospital. She was visited by priests, and eventually could not terminate her pregnancy. We took the case to the Inter-American Commission. After several years of negotiating, the Mexican government decided to settle the case. They settled it giving monetary compensation to the young woman and her family, but also agreed to ensure that rules and regulations are in place so that women can access abortion.

There were several important things about this case. One was the Inter-American Commission's statement around the Mexico settlement: "Women cannot fully enjoy their human rights without timely access to comprehensive health care services, to information, and education." This is talking, of course, about abortion. It was also the first time that a Latin American government had conceded in the context of a treaty interpretation that "the absence of an appropriate body of regulations concerning abortion resulted in a violation of individual human rights." So, you have this Latin American government conceding that denying access to abortion in these circumstances could be a detriment to human rights. This case is actually a good example of the way one wants to galvanize people and organize them. There was a lot of publicity on this case, which helped create an atmosphere in Mexico that also supported Mexico City's liberalization of its abortion law.

The last case I want to mention is a national level case that shows how these decisions can play out in the context of a constitutional court decision. This is around Colombia's abortion law, and was a case from 2006. The background in terms of the facts was that unsafe abortion was the second largest cause of maternal death in Columbia, and Columbia had also maintained a total ban on abortion. A challenge was brought to it under Columbia's constitution. The court held – and again, this is a Latin American court – that the total ban on abortion was a violation of Columbia's constitution, and that there had to be

broad exceptions for mental and physical health, for fetal abnormalities, for rape, and for incest. But what is really kind of stunning about the case is the language that the court used. And so I want to read just a little bit from the decision.

The decision was 600 pages long. Roberta says that's too much. But there are some real nuggets in here. What's interesting to note is they go through all the rights that I've talked about that are impacted by the denial of the right to abortion. But they also talk about other things that key into what David was saying. They talk about other fundamental rights, such as the right to work and the right to education, which are impacted by women's ability to control their reproductive lives. They also tell the story of Cairo and Beijing. And, they tell the story of the treaties and how they're being interpreted. They also cite **the treaty monitoring bodies' decisions**.

And, they say on page 31 of 600 that "women's sexual and reproductive rights have finally been recognized as human rights." The court also said 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."

That's a pretty stunning and perfect articulation of what we want to be pressing, and why we think that the laws that are developing outside the United States have a lot to offer to those nine Justices on the bench. Seventeen countries have liberalized their abortion laws in the last twelve years.

I want to finish on the note that two major human rights organizations have taken on abortion as a human rights issue in the last five years. In June of 2005, Human Rights Watch, which is one of the most respected human rights organizations worldwide, took the position that decisions about abortion belong to pregnant women without interference by the state or others. The denial of a pregnant woman's right to make an independent decision regarding abortion violates or poses a threat to a wide range of human rights. This means that Human Rights Watch is now doing reports around the world on abortion as a human right.

Secondly, Amnesty International, which is a democratic and human rights movement with 150 chapters around the world, has also taken up addressing abortion as a human right. They have a policy to

decriminalize abortion and they're working on specific areas around that. But those are huge steps forward. When I came to the Center just five years ago and made my tour of meeting the heads of various human rights organizations, there definitely was a vibe of "you're not really in our club." But that is changing.

I'll close here so that we can open it up to questions. But there's a lot of rich language and vision for us to use in our discussions in the United States. We should look at this not just as some legal hook that's going to be a silver bullet, but really as a way to open up the dialogue. And that's what we hope widening the lens can do. Thank you.

**ROBERTA SCHNEIDERMAN:**
We can have questions now.

**AUDIENCE MEMBER:**
Who are the people who are appointed to these international oversight committees?

**NANCY NORTHUP:**
They're human rights experts who get nominated by the various countries who are parties to the conventions. But one of the advantages, of course, when you're working with a human rights structure is that they're supposed to be human rights experts. So they start with, hopefully, a little bit of a balance on our side.

**AUDIENCE MEMBER:**
Are there any prominent court cases coming up that may further erode abortion rights?

**DAVID COLE:**
Nancy is probably better at answering that since she deals with the cases. But I guess what I would say is I don't see a case out there, and the large thrust of my remarks was that we ought not hope that the Court is going to be our savior here. There really needs to be a political and cultural struggle to define, recognize, and establish this right. I think in the context of that, it's important to understand why *Roe* was not the best articulation of the right and not the best defense of the right. I think *Casey* did a much better job of talking about the centrality of this particular decision to women's equal place in our society.

Justice Ginsberg does a tremendous job, as I said, in her descent in *Gonzalez v. Carhart*, and that seems to me to be the theme we need to be pressing.

I love the human rights theme as well. In so many areas, we used to think that we were the leader in human rights, but we're now sort of falling behind as the rest of the world goes beyond us. Maybe we can use that as well. But I don't see this as something we're going to establish in the courts, at least in our lifetime.

**NANCY NORTHUP:**
I always think of this like sailing a boat – we're going to have to tack in a different direction for a while before we come back. I think that some of that tacking to get the equality jurisprudence established and see this through the broader frame will involve bringing cases that are not necessarily abortion cases. So, you build it up in that area before you can sail back in the other.

The alternative scenario with our opposition is that if we give them long enough rope, eventually they're going to hang themselves. And they're just going to go too far. That could possibly be our vehicle; they almost did it in South Dakota.

**AUDIENCE MEMBER:**
If we are able to elect a President who is pro-choice, could she or he appoint a tenth member to the Supreme Court?

**DAVID COLE:**
In theory, yes, but in practice, no. There's no requirement that the Court have any particular number of justices, and it has had varying numbers over the course of its history. But it's had nine for a long time. There was a particular President – FDR – who proposed packing the court by adding some justices whom he felt more simpatico, but that didn't go over very well. So I think we're stuck at nine for the time being.

**AUDIENCE MEMBER:**

Professor Cole, would you comment on the relevance of international decisions to the Supreme Court? Scalia and Breyer have had a long discourse about that. Scalia says, I think, "Very interesting, but irrelevant." How can you translate one to the other? Will that be acceptable?

**DAVID COLE:**

I think it's becoming increasingly acceptable, and there's actually an interesting history here. When we began as a nation we were a small and not particularly powerful country, and we often borrowed from international law. We paid quite a bit of respect to international law. But, as we became a power – a superpower – we became more and more dismissive of international law, at least in any instance where it limited our prerogatives.

That's certainly the attitude of the Bush Administration, but not just the Bush Administration. That's often the attitude of the United States even when Democrats are in power. But that said, the world is growing smaller. The human rights instruments that Nancy referred to – many of them came out of initiatives that the United States was very much a part of, and which were developed from our Bill of Rights. And it's only been 50 years that the international human rights movement has been in existence.

Increasingly, I think that courts around the world are looking to other courts around the world and to international human rights principles in their own decision-making. In Great Britain, for example, they made the European Convention on Human Rights directly applicable in their own courts several years ago, and the law lords have struck down a number of very troubling anti-terrorism measures. On the basis of human rights law, the South African Constitutional Court draws on a whole range of sources. The Canadian Supreme Court does as well.

All these justices get together in the summers. They go to nice places like Bellagio and get together and talk. They have nice wine and cheese just like we're doing – except they have power. In that sort of acculturation, the world is growing smaller and international human rights are growing larger. But, is that leading our own Court to pay more attention to international law and international human rights? It's not without significant opposition from Justice Scalia, from the Federalist Society, and from lots of conservatives who say this is anti-democratic. But I think it's the way the world is moving. And that's why I think what Nancy is talking about is so exciting.

**AUDIENCE MEMBER:**

This is also for Professor Cole. I was at a conference this week where there was a Federalist Society member who was a judge from Utah named McConnell. You may remember him?

**DAVID COLE:**

Yes.

**AUDIENCE MEMBER:**

He spoke about not overturning *Roe* as much as there ought to be stronger States' rights. My question is, if you look at the various Republican candidates – and I include all of them including our former mayor – they're not talking so much about getting rid of *Roe* as they're talking about a States' rights construction. So let us assume that there is a Republican in the White House and there are the five justices that you were talking about. Could you envision a States' rights decision that would allow places like New York and California to be the places where women would be able to get abortions? And how would you play that out from a legal standpoint?

**DAVID COLE:**

Well, I think that States' rights are just the opposite of individual rights. It's a way of saying we should recognize that this is a political matter that ought not be protected by inception of federal constitutional rights. I think that if you had a fifth justice who was a radical conservative, they would go very far towards undermining *Roe*. In *Gonzalez v. Carhart*, it was determined that morality was a legitimate consideration for the legislature in banning certain kinds of abortion. An interest in protecting women from their own uninformed decisions that they subsequently regret justified the federal government in banning this particular form of abortion. My guess is that there are a lot of ways one could go, and States' rights is just sort of a label that you can put on the outcome.

But my own sense is that it's highly unlikely – even if you got a fifth justice. It seems unlikely that at least in the near term that they would overturn *Casey* or *Roe* outright. I think there are a lot of conservatives who recognize that this might well be a disaster for them in terms of broader political issues, so I think they're likely to be smarter about it than that. They're likely to do what they've done thus far, which is death by a thousand cuts, and to cut away at it in a variety of ways until there's very

little left of it, without having to have a headline saying "*Roe v. Wade* Overturned." That would be an incredibly mobilizing headline, and so I don't think we'll see it.

Our job is to make people recognize that it's not just that headline we have to be afraid of – we have to be afraid of each of these incremental moves. Particularly where they have the character of this one, which is that they don't have any logical stopping point.

**NANCY NORTHUP:**
I'd like to add to that. First of all, David, I was going to remind you that you weren't going to predict the Supreme Court.

**DAVID COLE:**
Yes, that's true.

**NANCY NORTHUP:**
But maybe on this issue, I largely think that's true. Although sometimes I wonder about the hard-core conservatives and that their internal storytelling will see themselves as really issuing a *Brown v. Board* kind of decision. It also depends on how hard-core that next decision might be if there was another justice replaced.

I also wanted to say that the Center just issued a report called What if Roe Fell? You can get it on our website. The report goes state-by-state through what would happen within days after a *Roe* reversal. We did that because we were actually sick and tired of listening to our pundit friends saying something like, "I'm pro-choice but I don't like *Roe*. And I think we should reverse it and it should go back to the states. And really only a few states will criminalize abortion."

When you hear that from your friends, beware. What we wanted to show was that not just a few states would criminalize abortion. When we looked at the sort of legal building blocks that are in place, we found about 30 states that are likely to re-criminalize abortion. What people don't realize is that there is a strategy going on to pass what are called "bans–in-waiting." These are criminal abortion laws that are now on the books. The trigger for them to spring into effect is that *Roe* would be reversed. Four states have passed these since Justice O'Conner's retirement: North and South Dakota, Louisiana, and Mississippi. They're ready to go. You've also got states with injunctions in place that arguably could be lifted, and so they're moving with this kind of stealth strategy.

So who's paying attention to a ban-in-waiting that's passing? It was not even reported in the press in North Dakota, compared with the press that was gotten in South Dakota. So it's important to realize that they are working on this strategy and to really fight against this kind of framing. For example, this would be bad for women in Louisiana. They would have to cross at least two state lines to get to a state where abortion would likely remain legal. And if people in Louisiana cannot get out of the way of a hurricane, the notion that that is going to be an easy thing to do is unlikely.

**AUDIENCE MEMBER:**
What are the implications of the increased talk about fetal personhood and the rights of the fetus?

**NANCY NORTHUP:**

Obviously, the relationship is that the opposition is the same. It's trying to establish that the fertilized egg is a human being that must be protected, and this has created some difficult decisions we've had internationally. For example, in Costa Rica they've banned *in vitro* fertilization because it requires the wasting of embryos, and we actually have taken a case to the Inter-American Commission on behalf of families that want to use *in vitro* fertilization to get pregnant. That's the impact of this concept that a fertilized egg should be fully embodied with all of the constitutional rights that a born person has.

**AUDIENCE MEMBER**:

Tonight's discussion brought to mind Susan Faludi and her book, The War on Terror, and how the reaction to 9/11 has brought out this sort of underground well of stereotypes about women, which I thought died a long time ago, and which Justice Kennedy referred to in the need to protect women from her own regrets. It makes me think that what we're really fighting is what Nancy referred to as the third arena or chapter. We need to have this be part of the human discourse more, because that's really what we're what we're fighting for – that this is a human right. Do you have any suggestions for how we can really engage people on this? Because what the Administration and what the courts have done is to put us in a surreal world where facts don't really matter and science doesn't matter.

**NANCY NORTHUP:**

My answer would be that we need to find many vehicles. I think that David has suggested things that allow us to build bridges with those outside the traditional pro-choice community. We also have to organize and care as much as our opposition does. I've always said that the thing about our opposition, and you have to respect this, is that they knock on doors, they organize, and they are here for the long haul. People can't see this as just getting through the next election, getting a Democrat in the White House, and going home. This is an ideological battle between people who believe there's one answer to questions about women's role in society, about sexuality, and reproduction and people who believe in a pluralistic perspective. The tough thing is it's harder to knock on doors for pluralism. But, that's what's got to happen. Thank you.