

Dignity and the Abortion Debate

Reva B. Siegel[♦]©

SELA June 2009

*This is an early draft. Comments Appreciated.
Please Do Not Cite Without Permission.*

Dignity is a contested concept, invoked by many in debates over sexual and reproductive rights. I have recently examined the role of dignity in law governing abortion under the United States Constitution.¹ After reviewing recent developments in U.S. law, this paper examines claims about dignity in debates over abortion in the international arena, considering differences in usage in human rights law, in religious doctrine, and in the constitutional law of Germany and Colombia.

This essay offers only the briefest account of abortion law in these different constitutional orders. It focuses instead on the ways that judges and advocates appeal to dignity when making claims about how law should govern abortion. Examining claims on dignity in the abortion debate exposes gendered understandings that structure citizenship. No less importantly, it suggests pathways of influence between national and international law, and between religious and secular authority.

[♦] Nicholas deB. Katzenbach Professor of Law, Yale University. I owe thanks to Stella Burch and Hunter Smith for conversation and research assistance, and to Paola Bergallo, Joanna Erdman, Ruth Rubio Marin, and Kenji Yoshino for their comments on the manuscript.

¹ Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008).

I. Restricting Abortion: Recent Developments in U.S. Law

*Roe v. Wade*² famously extended constitutional protection to women's decision whether to continue or abort a pregnancy. *Roe* recognized that government has an interest in regulating abortion to protect potential life, but declared that interest insufficient to justify laws depriving women of control over the decision whether to continue a pregnancy. Only at the point of fetal viability, in the third trimester of pregnancy, did *Roe* allow government to ban abortion, except when needed to protect a woman's life or health.³

In 1992, after two decades of conflict over the abortion right, the U.S. Supreme Court reaffirmed and narrowed *Roe* in *Planned Parenthood v Casey*.⁴ *Casey* held that government could regulate a woman's abortion decision to promote its interest in potential life *throughout* the term of her pregnancy, so long as the government did not impose a substantial obstacle to exercise of a woman's right to choose.⁵ Fetal-protective regulation is permissible *earlier* in pregnancy, but it must also be compatible with constitutional protections for a woman's right to decide, unhindered by government, whether to carry a pregnancy to term. *Casey* shapes the state interest in protecting potential life into the kind of interest that can be vindicated, expressively, as an integral part of an abortion-rights regime. Under *Casey*, government can deter women's abortion decision by interposing practical impediments to abortion, or by sending messages or creating meanings that guide women's decision about whether to carry a pregnancy to term—so long as those impediments or messages do not impose an “undue burden” on a

² 410 U.S. 113 (1973).

³ *Id.* at 164-65.

⁴ 505 U.S. 833 (1992).

⁵ *Id.* at 877-79.

woman's decision or a "substantial obstacle" to it.⁶

We see this dynamic at work in the Supreme Court's 2007 decision in *Gonzales v. Carhart*.⁷ *Carhart* upheld the Partial Birth Abortion Ban Act, a federal law that prohibited a certain method of performing later term abortions—relatively infrequent procedures generally undertaken for health reasons. The law regulating how doctors perform these procedures was designed by the antiabortion movement to elicit revulsion at abortion,⁸ and was a dramatic success, with versions passed at the state and federal level. By the time the case challenging the Partial Birth Abortion Ban Act reached the U.S. Supreme Court there were five justices ready to uphold the law, reasoning that, under *Casey*, Congress could regulate the *method* that doctors employ to perform later abortions, in order to insure that there is a clear line of demarcation between abortion and infanticide.⁹ The Court upheld the federal law proscribing certain methods of performing later term abortions reasoning, "The Act expresses respect for the dignity of human life."¹⁰

Observe that in *Carhart* the state's interest in protecting potential life can be vindicated without ever stopping an abortion or saving particular potential lives. It is an *expressive* interest, an interest in creating a social meaning or inculcating a moral value.

The Partial Birth Abortion Ban Act is *incrementalist* antiabortion regulation: it uses law

⁶ *Id.* at 877.

⁷ 550 U.S. 124 (2007).

⁸ See David J. Garrow, *Significant Risks: Gonzales v. Carhart and the Future of Abortion Law*, SUP. CT. REV., 1, 2-6 (2007); Siegel, *supra* note 1, at 1707 n.40.

⁹ *Carhart*, 550 U.S. at 157-58 (explaining that *Casey* "reaffirmed" that "government may use its voice and its regulatory authority to show its profound respect for the life within the woman." Having "determined that the abortion methods it proscribed had a 'disturbing similarity to the killing of a newborn infant,'" and "concerned with 'draw[ing] a bright line that clearly distinguishes abortion and infanticide,'" "Congress could . . . conclude that the type of abortion proscribed by the Act requires specific regulation because it implicates additional ethical and moral concerns that justify a special prohibition.") (citing Congressional Findings).

¹⁰ *Id.* at 157.

to inhibit abortion and thus bring about an end to the practice gradually.¹¹ The Partial Birth Abortion Ban Act resembles so-called “informed consent” statutes—which mandate counseling and the provision of certain information or ultrasound viewings—in order to produce negative social meaning, and thus to deter, but not prohibit abortion.¹²

The *Carhart* decision is noteworthy, not only for the expressive fashion in which it vindicates the state’s interest in potential life, but also because it suggests that the Court might soon recognize a *new* government interest in restricting abortion—an interest in regulating abortion in order to protect *women*, as well as the unborn. In *Carhart*, the Court observes:

While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05-380, pp. 22-24. Severe depression and loss of esteem can follow. See *ibid.*

. . . .

The State has an interest in ensuring so grave a choice is well informed.¹³

Carhart’s woman-protective rationale for restricting abortion is scarcely considered in the Court’s cases, and was *not* discussed by Congress in enacting the

¹¹ Siegel, *supra* note 2, at 1707-12.

¹² See Siegel, *supra* note 2, at 1722-30. On the use of ultrasound as an incrementalist measure to “make foetal personhood a self-fulfilling prophecy by making the foetus a public presence [in] a visually oriented culture,” see Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 823-26 (quoting Rosalind Pollack Petchesky, *Foetal Images: The Power of Visual Culture in the Politics of Reproduction*, in REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE 57, 58 (Michelle Stanworth ed., 1987)).

Medical ethics enshrines patient autonomy as the core value of counseling. Incrementalist restrictions on abortion may claim the mantle of informed consent, but such regulation often endeavors to steer patient choices, by providing selective, misleading, or inaccurate information designed to deter women from ending a pregnancy. See, e.g., Siegel, *supra* note 1, at 1708-09, 1753-63, 1783-87. U.S. law once prohibited and, under *Casey*, now allows counseling designed to deter abortion, so long as the counseling is truthful and not misleading. See *id.* at 1757-59.

¹³ *Carhart*, 550 U.S. at 159.

Partial Birth Abortion Ban Act.¹⁴ But the claim that women need protection from abortion has been spreading within the antiabortion movement for decades.¹⁵ Claims that abortion hurts women and that women are coerced into abortion are now prominently featured on antiabortion websites¹⁶ and a common part of state legislative hearings in the United States.¹⁷ The claim is spreading across the world. In the recent statement of the Parliamentary Assembly of the Council of Europe on access to safe and legal abortion in Europe,¹⁸ the accompanying explanatory memorandum recognizes the woman-protective argument as a key claim of those opposed to abortion.¹⁹

What exactly is the woman-protective argument for regulating abortion? Advocates contend that a regime of legally protected abortion poses a threat to women's

¹⁴ Siegel, *supra* note 2, at 1697 & n15.

¹⁵ See Siegel, *supra* note 2, at 1712-33.

¹⁶ See, e.g., Abortion Is the Unchoice, Print Ads, <http://www.unfairchoice.info/display.htm> (last visited May 5, 2008) (featuring collection of twelve antiabortion advertisements). Several of the ads include the claim that sixty-four percent of abortions are coerced and state that sixty-five percent of women who have had abortions suffer symptoms of posttraumatic stress disorder. See, e.g., Abortion Is the Unchoice, She Believed the Guy in the Letter Jacket Who Said He Loved Her ... and the Guy in the White Coat Who Said It's Just a Blob of Tissue, <http://www.unfairchoice.info/pdf/DisplayAds/4CAds/Diner4ColorAd.pdf> (last visited May 5, 2008). See generally Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L. J. 815, 835-36 n.68 (2007) (citing numerous sources from throughout anti-abortion movement that employ harm-to-women argument).

¹⁷ See Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1646 (2008).

¹⁸ EUR. PARL. ASS., *Access to Safe and Legal Abortion in Europe*, 15th Sess., Res. No. 1607 (April 16, 2008), "available at http://assembly.coe.int/main.asp?Link=/documents/adopted_text/ta08/eres1607.htm (last visited Mar. 22, 2009):

The right to safe abortion should be considered as a fundamental human right. The argument builds on women's right to life and to health, since in countries where abortion is restricted by law, women tend to resort to illegal abortions in conditions which are medically unsafe and put their lives and health at risk

¹⁹ EUR. PARL. ASS., Committee on Equal Opportunities for Women and Men, Report, *Access to Safe and Legal Abortion in Europe*, Doc. No. 11537 at 16 (April 8, 2008) ("The 'pro-life' camp emphasises the possible negative effects an abortion can have on a woman: both physically and psychologically ('symptoms comparable with post-traumatic stress disorder, involving nightmares, a feeling of guilt, a need to "make amends"')) (citing speech made by Claudia Kaminski, President, "Aktion Lebensrecht für Alle", Germany, AS/Ega (2007) PV 3 addendum, pp. 7-9.); see also *infra* note 96 (surveying websites from around the world that feature woman-protective antiabortion argument).

freedom and to women's health, exposing women to abortions they do not want and, in all events, should not have.²⁰

Typically, advocates of woman-protective antiabortion argument substantiate their claims with two types of evidence: narrative and empirical. South Dakota's Abortion Task Force Report contends that a woman who aborts a pregnancy is encouraged "to defy her very nature as a mother to protect her child,"²¹ is likely "to suffer[] significant psychological trauma and distress,"²² and will be put at risk of a variety of life-threatening illnesses ranging from bipolar disorder, post-traumatic stress disorder, and suicidal ideation to breast cancer²³—citing studies whose methods and claims have been repeatedly rejected by government oncologists²⁴ and by leading psychology and psychiatry professionals.²⁵

Yet the Report does not only marshal empirical evidence in support of the abortion-harms-women argument. Numbers and stories reinforce each other: the South Dakota Task Force relied on the same Operation Outcry affidavits that the Court would

²⁰ See Siegel, *supra* note 2, at 1712-33; Siegel, *supra* note 19, at 1656-81 (discussing the history of woman-protective antiabortion argument). For a primary text of the movement, see DAVID REARDON, MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION (1996).

²¹ S.D. Task Force to Study Abortion, Report of the South Dakota Task Force to Study Abortion 56 (2005), available at <http://www.voteyesforlife.com/docs/Task Force Report.pdf>.

²² *Id.* at 47-48.

²³ *Id.* at 43-44.

²⁴ See Siegel, *supra* note 2, at 1719 (discussing findings of United States National Cancer Institute and World Health Organization).

²⁵ See Siegel, *supra* note 2, at 1719 (citing numerous studies discrediting the claim that abortion causes psychological harm); American Psychological Association, Task Force on Mental Health and Abortion, Report of APA Task Force on Mental Health and Abortion 93 (2008), available at <http://www.apa.org/releases/abortion-report.pdf> (concluding that "the most methodologically sound research indicates that among women who have a single, legal, first-trimester abortion of an unplanned pregnancy for nontherapeutic reasons, the relative risks of mental health problems are no greater than the risks among women who deliver an unplanned pregnancy"). *But cf.* Royal College of Psychiatrists, Position Statement on Women's Health and Abortion (Mar. 14, 2008), available at <http://www.rcpsych.ac.uk/members/currentissues/mentalhealthandabortion.aspx> (stating that "the specific issue of whether or not induced abortion has harmful effects on women's mental health remains to be fully resolved.").

cite two years later in *Carhart*.²⁶ The South Dakota Task Force asserted it received the testimony of 1,950 women and reported that “[v]irtually all of them stated they thought their abortions were uninformed or coerced or both.”²⁷ The Report asserted that women who have abortions could not have knowingly and willingly chosen the procedure and must have been misled or pressured into the decision by a partner, a parent, or even the clinic—because “[i]t is so far outside the normal conduct of a mother to implicate herself in the killing of her own child.”²⁸

As I have elsewhere traced in detail, woman-protective antiabortion argument emerged out of several decades of social movement conflict. Initially, opponents of abortion focused passionately on the importance of protecting the unborn, while the feminist movement emphasized the threat that criminal abortion laws posed to women’s health and asserted women’s right to freedom from legally coerced pregnancy. After several decades in which the antiabortion movement failed to persuade decisive majorities of Americans to oppose *Roe*, the movement added to its fetal-protective claims arguments against abortion in woman-focused frames, derived in part from its feminist adversaries.²⁹ Woman-protective antiabortion argument states the case against abortion

²⁶See Siegel, *supra* note 19, at 1642.

²⁷ S.D. Task Force to Study Abortion, *supra* note 22, at 38.

²⁸ *Id.* at 56. *But cf.* Siegel, *supra* note 19 at 1681-1684 (describing how Task Force Chairwoman Dr. Marty Allison, despite her personal opposition to abortion, could not endorse the Task Force’s Report because of her concern that its claims about post-abortion syndrome lacked scientific rigor and its account of women’s testimony was selective, because of her belief that any restrictions on abortion should be accompanied by public health strategies to reduce unwanted pregnancy, and, ultimately, because of her conviction that abortion restrictions should be enacted to protect unborn, not women.)

²⁹ During the 1980s, women in the antiabortion movement began to employ talk of abortion’s harm to women in an effort to dissuade women from having abortions at the movement’s network of crisis pregnancy centers. Leaders of the antiabortion movement who passionately argued abortion as a question of protecting the unborn initially resisted woman-centered forms of antiabortion argument, but came to embrace the claim strategically, under conditions of escalating social movement conflict, through a learning process in which they came to believe in the argument’s power to persuade audiences *outside* the movement’s ranks. See Siegel, *supra* note 17.

in terms intended to persuade audiences in the middle, who respond to the claims of *both* movements.³⁰

The claims of woman-protective antiabortion argument are deeply gender-conventional: The antiabortion movement warns that it is against women's nature to refuse motherhood, asserts that no woman could willingly refuse motherhood, and claims that women will suffer harm if they do so. Yet the antiabortion movement expresses these gender-role conforming messages through feminist and prochoice rhetoric, flipped on its head: the antiabortion movement now claims we must *criminalize* abortion in order to protect women's health and women's freedom. If woman-protective antiabortion argument is persuasive, it is because it fuses the claims and frames of the antiabortion movement *and* its adversary, knitting role-conventional and role-transformative talk in one culturally confused but compelling amalgam.

II. Restating *Casey/Carhart* as a Struggle over Dignity

Last year, in puzzling about how to respond to *Carhart's* claim that the Partial Birth Abortion Ban Act expresses respect for the dignity of human life, and to its mention of woman-protective justifications for restricting abortion, I began to focus on the variant usages of dignity in American constitutional cases. I thought it worth examining the *different* forms of dignity the cases vindicated, in order to identify constitutional limits on fetal-protective and woman-protective justifications for restricting abortion, and to express the justifications for those limits in a language intelligible inside and outside of

³⁰ See Siegel, *supra* note 1, at 1715-1733 (detailing the history of the antiabortion movement's construction of woman-protective antiabortion argument as "a political discourse designed to counter feminist, prochoice claims"); Siegel, *supra* note 17, at 1656-81 (tracing the social movement history of woman-protective antiabortion argument).

courts, to persons of very different convictions. Dignity has the power it does because dignity has authority for many normative, national, and transnational communities.

Dignity is not one value but a cluster of values, with both secular and religious meanings. Adversaries on both sides of the abortion debate invoke dignity. Dignity is a site of contest, in law and in politics, in professional and popular arenas, in U.S. law, the constitutional law of other jurisdictions, and in human rights law.

Dignity's semantic instabilities and associations make it dangerous and attractive as a place to wrestle with the equities of abortion. Does it mean respect-worthy—or respectable? Does it bring religion into public life—or simply confront it there? Is its fluidity a strength or risk? As I understand it, dignity encompasses sensibilities, concerns, and commitments like, and foreign to, my own. It is for this very reason that I found dignity an attractive place to explore dialogic possibilities—to the extent there are any—in the abortion debate.

After years of writing about the abortion right as a sex equality right,³¹ I decided to examine the possibilities of reasoning about the abortion right in the framework of dignity, to see whether this way of defending the right would allow me to hear and speak to the concerns of those unmoved by sex equality claims. The project felt urgent for other reasons. *Carhart's* usage of dignity varied from *Casey's* even as *Carhart* claimed to apply the *Casey* framework.³² I could see that the usage of dignity was evolving in the

³¹ See, e.g., Reva B. Siegel, *Reasoning From the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992); Reva B. Siegel, *Roe as Sex Equality Opinion*, in WHAT ROE SHOULD HAVE SAID (J.M. Balkin ed., 2005); Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. LAW REV. 991 (2007); Siegel, *supra* note 16.

³² *Gonzales v. Carhart*, 550 U.S. 124, 153 (2007) (construing the Partial Birth Abortion Ban Act as inapplicable to ordinary second-trimester abortions protected under *Casey* by applying “the canon of constitutional avoidance [to] extinguish[] any lingering doubt as to whether the Act covers the prototypical D & E procedure”).

case law, in confusing and potentially contradictory ways. If a struggle over dignity was ongoing, it was important to engage.

My first object was to address the usage of dignity in U.S. constitutional cases; but I was well aware that pursuing this question would lead me to locate the U.S. constitutional cases in a larger transnational field. The text of the U.S. Constitution does not expressly employ the term dignity; but the United States Supreme Court has not infrequently invoked dignity in explaining the Constitution's rights guarantees,³³ in all likelihood drawing on understandings of dignity developed in other constitutional orders and the international human rights regime.³⁴ Justice Kennedy is one of the justices who most commonly invokes dignity.³⁵

Consider *Carhart*. *Carhart* describes the government's interest in regulating abortion to protect potential life as an interest in "express[ing] respect for the dignity of human life."³⁶ Here dignity means something like the inherent worth of a life—indeed, we might call this usage dignity as "life." But elsewhere in his substantive due process

³³ See Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006); Gerald Neuman, *Human Dignity in United States Constitutional Law*, in ZUR AUTONOMIE DES INDIVIDUUMS 271 (Dieter Simon & Manfred Weiss, eds. 2000); Erin Daly, *Constitutional Dignity: Lessons from Home and Abroad* (June 7, 2007) Widener Law Sch. Legal Studies Res., Paper No. 08-07, June 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991608; see, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008) (holding in context of Eighth Amendment that "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."); *Alden v. Maine*, 527 U.S. 706, 715, 749 (1999) (holding that States "retain the dignity . . . of sovereignty" and that "[p]rivate suits against nonconsenting States . . . present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties") (internal citation and quotation marks omitted); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613-14 (1989) (stating that "[t]he [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."); *McKaskle v. Wiggins*, 465 U.S. 168, 177 (1984) (holding that Sixth Amendment guarantees right to represent oneself in court *pro se* in order to "affirm the dignity and autonomy of the accused.").

³⁴ See sources *infra* note 55.

³⁵ See Siegel, *supra* note 2, at 1736-45.

³⁶ *Carhart*, 550 U.S. at 157 (2007) ("The Act expresses respect for the dignity of human life.")

and equal protection opinions, Justice Kennedy has used dignity in a very different register, in ways that value the forms of freedom and respect we accord one another.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the portion of the plurality opinion attributed to Justice Kennedy invokes dignity to explain why the Constitution protects decisions regarding family life and child rearing: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”³⁷ Here dignity means, not the value of life as such, but instead liberty or autonomy. In his opinion for the majority in *Lawrence v. Texas*, Justice Kennedy quotes *Casey*’s claims about dignity, and reasons that, to protect dignity, the Constitution requires government to respect an individual’s choice to engage in a same-sex relationship just as it must respect an individual’s decision whether to bear a child.³⁸ Justice Kennedy’s equal protection opinions use the concept of dignity to highlight how restrictions on autonomy can communicate meanings about social role, respect, and social standing—concerns about social status I term dignity as equality. Just last term in *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy’s concurring opinion described the harm of the school district categorizing elementary and secondary school students on the basis of race as a harm to dignity,

³⁷ *Planned Parenthood v. Casey*, 505 U.S. 833, 851(1992) (discussing the “constitutional protection” “our law affords . . . to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education”).

³⁸ *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” (quoting *Casey*, 505 U.S. at 851)); *see also id.* at 567 (acknowledging that “adults may choose to enter upon [a consensual, personal] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”).

asserting that “[t]o be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.”³⁹

Once we attend to these differences in meaning, it is clear that dignity comprehends different values. The value of dignity the Constitution protects when it prohibits government from punishing citizens for their decisions about parenting or sexual partners—dignity as autonomy or dignity as equality—is different than the value of dignity the Constitution protects when it allows government to restrict abortion to express respect for the dignity of human life.

Furthermore, there are tensions in these usages of dignity—deeply *gendered* tensions. When the Court justifies restrictions on abortion as expressing respect for the dignity of human life, the claim may mean that every life has worth. It may *also* express the conviction that abortion violates dignity because it interferes with the procreative ends of sex.⁴⁰ Persons of different religious backgrounds may object to abortion, contraception, and same-sex marriage as threatening traditional family roles;⁴¹ some

³⁹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2797 (2007) (Kennedy, J., concurring).

⁴⁰ For illustrations of these different usages of dignity in Catholic doctrine, see *infra* notes 67-72 and accompanying text. For evidence that views about abortion reflect views about sexuality, consider the widespread belief that government is justified in compelling a pregnant woman to bear a child because she has consented to sex, but should allow abortion when pregnancy results from rape.

⁴¹ For statements by advocates of Catholic and evangelical Protestant faith who link their opposition to abortion to views about the proper form of sexual intimacy and family life, see Siegel, *supra* note 17 at 1684, 1684 n.142, 1684-85 n.143 ; see also Robert C. Post & Reva B. Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 418-20 (recounting how the traditional family values movement opposed the Equal Rights Amendment by associating it with abortion); *id.* at 423-24 n.232 (describing the Protecting Life and Marriage Rally at the South Canyon Baptist Church in support of referendum provisions banning abortion and same-sex marriage, and quoting antiabortion activist Alan Keyes as claiming that abortion and same-sex marriage are “one and the same issue”; listing many leading conservative groups that combine opposition to abortion and same sex marriage with support for abstinence education).

A lay commentary on *Dignitas Personae*, the Catholic Church’s Congregation for the Doctrine of the Faith 2008 instruction on the dignity of the person and biotechnology, categorizes abortion with contraception, sterilization, homosexual adoption and gay marriage as evils caused by “lack of respect for the transmission of life within the marital union.” The author does not classify abortion along with the other major “cause[] of human misery[:] . . . lack of respect for the born human person,” under which he groups

characterize all these practices as violating human dignity.⁴² *Carhart*'s assertion that the Partial Birth Abortion Ban Act as expresses respect for the dignity of human life may reflect the influence of these customary and religious beliefs. (Just after this usage of dignity entered constitutional discourse in the 2007 *Carhart* case,⁴³ it was adopted in the 2008 platform of the Republican National Party.⁴⁴)

But if certain usages of dignity and respect for life in American case law have their roots in religious usage, they have been at least partly transformed in their secularization and incorporation into American constitutional discourse. Indeed, what is striking about American constitutional usage of "respect for life" is that it entered the abortion case law precisely at the point at which the Court was defining the state's interest in potential life as the kind of regulatory interest that could and must be expressed compatibly with constitutional protection for a woman's decision whether to have an abortion.⁴⁵

Casey does not understand abortion regulation as a zero-sum game requiring a choice between dignity as life and dignity as liberty or equality; instead, the undue burden framework requires government to vindicate multiple dimensions of human

"murder, genocide, racism, slavery, rape and many other evils." Brian Clowes, *Dignitas Personae and the Right to Life*, 4 Human Life International e-Newsletter (2009), available at http://www.hli.org/sl_2009-01-02.html.

⁴² See Address of Benedict XVI to Italy's Pro-Life Movement, *infra* note 69 (praising initiative to give meaning to "human dignity" as the fundamental values of "the family founded on the marriage of a man and a woman, of the right of every human being conceived to be born and brought up in a family by his parents"). See *infra* notes 67-73 and accompanying text.

⁴³ See *supra* text at note 10.

⁴⁴ See 2008 Republican National Committee, 2008 Republican Platform 52, available at <http://platform.gop.com/2008Platform.pdf> (asserting "the inherent dignity and sanctity of all human life and affirm[ing] that the unborn child has a fundamental individual right to life which cannot be infringed."). For decades, the Republican platform pledged to "work for the appointment of judges at all levels of the judiciary who respect traditional family values and the sanctity of innocent human life." See Post & Siegel, *supra* note 41, at 420.

⁴⁵ Siegel, *supra* note 2, at 1751-52. See *supra* text at note 6. For Mary Ann Glendon's critique of this difference in usage, see *infra* text at notes 91-94.

dignity, *concurrently*. *Casey* holds that the state can regulate abortion in ways that express respect for the value of human life, *so long as* government does not impose an undue burden on women's freedom to decide whether to become a mother.⁴⁶ When we read *Casey* and *Carhart* together, *the undue burden framework allows government to regulate abortion in ways that respect the dignity of life, so long as such regulation respects the dignity of women.*⁴⁷

Even as *Casey* dramatically expands government authority to regulate abortion expressively, it prohibits regulation that restricts the autonomy of the pregnant woman or treats her instrumentally, as a means to an end.⁴⁸ *Casey* holds that government may only persuade a woman to continue a pregnancy by truthful and nonmisleading means.⁴⁹ Government may not, however, manipulate, trick, or coerce women into continuing a pregnancy. Instrumentalizing a woman in these ways would violate her dignity. Again: Government may regulate abortion to express respect for human dignity, so long as it does so in ways that respect women's dignity.

The decisional right vindicated in *Casey* respects dignity as equality, as well as dignity as liberty. *Casey* strikes down a provision requiring women to inform their husband before obtaining an abortion, emphasizing that the spousal notice requirement violates the Constitution because of the sex role the law imposes on women. *Casey* holds that government may not empower husbands with forms of authority over their wives that

⁴⁶ *Casey*, 505 U.S. at 877-78 (“the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. . . . Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose”)

⁴⁷ See Siegel *supra* note 1, at 1745-52.

⁴⁸ See Siegel *supra* note 1, at 1759-61.

⁴⁹ See *Casey*, 505 U.S. at 882.

custom and common law imposed before women were afforded equal standing with men by modern constitutional law.⁵⁰

To this point, the reading of *Casey/Carhart I* I have offered looks to dignity as a ground on which to respond to fetal-protective justifications for restricting abortion—suggesting that, under *Casey*, respect for women’s dignity supplies a basis for objecting, not only to the criminalization of abortion, but even to certain incremental restrictions on abortion, if they manipulate or coerce in ways that instrumentalize women.

The forms of dignity *Casey* recognizes supply a basis on which to respond to *woman*-protective, as well as fetal-protective, justifications for restricting abortion. The emergent woman-protective rationale for criminalizing abortion expresses traditional forms of gender paternalism⁵¹ in modern feminist and public health idiom. The claim of woman-protective antiabortion argument is that women who abort pregnancies are coerced or confused and will suffer regret and trauma for acting against their nature; on this view, criminalizing abortion protects women’s freedom and health. Woman-protective antiabortion argument is suspect, not only because it rests on inaccurate facts,⁵² but also because it so often depends on what U.S. equal protection cases term “archaic stereotypes” about women. Woman-protective antiabortion argument is (1) based on

⁵⁰ See *id.* at 896-98; Siegel, *supra* note 1, at 1763-66.

⁵¹ Cf. Siegel, *supra* note 1, at 1775-76:

A special tradition of gender paternalism played a role in rationalizing family-role based limitations on women’s civic freedom. For centuries, law employed descriptive claims about women’s vulnerability and dependence to justify a regime of “protection” that imposed legal disabilities on women and so made women into ascriptive dependents of their husband and the state. [Equal protection cases] beginning with *Frontiero v. Richardson* condemn these sex-specific limitations on women’s freedom.

Paradigmatically, these gender-paternalist restrictions claimed to free women from male coercion, often for the express purpose of enabling women to fulfill their natures as wives and mothers. . . . Depriving women of legal capacity was said to protect women from male coercion.

The telling, and morally problematic, feature of this tradition of gender paternalism was its habit of redressing male dominance by laws that empowered men and disempowered women.

⁵² See *supra* text accompanying notes 23-25.

stereotypes about women's nature, roles, and capacities; (2) it denies women agency (3) for the claimed purpose of protecting women from coercion and/or freeing them to be mothers. As I have argued elsewhere at some length, gender paternalism of *this* kind violates the very forms of dignity that *Casey*—and the equal protection cases—protect.⁵³

Woman-protective antiabortion argument is confused, about the capacities of women who consider abortion and the forms of community support that might be responsive to their needs. Women who consider abortion may be in great need, but the remedy that woman-protective antiabortion argument offers does not address those needs. The new gender paternalism does not merely generalize or stereotype. Like the old gender paternalism, the new gender paternalism points to social sources of harm to women—abuse, poverty, or work/family conflict—and offers control of women as the answer. Women in need deserve better.⁵⁴

III. Dignity and the Abortion Debate in the International Arena

In analyzing the usage of dignity in U.S. due process and equal protection cases, I well appreciated that I have taken up a question that has transnational roots and implications. Dignity is not in the text of the U.S. Constitution, and has entered U.S. law from outside its borders, where dignity has a robust life in international human rights law and in the constitutional law of other nations.⁵⁵ I am only beginning to explore the

⁵³ See *supra* note 51; see generally Siegel, *supra* note 1; Siegel, *supra* note 31.

⁵⁴ See Siegel, *supra* note 1, at 1793-94 (discussing forms of social support that would help women more than criminalization of health care).

⁵⁵ For discussions of the role of dignity in U.S. Constitutional law, see *supra* note 33. For scholarly accounts of differing roles played by “dignity” in international and comparative constitutional law, see generally Daly, *supra* note 37; Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655; Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 EUR. J. INT’L L. 931 (2008); Neomi Rao, *On the Use and Abuse of Dignity in*

transnational story of dignity and the abortion debate. The ensuing observations reflect the very beginnings of that inquiry.

Dignity may not appear in the text of the United States Constitution, but it plays a key role in the international human rights regime—for example, the Universal Declaration of Human Rights of 1948 proclaims: “Recognition of the inherent dignity and of the equality and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world,”⁵⁶ the Convention on the Elimination of All Forms of Discrimination Against Women recognizes that “discrimination against women violates the principles of equality of rights and respect for human dignity,”⁵⁷ and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women expresses concern that “violence against women is an offense against human dignity.”⁵⁸

Dignity is central to human rights discourse; but in human rights instruments dignity is *not* a locus of abortion rights. Women’s access to abortion under certain conditions is now gaining recognition as a human right⁵⁹—and to the extent it is, the right is most commonly expressed as the right to protection from unsafe abortion, which is understood as an aspect of the *women’s right to life and health*⁶⁰—as the Parliamentary

Constitutional Law, 14 COLUM. J. EUR. L. 201 (2008); Evadne Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 229 (2007).

⁵⁶ Universal Declaration of Human Rights, G.A. Res. 217A, at preamble, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948).

⁵⁷ Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, at preamble, U.N. Doc. A/34/46 (Dec. 18, 1979).

⁵⁸ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534 (Convention of Belem do Pará), OAS/ser.L./II.2.27, CIM/doc.33/9 (Mar. 5, 1995).

⁵⁹ See, e.g., Rebecca J. Cook & Susannah Howard, *Accommodating Women’s Differences Under the Women’s Anti-Discrimination Convention*, 56 EMORY L.J. 1039 (2007); Christina Zampas & Jaime M. Gher, *Abortion as a Human Right—International Standards & Regional Standards*, 8 HUM. RTS. L. REV. 249 (2008).

⁶⁰ See, e.g., Zampas & Gher, *supra* note 59.

Assembly of the Council of Europe's Committee on Equal Opportunities for Women and Men recently expressed it:

'The right to safe abortion should be considered as a fundamental human right.' The argument builds on women's right to life and to health, since in countries where abortion is restricted by law, women tend to resort to illegal abortions in conditions which are medically unsafe and put their lives and health at risk.⁶¹

CEDAW does not refer explicitly to abortion, but Article 12, which calls on states parties to take all appropriate measures to eliminate discrimination against women in health care services including family planning, has been interpreted as applying to criminal abortion laws as they threaten women's health.⁶²

It is not surprising that human rights law has begun to recognize the abortion right as a human right in terms that focus more clearly on women's health than their dignity.⁶³

In the United States, the decriminalization and subsequent constitutionalization of

⁶¹ EUR. PARL. ASS., Committee on Equal Opportunities for Women and Men, Report, *Access to Safe and Legal Abortion in Europe*, Doc. No. 11537 at 17 (April 8, 2008) (citing speech of Ms. Anne Quesney, Director of "Abortion Rights", United Kingdom, AS/Ega (2007) PV 3 addendum, p. 6-7.)

⁶² See Committee on the Elimination of Discrimination Against Women [CEDAW], *General Recommendation No. 24. Women and Health*, ¶ 14, U.N. Doc. A/54/38/Rev. 1 (1999) (interpreting Article 12 to "require[] States parties to refrain from obstructing action taken by women in pursuit of their health goals. . . . [B]arriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures."); *id.* at ¶ 31(c) ("When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion."); CEDAW, *Concluding Observations of CEDAW, Colombia*, ¶ 393, U.N. Doc. A/54/38 (Feb. 3, 1999) (noting that "[n]o exceptions are made to th[e] prohibition [on abortion in Colombia], including where the mother's life is in danger or to safeguard her physical or mental health, or in cases where the mother has been raped. The Committee believes that legal provisions on abortion constitute a violation of the rights of women to health and life and of Article 12 of the Convention."). See also Ireland, 1 July 1999, A/54/38 at para. 186 ("The Committee urges the State party to continue to facilitate a national dialogue on women's right to reproductive health, including on the very restrictive abortion laws."); Mexico, 14 May 1998, A/53/38 at para. 408 ("The Committee recommends that all states of Mexico should review their legislation so that, where necessary, women are granted access to rapid and easy abortion.").

For commentary, see Cook & Howard, *supra* note 59, at 1051-54; Zampas & Gher, *supra* note 59, at 273 and n.149 (arguing that the Committee on the Elimination of all Forms of Discrimination Against Women has "called upon States Parties to review legislation criminalising abortion and potentially remove barriers restricting access to safe abortion, connecting such barriers to women's right to health").

⁶³ For an account interpreting CEDAW as limiting the criminalization of abortion because CEDAW prohibits discrimination in health care *and* because CEDAW prohibits stereotyping in family roles, see Cook & Howard, *supra* note 59.

abortion proceeded initially in a medical framework; only over time did the U.S. cases fully articulate a women's rights justification for the abortion right that viewed state control of women's reproductive decisions as violating women's dignity and harming women's lives—even when it did not impair their health.⁶⁴ The understanding that coercing women to bear children violates their dignity took decades to establish, and engendered a firestorm of opposition—at least in part because this view of women's dignity implicates deep questions of women's roles.⁶⁵

The view that criminalizing abortion violates women's dignity is premised on the understanding that (1) women are entitled to have sexual relations without bearing children and that (2) women are entitled to decide when and whether to bear children and, consequently, that (3) the community's attempt to control women's decisions about sex and parenting denies women forms of freedom and respect to which they are entitled. On this view of women's rights, imposing traditional roles on women instrumentalizes women and expropriates their care-giving labor; further, because of the way society organizes motherhood, imposing motherhood on women denies women freedom to define themselves and to lead self-governing lives, and excludes women from full membership in the community.⁶⁶

These are contested views, and human rights law exerts most persuasive authority when it expresses widely shared norms. It is not surprising then, that there is more support for interpreting human rights instruments to require access to abortion to protect women from death and injury associated with illegal abortions than there is support for

⁶⁴ See Reva B. Siegel, *Roe's Roots: The Women's Rights Claims that Engendered Roe* (unpublished manuscript on file with the author). See also GENE BURNS, *A MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* (2005).

⁶⁵ See sources cited *supra* note 41.

⁶⁶ For sources developing this claim at length see *supra* note 31.

interpreting the human rights instruments to require decriminalization of abortion to protect women's freedom and standing as citizens. The articulation of the abortion right as a human right grounded in the right to life and health—rather than the right to dignity—is a rich illustration of the ways that laws on abortion reflect views about women, as well as the unborn. It is a rich illustration of dignity's gender.

Indeed, there are transnational forces that are simultaneously reinforcing these gendered understandings of dignity. Religious authorities, prominently though by no means exclusively, the Catholic Church, continue to oppose abortion in the discourse of dignity.⁶⁷ The Catholic Church invokes dignity to oppose abortion as the wrongful taking of life,⁶⁸ and in a different usage, invokes dignity to oppose contraception, artificial

⁶⁷ For examples of religious opposition to abortion on the grounds of the dignity and sanctity of life, see, e.g., The Catechism of the Catholic Church, Part Three, Section Two, Chapter Two, Article 5, para. 2270, *available at* http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a5.htm (articulating the Catholic Church's belief that "[h]uman life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person - among which is the inviolable right of every innocent being to life"); Letter of John Paul II to Cardinal Bishop Law, Archbishop of Boston (U.S.A.) (Dec. 29, 1997), *available at* http://www.vatican.va/holy_father/john_paul_ii/letters/1997/documents/hf_jp-ii_let_19971229_cardinal-law_en.html (discussing "the grave threats to human dignity and freedom represented by abortion, euthanasia and other crimes against God's gift of life."); God Loves All That Lives, Joint Declaration of the Council of the Protestant Church in Germany and the German Bishops' Conference, *available at* <http://www.ekd.de/english/1731-2373.html> (opposing abortion on ground of "dignity of prenatal life"); Osnovy sotsial'noj kontseptsii Russkoj Pravoslavnoj Tserkvi, [The Principles of the Social Conception of the Russian Orthodox Church], Chap. XII, Part 4 *available at* <http://www.mospat.ru/index.php?mid=192> (stating that "[i]t is precisely on the recognition of human dignity even in an embryo that the moral condemnation of abortion by the [Russian Orthodox] Church is based."). *But cf.* Evangelical Lutheran Church in America, A Social Statement on Abortion 9-10 (adopted in meeting Aug. 28-Sept. 4, 1991), *available at* <http://www.elca.org/~media/Files/What%20We%20Believe/Social%20Issues/abortion/Abortion%20social%20statement.pdf> (opposing certain restrictions on abortion and stating that "[i]n the case of abortion, public policy has a double challenge. One is to be effective in protecting prenatal life. The other is to protect the dignity of women and their freedom to make responsible decisions in difficult situations").

⁶⁸ *See, e.g.,* Address of John Paul II to Participants in the Study Convention on the Right to Life and Europe (Dec. 18, 1987), *available at* http://www.vatican.va/holy_father/john_paul_ii/speeches/1987/december/index_en.htm ("How it is possible to still speak about the dignity of every human person, when the most innocent and weak are permitted to be killed?").

insemination and same-sex marriage as violating the procreative and conjugal ends of sex.⁶⁹ Consider the Church's 2008 statement in *Dignitas Personae*:

The human embryo has, therefore, from the very beginning, the dignity proper to a person. . . . Respect for that dignity is owed to every human being because each one carries in an indelible way his own dignity and value. *The origin of human life has its authentic context in marriage and in the family*, where it is generated through an act which expresses the reciprocal love between a man and a woman. Procreation which is truly responsible vis-à-vis the child to be born “must be the fruit of marriage.”⁷⁰

The Catholic Church understands dignity as having an expressly gendered meaning that incorporates understandings of sex role differentiation, sex role reciprocity, and sexual identity.⁷¹ This is in deep tension with the understanding of dignity as autonomy and dignity as equality in American due process and equal protection cases: *Casey*, for example, associates dignity with the view that women are to choose their own roles,

⁶⁹ See The Catechism of the Catholic Church, Part Three, Section Two, Chapter Two, Article Six, para. 2353, available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm (“Fornication is carnal union between an unmarried man and an unmarried woman. It is gravely contrary to the dignity of persons and of human sexuality which is naturally ordered to the good of spouses and the generation and education of children.”) On the Church's changing understanding of the “procreative” and “unitive” meanings of sex, see James C. Cavendish, *The Vatican and the Laity: Diverging Paths in Catholic Understanding of Sexuality*, in *SEXUALITY AND THE WORLD'S RELIGIONS*, 203, 214-16 (David W. Machacek & Melissa M. Wilcox eds., 2003).

⁷⁰ Congregation for the Doctrine of the Faith, Instruction *Dignitas Personae* on Certain Bioethical Questions (Sept. 8, 2008) at 5-6, available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20081208_dignitas-personae_en.html (emphasis in original).

⁷¹ The Catechism teaches that “[e]ach of the two sexes is an image of the power and tenderness of God, with equal dignity though in a different way.” Catechism of the Catholic Church, Part Three, Section Two, Chapter Two, Article Six, para. 2335, available at http://www.vatican.va/archive/ccc_css/archive/catechism/p3s2c2a6.htm. The Catechism further instructs that “[e]veryone, man and woman, should acknowledge and accept his sexual identity. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life.” *Id.* at para. 2333 (emphases in original). See also Apostolic Letter *Mulieris Dignitatem* of the Supreme Pontiff John Paul II on the Dignity and Vocation of Women on the Occasion of the Marian Year (Aug. 15, 1988), available at http://www.vatican.va/holy_father/john_paul_ii/apost_letters/documents/hf_jp-ii_apl_15081988_mulieris-dignitatem_en.html (“The personal resources of femininity are certainly no less than the resources of masculinity: they are merely different. Hence a woman . . . must understand her “fulfillment” as a person, her dignity and vocation, on the basis of these resources”).

however they diverge from tradition.⁷² In condemning abortion, the Church invokes a sex-role based understanding of dignity,⁷³ in addition to its appeal to dignity as life.

⁷² See *Planned Parenthood v. Casey*, 505 U.S. 833, 851(1992) (discussing the “constitutional protection” “our law affords . . . to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education” and observing: “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”). *Casey* explains that the Constitution prevents government from imposing on women “its own vision of the woman’s role, however, dominant that vision has been in the course of our history and our culture” and asserts that “[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.” *Id.* at 852.

Casey expresses, as part of substantive due process law, values that are generally associated with American equal protection law. The equal protection cases do not forbid government from recognizing sex differences; the cases allow government to differentiate between the sexes, so long as government does not restrict individual opportunities or enforce group inequalities: “Inherent differences” between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity. Sex classifications may be used to compensate women “for particular economic disabilities [they have] suffered,” to “promot[e] equal employment opportunity,” to advance full development of the talent and capacities of our Nation’s people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women. *United States v. Virginia*, 518 U.S. 515, 533–34 (1996) (citations omitted). Equal protection doctrine requires government to leave to individual citizens the choice of whether and how to conform to conventional gender norms. *But cf.* David. S. Cohen, *Justice Kennedy’s Gendered World*, 59 S. CAR. L. REV. 673 (2008) (showing that the justices differ in the degree to which they separate law from gender conventional understandings).

Mary Ann Glendon, an American constitutional law scholar, as well as the U.S. Ambassador to the Holy See and President of the Pontifical Academy of Social Sciences, contrasts the American constitutional tradition’s emphasis on autonomy with “dignitarian systems [that] tend to make explicit that each person is constituted in important ways by and through his relations with others.” Mary Ann Glendon, *Conceptualization of the Person in American Law*, in THE PROCEEDINGS OF THE ELEVENTH PLENARY SESSION OF THE PONTIFICAL ACADEMY OF SOCIAL SCIENCES, 18-22 NOV. 2005, 103, 109 (Edmond Malinvaud & Mary Ann Glendon eds., 2006), available at [http://www.vatican.va/roman_curia/pontifical_academies/acdscien/2006/Acta%2011_PASS/Acta11\(2_of_4\).pdf](http://www.vatican.va/roman_curia/pontifical_academies/acdscien/2006/Acta%2011_PASS/Acta11(2_of_4).pdf). Glendon associates American law’s attentiveness to autonomy in *Lawrence v. Texas* with a view of the person, in Pope John Paul II’s words, as “creative of itself and its values.” *Id.* at 109-10. This, Glendon emphasizes, is not the Catholic Church’s view of the person. *Id.*

The Church has declared that “there can be no true promotion of man’s dignity unless the essential order of his nature is respected.” Sacred Congregation for the Doctrine of the Faith, *Persona Humana*, Declaration on Certain Questions Concerning Sexual Ethics (Nov. 7, 1975), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19751229_persona-humana_en.html. Further, it has instructed that “the moral goodness of the acts proper to conjugal life, acts which are ordered according to true human dignity, does not depend solely on sincere intentions or on an evaluation of motives. It must be determined by objective standards.” *Id.* (internal citation and quotation marks omitted). This understanding is in deep tension with the expression of dignity as liberty and dignity as equality in *Casey* and *Lawrence*, as Glendon emphasizes; indeed she does not even deign to acknowledge that *Casey* and *Lawrence* appeal to dignity. See *infra* text at notes 91-94 .

⁷³ See sources cited *supra* note 71. A 1998 address by Pope John Paul II to “pro-life” activists reasons about abortion in this sex-role based framework: The Pope exhorted the movement to defend the family and noted as “an encouraging sign” that today “there are many who, *in consideration of the dignity of woman as a person, wife and mother, see permissive abortion laws as a defeat and humiliation for woman and her dignity.*” Address of the Holy Father Pope John Paul II to Members of the Italian Pro-Life

The conflict over dignity's meaning in the abortion debate has been played out in several constitutional courts. We have already witnessed the story in the United States. German constitutional law on abortion manifests intriguingly similar tensions in the use of dignity. West German abortion jurisprudence begins with the emphatic recognition of dignity as life, and *requires* the criminalization of abortion.⁷⁴ Only after German reunification did the German Constitutional Court adopt a compromise formulation according greater protections for women.⁷⁵ In its post-unification abortion decision, the Constitutional Court recognized that some restrictions on abortion could violate women's dignity, and allowed the government to vindicate its responsibility to promote respect for life through a regime of counseling designed to deter abortion and through the provision of support for motherhood; this second decision allowed women who submitted to counseling access to abortion with immunity from prosecution, and in some cases, even with public support.⁷⁶

Movement (May 22, 1998), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1998/may/documents/hf_jp-ii_spe_19980522_movimento-vida_en.html (emphasis added).

⁷⁴ See *Schwangerschaftsabbruch*, I BVerfGE 39 (1975) (holding that the Basic Law's guarantees to all persons of inviolable rights to life and dignity included the developing fetus and that the state was therefore obliged to protect the life of the fetus, even against the mother.) The Court acknowledged that the woman had a right to "freely to develop her personality" which "also lays claim to recognition and protection" by the state, but concluded that: "the decision must come down in favor of . . . protecting the fetus's life over the right of self-determination of the pregnant woman" for the duration of her pregnancy. *Id.*

⁷⁵ See *Schwangerschaftsabbruch II*, BVerfGE 88 (1993) (reaffirming the state's commitments to protect unborn life but acknowledging that this must be balanced against the state's commitments to advance women's dignitarian rights: "[w]here the woman's constitutional rights, namely her right to free development of her personality . . . and to the protection of her dignity, collides with the duty to protect the unborn, the conflict must be solved in accordance with the principle of proportionality'). *Id.* at 203. The German abortion decisions embed women's rights to "dignity" and the "free development of personality" in the abortion context within a constitutional framework that encompasses many other iterations of dignitarian rights. See, e.g., McCrudden, *supra* note 54 at 717 (discussing the relationship between the Aviation Security Act case, BVerfGE, 1 BvR 357/05, and the *Abortion I* case, I BVerfGE 39/75).

⁷⁶ See *Schwangerschaftsabbruch II*, BVerfGE 88, ¶¶ 347-48 (1993) For an analysis of the importance of the post-*Abortion II* counseling regime in balancing the dignity rights of woman and fetus, as well as potential parallels with the United States, see McCrudden, *supra*, note 54 at 1035); see also *infra* note 83 and accompanying text (discussing German compromise).

Colombia's story is equally if not more remarkable. In 1997 six of the nine Colombia Constitutional Court Magistrates thought that a woman's dignity was not compromised by a law requiring her to continue a pregnancy caused by rape, a decision in which the majority cited several papal encyclicals, over the dissenting judges' objection.⁷⁷ But by 2006, with new appointments and argument by the international human rights community, the Court had changed course. The Court read the Colombian constitution as incorporating various human rights instruments including CEDAW⁷⁸ and struck down Colombia's abortion law in part, ruling that the Constitution prohibited criminalization of abortion when pregnancy was the result of rape/incest, when pregnancy posed a threat to a woman's life or health (physical or mental), and when the pregnancy involved a fetus with developmental anomalies so that it could not survive outside the womb.⁷⁹ *In each of these circumstances, the Colombian Court invoked women's dignity as a limit on the reach of the criminal law.* Thus:

When a woman is the victim of rape . . . A woman's right to dignity prohibits her treatment as a mere instrument for reproduction, and her

⁷⁷ Colombian Constitutional Court Decision C-013 of 1997, José Gregorio Hernández, J. (Jorge Arango Mejía, J. concurring; Alejandro Martínez Caballero, J., Eduardo Cifuentes Muñoz, J., and Carlos Gaviria Díaz, J. dissenting), *In re* Artículos 328, 345, 347 y 348 del Código Penal (Articles 328, 345, 347, 348 of the Criminal Code). *See also* Carmen Posada, *Abortion: A Social, Legal and Juridical Debate of the First Order in Colombia*, 5 REPRODUCTIVE HEALTH MATTERS 147(1997) (reporting that the Court "said that a woman's dignity is not affected by the continuation of a pregnancy resulting from rape"); Manuel José Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*, 3 WASH. U. GLOBAL STUD. L. REV. 529, 586 (2004) (noting that the majority "quoted a number of Papal Encyclicals to support its line of reasoning").

⁷⁸ Colombian Constitutional Court Decision C-355 of 2006, Clara Inés Vargas Hernández J. (Jaime Araujo Rentería, J., Manuel José Cepeda Espinosa, J., concurring; Rodrigo Escobar Gil, J. and Marco Gerardo Monroy Cabra, J. dissenting), *In re* Artículo 122 del Código Penal (Article 122 of the Criminal Code), translated in MÓNICA ROA, C-355/2006, 28-31 (María Catalina Rodríguez, trans.) (2007), available at http://www.womenslinkworldwide.org/pdf_pubs/pub_c3552006.pdf (discussing CEDAW and acknowledging that CEDAW "has established that a woman's right to reproductive autonomy is infringed upon by obstacles to her access to the means of controlling her fertility."). *See also supra* note 62 (CEDAW Committee's 1999 observations on Colombia). *See generally* V. Undurraga & R. Cook, *Constitutional Incorporation of International and Comparative Human Rights Law: The Colombian Constitutional Court Decision C-355/2006* in *Constituting Equality: Gender Equality and Comparative Constitutional Law*, Williams, S.H. ed. (Cambridge: Cambridge University Press, forthcoming 2009).

⁷⁹ *See id.* at 6.

consent is therefore essential to the fundamental, life-changing decision to give birth to another person.⁸⁰

...

In a situation where the fetus is not viable, forcing the mother, under the threat of criminal charges, to carry the pregnancy to term amounts to cruel, inhumane and degrading treatment, which affects her moral well-being and her right to dignity.⁸¹

Also, when there is a risk to the health and life of the pregnant woman, it is clearly excessive to criminalize abortion since it would require the sacrifice of the fully formed life of the woman in favor of the developing life of the fetus . . . which is . . . is in violation of autonomy, dignity, and the right to the free development of the individual, all fundamental pillars of our legal system.⁸²

(*A word of caution in comparing abortion law.* Comparing law on the books and law in action may reveal facts about the accessibility of abortion that cannot be gleaned from the text of statutes or cases. Although German law appears highly restrictive on its face, there is some evidence that the German state provides fairly high degrees of access to abortion services and substantial financial support for women seeking abortions.⁸³ Conversely, while the 2006 Colombian decision theoretically increased access to abortion, recently released government figures suggest that there has been little change in the number of women obtaining legal abortions, with a particular lack of services in rural areas.⁸⁴ In the United States there is also considerable geographic variation in the

⁸⁰ *Id.* at 52-53

⁸¹ *Id.* at 57.

⁸² *Id.* at 54-55.

⁸³ See, e.g., Mary Anne Case, Presentation *Perfectionism and Fundamentalism in the Application of the German Abortion Laws*, Presentation at the Indiana University Conference: Constituting Equality: Comparative Constitutional Law and Gender Equality (Mar. 23-24, 2007) (on file with author) at 11 (describing how “abortion in Germany can be paradoxically at once condemned and subsidized”).

⁸⁴ See, e.g., Anastasia Moloney, *Unsafe Abortions Common in Colombia Despite the Law Change*, 373 THE LANCET 534 (2009) (explaining that “nearly 3 years after Colombia’s high court partially depenalised abortion, government figures show that few women have had legal terminations” due to “a lack of awareness about changes to abortion legislation, [and] widespread refusal among doctors to do the procedure, coupled with conservative social attitudes.”)

provision of abortion services because of pressures on many abortion providers to close.⁸⁵⁾

IV. Dignity's Future in Debates over Sexual and Reproductive Rights

The fact that dignity has played a role in securing for women limited rights of access to abortion in U.S., German, and Colombian cases does not mean it is necessarily suited for advancing arguments on behalf of the abortion right in other constitutional jurisdictions. Normative argument takes shape in local contexts. There might be countries in which constitutional law makes possible a direct appeal to the value of sex equality, undiluted by conservative associations that may limit dignity. Conversely, given the shockingly high death and injury rates associated with the criminalization of abortion,⁸⁶ there are *certainly* countries where it is politically safer to advance the argument for abortion rights as part of women's right to life and health under CEDAW Article 12 and other regional human rights agreements; asserting a right of access to abortion on grounds of the right to life and health draws attention away from dignitarian arguments concerned with women's role autonomy in matters of sex, parenting, and political participation.

Throughout the world, illegal abortion remains commonplace, as does hostility to legalizing the practice. Given both of these facts, continuing reliance on health-based arguments for abortion access seems likely.

⁸⁵ See Rachel K. Jones et al., *Abortion in the United States: Incidence and Access to Services, 2005*, 40 PERSP. ON SEXUAL & REPROD. HEALTH 6 (2008).

⁸⁶ See, e.g., Guttmacher Institute & World Health Organization, Facts on Induced Abortion Worldwide (Oct. 2008) at http://www.guttmacher.org/pubs/fb_IAW.html ("Where abortion is legal and permitted on broad grounds, it is generally safe, and where it is illegal in many circumstances, it is often unsafe."); Gilda Sedgh et al., *Induced Abortion: Estimated Rates and Trends Worldwide*, 370 THE LANCET (2007) (arguing that more than 97% of all unsafe abortions were in developing countries, and that there was a correlation between legal prohibition of abortion and unsafe abortion and maternal mortality).

But if advocates for abortion rights reason in medical frames and forbear making dignity arguments, their opponents will not. And if it is only *opponents* of abortion, contraception, and same-sex marriage who continue to speak about dignity in these contexts, conventional understandings of sex and family are likely to shape dignity's meaning in matters of sexual and reproductive rights.⁸⁷

On the sixtieth anniversary of the Universal Declaration of Human Rights, the Pope addressed the United Nations General Assembly in New York, asserting his view that “[t]he promotion of human rights remains the most effective strategy for eliminating inequalities between countries and social groups, and for increasing security.”⁸⁸ In his address to the UN, the Pope called for “recognition of the unity of the human family, and attention to the innate dignity of every man and woman.”⁸⁹ He provided a fuller account of his vision of the role of dignity as a human right, only a few weeks later, when he commended the Italian “pro-life” movement for its advocacy that “proper recognition be given to the words ‘human dignity’” in all the relevant political debates, emphasizing:

the fundamental values of the right to life from conception, of the family founded on the marriage of a man and a woman, of the right of every human being conceived to be born and brought up in a family by his parents, further confirms the solidity of your commitment and your full communion with the Magisterium of the Church, which has always proclaimed and defended these values as “non-negotiable.”⁹⁰

In a similar spirit, Mary Ann Glendon, a Harvard law professor, as well as the U.S. Ambassador to the Holy See and President of the Roman Curia's Pontifical

⁸⁷ See *supra* notes 67-73 and accompanying text.

⁸⁸ Address of Benedict XVI to the General Assembly of the United Nations Organization (Apr. 18, 2008), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/april/documents/hf_ben-xvi_spe_20080418_un-visit_en.html

⁸⁹ *Id.*

⁹⁰ Address of Benedict XVI to Members of Italy's Pro-Life Movement (May 12, 2008), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2008/may/documents/hf_ben-xvi_spe_20080512_movimento-vita_en.html.

Academy of Social Sciences, emphasizes “the dignitarian rights language that one finds in several post-World War II documents—such as the German 1949 Basic Law and the 1948 Universal Declaration of Human Rights, as well as in the social teachings of the Catholic Church as elaborated by Popes John XXIII and John Paul II.”⁹¹ She contrasts this “dignity-based constitutional tradition” with the more “‘libertarian’ U.S. approach,” which she characterizes as “[r]ights . . . without . . . limits” and “freedom . . . lack[ing] an explicit normative structure”⁹²—a licentious order she sees as embodied in *Casey* and *Lawrence*.⁹³ *Glendon refuses even to acknowledge that Casey and Lawrence appeal to dignity, dismissing the rulings:* “The U.S. Court majority’s current notion of freedom is thus quite distant from understandings of freedom that stress the dignity of the person as actualized through relations with others and through the development of one’s ability to exercise freedom wisely and well.”⁹⁴ There is, in short, a contest to shape the normative salience of dignity.⁹⁵ If only some speak the language of dignity in debates over sexual and reproductive rights, dignity is likely to acquire the normative salience they urge.

⁹¹ Glendon, *supra* note 72, at 108-09.

⁹² *Id.*

⁹³ *Id.* at 109-10.

⁹⁴ *Id.* at 110.

⁹⁵ See, e.g., “International Call for Rights and Dignity of the Human Person and the Family,” a petition on the 60th anniversary of the Declaration of Human Rights led by C-FAM, the Catholic Family & Human Rights Institute (“Defending Sovereignty and Human Dignity at International Institutions”), available at <http://www.c-fam.org/campaigns/lid.2/default.asp>.

Some in the U.S. “family values” movement appeal to the role that religious understandings of dignity originally played in shaping the Universal Declaration of Human Rights, and emphasize, in dismay, the different understandings of family and sexuality that have come to shape the concept of dignity with the maturation of the human rights movement. Allan Carlson, Globalizing Family Values, The Howard Center for Family, Religion & Society, available at <http://www.profam.org/docs/acc/thc.acc.globalizing.040112.htm> (a talk for the Charismatic Leaders’ Fellowship, Jan 12, 2004, Jacksonville, Florida) (“This ‘Judeo-Christian influence at the UN survived into the 1950’s, but was in full retreat by the 1960’s. Replacing this foundation of faith was a different idea system: secular democratic socialism.”). Conservative “pro-family” leadership is passionately critical of human rights movement, disdaining it as calling for “‘women’s rights’ . . . abortion; the deconstruction of marriage; the full recognition of all so-called ‘sexual preferences’; and androgyny” and in this way assaulting “the natural family and a moral code based on revelation.” *Id.*

Even so, in some settings, it may *still* seem too costly for advocates to argue that abortion rights protect women's dignity when it is safer to argue for decriminalization in order to protect women's health. But in time, it may be impossible to avoid the debate. Over time, arguments about women's roles will penetrate and organize claims about women's health, as they have in the United States.

How do right-to-health claims for decriminalizing abortion respond to woman-protective arguments for criminalizing abortion as the woman-protective argument continues to spread world-wide?⁹⁶ Woman-protective antiabortion argument cagily

The movement has issued a manifesto advancing a "pro-family" understanding of dignity (opposing abortion and same sex marriage and endorsing other normatively related policy positions):

We affirm that women and men are equal in dignity and innate human rights, but different in function. Even if sometimes thwarted by events beyond the individual's control (or sometimes given up for a religious vocation), the calling of each boy is to become husband and father; the calling of each girl is to become wife and mother. Everything that a man does is mediated by his aptness for fatherhood. Everything a woman does is mediated by her aptness for motherhood. Culture, law, and policy should take these differences into account.

Allan C. Carlson & Paul T. Mero, *The Natural Family: A Manifesto*, FAM. AM. (SPECIAL EDITION) 1, Mar. 2005, available at <http://www.heartland.org/pdf/17267.pdf>. For a list of other affiliate organizations of the World Congress of Families, see World Congress of Families IV: Warsaw 2007: The Howard Center, <http://www.worldcongress.org/WCF4/wcf4.ini.htm>.

⁹⁶ Antiabortion groups throughout the world have adopted the woman-protective argument. See, for example, material posted on the websites of: the Canadian Center for Bio-Ethical Reform, <http://www.unmaskingchoice.ca/> (claiming that abortion leads to increased incidence of breast cancer); SOS Familia (Spain), http://www.sosfamilia.es/fotos_pagina/folletoaborto3.pdf (claiming that women are the victims of abortion and suffer terribly); Jugend für das Leben (Youth for Life) (Austria) <http://www.youthforlife.net/> (providing factsheets detailing Post-Abortion Syndrome's physical and psychological effects); Human Life International (Ireland), http://www.hliireland.ie/abortion_risks.html (discussing the increased risk of breast, liver and cervical cancer in women who have abortions); Life Pregnancy Services (Ireland), <http://www.life.ie/assets/Considering%20Abortion.htm> (claiming that "20% of women undergoing elective abortion will suffer medical complications, of which about 2% are considered life-threatening."); Alliance pour la Droit de la Vie (Alliance for the Rights of Life) (France), <http://www.adv.org/> (claiming that abortion is a moral pain that hurts profoundly and destroys relationships); Russian website *Abort i ego posledstviia* [*Abortion and Its Consequences*], <http://www.aborti.ru> (providing posters contrasting the happy and fulfilled lives of women who choose to carry their pregnancies to term with the endless suffering and "ill health" of women who have abortions); Aktion Lebensrecht für Alle (The Campaign for the Right to Life for All) (Germany), <http://www.alf-ev.de/> (including a booklet entitled "When the Soul dies" describing Post Abortion Syndrome); British Victims of Abortion, <http://www.bvafoundation.org>, (describing "Post Abortion Trauma formally defined as a category of Post Traumatic Stress Disorder which may either be acute or delayed."); Proyecto Esperanza (Project Hope) (Chile), <http://www.proyectoesperanza.cl> (offering post-abortion counseling to women who "feel very deep pain"); Comité Nacional Provida (National Pro-life Committee) (Mexico), <http://www.comiteprovida.org/>, (providing factsheets entitled "Abortion's Complications," "What's being

counters human rights arguments from women's health with *gender-conventional* arguments emphasizing women's health. Resolving this clash of claims about health will require confronting dignity's meaning in matters of sexual and reproductive rights.

HIDDEN from women about abortion," and "The truth about legal abortion clinics"); and Africa Cares for Life, <http://www.africacaresforlife.org.za/> (providing photographs taken at the opening of the new "dignity center" for pregnant women).