



MAKING THE BEST OF IT: A CONCEPTUAL RECONSTRUCTION OF ABORTION JURISPRUDENCE IN THE UNITED STATES AND MEXICO

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ABSTRACT. *This article makes an effort to identify conceptual categories abstracted from the history of abortion case law in the United States, with the ultimate goal of building a conceptual constitutional framework that is more or less detached from the particularities of the legal system that created it. The result is then used to evaluate the unprecedented ruling by the Mexican Supreme Court in 2008 to decriminalize abortion. The study is divided into five sections. Section I asks why women should be allowed to have abortions. The answer to this question justifies the existence of the right to choose, which involves interests, rights, principles and values. Sections II and III consider how the State should regulate abortion procedures by presenting a detailed regulatory scheme born out of various concepts of United States jurisprudence. Section IV offers some general conclusions on American case law. Finally, Section V focuses on the decriminalization of abortion in the Mexico City Criminal Code. It offers an exercise in comparative law that gives a detailed account of the content of the newly reformed statute and its constitutional challenge in the Mexican Supreme Court, analyzing it through the newly constructed looking glass.*

KEY WORDS: *Abortion, jurisprudence, United States, Mexico, comparative law.*

RESUMEN. *Esta investigación está enfocada a la identificación de categorías conceptuales abstraídas de la jurisprudencia del tema de aborto en los Estados Unidos, con la meta de construir un esquema constitucional que pue-*

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da ser deslindado de las particularidades del sistema jurídico que le dio origen. El resultado de este proceso es utilizado como un parámetro de medición para estudiar la acción de inconstitucionalidad sobre la despenalización del aborto, emitida por la Suprema Corte de Justicia de la Nación en 2008 y que constituye la primera de su tipo. El estudio se divide en cinco secciones. La sección I se pregunta por qué se debe permitir la práctica del aborto. La respuesta justifica la existencia del derecho a elegir, involucrando intereses, derechos, principios y valores. Las secciones II y III consideran cómo el Estado debe regular el aborto, creando un detallado esquema a partir de las categorías que surgen de la jurisprudencia norteamericana. La sección IV ofrece algunas conclusiones generales sobre la experiencia constitucional en ese país. Finalmente, la sección V se enfoca en la despenalización del aborto en el Código Penal del Distrito Federal. Se construye a partir de un ejercicio sobre derecho comparado que brinda una descripción detallada del contenido de esta reforma y el proceso de su impugnación constitucional, concluyendo con un análisis de la sentencia emitida por la Corte mexicana a través del nuevo esquema construido.

PALABRAS CLAVE: *Aborto, jurisprudencia, Estados Unidos, México, derecho comparado.*

TABLE OF CONTENTS

I. INTRODUCTION	33
II. WHAT ARE WE PROTECTING?	35
1. Separate and Distinct Interests.	36
2. Constitutional Rights, Principles and Values.	38
A. Autonomy and Bodily Integrity	38
B. Human Dignity	41
C. The Right to Privacy	42
III. QUALITATIVELY SPEAKING, HOW MUCH IS TOO MUCH?	43
1. Outlining a Regulatory Scheme.	43
2. Autonomy and Interest in Potential Life	45
3. “Trimesters” and “Viability”	46
4. Informed Consent, Paternalism and Perfectionism	47
5. Undue Burden	50
6. Varying Scrutiny	54
IV. THE AMERICAN CONCLUSION	55
V. THE MEXICAN EXPERIENCE	56
1. <i>Acción de Inconstitucionalidad</i> 146/2007 and 147/2007: An Example of Legislative Deference	58
2. Federal or State Powers?	60

3. Does the Constitution Warrant a Right to Life?	60
4. Preliminary Conclusions with Regard to the Mexican Case . .	63
5. Epilogue	64

I. INTRODUCTION

Regardless of one’s perspective, discussing abortion is never easy. In a country like the United States that has recognized women’s right to choose for over thirty years, the topic still raises many eyebrows. Women who have had an abortion seldom admit it and will most likely deny it. The issue is even used as a basis for moral accountability on political grounds.¹

Society is harsh on abortion, judging women who have chosen —for whatever reason— that having a child is not the right decision for them at a certain moment in time. Even though in the United States the procedure is legal under an established framework, women are morally criminalized for exercising their constitutionally protected choices.

The pro-choice versus pro-life battle is not exclusive to social morality; battles are going strong in the legal arena as well. This ongoing fight has spanned over three decades in a clash that started with the Supreme Court’s recognition that the constitutional right to privacy encompassed the choice for women to terminate a pregnancy in *Roe v. Wade*,² followed by a tug-of-war in Congress —fueled by a very active sector of conservative society— and the courts.

On one side, there are the conservative state legislatures —claiming their actions are in the name of “the People”— who exhaustively regulate abortion to an extent that often make procedures practically inaccessible. On the opposite side, there are the courts that —in the name of *stare decisis* via judicial review— must uphold the central tenet of *Roe* by reviewing legislation and ensuring that regulations do not nullify a constitutionally protected choice.³

¹ Former vice-presidential candidate Sarah Palin politicized abortion on two fronts: the fact that she never considered the *possibility* —lest we forget, because she had the right of choice— of interrupting her pregnancy even though she knew her child would be born with Down’s syndrome; on the other hand, by parading her pregnant teenage daughter as a model of how young girls should conduct their affairs. See “Sarah Palin on Abortion”, available at: http://www.ontheissues.org/2008/Sarah_Palin_Abortion.htm.

² *Roe v. Wade*, 410 U.S. 113 (1973).

³ This is a broad generalization, as conservatives can form part of legislatures while also taking on the role of judges who impose their own moral discourse in their rulings. One example is found in the words of Judge Easley: “ever since the abomination known as *Roe v. Wade*, became the law of the land, the morality of our great nation has slipped ever so downwards to the point that the decision to spare the life of an unborn child has become an arbitrary decision based on convenience.” See *In The Matter of R.B., a Minor, By and Through Her Next Friend, V.D., v. State of Mississippi*, 790 So.2d 830,835 (Miss. 2001).

Because the advances of American abortion jurisprudence have provided a fertile ground for study over the past three decades, it is no wonder that so much literature has focused on analyzing it. Of the many interpretative possibilities, this article focuses on the difference between merely naming rights and implementing mechanisms that protect the exercise of these rights, adhering to the premise that “the point of constitutional adjudication is not merely to name rights but to secure them, and to do so in the interests of those whose rights they are.”⁴

The focus is not on the institutional question of *who* should be securing rights, be it the legislature or judges —and therefore, leaving the countermajoritarian debate aside— but on the mechanisms themselves. In this case, the right for women to choose to terminate a pregnancy was *named* in *Roe* in 1973, but has been *secured* —or in some cases left unprotected— by the jurisprudence the American judiciary has produced in its study of the various forms of regulations presented by legislatures.

This article does not offer a detailed description of American abortion jurisprudence, but makes an effort to identify conceptual categories abstracted from case law. The search is guided by the following questions: What are the different interests held by women and State? What are the constitutional principles and values behind the right to choose? What possible tests should be used? Are there varying degrees of scrutiny? How much regulation is permitted without nullifying this right?

The ultimate goal is to build a conceptual constitutional framework that is more or less detached from the particularities of the legal system that created it. Ideally, such a structure could be adopted by other legal systems that have decided to decriminalize abortions and are looking for answers on how best to regulate the procedure, or even by those still struggling with the decriminalizing decision itself. The object of study is limited to giving the jurisprudential reasons that make the criminalization of abortion for women over eighteen unconstitutional. The issue of teenage abortion lies outside its scope.⁵

The article contains no hidden agenda; this work takes a liberal pro-choice stand and focuses on identifying liberal concepts. It is not directed at providing a detailed account of *how the regulatory system is* but on interpreting

⁴ RONALD DWORKIN, *LAW'S EMPIRE* 390 (Harvard University Press, 1986).

⁵ As an aside, it should be mentioned that the current rule in American jurisprudence is that parental consent can be given to girls under 18. In addition, if a state decides to require that a pregnant minor obtain one or both parent's consent to an abortion, it must also provide an alternative procedure whereby authorization for the abortion (which in most states takes the form of judicial bypass) can be obtained. See *Bellotti v. Baird*, 443 U.S. 622 (1979). Other relevant cases: *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Cincinnati Women's Services Inc v. Taft D K*, 468 F.3d 361 (2006); and *In the Matter of Mary P.*, 444 NYS 2d 545, NY (1981).

it as *the best it can be*. Consequently, attention is centered on the good and not on the bad, on “making the best” of what is available.

The philosophical background of this article follows the constructive method of interpretation proposed by Ronald Dworkin, who argues that legal interpretation —much like artistic interpretation— is creative in nature, as opposed to conversational and scientific interpretations, which are descriptive. Creative interpretation is constructive: it is a matter of imposing a purpose on an object or practice in order to make it the best possible example of the form or genre to which it belongs. It does not follow that an interpreter can make a “practice” or work of art anything he may want it to be because the history or shape of a practice or object constrains its available interpretation. It is an issue of interaction between purpose and object. In short, it is about making the object or practice the best it can be.⁶

The study is divided into five sections. Section I asks why women should be allowed to have abortions. The answer to this question justifies the existence of the right to choose, which involves interests, rights, principles and values. Sections II and III consider how the State should regulate abortion procedures by presenting a detailed regulatory scheme born out of various concepts of United States jurisprudence. Section IV offers some general conclusions on American case law. Finally, Section V focuses on the decriminalization of abortion in the Mexico City Criminal Code. Here I offer an exercise in comparative law that gives a detailed account of the content of the newly reformed statute and its constitutional challenge in the Mexican Supreme Court, and then analyzes it through the newly constructed liberal looking glass.

II. WHAT ARE WE PROTECTING?

The responsibility of a legislature is to regulate the exercise of constitutionally protected rights by creating a legal framework that will support the constitutional text and provide the conditions for individuals to access their privileges and comply with their obligations. When carrying out this responsibility, it must take into account two major points: harmonizing competing interests while protecting the values the Constitution recognizes as important.

In this respect, constitutional judges have the correlative obligation of evaluating legislation and determining whether it does indeed protect values and harmonize interests or whether it disregards what the Constitution —either the text itself or as it is interpreted by the Supreme Court— deems valuable and favors certain interests to the detriment of others.

On the subject of abortion, courts must review regulations on the basis that the State and women have distinct and separate interests that will oc-

⁶ See in general Dworkin, *supra* note 4.

asionally compete with each other. The result should accommodate these interests and when in conflict, the outcome should be balanced and not blatantly in favor of one or the other.

1. *Separate and Distinct Interests*

Any discussion on the topic of abortion must take into account the fact that there are separate and distinct interests involved. The claim that the only existing interest is the women's right to choose without mention of any countervailing or, counterbalancing concern is only half of the story. Vice versa, an incorrect bias is evidenced by affirming that the topic centers exclusively on State protection of prenatal life while disregarding a woman's right over her own body.

As expressed in *Roe*, the chief interests are that of a woman's to decide over her own body and that of the State to regulate pregnancy in terms of maternal health and the protection of potential human life:

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly (emphasis added).⁷

These separate interests also hold varying degrees of intensity regarding the stage of pregnancy. While initially separate and distinct, these interests will most likely become competing forces with the progression of the pregnancy. It is in this complex balancing act that judges must exercise special care:

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. *These in-*

⁷ *Jane Roe et al. v. Henry Wade*, 93 U.S. 705, 730 (1973).

terests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes “compelling.”

With respect to the State’s important and legitimate interest in the health of the mother, the “compelling” point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this “compelling” point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother (emphasis added).⁸

The fact that the interests have varying degrees of intensity makes for varying degrees of scrutiny that will be developed further on. Suffice to say, while the “compelling” note used in *Roe* is relevant when evaluating competing interests, it should be made clear that the proposed model follows the possibility of regulation in the first trimester — before State interest becomes “compelling”— accepted in *Casey*, as part of the compromise between State and maternal concerns.

It should be noted that the fetus’ interest in its potential life is absent at this initial point of the discussion. This is no mistake, but rather a proper conceptual delimitation. Further along, this study will show that acknowledging the fetus as having a distinct and separate interest from the mother from the moment of conception is unacceptable when the structure of the argument is based on autonomy. This component should be introduced hand-in-hand with the concept of viability instead.

Placing the emphasis on the separate interests of women and of the State advances the liberal argument as it leaves out questions like “When does

⁸ *Id.*

life begin?” and “Is the fetus a person?” outside its scope, similar to the position adopted in *Roe*:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.⁹

This reasoning does not conclude that the fetus is completely irrelevant in the discussion, but that there is no legal fiction — arising from the Constitution itself— that gives it a distinct interest opposable to its mother’s own life plan at least until the “point of viability” is reached.

2. *Constitutional Rights, Principles and Values*

The argument was first framed in the language of interests to contextualize the considerations judges must take into account when evaluating legislative actions, ensuring that every regulation bears in mind both sets of interests, brings them together and in the case of competing interests, that this be done fairly without favoring one to the detriment of the other. The next step is to ask what *right* is protected by declaring the criminalization of abortion unconstitutional, as well as what *principles and values* are derived from the Constitution and subsequently guide any interpretation.

The abortion decision —the right to choose— is not absolute unto itself, but rather a reflection, a consequence, of other constitutionally protected rights. Because its nature is not autonomous but an effect, a response must be given on those grounds.

A. *Autonomy and Bodily Integrity*

Combining the reasoning of both *Roe* and *Casey v. Planned Parenthood*, a more complete and comprehensive justification can be provided as to why abortion should not be criminalized. The Supreme Court’s original argument in *Roe* centered on women’s right to privacy —stemming from the 14th Amendment’s concept of personal liberty— which is broad enough to encompass a woman’s decision of whether or not to terminate her pregnancy.

While this response is convincing and privacy is an important right —fundamental even— within most legal systems, the proposed argument is that it is not the primary right that should be taken into account, but rather a secondary one. Under a liberal perspective, autonomy and bodily integ-

⁹ *Id.*

rity take center stage in decriminalizing abortion.¹⁰ The emphasis shifts from the reasons of *Roe* to the arguments in *Casey*:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. *Carey v. Population Services International*, 431 U.S. Our cases recognize “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.” *Eisenstadt v. Baird*, supra, at 453 (emphasis in original). Our precedents “have respected the private realm of family life which the state cannot enter.” *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L. Ed. 645, 64 S. Ct. 438 (1944). *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. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.* Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.

Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*’s view that a State’s interest in the protection of life falls short of justifying any plenary override of individual liberty claims (emphasis added).¹¹

In this text, stress is placed on the right to make intimate and personal life choices free from governmental interference. In the United States Constitution, these two principles—autonomy and bodily integrity—are inferred from the positivized right to personal liberty prescribed in the 14th Amendment. It is worth mentioning that these principles are completely autonomous in other modern legal systems, such as the German one.¹²

¹⁰ A basic definition of autonomy: the actual possibility for a person to choose his or her own individual “life plan.”

¹¹ *Planned Parenthood of Southeastern Pennsylvania et al. v. Robert P. Casey et al.*, 505 U.S. 833, 851, 857 (1992).

¹² The first two articles of the German Constitution or Basic Law, prescribe:
 “Article 1 [Human dignity – Human rights – Legally binding force of basic rights]
 (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
 (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
 (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

Article 2 [Personal freedoms]

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

Liberalism is the art of separation. The fundamental exercise of constitutional engineering based on this ideal is to separate with absolute clarity the space that belongs to the master of the house —the citizens— and the area restricted to his servants —government authority. In other words, the central focus of liberal constitutional construction is to place strong boundaries and build unmistakable limits between that which corresponds to citizens and the limited space confined to governmental action.

The liberal framework, built primarily from the concepts presented in *Casey*, rests precisely on the goal of separation, on placing a protective sphere around the core of an individual's personal choices. In the present case, this core is qualified by the State's interest in protecting prenatal life and maternal health, and should be regulated accordingly.

The concept of personal autonomy can be addressed from two different angles. From a descriptive point of view, its characteristics and requirements can be analyzed. Adopting a valorative perspective one focuses on the moral value of autonomy and the justification behind the right to personal autonomy:

A. From a descriptive point of view autonomy can be defined as the capacity that people have to design their own life. This is the capacity to critically decide over which life plan to follow. This capacity requires having a mental ability to form complex intentions and plan their execution, the lack of coercion and manipulation, and the existence of an array of possibilities.

...

B. The valorative point of view regarding personal autonomy looks to the question of its value. It seems uncontested that autonomy as a capacity to guide our own life by critical reflection is something valuable per se. This intuition is heavily justified by the fact that the notion of autonomy is strongly tied to the notion of what it means to be a moral person, a responsible individual, an agent capable of giving him or herself an individual life plan [...] [F]ollowing this line of thought it can be said that to be a moral person —an individual— it is required to guide our actions by the rules we set for ourselves. A difference between autonomous beings and those are not, resides on the fact that the first are responsible, that they are held accountable for their actions, while the second are not [...] [B]eing autonomous is a necessary precondition for the rest of the values to really make sense [...] [B]y accepting the value of autonomy one can derive a postulate of political philosophy, the principle of individual autonomy that holds that the free adoption of individual life plans is valuable and that the State must not interfere in this regard.¹³

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

¹³ Gabriel Bouzat, *El principio de la autonomía personal en la teoría constitucional*, 37 CUADERNOS Y DEBATES 86-88 (Centro de Estudios Constitucionales, 1992).

Autonomy is clearly a key concept in modern constitutionalism, especially in one that takes pride in its forward-thinking liberal nature. In the framework proposed in this work, the concept is understood both in descriptive terms and as a value that should serve as an interpretative canon in any modern legal system.

The reasons in *Casey* are fully compatible with this complex conception of autonomy and the significance of considering it valuable in a legal system. The Constitution protects women's right to make personal choices over their own bodies, and this is projected in positive terms in the right to privacy. Additionally, it can be said that autonomy is also valued in terms of the Constitution as a whole, as the document protects individuals and their personal choices —evidenced in the Supreme Court's Due Process Clause interpretations in *Griswold v. Connecticut* and *Lawrence v. Texas*, amongst others.

The primary rationale of my argument is not based on equal protection or gender rights. Although these are considerations that can certainly be introduced —as in the prohibition of spousal veto in *Casey*—, they are not the *sine qua non* conditions for a declaration of unconstitutionality concerning laws that prohibit abortions.

B. *Human Dignity*

Another concept that should be brought into play from reading *Casey* is the value of human dignity. Reva Siegel proposes an interesting dignity-based focus on Justice Kennedy's opinion that is a helpful addition to the desired liberal construction. Bringing dignity into the discussion is useful because in many legal systems it is a concept that is common language in both human rights and constitutional law. Siegel writes “dignity is a value to which opponents and proponents of abortion are committed, in politics and in law. It is a value that connects analysis of abortion regulation to other questions of constitutional law. It is a value that guides interpretations of other national constitution and of human rights.”¹⁴

Since the proposed scheme places autonomy and bodily integrity at the heart of decriminalizing abortion, it takes into account dignity in its specific autonomous dimension, which resembles “Kantian autonomy —the right of individuals to be self-governing and self-defining, and their commensurate right not to be treated as mere objects or instrument of another's will.”¹⁵ Dignity will also come into play further on when developing an undue burden standard based on this value.¹⁶

¹⁴ Reva B. Siegel, *The Politics of Protection: A Movement History and Dignity Analysis of Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 101 (2008).

¹⁵ *Id.*

¹⁶ As a matter of clarification: values belong in the axiological realm, as opposed to principles that work at a deontological level.

C. *The Right to Privacy*

Having established that the fundamental principles that allow women to have a qualified right to make the abortion decision are autonomy, bodily integrity and the value of dignity, I now reintroduce the original reasons in *Roe* in the form of the *right to privacy*. Within this framework, privacy is not the primary reason, but the result of other hierarchically superior principles and values. In other words, individuals have privacy because they have autonomy, bodily integrity and human dignity, not the other way around.

This is a distinction with a highly practical value. Autonomy is broader while privacy is narrower. Liberal legal philosophers believe autonomy is a true fundamental right, even more valuable than the right to life.¹⁷ Even though the right to privacy holds a significant place in many legal systems, it is also true that it can be defeated against government interest in a wide array of instances, such as legal searches and seizures, wire tapping, and disclosure requirements, among others.

In *Roe*, the right to privacy argument used to recognize the right to choose is presented as follows:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

...

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. *The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.* In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in

¹⁷ Euthanasia is an example of balance between autonomy and life, in which the first rises above the second. We refer to cases in which a competent person makes an autonomous decision to end his or her own life. See in general Manuel Atienza, *Juridificar la bioética*, 8 ISONOMÍA (1998), available at: www.cervantesvirtual.com/servlet/SirveObras/35706177436793617422202/isonomia08/isonomia08_05.pdf.

the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U.S. 200 (1927) (sterilization) (emphasis added).¹⁸

Using the same methodological approach as the one used in this work, the argument in *Roe* identifies the right to choose as a projection, a reflection, of the positive right to privacy. It is only natural that privacy would take on a central role in this decision, since nowhere in the American Constitution does it specifically mention anything regarding the “right to have an abortion” —better defined as the right to choose— and the right to privacy is sufficiently open-ended and flexible that a wide range of concepts can be incorporated into its meaning.

Summarizing these findings, the subject of abortion entails balancing separate and distinct interests held, on the one hand, by women making the abortion decision and, on the other hand, the government's concern in regulating it due to its interest in maternal health and protecting potential life. By combining the reasons found in both *Roe* and *Casey*, it is possible to build an acceptable liberal framework based primarily on the principles of autonomy, bodily integrity and the value of dignity, and to a lesser degree on the right to privacy.

III. QUALITATIVELY SPEAKING, HOW MUCH IS TOO MUCH?

1. *Outlining a Regulatory Scheme*

The right to make the abortion decision is not absolute. It is a *qualified* right, which means it can be regulated at varying intensities as the pregnancy progresses. In order to figure out, qualitatively speaking, how much regulation is too much regulation —which would result in nullifying the right—, this article proposes a combination of *Roe*'s trimester framework and *Casey*'s undue burden standard.

The overall idea is that there is an indirect relation between the health-related risks involved in the procedure and the degree of scrutiny: the safer the procedure, the stronger the scrutiny; the riskier the procedure, the weaker the scrutiny. This proportion is accurate to the point of “viability,” when an abortion should only be permitted on rare and exceptional cases based on a threat to maternal life.

The argument is as follows:¹⁹

¹⁸ *Roe*, *supra* note 2, at 727.

¹⁹ The argumentative framework used is based on the one developed by John Hart Ely when explaining *Roe* in John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973).

- 1) Based on the principles of autonomy, bodily integrity, the value of human dignity and the right to privacy, women have a qualified right to make the abortion decision. The State may regulate the exercise of such right on the basis of a distinct interest that will become compelling at some point of the pregnancy.
- 2) The State has two separate and legitimate interests: protecting maternal health and life, and protecting prenatal life. Neither can be counted as compelling throughout the entire pregnancy, as each evolves differently in terms of the unborn child.
- 3) The scrutiny applied by the Court will be measured as an indirect proportion between the health-related risks of the procedure and the undue burden scrutiny.
- 4) This rule is applied until the point of viability. After this moment, abortions should be extremely rare and exceptional, and the burden of proof should be shifted accordingly, as now the instances in which an abortion is permitted should be judged with strict scrutiny, only allowing the procedure when maternal life is seriously at stake.
- 5) Since the risks of performing the procedure are minimal during the first trimester of pregnancy, neither interest is sufficiently compelling to justify the State's interference with the decision that lies between a woman and her physician. This does not mean that procedure will be available on demand because the State can impose regulations to ensure the woman is a competent individual making a decision based on informed consent and that the procedure is carried out with the required medical care. Government regulation will be judged on the basis of an undue burden with the use of strict scrutiny.
- 6) As we move into the second trimester, the interest in protecting the fetus is still less compelling, but the procedures performed to interrupt the pregnancy grow riskier. At this point, the health-related risks of having an abortion begin to exceed those of childbirth. The government may impose regulations related to the preservation and protection of maternal health, judged on the basis of an undue burden test and utilizing intermediate scrutiny.
- 7) When the fetus becomes viable, the interest in protecting it becomes compelling. This leads to strict restriction of the instances in which an abortion is permitted, judged on the basis of strict scrutiny and only allowing the procedure when maternal life is seriously at stake. Viability also marks the introduction of the concept of the fetus' restricted autonomy, and thus a distinct interest in its own life that is now balanced against the mother's.

2. *Autonomy and Interest in Potential Life*

Introducing the fetus' interest in its own life and its restricted autonomy at the point of viability is consistent with the same principle of autonomy that protects the abortion decision in the first place. Before viability, the fetus is not considered an autonomous being, but completely dependent on the mother because it would not be able to survive outside the womb.

However, once viability is reached, even though the fetus has not *ipso iure* become an autonomous entity, it now has the actual possibility of becoming one as it has been detached from the womb.²⁰ Accordingly, its interests grow compelling and the State may not only prohibit abortions but is even obliged to do so, except in exceptional cases when it is absolutely necessary to protect maternal life.

The issue of fetal autonomy is incredibly complex. It would be impossible to apply the above concept of autonomy when it comes to a fetus. However, considerations on the special nature of this restricted concept have been made by legal philosopher Carlos Santiago Nino, who identifies the fetus as valuable because of its possibility of becoming an autonomous individual:

...[e]ven though in reality autonomy has a minimum threshold that is satisfied with the capacity to make evaluations, trivial as they may be; it reaches its highest expression when the person is capable of evaluating a life plan and choose between diverse ideals of personal good. From the fact that the fetus or the embryo is not an autonomous entity it does not necessarily follow that it is not an individual and that, as such, does not have the incommensurable value that belongs to individuals. From the fetus' lack of autonomy, its individuality, just like that of a newborn child, can only stem from its identity with a future autonomous being.²¹

Having resolved the question of value, Nino then focuses on drawing a line at the moment the fetus develops a central nervous system, which corresponds with the principle of autonomy:

However, even though this identity does not require autonomy, it demands, under the most plausible criteria, a continuity of mental processes with that which will become an autonomous entity. It is obvious that the fetus or the embryo during the first stages of gestation cannot have a psychological continuity with that which will become an autonomous entity, for the simple

²⁰ In this scenario, the use of autonomy is very limited. After viability, the fetus can survive without being attached to the mother, even if it cannot make informed decisions or design its own life plan.

²¹ Carlos Santiago Nino, *La autonomía constitucional*, 37 CUADERNOS Y DEBATES 45-46 (Centro de Estudios Constitucionales, 1992).

reason that it does not have mental processes; and it does not have such processes also for the simple reason that it has not developed a neurological system, which according to our current scientific knowledge is necessary to develop a psyche. Accordingly, the fetus or the embryo cannot have value as an individual during the first stages of gestation in which it has not developed a central nervous system. Consequently, a Constitution that is committed to the value of personal autonomy must not necessarily protect the fetus or the embryo in the early stages of its development.²²

The background Nino lays out advances the arguments proposed in this essay, regarding the fact that the fetus' interests in its potential life comes into play as distinct and opposable to its mother's in the later stages of pregnancy, and should not be introduced in the first and second trimester, as stated earlier.

3. "Trimesters" and "Viability"

These are not legal but medical concepts. A trimester refers to the three twelve-week periods in which a pregnancy is divided. Viability is a concept used to designate the moment in which a fetus could potentially survive outside the mother's womb, even if it means through artificial means. Unlike a trimester, the point of viability is not a static term, but a dynamic one that depends on technological breakthroughs.

In the proposed scheme, the specifications established by the Court in *Planned Parenthood of Central Missouri v. Danforth* should be considered:

In *Roe*, we used the term "viable," properly we thought, to signify the point at which the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and presumably capable of "meaningful life outside the mother's womb," 410 U.S. at 160, 163. We noted that this point "is usually placed" at about seven months or 28 weeks, but may occur earlier. *Id.* at 160.

...

In any event, we agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician. The definition of viability in § 2(2) merely reflects this fact. The appellees do not contend otherwise, for they insist [p. 65] that the determination of viability rests with the physician in the exercise of his professional judgment (emphasis added).²³

²² *Id.* at 46.

²³ *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).

Accordingly, the point of viability should not be codified by the legislature, but left open-ended to take available technologies into consideration and the particular situation of the woman, as evaluated by her physician. Currently, viability regulation varies from State to State from twenty to twenty-four weeks or in the third trimester.²⁴

4. *Informed Consent, Paternalism and Perfectionism*

For a decision to be considered autonomous, it must be an informed conclusion voiced by a competent person. One cannot state that a drunken person “autonomously” chose to get behind the wheel and drive in a completely inebriated state, eventually ending up in a terrible accident. That affirmation would be incorrect because his judgment was impaired by the amount of alcohol in his body.

A similar consideration can be made when it comes to medical procedures, and particularly to abortion. The State cannot assume the person already knows all the benefits and consequences associated with a procedure. Accordingly, the State must prescribe that it is the duty of the physician performing the abortion to inform the patient and guarantee that the patient’s decision is autonomous.

Informed consent should not be equated with unjustified paternalism, which is frowned upon in a liberal state. A justified form of paternalism in which government uses objective criteria to protect those considered incompetent is very much compatible with a modern democratic state.

Ernesto Garzón Valdés has differentiated two forms of paternalism by using arguments based on autonomy and giving objective criteria to identify when a person can legitimately be deemed incompetent.²⁵ These causes are:

- 1) Ignorance: understood as the lack of knowledge of the relevant elements of the situation one has to act upon. For example, a person may ignore the consequences of using a certain drug; therefore, the Food and Drug Administration is justified in forcing drug companies to include a detailed label explaining all possible effects —and side effects— of the medication. In the same way, the State must ensure the woman is informed of all the medical consequences of having an abortion.
- 2) Lack of willpower: these are the circumstances in which an individual’s willpower is so affected or reduced that he cannot make an informed decision. This is the case of a person suffering from substance

²⁴ See The Guttmacher Institute (2008), *An Overview of State Abortion Laws*, available at: http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf.

²⁵ See Ernesto Garzón Valdés, *¿Es éticamente justificable el paternalismo jurídico?*, 5 DOXA 155 (1988).

- abuse, whose decisions cannot be considered based on objective considerations. One example would be a heroin-addicted mother demanding an abortion.
- 3) Coercion: when the individual is acting under compulsion to behave in a certain way, the decision cannot be considered as having been taken by a competent person. A man acting under a death threat does not freely choose his actions just as a woman who is forced to have an abortion by her violent spouse is not a free-acting agent.
 - 4) Incoherence: if a person accepts the importance of a value and yet refuses a mechanism that ensures its protection, the resulting decision cannot be judged as competent. This would be the example of an individual proclaiming the value of life above all else and then refusing to wear a seatbelt on a potentially dangerous amusement park ride, or a woman who goes to her doctor explaining that she wants an abortion because she wants the fetus to live.

Paternalism is generally unjustified when the person is competent and does not fall under any of the above-mentioned categories. If a woman who wants an abortion is informed and makes coherent arguments to justify her free and autonomous decision, the State has no role in stopping her. Because the State cannot make *a priori* assumptions that all the women who request abortions are competent, it must impose informed consent regulations aimed at fulfilling this requirement.

Once the autonomic importance of informed consent has been accepted, we must not forget that these regulations can cut both ways, as they are situated along a fine line between paternalism and perfectionism. As explained, paternalism refers to coercive State action aimed at protecting an individual from harming himself or creating an unsolicited benefit, and can be either justified or unjustified.

On the other hand, perfectionism is never justified in a liberal democratic State as it entails the government's assuming a certain model of virtue and consequently coercing its citizens into acting accordingly. Informed consent can be the perfect guise for a perfectionist legislature that believes abortion is immoral to impose its own value-judgments and place almost unbearable obstacles for women to gain access to this procedure.

A textbook example of the wrongful use of these types of regulations is South Dakota Title 34 that requires the doctor to "inform" the woman "that the abortion will terminate the life of a *whole, separate, unique, living human being*."²⁶ In *Planned Parenthood v. Rounds*, 375 F. Supp. 2d 881 (D.S.D.

²⁶ This is not the only example of value judgments imposed by South Dakota legislation. In the South Dakota Women's Health and Human Life Protection Act —repealed in a November 2007 referendum— which was set to ban abortion in the State, it is possible to find such value filled statements as: "life begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*, including the fact

2005), the District Court for the District of South Dakota granted a preliminary injunction preventing the 2005 version of South Dakota's statute regulating informed consent to abortion from becoming effective, based on its finding that Planned Parenthood had a fair chance of success on its claim that § 7(1)(b) violated physicians' 1st Amendment right to free speech and that the balance of harms favored Planned Parenthood.²⁷

Because of the potential misuse of informed consent, it is necessary to develop a standard to judge regulations that could invalidate constitutional rights under a legal disguise. The New Jersey Supreme Court has developed reasonable jurisprudence that strikes down laws that only use informed consent as a vehicle for perfectionism:

On the profound issue of when life begins, this Court cannot drive public policy in one particular direction by the engine of the common law when the opposing sides, which represent so many of our citizens, are arrayed along a deep societal and philosophical divide. We are not unmindful of the raging debate that has roiled the nation and of the sincerely and passionately held beliefs by those on opposite sides of the debate. We are sympathetic to the deep pain plaintiff has suffered in the aftermath of the termination of her pregnancy. However, *the common law doctrine of informed consent requires doctors to provide their pregnant patients seeking an abortion only with material medical information, including gestational stage and medical risks involved in the procedure. Under that doctrine of informed consent, the knowledge that plaintiff sought from defendant cannot be compelled from a doctor who may have a different scientific, moral, or philosophical viewpoint on the issue of when life begins. Therefore, we do not find that the common law commands a physician to inform a pregnant patient that an embryo is an existing, living human being and that an abortion results in the killing of a family member* (emphasis added).²⁸

In addition to this, there is the following ruling from the District Court of the District of Rhode Island:

The next provision under "Required disclosures," § 23-4.7-2(2), provides that a woman seeking an abortion acknowledge that "the nature of an abortion has been fully explained, including the probable gestational age of the fetus at the time the abortion is to be performed." Regarding the first part of this provision, *requiring that the nature of an abortion be fully explained, I interpret this to require an explanation of the medical nature of an abortion. Consistent with the notion*

that each human being is totally unique immediately at fertilization;" allegedly protecting "the mother's fundamental natural intrinsic right to a relationship with her child;" and defining the fetus as an "unborn human being, an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal ages of the unborn child from fertilization to full gestation and childbirth."

²⁷ The injunction was subsequently overturned on appeal by the Eighth Circuit Court of Appeals on the 27th of June 2008.

²⁸ *Acuna v. Turkish*, 192 N.J. 399, (2007).

that the State may act in unintrusive ways to enhance the quality—medically speaking—of the decision-making process, this provision requires simply that a woman be informed that an abortion will terminate her pregnancy and that, once completed, the operation cannot be reversed. Nothing on its face indicates that a physician must engage in a philosophical or moral discussion of abortion to satisfy this provision. In fact, physicians are not necessarily qualified to engage in such discussions and the State's interest in *assuring informed consent extends only far enough to include the medical aspects of a woman's decision.* Interpreted in this way, the provision requires nothing more than what was approved by the Supreme Court in *Danforth*: “we are content to accept, as the meaning (of informed consent), the giving of information to the patient as to just what would be done[...].” 428 U.S. at 67 n.8, 96 S. Ct. at 2840 n.8. Fundamental to a meaningful decision on whether to have an abortion is a precise understanding that it will terminate pregnancy, and that the operation is irreversible. *This kind of information serves to enhance the quality of the decision-making process and cannot be viewed as anything except a neutral, non-normative requirement that a woman know exactly what it is that she is requesting.* Thus, I find the requirement that women be informed of the “nature of an abortion” to be constitutional (emphasis added).²⁹

The Rhode Island Court highlights the most important characteristic of informed consent: it is meant to *enhance* the quality of the decision-making process. Following the cases cited, informed consent should not be interpreted as a grab bag for legislature to introduce its own values, but rather as a very narrow term that only allows for material medical facts, informing the patient that an abortion ends the pregnancy, the gestational age, the fact that it is not a reversible procedure and the potential medical risks involved.

5. *Undue Burden*

Aside from requiring that women make the decision to terminate a pregnancy by fulfilling the requirements of informed consent, the State may also place another set of regulations if they are backed by the legitimate interest in protecting maternal health and potential life. These regulations are directly aimed at ensuring the quality of the procedure.

Much like informed consent, these types of regulations can also serve as a cover for a legislature to introduce its own moral agenda aimed at preventing women from gaining access to the procedure. Consequently, they will be judged by the undue burden standard. Modalities like a twenty-four hour waiting period, the “two-visit rule,” and requiring a physician to perform the procedure are all examples of what the State is allowed to do when

²⁹ *Women's Medical Center Of Providence, Inc. v. Dennis J. Roberts II, et al.*, 530 F. Supp. 1136 U.S. Dist. (1982).

placing modalities on the right to choose. Below, we explore the concept of undue burden following the dignity-based reading proposed by Siegel and incorporating another set of categories, such as the gender paternalism argument.

It is important to clarify that while the system proposed in this article incorporates both the trimester rule and the undue burden standard, it partly aims at “making the best of it” and is directed at creating a stronger yet dignity-based test. These two concepts have not coexisted in American jurisprudence as the undue burden test was coined by the Court in *Casey* to take the place of the trimester standard. The ruling forgoes the design set forth in *Roe* that allowed for an unregulated first trimester and replaces it with one that will judge regulations based not on trimesters, but on the finding that these regulations impose an undue burden which “exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”³⁰

An undue burden is understood as the “substantial obstacle rule,” better understood in the context of other considerations made in the opinion:

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. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.*

...

Some guiding principles should emerge. What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. *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.* See *infra*, 505 U.S. at 899-900 (addressing Pennsylvania’s parental consent requirement). [*878] Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. *Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden* (emphasis added).³¹

In Justice Kennedy’s opinion, the cited considerations are central in the dignity-based argument interpreted by Siegel, whose reading rests on stressing the importance of these paragraphs to explain why the standard is based on dignity —both as autonomy and as equality. Siegel reaches the following conclusions:

³⁰ *Casey*, *supra* note 11, at 878.

³¹ *Id.* at 877-878.

The joint opinion does not understand abortion regulation as a zero-sum game requiring choice between dignity as life and dignity as liberty and equality; instead, the undue burden framework requires government to vindicate multiple dimensions of human dignity, concurrently. *The joint opinion allows government to regulate abortion in ways that respect the dignity of life, so long as the regulation also respects the dignity of women as autonomous and equal.* Indeed, when the interest in potential life understood as an interest in expressing respect for life (rather than an interest in increasing population, understood as human capital, it makes little sense to vindicate this value by means that manipulate or instrumentalize women. Accordingly, the joint opinion adopts an undue burden framework that insists that regulation on behalf of potential life must assume a form that respects women's dignity as self-governing members of the polity.

[...]

Even as the joint opinion dramatically expands government authority to regulate abortion expressively, *it prohibits regulation that restricts autonomy of the pregnant woman or that instrumentalizes her life.* The joint opinion recognizes government interest in expressing respect for human life as a reason to allow additional, incremental regulation of abortion: but it simultaneously affirms that constitutional protection of women's dignity limit the ways government can intervene in women's decision making. Even as *Casey* allows more restrictions on abortion, the undue burden framework reaffirms women's constitutional right to decide whether to carry a pregnancy to term. *Women's decisional autonomy is the core value the undue burden framework vindicates. Government may persuade women to carry a pregnancy to term, it may not manipulate, trick, or coerce her into continuing the pregnancy. The undue burden framework thus allows modes of vindicating the state's interest in potential life that create meaning, promote values, or communicate with a pregnant woman and her community—that may deter abortion, rather than prohibit it* (emphasis added).³²

This dignity-based standard fits perfectly into the autonomy-centered system proposed in this article. Since women's autonomy is the main principle behind the right to choose over her body, the undue burden framework should be centered on treating women as equal autonomous beings.

The twenty-four hour waiting period vindicated in *Casey* is incorporated into the above dignity-based conception because it treats women as autonomous beings as opposed to taking an instrumentalist approach. "Under the undue burden framework, dignity-respecting regulation of women's decisions can neither manipulate nor coerce women: the intervention must leave women in substantial control of their decision, and free and unimpeded to act on it."³³

In addition to the autonomy reading, Siegel utilizes a gender-based approach in which the "government cannot enforce customary or common

³² Siegel, *supra* note 14, at 44.

³³ *Id.* at 45.

law understanding of women's roles."³⁴ Take the example of the spousal notification requirement struck down in *Casey* because it established a third party veto—in the husband's hands—that placed the decision outside the sphere of the woman and her doctor—the only ones legitimized to make the choice. Instead of attaching an autonomous dimension to this decision, Siegel focuses on the implications of gender and equality:

In striking down the spousal notice requirement, the Court vindicated dignity as liberty and equality, analyzing abortion regulation with attention to history and social meaning of the kind required to identify violations of equal respect. In applying undue burden analysis to the spousal notice requirement, the Court identifies the traditions of legal coercion that the Constitution renounces in protecting women's dignity as self-governing members of polity.³⁵

Following this line of reasoning, a dignity-based undue burden standard proves to be useful not only in the realm of the autonomous, but can also be incorporated on the level of equality.

This framework acknowledges that another fundamental aspect of protecting any decision is that of protecting the path that leads to reaching its conclusions. A resolution is not autonomous and cannot be made by a competent person if it is based on untruthful or misleading information. Writing about the possibility of striking mandatory ultrasound requirements as an undue burden, Carol Sanger notes:

It is generally accepted that in a liberal democracy certain decisions about how a person organizes his or her life reside within the special competence and authority of the person making the decision. These decisions encompass a range of deeply personal, often self-defining preferences and commitments [...] [S]ince 1973, a decision whether or not to abort has been a similar sort of protected decision, one characterized by the Supreme Court as involving nothing less than a choice about a woman's destiny. *But it is not the decision alone that is protected from state interference. It is also and importantly the deliberative path a person takes to reach the decision [...]* [B]ut, if a choice is protected because of the profound significance it bears to the meaning of a person's life, *then the part of life devoted to the choosing—the thinking of it—has got to be protected as well. Adults may arrive at certain decision—including or not whether to have a child—having chosen and followed their own path to get there without intercession from one's offspring or from God or from legislatures doing God's work* (emphasis added).³⁶

This is another aspect of the undue burden standard of which the Courts should be wary: not only scrutinizing the fact that a woman is allowed to

³⁴ *Id.*

³⁵ *Id.*

³⁶ Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 387, 391 (2008).

make the choice, but constantly verifying that the act of decision-making is informed and coercion-free, thanks to the obligation placed upon her doctor to provide truthful and neutral information.

6. *Varying Scrutiny*

The operational part of the undue burden standard has been mostly developed under the “large fraction test” stated in *Casey*: “the Court inquires, based on expert testimony, empirical studies, and common sense, whether in a large fraction of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”³⁷ Lower courts have also opted for judging abortion restrictions under the *United States v. Salerno* “under no circumstances” test, which requires the challenger making a facial claim to show that there is no set of circumstances under which the statute would be valid.³⁸

While it is clear that the “large fraction” test is more benign than the “under no circumstances” one, I consider both options unsatisfactory and incompatible with an autonomy-based framework. When the issues at stake are constitutional principles, values, compelling interests and individual rights, courts should not discriminate on the basis of quantity. What would the Constitution say to a “small fraction” of women who were sufficiently deterred from getting an abortion by a determinate set of requirements? Would it answer that they, as individuals, are not significant enough?

Because of these reasons, the scheme I propose opts for the application of varying degrees of scrutiny in the form of strict and intermediate standards. This is not an unprecedented argument, as it was suggested back in *Roe*, but later abandoned in *Casey*. The combination of undue burden and varying degrees of scrutiny provides a more comprehensive test. Why is this important? Because in a liberal democracy, citizens should be wary of instances in which the government persuades them to abandon the exercise of their constitutional rights and protected choices.

Some might argue that the use of strict scrutiny automatically translates into equating the right to choose—which encompasses the abortion decision—to a fundamental right. While there might be some theoretical misgivings about taking this step, it is consistent with the labeling provided in *Roe*. To be clear, I do not advocate that the right to choose is a fundamental right unto itself, but rather that personal autonomy should be branded as fundamental, and the abortion choice is but one of its manifestations.

The varying degree framework would work as follows:

³⁷ *Casey*, *supra* note 11, at 925.

³⁸ *See generally* *United States v. Salerno*, 481 U.S. 739 (1987).

- a) During the first trimester of pregnancy, where the risks involved in the procedure are minimal, the Court should be especially careful in analyzing government regulations by using strict scrutiny. To pass the test, a compelling government purpose—the interests announced in *Roe*, as well as the need for the treatment, would have to be proved.
- b) During the second trimester, as the risks are greater and government interests more compelling, the Court should relax its standard of review. An intermediate review in which the State must prove the existence of specific government objectives and the law must be substantially related to the achievement of those aims would be the desired standard in these circumstances.
- c) Finally, third trimester abortions should be extremely rare and exceptional. Thus, the burden of proof shifts as now it is the instances in which an abortion is permitted that should be judged with strict scrutiny, only allowing the procedure when maternal life or health is seriously at stake.³⁹

While it is evident that the use of varying degrees of scrutiny turns the framework into a more complex exercise than the “large fraction” or the “under no circumstances” test, this fact should not be viewed negatively. When applying a complex standard results in one that favors dignity and individual autonomy, the burden placed upon the courts is fully justified in a liberal democracy.

IV. THE AMERICAN CONCLUSION

This paper is an example of constructive interpretation of what is considered the most liberal and useful concepts of American abortion jurisprudence. The result is a workable framework that could be imported into countries that are struggling with the decriminalization of abortion or how best to regulate the procedure.

The scheme can be summed up as follows: both women and the State have separate and distinct interests related to interrupting a pregnancy, but women have a qualified right to choose that stems from the constitutional principles of autonomy, bodily integrity, the value of human dignity and the right to privacy.

The State may impose regulations on the procedure, but it cannot prohibit abortion until the point of “viability,” at which point it should be an exceptional procedure only permitted when maternal life or health is gravely at stake. Before the point of viability, the State may impose informed consent

³⁹ An argument could also be made here for third semester abortions in the case of serious birth defects that would prevent the child from ever having an autonomous life.

requirements and other regulations aimed at protecting maternal health and its interest in potential life, which will be judged under the undue burden standard with varying scrutiny in an indirect proportion to the pregnancy's progression: the safer the procedure, the stronger the scrutiny; the riskier the procedure, the weaker the scrutiny.

The proposed conceptual framework is born solely out of American jurisprudence analyzed through a liberal looking glass. The construction is not rigid but flexible, which means that adjustments can be made to address particular concerns and it would still remain functional.

Is this the only way? Is this the best way? Not necessarily. Others might argue that the varying degrees of scrutiny are unnecessary or that the trimester framework should be eliminated. There are many different interpretations and they are all acceptable as long as compelling arguments are given to justify their conclusions. But the main idea behind this review is to make a solid case for a liberal interpretation of abortion jurisprudence.

V. THE MEXICAN EXPERIENCE

April 26, 2007 marks a historical event in Mexican legislative history. It is the date the amendments to the Mexico City Penal Code and the Health Law were officially promulgated, legalizing abortion for the first time ever in Mexican history.⁴⁰ These reforms were the culmination of a process that took many years in the making, representing the struggles between local and federal governments, feminist groups, right- and left-wing activists and the prominent involvement of the ever-present Catholic Church.

Even though Mexico is a secular State and thus there is no official religion, the reality is that the predominance of Catholicism is an enduring legacy from the 1521 Spanish *Conquista*. A 2005 document on religious diversity released by the *Instituto Nacional de Estadística y Geografía* (INEGI, the federal organ in charge of national surveys and census) showed that in 2000 there were 84.4 million people over 5 years of age, of which 96.6% admitted to having religious beliefs. Overall, 88 out of every 100 people responded as being Catholics, 8 said they had a different religion and only 4 said they did not profess any religion.⁴¹

Under such circumstances, the obvious question is raised: How was decriminalizing abortion in Mexico possible? The answer comes within the composition of the *Asamblea Legislativa del Distrito Federal* [Mexico City Legislature] where there is a supermajority of the left-wing party, *Partido de la*

⁴⁰ Gaceta Oficial del Distrito Federal, No. 70, April 27, 2007.

⁴¹ See Instituto Nacional de Estadística y Geografía, *La diversidad religiosa en México*, 2005, available at: http://www.inegi.gob.mx/prod_serv/contenidos/espanol/bvinegi/productos/integracion/sociodemografico/religion/Div_rel.pdf.

Revolución Democrática (PRD) [Party of the Democratic Revolution]. This distribution in the legislature is the key that allowed the reforms to pass in the midst of heated debate with the vocal opposition of the conservative *Partido Acción Nacional* (PAN) [National Action Party].

In the end, the final vote was taken on April 23rd, with an outcome of 43 votes in favor, 17 against and 1 abstention. The winning coalition was made up of the leftist PRD, the centrist *Partido Revolucionario Institucional* (PRI) [Institutional Revolutionary Party] and the swing vote *Partido Nueva Alianza* (PANAL) [New Alliance Party], while opposed were the right wing parties PAN and *Partido Verde Ecologista* (PVEM) [Green Ecologist Party].

As was expected, voices were immediately raised both for and against the reform. Legal action was taken soon after and two lawsuits challenging constitutionality (*acciones de inconstitucionalidad*) were presented before the *Suprema Corte de Justicia de la Nación* (SCJN) [Mexican Supreme Court] by the *Procurador General de la República* [Federal Attorney General] and the *Presidente de la Comisión Nacional de los Derechos Humanos* [Federal Ombudsman of the National Human Rights Commission] on May 24th and 25th, respectively.⁴²

In an unprecedented decision, the Court allowed public hearings to take place, giving anyone with an opinion about decriminalizing abortion the opportunity to be heard. From April 11th to June 27th, 2008, a total of 6 hearings were held before the justices. A wide variety of actors presented their arguments to the Court: from the Attorney General and the *Ombudsman* to representatives from every political party and both Chambers of Congress, non-governmental organizations, prominent lawyers, academics, physicians and regular citizens acting on a personal capacity. By the last hearing, a total of 80 people had spoken before the Court.⁴³

Having concluded these hearings, on August 15th Justice Salvador Aguirre Anguiano presented his fellow justices with a first draft of the ruling to be discussed over the days to come. In a truly noteworthy effort towards transparency, this document was made available to the public on a website created for this purpose.

⁴² It is important to note that the Mexican Judiciary was completely restructured in 1994 by means of a constitutional amendment, which effectively transformed the Supreme Court into a Constitutional Court with abstract review, concrete review and individual complaints (known as *acción de inconstitucionalidad*, *controversia constitucional*, and *amparo*, respectively) under its jurisdiction. An *acción de inconstitucionalidad* is a constitutional proceeding regulated by Article 105, Section II of the Mexican Constitution which allows for the minority of the Federal or local chambers within each Congressional Chamber—a minimum of 33%—, the Attorney General, the *Ombudsman* and political parties—only in electoral law matters—to question the constitutionality of a statute within 30 days of its publication before the Mexican Supreme Court. For the ruling to result in the annulment of the statute and a binding precedent (*jurisprudencia*), a total of 8 votes out of the 11 Justices sitting *en banc* is required.

⁴³ Press release on the subject available at: <http://www.scjn.gob.mx/SiteCollectionDocuments/PortalSCJN/MediosPub/AlDiaConLaCorte/2008/Junio/30jun284.pdf>.

The first document drafted by Justice Aguirre Anguiano proposed striking down the amendments because they violated the right to life that was implicit in the Mexican Constitution. According to the proposal, allowing abortion in the first 12 weeks of gestation resulted in a failure to protect a life that the Constitution safeguarded unconditionally from conception to birth.

After days of public deliberation—from August 25th to the 28th, 2008—in more than 17 hours of heated debate—available to the general public on the Court's Transparency TV Channel, a Judiciary version of C-Span—the eleven justices reached a decision, with a majority of 8 voting for the constitutionality of the statutes. The new ruling that validated the reforms was written by Justice José Ramón Cossío, and was made public in mid-February of the following year.⁴⁴

1. *Acción de inconstitucionalidad 146/2007 and 147/2007:*
An Example of Legislative Deference

In a completely different scenario from that of the American experience, Mexican justices were not faced with one citizen challenging a statute that criminalized the abortion procedure, but rather a democratic majority that chose to decriminalize abortion in the first 12 weeks of gestation. Articles 144, 145, 146 and 147 of the Mexico City Criminal Code were reformed as follows:

Chapter V
Abortion

Article 144. Abortion is the interruption of pregnancy after the 12th week of gestation.

For purposes of this Statute, pregnancy is the part of the human reproductive process that starts with the implantation of the embryo in the endometrium.

Article 145. A woman who voluntarily practices her own abortion or consents to another person performing it after the 12th week of gestation shall be punished by imprisonment for no less than three months but no more than six months or community service no less than 100 days but no more than 300 days. In this case, the crime shall only be punished when completed.

A penalty of one to three years of prison shall be imposed on the person that performs an abortion, even with a woman's consent. Whoever performs the abortion, be it with or without the pregnant woman's consent,

⁴⁴ For more on the subject, see Francisca Pou, *El aborto en México: el debate en la Suprema Corte sobre la normativa del Distrito Federal*, ANUARIO DE DERECHOS HUMANOS (Universidad de Chile, 2009), available at: http://www.anuariocdh.uchile.cl/anuario05/6_Perspectivas_regionales/PerspectivasRegionales_FranciscaPou.pdf.

will be punished by imprisonment for no less than one year but no more than three years.

Article 146. Compelled abortion is the interruption of the pregnancy, at any moment, without the pregnant woman's consent.

For the purpose of this article, a penalty of five to eight years in prison shall be imposed on the person that forces a woman to abort by any means without her consent. If physical violence or intimidation were to be proved, the penalty imposed will be from eight to ten years in prison. For the purpose of this article, whoever forces a woman to abort by any means without her consent shall be punished by imprisonment for no less than five years but no more than eight years. In this case, when the person uses physical or moral violence as a force, he or she shall be punished by imprisonment for no less than eight years but no more than 10 years.

Article 147. When the compelled abortion is procured by a practicing medical doctor, midwife or nurse, in addition to the penalties prescribed in this Chapter, their practicing license shall be suspended for a period of time equal to that spent in prison.

Interpreting the cited articles one can differentiate three different categories:

- a) The voluntary interruption of pregnancy within the first 12 weeks of gestation, which is not punishable by law.
- b) The unjustified interruption of pregnancy after the 12th week of gestation, identified as abortion punishable by law for both the woman and the doctor who performs the abortion.
- c) The forced interruption of the pregnancy at any moment, classified as compelled abortion, punishable by law for anyone who performs the abortion.

In addition to reforming the Criminal Code, the legislature also amended the Mexico City Health Law to guarantee that women would have access to the procedure, free of charge, in public hospitals. As a result, Article 16 Bis 6 prescribes that Mexico City public health institutions must provide women with quality procedures free of charge, as well as give timely and truthful information about other available options and possible side effects. The abortion must be performed within 5 days of the formal request presented, which must be honored even if the woman has another type of private or public insurance. In addition, Article 16 Bis 8 establishes the public health policy to be followed by local hospitals, which includes implementing a policy of education, reproductive choice and prevention of unwanted pregnancies (by distributing free contraception), as well as psychological counseling after the procedure has been performed.

There were two main issues presented to the Court in the unconstitutionality lawsuits: *a)* Did the Mexico City legislature have the power to leg-

islate in health policy or is this the dominion of federal law under Articles 73, paragraph XVI, and 133 of the Constitution? And *b*) should the protection of life be qualified or does the Constitution warrant the uncompromised protection of life?

2. *Federal or State Powers?*

The plaintiffs argued that the definitions of concepts such as embryo, pregnancy, gestation, and issues related to family planning and health policy in general were under the jurisdiction of the federal health authority reserved for the federal powers exercised by *Congreso de la Unión* [Congress of the Union].⁴⁵ On the subject, the Court held that Article 4 of the Constitution and the statutes contained in the General Health Law (*Ley General de Salud*) establish a National Health System that coordinates both Federal and state authorities, and that the matter of women and their pregnancies is left to the jurisdiction of state law.

Regarding the definition of pregnancy in the General Health Law, the ruling states that the law itself does not define the concept. Although there is a definition in health regulations (*Reglamento de la Ley General de Salud en Materia de Investigación para la Salud* [General Health Law Regulations for Matters of Health Research]), it only applies to the Federal Public Administration and not to state or municipal law.

In view of these reasons, the Court concluded that the local legislature acted within its autonomous powers—especially safeguarded in terms of criminal law—when it defined pregnancy for the purposes of its Criminal Code, and thus there was no invasion of powers.

3. *Does the Constitution Warrant a Right to Life?*

At the first level of analysis, the Court specified that just because life is a prerequisite for the exercise of all the other rights, it does not mean that it is placed in a higher position than the rest. In fact, it clearly stated that no constitutional right is absolute or ranked higher than another, and when in conflict they should be balanced against each other. The ruling went on to analyze the constitutional text and reaches a clear conclusion: the Mexican Constitution does not recognize a right to life in any of its articles. This does not mean that life is not protected, but that the right to life is not—as is often argued—expressly warranted in the Constitution or superior to the rest.

⁴⁵ Similar to the American Congress, composed by the joint Senate and the House of Representatives, both enact federal laws.

The Court then studies international law and jurisprudence —ranked below the Constitution but higher than federal and state law in the Mexican legal system— and states that due to international obligations life should be protected under the following circumstances:

- The right to life should be warranted by national legislation, stating a minimum standard for its protection which should be progressively expanded;
- There is no international convention to which Mexico is a party that warrants an absolute right to life or establishes when life begins;
- In compliance with international law, Mexico has obligations with respect to the arbitrary deprivation of life and the execution of the death penalty; and
- Mexico is not internationally constrained to protect life from the moment of conception, or at any specific point.

In other words, the Court states that there is no right to life in itself, only rights that reflect a State's obligation to promote and protect life —such as the right to healthcare granted in Article 4. Using this as a starting point, the decision goes on to declare that criminal law should not be viewed as punishing acts that are *mala in se* but rather *mala prohibita*; thus, the criminalization of a certain conduct depends on the social circumstances of the time and not on a particular notion of natural rights that are above positive law.

The Court then comes to a fundamental point in which it differentiates the case presented to them from the decisions adopted by the American Supreme Court in *Roe v. Wade*,⁴⁶ the Colombian Constitutional Court, the Canadian Supreme Court and the Spanish Constitutional Tribunal. These courts were faced with criminal sanctions that penalized abortion, while the Mexican ruling analyzes the decision of a democratically elected legislature to decriminalize the procedure.

The question is then, the ruling states, not of whether the criminalization of an action should be prohibited in constitutional terms but whether a legislature should be forced to criminalize certain behaviors. While the Constitution forces the legislature to criminalize some behaviors in so many words —citing the examples of Articles 16, 19 and 20 all those pertaining to violations of criminal procedure—, it reads no such mandate when it comes to the interruption of pregnancy, and cites a wide variety of examples of offenses that have been decriminalized over the years by a democratically elected legislature. Such an action is evidently permitted in constitutional terms as long as there is no express mandate to criminalize.

⁴⁶ *Roe*, *supra* note 2.

Through this standpoint of legislative deference, the ruling then cites the reasons that motivated the local legislature to make its decision: public health concerns related to ending back alley abortions; equal rights among women, especially concerning those living in poverty and without access to private doctors who would perform the procedure safely, as opposed to well-to-do women who have their private doctors perform the procedure at a minimum risk; freedom of reproductive choice; the importance of the 12-week barrier in guaranteeing that the procedure is done while still safe, and the fact that the embryo has not yet developed sentience or consciousness, which it considers suitable in constitutional terms.

Following the *ultima ratio* criminal law principle, the Court states that criminal sanctions should only be used as a last resort to ensure the protection of constitutionally recognized values because government intrusion should be kept to a minimum in a modern democratic state. Accordingly, if the legislature decided that criminalizing abortion no longer fit into the social reality because far from preventing women from undergoing the procedure, it forced them to seek abortions under unsafe circumstances—that present both a public health issue and a disregard for women's rights—the Court should not force the legislature into criminalizing abortion.

Having solved the main issue at hand—that the local legislature did not have an obligation to criminalize abortion and the balancing criterion used to decriminalize it corresponded with constitutional standards—the ruling then turns to more specific questions regarding the equal protection clause in Article 1: abortions solicited by underage girls and criminal law principles.

Regarding the first issue, the plaintiffs had argued that the legislation discriminated against men as it denied them of their right to procreate because they had no veto power over women's choice to have an abortion. The Court rejected the claim, explaining that due to the nature of pregnancy, the burden on men and women's life plan is completely asymmetric. Women bear much heavier consequences, not only physically but also legally since the legal system does not provide full certainty that the father will be economically responsible for the child. Thus, the ruling concludes that the legislature based its decision to let women have the last word on objective reasons, thereby respecting equal protection standards.

Regarding underage abortions, the decision rules out the argument that the legislature should have been forced to establish a special procedure for women under the age of 18, stating that there is no compelling reason to broaden informed consent requirements due to legal age. The Court concludes by reaffirming the fact that criminal law intrusion should be kept to a minimum and that if the legislature decided to decriminalize certain behaviors, the Court should be extremely wary of striking down a law that would result in more State interference against the will of the democratic

power. The final part of the Court's decision is focused on criminal law principles, affirming that the type of criminal offense is clearly defined and provides full legal security, and that there is a relationship of proportionality between the actions punished and their legal consequences.

4. *Preliminary Conclusions with Regard to the Mexican Case*

Having analyzed the Mexican abortion ruling, it is quite evident that comparing the Mexican case to thirty years of American experience is like comparing apples and oranges. This is mainly due to the fact that American courts have been faced with legislative prohibitions while the Mexican Supreme Court had to rule on a legislative permission, which called for a completely different approach that the Court fully understood and acted accordingly.

One can still find common ground between them such as women's rights over their own bodies, even though there is a shift of focus between the right to privacy (the United States) and an autonomous life plan (Mexico); the 12-week framework which was imported from American jurisprudence; informed consent requirements, and so forth.

The Mexican framework is notably more rigid, poses no exceptions to the 12-week period and is far less complex, but this is only natural seeing as it embodies a legislature's first attempt at providing a regulatory scheme for decriminalizing abortion. Another notable difference is the treatment given to underage abortions. While the Mexican Court stated special requirements need not be placed upon minors, its American counterpart decided in *Planned Parenthood of Missouri v. Danforth* that while States may not impose a blanket parental veto for minors, a judicial bypass—where the minor needs to prove to a judge that she is either mature enough to make the decision or, if she is not, it would be in her best interest to have the abortion—does comply with constitutional standards.⁴⁷

Just as the 30-year abortion debate in the United States is still going strong, Mexico has only just begun a process that will surely take years to perfect. The next hurdle is a new *acción de inconstitucionalidad* in which the local Baja California Constitution was amended to force its legislature to criminalize abortion that has already been presented before the Supreme Court.⁴⁸ Without legislative deference used as a baseline, it is safe to predict that the Mexican Court will most likely look to comparative jurisprudence to start building a more complex structure, much like the one the United States has developed over the past decades.

⁴⁷ *Planned Parenthood of Missouri v. Danforth*, *supra* note 23.

⁴⁸ *Acción de inconstitucionalidad* 11/2009 assigned to Justice Franco.

5. Epilogue

As expected, the Baja California Constitutional reform was only the beginning. What has followed since is a tidal wave of amendments in state constitutions. Conservative legislatures have since banned abortions in their highest-ranking norms by stating that human life begins at the very moment of conception. This has been the case for fifteen out of the thirty-one states.⁴⁹

But local constitutions are just a part of the story.⁵⁰ Besides the Baja California *acción de inconstitucionalidad*, there is another one presented by the San Luis Potosí legislature;⁵¹ a *controversia constitucional* filed by the Municipality of Uriangato in the state of Guanajuato challenging the local antiabortion law;⁵² and last but not least, a whopping 400 plus *amparos* questioning the administrative standards regulation (NOM) that forces private hospitals to perform abortions free of charge when the pregnancy is the result of a rape.⁵³

These cases give the Court an opportunity to expand its constitutional doctrine not only on the topic of abortion itself, but also on a number of relevant issues such as the right of privacy, autonomy and federalism, to mention a few. It should be added that at the end of 2009 two justices (Mariano Azuela Güitrón and Genaro Góngora Pimentel) left the seats they held in the Court—for the last fifteen plus years—, which could shift the balance on the abortion issue. As more and more politically complicated questions are brought before the Court, all eyes will be on the eleven justices in the upcoming years, scrutinizing the way they interpret modern-day problems through the eyes of a Constitution that—admittedly, amended an estimate of five hundred times— will be celebrating its 100th anniversary in 2017.

⁴⁹ Thirty two if Mexico City, technically not a state, but a federal district, is counted. The state constitutions that have been amended to protect life from the moment of conception are those of Baja California, Colima, Jalisco, Sonora, Puebla, Morelos, Campeche, Querétaro, Quintana Roo, Durango, Nayarit, Guanajuato, San Luis Potosí, Yucatán and Oaxaca.

⁵⁰ For an account of the wide variety of cases presented before the Court, news coverage is available at: <http://www.alterinfos.org/spip.php?article3848>.

⁵¹ *Acción de inconstitucionalidad* 62/2009 assigned to Justice Franco.

⁵² In this most peculiar of cases, the *controversia constitucional* 26/2009 assigned to Justice Góngora Pimentel, a municipal government challenges the state anti-abortion law. For news coverage, see: <http://www.jornada.unam.mx/2009/07/09/index.php?section=estados&article=035n3est>.

⁵³ Normas Oficiales Mexicanas [Official Mexican Standards] are general administrative regulations that can regulate a number of issues. News coverage of these *amparos*, currently pending resolutions in the district courts, available at: <http://www.aciprensa.com/noticia.php?n=25857>.