

Reproductive Rights in the Legal Academy: A New Role for Transnational Law

Martha F. Davis and Bethany Withers

A. Introduction

Increased law school attention to instruction in transnational law is well-documented. Over the past few years, the American Association of Law Schools and the *Journal of Legal Education* have played leadership roles in galvanizing the legal academy to explore these issues.¹ Individual law schools and professors

Martha F. Davis is a Professor of Law at Northeastern University School of Law. She completed this article while serving as a Visiting Fellow at the Harvard Law School Human Rights Program and the Women and Public Policy Program of the Kennedy School of Government, Harvard University.

Bethany Withers is a third year student at Harvard Law School, where she serves as Senior Article Editor and Senior Technical Editor of the Harvard Law and Policy Review.

The authors would like to thank Nancy Northup and Cynthia Soohoo, who provided the catalyst and research support for this study, and Jill Adams and Khiara Bridges, who provided important baseline information. Elizabeth Persinger, Sonya Sultan-Khan, and Kyle Courtney provided critical research assistance. The authors also appreciate the generosity of the many faculty who shared their syllabi and comments on reproductive rights teaching for this study, and the helpful comments of attendees at Harvard Law School Human Rights Program Fellows workshop in December 2008.

1. See, e.g., Andrew Boon & Julian Webb, *Legal Education and Training in England and Wales: Back to the Future?* 58 J. Legal Educ. 79 (2008); Catherine J. Iorns Magallanes, *Teaching for Transnational Lawyering*, 55 J. Legal Educ. 519 (2005); Fleur Johns & Steven Freeland, *Teaching International Law Across an Urban Divide: Reflections on an Improvisation*, 57 J. Legal Educ. 539 (2007); Anthony J. Sebok, *Using Comparative Torts Materials to Teach First-Year Torts*, 57 J. Legal Educ. 562 (2007); Tatiana Selezneva, *Innovative Legal Education and Its Role in Developing the State Based on the Rule of Law: Analysis of the U.S. Law Schools Academic Experience and the Prospects of Its Implementation in the Republic of Belarus*, 58 J. Legal Educ. 122 (2008). See also Association of American Law Schools Annual Meeting, *Empirical Scholarship: What Should We Study and How Should We Study It?* (2006), <http://www.aals.org/am2006/program.html> (last visited May 5, 2009) (featuring a workshop on “Integrating Transnational Legal Perspectives into the First Year Curriculum” and panels such as, “The Globalization of American Law? Comparative Law and the New Legal Transplants”).

with a transnational vision of U.S. legal education have also been influential.² The transnational project has become so widely accepted, in fact, that its absence from the Carnegie Foundation Report on Legal Education sparked immediate commentary and critique, as well as proposals of how to integrate the two approaches.³

The results of this attention to transnational legal education have been considerable. Work has examined the range of first-year courses with an eye toward transnational connections.⁴ Upper-level courses have also been scrutinized for transnational opportunities.⁵ New courses have been developed to offer transnational perspectives, including new required first-year courses that underscore the institutional priority given to the material.⁶ Law schools are increasingly reaching out to form international teaching partnerships, encouraging their students to work or study abroad for some period of their law school education.⁷ Further, new subject-matter casebooks provide global supplements to assist professors with minimal background in global law, and newly revised casebooks increasingly incorporate integrated transnational perspectives for standard law school courses.⁸

2. For example, New York University established The Hauser Global Law School in 1994. *See also*, Larry Catá Backer, *Parallel Tracks? Internationalizing the American Law School Curriculum in Light of the Principles in the Carnegie Foundation's Educating Lawyers, The Internationalization of Law and Legal Education* 102, 131 (Jan Klabbers & Mortimer Sellers eds., Springer, Dordrecht, The Netherlands, 2009), *available at* http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/ParallelTraks2008.pdf (citing Dean Harold Koh's leadership at Yale).
3. Backer, *supra* note 2.
4. For example, Dean Harold Koh reported that "at Yale Law School, our approach has been to mainstream a focus on globalization into our traditional First Term Curriculum, adding international modules to the basic courses of Procedure, Torts, Constitutional Law, and Contracts." Harold Hongju Koh, *Why Transnational Law Matters*, 24 *Penn. St. Int'l L. Rev.* 745, 752 (2006).
5. *See, e.g., id.* at 751-52; Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 *Pac. McGeorge Global Bus. & Dev. L.J.* 267, 297-302 (2006) (discussing bringing a global perspective to law school corporations courses); Mark Tushnet, *How (and How Not) to Use Comparative Constitutional Law in Basic Constitutional Law Courses*, 49 *St. Louis U. L.J.* 671 (2005).
6. *See* Mathias Reimann, *Taking Globalization Seriously: Michigan Breaks New Ground by Requiring the Study of Transnational Law*, 82 *Mich. B.J.* 52 (2003); Jeri Zeder, *The New Curriculum Embraces Law's Increasingly Transnational Nature*, *Spotlight at Harvard Law School*, <http://www.law.harvard.edu/news/spotlight/classroom/at-home-in-the-world.html> (last visited Dec. 1, 2008).
7. *See* Louis F. Del Duca ed., *Enriching the Law School Curriculum in an Increasingly Interrelated World: Learning from Each Other*, 26 *Penn St. Int'l L. Rev.* 831 (2008).
8. For instance, West Law School Publications has developed a Global Issues Series, which "contains materials designed to facilitate the introduction of international, transnational and comparative law issues into basic law school courses." West Law School Publications, <http://www.westglobalissues.com> (last visited Dec. 1, 2008).

We applaud these developments. However, this article takes a new, distinct tack by examining a single issue area, sexual and reproductive health, which cuts across the law school curriculum. In this article, we ask how a transnational perspective might enhance the teaching of sexual and reproductive health in all of the law school courses and doctrinal settings in which this topic is treated. By framing the inquiry in this way, we necessarily embrace an “integrative,” rather than a “segregative” approach to the internationalization of the law school curriculum. While the topic of “Global Sexual and Reproductive Rights” can be presented in a free-standing course—as it is in several law schools⁹—we believe that transnational perspectives should also be integrated across the curriculum where sexual and reproductive rights are discussed.

While we believe that transnational approaches are valuable in every area of the curriculum, there are several reasons for singling out this issue area for transnational treatment. First, topics addressing sexual and reproductive health raise questions concerning the human condition that cross international boundaries. The universal nature of this human experience is reflected in the international attention that has marked this area. Global gatherings such as the Cairo International Conference on Population and Development and the Beijing Fourth World Conference on Women speak directly to the transnational character of this simultaneously domestic issue.¹⁰ The political context in which the issue is framed in the United States may be peculiarly local, but the experiences of women and men that underlie that political context are by their nature universal.

Second, as we describe in greater detail below, sexual and reproductive rights issues are not often taught in a free-standing course, and particularly not by full-time faculty. An issue-based integration of transnational perspectives will be the only way to transform this subject in the same way that subjects like civil procedure have been reshaped.¹¹ Indeed, because the topic of reproductive rights is addressed in so many courses across the curriculum, it provides a unique opportunity to expose many students to this approach.

9. See, e.g., Georgetown and Harvard Law School. Of course, course listings are a moving target; outside of the first-year curriculum, new courses are often introduced and old courses may be dormant. For example, Judith Younger of the University of Minnesota offered an interesting new course, “Choice: The Law of Reproductive Rights,” in the 2008-2009 school year, after several years during which she did not teach the material.
10. United Nations, Division for the Advancement of Women, Fourth World Conference on Women, Beijing, China (Sept. 4-15, 1995), <http://www.un.org/womenwatch/daw/beijing/official.htm> (last visited May 5, 2009); United Nations, International Conference on Population and Development, Cairo, Egypt (Sept. 5-13, 1994), <http://www.un.org/popin/icpd2.htm> (last visited May 5, 2009).
11. See Kevin M. Clermont, Integrating Transnational Perspectives into Civil Procedure: What Not to Teach, 56 J. Legal Educ. 524 (2006); Gevurtz, *supra* note 5, at 281-86; Helen Hershkoff, Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum, 56 J. Legal Educ. 479 (2006); Edward F. Sherman, Transnational Perspectives Regarding the Federal Rules of Civil Procedure, 56 J. Legal Educ. 510 (2006).

Finally, including a transnational perspective on reproductive and sexual health reflects the debates outside of the academy in ways that tend to unite the study of law with its practice—an approach roundly endorsed by the Carnegie Report.¹² For example, Justice Scalia cited transnational law on abortion rights in his dissent in *Atkins v. Virginia*,¹³ using it to argue that the U.S. law on the subject was relatively liberal. Transnational human rights law was offered to the New Jersey Supreme Court as it considered that state’s “family cap” law, which denied welfare benefits to children born to women on welfare in an effort to deter such women from giving birth.¹⁴ In addition, recent scholarly writing on the role of “human dignity” in domestic abortion adjudication underscores the ways in which U.S. jurisprudence in this area already draws significantly from transnational human rights norms.¹⁵ Incorporating this transnational perspective into reproductive health and rights teaching will better prepare students to understand and use these approaches—and to engage in the public debate of these issues—once they embark on their legal careers.

In sum, expanding reproductive rights pedagogy to address transnational perspectives will aid in exposing a wide range of students to transnational material, will contribute directly to the transnational project to expand students’ preparedness to analyze such materials, and will better reflect the debates on sexual and reproductive health currently taking place outside of law school classrooms—in the courts, among policymakers, and in scholarly writing. Below, we explore in greater detail the current status of reproductive rights teaching, the current casebook treatment of reproductive rights, and the specific ways in which transnational perspectives might be introduced to this material in a range of courses.

12. William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, San Francisco, 2007).
13. 536 U.S. 304, 337 (2002) (Scalia, J., dissenting). *See also* Philip D. Racusin, *Looking at the Constitution through World-Colored Glasses: The Supreme Court’s Use of Transnational Law in Constitutional Adjudication*, 28 *Hous. J. Int’l L.* 913 (2006).
14. *Sojourner A. v. New Jersey Dep’t of Human Services*, 828 A.2d 306 (N.J. 2003).
15. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 *Yale L.J.* 1694 (2008).

B. Current Status of Sexual and Reproductive Health Law Teaching¹⁶

We surveyed the current landscape of sexual and reproductive health teaching in law schools by examining syllabi from reproductive rights courses and reviewing existing casebooks from various fields of law that touch on reproductive rights issues. The course research revealed that there are relatively few free-standing reproductive health courses in law schools today. Only nine of the top-ranked thirty-one law schools offer reproductive rights courses, and only nineteen reproductive rights law courses were identified in total.¹⁷ Of these courses, ten focus solely on domestic reproductive rights law,¹⁸

16. For this section, we identified reproductive rights courses by examining the online course catalogues of the top-31 law schools, according to the 2008 U.S. News & World Report. In addition, we searched Google for “Reproductive Rights Law Syllabus,” consulted the reproductive rights course list provided by the Law Students for Reproductive Justice, and were grateful to Caitlin Borgmann and Jessie Allen, who shared several syllabi with us that they had collected for other purposes. (While the Law Students for Reproductive Justice course list is not yet available online, other materials by the group can be found on their website at: <http://lsrj.org>.) We also reviewed fifty-eight casebooks in the fields of constitutional law, family law, bioethics, children’s law, women’s rights, public health, torts, international law, and comparative constitutional law for their treatment of reproductive health. The survey was an extensive sample rather than a complete review of all existing casebooks, and each casebook has been given equal standing, since there is no authoritative information on which casebooks are used most frequently in each field. See the appendix for a full list of the casebooks reviewed.
17. Case Western Reserve, Reproductive Rights Seminar; Columbia, Reproductive Health and Human Rights; CUNY, Reproductive Rights; Duke, Legal Issues in Human Reproduction; Emory, The Legal Regulation of Sexuality and Parenthood; Georgetown, Global and National Approaches to Reproductive Health and the Law; Harvard, International Reproductive/Sexual Health Rights Reading Group; Rutgers at Camden, Bioethics, Babies & Babymaking; Santa Clara University, Health Law Seminar: Government Regulation of Reproduction; Albany Law School, Human Reproduction: Legal and Moral Issues; University of California at Davis, Reproductive Rights, Law and Policy; University of Denver, Reproductive Rights; University of Minnesota, Choice: The Law of Reproductive Rights; University of Pennsylvania, Human Reproduction: Law and Policy; University of Toronto, Reproductive and Sexual Health Law; University of Washington, Beginning of Life: Rights and Choices; Washington & Lee, Reproductive and Sexual Health and Rights Seminar; African Human Rights Challenges; Whittier, Reproductive Technologies and the Law; William Mitchell, Assisted Reproductive Technologies Seminar.
18. The courses focusing solely on domestic law are those taught at CUNY, Case Western Reserve, Emory, Rutgers at Camden, Albany Law School, University of Denver, University of Pennsylvania, University of Washington, Whittier, and William Mitchell. We have not obtained syllabi from Albany Law School or University of Pennsylvania; however the professor who teaches the course at Albany Law School has indicated that the course does not include material on human rights, comparative, or international law, and the description of the University of Pennsylvania’s course indicates that it takes a similarly domestic approach. Courses taught at Duke, Santa Clara University, the University of California at Davis, and the University of Minnesota include one or two sessions on global reproductive rights issues, but they too primarily adopt a domestic approach. Law Students for Reproductive Justice takes a similar approach in their proposed model curriculum, devoting one module to “International Women’s Reproductive Rights.” Law Students for Reproductive Justice, http://lsrj.org/documents/Model_Curriculum.pdf (last visited Dec. 1, 2008).

addressing the familiar series of cases, from *Skinner v. State of Oklahoma, Ex. Rel. Williamson*¹⁹ through *Gonzales v. Carhart*.²⁰ There are, however, five reproductive health courses that have a fully-integrated transnational approach.²¹ While these courses are demonstrative of the applicability and value of transnational perspectives in reproductive rights teaching, their approach has clearly not yet been widely adopted. This point is further illuminated by the fact that there has not been a reproductive rights “casebook” published to date.²² The rarity of free-standing reproductive health classes in law schools and the absence of a casebook on the subject suggest that a transnational approach will be most effective on an issue-based level, across many courses in the curriculum that cover reproductive rights. This approach to integrating transnational perspectives will also expose more students to transnational law than would a focus on free-standing courses.

Traditional law school courses that cover reproductive rights often include bioethics, children’s rights, constitutional law, family law, public health law, torts, and women’s rights. The casebooks in these fields provide insight how current courses typically cover reproductive rights, as well as the extent to which these courses have already integrated transnational law into their reproductive rights discussions. While few casebooks mention international law in conjunction with reproductive health, there are some noteworthy exceptions. For example, while all of the constitutional law casebooks we examined solely excerpt domestic cases on reproductive rights, the note commentary in some of them takes a more transnational approach.²³ Similarly, Catherine MacKinnon adopted a full-fledged comparative approach in her women’s rights casebook, using excerpts from briefs as well as cases, with frequent references to Canadian, South African, and European law.²⁴ There also seems to be particular interest in incorporating a transnational approach in the field of family law. Barbara Stark of Hofstra Law School has recently

19. 316 U.S. 535 (1942).

20. 127 S. Ct. 1610 (2007).

21. The courses with a transnational approach are those taught at Columbia, Georgetown, Harvard, University of Toronto, and Washington & Lee.

22. An excellent “reader” was published recently: *The Reproductive Rights Reader: Law, Medicine, and the Construction of Motherhood* (Nancy Ehrenreich ed., New York Univ. Press, New York, 2008). However, despite its other merits, it does not include any discussion of human rights, international, or comparative law relating to reproductive rights.

23. Paul Brest’s casebook specifically raises the relevance of foreign and comparative law to constitutional adjudication and has an extensive note on citation of foreign law by U.S. courts, without directly linking this to reproductive rights. However, William Araiza explicitly links reproductive rights and, in particular, privacy rights to international human rights standards. See William Araiza et al., *Constitutional Law: Cases, History and Dialogues* (3d ed., LexisNexis, 2006); Paul Brest et al., *Processes of Constitutional Decision-Making: Cases and Materials* (5th ed., Aspen Publishers, New York, 2006); Michael K. Curtis et al., *Constitutional Law in Context* (2d ed., Carolina Academic Press, Durham, 2006).

24. See Catharine MacKinnon, *Sex Equality* (2d ed., West, St. Paul, MN, 2007).

led an effort to expand the horizon of family law courses to include global issues²⁵—her 2005 casebook, *International Family Law*, draws on her comparative work on China, South Africa, and Germany and reviews public international law relevant to reproductive rights.²⁶ These few examples illustrate the larger role that a transnational approach could play in the discussion of reproductive health in traditional law school courses.

In addition to researching casebooks in typically domestic-focused areas, we examined international human rights law and comparative constitutional law casebooks, as they present similar opportunities to introduce a transnational approach to sexual and reproductive health issues. Burns Weston's international law casebook presents a major problem including discussions of the status of women and of reproductive rights under international law, comparative case law, and legislative materials. It is an excellent illustration of how professors can engage students in a transnational analysis of reproductive rights issues.²⁷ Further, Vicki Jackson and Mark Tushnet's comparative law casebook uses abortion case law in the United States, Germany, and Canada in its opening chapter to illustrate principles of constitutionalism, inciting comparison of different constitutional approaches to reproductive health and demonstrating the potential analytical utility of transnational perspectives.²⁸ Still, these examples are exceptions to the generally uniform treatment of reproductive health as a domestic issue. While they provide useful illustrations of a transnational approach to teaching reproductive health issues, no current casebook outside the arena of international or comparative law has fully embraced such an approach or explored the extent to which it can heighten understanding and enhance students' learning experiences.

25. Barbara Stark is a leading international scholar and former member of the executive counsel of the American Society of International Law. For more about her work, see: http://law.hofstra.edu/directory/faculty/fulltimefaculty/ftfac_stark.html (last visited May 7, 2009).
26. Barbara Stark, *International Family Law: An Introduction* (Ashgate Publ'g, Burlington, 2005). In addition, Stark and Ann Estin published *Global Issues in Family Law*—a slim volume that can stand on its own or be used to supplement a basic family law casebook—as part of a *Global Issues Series* published by West. Ann Laquer Estin & Barbara Stark, *Global Issues in Family Law* (West, St. Paul, MN, 2007).
27. Burns H. Weston et al., *International Law and World Order: A Problem-Oriented Coursebook* (4th ed., West, St. Paul, MN, 2006).
28. Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (Found. Press, New York, 1999). Other noteworthy use of international material in discussions of reproductive and sexual health occurs in comparative law casebooks authored by Norman Dorsen and by Brian Landsberg and Leslie Jacobs. Dorsen includes an extensive discussion of abortion, beginning with the landmark U.S. cases, *Griswold v. Connecticut*, *Roe v. Wade*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*; he then draws upon foreign decisions and international instruments to broaden the perspective. Landsberg and Jacobs's casebook begins with issues of constitutionalism and moves through comparative structural issues to sections on equality and fundamental rights. See Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials* (West, St. Paul, MN, 2003); Brian Landsberg & Leslie Jacobs, *Global Issues in Constitutional Law* (West, St. Paul, MN, 2007).

C. Opportunities to Integrate Transnational Law into Coverage of Reproductive Health and Rights

Rather than simply respond to this gap in coverage by developing freestanding courses on global reproductive rights, transnational materials on reproductive health and rights should be incorporated throughout the curriculum. Transnational law materials on reproductive health fit comfortably within a number of traditional law school courses, providing both a basis for expanding the theoretical discussions of the basic materials and a practical introduction to transnational approaches. Below, we discuss specific material that is relevant to three standard law school courses: constitutional law, family law, and bioethics. With some adjustments, many of the same transnational materials could be introduced in courses on health law, reproductive technologies, women's rights, children's rights, and sexuality and the law.

Constitutional Law

Constitutional law casebooks invariably address the major Supreme Court cases on reproductive rights and health, generally moving from *Skinner v. State of Oklahoma*,²⁹ to *Griswold v. Connecticut*,³⁰ to *Roe v. Wade*,³¹ to *Planned Parenthood v. Casey*,³² to *Gonzales v. Carhart*.³³ Excerpts from this progression of cases are used to illustrate the development of the constitutional fundamental rights doctrine under the due process clause as well as the concept of the right to privacy. In addition, through note material accompanying *Casey*, the casebooks often introduce the underpinnings of the sex equality doctrine that informs some of this jurisprudence.³⁴

Right to Procreate and Transnational Law

Beginning with *Skinner*, transnational material can supplement a discussion of domestic fundamental rights questions. Interestingly, Justice Douglas's opinion in *Skinner* framed the case as one that "touches a sensitive and important area of human rights,"³⁵ thus signaling the relevance of transnational law—if not jurisprudentially then certainly as it is suggested here, for pedagogical purposes.

29. 316 U.S. 535 (1942).

30. 381 U.S. 479 (1965).

31. 410 U.S. 113 (1973).

32. 505 U.S. 833 (1992).

33. 127 S. Ct. 1610 (2007).

34. See generally Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 955 (1984); Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 350-80 (1992); Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*, 63 N.C. L. Rev. 375 (1985).

35. *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942).

Two transnational cases are particularly useful to a discussion of the liberty and equality rights that Justice Douglas identified in *Skinner*. First, *Maria Mamerita Mestanza Chavez v. Peru* stemmed from Peru's government policy of sterilizing poor, rural women in the 1980s and 1990s.³⁶ Ms. Chavez died from complications following a forced sterilization procedure. In response, several women's rights organizations filed a petition with the Inter-American Commission on Human Rights, an arm of the Organization of American States, alleging that the government's policy violated human rights principles. The Peruvian government entered a "friendly settlement" of the matter, but acknowledged that the harm done to Ms. Chavez violated several provisions of the American Convention on Human Rights, including the right to equality under the law (Article 24) and the right to have one's "physical, mental and moral integrity respected."³⁷ The settlement not only addressed Ms. Chavez's specific facts, but also obligated the Peruvian government to adopt a roster of changes to its generally-applicable law and policies.

Applied in this case, the equality prong of the American Convention serves the same analytical purpose as the equal protection clause in *Skinner*. However, Article 5 of the Convention seems to go beyond the strict scrutiny regime established under domestic law to recognize a right to physical integrity that encompasses a more participatory decision-making process concerning sterilization. Given these different approaches, it would be helpful to refer students to the specific text of the American Convention when using this case in a constitutional law class to illustrate the scope of the international community's recognition of procreational rights.

A second case provides a counterpoint to both *Skinner* and *Chavez*. In *Javed v. State of Haryana*,³⁸ the Supreme Court of India addressed a somewhat less intrusive effort to discourage childbirth. There, individuals with more than two children were barred from seeking election for certain official government positions. Examining the "menace of growing population" at some length, the court upheld this "child cap" for elective office, concluding that the paramount goal of population control overrode claims of fundamental rights.³⁹ Taking into consideration other provisions protecting economic and educational interests in India's Constitution, the court opined that "[n]one of these lofty ideals can be achieved without controlling the population."⁴⁰ Further, the Indian court rejected claims that the law's classification violated principles of equal protection.

36. Case 12.191, Inter-Am. C.H.R., Report No. 71/03, Friendly Settlement Agreement (2003), available at: <https://www.cidh.oas.org/annualrep/2003eng/Peru.12191.htm>.

37. Organization of American States, American Convention on Human Rights, Arts. 5, 24, Nov. 22, 1969, 1144 U.N.T.S.123, available at http://www.hrcr.org/docs/American_Convention/oashr.html.

38. A.I.R. 2003 S.C. 3057.

39. *Id.*

40. *Id.*

These transnational materials highlight the opposing considerations that *Skinner* resolved under our own constitutional jurisprudence. On the one hand, the U.S. Supreme Court in *Skinner* had to confront the notorious *Buck v. Bell* proposition that “[t]hree generations of imbeciles are enough”⁴¹ and the Supreme Court’s earlier endorsement of sterilization for supposed undesirables. Like the Court in *Buck*, and faced with population control issues of enormous proportions, the Indian Supreme Court found that a lesser intrusion on reproductive choice—a childbirth penalty, rather than sterilization—was constitutionally permissible. In contrast, in *Chavez*, the international community reiterated that forced sterilization constitutes a human rights violation. In *Skinner*, the sterilization to which certain criminals were subject was non-elective, but the punishment was only applied to those who had been convicted of a crime that included an element of intent. Yet as Justice Douglas’s opinion indicates, *Skinner* itself staked out a path of universalism as well, indicating that the U.S. Constitution’s liberty protections incorporate the understanding that “[m]arriage and procreation are fundamental to the very existence and survival of the race.”⁴²

Abortion and Transnational Law

Many of the constitutional reproductive health and rights cases excerpted in constitutional law casebooks concern abortion.⁴³ Here, too, transnational references can be illuminating.

Two venerable West German abortion cases are occasionally cited in domestic constitutional texts.⁴⁴ In 1975, the West German constitutional court was heavily influenced by the nation’s history of governmental eugenics policies when it struck down a law liberalizing access to abortion on the grounds that the fetus is constitutionally protected.⁴⁵ The Supreme Court of a unified Germany reiterated this view in 1993, while also opining that the legislature could permit first trimester abortions “on demand” so long as the procedure was accompanied by legislatively mandated counseling.⁴⁶ Surprisingly, less often cited in U.S. casebooks is the Canadian Supreme Court’s 1988 decision

41. *Buck v. Bell*, 274 U.S. 200, 207 (1927).

42. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

43. Tushnet, *supra* note 5, at 680 (“[T]he issue of constitutional regulation of abortion plays a large role in nearly every basic Constitutional Law course.”).

44. Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court] Feb. 25, 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.) (translated in John D. Gorby & Robert E. Jonas, West German Abortion Decision: A Contrast to *Roe v. Wade*, 9 J. Marshall J. Prac. & Proc. 605 (1976)); Bundesverfassungsgerichts [BverfGE] [Federal Constitutional Court] May 28, 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 203 (F.R.G.). Many constitutional law textbooks draw on Glendon, *supra* note 38, a now somewhat dated examination of continental law. Her book does not address the more recent 1992 opinion of the German Supreme Court.

45. 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.).

46. 88 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 203 (F.R.G.).

in *Morgentaler v. Queen*, which construed the Canadian Charter of Rights and Freedom's language concerning "life, liberty and security of the person" to strike down a law that restricted abortion.⁴⁷

While these older cases remain important, more recent transnational jurisprudence is indicative of the current international trends in reproductive health and rights, and also provides a useful basis for comparison with the contemporary U.S. Supreme Court decisions. For example, in *Gonzales v. Carhart*,⁴⁸ the U.S. Supreme Court upheld a restriction on the availability of certain late-term abortion procedures, i.e., intact D&X abortions. In doing so, the Court applied the *Casey* balancing test, which—unlike the more rigorous strict scrutiny test applied in other contexts where fundamental rights are impinged—provides that only those restrictions that cause an "undue burden" on the privacy right are impermissible.⁴⁹ In evaluating the extent of that burden and the impact of the restriction on women, the majority in *Carhart* cited as a factor in its decision that:

It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns...that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.⁵⁰

This concept of maternal regret figured in the majority's decision to uphold the ban despite evidence that some women's health might be adversely affected if doctors were not permitted to use the procedure.

It is interesting to contrast the U.S. Supreme Court's approach with the 2006 decision issued by the Colombian Constitutional Court.⁵¹ Unlike the *Carhart* case, which dealt with only a partial ban on abortion procedures, the Colombian court considered the constitutionality of a law that criminalized all abortions. In striking down the statute, the court addressed the equality of women at some length, noting the protection of reproductive rights as an aspect of the human right to health protected by the Colombian Constitution. Further, the Colombian court expressed clear limits on the legislature's discretion over criminal matters, noting that the absolute ban on abortion violated the "fundamental right to dignity."⁵² The court concluded that the law must permit termination of pregnancy when, among other things, the continuation of the pregnancy "presents risks to the life or health of the

47. [1988] 1 S.C.R. 30, 44 (Can.).

48. 550 U.S. 124 (2007).

49. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992).

50. 550 U.S. at 159.

51. Sentencia C-355/06, Corte Constitucional (May 10, 2006) (Colom.), available at <http://turan.uc3m.es/uc3m/inst/MGP/FCI12SCr.pdf> (in Spanish).

52. *Id.*

woman.”⁵³ In short, the *Carhart* case bans a type of abortion regardless of the impact on women’s health, while the Colombian case privileges protection of women’s health over any objections to particular procedures, using human dignity as the centerpiece of its decision. When integrating the Colombian case into a domestic constitutional law class, it is worth mentioning that the notion of human dignity has also played a central role in recent U.S. jurisprudence, including *Planned Parenthood v. Casey* and *Lawrence v. Texas*.⁵⁴ Reva Siegel’s recent article, “Dignity and the Politics of Protection: Abortion Restrictions Under *Casey/Carhart*,”⁵⁵ provides excellent supplemental reading on this topic that can be used to draw these themes together.

Beyond the rulings of individual national courts, the international community’s approach to abortion is set out in two recent cases: *Tysiak v. Poland*,⁵⁶ a judgment of the European Court of Human Rights, and *K.L. v. Peru*,⁵⁷ a decision of the United Nations Human Rights Committee. Both of these decisions are useful for purposes of discussing and analyzing U.S. law.

The *Tysiak* case arose from an application made against the Republic of Poland. Under Polish law, Tysiak sought a certificate for termination of her pregnancy based on the risk to her eyesight posed by her condition. The domestic law provided that an abortion should be available irrespective of the stage of pregnancy when, among other circumstances, “the pregnancy endangered the mother’s life or health.”⁵⁸ Tysiak’s request was denied because the evaluating doctors disagreed on her prognosis and she carried the pregnancy to term. After delivery, her eyesight deteriorated badly and she lost most of her sight. When domestic remedies proved inadequate to protect her rights, Tysiak filed an application with the European Court of Human Rights.

The court concluded that the application of the Polish law in Tysiak’s case, to preclude her abortion, violated the provisions of Article 8 of the European Convention on Human Rights. The essence of that provision, the court wrote, is “to protect the individual against arbitrary interference by public authorities.”⁵⁹ The court derived this central theme of Article 8 from the Convention’s general “right to respect for [] private...life....”⁶⁰ After a review of the facts, the court concluded that the applicant should not be limited to after-the-fact

53. *Id.*

54. 505 U.S. 833 (1992); 539 U.S. 558 (2003).

55. Siegel, *supra* note 15.

56. 45 Eur. Ct. H.R. 42 (2007), available at <http://www.unhcr.org/refworld/docid/470376112.html>.

57. U.N. Doc. CCPR/C/85/D/1153/2003 (2005), available at http://www.jura.fu-berlin.de/einrichtungen/we3/professoren/l_s_rudolf/veranstaltungen/o7o8ws/v_frauenrechte_im_voelkerrecht/C6_KL-v-Peru.pdf.

58. Tysiak, 45 Eur. Ct. H.R. 42 at ¶ 35.

59. *Id.* at ¶ 109.

60. *Id.* at ¶ 67.

remedies in tort law. Rather, she was entitled to timely compliance with the state's "positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion."⁶¹ The court suggested several procedural safeguards that might be implemented in such a situation—all of which, it observed, must be particularly sensitive to the pregnant woman's legal position and the time constraints that nature imposes on the decision making.

In reaching this conclusion, the *Tysiack* court took care to respect the limits of the Convention as providing essentially procedural protections from privacy violations. At the same time, however, the court's approach acknowledges that such procedural refinements could fall short of protecting underlying substantive rights to privacy, including the right to abortion provided under the domestic law of Poland. Interestingly, the European Court's decisional approach has many parallels with U.S. courts' efforts to address the procedural and substantive aspects of our own Constitution's due process clause. At times, the Supreme Court has used procedure as a means to bolster substantive rights, while at other times, the Court has found substantive rights in the due process clause itself.⁶²

The *K.L.* matter, submitted to the U.N. Human Rights Committee in 2003, also examines abortion through the prism of human rights provisions and the International Covenant on Civil and Political Rights (ICCPR). After she became pregnant, a scan revealed that K.L., a seventeen-year-old, was carrying an anencephalic fetus. Peruvian law permitted a therapeutic abortion if, among other possible factors, "termination of the pregnancy was the only way of...avoiding serious and permanent damage to [the pregnant woman's] health."⁶³ Despite several expert reports supporting K.L.'s claim that her physical and mental health would be jeopardized by carrying the ill-fated pregnancy to term, the government authorities refused to permit an abortion. The anencephalic baby girl who was ultimately born survived four days, during which time K.L. breastfed her. After her daughter's death, K.L. fell into a state of deep depression. Because domestic remedies were futile, she proceeded directly to the Human Rights Committee, filing a complaint alleging that the government of Peru violated provisions of the ICCPR.

The Committee concluded that the facts revealed a violation of Article 17 of the ICCPR, which bars arbitrary interference with private life. In addition, the Committee found a violation of Article 7 of the ICCPR, which provides

61. *Id.* at ¶ 128.

62. For background on the evolving relationship between "procedural due process" and "substantive due process" in the context of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, see, for example, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965); *Nebbia v. New York*, 291 U.S. 502, 525 (1934); *Lochner v. New York*, 198 U.S. 45, 53-54 (1905).

63. *K.L. v. Peru*, U.N. Doc. CCPR/C/85/D/1153/2003, ¶ 2.3 (2005), available at http://www.jura.fu-berlin.de/einrichtungen/we3/professoren/lr_rudolf/veranstaltungen/o7o8ws/v_frauenrechte_im_voelkerrecht/C6_KL-v-Peru.pdf.

in pertinent part that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”⁶⁴ Peru’s failure to provide an abortion caused K.L.’s suffering, the Committee stated, framing access to an abortion under the circumstances as a positive obligation; the Committee had previously opined that criminalization of abortion was incompatible with Article 7 of the Covenant.⁶⁵ Finally, the Committee found violations of Article 24, which requires that the State party provide special care to minors, and Article 2, which requires adequate legal remedies for violations of rights. A dissenting committee member would have also found a violation of the “right to life” protected by Article 6 of the Covenant, but that view did not command a majority of the Committee members.

Though written in the stylized language of an international document, the Committee’s decision in *K.L.* provides another useful basis for comparison and analysis of the legal status of abortion. Unlike several U.S. courts, which have dealt with similar issues under the Constitution’s Eighth Amendment in the context of prisoner abortions,⁶⁶ the Human Rights Committee construed denial of a therapeutic abortion as an act of forbidden cruelty. Further, as in *Tysiac*, the Committee found that the right to privacy itself supported the right of access to an abortion. However, *K.L.* goes farther than *Tysiac* in that it directly construes international law rather than resting on the provisions of domestic law. It is pertinent because, like Peru, the United States is a party to the ICCPR.

As the reasoning in these matters indicates, the texts of the European Convention on Human Rights and the ICCPR do not address abortion directly. To see how abortion is specifically referenced by the international community, it is useful to examine the international documents that are more directly focused on reproductive issues.

64. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 7, U.N. Doc. A/6316 (Dec. 16, 1966).
65. U.N. Human Rights Committee [HRC], Concluding Observations of the Human Rights Committee: Peru, U.N. Doc. CCPR/CO/70/PER, (Nov. 15 2000), available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.70.PER.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.70.PER.En?Opendocument).
66. See, e.g., *Roe v. Crawford*, 514 F.3d 789 (8th Cir. 2008); *Victoria W. v. Larpenter*, 369 F.3d 475 (5th Cir. 2004). But see *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326 (3d Cir. 1987). For a thorough discussion of the Eighth Amendment as it relates to prison abortions, see Mark Egerman, *Roe v. Crawford: Do Inmates Have an Eighth Amendment Right to Elective Abortions?*, 31 *Harv. J.L. & Gender* 423 (2008).

Article 16 of the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) contains specific language concerning procreative decision making, framed there as an issue of equality:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:...

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.⁶⁷

Going further, the Cairo Programme of Action, developed at the International Conference on Population and Development in 1994, marked the first time that the international community squarely identified reproductive rights as human rights. According to the Programme,

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other relevant United Nations consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents. In the exercise of this right, they should take into account the needs of their living and future children and their responsibilities towards the community. The promotion of the responsible exercise of these rights for all people should be the fundamental basis for government—and community-supported policies and programmes in the area of reproductive health, including family planning.⁶⁸

Among other things, the Programme echoes some of the earlier language from CEDAW, but divorces it from the equality considerations that animate that earlier document. In doing so, the Programme reframes procreative rights as freestanding rights that do not depend on gender inequality alone for their purchase in the international community. For purposes of a domestic

67. Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, Art. 16, U.N. Doc. A/34/46 (Dec. 18, 1979), available at <http://www2.ohchr.org/english/law/cedaw.htm>.

68. § 7.3, U.N. Doc. A/CONF.171/Rev.1 (Sep. 5-13, 1994), available at <http://www.unfpa.org/publications/detail.cfm?ID=275>.

constitutional law course, Professor Rebecca Cook's scholarship provides very helpful commentary on these provisions.⁶⁹

Family Law

Family law textbooks include many of the same materials on reproductive rights and health as constitutional law texts, but the emphasis subtly shifts from constitutional norms to individual and familial relationships. While many of the same cases are relevant to both courses, some additional cases can be added to "transnationalize" the treatment of reproductive rights and health in a family law course.

Sterilization and Transnational Law

The issue of sterilization is often presented in family law casebooks in the context of fundamental rights to make decisions about one's family. While constitutional law casebooks present *Skinner* as an early expression of fundamental rights leading to later developments under the due process clause, family law casebooks may instead emphasize *Skinner's* more immediate and direct implications for the government's role in decisions about childbirth and sterilization. Because of this change in emphasis, an additional transnational case is pertinent here.

In re Eve is a Canadian Supreme Court case addressing a mother's application to sterilize her mentally retarded daughter.⁷⁰ Rejecting the mother's wishes, the court asserted a special obligation to protect the interests of the daughter under the ancient doctrine of *parens patriae*. There was no evidence that pregnancy would harm the daughter, and the court noted that its obligation was to protect the interests of the person, and not other interested individuals. As in *Skinner*, the court also directly addressed the underlying human rights issues, noting that:

[This] decision involves values in an area where our social history clouds our vision and encourages many to perceive the mentally handicapped as somewhat less than human. This attitude has been aided and abetted by now discredited eugenics theories whose influence was felt in this country as well as the United States.⁷¹

While steering clear of an overt declaration of a right to procreate, the court also noted that sterilization is a serious matter that "removes from a person the

69. See, e.g., Rebecca J. Cook & Bernard M. Dickens, Human Rights Dynamics of Abortion Law Reform, 25 Hum. Rts. Q. 1 (2003). In addition, Professor Cook's course on Reproductive and Sexual Health Law takes on the task of integrating international and domestic materials on reproductive rights in a Canadian context. Professor Cook's website, with a link to her courses and their syllabi, is available at: http://www.law.utoronto.ca/faculty_content.asp?pofile=14&cType=facMembers&itemPath=1/3/4/0/0.

70. [1986] 2 S.C.R. 388 (Can.).

71. *Id.* at ¶ 78.

great privilege of giving birth.”⁷² Further, while acknowledging that a mentally incompetent person may also be a poor parent, the court observed that “there are human rights considerations that should make a court extremely hesitant about attempting to solve a social problem like this” through sterilization.⁷³ The court concluded that a non-therapeutic abortion should never be authorized by a court exercising its *parens patriae* powers.

As discussed above, the Indian Supreme Court upheld under its Constitution a provision limiting elected officials to individuals with two or fewer children. While such a limitation is much less intrusive than sterilization, the juxtaposition of *Javed* and *In re Eve* does starkly present the question of whether the state may take actions impinging on childbearing that would be impermissible if done by private actors. Under U.S. law, *Dandridge v. Williams*,⁷⁴ which placed a “family cap” on welfare benefits, parallels some of the reasoning in *Javed* in upholding a government restriction that merely impinges on childbearing while continuing to allow families some modicum of decision-making about family composition.

Reproductive Decision-Making within the Family

As set out in our discussion of constitutional law above, a number of international documents spell out approaches to reproductive decisionmaking within the family, an issue that falls squarely within the the purview of a family law course. In addition to CEDAW’s Article 16, noted above, the Beijing Declaration provides that “[t]he explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment.”⁷⁵ The accompanying Platform for Action includes several paragraphs on reproductive health and rights, including the statement that:

[t]he human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Equal relationships between women and men in matters of sexual relations and reproduction, including full respect for the integrity of the person, require mutual respect, consent and shared responsibility for sexual behaviour and its consequences.⁷⁶

72. *Id.* at ¶ 79. The court notes that the right to procreate might be presented in a subsequent case involving state action that would arise under the Canadian Charter of Rights and Freedoms. *Id.* at ¶ 88. In this instance, where the application for sterilization is brought by a private party, the court does not find that a right to procreate is implicated despite counsel’s entreaties. *Id.* at ¶¶ 96-99.

73. *Id.* at ¶ 84.

74. 397 U.S. 471 (1970).

75. Beijing Declaration, Fourth World Conference on Women, 15 Sept. 1995, A/Conf.177/20 (1995).

76. Beijing Platform for Action, Fourth World Conference on Women, 15 Sept. 1995, A/Conf.

These materials would add an important perspective to classroom discussion of *Casey*, as it touches on husband notification, and *Gonzales*, with its contrasting treatment of regret and women's reproductive decisionmaking.

Bioethics

Bioethics courses incorporate much of the same background material on constitutional procreative rights as that found in constitutional law and family law courses. Several emerging principles of international human rights law can provide stimulating additions to discussions of ethical, medical and constitutional issues that are traditionally part of these courses.

In particular, in addressing reproductive rights as well as other areas, bioethics courses often pay significant attention to issues of access—i.e., access to new scientific knowledge and access to emerging technologies. While there has been little transnational case law on this issue, the international standards in this area are surprisingly robust.

Right to Benefits of Scientific Progress

Article 27 of the Universal Declaration of Human Rights provides in part, “Everyone has the right—to share in scientific advancement and its benefits.”⁷⁷ Similar stipulations appear in the International Covenant on Economic, Social and Cultural Rights and the Universal Declaration of Bioethics and Human Rights.⁷⁸ As Yvonne Donder, deputy director of the Amsterdam Center of International Law, recently put it in an address at the UNESCO headquarters in Paris, this is “perhaps one of the least known human rights,”⁷⁹ but one that is increasingly important in our technologically-driven society.

This human right is certainly pertinent to the question of access to assisted reproductive technologies. There, the issue may be whether such technologies are accessible regardless of wealth or geography. However, the right to benefit from scientific progress is also pertinent in discussions of “conscience clauses.” These laws, adopted in many states, permit doctors, pharmacists, or other medical personnel to refuse to assist women in obtaining contraception, abortions, or other medical services through regular medical channels.⁸⁰

177/20/Add.1 (1995), ¶ 97.

77. G.A. Res. 217A (III), Art. 27(1), U.N. Doc A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html>.

78. ICESCR, G.A. Res. 2200A (XXI), Art. 15(1)(b), U.N. Doc. A/6316 (Dec. 16, 1966), available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm; U.N.E.S.C.O. Res. SHS/EST/BIO/06/1, Art. 15 (Oct. 19, 2005), available at http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html.

79. Yvonne Donders, Deputy Director of the Amsterdam Center for International Law, The Right to Enjoy the Benefits of Scientific Progress and its Applications, Address at UNESCO Headquarters on the Occasion of Human Rights Day (Oct. 17, 2007) (transcript available at: <http://unesdoc.unesco.org/images/0015/001586/158691e.pdf>).

80. Guttmacher Institute, State Policies in Brief, Refusing to Provides Health Services (Dec. 1,

Referencing the “right to benefit from scientific progress” provides an additional, more technology-focused perspective on the perennial tension in U.S. law between religious freedom and fundamental rights.

Right to Receive and Impart Information

Access to information is often an important theme in bioethics courses. For example, there is growing attention to the question of how information obtained from genetic testing should be treated. Abstinence-only-until-marriage education raises similar access questions, especially where school districts are forbidden from providing contraceptive information as part of federally-funded sex education programs. In domestic casebooks, the issue of information enters the curriculum through *Rust v. Sullivan*,⁸¹ where the U.S. Supreme Court upheld a regulation prohibiting doctors and clinics that received federal funding from providing abortion counseling to clients. In *Rust*, information itself was restricted, not services. However, the Supreme Court rejected a First Amendment challenge to the regulations, opining that the government could set conditions on its grants and that clinics remained free to turn down federal funds.

International human rights instruments and case law can provide a basis for expanding this discussion. For example, the Universal Declaration of Human Rights provides that “[e]veryone has the right...to seek, receive, and impart information and ideas through any media.”⁸² The European Convention on Human Rights contains slightly different wording with a state action limitation, stating that “[e]veryone has the right to...receive and impart information and ideas without interference by public authority and regardless of frontiers.”⁸³

In *Open Door Counseling & Dublin Well Woman v. Ireland*,⁸⁴ the issue of governmental information restrictions came before the European Court of Human Rights. Two Irish health centers provided women with information about a full range of pregnancy-related options, including the availability abortions at facilities in Great Britain. When the Supreme Court of Ireland issued an injunction against the centers, they appealed to the European Court.

The court ruled in favor of the health centers, eschewing the relevance of Ireland’s domestic law restrictions on abortion. According to the court, the injunction interfered with the right of the applicants to provide information

2008), available at http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf.

81. 500 U.S. 173 (1991).

82. G.A. Res. 217A (III), Art. 19, U.N. Doc A/810 (Dec. 12, 1948), available at <http://www.un.org/Overview/rights.html>.

83. European Convention for the Protection of Human Rights and Freedoms, Art. 10, Nov. 4, 1950, 213 UNTS 221, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

84. 15 Eur. Ct. H.R. 244 (1992), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Dublin%20%7C%20Well%20%7C%20Woman%20%7C%20Ireland&sessionId=17024464&skin=hudoc-en>.

about pregnancy-related options, and with the ability of women to obtain information. Even if Ireland had a legitimate interest in protecting the life of the unborn, the court determined the injunction had a disproportionate impact because it prohibited counseling regardless of the age, health, or circumstances of pregnant women. It therefore posed a health risk to women who would likely terminate pregnancies at later stages without adequate counseling.⁸⁵

Open Door Counseling leaves open many questions about the right to information under international law. For example, does the right create affirmative obligations on government? If the health centers were not providing this information to women, would the government itself be required to provide it? Similarly, to what extent is the international right to information applicable to private parties as well as government? And what exactly constitutes information?

There is little case law to help answer these questions. However, on its facts, *Open Door Counseling* serves as a useful counterpoint to *Rust v. Sullivan* by drawing from international perspectives to broaden discussion of reproductive rights counseling.

Additional Resources

As these examples demonstrate, these are ample pedagogical opportunities to incorporate transnational legal materials into reproductive health and rights units across the curriculum, from Bioethics to Constitutional Law to Women's Rights. In addition, there are many resources to draw on to facilitate such expanded coverage. Beyond the cases and sources listed above, additional information is available from the website of the International Reproductive and Sexual Health Law Programme at the University of Toronto, http://law.utoronto.ca/faculty_content.asp?itemPath=1/3/4/0/0&contentID+1567, the website of the Center for Reproductive Rights, www.reprorights.org, and more generally, the website of the University of Minnesota's on-line Human Rights Library, <http://www1.umn.edu/humanrts/>. Like domestic courts, international courts such as the European Court of Human Rights and adjudicative bodies like the U.N. Human Rights Committee maintain searchable databases.

D. Conclusion

Reproductive rights can seem a quintessentially domestic topic because of the sometimes heated domestic politics that tend to define our scope of vision. But nature has ensured that the issue of reproduction is global. Our domestic perspectives can benefit from exposure to and engagement with the approaches taken transnationally as well as nationally.

85. *Id.* at ¶¶ 74-77.

At first blush, this may seem to be a controversial proposition. After all, members of the Supreme Court have publicly debated the question of whether foreign law can ever be relevant to constitutional opinion-writing, with strong positions articulated on both sides.⁸⁶ Yet regardless of their positions in this debate, there seems to be no disagreement among members of the Court that lawyers have good reason to be familiar with foreign and international law. Indeed, even Justice Scalia is prepared to cede the importance of foreign and international law in non-judicial contexts. As he has repeatedly observed, foreign sources are central aids in the development of laws: “Of course you consult foreign sources, see how it’s worked, see what they’ve done, use their examples and so forth.”⁸⁷

Since reproductive rights will undoubtedly continue to be one of the “issues of the day” for some time, lawyers will also continue to engage with the issue in a variety of settings, from courts to legislatures. Introducing law students to transnational approaches to reproductive rights is invaluable preparation for their roles as full members of the legal profession.

86. *See generally* Sarah Cleveland, *Our International Constitution*, 31 *Yale J. Int’l L.* 1 (2006) (reviewing current controversy and examining historic uses of international law in constitutional adjudication).

87. Justice Antonin Scalia, Discussion with Justice Stephen Breyer at the American University Washington College of Law: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), *available at* <http://domino.american.edu/AU/media/mediaref.nsf/1D265343B DC 2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>.

Appendix: Casebooks Consulted for This Study*Bioethics*

Janet L. Dolgin & Lois L. Shepherd, *Bioethics and the Law* (Aspen Publishers, New York, NY, 2005)

Marsha Garrison & Carl E. Schneider, *The Law of Bioethics: Individual Autonomy and Social Regulation* (West, St. Paul, MN, 2003)**

Arthur LaFrance, *Bioethics, Health Care, Human Rights, and the Law* (M. Bender, New York, NY, 1999 & Supp. 2002)*

Michael H. Shapiro et al., *Bioethics and Law: Cases, Materials and Problems* (2d ed., West, St. Paul, MN, 2003)**

Wanda Teays & Laura M. Purdy, *Bioethics, Justice, and Health Care* (Wadsworth Publ'g, Belmont, CA, 2000)*

Children's Law

Douglas E. Abrams & Sarah H. Ramsey, *Children and the Law: Doctrine, Policy, and Practice* (3d ed., West, St. Paul, MN, 2007)

Samuel M. Davis et al., *Children in the Legal System: Cases and Materials* (3d ed., Found. Press, New York, NY, 2004)

Martin R. Gardner & Anne Proffitt Dupre, *Children and the Law: Cases and Materials* (LexisNexis, Newark, NJ, 2002)

Comparative Law

Norman Dorsen et al., *Comparative Constitutionalism: Cases and Materials* (West, St. Paul, MN, 2003)**

Vicki C. Jackson & Mark Tushnet, *Comparative Constitutional Law* (Found. Press, New York, NY, 1999)**

Brian Landsberg & Leslie Jacobs, *Global Issues in Constitutional Law* (West, St. Paul, MN, 2007)**

Constitutional Law

William Araiza et al., *Constitutional Law: Cases, History and Dialogues* (3d ed., LexisNexis, Newark, NJ, 2006)**

Randy E. Barnett, *Constitutional Law: Cases in Context* (Wolters Kluwer Law & Bus., Austin, TX, 2008)

Jerome A. Barron et al., *Constitutional Law, Principles and Policy: Cases and Materials* (7th ed., LexisNexis, Newark, NJ, 2006)

Daan Braveman et al., *Constitutional Law: Structure and Rights in Our Federal System* (5th ed., LexisNexis, Newark, NJ, 2005)

*Cites international human rights law

**Relates international human rights law to reproductive health issues

Paul Brest et al., *Processes of Constitutional Decision-Making: Cases and Materials* (5th ed., Aspen Publishers, New York, NY, 2006)*

Erwin Chemerinsky, *Constitutional Law* (2d ed., Aspen Publishers, New York, NY, 2005)

Jesse H. Choper et al., *Constitutional Law: Cases, Comments, Questions* (10th ed., West, St. Paul, MN, 2006)

William Cohen et al., *Constitutional Law: Cases and Materials* (concise 12th ed., Found. Press, New York, NY 2006)

Michael K. Curtis et al., *Constitutional Law in Context* (2d ed., Carolina Academic Press, Durham, NC, 2006)*

Daniel A. Farber et al., *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* (3d ed., West, St. Paul, MN, 2003)

Douglas W. Kmiec et al., *Individual Rights and the American Constitution* (2d ed., LexisNexis, Newark, NJ, 2004)

Calvin Massey, *American Constitutional Law: Powers and Liberties* (2d ed., Aspen Publishers, New York, NY, 2005)

Norman Redlich et al., *Constitutional Law* (4th ed., LexisNexis, Newark, NJ, 2002)

Ronald D. Rotunda, *Modern Constitutional Law: Cases and Notes* (8th ed., West, St. Paul, MN 2007)

Geoffrey Stone et al., *Constitutional Law* (5th ed., Aspen Publishers, New York, NY, 2005)

Kathleen M. Sullivan & Gerald Gunther, *Constitutional Law* (16th ed., Found. Press, New York, NY, 2007)

Russell L. Weaver et al., *Constitutional Law: Cases, Materials & Problems* (Aspen Publishers, New York, NY, 2006)

Family Law

Judith Areen, *Family Law: Cases and Materials* (5th ed., Found. Press, New York, NY, 2006)

Homer Clark & Ann Estin, *Domestic Relations: Cases and Problems* (7th ed., West, St. Paul, MN, 2005)

John De Witt Gregory et al., *Understanding Family Law* (3d ed., LexisNexis, Newark, NJ, 2005)

Ann Estin & Barbara Stark, *Global Issues in Family Law* (West, St. Paul, MN, 2007)**

Robert Oliphant & Nancy Ver Steegh, *Family Law: Examples and Explanations* (2d ed., Aspen Publishers, New York, NY, 2007)*

Carl E. Schneider, *An Invitation to Family Law: Principles, Process, and Perspectives* (3d ed., West, St. Paul, MN, 2006)

Barbara Stark, *International Family Law: An Introduction* (Ashgate Publ'g, Burlington, VT, 2005)**

D. Kelly Weisberg & Susan Appleton, *Modern Family Law: Cases and Materials* (3d ed., Aspen Publishers, New York, NY, 2006)**

International Law & Human Rights

Lori F. Damrosch et al., *International Law: Cases and Materials* (4th ed., West, St. Paul, MN, 2001)*

Richard B. Lillich et al., *International Human Rights: Problems of Law, Policy, and Practice* (4th ed., Aspen Publishers, New York, NY, 2006)*

Henry Steiner et al., *International Human Rights in Context: Law, Politics, Morals* (3d ed., Oxford Univ. Press, New York, NY, 2008)*

Burns H. Weston et al., *International Law and World Order: A Problem-Oriented Coursebook* (4th ed., West, St. Paul, MN, 2006)**

Jeanne M. Woods & Hope Lewis, *Human Rights and the Global Marketplace: Economic, Social and Cultural Dimensions* (Transnational Publishers, Ardsley, NY, 2005)**

Public Health

Barry R. Furrow et al., *Health Law: Cases, Materials and Problems* (6th ed., West, St. Paul, MN, 2008)*

Lawrence O. Gostin, *Public Health Law and Ethics: A Reader* (Univ. of Cal. Press, Berkeley, CA, 2002)*

Lawrence O. Gostin et al., *Law, Science and Medicine* (3d ed., Found. Press, New York, NY, 2005)*

Kenneth R. Wing et al., *The Law and American Health Care* (Aspen Law & Bus., New York, NY, 1998)*

Kenneth R. Wing et al., *Public Health Law* (LexisNexis, Newark, NJ, 2007)**

Torts

Arthur Best & David W. Barnes, *Basic Tort Law: Cases, Statutes, and Problems* (2d ed., Wolters Kluwer Law & Bus., Austin, TX, 2007)

Richard A. Epstein, *Cases and Materials on Torts* (8th ed., Aspen Publishers, New York, NY, 2004)

Marc A. Franklin et al., *Tort Law and Alternatives: Cases and Materials* (8th ed., Found. Press, New York, NY, 2006)

John C. P. Goldberg et al., *Tort Law: Responsibilities and Redress* (2d ed., Wolters Kluwer Law & Bus., Austin, TX, 2008)*

Victor E. Schwartz et al., *Prosser, Wade, and Schwartz's Torts: Cases and Materials* (10th ed., Found. Press, New York, NY, 2000)

Harry Shulman et al., *Cases and Materials on the Law of Torts* (4th ed., West, St. Paul, MN, 2003)

Aaron D. Twerski & James A. Henderson, *Torts: Cases and Materials* (Aspen Publishers, New York, NY, 2003)

Dominick Vetri et al., *Tort Law and Practice* (3d ed., LexisNexis, Newark, NJ, 2006)

Women's Rights

Libby Adler et al., *Women and the Law* (4th ed., West, St. Paul, MN, 2008)*

Herma Hill Kay & Martha West, *Sex-Based Discrimination: Text, Cases and Materials* (6th ed., West, St. Paul, MN, 2005)

Catharine MacKinnon, *Sex Equality* (2d ed., Found. Press, New York, NY, 2007)**

Deborah Rhode & Katherine Bartlett, *Gender and Law: Theory, Doctrine, and Commentary* (4th ed., Aspen Publishers, New York, NY, 2006)