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# Reproductive Privacy in the World: Critical Examination of *June Medical Services, L.L.C. v. Russo* and *Buck v. Bell*

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## *I. Introduction*

In *June Medical Services, L.L.C. v. Russo*,[1] the Supreme Court of the United States invalidated a Louisiana statute requiring abortion providers to have admitting privileges at a nearby hospital,[2] following the Court's similar decision in *Whole Woman's Health v. Hellerstedt*.[3] The opinion did not explicitly overrule *Roe v. Wade*,[4] but nevertheless, it left uncertainties regarding the Court's abortion rights jurisprudence.[5]

Another type of reproductive privacy, the freedom to have offspring, is on the opposite side of the coin from a right of abortion.[6] Governments have denied the freedom to have offspring, also considered the right to procreate, in a number of countries.[7] Lawmakers enacted statutes that destroyed the fertility of citizens.[8] People suffering from a seizure disorder, for example,

1. *See* June Med. Serv., L.L.C. v. Russo, 140 S. Ct. 2103, 2133 (2020) (stating that Louisiana's "admitting privileges" statute was unconstitutional).

2. LA. REV. STAT. ANN. § 40:1061.10(A)(2)(a) (West 2020).

3. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2318 (2016) (stating that a Texas statute's requirements on abortion-performing doctors were unnecessary, and therefore placed an undue burden on the constitutional right to seek an abortion).

4. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) (recognizing the constitutionally protected right to seek an abortion).

5. *See Russo,* 140 S. Ct. at 2133 (Roberts, C.J., concurring) ("I joined in the dissent in *Whole Women's Health* and continue to believe that the case was wrongly decided."); *see* Jessica Glenza, *Abortion Rights Case is First Test for Right-Leaning US Supreme Court*, GUARDIAN (Mar. 4, 2020) (clarifying that the terms "reproductive right" and "reproductive privacy" are used to mean a person's liberty interests in initiation and continuation of pregnancy (procreation), termination of pregnancy (abortion), and rearing of infants) [https://perma.cc/3LC6-6HMZ].

6. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (recognizing that the right to procreation is protected by the Fourteenth Amendment).

7. *See, e.g.*, Sexual Sterilization Act, S.A. 1928, c 37 (Can.) (enabling forced sterilization of mental hospital inmates upon their release).

8. *See* PHILIP R. REILLY, THE SURGICAL SOLUTION: A HISTORY OF INVOLUNTARY STERILIZATION IN THE UNITED STATES 30–87 (1991) (clarifying that compulsory sterilization is a medical procedure that deprives a person's ability to reproduce).

were involuntarily sterilized at the peak of the eugenics movement.[9]

In the United States, to permanently deprive targeted citizens of their freedom to procreate, as many as twenty-eight states enacted sterilization statutes by 1931.[10] Vigorous constitutional challenges ensued,[11] with the challengers initially prevailing.[12] These victories did not last long, however, because eugenicists

9. *See* DANIEL J. KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 253–56 (Alfred A. Knopfy ed.) (1985) (explaining the role of genetic screening programs in the height of the eugenics movement and specifically a voluntary screening program for Tay-Sachs carriers in 1971, a disease which results in seizures); Mary L. Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 841–48 (1986) (explaining the early twentieth century theory of Malthusianism, which was concerned not just about the quantity of the population, but also the quality, and was therefore concerned with the question of who produced the population); Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and The History of Equal Protection*, 90 MINN. L. REV. 106, 120–24 (2005) (analyzing Harry Laughlin's proposed model for eugenic sterilization law, which in part hinged on the argument that the state's policing power encompassed compulsory eugenic sterilization in the prevention of menace which arguably applied to natural classes of degenerates, including the epileptic, feebleminded, criminals, and insane); Lisa Powell, *Eugenics and Equality: Does The Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481, 563 (2002) (explaining that eugenics is a study about inheritance of human characteristics such as intelligence, epilepsy, and criminality, and it aimed to improve the "wellbeing of the society" by changing people's mating behaviors).

10. *See* Powell, *supra* note 9, at 484–88 (exploring the vast array of groups targeted by the eugenic movement in America, including racial minorities, the poor, criminals, people with mental disabilities, and other socially unpopular groups, all of which were deemed genetically defective and doomed to reproduce); *see also* Robert J. Cynkar, *Buck v. Bell: "Felt Necessities" v. Fundamental Values?*, 81 COLUM. L. REV. 1418, 1423–32 (1981) (stating that by 1927, twenty-eight out of forty-eight states passed compulsory sterilization laws).

11. *See* Siegel, *supra* note 9, at 111–13, 115–24 (detailing the early challenges to state sterilization laws and the constitutional grounds on which some challenges succeeded).

12. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

enacted "reinforced" sterilization laws that incorporated various procedural safeguards.[13]

The tragedy of eugenics did not end in these pieces of legislation.[14] In 1927, the Supreme Court upheld Virginia's "reinforced" sterilization statute as constitutional and approved the forced sterilization of an intellectually challenged woman named Carrie Buck.[15] By adding legitimacy to eugenics movements,[16] *Buck v. Bell*[17] demonstrated the real danger of common misconceptions clouding the minds of Justices during judicial review.[18]

Now that classical eugenics has been proven to be a pseudoscience,[19] it is surprising to find courts still citing to *Buck v.*

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13. *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U.L. REV. 30, 36–37 (1985) (noting that Virginia forced the sterilization of women before discharge from a psychiatric institution); *see also* Siegel, *supra* note 9, at 120–32 (detailing the successful defenses of refined sterilization laws from constitutional challenges).

14. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.").

15. *See id*. at 207 (upholding the constitutionality of Virginia's sterilization statute).

16. *See id.* at 207 ("Three generations of imbeciles are enough."); Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1786–87 (2019) (Thomas, J., concurring) ("[T]he Court threw its prestige behind the eugenics movement."); Lombardo, *supra* note 13, at 33 (describing that *Buck* would not have issued if three close political associates had not used the specious "scientific" tenets of eugenics to legitimate their private prejudices).

17. 274 U.S. 200 (1927).

18. *See* People v. Barrett, 281 P.3d 753, 778 (Cal. 2012) (Liu, J., dissenting) ("*Buck v. Bell* reflected then prevalent attitudes toward persons with mental disabilities."); Cynkar, *supra* note 10, at 1457–60 (explaining that the paucity of cited references in *Buck* shows the predominance of the eugenics-driven atmosphere over the administration of justice); Lombardo, *supra* note 13, at 33 (describing that *Buck* would not have issued if three close political associates had not used the specious "scientific" tenets of eugenics to legitimate their private prejudices).

19. *See* Clarence J. Ruddy, *Compulsory Sterilization: An Unwarranted Extension of the Powers of Government*, 3 NOTRE DAME L. REV. 1, 5–10 (1927) (critiquing the scientific and legal justification for sterilization of certain groups of people such as seizure patients); Arthur B. Dayton, Book Review, 39 YALE L.J. 596, 597 (1930) (questioning the whole problem of heredity, birth control, and sterilization as applied to eugenics); *see also* Lene Koch, *The Meaning of Eugenics:*

*Bell* as good law.[20] To determine whether *Buck v. Bell* and *Roe v. Wade* are still good law, this Article examines the nature of reproductive privacy rights and the methods of judicial review in various jurisdictions.[21]

Using insights from Professor Stephen A. Simon's *Universal Rights and the Constitution*, this Article argues that national courts should continue to assume an active role in the protection of privacy rights by giving due consideration to the nature of the privacy right in combination with the merits of the universal right theory.[22] This Article then demonstrates that both foreign national courts and domestic state courts have recognized the right to procreate and key aspects of the right to abortion as fundamental rights.[23]

Part II introduces the universal right theory, explaining why the theory is particularly relevant to the protection of privacy, in

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*Reflections on the Government of Genetic Knowledge in the Past and the Present*, 17 SCI. CONTEXT 315, 317 (2004) (explaining that State courts later noted the tragedy of eugenics); *see e.g.*, *In re* A.W., 637 P.2d 366, 368 (Colo. 1981) (stating that compulsory sterilization based on eugenic theories can no longer be justified as a valid exercise of governmental authority).

20. *See, e.g.*, Jeffrey F. Ghent, *Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Central Defectives*, 53 A.L.R.3d 960 (2019) (observing that many of the state sterilization statutes were upheld against the constitutional challenge); *see* Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 123 (1993) (stating that courts cite *Buck* as a case of authority on the sterilization of mentally incompetent individuals); Powell, *supra* note 9, at 503 (citing Board of Trustees v. Garrett, 531 U.S. 356, 369 (2001)) (stating that *Buck* was cited favorably as recently as 2001).

21. The "privacy rights" in this Article refer to a right, freedom, and liberty that guards bodily integrity, familial and other intimate relationships (including contraception and burials), reproduction, parenthood (including education), happiness in life, including a right to be left alone, as the nature and origins of these liberties all share the same implications regarding an individual's autonomy and dignity. Because of the complexity of the law regarding privacy rights in relation to the space allotted for this Article, this Article focuses on the cases, statutes, and practices that implicate the reproductive aspects of the privacy rights. *See infra* Part II.

22. *See* Stephen A. Simon, UNIVERSAL RIGHTS AND THE CONSTITUTION (2014) (examining and critiquing the Court's reasoning for its constitutional rights jurisprudence).

23. *See id.* (emphasizing the widespread recognition of the right to abortion).

contrast to textualist Justices' skepticism towards the theory.[24] Part III provides an overview of reproductive privacy law in the United States and foreign jurisdictions. It highlights the judicial acknowledgement that reproductive freedom underpins human dignity and autonomy.[25] Part IV then examines representative methods of judicial review in various jurisdictions, showing the remarkable similarities in the courts' analyses.[26] In conclusion, this Article identifies the role of judicial review based on the universal right theory, the convergence in the applicable standards of review, and the diminished precedential value of *Buck v. Bell*.[27]

### *II. The Universal Rights of Human Dignity and Autonomy*

Privacy has been called and understood as a naturally conferred right.[28] Although the Constitution was initially silent as to the right of privacy, that silence was broken by the addition of the Fourteenth Amendment[29] following the Civil War.[30]

The right to procreate and the right to abortion have been declared as fundamental rights.[31] As such, the Court should apply

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24. *See infra* Part II.

25. *See infra* Part III.

26. *See infra* Part IV. The majority of domestic courts elect to apply strict scrutiny in both sterilization cases and in abortion cases, with few courts making determinations under a balancing test or by using rational basis. *See* cases cited *infra* notes 37–38.

27. *See infra* Part V.

28. *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 70 (Ga. 1905) (declaring that a right to be left alone is a natural right by stating "every man is entitled to enjoy a right to privacy, whether out of society or in it"); *see also* 16A Am. Jur. 2d Constitutional Law § 405 (1994) ("Of those rights now-called 'fundamental rights . . . practically all of them were at one time deemed natural rights by the American founding fathers.").

29. U.S. CONST. amend. XIV.

30. *See* David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 810–13 (1996) (discussing the various interpretive theories that the Court has used when recognizing new rights under the Constitution); Thomas C. Grey, *The Use of an Unwritten Constitution*, 64 CHI-KENT. L. REV. 211, 218–19 (1988) (describing the process through which the Court found a right to privacy within the due process clause of the Fourteenth Amendment).

31. The Constitution guarantees certain "zones of privacy" covering family relationships and child rearing. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967)

strict scrutiny in the judicial review of statutes that limit one's freedom to procreate or to abort.[32] Nevertheless, the right to reproduce and the right to abortion have not always enjoyed the benefit of strict scrutiny, and the protection for these rights have been deemed "confusing at best."[33]

In examining the relevance of dignity and autonomy to the protection of privacy under substantive due process, subsequent discussions explore whether there is, or whether there should be, a universal right of privacy and a corresponding uniform standard of judicial review in reproductive privacy cases.

### *A. Embodiments of the Universal Rights Theory for Essential Liberties*

In his book *Universal Rights and the Constitution*, Professor Simon introduced the concept of universal rights as a way to confer constitutional protection to those rights universally accepted as indispensable.[34] Fighting against a traditional judicial reluctance to import natural law principles,[35] Professor Simon elucidated the

(recognizing that marriage is a freedom protected by the Fourteenth Amendment); Carey v. Population Servs. Int'l, 431 U.S. 678, 685 (1977) (recognizing that the right to have or not to have children is protected under the right to marital privacy); Roe v. Wade, 410 U.S. 113, 154 (1973) (recognizing that the right to terminate a pregnancy is protected by the Fourteenth Amendment); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (recognizing that the right to use or not to use contraception falls within the constitutionally-protected right to marital privacy); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (striking down Oklahoma's forced sterilization statute as unconstitutional).

32. *See* Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (discussing standard of review for fundamental rights); *Ex parte* E.R.G., 73 So.3d 634, 665 (Ala. 2011) (Murdock, J., concurring) (discussing the reasoning of applying strict scrutiny to review of fundamental rights).

33. *See* Windsor v. United States, 699 F.3d 169, 180–82 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (applying rational basis review to an equal protection claim).

34. *See* Simon, *supra* note 22, at 3–4 (describing universal law theory and its roots in natural law).

35. *See id.* at 5–6, 25, 31–33, 36, 45–46 (explaining that universal rights are not bound by history or prevailing attitudes, nor are a product of mechanical derivation from natural law or a certain ideology, and discussing whether a consensus existed on the indispensable character of the right); *see also* Peter B. Bayer, *Deontological Originalism: Moral Truth, Liberty, and Constitutional "Due Process" Part II*, 43 T. MARSHALL L. REV. 165, 253–57 (2019) (explaining why

critical role that universal arguments have assumed,[36] upon the understanding that universal principles are manifestations of the original purpose of government itself.[37] Textualists, such as Justice Scalia, have expressed disfavor towards universal arguments.[38] In particular, Justice Scalia cautioned that any reliance by the Court on international sources may lead to a wrong conclusion given the fact that foreign law may not be relevant to domestic law.[39] Justice Scalia also criticized any reliance on a "national consensus," because legislatures are better qualified to make a final decision.[40] The presumption of constitutionality, however, will not always stand, particularly when the legislative act limits the procreative freedom of a politically neglected population, and this freedom is one that directly defines a person's life and happiness.[41]

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concepts of natural rights and human dignity were ignored by U.S. courts); John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 710 (2008) ("While a few cases have paid lip service to the notion that unreasonable impositions on dignity give rise to a Fourth Amendment violation, this notion has been underdeveloped in the case law, limited largely to brief invocations and inconsistent application.").

36. *See* Simon, *supra* note 22, at 3 ("The study of universal arguments is vital to the study of constitutional law and theory regardless of one's ideology or research agenda.").

37. *See id.* at 18 ("A government lost legitimacy if it violated the mandates of natural law. Locke held that the people retained the right to remove a government that transgressed their rights . . . .").

38. *See id.* at 55–57 (citing Maxwell v. Dow, 176 U.S. 581, 607–08 (1990) (Harlan, J., dissenting)) (conducting a word-for-word review of constitutional amendments and describing the rights enumerated therein); Adamson v. California, 332 U.S. 46, 89–90 (1947) (Black, J., dissenting) ("I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights."); Atkins v. Virginia, 536 U.S. 304, 337 (Scalia, J., dissenting) (claiming that the Court's interpretation of the Eighth Amendment was improper as it was not supported by the text nor history of the Constitution); *see also* Simon, *supra* note 22, at 65 (clarifying that the approach shared by these opinions is called "fixed exclusivism").

39. *See* Roper v. Simmons, 543 U.S. 551, 622 (2005) (Scalia, J., dissenting) (claiming that the majority opinion discarded the will of US citizens in favor of the "international community").

40. *See id.* at 608 ("[The Court's decision] finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists.").

41. If the premise that legislative acts are constitutional is not justified, the criticism against the universal arguments also fails. *See* Marbury v. Madison, 5

In the nineteenth century, the Court consulted state and foreign practices, reaching the conclusion that a presumption of innocence is a constitutional requirement.[42] Similarly, the Court struck down the capital punishment of juvenile offenders because of the growing consensus among states and foreign nations.[43] These decisions have redefined the constitutional protection and harmonized it with national and international standards whenever the liberty is critical to the life and happiness of powerless groups.[44] The Court's aspiration to defend "human dignity" surfaces whenever the right is harmed by cruel punishment or by the application of excessive enforcement.[45]

Privacy right cases provide another footing for arguments utilizing the universal right theory.[46] Recent decisions from foreign jurisdictions have prompted the Court to revisit old privacy

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U.S. 137, 176–78 (1803) (establishing the Supreme Court's ability to consider whether legislation is constitutional, and to render the law null and void if it is not); Garland E. Allen, *The Social and Economic Origins of Genetic Determinism: A Case History of the American Eugenics Movement, 1900–1940 and Its Lessons for Today*, 99 GENETICA 77, 81 (1997) ("[E]ugenicists lobbied in a number of state legislatures on behalf of compulsory sterilization laws for institutionalized individuals deemed to be 'genetically inferior.'").

42. *See* Ford v. Wainwright, 477 U.S. 399, 406 (1986) (discussing "fundamental human dignity"); *see also* Death Penalty–Execution of the Insane, 100 HARV. L. REV. 100, 102 (1986) (observing that a ban on executing the insane offended contemporary understandings of human dignity).

43. *See* Thompson v. Oklahoma, 487 U.S. 821, 821–23 (1988) (discussing "evolving standards of decency"). The same universal approach in *Atkins v. Virginia* produced the exclusion of mentally disabled defendants from capital punishment. *See* Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (recognizing the trend of the global community away from executing mentally impaired individuals).

44. *See Thompson*, 487 U.S. at 831 n.34 (detailing prohibitions on executing juveniles in other nations).

45. *See* Simon, *supra* note 22, at 50 ("Justice Brennan outlined an approach that centered on normative analysis according to the universal principle that a 'punishment must not by its severity be degrading to human dignity.'").

46. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."); *see* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) ("The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.").

opinions and to depart from them.[47] The risk of irreversible damage to targeted individuals, in addition to the inadequate democratic process to speak for "undesired citizens," propelled the Court's internationalism, as evident in the Eighth Amendment cruel and unusual punishment cases, as well as in the Fourteenth Amendment criminal due process cases.[48]

For instance, in *Lawrence v. Texas*,[49] the justices noted that a person's full enjoyment of "liberty" without stigma is paramount in the substantive due process analysis,[50] and that the ability to engage in homosexual activities should fall within that "liberty" because "the stigma this criminal statute imposes, moreover, is *not trivial*."[51]

The Court recognized that privacy—the freedom one exercises to appreciate the meaning of life and to preserve self-control—lies at "the heart of liberty"[52] (hereinafter "essential privacy").[53] In its

47. *See* Stephen A. Simon, *The Supreme Court's Use of Foreign Law in Constitutional Rights Cases: An Empirical Study*, 1 J.L. & CTS. 279, 294 (2013) ("[The *Atkins*, *Lawrence*, and *Roper* opinions] not only relied on foreign law in support of a rule at odds with the challenged legislation but did so to support the overturning of recent precedents on the basis of intervening changes in societal values.").

48. The statutes restricting individuals' essential privacy rights in the areas of marriage, reproduction, contraception, family relationships, child rearing, and education may cause the elimination of the targeted group through the destruction of their value of life, an equivalent to the death penalty in terms of their spiritual or bodily integrity. *See supra* note 38, 39 and accompanying text.

49. *See Lawrence*, 539 U.S. at 578 (hold the Texas statute criminalizing homosexual conduct as unconstitutional).

50. The term "liberty" may indicate pre-constitutional freedom that every person enjoyed without the government's interference. Justice Douglas explained that "[w]e deal with a right of privacy older than the Bill of Rights—older than our political parties," when concluding that privacy rights are no less important than any other right. *See Griswold*, 381 U.S. at 485–86 (discussing the sacred importance of the right to privacy); *Lawrence*, 539 U.S. at 576–77 ("[T]he right [to privacy] has been accepted as an integral part of human freedom in many other countries.").

51. *See Lawrence*, 539 U.S. at 576 (describing the "consequential nature" of the criminal statute) (emphasis added).

52. *See id.* at 575 ("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.").

53. *See id.* (describing privacy as the "heart of liberty"); *see also* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 869 (1992) (stating "the

elucidation of the importance of the freedom to engage in homosexual conduct, the Court in *Lawrence v. Texas* consulted both state law and foreign principles.[54]

Additionally, the *Lawrence v. Texas* opinion observed that the Texas statute specifically impacted those individuals deemed outliers to Judeo-Christian moral and ethical standards.[55] The powerlessness of the affected population was a catalyst for the justices to take a closer look and to adopt an international perspective.[56] Because marginalized groups often yield to essential privacy restrictions, which are difficult to reverse, those individuals lose their autonomy and happiness, as well as follow a course of decline.[57] Cross-jurisdictional consideration is warranted to save their dignity and autonomy.[58]

Thus, the application of the universal right theory is urged to prevent serious, irreversible restrictions upon essential privacy and to neutralize a distorted democratic process. As Justice Brennan previously pointed out, the ultimate goal of the

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ultimate control over her destiny and her body" as implicit in the meaning of liberty); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (describing the control of contraception use as "a maximum destructive impact upon that relationship" within the zone of privacy); Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (describing the profoundness of marriage and the right to marriage granted under the Constitution).

54. *See* People v. Barrett, 281 P.3d 753, 778–81 (Cal. 2012) (Liu J., dissenting) (reflecting on history of eugenics in the United States); *see also* Pooja Nair, *Litigating Against the Forced Sterilization of HIV-Positive Women: Recent Developments in Chile and Namibia*, 23 HARV. HUM. RTS. J. 223, 227–31 (2010) (reflecting on legal remedies in forced sterilization victims in Chile and Namibia).

55. *See* Lawrence v. Texas, 539 U.S. 558, 571 (2003) (acknowledging historical condemnation of homosexual conduct as immoral and shaped by religious tradition).

56. *See id.* at 572–73 (examining cases under the purview of European Court of Human Rights).

57. *See* Simon, *supra* note 22, at 36–41, 50–53 (describing the universal approach in substantive due process cases involving privacy, such as *Lawrence v. Texas*, and explaining the importance of judicial scrutiny in Eighth Amendment cases).

58. *See* Allen, *supra* note 41, at 84–85 (comparing historical trends in Germany and United States regarding minority groups and imposed restrictions); *see also* José Miguel Vivanco, *The Tyranny of Majorities*, HUMAN RIGHTS WATCH (Jan. 19, 2017), (describing the absence of judicial check and human right violations in Venezuela) [https://perma.cc/3MYR-CYB7].

Constitution is to guarantee dignity and autonomy, and this coincides with the merits of the universal right theory.[59] Thus, the universal right theory can insulate the purpose of the Fourteenth Amendment from majoritarian attacks.[60]

In essential privacy cases, arguments based on the universal right theory should be introduced. Both domestic and international cases have been integral to the developing contour of essential privacy.

### *B. Making the Universal Right Theory Work for Reproductive Privacy*

Even when the universal right theory guides the Court's quest for "liberty" under the Fourteenth Amendment, there have been concerns about the Court "expanding liberty" through judicial scrutiny.[61] Both freedom from sterilization and freedom of abortion are fundamental rights. [62] Yet, the Court has not declared strict

59. *See* William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification,* 27 S. TEX. L. REV. 433, 439 (linking the protection of human autonomy and dignity)*; see also* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.").

60. *See* Simon, *supra* note 22 and accompanying text for Professor Simon's summary of the use of the universal right theory. *See also* Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1539–40 (2005) (criticizing foundations of judicial review).

61. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 500–01 (1965) (Harlan, J., concurring) (noting concern of judicial interpretations being restrained); Skelly Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L. Q. 487, 489 (1987) (discussing judicial activism as judging in the service of conscience); William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1, 4 (1992) (noting judicial activism as "natural law or basic notions of humanity").

62. *See* Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942) (describing sterilization as the deprivation of a basic liberty); *see also* Roe v. Wade, 410 U.S. 113, 152 (1973) (recognizing the right of personal privacy and personal rights as fundamental).

scrutiny to be the standard for evaluating essential privacy restrictions.[63]

Under the separation of powers doctrine, unnecessary judicial activism is discouraged.[64] Therefore, the use of a strict standard should be adequately constrained to avoid unjustifiable judicial interference into legislative power. Additionally, the notion of "core" of "liberty," which is called "dignity" and "autonomy," requires further elucidation by courts.[65]

Nevertheless, these self-limiting mechanisms should not preclude the Court's more informed analysis of the Fourteenth Amendment and the universal right theory.[66]

First, the universal right theory is not identical to judicial activism.[67] Rather, it simply serves to add viewpoints independent from that of legislatures.[68] Majority groups have successfully deprived a targeted group's reproductive freedom to eliminate its existence.[69] Controlling votes in political branches tend to favor majoritarian propaganda and to discount any negative

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63. *See* Windsor v. United States, 699 F.3d 169, 180–82 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013) (recognizing doctrinal instability of "dignity"); Erin Daly, *The H. Albert Young Distinguished Lecture in Constitutional Law Constitutional Comparisons: Emerging Dignity Rights at Home and Abroad*, 20 WIDENER L. REV. 199, 200–01 (2014) (discussing absence of clear standard of judicial review in *Windsor*).

64. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (noting importance of government with limited powers).

65. *See* Lawrence v. Texas, 539 U.S. 558, 574 (2003) (explaining the respect the Constitution demands for autonomy); *Skinner*, 316 U.S. at 546 (Jackson, J., concurring) (describing limits of Oklahoma Habitual Criminal Sterilization Act with respect to people's dignity).

66. *See* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 412 (1997) (describing the perception of the invalidation of majoritarian statutes to minority populations as problematic).

67. *Compare* Simon, *supra* note 22 (introducing universal right theory) *with* Wright, *supra* note 61, at 489 (describing judicial activism).

68. *See* Crump, *supra* note 30, at 854–56 (discussing test for deciding whether case involves a fundamental right).

69. *See* Laura I Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L. J. 417, 448 (2018) (discussing historical success of eugenicists and Nazis); *Genocide Trade Bill Row: Peers Back New Amendment in Lords Debate*, BBC NEWS (Feb. 23, 2021) (describing congressional solicitation for "judicial experience" over the allegation of genocide in a foreign country) [https://perma.cc/9D4S-PAQ2].

constitutional implications.[70] As such, when the human dignity and autonomy of a minority population is endangered,[71] the universal right theory ensures that judges are provided with the unbiased guidance of state and foreign courts.[72]

Second, the exercise of a protected "liberty" is an individualized question and a phenomenon remote from voting processes.[73] For instance, political representation involves sharing concerns and personal values of others, but representatives may not share what lies at the heart of someone else's "liberty" to protect it.[74] Devastating consequences to affected individuals are often difficult to be explained and understood in congressional debates.[75] Accordingly, a more "searching" judicial review is justified, and multicultural, multijurisdictional viewpoints should check whether "natural powers of a minority" have been left out by legislative discussion.[76]

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70. *See* Siegel, *supra* note 9, at 110–14 (discussing popular opinion on sterilization statutes).

71. *See* Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 4 (2005) (introducing *Lawrence v. Texas* as a representative opinion that protected the interests of disadvantaged groups); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–79 (1980) (discussing the failure of democracy and human right violations against minority groups); *see also supra* notes 38–40 and accompanying texts (covering historical examples of judicial decisions regarding harmed minority populations).

72. *See* Allen, *supra* note 41, at 81 (describing the challenge to the constitutionality of sterilization laws in *Buck v. Bell*); José Miguel Vivanco, *The Tyranny of Majorities*, HUMAN RIGHTS WATCH (Jan. 19, 2017) (describing the absence of judicial check and human right violations in Venezuela) [https://perma.cc/3MYR-CYB7].

73. *See* Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (discussing liberty and the rights of the individual man).

74. *See* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 190–92 (2011) (discussing different concepts of dignity and times when they conflict).

75. *See* Simon, *supra* note 22, at 104–08 (recognizing the justifiable use of universal principles in issues involving human dignity and the seriousness of harms)*; see also* Rao, *supra* note 74, at 193 (2011) (describing human dignity as a moral, philosophical, and religious concept).

76. *See* McDonald v. City of Chicago, 561 U.S. 742, 880 (2010) (Stevens, J., dissenting) (describing the important context for guiding judicial discretion).

The value of dignity and autonomy has been "clearly accepted as universal."[77] And the exercise of reproductive freedom is paramount to the sense of personhood and happiness.[78] Hence, courts should examine corresponding state decisions and foreign decisions to determine the constitutionality of essential privacy regulations.[79]

### *III. Reproductive Rights are Essential Privacy and Universal Rights*

This Part shows that the right to procreate and several key aspects of the right to abortion constitute essential privacy in a majority of jurisdictions,[80] and that the universal right theory should supplement the Court's analysis of reproductive privacy restrictions.[81]

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77. Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848–50 (1983). *See infra* Part II (discussing privacy right opinions that relied on human dignity and autonomy in state and foreign jurisdictions).

78. A right to procreate and core aspects of a right of abortion have been found to be considered essential privacy by the United States Supreme Court. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Roe v. Wade, 410 U.S. 113, 153–54 (1973) (recognizing the choice to have or not to have a child as a liberty that affects the physical and psychological integrity of a pregnant woman, and the risk of stigmatization against unwed mothers).

79. *See* Simon, *supra* note 22, Chapter 3 (discussing Universal Arguments in Constitutional Law); *id.* at 24 (comparing the theory's relation to "law of nation" and "common law"); *id.* at 61 (pointing out the requirement of elucidation).

80. *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (finding amendment prohibiting protections for homosexuals unconstitutional); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (describing personal decisions related to contraception and procreation as constitutionally protected); Obergefell v. Hodges, 576 U.S. 644, 662–64 (2015) (describing "personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" as fundamental liberties); Simon, *supra* note 22, at 45 (noting privacy rights as fundamental rights).

81. *See* Simon, *supra* note 22, at 45 (describing courts should take active role in privacy right protection).

### *A. Reproductive Privacy in the United States*

A right of procreation and a right of abortion constitute essential privacy to the extent that procreative decision-making is indispensable to dignity and autonomy.[82] As this subsection illustrates, the Court has assumed the primary responsibility for the protection of reproductive freedom.[83]

#### *1. The U.S. Constitution and Privacy Protection*

A right to procreate and a right of abortion are fundamental freedoms protected under the Fourteenth Amendment.[84] *Skinner v Oklahoma*[85] was the first milestone in establishing the idea of essential privacy.[86] The Court struck down a sterilization statute that targeted larceny convicts, noting that the statute concerned a fundamental right to procreate.[87] *Griswold v. Connecticut*[88] later anchored the freedom of contraceptive access to the zone of privacy created by the "fundamental" constitutional guarantees,[89] and invalidated Connecticut's intrusion into a married couple's contraceptive use. The *Griswold* Court applied a level of scrutiny

82. If reproductive rights were arbitrarily restricted, there would be devastating effects to those affected. *See Skinner,* 316 U.S. at 541 (describing sterilization as an irreparable injury); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (noting obtaining birth control as right of privacy free from government intrusion); *Roe*, 410 U.S. at 154 (finding right of personal privacy includes abortion).

83. *See Skinner,* 316 U.S. at 541 (describing the sterilization act as a deprivation of a basic liberty); *Roe*, 410 U.S. at 154 (describing the State's interests in regulations of factors governing abortion); *but see* Powell, *supra* note 9, at 504 (stating "reproductive privacy is less likely to reach policies that do not place a large burden on reproduction").

84. *See supra* notes 58, 77–78 and accompanying texts.

85. 316 U.S. 535 (1942) (holding the enforcement of state sterilization act as unconstitutional).

86. *See id.* at 536 (invalidating statute for lack of rational basis while recognizing that strict scrutiny is applicable for restrictions of a fundamental right).

87. *Id.* at 541–43.

88. 381 U.S. 479 (1965).

89. *See id.* at 485 (holding Connecticut law forbidding contraceptives unconstitutional).

that had been usually applied to restrictions on one's freedom of association.[90]

Along with *Skinner* and *Griswold*, later cases have held that a right of abortion may not be restricted unless there is a compelling state interest.[91] The trimester framework in *Roe v. Wade*[92] confirmed that the ability to have an abortion is a fundamental right and required protection under a stricter standard.[93] The Court held that states cannot interfere until a fetus becomes viable, at which point a "compelling state interest" in protecting the health and well-being of a fetus justifies the intrusion into privacy.[94] *Planned Parenthood of Southeastern Pennsylvania v. Casey*[95] applied the undue burden test—which incorporated *Roe*'s strict trimester approach—without overruling *Griswold* and *Skinner*.[96] *Casey* and later decisions balanced a woman's right to abortion with state interest in fetal health, maternal health, and moral values.[97] In certain abortion cases, the Court has applied a standard similar to rational basis;[98] however,

90. *See id.* at 485–86 (adopting the same standard of review as in freedom of association, "unnecessarily broad"); NAACP v. Alabama, 377 U.S. 288, 307 (1964) (determining that the government cannot prevent or control activities by means that unnecessarily broadly invade an individual's protected freedom).

91. *See* Roe v. Wade, 410 U.S. 113, 164 (1973) (protecting the right to an abortion in the absence of a compelling state interest); Planned Parenthood v. Casey, 505 U.S. 833, 886 (1992) (discussing compelling state interests).

92. 410 U.S. 113 (1973).

93. *Id.* at 153 (holding that the decision as to whether to have an abortion before viability falls within her right to privacy).

94. *Id.* at 162–63.

95. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (holding "[r]egulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden").

96. *See id.* at 848–49, 877 (declaring that a state regulation is unconstitutional if it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion).

97. *See* Gonzales v. Carhart, 550 U.S. 124, 132 (2007) (upholding the state's prohibition of partial-birth abortions); *see also* Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606, 2607 (2019) (affirming the invalidation of the dismemberment abortion ban).

98. *See* Powell, *supra* note 9, at 563 (noting rational basis or similar standards are often applied in abortion cases); Romer v. Evans, 517 U.S. 620, 631 (1996) (explaining access to public funding and resources); *see generally* Webster v. Reprod. Health Servs., 492 U.S. 490 (1989).

the freedom restricted in those cases could be considered peripheral to dignity and autonomy when compared with more direct interferences with women's abortion rights, such as ban of abortion.[99]

In *June Medical*,[100] four Justices applied a balancing test based on *Casey*, another four Justices dissented, and Chief Justice Roberts outlined his interpretation of *Casey* in a concurring opinion.[101] Since *June Medical*, the Eighth Circuit has rejected the balancing test, on the ground that Chief Justice Roberts' opinion should control.[102] According to the Eighth Circuit, *Hellerstedt* loses its precedential value since Justice Roberts' opinion is controlling.[103]

The Seventh Circuit, on the other hand, did not conclude that *Hellerstedt* had been overruled by Justice Roberts' interpretation given that dicta should not replace a previously established framework.[104] The Seventh Circuit's interpretation is consistent with the fact that Justice Roberts' opinion supplied a winning vote to the majority because Justice Roberts admitted that *Hellerstedt* was controlling.[105]

In sum, the right to abortion and the right to have children are fundamental rights in the United States.[106] Restrictions that

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99. *See* Roe v. Wade, 410 U.S. 113, 163 (1973) (stating that an abortion should be free from interference).

100. 140 S. Ct. 2103, 2132 (2020).

101. *See id.* at 2136 (holding that plaintiffs had standing to assert rights of third parties when applying the restriction against a litigant would indirectly affect the third party).

102. *See* Hopkins v. Jegley, 968 F.3d 912, 914–916 (8th Cir. 2020) (holding that Chief Justice Roberts' opinion in *June Medical* is controlling).

103. *See id.* at 914 (discussing Chief Justice Robert's view that *Hellerstedt* was wrongly decided).

104. *See* Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F.3d 740, 743 (7th Cir. 2021) (explaining that the "principles of stare decisis called for the Court to adhere to that earlier result on the essentially identical facts").

105. *Compare* Hopkins, 968 F.3d at 914 (explaining that *Hellerstedt* was wrongly decided) *with Planned Parenthood of Ind. & Ky., Inc.*, 991 F.3d. at 743 (stating that the enforcement of the Louisiana law was properly enjoined before it took effect).

106. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (listing the "liberties" specially protected by the Due Process Clause, which includes the right to abortion and the right to have children).

interfere with an individual's personal choices that are central to dignity and autonomy trigger the application of strict scrutiny under *Griswold* and *Skinner*, while states' compelling interest in maternal health and well-being of the fetus allows restrictions that meet *Casey*'s undue burden test.[107] The uncertainties of abortion rights lie in the interpretation of *Casey* after Justice Roberts opined on the interpretation of *Casey* in *June Medical*.[108]

### *2. Application of Strict Scrutiny Against Sterilization*

Today, none of the fifty states in the United States perform unconsented surgical sterilization for eugenics purposes.[109] When Nazis Germany was defeated, the world understood the danger of classical eugenics that led to the Holocaust.[110]

On top of that, the *Skinner* opinion and civil rights movements gave rise to the recognition of procreative freedom within the country.[111] Courts have invalidated sterilization laws on the ground that irreversible surgical sterilization is a cruel and unusual punishment under the Eighth Amendment.[112]

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107. *See id.* (describing which restrictions trigger which level of scrutiny by the courts).

108. *See* Hopkins v. Jegley, 968 F.3d 912, 914–916 (8th Cir. 2020) (illuminating ambiguity in Chief Justice Roberts' opinion in *June Medical*).

109. *See* Lombardo*, supra* note 13.

110. *See* Daniel J Kelves, *Eugenics and Human Rights*, 319 BMJ 435, 438 (1999) (stating that the Holocaust strengthened the moral objections to eugenics); Laura I Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 448 (2018) ("World War II and the effort to defeat the Nazi regime momentarily stemmed the tide of enthusiasm for eugenics and its rhetoric.").

111. *Skinner* has played a critical role in the establishment of privacy rights and the expansion of substantive due process. Alfred L. Brophy & Elizabeth Troutman, *The Eugenics Movement In North Carolina*, 94 N.C.L. REV. 1871, 1917 (2016). Moreover, coerced sterilizations and degrading conditions in state mental institutions prompted the deinstitutionalization movement. *See id.*, at 1926–28 (discussing attitudes towards sterilizations at state mental institutions); ROBERT MORRIS LEVY & LEONARD S. RUBENSTEIN, THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES, at 19 (1996).

112. *See* Catherine Rylyk, *Lest We Regress to the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters*, WM.

Additionally, some sterilization statutes were held to violate the Fourteenth Amendment's due process requirement.[113] Ultimately, many sterilization laws were repealed because of their violation of human rights.[114]

Natural law concepts influenced early privacy cases.[115] Contrasting *Buck* with *Skinner*, the Supreme Court of California reasoned that the coerced sterilization of intellectually challenged people is an infringement to the "natural right" of procreation.[116] *Skinner* guided state courts to the adoption of heightened scrutiny.[117]

The majority of state court opinions require that the sterilization of intellectually challenged persons should be the last resort; that sterilization procedures may be initiated only by a director of the institution in which a subject resides or by a director of social services; that sterilization must be in the best interest of the subject; that clear, strong, and convincing evidence support a

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& MARY BILL OF RTS. J. 1305, 1327 (2008) (explaining the impact that *Skinner* had on sterilization laws).

113. *See* Smith v. Bd. of Exam'rs of Feeble-Minded, 88 A. 963, 966 (N.J. 1913) (discussing the discrimination against confined individuals); Mickle v. Henrichs, 262 F. 687 (D. Nev. 1918) (holding that vasectomy of criminals violative of Nevada's unusual punishments provision); Davis v. Berry, 216 F. 413 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917) (noting a due process violation).

114. *See* Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 817 (1986) (stating that some states have banned sterilizations of incompetent persons).

115. *See infra* note 117 (listing early privacy law cases which were influenced and informed by concepts of natural law).

116. *See* Perez v. Sharp, 198 P.2d 17, 26 (Cal. 1948) (invalidating a denial of marriage license).

117. *See In re* Grady, 246 A.2d 467, 475 (N.J. 1981) (noting a natural right origin of privacy); Hudson v. Hudson, 373 So.2d 310, 311–12 (Ala. 1979) (noting the lost significance of *Buck*); *In re* A.W., 637 P.2d 366, 368–69 (Colo. 1981) (requiring evidence that sterilization is the only remedy to further a compelling interest); V.H. v. K.E.J. 887 N.E.2d 704, 715 (Ill. App. Ct. 2008) (affirming the denial of a petition for tubal ligation); Wyatt v. Aderholt, 368 F. Supp. 1383, 1384–86 (M.D. Ala. 1974); *In re* Guardianship of Hayes, 608 P.2d 635, 636 (Wash. 1980) (discussing the sterilization requirements); In re Moe, 432 N.E.2d 712, 715 (Mass. 1982) (noting that there is no sterilization on the basis of state or parental interest); Relf v. Weinberger, 372 F. Supp. 1196, 1202 (D.D.C. 1974) (holding that minors' consent is generally required); N. Carolina Ass'n for Retarded Child. v. State of N.C., 420 F. Supp. 451 (M.D.N.C. 1976) (showing strict procedural requirements).

conclusion that the subject is likely to engage in sexual activity without the use of contraceptive devices; that scientific and medical knowledge does not suggest either (a) that a reversible sterilization procedure or other less drastic contraceptive method will shortly be available, or (b) that science is on the threshold of an advancement in the treatment of the individual's disability; and that the subject is incapable of caring for a child, even with reasonable assistance.[118] In sum, sterilizations are performed as the last resort and under extremely strict conditions.

### *3. Strict Scrutiny and Other Tests in Abortion*

Thirty-eight states have enacted feticide laws that generally prohibit the abortion of a fetus.[119] Some of those statutes have targeted non-therapeutic abortions, disguised as a measure to advance health of pregnant women and well-being of a fetus.[120] Abortions of a fetus with a detected heartbeat have been banned.[121]

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118. *See In re* Guardianship of Hayes, 608 P.2d at 640–41 (noting that by limiting compulsory sterilization to cases where less drastic methods will not shortly be available, and there is no proven treatment, the opinion supports "no less restrictive" limitation of strict scrutiny); Conservatorship of Maria B., 160 Cal. Rptr.3d 269, 276 (Cal. Ct. App. 2013) (discussing the medical purpose and necessity of the sterilization procedure); Kennedy v. Kennedy, 845 N.W.2d 707, 714–15 (Iowa 2014) (interpreting a statute to mean that it requires a court's approval in arranging a vasectomy of a ward); *see also* Gerber v. Hickman, 291 F.3d 617 (9th Cir. 2002) (affirming the prisoner's right against sterilization).

119. *See Fetal Homicide Laws*, NAT'L CONF. OF ST. LEGIS., (last updated May 1, 2018) (listing current states with fetal homicide laws) [https://perma.cc/56H6-88D2]; *see also* Marissa Kreutzfeld, *An Unduly Burdensome Reality: The Unconstitutionality of State Feticide Laws That Criminalize Self-Induced Abortion in the Age of Extreme Abortion Restrictions*, 38 WOMEN'S RTS. L. REP. 55, 55–56 (2016) (noting that Indiana is one of the thirty-eight states with feticide laws).

120. *See, e.g.*, Jane L. v. Bangerter, 102 F.3d 1112, 1117 (10th Cir. 1996) (finding specific purpose of placing an insurmountable obstacle in the path of a woman seeking the nontherapeutic abortion); *see also* Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1431 (2016) (explaining that it is the court's duty to ascertain the actual purpose of laws under *Casey*).

121. *See* Laura Bakst, *Constitutionally Unconstitutional? When State Legislatures Pass Laws Contrary to Supreme Court Precedent*, 53 U.C. DAVIS L. REV. ONLINE 63, 78 (2019) (illustrating unconstitutional state laws).

In response, courts in Alaska, California, Florida, Illinois, Tennessee, Iowa, Kansas, Minnesota, and Montana have struck down these restrictions due to a lack of a compelling state interest after adopting strict scrutiny as the test for determining the constitutionality of abortion statutes.[122]

Other courts have reached different conclusions in terms of what degree of restrictions are permissible. While these opinions follow *Casey*'s undue burden test, they have spawned divided interpretations of *Casey*. One approach requires courts to closely examine the state interest a regulation is expected to serve; what physical, health, and logistical burdens are imposed on women; and whether the adopted measure and its corresponding placement of burdens is well-suited to bring about the aims of the regulation.[123] Others solely ask whether there is a debilitating, or "substantial," burden upon the freedom of abortion, without a consideration of the connection between the legislative purpose of the statute and the imposed burdens.[124] In other words, the former

122. *See* Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1138 n.88 (Alaska 2016) (explaining how to prove a compelling state interest); Am. Acad. of Pediatrics v. Lungren, 940 p.2d 797, 825 (Cal. 1997) (describing how the Florida Supreme Court considered a similar issue by searching for a compelling state interest); Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1255 (Fla. 2017) (noting that the court has repeatedly applied strict scrutiny for privacy); Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 765-67 (2013) (analyzing why strict scrutiny applies); Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W.3d 1, 16 (Tenn. 2000) (noting that a right to privacy is fundamental and shall be subjected to strict scrutiny); Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 239–41 (Iowa 2018) (using strict scrutiny instead of undue burden test); Hodes & Nauser, MDS, P.A. v. Schmidt, 440 P.3d 461, 494–97 (Kan. 2019) (applying strict scrutiny instead of undue burden test); Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 30–32 (Minn. 1995); Armstrong v. State, 989 P.3d 364, 380–82 (Mont. 1999) (mentioning undue burden test and women's right to obtain a healthcare provider of their choice).

123. *See, e.g.*, Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 632–36 (N.J. 2000) (measuring the extent of restriction upon abortion); Moe v. Sec'y of Admin. & Fin., 382 Mass. 629, 655–60, 417 N.E.2d 387, 402–05 (1981) (balancing the women's freedom against state interest).

124. *See, e.g.*, Clinic for Women, Inc. v. Brizzi, 837 N.E.2d 973, 988 (Ind. 2005) (applying undue burden test in abortion context, but strict scrutiny in privacy context); Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 582–84 (1993) (explaining what is meant to be a substantial obstacle); Pro-Choice Miss. v.

approach examines the proportionality and the close relationship, or nexus, of the abortion restrictions with the corresponding state interests, while the latter does not.

On balance, a greater number of states apply strict scrutiny standard or a rigorous undue burden test, not a relaxed undue burden test.

### *4. Summary*

The right to procreate and the right to have an abortion are fundamental rights. As *Griswold*, *Skinner*, and *Roe* have held, courts must strictly scrutinize the constitutionality of restrictions upon fundamental privacy rights, such as involuntary sterilization statutes, and the vigorousness of constitutional scrutiny should not change when intellectually challenged individuals are targeted; state courts, for instance, inquire whether sterilization is necessitated by a compelling state interest, whether the regulation realizes the affected individual's best interests, and whether the regulation provides the least invasive process to achieve its legislative purpose.[125]

However, courts take different approaches in reviewing abortion statutes. Federal courts are split in their interpretation of *Casey* and *June Medical*, with the Eight Circuit following Justice Robert's concurring opinion, asserting that abortion restrictions are constitutional under *Casey* unless there is a substantial obstacle to pregnant women, while the Seventh Circuit follows *Roe*, *Casey*, and *Hellerstedt*.[126] The majority of state court opinions require strict scrutiny or a rigorous form of the undue burden test. Significantly fewer courts apply a less rigorous undue burden test.[127]

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Fordice, 716 So. 2d 645, 655 (Miss. 1998) (applying the undue burden standard as a way to reconcile state's interests).

125. *See supra* notes 113–118 and accompanying texts.

126. *Compare* Hopkins v. Jegley, 968 F.3d 912, 914 (8th Cir. 2020) (explaining that *Hellerstedt* was wrongly decided) *with* Planned Parenthood of Ind. & Ky., Inc. v. Box, 991 F.3d 740, 743 (7th Cir. 2021) (stating that the enforcement of the Louisiana law was properly enjoined before it took effect).

127. *See supra* notes 113–118 and accompanying texts.

### *B. Reproductive Privacy in Foreign Countries*

Certain privacy rights, including a right to procreate and a right to safely abort, are protected as fundamental freedom in many parts of the world because they are indispensable to dignity and autonomy.[128]

Eugenics laws permitted sterilization of intellectually challenged citizens in foreign nations, but they were later repealed or abolished.[129] Foreign courts have also disallowed sterilizations as a privacy rights violation.

Abortion was previously criminalized or heavily regulated because of its risk to women's health, morals, and fetal life.[130] In the Global North, since abortion has become a safe procedure, it has been deregulated in most territories.[131]

#### *1. European Law*

In Europe, each member state may provide a different degree of privacy protection. A member state may restrict a right to abortion and a right of same sex marriage albeit the fact that

128. *See* Erin Daly, *The H. Albert Young Distinguished Lecture in Constitutional Law Constitutional Comparisons: Emerging Dignity Rights at Home and Abroad*, 20 WIDENER L. REV. 199, 205 (2014) (stating that human dignity was the ground on which the Constitutional Court of South Africa and the Supreme Court of Nepal struck down prohibitions on same sex marriage, and Mexican court allowed a same-sex couple to adopt a child); Allen, *supra* note 41, at 77 (discussing genetics, privacy, and autonomy generally); José Miguel Vivanco, *The Tyranny of Majorities*, HUMAN RIGHTS WATCH (Jan. 19, 2017) (describing the absence of judicial check and human right violations in Venezuela) [https://perma.cc/R3LQ-25GN].

129. *See* Jean-Jacques Amy & San Rowlands, *Legalised Non-Consensual Sterilization – Eugenics Put into Practice Before 1945, and the Aftermath. Part 2: Europe*, 23 EUR. J. CONTRACEPTION & REPRODUCTIVE HEALTH CARE 194 (2018) (tracing the history of sterilization laws in Europe, North America, and Japan).

130. Marge Berer, *Abortion Law and Policy Around the World: In Search of Decriminalization*, 19 HEALTH & HUM. RTS. J. 13, 14–15 (2017) (noting that abortion prohibitions were generally introduced for three main reasons: abortions were dangerous, abortions were considered sinful, and abortions posed a risk to fetal life).

131. *See id.* at 14–18 (noting that many countries have decriminalized abortion as it has become safer).

discretional margins are limited in many ways.[132] The European Convention on Human Rights ("ECHR") provides a floor for human rights protection among member states of the Council of Europe.[133] Reproductive privacy is protected through the right to private and family life under Article 8, the right to freedom from torture, inhuman or degrading treatment or punishment under Article 3, the right to life under Article 2, the right to an effective remedy under Article 13, and the prohibition of discrimination under Article 14.[134] These provisions are broadly interpreted to cover the procreative privacy that is essential to human dignity and autonomy.[135]

### *a. Unconsented Sterilization*

When it comes to compulsory sterilization, European authorities consider it a violation of important human rights: freedom in the body and health, as well as freedom in one's private and family life, which includes free decision-making in familial

132. Amendment No. 8/1983, Eighth Amendment of the Constitution Act, 7 October 1983, incorporated as Const. Art. 40.3.3.4. (showing that abortion was illegal in Ireland); *see* Dorota A. Gozdecka, *Moral Obligation of The State or a Woman's Right to Privacy? How Women's Reproductive Rights Challenged the Natural Law Tradition in Ireland*, 6 NOFO 89, 90–91 (2009).

133. *See A Convention to Protect Your Rights and Liberties*, THE COUNCIL OF EUROPE ("The European Court of Human Rights oversees the implementation of the Convention in the 47 Council of Europe member states. Individuals can bring complaints of human rights violations to the Strasbourg Court once all possibilities of appeal have been exhausted in the member state concerned.") [perma.cc/795K-JHRG].

134. *See A Convention to Protect Your Rights and Liberties*, THE COUNCIL OF EUROPE, arts. 2, 3, 8, 13, and 14 (listing protections for privacy both through explicit and implicit means in the convention) [perma.cc/795K-JHRG].

135. *See Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 U.N.T.S. 222 [ECHR] (entered into force Sept. 3, 1953) ("Everyone has the right to respect for his private and family life, his home and his correspondence."); *see also* Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353, 71 ("'[P]rivate life', which is a broad term encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world . . . incorporates the right to respect for both the decisions to become and not to become a parent.").

matters.[136] The European Court of Human Rights held that the requirement of sterilization prior to the correction of a transgender applicant's birth certificate violated the patient's right to health and procreative privacy.[137] The court explained that an individual is entitled to the ECHR's guarantee of physical and mental well-being under Articles 3 and 8.[138] It indicated that a non-consensual sterilization of an adult violates their basic freedom of health, spiritual and family life, except for therapeutic purposes where a case of medical necessity has been convincingly established.[139]

In Czechoslovak regions, Romani women were sterilized without informed consent, under a eugenics-inspired policy.[140] Some sterilized women filed civil lawsuits in national courts and later settled their claims with defendants.[141] Relief was denied to other women on the ground that the act of coercion was not found

136. *See* A.P., Garçon and Nicot v. France, App. Nos. 79885/12 52471/13 52596/13, ¶ 129 (April 7, 2017) ("[T]he Court has held that, in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity.") [perma.cc/K93F-NNRN].

137. *See id.* at ¶ 73 (noting that the Commissioner for Human Rights of the Council of Europe published an issue paper, "Human rights and gender identity," in which he explained that the right not to be sterilized is a basic right and intrusion should be avoided); *see also* Transgender-Europe and ILGA-Europe v. Czech Republic, App. No. 117/2015, ¶ 82 (2018) ("Medical treatment without free informed consent breaches physical and psychological integrity, and may in certain cases be injurious to health . . . . Guaranteeing free consent is fundamental to the enjoyment of the right to health, and is integral to autonomy and human dignity and the obligation to protect the right to health.") [https://perma.cc/YTX3-R2RK].

138. *See* Charter of Fundamental Rights of the European Union, 2012/C 326/02 (recognizing that reproductive privacy rights are guaranteed under the charter).

139. *See* Garçon and Nicot, at ¶ 128 (stating that the court did not include the intellectual hardship in "medical" necessities).

140. *See* Gwendolyn Albert & Marek Szilvasi, *Intersectional Discrimination of Romani Women Forcibly Sterilized in the Former Czechoslovakia and Czech Republic*, 19 HEALTH AND HUM. RTS. J. 23, 26–27 (2017) (noting that pursuant to the policy, 60 % of sterilizations were performed on Romani women, who accounted for only 7% of the population).

141. *Id.* at 23–24 (stating that the first Romani woman began filing lawsuits in 1995 with varying success).

or their claims were time-barred.[142] The European Court of Human Rights concluded that when the applicant was left with no option but to agree to a sterilization, it amounted to the violation of ECHR's guarantee of freedom from inhuman or degrading treatment or punishment and the protection of private and family life.[143] The court found that the deprivation of meaningful choice from the applicant constituted a gross disregard for her dignity and autonomy.[144]

Freedom from sterilization expands to the right from inadvertent sterilization. A nurse who suffered a serious complication after using an abortion medication alleged that her right of informed consent was violated.[145] The ECHR found that her right to personal life was harmed by the negligent omission of information about the abortion procedure, even though she was a medical professional.[146]

142. *Id*. at 28–29 (describing that many women did not realize the procedure they had done until many years later, time-barring their claims against hospitals).

143. *See* V.C. v. Slovakia, 2011-V Eur. Ct. H.R. 381 ¶ 106 ("The Court notes that sterilisation constitutes a major interference with a person's reproductive health status. As it concerns one of the essential bodily functions of human beings, it bears on manifold aspects of the individual's personal integrity including his or her physical and mental well-being and emotional, spiritual and family life.").

144. *See id.* at ¶¶ 119–20 (noting that the medical staff displayed gross disregard "for her right to autonomy and choice as a patient" that amounted to a violation of Article 3 of the Convention).

145. *See* Csoma v. Romania, App. No. 8759/05, ¶ 27 (Jan. 15, 2013) [https://perma.cc/6B9E-YV74] ("Relying on Articles 2, 6 and 13 of the Convention, the applicant complained that she had not been properly informed of the risks of the procedure and that because of medical negligence her life had been endangered and she had become permanently unable to bear children.").

146. *See id.* at ¶ 68 (stating that "by not involving the applicant in the choice of medical treatment and by not informing her properly of the risks involved in the medical procedure, the applicant suffered an infringement of her right to private life").

### *b. Abortion*

A woman's decision to obtain an abortion is also protected against legislative interference.[147] In 2009, the European Parliament adopted a Resolution on the Situation of Fundamental Rights.[148] The resolution urged member states to ensure that women can fully enjoy their reproductive rights, including the freedom to avoid unsafe abortions.[149] It advised against invoking customs, traditions, or religious considerations to justify discrimination against women, even if such discrimination had been authorized in a member state.[150] This means that member states cannot invoke their own cultural tradition or religion to hinder the basic right to have a safe abortion.

The resolution prevents burdensome abortion regulations, which have been enacted and enforced, for example, in Germany.[151] Since the Nazi era, the act of having an abortion is a criminal offense, and the abortion was unpunished only if strict statutory conditions were satisfied.[152] While human dignity is

147. *See* Berer, *supra* note 130, at 15–16 (stating that despite foreign legislatures' attempts to restrict abortions in their countries, international human rights bodies are increasingly advocating for safe abortions based on international human rights standards for women's reproductive autonomy).

148. Comm. on C.L., Just. and Home Affs., *Report on the Situation of Fundamental Rights in the European Union 2004–2008*, (2007/2145 (INI)) (Jan. 14, 2009).

149. *See id.* at ¶ 61 (emphasizing the need for states to raise awareness of women's right to reproductive health which includes freedom of access to contraception and freedom to avoid high-risk illegal abortions).

150. *See id.* at ¶ 70 (encouraging Member States "to disallow the invoking of custom, tradition or any other religious consideration to justify any form of discrimination, oppression or violence against women or the adoption of policies which might put their lives in danger").

151. *See* Melissa Eddy, *A Hitler-Era Abortion Law Haunts Merkel, and Germany*, N.Y. TIMES (Mar. 27, 2018) (explaining that one such law, § 219a of Germany's criminal code, makes it illegal for doctors to publicize in any way that they perform abortions) [perma.cc/3H48-6Z82].

152. *See* Strafgesetzbuch [StGB.] [Penal Code], 1871, as amended, §§ 218, 219 (Ger.) (noting that these provisions date back to 1871, but under the current statute, § 218a, an abortion is not punished if abortion counseling is offered before abortion and the operation is performed by a doctor within twelve weeks of conception).

central to constitutional liberties,[153] the West Germany's Federal Constitutional Court held decades ago that the constitutional protection of fetal life required restrictions on the right to abortion.[154]

Shortly after the opinion was issued, negotiations between the West Germany and East Germany gave rise to a unified abortion law.[155] The law balanced the protection of a fetus with women's privacy to a certain degree, and it decriminalized the abortion in the following circumstances: medical indication (e.g., risk to a pregnant woman's life, a disability of a fetus); criminological indication (e.g., rape); and abortion consultation.[156] The consultation exception has required women to go through state-

153. *See* Grundgesetz [GG] [Basic Law], May 23, 1949, BGBI. I art. 2(1) (Ger.) ("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.") [https://perma.cc/TMP4-RCBF].

154. *See* BVERFGE 88, 203 (1993) (invalidating a statute that allowed abortion in the first 12 weeks of pregnancy); *see also* Edward J. Eberle, *Observations on the Development of Human and Personality in German Constitutional Law: An Overview*, 33 LIVERPOOL L. REV. 201, 209 (2012) (stating that the Constitutional Court invoked article two of the Basic Law's "the right to life and to physical integrity" clause to justify strict limitations on abortions in the country); Stephan Jaggi, *Revolutionary Reform in German Constitutional Law*, 41 HASTINGS INT'L & COMP. L. REV. 219 (2018) (explaining that the court changed the burden of proof and used a balancing test to harmonize a woman's right of abortion with a fetal life protection, and transformed the feticide punishment to abortion counseling); Reve B. Siegel, *Dignity and Sexuality: Claims on Dignity in Transnational Debates over Abortion and Same-sex Marriage*, 10 INT'L J. CONST. L. 355, 370 (2012) (stressing the meaning of dignity in US law and German law).

155. *See* Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONTEMP. HEALTH L. & POL'Y 1, 15 (1994) ("[T]he Bundestag passed the new all-German abortion statute on June 26, 1992."); *see also* Jeremy Telman, *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, 24 N.Y.U. REV. L. & SOC. CHANGE 91, 148 ("The new abortion law is a compromise that reflects the general lack of social consensus in the united Germany.").

156. *See* Kommers, *supra* note 155 at 13–14 (stating that the law declared abortion as "not illegal" under certain circumstances, but after the twelfth week of pregnancy, the woman could only abort her fetus to prevent a serious threat to her life or a grave impairment of her physical or mental health).

provided abortion consultations and to disclose a reason for seeking an abortion.[157]

Notwithstanding the foregoing historically restrictive environment, German abortion law is expected to change.[158] In 2019, the German Criminal Code was amended to narrow the criminalization of health care providers' giving of information about abortions.[159] Section 219a (Advertising Abortion) Paragraph 4 allows doctors, hospitals, and other institutions to provide objective information about the abortion procedures that they may provide in certain cases allowed under the law.[160] Providers may refer to information on abortions provided by other listed institutions, such as federal or state agencies, and the German Medical Association.[161] German courts may have an opportunity to decide on women's abortion rights if the abortion law is amended as proposed.[162]

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157. *See* BVERFGE 88, 203 (citing Basic Law Grundgesetz, art. 2(1) as the constitutional ground of fetal life protection); *see also* Kommers, *supra* note 155 at 14 ("The statute's counseling provisions . . . directed counselors to stress the value of unborn life and to encourage women in distress to make a responsible and conscientious decision.").

158. Melissa Eddy, *Germany Proposes to Ease, Not End, Nazi-Era Abortion Law*, N.Y. TIMES (Jan. 29, 2019) [perma.cc/ZWE8-VXB4].

159. *See* Strafgesetzbuch [StGB.] [Penal Code], 2019, § 219a (Ger.) (stating that criminal liability "does not apply where physicians or statutorily recognised counselling agencies provide information about which physicians, hospitals or facilities are prepared to terminate a pregnancy under the conditions of section 218a (1) to (3)") [perma.cc/RH63-QMKY]; *see generally German Cabinet Backs Compromise in Abortion Dispute*, ASSOCIATED PRESS (Feb. 6, 2019, 6:24 AM) [perma.cc/W76L-CVLK].

160. *See* Strafgesetzbuch [StGB.] [Penal Code], 2019, § 219a(4) (Ger.) (stating that a penalty of imprisonment "does not apply where doctors, hospitals or facilities 1) make reference to the fact that they terminate pregnancies under the conditions of section 218a (1) to (3) or; 2) make reference to information about terminating a pregnancy provided by the competent federal or *Land* authority, a counselling agency in accordance with the Act on Pregnancies in Conflict Situations or a medical council") [perma.cc/RH63-QMKY].

161. *See* Eddy, *supra* note 158 (stating that "the proposal would task the German Medical Association, which represents physicians, with compiling and publishing a list of all doctors and clinics providing abortions, along with information about which procedures are offered").

162. *See* Rachel Loxton, *Explained: Germany's Plans to Change Controversial Abortion Laws*, THE LOCAL DE (Jan. 30, 2019, 4:57 PM) (stating that there is a

Polish law has one of the strictest sets of abortion regulations in Europe.[163] The Constitutional Court ruled that the abortion is unconstitutional if performed for social reasons, because fetal life is not well respected.[164] Under the current law, women can obtain abortions only in the following circumstances: if there is a high probability of fetal abnormality or serious disease; if the pregnancy has resulted from a criminal act; and if a pregnant woman's life or health is endangered.[165]

A Polish woman who could not get access to genetic testing or an abortion because of the absence of procedural framework, filed a complaint with the European Court of Human Rights.[166] The court held that the failure to allow her timely access to prenatal genetic testing had amounted to interference with her right to private life guaranteed by Article 8 of ECHR.[167] The obstacles preventing her from seeking an abortion to protect her own health were also found to have violated her right to private life.[168] With regard to procedural protection, the court concluded that a pregnant woman should at least have a procedure to be heard in

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strong social movement in Germany pushing for the decriminalization of abortion laws, along with abolition of Section 219a) [perma.cc/ZH38-G747].

163. *See Poland's Abortion Rules Are Now Among the Strictest in Any Rich Country*, THE ECONOMIST (Oct. 31, 2020) (describing an October 2020 ruling from the country's Constitutional Tribunal which held that women would no longer be able to justify an abortion based on severe fatal defects) [perma.cc/KKW6-UQT8].

164. *See* Tysiąc v. Poland, App. No. 5410/03 ¶¶ 36–40, Eur. Ct. H.R. 42 (2007) [https://perma.cc/P975-NE97] (describing the regulation of abortion in Poland).

165. *See* Matina Stevis-Gridneff, Alisha Haridasani Gupta, and Monika Pronzcuk, *Coronavirus Created an Obstacle Course for Safe Abortions*, N.Y. TIMES (Oct. 22, 2020), ("Abortion is illegal in most circumstances in Poland, and so for years, many women have traveled within Europe to seek the procedure.") [perma.cc/Q68W-UXEN].

166. R.R. v. Poland, App. No. 27617/04, Eur. Ct. H.R. 828 (2011) [https://perma.cc/5L4X-FHN3].

167. *See id.* at ¶ 211 ("[I]t cannot . . . be said that . . . the Polish State complied with its positive obligations to safeguard the applicant's right to respect for her private life in the context of controversy over whether she should have had access to, firstly, prenatal genetic tests and subsequently, an abortion, had the applicant chosen this option for her.").

168. *See id.* at ¶¶ 192–214 (stating that the Polish Government's alleged procedures were neither effective nor accessible and based on the factual circumstances, the Court concluded that the applicant was denied effective respect for her private life).

person and receive a written reasoned decision by a competent authority.[169] The application of strict scrutiny was suggested given that core of privacy rights under Article 8 of ECHR was at issue.[170]

Restrictions not falling within a woman's core freedom to make an abortion decision are subject to a balancing test.[171] In *A, B and C v. Ireland*,[172] the European Court of Human Rights, sitting in Grand Chamber, held that Ireland's restrictions on abortion violated the plaintiff's fundamental rights after she was required to travel to England to obtain an abortion when she felt her pregnancy, in combination with her cancer, posed a significant health risk.[173] The court, stating that Article 8 of ECHR encompasses the right to personal autonomy and to physical and psychological integrity, held that the plaintiff's right to family life and private life was violated when she could not establish her eligibility for a lawful abortion in Ireland.[174] Yet, as to plaintiffs seeking an abortion for their well-being and health,[175] the court asked whether the aim was justifiable and whether the restriction amounted to a disproportionate interference with the plaintiffs'

169. *See* Tysiąc v. Poland, App. No. 5410/03, ¶ 117, Eur. Ct. H.R. 42 (2007) (stating that measures affecting fundamental human rights, should be subject to such procedures before an independent body that should also guarantee pregnant women "at least the possibility to be heard in person and have her views considered" and a written decision issued by the competent body) [https://perma.cc/P975-NE97].

170. *See id.* at ¶¶ 83–84 (describing applicant's argument that the lack of scrutiny of the State's decision and lack of adequate procedures for redress in her case failed to respect her privacy and bodily integrity).

171. *See* A, B and C v. Ireland, App. No. 25579/05, ¶ 229, Eur. Ct. H.R. 2032 (2010) ("[T]he Court must examine whether there existed a pressing social need for the measure in question and, in particular, whether the interference was proportionate to the legitimate aim pursued . . . .") [https://perma.cc/VRZ8-3LS4].

172. *See id.* at ¶ 263 (holding that third applicant's Article 8 rights had been violated when "neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which allowed the third applicant to establish her right to a lawful abortion in Ireland").

173. *See id.* at ¶¶ 247–268.

174. *See id.* at ¶ 242 (noting that the court recognized reproductive "autonomy" as well as bodily integrity in privacy right).

175. *See id.* ¶ 125 (detailing that the first applicant submitted her history of alcoholism, post–natal depression, and difficult family circumstances in seeking an abortion abroad and the second applicant acknowledged that she travelled for an abortion as she was not ready to have a child).

rights.[176] While the protection of fetal life was held to be a legitimate aim, the court proceeded to examine whether the restrictions at issue were proportionate to the state's purpose.[177]

Ultimately, Irish citizens voted to repeal the abortion prohibition in a May 2018 referendum.[178] To the disappointment of the voters, however, the current Irish law permits abortions only until the twelfth week of gestation, which is a very short timeframe in which a woman may seek an abortion.[179]

### *c. Summary*

In conclusion, the European decisions concerning reproductive privacy show that courts begin their analyses by characterizing the restricted freedom and then applying a different level of scrutiny depending on whether the freedom falls within the "core" of privacy rights under Article 8 of the ECHR.[180] Courts apply stricter standards to restrictions of the freedom that is central to private life.[181] Disproportionately broad regulations have been struck

176. *See id*. ¶¶ 219–42 (explaining that the court examined whether the interference was "in accordance with the law" and "necessary in a democratic society" for one of the "legitimate aims" of Art. 8 of the ECHR).

177. *See* Open Door & Dublin Well Woman v. Ireland, 29 Oct. 1992, 15 Eur. Ct. H.R. 244 (1993) (describing that although states are given a wide margin of appreciation in this area, it noted that this margin is not unlimited and that a state's discretion in the field of morals is not absolute); *Id*. ¶ 232.

Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted . . . Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider.

178. Caelainn Hogan, *Why Ireland's Battle Over Abortion is Far From Over*, THE GUARDIAN (Oct. 3, 2019) [https://perma.cc/LV3MAL2E].

179. *See id*. (explaining patients can only access a free and legal abortion if their pregnancy is no more than twelve weeks).

180. *See Guide on Article 8 of the European Convention on Human Rights; Right to Respect for Private and Family Life, Home and Correspondence,* EUR. CT. OF HUM. RTS., ¶¶ 107, 110 (2020).

181. *See id.* at 73 ("[S]tricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of

down, because they violate a pregnant woman's right to private life, as well as her right to psychological and bodily integrity.[182] Decriminalization and downregulation is the mainstay in European countries.[183]

In other words, a European government's restriction on freedom stemming from compulsory sterilization is presumptively impermissible, because the freedom to have a child is at the core of one's private life, and is therefore given heightened protection.[184] A right to abortion is protected, but it is subject to competing state interests in protecting fetal life and maternal health, as well as maintaining socially accepted morals.[185] The extent of restrictions on a woman's freedom is weighed against governmental interests under a balancing test when abortions are sought for the woman's well-being or her life planning.[186] In such cases, the government must establish that there is a legitimate interest and that the methods used are necessary and proportional.[187] Whereas, if a right to safe abortions, or a "core" freedom of privacy, is restricted, courts apply stricter standard and generally invalidate the law.[188]

### *2. Canadian Law*

While Canada is one of the common law countries, a stark difference has emerged between Canadian law and British law

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access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life.").

182. *See* R.R. v. Poland, No. 27617/04, Eur. Ct. H.R. 828 (2011) ¶¶ 192–214*; Tysiąc v. Poland,* No. 5410/03, Eur. Ct. H.R. 42 (2007) ¶¶ 116–124 (describing differing reasons overly broad regulations have been found unconstitutional).

183. *See* A, B and C v. Ireland, No. 25579/05, Eur. Ct. H.R. (2010) ¶ 175 (finding European consensus including the abortion legalization during the first trimester in 31 out of 47 member states); Berer, *supra* note 130, at 21–22.

184. A, B and C, No. 25579/05 at ¶¶ 107, 110.

185. *See id.* at ¶ 213 ("The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child.").

186. *Id.*

187. *Id.* at ¶ 231.

188. *See id*. at ¶ 232 ("Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted.").

where abortion rights and compulsory sterilizations are concerned.[189]

### *a. Unconsented Sterilization*

The Supreme Court of Canada concluded that the non-therapeutic sterilization of a woman with intellectual difficulty was impermissible, even upon the request of her parent, because the sterilization violated her basic rights.[190] The court rejected the English "best interest" approach on the ground that it would be extremely difficult or even impossible to decide what an affected person's best interest would be.[191]

### *b. Abortion*

The right to abortion receives robust protection.[192] Canada's criminalization of abortion ended in 1984.[193] Moreover, *R v. Morgentaler*[194] invalidated the criminalization of abortion on the ground that forcing a woman, by threat of criminal sanction, to carry a fetus to term is a profound interference with a woman's

189. *See* R v. Morgentaler, [1988] 1 S.C.R. 30, 63 O.R. (2d) 281 (Can. Ont.); [1993] 3 S.C.R. 463, 490, 107 D.L.R. 4th 537 (Can.) (finding the abortion provision in the Criminal Code to be unconstitutional); *see also* Berer, *supra* note 130, at 16 (detailing reasons abortions had previously been criminalized or regulated).

190. *See* E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388, ¶ 86 (Can.) (illustrating that therapeutic sterilization is defined to mean a sterilizing procedure performed for treating physical or mental conditions, therefore the operation would not serve any benefits to the women).

191. *See* Re F, [1990] 2 A.C. 1, 55 (explaining why the "best interest" approach was rejected).

192. *See* Maham Abedi, *How Abortion Rights Work in Canada — and Whether They Could Be Put at Risk,* GLOBAL NEWS (May 24, 2019) ("Canada has a strong history since 1988 of shutting any attempt to reopen the abortion debate in Parliament.") [https://perma.cc/AZR3-B3BT].

193. *History of Abortion in Canada,* NAT'L ABORTION FEDERATION, (last visited Aug. 26, 2020) (giving a history of the Canada Health Act 1984 and how it legalized abortions the government funds are available for certain services) [https://perma.cc/45SZ-YCKL].

194. R v. Morgentaler, [1988] 1 S.C.R. 30, 63 O.R. (2d) 281 (Can. Ont.); [1993] 3 S.C.R. 463, 490, 107 D.L.R. 4th 537 (Can.).

body and thus a violation of the security of her person.[195] Justice Wilson concluded that a woman's decision to terminate her pregnancy is a freedom protected from government interference as part of a democratic society.[196]

#### *c. Summary*

In Canada, strict scrutiny is applied in cases involving nonconsensual sterilization.[197] Also, based on *R v. Morgentaler*'s broad prohibition of abortion bans, any interference with a woman's freedom to receive an abortion is presumably unconstitutional, unless proven otherwise.[198]

### *3. English Law*

#### *a. Unconsented Sterilization*

The United Kingdom never enacted a eugenics sterilization statute, even though nonconsensual sterilization operations have been performed.[199] An application for a compulsory sterilization procedure for non-therapeutic purposes has been approved when the procedure would serve the best interests of the patient.[200]

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195. *See id.* (showing that the minority in *Morgentaler* indicated that less rigorous scrutiny should apply).

196. *See id.* at 105 (stating that the psychological trauma that a pregnant woman suffers shows that the procedure violates the security of her person); Joanna N. Erdman, *Constitutionalizing Abortion Rights in Canada*, 49 OTTAWA L. REV. 221, 245 (2018) (indicating the importance of a woman's autonomy and importance in society).

197. *See* Re Eve, [1986] 31 D.L.R. (4th) 1,14 (Can.) (describing the standard for determining the constitutionality of unconsented sterilization in Canada).

198. [1988] 1 S.C.R. 30, 63 O.R. (2d) 281 (Can.).

199. *See* Stansfield et al., *The Sterilization of People with Intellectual Disabilities in England and Wales During the Period 1988 to 1999*, 51 J. INTELL. DISABILITY RES. 569, 570 (2007) (discussing that some courts have hesitated to apply best interest standard because there is not enough guidance).

200. *See* Re F, [1990] 2 A.C. 1, 55 (explaining that there exist circumstances that should allow treatment be given to a patient without consent if in the best interests of the patient).

This English approach has been criticized as vulnerable to a decision-maker's subjective perspective in attempting to ascertain a patient's "best interest."[201] According to one report, in thirty-nine sterilization applications from 1988 to 1999, courts ruled that the procedure was in the person's best interest in thirty-one cases, even though almost all were made on behalf of persons with intellectual difficulties.[202] This data suggests individuals with intellectual difficulties in the United Kingdom are at serious risk of being deprived of their reproductive freedom.[203]

### *b. Abortion*

In Britain and its former colonies, abortion was criminalized by the Offences against the Person Act of 1861.[204] There are exceptions to the ban, such as when an abortion will save a woman's life or when it may help a woman's physical or mental health.[205] As set forth in the Abortion Act of 1967, abortions are permitted, up to a period of twenty-four weeks, only if continuing the pregnancy would involve a greater risk to the woman's physical or mental health than what would exist if the pregnancy were to be terminated.[206] Abortions after twenty-four weeks are also permissible, where the health of a pregnant woman is severely at risk.[207] In essence, clinicians in the United Kingdom are free to exercise their own good faith judgments when faced with justifiable social concerns.[208]

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201. *See* Stansfield, *supra* note 199, at 570 (discussing that some courts have hesitated to apply best interest standard because there is not enough guidance).

202. *See id.* (explaining the statistical study of forced sterilization).

203. *See id.* ("Referrals for sterilization are almost always for people with IDs.").

204. *See* Andrew Grubb, *Abortion Law in England: The Medicalization of a Crime*, 18 LAW MED. HEALTH CARE 146, 148 (1990) (detailing how abortion was criminalized by the Offences against the Person Act of 1861).

205. *See generally* R v. Bourne, [1939] 1 K.B. 687 (detailing exceptions to the Offences Against the Person Act).

206. The Abortion Act 1967, c. 87, § 1(1)(d) (Eng.).

207. *Id.*

208. Amelia Hill, *MPs Bring Bill to Ban Late Abortions for Cleft Lip, Cleft Palate and Clubfoot*, THE GUARDIAN (May 28, 2020) (explaining that § 1(2) of the

### *c. Summary*

In short, the United Kingdom allows nonconsensual sterilization procedures when it is in the best interests of the patient, although the best interest test is a standard difficult to apply.[209] Additionally, while abortion is criminalized, it is generally available for women through statutory exceptions.

## *4. Japanese Law*

### *a. Unconsented Sterilization*

Japan enforced a statute allowing the sterilization of people with intellectual difficulties from 1948 to 1996.[210] Civil rights actions were filed by sterilized women, who alleged that their reproductive rights had been violated.[211] The women further argued that their freedom of reproduction was constitutionally protected as a part of their right to pursue happiness, under Article 13 of the constitution.[212] Sendai Chihō Saibansho, the district court, stated that the right to procreate was constitutionally protected.[213] While the court's did not clearly describe the standard it applied, it nevertheless concluded that forced sterilization was a

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Abortion Act allows a doctor to take into account the patient's actual or reasonably foreseeable environment in making a decision to terminate the pregnancy, increasing the frequency of abortions that are performed) [https://perma.cc/M9GZ-YYGV].

209. *See* Doug Pet, *Forced Sterilization Considered in a UK Court*, BIOPOLITICAL TIMES (Feb. 17, 2011), (explaining the court's determination of when forced sterilization is appropriate) [https://perma.cc/X4Y2-J88Y].

210. *See* Mari Yamaguchi, *Victims Begin to Talk About Japan's Sterilization Program,* AP NEWS (Dec. 18, 1997), (explaining that many people were forcibly sterilized under the eugenics law) [https://perma.cc/YB54-W8FE].

211. Sendai Chihō Saibansho [Sendai Dist. Ct.] May 28, 2019, Hei 1 (wa) no. 76 HANREI TAIMUZU [HANTA] 1461, 153 (Japan).

212. *See* Saikō Saibansho [Sup. Ct.] Nov. 27, 2001, Hei 15 (o) no. 576, 55 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSYŪ] 1154 (Japan) (explaining how the Supreme Court of Japan has not decided on a right to privacy).

213. Sendai Chihō Saibansho,HANREI TAIMUZU [HANTA] 1461, 153.

significant constitutional violation.[214] In related cases, Japanese courts have continued to hold that nonconsensual sterilization procedures are unconstitutional.[215]

### *b. Abortion*

It is a criminal offence in Japan to either receive an abortion or to perform an abortion without a special medical license.[216] The Japanese regulation permits licensed doctors to conduct abortions within twenty-two weeks of pregnancy where there are medical or economic grounds.[217] This statutory safe harbor has been liberally interpreted in practice.[218] As a result, more than 150,000 abortions were performed, with only twelve detected violations and no court proceedings, between 2014 and 2017.[219] The economic hardship exception covers situations in which the pregnant women is a bread earner and cannot both work and raise a child.[220]

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214. *See id.* (detailing that the court refused to afford monetary compensation to plaintiffs on statute of limitations grounds).

215. *E.g.*, Tokyo Chihō Saibansho [Tokyo Dist. Ct.] June 30, 2020, Hei 2 (wa) no. __ HANTA ___, ___ (Japan).

216. *See* KEIHŌ (PEN. C.) art. 212, 214 (explaining that a practitioner may obtain a license from a regional licensing authority, which is comprised of professional obstetricians); *see also Please Tell Me About Abortion*, JAPAN ASSOCIATION OF OBSTETRICIANS AND GYNECOLOGISTS, (recommending abortion performed earlier than twenty-two weeks for the lower risk to a patient's health and the lower medical costs) [https://perma.cc/9U85-9EW8].

217. *See id.* (offering questions and answers regarding the Maternal Health Act, including the twenty-two week provision); Botaihogohō [Maternal Protection Act], Law No. 156 of 1948, art. 14 (Japan) (establishing the twenty-two week provision).

218. *See Criminal Prosecution Statistics*, MINISTRY OF JUST. (providing raw data showing extremely low prosecution rates under the Maternal Health Act) [https://perma.cc/Q2AK-QJKL].

219. *See id.* (gathering annualized prosecution data for the Maternal Health Act); *Report on Public Health Administration and Services* FY2018, Abortion *Statistics*, MINISTRY OF HEALTH, LABOR, AND WELFARE (providing data on the Maternal Protection Act and highlighting that 161,741 legal abortions took place in fiscal year 2018) [https://perma.cc/C393-32JG].

220. *See* Ryoichiro Miyazaki, *A Standard for Medical Care and Clinical Practice* 59 JAPANESE OBSTETRICS & GYNECOLOGY J. N-18 (2007) (acknowledging that the economic exception hardship would be impossible for doctors to define

#### *c. Summary*

In sum, the Japanese constitution protects an individual's freedom from compulsive sterilization because of an intellectual difficulty.[221] Abortion is not tightly restricted nationwide because there are various socioeconomic grounds for permitting an abortion procedure. The grounds for providing an abortion procedure are liberally applied by Japanese courts.[222]

### *5. The Republic of Korea and Reproductive Privacy*

#### *a. Unconsented Sterilization*

In terms of the right to procreate, Korea's compulsory sterilization regime was abolished on the ground of privacy protection.[223] Korea has revised provisions in the Mother and Child Health Act of 1973 ("MCHA") to terminate the compulsory sterilization of intellectually challenged people.[224]

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and apply and laying out conditions that meet the economic exception accordingly) [https://perma.cc/9V6K-PWJX].

221. *See* Botaihogohō [Maternal Protection Act], Law No. 156 of 1948, art. 14 (Japan) (terminating the National Eugenical Act, Act No. 107 of 1940).

222. MINISTRY OF JUST., *supra* note 218 (providing raw data showing extremely low prosecution rates under the Maternal Health Act).

223. *See* Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-MaBa127 (S. Kor.), *translated in* Constitutional Court of Korea's online database (explaining that "the right to self-determination includes the right of a woman to freely create her own private sphere of life based on her own dignified right to personality, and the right of a pregnant woman to determine whether to continue her pregnancy is included in such right . . . ") [https://perma.cc/CW66-R3CA].

224. *See* Mother and Child Health Act of 1999 art. 15 (S. Kor.), *translated in* Korean Legislation Research Institute's online database, (deleting the sterilization provision of the MCHA); *See also* Ki-Hyun Hahm & Ilhak Lee, *Biomedical Ethics Policy in Korea: Characteristics and Historical Development*, 27 J. KOREAN MED. SCI., S76, S76–S81 (May 18, 2012) ("The act was revised to eliminate eugenic provisions . . . ") [https://perma.cc/BHX5-2KUM].

*b. Abortion*

Abortion has been a criminal act in Korea, although there have been exceptions for therapeutic abortions.[225] Article 14 of the MCHA permits abortions under the following limited circumstances: the existence of hereditary diseases; specified infections; rape or quasi-rape; incest; and a danger to maternal health.[226]

Even so, abortions performed before fetal viability were not excluded from criminal liability, and a woman's freedom to terminate her pregnancy was limited even in circumstances where there was no protectable fetal life under Article 14.[227] In 2019, the Korean Constitutional Court held that a woman has a fundamental right of self-determination about her pregnancy.[228] The court ruled that the broad prohibition of abortion excessively limited a woman's right under the principle of balance.[229]

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225. *See* Criminal Act art. 269–270 (S. Kor.), *translated in* Korean Legislation Research Institute's online database, https://law.go.kr/LSW/eng/engMain.do (search required) (outlawing procuring and providing abortions).

226. *See* Mother and Child Health Act of 2020 art. 14. (S. Kor.), *translated in* Korean Legislation Research Institute's online database, https://law.go.kr/LSW/eng/engMain.do (search required) (listing the exclusive exceptions for induced abortion operations).

227. *See id.* (lacking language excepting abortions before viability performed for any reason from criminal liability).

228. *See* Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-Ma127 (S. Kor.), *translated in* Constitutional Court of Korea's online database (explaining that the self-abortion restrictions of MHCA violates rules "against excessive restriction, as well as a pregnant woman's right to self-determination, right to health, right to bodily integrity, right to protection of motherhood, and right to equality") [https://perma.cc/CW66-R3CA].

229. *See id.* (concluding that the legislature improperly balanced the public interest in a fetus's life and the private interest in preserving a woman's right to self-determination, incorrectly giving unilateral priority to the public interest in the fetal life); *See also* Joyce Lee & Josh Smith, *South Korea court strikes down abortion law in landmark ruling*, REUTERS (Apr. 11, 2019), (summarizing the Court's holding and explaining that the ban unconstitutionally curbed women's rights) [https://perma.cc/P77R-W5YE].

### *c. Summary*

Korea has seen remarkable developments in reproductive privacy.[230] The Korean Constitutional Court confirmed constitutional protections for reproductive privacy, and it has applied a type of a balancing test in determining the constitutionality of abortion prohibitions.[231]

## *6. Privacy Protection in Countries in the Global South*

Serious privacy violations have been reported from the Global South, which have drawn immediate backlash from international organizations.[232] For instance, upon the discovery of widespread involuntarily sterilizations of HIV-positive women in Namibia, the United Nations and various human rights groups worked to end the practice.[233]

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230. *See* Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017Hun-Ma127 (S. Kor.), *translated in* Constitutional Court of Korea's online database (explaining that the self-abortion restrictions of MHCA violates rules "against excessive restriction, as well as a pregnant woman's right to self-determination, right to health, right to bodily integrity, right to protection of motherhood, and right to equality") [https://perma.cc/CW66-R3CA].

231. *See id.* (defining the right to self-determination in terms of freedom in one's private sphere of life and weighing that private interest right more heavily than the public interest motivating the law at issue).

232. *See* Berer, *supra* note 130, at 15–16 (describing an increase of recognition in the Global South that preventing unsafe abortions is paramount to public health progress and noting the organizations that support a similar view on progressive abortion law reform).

233. *See* Pooja Nair, *Recent Development: Litigating against the Forced Sterilization of HIV-Positive Women: Recent Developments in Chile and Namibia*, 23 HARV. HUM. RTS. J. 223, 229–31 (2010) (summarizing patient experiences with forced sterilization, the coercive tactics they experienced, and the efforts of groups like the International Community of Women Living with HIV/AIDs and the Legal Aid Centre); Lucile Scott, *Forced Sterilization and Abortion: A Global Human Rights Problem*, THE FOUND. FOR AIDS RSCH. (noting that the exposure from cases like Namibia spur awareness and United Nations agencies educate the public on vulnerable populations) [https://perma.cc/K7F4-6KQS].

### *a. Unconsented Sterilization*

Namibia's Supreme Court held that HIV-positive women were involuntarily sterilized where they had signed consent forms while in labor without fully understanding the consequences of such an action.[234]

In 2016, the Inter-American Court of Human Rights held that Bolivia's nonconsensual sterilization of a woman, immediately after she had given birth, constituted a violation of the woman's privacy rights.[235] Similarly, the African Commission on Human and Peoples' Rights recently issued a statement asserting that involuntary sterilization is an act of sexual or gender-based violence that may amount to torture or inhumane treatment.[236] Both opinions make it clear that forced sterilizations violate universal protections for human dignity and autonomy.[237]

### *b. Abortion*

In countries such as South Africa, the right to an abortion has been enumerated as a constitutional right.[238] The preamble to

234. *See* Gov't of the Republic of Namib. v. LM, (SA 49/2012) [2014] NASC 19 (Namib.) (stressing the absence on informed consent).

235. *See* I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329, ¶ 153 (Nov. 30, 2016) ("[T]he decision of whether or not to become a mother or father belongs to the sphere of the autonomous decisions of the individual in relation to his or her private and family life."); *IACTHR Holds Bolivia Responsible for Forced Sterilization in Landmark Judgment*, INTERNATIONAL JUSTICE RESOURCE CENTER (Jan. 3, 2017) (reporting on the decision, explaining its scope and relationship to various rights, including privacy) [https://perma.cc/M5L2-B5A8].

236. AFR. COMM'N ON HUMAN AND PEOPLE'S RIGHTS, GENERAL COMMENT NO. 4 ON THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: THE RIGHT TO REDRESS FOR VICTIMS OF TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING PUNISHMENT OR TREATMENT (ARTICLE 5) 17 (2017) ("These include physical and psychological acts committed against victims without their consent or under coercive circumstances, such as . . . denial of reproductive rights including forced or coerced pregnancy, *abortion and sterilization* . . . .") (emphasis added) [https://perma.cc/6HBN-7VBX].

237. *See supra* notes 235–236 and accompanying text.

238. Reva B. Siegel, *The Constitutionalization of Abortion,* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1057, 1072 (Michel Rosenfeld

South Africa's abortion statue declares "that it vindicates the values of human dignity, the achievement of equality, security of the person, non-racialism and non-sexism, and the advancement of human rights and freedoms which underlie a democratic South Africa."[239] The preamble to the Mexico City's statute legalizing abortions includes a similar provision.[240]

The African Commission on Human and People's Rights has declared that a woman's freedom to have a safe and legal abortion is a human right.[241] South American courts have similarly endorsed protections for abortion access under their constitutions and have also struck down abortion bans.[242]

### *c. Summary*

The opinions from the Global South stress the importance of reproductive freedom to secure dignity and autonomy.[243] The right to reproduce and the right to abortion are declared to be basic

& András Sajó eds., 2012) (explaining that the South African statute allowing abortion within the first 12 weeks of pregnancy has a preamble introducing the statute in terms of constitutional rights and freedoms valued by the South Africa's democracy).

239. *Id.*

240. *See id.* at 1072–73 (emphasizing individual rights to decide the number and spacing of children).

241. *See* AFR. COMM'N ON HUMAN AND PEOPLE'S RIGHTS, GENERAL COMMENT NO. 2 ON ARTICLE 14.1 (A), (B), (C) AND (F) AND ARTICLE 14. 2 (A) AND (C) OF THE PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA 1, 11–13 (2014) (explaining the general obligations of the state to respect, protect, promote and fulfill the women's rights, specifically their sexual and reproductive rights).

242. *See* Berer, *supra* note 130, at 19–20 (citing P. Bergallo & A. Ramo Michael, *Constitutional developments in Latin American abortion law*, 135 INT'L J. GYNECOLOGY & OBSTETRICS 228 (2016)) (listing places in Latin America where higher courts have aided in securing abortion rights or at least interpreting the constitutionality and defining the grounds for abortion).

243. *See* I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329, ¶ 153 (Nov. 30, 2016) ("The IACtHR's judgment expands the Court's jurisprudence . . . the (infrequently cited) right to dignity under the American Convention on Human Rights . . . ."); AFR. COMM'N ON HUMAN AND PEOPLE'S RIGHTS, *supra* note 241, at 8 ("The right to dignity enshrines the freedom to make personal decisions without interference from the State or non-State actors.").

human rights without regard to surrounding religious-cultural environments or dominant political views.[244]

### *6. The International Movements Against Coerced Sterilization and Abortion Restrictions*

#### *a. Unconsented Sterilization*

The United Nations and the World Health Organization ("WHO"), as well as the Inter-American Court of Human Rights, view involuntary sterilization as a human rights violation.[245] The International Covenant on Civil and Political Rights ("ICCPR") prohibits torture, as well as cruel, inhuman, or degrading treatment and punishment.[246] It also provides that all persons, even those imprisoned, shall be treated with humanity and with respect indicative of the inherent dignity of a person.[247] Compulsory sterilization falls within the meaning of "cruel, inhuman or degrading treatment or punishment," and deprives individuals the "dignity of the human person," as prohibited by the ICCPR.[248]

Lawmakers have attempted to justify the sterilization of intellectually challenged people on the ground that sterilization

244. *See* AFR. COMM'N ON HUMAN AND PEOPLE'S RIGHTS, *supra* note 241, at 9 ("Administrative laws, policies and procedures of health systems and structures cannot restrict access to family planning/contraception on the basis of religious beliefs.").

245. *See* I.V. v. Bolivia, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 329, ¶ 176 (Nov. 30, 2016) (reviewing these organizations' positions on consent, emphasizing its prior nature).

246. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, S. Treaty Doc. 95-20 (entered into force Mar. 23, 1976), (following from the "inherent dignity and of the equal and inalienable rights of all members of the human family").

247. *See id.* arts. 7, 10 (defining basic rights for those imprisoned while accused, including separation from convicted populations and separation and priority for the accused who are juveniles).

248. *See id.* (highlighting the proposition that compulsory sterilization falls within the meaning under the ICCPR).

benefits those who have limited vocational skills or a decreased understanding of their social settings.[249] However, this logic has been rejected under the ICCPR.[250] The United Nations prohibits discrimination against intellectually challenged people,[251] and it also forbids the forced sterilization as a form of treatment.[252] The United Nations has issued an interagency statement establishing that involuntary sterilization is a violation of fundamental human rights, including the right to health, the right to privacy, and the right to be free from discrimination.[253] Also, the United Nations has explained that every person with a disability has a right to have his or her physical and mental integrity respected on an equal basis with others, and the individual must be involved in any decisions affecting them.[254]

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249. *See* Buck v. Bell, 274 U.S. 200, 2017 (1927) (noting that "it is better for all the world . . . if society can prevent those who are manifestly unfit from continuing their kind[,]" in denying the due process and equal protection claims of a woman involuntarily sterilized by the state of Virginia for her feeble mind).

250. *See* Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 N.Y.L. SCH. J. INT'L & COMP. L. 469, 487 (2002) (controverting such justification by noting "that the lack of economic resources in any country is not a reason to limit any of the rights conventions or standards").

251. *See id*. at 472 (specifying that "people with mental disabilities are protected by human rights law by virtue of their basic humanity").

252. *See* G.A. Res. 46/119, Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (Dec. 17, 1991) (specifying that sterilization shall not be carried out as a treatment for mental conditions).

253. *See Eliminating Forced, Coercive and Otherwise Involuntary Sterilization: an interagency statement*, WORLD HEALTH ORGANIZATION [WHO] 1, 1 (2014), (reiterating the anti-involuntary sterilization position of the OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF, and WHO and highlighting the contours of their condemnation) [https://perma.cc/68J3-H4WF].

254. *See* Peter Bartlett, *United Nations Convention on the Rights of Persons with Disabilities and Mental Health Law*, 75 MODERN L. REV. 752, 755, 765 (2012) (differentiating the Convention on the Rights of Persons with Disabilities and Mental Health Law from prior articulations of rights of persons with disabilities).

*b. Abortion*

Regarding the abortion, strict regulations are disfavored because of their connection with poor gynecological outcomes.[255] A number of studies have identified a correlation between abortion bans and a higher mortality rate due to unsafe abortion procedures.[256] On the other hand, the legalization of abortion leads to safer operations, and improves women's health.[257] Therefore, the United Nations and the WHO have issued statements supporting less restrictive national systems.[258]

The UN Human Rights Committee ruled that Ireland's criminalization of abortion and failure to provide public health services violated Article 7 (right to be free from cruel, inhuman or degrading treatment), Article 17 (right to privacy), and Article 26 (right to equality before the law) of the ICCPR.[259] The committee found that Ireland's denial of abortion access through criminalization forced women to face a range of psychological, physical, and financial burdens and to experience fear, stigma, isolation, and abandonment.[260] The committee adopted a balancing

255. *See Marge Berer, National Laws and Unsafe Abortion: The Parameters of Change*, 12 REPROD. HEALTH MATTERS 1, 2–3 (2004) (showing that the prevalence of unsafe abortions remains the highest in the 82 countries with the narrowest legal grounds for obtaining abortions, while the 52 countries that allow abortion on request have a median unsafe abortion rate as low as two per 1000 women of reproductive age).

256. *See* David A. Grimes, Janie Benson, Susheela Singh, Mariana Romero, Bela Ganatra, Friday E. Okonofua & Iqbal H. Shah, *Unsafe abortion: the preventable pandemic*, 368 THE LANCET 1908, 1912 (2006) ("[U]nsafe abortion and related mortality are both highest in countries with narrow grounds for legal abortion." (citing Berer, *supra* note 255, at 1–8)).

257. *See* Grimes, et al., *supra* note 256, at 1915 (finding statistics from other countries showing that legalization of abortion leads to safer operations).

258. *See* Brooke R. Johnson, Vinod Mishra, Antonella Francheska Lavelanet, Rajat Khosla, & Bela Ganatra, *A Global Database of Abortion Laws, Policies, Health Standards and Guidelines*, 95 BULL. WORLD HEALTH ORGAN. 542, 542 (June 9, 2017) (reporting unsafe abortions are "more than four times higher in countries with more restrictive abortion laws") [https://perma.cc/425U-S99B].

259. *See generally*, U.N. Human Rights Comm., Whelan v. Ireland, Commc'n No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (2017) [https://perma.cc/M7TP-RQ2M].

260. *See id.* at 6.1–10 (finding psychological, physical and financial burdens caused by abortion's criminalization).

test similar to that in *A, B and C v. Ireland,*[261] and it concluded that the restrictions could not be justified.[262]

### *c. Summary*

Members of the United Nations must abolish compulsory sterilization of intellectually challenged people and are urged to decriminalize abortion where a fetus is not viable.[263] The suggestions are underpinned by the fundamental nature of a right to health and privacy.[264]

## *7. Summary*

The foregoing developments around the world elucidate the recognition of fundamental privacy rights covering both the freedom from nonconsensual sterilization and the freedom to seek a safe abortion.[265] The recent decisions from the European Court of Human Rights, the Supreme Court of Canada, the Korean

261. *See generally*, Case of A, B, and C v. Ireland, App. No. 25579/05 (December 16, 2010) [https://perma.cc/Z4ER-9EQX].

262. *See* U.N. Human Rights Comm., Mellet v. Ireland, Commc'n No. 2324/2013, U.N. Doc. CCPR/C/116/D/2324/2013 (2016) (deciding the legislation was too restrictive).

263. *See Sterilization of Women and Girls with Disabilities: A Briefing Paper*, HUM. RTS. WATCH (Nov. 10, 2011, 5:47PM) (describing the background of forced sterilization of females with disabilities and summarizing various international law and recommendations) [https://perma.cc/5LU7-YHDT]; *see also United Nations Human Rights Committee Defends Women and Girls' Right to Life*, INT'L WOMEN'S HEALTH COAL. (Nov. 30, 2018) (summarizing the 2018 Human Rights Committee joint statement by the Commission on the Rights of People with Disabilities and Elimination of Discrimination against Women) [https://perma.cc/ET9G-L3MB].

264. *See* HUM. RTS. WATCH, *supra* note 263 (finding the Committee on Economic, Social, and Cultural Rights stated a forced sterilization on females with disabilities violates the Article 17 of the International Covenant on Civil and Political Rights); INT'L WOMEN'S HEALTH COAL., *supra* note 263 (reporting undue restriction an infringement upon an individual's right to privacy).

265. *See UN Human Rights Committee Asserts that Access to Abortion and Prevention of Maternal Mortality are Human Rights*, CTR. FOR REPROD. RTS. (Oct. 31, 2018) (putting "women's health and bodily autonomy at the top of human rights conversations") [https://perma.cc/B9TZ-2E9U].

Constitutional Court, the UN Human Rights Committee, and the Japanese district courts regarding involuntary sterilization support the consensus that people, even if intellectually challenged, have a fundamental right to make procreative choices and abortion decisions, both of which are essential to their dignity and autonomy.[266]

### *C. General Acceptance of Strict Scrutiny*

If sterilization procedures are requested for a person with an intellectual disability, judicial review must be available.[267] Except for a compelling necessity that may not be satisfied by any other means, forced sterilizations violate a fundamental right of procreation.[268] As this Article discusses, a right to abortion is increasingly and predominantly recognized as a basic human right, and the United Nations and the WHO have urged nations to reconsider their strict abortion regulations.[269]

As such, an international consensus has developed that the freedom from compulsory sterilization is a protected fundamental right.[270] Foreign courts have invalidated sterilization statutes under a standard equivalent to strict scrutiny.[271] Courts in the United States also employ strict approaches in analyzing compulsory sterilization cases.[272] The heavy burden of proof falls

266. *See supra* Part III.B.1 (covering European Court of Human Rights), Part III.B.2 (covering Canadian law), Part III.B.4 (covering Japanese law), Part III.B.5 (covering South Korean law).

267. *See supra* Part III.B.1 (covering Britain) and Part III.B.2 (covering Canada).

268. *See Eliminating Forced, Coercive and Otherwise Involuntary Sterilization – An Interagency Statement*, WHO, 1 ("[s]terilization without full, free and informed consent" violates numerous human rights, including the right to "found a family") [https://perma.cc/FKS2-9PB4].

269. *See* CTR. FOR REPROD. RTS., *supra* note 265 (highlighting how comprehensive abortion services are necessary to guarantee the right to life, health, privacy, and non-discrimination for women and girls).

270. *See supra* Part III.A (discussing reproductive privacy in the United States).

271. *See supra* Part III.B.1 (discussing abortion in relation to European Law).

272. *See supra* Part III.A (discussing the recent abortion cases and the fetal remains case have been decided under a balancing test, considering the protection

on the government to demonstrate that the restrictions are necessary for a compelling state interest, and an irreversible measure is only available as a last resort to resolve significant difficulties of affected individuals.[273] Thus, a compulsory sterilization cannot be performed merely because an individual is intellectually challenged, suspectedly promiscuous, or dependent on other family members.[274]

The right to abortion has also been regarded as a fundamental right.[275] Decriminalization movements have spread the globe, and restrictions on abortions have been lifted.[276] The European Union and the United Nations have warned about the collateral consequences of strict abortion regulations, including the increased prevalence of unsafe abortions and the stigmatization of women who have experienced an abortion.[277]

The Supreme Court of Canada held that state interference into a woman's decision to terminate their pregnancy was unconstitutional.[278] Similarly, the Korean Constitutional Court, the UN Human Rights Committee, and the European Court of Human Rights have all seemingly agreed that the core of women's abortion decisions, which generally includes the access to safe

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of the health and well-being of a fetus, public morals over the use of not viable human tissues).

273. *See* Skinner v. Oklahoma, 316 U.S. 535, 541–43 (1942) (finding compulsory sterilization is reviewed under a strict scrutiny analysis).

274. *See id*. (deciding to sterilize an individual just on the basis of an intellectual disability does not pass through a strict scrutiny analysis).

275. *See* Johanna B. Fine, Katherine Mayall, & Lilian Sepúlveda, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, HEALTH & HUM. RTS. J. (June 2, 2017) (finding judicial and legislative evolutions regarding rights to abortions are creating a stronger protection to determine abortion rights are fundamental human rights) [https://perma.cc/MWW2-W89V].

276. *See e.g.*, Patrick J. McDonnell & Kate Linthicum, *Across Latin America, Abortion Restrictions are Being Loosened*, L.A. TIMES (Sept. 12, 2013) (reporting abortion has been decriminalized in cases of sexual assault showing restrictions have lifted) [https://perma.cc/ZLK4-2YZD].

277. *See "Unsafe Abortion is Still Killing Tens of Thousands Women Around the World" – UN Rights Experts Warn*, WHO (Sept. 28, 2016) (discussing the consequences of criminalized abortions) [https://perma.cc/N83Z-DEKC].

278. *See* R. v Morgentaler, [1988] 1 SCR 30, 90 (Can.) (invalidating criminalized abortions).

abortion or the access to abortion before fetal viability, constitutes a basic human right.[279] This reasoning was notably apparent in the European Court of Human Rights decision finding Ireland's abortion ban to be an impermissible infringement of the core of a woman's right to privacy.[280]

Numerous state courts continuously evaluate abortion restrictions under strict scrutiny.[281] The majority of courts examine the legislative process and check whether the restriction is well-suited and the least restrictive means to achieve the compelling state interest.[282] A minority of courts accept *Casey*'s undue burden test and inquire whether the restriction is closely connected to the legislative purpose and proportionate to the burdens placed on women.[283] Foreign decisions regarding abortion similarly regard the "core" of reproductive privacy, i.e., strict scrutiny, while non-core privacy restrictions are subject to a balancing test.[284] Under a balancing test, when state interest in regulating abortion is compelling, it is weighed against the affected women's injuries.[285] It is noteworthy that courts perform individualized qualitative assessments by determining the extent that each woman's freedom of private or family life is interfered

279. *See generally,* Hunbeobjaepanso [Const. Ct.], Apr. 11, 2019, 2017 Hunma 127 (S. Kor.); *Unsafe Abortion is Still Killing Tens of Thousands of Women Around the World" – UN Rights Experts Warn*, U.N. H.R. OFF. OF THE HIGHER COMM'R (Sept. 28, 2016) [https://perma.cc/LHG8-MAXR]; *see also* Spyridoula Katsoni, *The Right to Abortion and the European Convention on Human Rights: In Search of Consensus among Member-States*, VOLKERRECHTSBLOG (March 19, 2021) (referencing the European Court of Human Rights' jurisprudence as it pertains to Polish's "near-absolute abortion ban") [https://perma.cc/X7C5-VDNR].

280. *See supra* Part III.B.1 (covering European Court of Human Rights).

281. *See Hodes & Nauser, MDs, P.A. v. Schmidt,* 440 P.3d 461, 493 (Kan. 2019*)* (analyzing this case under strict scrutiny).

282. *See supra* Part III.A (discussing reproductive privacy in the United States).

283. *See supra* Part III.A (discussing reproductive privacy in the United States).

284. *See supra* Part III.B (discussing reproductive privacy in foreign countries).

285. *See* Planned Parenthood v. Casey, 505 U.S. 833, 878 (1992) (explaining the individual and state interests to balance).

with, as well as the extent to which a woman's psychological and bodily integrity is jeopardized.[286]

Based on the foregoing, there is a clear indication that reproductive privacy rights are universally protected as fundamental rights.[287] Accordingly, the next section applies the universal right theory for the right to procreate and the right to a safe abortion.[288]

### *IV. Application of the Universal Right*

Part II showed that when essential privacy is restricted, the universal right theory prompts courts to identify the fundamental rights under the Fourteenth Amendment without unduly intruding into the role of Congress.[289] The universal right theory provides unbiased instructions as to the method for judicial analysis when essential privacy is involved.

Part III explained that the right to procreate and key aspects of the right to abortion have been universally declared as fundamental rights.[290] When examining sterilization statutes, strict scrutiny is applied by both foreign and state courts.[291] Decreased intellectual capacity does not constitute a compelling

286. *See Dilation and Evacuation (D&E)*, C.S. MOTT CHILDREN'S HOSP., (last updated October 8, 2020) ("A woman who doesn't have access to an affordable abortion specialist in her area or whose access is slowed by legal restrictions may take several weeks to have a planned abortion. When an abortion is delayed, a D&E may be necessary.") [https://perma.cc/2A6F-GV4A]; *Abortion (Termination of Pregnancy)*, HARVARD HEALTH PUBL'G (January 9, 2019), ("The earlier in pregnancy this procedure is done, the less the cervix has to be dilated, which makes the procedure easier and safer.") [https://perma.cc/6S8U-43M5].

287. *See e.g.*, McDonnell & Linthicum, *supra* note 276 (showing an example of a country evolving and expanding abortion laws to provide women with safe, legal abortions in certain cases).

288. *See* Brennan, *supra* note 59, at 24–25 (advocating for the protection of human dignity and autonomy).

289. *See, e.g.,* Griswold v. Connecticut, 381 U.S., at 501 (Harlan, J. concurring) (wresting with the notion of the Fourteenth Amendment and right to abortion).

290. *See* Fine, et al., *supra* note 275 (finding support to determine abortion rights as fundamental human rights).

291. *See* International Covenant on Civil and Political Rights [ICCPR], Oct. 5, 1977, S. Exec. Doc. E, 95-2 at 23, 999 UNTS. 171, Art. 7, 10. (supporting the notion that strict scrutiny is applied within sterilization cases).

state interest in sterilizing a person, and neither does the person's limited vocational skills or decreased understanding of social settings.[292]

Regarding abortion, many state courts and Canadian courts apply strict scrutiny to any statute limiting women's freedom to terminate their pregnancy.[293] A minority of state courts have adopted a balancing test, and many foreign courts similarly balance a woman's non-core abortion right with the corresponding state interest in protecting fetal life, maternal health, and morals.[294]

Regarding the right to abortion, many state courts turn to strict scrutiny, as do some foreign jurisdictions.[295] More and more, a close nexus is required between abortion restrictions and state interest because abortions are safe when they are performed at an early stage of pregnancy.[296]

When a statute reduces the number of available abortion operations in a certain locality, a pregnant woman's right to abortion is restricted due to the burden that the statute creates. The physical and psychological consequences to the affected individual women are also carefully considered when the burden is weighed against the state interest.[297] A statute affecting a very small number of women might still be unbalanced due to the damaging effects on the dignity and autonomy of women.[298]

Virginia's sterilization statute in *Buck v. Bell* restricted Carrie Buck's right to procreate.[299] As analyzed above, however, a right to

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292. *See* Deborah Hardin Ross, *Sterilization of the Developmentally Disabled: Shedding Some Myth-Conceptions*, 9 FLA. L. REV. 600, 611 (explaining there is no compelling interest regarding sterilizing an individual because of a disability).

293. *See generally*, *Hodes & Nauser, MDs, P.A. v. Schmidt,* 440 P.3d 461 (Kan. 2019*)*; R. v Morgentaler, [1988] 1 SCR 30 (Can.).

294. *See supra* Part II.

295. *See generally*, R. v Morgentaler, [1988] 1 SCR 30 (Can.).

296. *See supra* Part III.C (discussing general acceptance of strict scrutiny).

297. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2319 (2016) (describing what kind of care women need during abortion appointments and stating Texas had placed too much of a burden on women).

298. *See supra* Part II for a discussion of decriminalization and downregulation.

299. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding the Virginia sterilization statute that allowed Carrie's sterilization because she was

procreate is essential to a woman's privacy and is a fundamental right protected by strict scrutiny.[300] In evaluating the Virginia sterilization statute under a substantive due process framework, the Supreme Court in *Buck v. Bell*[301] should have applied strict scrutiny, requiring Virginia to prove that there was a compelling state interest and that sterilization was the least restrictive means to achieve the desired end.[302]

Under the "universal rights theory," Virginia would have failed to prove its interest was compelling, because its purpose was to promote eugenics and the elimination of intellectually challenged people.[303] The statute would have been facially unconstitutional due to this absence of a compelling state interest on Virginia's behalf.[304] Alternatively, the Court should have invalidated Virginia's sterilization law even if a compelling state interest could be proven, because irreversible sterilization was far from being the least restrictive means to meet the state's

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determined by the court to be the "probable potential parent of socially inadequate offspring").

300. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (applying strict scrutiny to strike down a sterilization statute that targeted larceny convicts and noting that the statute concerned a fundamental right to procreate).

301. *See Buck*, 274 U.S. at 207 (upholding the Virginia sterilization statute that allowed Carrie's sterilization because she was determined by the court to be the "probable potential parent of socially inadequate offspring").

302. *See In re* Guardianship of Hayes, 608 P.2d 635, 640 (Wash. 1980) (creating a strict standard for determining whether sterilization is in the best interest of the individual to protect the individual's right of privacy); *see also* N. Carolina Ass'n for Retarded Child. v. State of N.C., 420 F. Supp. 451, 458 (M.D.N.C. 1976) (declaring that the right to procreate is fundamental and applying a heightened scrutiny to determine whether a sterilization statute was invalid as a matter of substantive due process).

303. *See In re* A.W., 637 P.2d 366, 368 (Colo. 1981) (holding that compulsory sterilization of persons with decreased decision-making capacity can no longer be justified as a valid exercise of governmental authority); *see also*, *People v. Barrett*, 281 P.3d 753, 779 (Cal. 2012) (Liu J., dissenting) ("[U]nfounded assumptions of incapacity and a legacy of paternalism have resulted in serious 'depriv[ations] of . . . basic liberty' with 'subtle, far-reaching and devastating effects.'" (quoting *Skinner*, 316 U.S. at 541)).

304. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (reasoning that limitations on fundamental rights are permissible only if they survive strict constitutional scrutiny—that is, only if the state imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest).

interests.[305] Either way, the Court should have invalidated Virginia's sterilization law.

Louisiana's abortion statute restricted women's access to abortion indirectly through the physician's privilege requirement.[306] As discussed previously, most state courts in the United States would likely apply strict scrutiny in analyzing this statute.[307] Canadian courts would likely use the same standard.[308] Additionally, European courts would choose a strict standard that is reserved for a woman's core of privacy, freedom to private life, and bodily integrity, because the Louisiana statue limited the number of safe abortion procedures available during certain specified weeks of gestation.[309]

In many jurisdictions, state courts would conclude that the Louisiana regulation is not supported by a compelling state interest and that the privilege requirement is not the least

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305. *See, e.g.*, *In re* Guardianship of Hayes, 93 Wash. 2d 228, 238 (1980) (listing less drastic contraceptive methods, including supervision, education and training).

306. *See* La. Rev. Stat. Ann. § 40:1061.10(A)(2)(a) (requiring any doctor who performs abortions to hold "active admitting privileges at a hospital that is located not further than thirty miles from the location at which the abortion is performed or induced and that provides obstetrical or gynecological health care services").

307. *See* Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1138 n.88 (Alaska 2016) (compelling state interest); *see also* Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 825 (Cal. 1997) (compelling state interest); Gainesville Woman Care, LLC v. State, 210 So. 3d 1243, 1255 (Fla. 2017) (covering strict scrutiny for privacy); Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 765–67 (Ill. 2013) (covering strict scrutiny); Planned Parenthood of Middle Tennessee v. Sundquist, 38 S.W.3d 1, 16 (Tenn. 2000) (covering strict scrutiny); Planned Parenthood of the Heartland v. Reynolds ex rel. State, 915 N.W.2d 206, 239–41 (Iowa 2018) (covering strict scrutiny instead of undue burden test); Hodes & Nauser, MDs, P.A. v. Schmidt, 440 P.3d 461, 494–97 (Kan. 2019) (covering strict scrutiny instead of undue burden test); Women of State of Minn. by Doe v. Gomez, 542 N.W.2d 17, 30–32 (Minn. 1995); Armstrong v. State, 989 P.2d 364, 380–82 (Mont. 1999).

308. *See* R v Morgentaler, [1988] 1 SCR 30, 63 O.R. (2d) 281 (Can.) (concluding that any substantial interference with women's freedom to receive an abortion is presumably unconstitutional, unless proven otherwise).

309. *See*, Part III.B.1 (describing the European approach to protecting the right to abortion).

restrictive means to achieve state interests.[310] The Louisiana statute would consequently be held unconstitutional through the application of this strict scrutiny standard.[311]

Where courts apply a balancing test, Louisiana's interest in maintaining the skill of providers in abortion operations to protect the health of pregnant women would likely be considered important and legitimate.[312] However, courts may reach different conclusions regarding whether the privilege requirement is constitutional considering the relation between the restriction and purported state interest.[313] The balancing test currently used by foreign courts (*e.g.,* Europe and Korea) and some domestic state courts examines the nexus between the restriction and the legislative purpose, and the proportionality between them.[314]

Under this test, Louisiana would likely fail to show that the restriction is sufficiently related to its state interest or proportional compared to the burdens imposed on women wishing to obtain a safe abortion.[315] The connection to the alleged state interest in protecting maternal health is weak because the qualifications of physicians are already regulated under the

310. *See, e.g.*, Planned Parenthood of the Great Nw. v. State, 375 P.3d 1122, 1138 n.88 (Alaska 2016) (finding that a provision governing notification of parents by physician was not the least restrictive means of achieving the State's compelling interests, and thus violated minors' fundamental right to privacy).

311. *Id.*

312. *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 132 (2007) (upholding the state's prohibition of partial-birth abortions); Harris v. W. Ala. Women's Ctr., 139 S. Ct. 2606, 2607 (2019) (affirming the invalidation of the dismemberment abortion ban).

313. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 848–49, 877 (1992) (holding that a state regulation is unconstitutional if it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion).

314. *See, e.g.*, Planned Parenthood of Cent. N.J. v. Farmer, 762 A.2d 620, 632–36 (N.J. 2000) (measuring the extent of restriction upon abortion); Moe v. Sec'y of Admin. & Fin., 417 N.E.2d 387, 402–05 (Mass. 1981) (balancing the women's freedom against state interest).

315. *See, e.g.*, *Casey*, 505 U.S. at 877 (explaining that a State has a legitimate interest in protecting the health of the woman and the life of the fetus that may become a child, but holding that a state regulation is unconstitutional if it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion).

national licensing regime and common abortion procedures are safe to women.[316]

In general, abortion procedures are performed by a licensed provider in a safe environment, and the specific type of procedure is mostly decided based on the patient's gestational age.[317] As such, Louisiana's interest is not adequately supported by scientific findings.[318] If there is a concern for medical complications following an abortion, the licensing body would decide on the providers' qualifications.[319] Additionally, if one or more providers in a certain geographic "cease practicing,"[320] many women seeking an abortion in the served area would be adversely affected.[321] The chance to obtain a less invasive abortion would proportionally decrease, because the provider shortage would lead to delays in the performance of abortion procedures.[322] The privilege restrictions would burden pregnant women without serving its goal, and even sacrifice the state's interest in protecting women's health.[323] For

316. *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2316 (2016) (finding only a tangential relationship to the state's interest and holding the restriction unnecessary).

317. *See* Grimes et. al., *supra* note 256 (describing how abortions are "the safest procedures in contemporary practice, with case-fatality rates less than one death per 100,000 procedures").

318. *See* June Med. Services LLC v. Kliebert, 158 F. Supp. 3d 473, 535 (M.D. La. 2016) (finding that abortions in Louisiana in the years before the enactment of the statute were "very safe procedures with very few complications" and that the "burdens [caused by increased travel distances to abortions clinics] include the risks from delays in treatment including the increased risk of self-performed, unlicensed and unsafe abortions"); *see also*, HARVARD HEALTH PUBL'G, *supra* note 286 ("The earlier in pregnancy this procedure [abortion] is done, the less the cervix has to be dilated, which makes the procedure easier and safer").

319. *See Kliebert*, 158 F. Supp. at 493 ("Hospitals may deny privileges or decline to consider an application for privileges for myriad reasons unrelated to competency.").

320. June Medical Services, L.L.C. v. Gee, 905 F.3d 787, 814 (5th Cir. 2018).

321. *See* C.S. MOTT CHILDREN'S HOSP., *supra* note 286 ("A woman who doesn't have access to an affordable abortion specialist in her area or whose access is slowed by legal restrictions may wait several weeks to have a planned abortion. When an abortion is delayed, a D&E may be necessary.").

322. *See* HARVARD HEALTH PUBL'G, *supra* note 286 ("The earlier in pregnancy this procedure [abortion] is done, the less the cervix has to be dilated, which makes the procedure easier and safer.").

323. *See id*. (same).

these reasons, Louisiana's statute would likely be held unconstitutional using the balancing test.[324]

The substantial obstacle test is not a supportable standard under the universal right theory. It is unclear whether Louisiana's statute would be upheld under the substantial obstacle test.[325] Because some state courts that use the substantial obstacle test do not assess the exact burdens on women caused by the regulation, these courts would likely conclude that the statute is constitutional.[326]

## *V. Conclusion*

This Article examines the validity of the universal right theory in reproductive rights.[327] Using the universal right theory, freedom essential to human dignity and autonomy will be protected by the judicial branch.[328] This Article concludes that a right of procreation is a universally protected fundamental right, which demands examination under strict scrutiny.[329] With regards to abortion rights, there is no universal consensus, but there is an emerging consensus that key aspects of the right to abortion are fundamental rights, because securing access to a safe abortion is

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324. *See id.* (same); *see also* C.S. MOTT CHILDREN'S HOSP., *supra* note 286 ("A woman who doesn't have access to an affordable abortion specialist in her area or whose access is slowed by legal restrictions may wait several weeks to have a planned abortion. When an abortion is delayed, a D&E may be necessary.").

325. *See* Preterm Cleveland v. Voinovich, 627 N.E.2d 570, 577 (Ohio Ct. App. 1993) (finding that a statute requiring physicians to provide woman seeking abortion with certain information and to obtain signed consent forms did not create a substantial obstacle so it was constitutional).

326. *See supra* Part II.A (discussing embodiments of the universal right theory for essential liberty).

327. *See supra* Part II (discussing universal rights of human dignity and autonomy).

328. *See supra* Part II.B (discussing making the universal right theory work for reproductive privacy).

329. *See* Simon, *supra* note 22 (demonstrating that foreign courts as well as state courts have recognized the right to procreate and key aspects of the abortion right as fundamental rights); *see also*, *Roe v. Wade*, 410 U.S. 113, 155 (1973) ("Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.") (citations omitted).

necessary for a person's dignity and autonomy—the core of privacy.[330] As to restrictions that indirectly affect women's reasonable access to safe abortions, a growing number of foreign and domestic courts require the government to prove its important legitimate or compelling interest and the regulation's connection and proportionality under a balancing test.[331] The universal right theory is a useful guiding principle for essential privacy cases, and should be used in place of *Buck v. Bell*.[332] Therefore, the "more searching judicial review" toward the protection of essential privacy should be supported.[333]

330. *See* Simon, *supra* note 22; *see also supra* Part III (showing that freedom to procreate is becoming universally recognized as a fundamental right and highlighting that reproductive freedom underpins human dignity and autonomy).

331. *See supra* Part III (explaining that a right of procreation and key aspects of a right of abortion are universally declared as fundamental rights).

332. *See supra* Part II (discussing universal rights of human dignity and autonomy); *but see*, Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding a sterilization statute).

333. McDonald v. City of Chicago, 561 U.S. 742, 880 (2010) (Stevens, J., dissenting).