

The Right of Privacy and Restraints on Abortion under the "Undue Burden" Test: A Jurisprudential Comparison of *Planned Parenthood v. Casey* with European Practice and Italian Law

by Charles Stanley Ross*

I. INTRODUCTION

The most recent Supreme Court decision on state regulation of abortion continues a particularly American line of precedent and reasoning—welcome to some, indefensible to others—in upholding a woman's right to choose an abortion before fetal viability. At the same time the Court recognized that a state may impose restrictions on the interruption of pregnancy, so long as these restraints do not impose an "undue burden" on the exercise of the constitutionally defended right.¹ The Court's 5-4 decision contains a withering dissent wherein the Chief Justice and three colleagues deny the existence of a constitutional right to an abortion and argue that a state legislature has total dominion over restraints on abortion procedures. Justice Scalia's additional dissent further gores the majority opinion by lamenting the impossibility of applying the "undue burden" test associated with the reasoning, in past decisions and this one, of Justice O'Connor.²

The language of the Court's opinion—from the majority's proclamation of the right to abortion as a "fundamental liberty" protected by the Constitution to the ridicule Scalia heaps on the "undue burden" test,³ as well as Justice Blackmun's lament that he is eighty-three years old and cannot much longer hold back the forces of darkness that were one vote away from gaining their will in this decision⁴—reveals a court

* Associate Professor, Department of English, Purdue University & J.D. Candidate, 1994, Indiana University School of Law—Indianapolis.

1. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

2. "Justice O'Connor's 'undue burden' test." *Id.* at 2855 (Rehnquist, C.J., dissenting).

3. "But to come across this phrase ['Liberty finds no refuge in a jurisprudence of doubt'] in the joint opinion—which calls upon federal district judges to apply an 'undue burden' standard as doubtful in application as it is unprincipled in origin—is really more than one should have to bear." *Id.* at 2876 (Scalia, J., dissenting).

4. *Id.* at 2844 (Blackmun, J., concurring in part).

polarized and even to a certain extent terrorized by what, at the time the decision came down, seemed the most divisive issue in American politics,⁵ certainly the issue that has ideologically accounted for the selection of Supreme Court justices in recent times. However, the apocalyptic terms of polarization and terror and the unwelcome specter of justices held hostage by a public clamoring for judicial support in a political war seem distant things to Americans today, only shortly after the 1992 election of the Democratic candidate for president. If this abatement arises in part from the fair certainty that the next justice will be appointed by a president driven by the ideological force of the abortion issue in an opposite direction from his predecessors, Americans can also derive a certain calm on the issue by realizing how much the *Casey* decision, despite its embattled language and logic, conforms to current developments in international law.⁶

5. "We are offended by these marchers who descend upon us, every year on the anniversary of *Roe*, to protest our saying that the Constitution requires what our society has never thought the Constitution requires." *Id.* at 2884 (Scalia, J., dissenting). See *Roe v. Wade*, 410 U.S. 113 (1973).

6. A similar thesis is offered by Mary Ann Glendon, in *ABORTION AND DIVORCE IN WESTERN LAW* (1987) [hereinafter *GLENDON*], who argues for restrictions on the "right of abortion" by finding them humanely applied in West European countries such as France and Germany. She argues for compromise in this sphere. "[T]he European countries have been able to live relatively peacefully with these laws without experiencing the violence born of complete frustration and without foreclosing re-examination and renegotiation of the issues." *Id.* at 40. She anticipates *Casey*: "It would not be necessary to overrule *Roe* in order to achieve the result of returning most regulation of abortion to the states." *Id.* at 42. She is also aware of Italy's similarity to the United States on this issue.

Here the Italian experience is instructive. In 1975 the Italian Constitutional Court was asked to rule on the constitutionality of an article of the Penal Code which made all abortions criminal except where the defense of strict necessity applied. The Court held that the Penal Code could not constitutionally place 'a total and absolute priority' on the fetus's constitutional right to life where this would deny adequate protection under the Italian Constitution.

Id. at 171 n.168 (citing "Carmosina et al., Decision of the Italian Constitutional Court of February 18, 1975," translated in MAURO CAPPELLETTI AND WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 612-14 (1979)). "This narrow holding permitted the Italian legislature to adopt compromise legislation (similar to the French statutes discussed above), which has been well accepted in a country where abortion was an explosive political issue." *Id.* at 43.

Glendon continues her argument in her book *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991), cited in Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992). "The judicially announced

This article will show that international practice and thinking support two key features of the *Casey* decision. These features are, first, a shift away from the language of a "right of privacy" to justify a woman's right to choose an abortion⁷ and, second, the search for a fair means to balance the woman's right against the state's interest in regulating abortion. A comparison of *Casey* with the practice in other countries defuses the conservative argument from tradition⁸ and original intent.⁹ Moreover, although Justice Scalia bemoans the "undue burden" test as unworkable because it is meaningless and at least one commentator claims the Court will be called upon to rule on every little variant the states will dream up to assert their regulatory privilege,¹⁰ this article will illustrate that the very same issue has been handled over the past fifteen years by the Constitutional Court of Italy in a series of decisions that have been overlooked by commentators in the United States because of their failure to grasp the rich texture of Italian law.¹¹

abortion right in 1973 brought to a virtual halt the process of legislative abortion reform that was already well under way to producing, in the United States as it did all over Europe, compromise statutes that gave substantial protection to women's interests without completely denying protection to developing life." *Id.* at n.474. It follows that an attack on the *Casey* view that undue burden does not infringe a fundamental right should center on analysis of European practice filtered through Glendon's book.

7. The minority opinion objects to an "all-encompassing 'right of privacy' " as a basis for abortion decisions. *Casey*, 112 S. Ct. at 2859 (Rehnquist, C.J., dissenting).

8. "[I]n defining 'liberty,' we may not disregard a specific, 'relevant tradition protecting, or denying protection to, the asserted right.'" *Id.* at 2874 (Scalia, J., dissenting) (citation omitted).

9. "At the time of the adoption of the Fourteenth Amendment, statutory prohibitions or restrictions on abortion were commonplace." *Id.* at 2859 (Rehnquist, C.J., dissenting).

10. Fed. News Service, July 3, 1992, available in LEXIS, Nexis library, FED-NEW file. "Mr. Barnes: 'What the court did by setting up this vague undue burden standard was to say you're going to have to send up every little regulation that involves abortion from now until Doomsday is going to be decided [sic].'" *Id.*

11. This article confirms Glendon's surmise that Italian law supports *Casey* and suggests *Casey* will not be dislodged. GLENDON, *supra* note 6, at 43. One suspects, in fact, that Glendon's book influenced Justice O'Connor's definition of "undue burden" in *Casey*. Such a direct influence would somewhat preempt the point of this article, were it not that Glendon, who seems comfortable with French and German law, shows no signs of reading law in Italian. Like the *Casey* plurality, Glendon clearly opposes the message of *Roe*, that "no state regulation of abortion in the interest of preserving unborn life is permissible in approximately the first six months of pregnancy." *Id.* at 45. She advocates leaving restriction decisions up to state legislatures, *id.* at 47, replacing

II. THE CULTURAL CONTEXT OF THE RIGHT TO PRIVACY AT THE TIME OF *ROE V. WADE*

Efforts at legislative reform to liberalize abortion laws in the United States were cut short in 1973 when the Supreme Court extended the notion of a "right to privacy" to create a constitutional guarantee against the power of the state to pass laws preventing the interruption of pregnancy.¹² A series of articles lauded the Court's decision while attacking its reasoning. One respected commentator, for example, wondered about the scope of the right to privacy: "Thus it seems to me entirely proper to infer a general right to privacy, so long as some care is taken in defining the sort of right the inference will support."¹³ The conservative view is that the inferred right will not support a constitutional protection of abortion such as *Roe* proposes. Archibald Cox, Alexander Bickel, John Hart Ely, Harry Wellington, Richard Epstein, and Paul Freund have all been highly critical of the logic of *Roe*.¹⁴ "A privacy-based defense of abortion seems to depend on the premise that the woman's choice affects only herself—in other words, that the fetus is not a person."¹⁵ The disquiet of the commentators suggests that the Court was guided by public policy in a way similar to its own earlier ruling that laws against contraception were unconstitutional on the right of privacy grounds.¹⁶

Today's disquiet also stems from our current chronological and emotional distance from the cultural upheaval that characterized the 1960s. This Article will briefly describe that era to make the point that the "right of privacy" may be regarded as a cultural phenomenon whose time had come.¹⁷ The most prominent cultural phenomenon of the sixties was the sexual revolution, heralded by the introduction of

a right to abortion with a legislative compromise. *Id.* at 60. Her view, then, seems to coincide with *Casey*. By contrast, *Casey* is this article's point of departure, not the *point d'arrivee*, and this article focuses ultimately on the comparative role of the Italian Constitutional Court in regulating such restrictions. Otherwise this article finds many points of similarity with Glendon's fine book.

12. Cf. GLENDON, *supra* note 6, at 34.

13. John Hart Ely, *The Wages of Crying Wolfe: A Comment on "Roe v. Wade,"* 82 YALE L. J. 920, 924 (1973).

14. GLENDON, *supra* note 6, at 43.

15. Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 480 (1990).

16. See *Griswold v. Connecticut*, 381 U.S. 479 (1964).

17. Cf. GLENDON, *supra* note 6, at 11, 12 (characterizing the era as concerned for world population and traumatized by birth defects caused by thalidomide).

the birth-control pill and by changes in fashion, popular culture, and politics. These changes manifested themselves in panty-hose and mini-skirts, drugs and new forms of rock and roll, and the Vietnam War.¹⁸ Some of these changes entered American consciousness from foreign experience. In the period between 1967 and 1980, European lawmakers passed liberal abortion laws, reflecting a cultural swing as much as a sudden application of liberal principles to social life. Under these conditions the "right of privacy" became a growth stock that would after two and a half decades offer less spectacular returns.

Cultural factors help us appreciate that at the time of the *Roe* decision, the development of a constitutional "right of privacy" was widely touted (and usually praised) as an example of the judicial power to make law. At Harvard the course syllabus for Social Science 137, taught to undergraduates by Prof. Paul Freund, began with a series of cases and articles on the right to privacy.¹⁹ The A student would,

18. For example, some contend that the Vietnam War was an attempt by aging World War II veterans to restage their youthful glories. The actors on stage this time, however, had grown up on war films that had declared bombing raids a thing of the past. I may cite my own experience, that 1950s documentaries like *Navy Log* or *Victory at Sea*, designed to glorify one branch of the armed services by recycling the same clips of guns blazing and sailors trapped in smoking hatches, had the opposite effect.

19. The reading consisted of sections of *Roberson v. Rochester-Folding Box Co.*, 64 N.E. 442 (N.Y. 1902) (refusing to grant an injunction against the use of girl's picture in an advertisement); O'Brien, *The Right of Privacy*, 2 COLUM. L. REV. 437 (1902) (asserting that the development of right of privacy shows how public opinion can affect the law and evolving legal institutions); *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905) (holding unauthorized use of photo is breach of right of privacy grounded in natural law); *Donahue v. Warner Bros., Inc.*, 194 F.2d 6 (10th Cir. 1952) (holding that since right of privacy does not have vital social implications that freedom of expression does, it does not preclude semi-fictional portrayal of a public personality); *Haelan-Laboratories, Inc. v. Topps Chewing Gum Inc.*, 202 F.2d 866 (2d Cir. 1953) (stating that ball player has right to publicity value of his portrait); BENJAMIN CARDOZO, *THE GROWTH OF THE LAW* (1924), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO*, 201-204, 213-216 (1947) (asserting that judges apply not only logic, history, and tradition, but also social mores); FREDERICK WILLIAM MAITLAND, *EQUITY AND THE FORMS OF ACTION* 1-22 (1936) (describing the independence of courts and their equity function); C.K. OGDEN, *BENTHAM'S THEORY OF FICTIONS* xvii-xix, cxiii-cxviii (1932) (stating that a fiction says something exists that does not exist); JEROME FRANK, *LAW AND THE MODERN MIND* 312-321 (1930) (denouncing legal formalism, Frank equates legal fictions with logical forms); *Koussevitsky v. Allen*, Towne & Heath, 188 Misc. 479 (N.Y. Sup. Ct. 1947) (refusing to enjoin an unauthorized biography where the subject is famous); *Eick v. Park Dog Food Co.*, 106 N.E.2d 742 (1952) (holding right of privacy prevents unauthorized use of photograph); JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 30-37 (1963) (stating

on his midterm exam, show an erudite ability to temper his excitement and joy that by means of the *Griswold* decision, the Supreme Court had permitted the sale of contraceptive devices; he would also show a sceptical appreciation of the blend of logic, tradition, and stare decisis which fed the growth of the "right of privacy."²⁰ But the liberal slant was unmistakable, if not quite what Prof. Freund intended.

The existence of the right of privacy as a legal fiction, the subject of Freund's course, may be better illustrated by a quotation from Thomas Wolfe's *Bonfire of the Vanities*, where the narrator draws on cultural anthropology to theorize, humorously, about the breakdown in privacy that occurs when the popular press pillories a young millionaire bond salesman whose car has struck a black teenager:

The Bororo Indians, a primitive tribe who live along the Vermelho River in the Amazon jungles of Brazil, believe that there is no such thing as a private self. The Bororos regard the mind as an open cavity, like a cave or a tunnel or an arcade, if you will, in which the entire village dwells and the jungle grows. In 1969 José M. R. Delgado, the eminent Spanish brain physiologist, pronounced the Bororos correct. For nearly three millennia, Western philosophers had viewed the self as something unique, something encased inside each person's skull, so to speak. This inner self had to deal with and learn from the outside world, of course, and it might prove incompetent in doing so. Nevertheless, at the core of one's self there was presumed to be something irreducible and inviolate. Not so, said Delgado. "Each person is a transitory composite of materials borrowed from the environment." The important word was *transitory*, and he was not talking about years but hours. He cited experiments in which healthy college students lying on beds in well-lit but soundproofed chambers, wearing gloves to reduce the sense of touch and translucent goggles to block out specific sights, began to hallucinate *within hours*. Without the entire village, the whole jungle, occupying the cavity, they had no minds left.

He cited no investigators of the opposite case, however. He did not discuss what happens when one's self—or what

that fictions help law develop); and finally *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that there is a constitutional right of privacy found in penumbras of Bill of Rights that protects married couple's use of contraceptive from government interference).

20. *Griswold*, 381 U.S. at 479.

one takes to be one's self—is not a mere cavity open to the outside world but has suddenly become an amusement park to which everybody, *todo el mundo*, *tout le monde*, comes scampering, skipping and screaming, nerves a-tingle, loins aflame, ready for anything, all you've got, laughs, tears, moans, giddy thrills, gasps, horrors, whatever, the gorier the merrier. Which is to say, he told us nothing of the mind of a person at the center of a scandal in the last quarter of the twentieth century.²¹

This wonderful passage from Wolfe's novel reminds us that the "right of privacy" that eventually supported *Roe* began in an article in which Warren and Brandeis argued against the power of the press to publish unauthorized photographs.²² Wolfe goes on to describe the postmodern nightmare that occurs as the press turns the life of the novel's protagonist, Sherman McCoy, into a public spectacle. When the "brass crucible of his mind" is invaded by brash newspaper reporters, Sherman loses "his inviolable self."²³ Brandeis's reworking of John Stuart Mill's idea of personal autonomy, the "right to be let alone,"²⁴ continues to exert its powerful magic today, whether in right to privacy arguments against strip searches in prisons or to defend Amish communities.²⁵

Set against this cultural context, the low profile the right to privacy maintains in the *Casey* Court's opinion is remarkable. The phrase does not occur at all in the plurality opinion except in the context of a

21. THOMAS WOLFE, *THE BONFIRE OF THE VANITIES* 511-512 (1988).

22. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

23. Wolfe, *supra* note 21, at 512.

24. Cf. Ronald J. Krotoszynski, Jr., *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L. J. 1398, 1398 n.2 ("The autonomy/privacy relation is a difficult matter."); and Yao Apasum Gbotsu et. al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 UNIV. OF MIAMI L. REV. 521 (1986). "The privacy line of cases can be read to either restrict the right of privacy to familial decisions, or to expand the right to privacy to protect individual autonomy. It is not clear which interpretation the Court will ultimately embrace." *Id.* at 563. Mill's concept of autonomy "would restrict an individual's sphere of action only where other members of the society are at risk of harm." *Id.* at 565-66.

25. "The Amish and others who settled in America generally found the essential conditions to form communities and to practice the free exercise of religion. They found for the most part a right that Justice Louis Brandeis calls 'the most comprehensive of rights and the right most valued by civilized man,' a right Americans should be proud to protect—the right to be left alone." John A. Hostetler, *An Amish Beginning*, THE AMERICAN SCHOLAR 552, 562 (1992).

woman's right to overrule her husband: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion."²⁶ Notice to husbands is the one restriction the Court strikes down, however, and the opening concessive clause ("If the right to privacy means anything") suggests that it does *not* mean anything—which is fairly accurate as far as the sheer argument of *Casey* is concerned.

Rather than arguing that a woman's right to privacy protects her decision to terminate her pregnancy as in *Roe*, the *Casey* Court draws on the language of "due process" and the liberty clause of the Fourteenth Amendment. The *Casey* Court states, "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.'"²⁷ "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights."²⁸ Other liberties are protected also, even where not mentioned in the Bill of Rights or recognized when the Fourteenth Amendment was passed. The Court opines that "[m]arriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause. . . ."²⁹ The Court cites with approval the words of Justice Harlan: "This 'liberty' is not a series of isolated points . . . [but] a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement."³⁰ The plurality opinion ultimately rests on the view that "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."³¹ Gone is the powerful "fiction" of the right of privacy (the point of Prof. Freund's course) and its penumbras from *Griswold*. Abortion is *sui generis*.³²

26. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2830 (1992) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453).

27. *Id.* at 2804.

28. *Id.*

29. *Id.* at 2805

30. *Id.*

31. *Id.* at 2807.

32. *Cf. Casey*, 112 S. Ct. at 2810. "Finally, one could classify *Roe* as *sui generis*."

III. CURRENT ABORTION PRACTICE IN EUROPE

Every Western European country except Ireland has either a law that permits abortion or a cultural strategy that effectively allows access to abortion services. France, West Germany, Italy, Luxembourg, the Netherlands, Portugal, Spain, Switzerland, and the United Kingdom permit abortion for cause.³³ Ireland's law, deriving from a constitutional referendum in 1983, openly prohibits abortion. Yet in abortion as in trade, politics, and cultural autonomy, the practice of the Irish contradicts the public expression of sentiment.³⁴ Thousands of Irish women

By this phrase the Court means that the woman's liberty is tied into a complex of decisions that impinge on her choice as to marriage and procreation. *Id.* at 2811. The Court calls *Roe* a "rare" case, comparable in the lifetime of the judges only to *Brown v. Board of Education*, 347 U.S. 483 (1954), where the "the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Casey*, 112 S. Ct. at 2815.

33. GLENDON, *supra* note 6, at 146-50.

34. The myth that the Irish abstain from contraception practices is openly belied by the contents of public sewer systems that litter the country's estuaries (used condoms carried in from England and America by Irish citizens). Ireland winks at embargoes as well as contraception. A flourishing transshipment industry repackages goods from America in order to avoid this or that trade sanction. Spray-painted slogans of "Brits out" on public walls in Ireland do not stop Irish citizens from enjoying open immigration that Great Britain has allowed Irish workers in advance of the EEC open border policy. Slogans are often at cross purposes with private attitudes. For example, it is not clear how many citizens of the Republic—outside the paid ranks of the IRA—would genuinely welcome unification with a million and a half Protestants in the North.

The Irish maintain a moral position often misunderstood by Americans, who tend to take what they hear about Irish politics at face value. The current President of Ireland, Mary Robinson, established her reputation as counsel in *Norris v. Ireland*, a right to privacy case where the European Court of Human Rights ruled against Irish homosexuality laws on the grounds that article 8 of the European Convention on Human Rights protects sexual behavior on the basis of right to privacy. 13 EUR. CT. H. R. 186 (1991). Article 8 of the European Convention on Human Rights reads, "Everyone has the right to respect for his private and family life, his home and his correspondence." Involved in the right of privacy issue, homosexuality cases may be said to be "really about" abortion. For instance, the rejection of homosexual rights base on a right to privacy in *Bowers v. Hardwick*, 478 U.S. 186 (1986), precursored *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), which criticized *Roe's* trimester framework which had been founded in *Roe* on a woman's right to privacy. Both issues potentially broaden the right of personal autonomy. BASIC DOCUMENTS ON HUMAN RIGHTS 246 (Ian Brownlie ed., 2nd ed., 1981). Unlike the United States Supreme Court, the European Court of Human Rights can review cases, but it is not an appeals court. Its "task is to ensure that the standards of the Convention and its protocols are observed by the administration of the States concerned." *Id.* at 242.

use abortion facilities in England, just as the work force passes fluidly from country to country.³⁵ The recent decision by the European Court of Human Rights defining abortion as a "service" further weakens the Irish law.³⁶ Similarly, West Germany's memories of the slaughter of the unwanted make its laws strict, as judges are hesitant to tamper with any form of human life,³⁷ but the restrictions imposed by its conservative Supreme Court are regularly evaded by women who resort to nearby countries.³⁸ Moreover, since unification Germany has had two laws, the restrictive measures of the West and the liberal law of

The European expansion of the right to privacy to include homosexual conduct may explain the reticence of the *Casey* court to talk in terms of privacy, if the United States Supreme Court regards the right to privacy as the thin end of the wedge toward expanding homosexuals' rights. *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986).

As a product of a changing culture, Ireland's President Robinson, who won a case condemning homosexuality laws on right to privacy grounds (in contrast to the *Bowers* decision) clearly favors abortion, but as president she refuses to promote her cause, even when speaking French. An interviewer from *LE MONDE* asked her if she was free to express her opinion on abortion, since everyone knew where she stood ("Donc, même si vous ne pouvez pas dire tout ce que vous pensez, sur l'avortement par exemple, les gens savent quelles sont vos convictions"). She responded, "Exactly. My past views [when she was free to speak before her election as President] are perfectly clear" ("Tout à fait. Mes déclarations passées sont parfaitement claires"). *LE MONDE*, May 26, 1992, available in LEXIS, Nexis library, Currnt file.

35. Alberto Trevissoi and Martino Cavalli, *Speciale Aborto—Un problema che divide i Dodici: la Corte di giustizia apre uno spiraglio all'armonizzazione*, *IL SOLE 24 ORE*, Oct. 14, 1991, at 29 [hereinafter *Speciale Aborto*]. "A migliaia, tuttavia, ogni anno le irlandesi vanno ad abortire nel vicino a molto più permissivo Regno Unito." *IL SOLE 24 ORE* is an Italian financial newspaper, available on Lexis, comparable to the *WALL STREET JOURNAL* or the *FINANCIAL TIMES*.

36. The right to services seems ready to join the free circulation of merchandise, people, and capital that enjoy immunity from legal interference by members of the European Community. *Speciale Aborto*, *supra* note 35: "L'aborto è un <servizio medico>. Come tale, potrebbe in futuro rientrare in una delle quattro grandi libertà di circolazione delle merci, delle persone, dei capitali e, appunto dei servizi che il Trattato Cee pone a fondamento del mercato unico europeo" (summarized in text). See *Open Door Counselling, Ltd. and Dublin Wellwoman Centre Ltd. v. Ireland*, Nos. 14234/88, 14235/88. *EUR. CT. H. R.*, March 7, 1991. See also Cathleen Colvin, *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan: Irish Abortion Law and the Free Movement of Services in the European Community*, 15 *FORDHAM INT'L L. J.* 476 (1991/92).

37. Contrast Glendon's explanation of West Germany's conservatism ("The priority given to the value of life in the West German constitutional order is, the Court explained, a reaction to the taking of innocent life in the years of the 'final solution'." *GLENDON*, *supra* note 6, at 26) with the report in a French newspaper, which calls the decision part of the most hypocritical legislation in Europe ("L'ancienne Allemagne fédérale a l'une des législations les plus hypocrites d'Europe,") *LE MONDE*, Aug. 6, 1992, available in LEXIS, Nexis library, Currnt file.

38. *Speciale Aborto*, *supra* note 35.

East Germany. Like all countries influenced by the liberal constitution of the former Soviet Union, East Germany permits abortion on demand. The problem of merging two very different philosophies of abortion is currently a key item in the country's judicial agenda.³⁹

In addition to abortions for cause, some countries allow abortion on demand (as does the United States). These are Austria, Denmark, Greece, Norway, and Sweden.⁴⁰ In others, however, even the limitation of abortion for "cause" poses little restriction when the cause includes the mental and social well-being of the woman, as in the law of the United Kingdom, in effect since 1967.⁴¹ All the countries of Europe regulate abortion by statute, unlike the United States, where the abortion right is constitutionally guaranteed. Just as the United States Supreme Court in *Casey* has taken on the task of monitoring whether state laws infringe on a woman's fundamental liberty, in most countries the courts are called on to interpret abortion statutes. This fact is only remarkable in light of the emotionally charged political nature of the abortion issue. In Italy, abortion statutes are promoted by the Constitutional Court.

Access to abortion facilities in Europe is hampered less by the legal structure than the unwillingness of doctors to perform the operation. Doctors in Portugal, Spain and Greece disfavor the procedure, making abortion difficult to obtain.⁴² In Poland, the Medical Association has declared participation in the procedure a breach of ethics. Moreover, a divided court has refused to intervene.⁴³

The Constitutional Tribunal found the case made by the Commissioner for Civil Rights Protection against the Doctors' Code of Ethics inconsistent with current law. The Tribunal found the Code not to be a legal norm, but a community one, and as such not falling under its authority. It did not pass sentence, but decided to notify the Sejm of the Code's

39. LE MONDE, Aug. 6, 1992, available in LEXIS, Nexis library, Currnt file.

40. GLENDON, *supra* note 6, at 151-53.

41. *Id.* at 12.

42. *Speciale Aborto*, *supra* note 35.

43. Polish News Bull., October 8, 1992, available in LEXIS, Nexis library, Currnt file. "Four justices issued separate statements, reiterating that they did not share the above position. Describing that the code was a set of legal and [sic] well as ethical norms, they emphasized that the Constitutional Tribunal should have examined the code guided by judicial autonomy." Poland's current abortion law was passed in 1956. *Speciale Aborto*, *supra* note 35.

inconsistency with several laws, including that on conditions of legalized abortion. The Code, in force since May, permits abortion only in cases when the pregnancy threatens the mother's life. A doctor who performs an abortion in any other case may lose his license.⁴⁴

Much closer study of the actual conditions in individual countries is needed in order to compare practice and the impact of local laws.

V. SIMILARITY OF RESTRICTIONS ON ABORTION PROCEDURES BETWEEN EUROPEAN LAW AND CASEY

The *Casey* decision represents current American policy on abortion. As we have seen, the Court affirmed the right of a woman to decide for herself whether or not to abort a fetus she is carrying as a liberty interest protected by the Constitution, avoiding the topic of the right to privacy. But the Court also gave prominence to another rule of law when in *Casey* it applied the "undue burden" test to uphold five restrictions on abortion while striking down one. The Court applied the "undue burden" test to allow a waiting period restriction of twenty-four hours; a requirement that minors inform one parent or employ a judicial bypass procedure; a provision for informed consent about the nature of abortion, fetal development, and attendant health risks; a provision that specifies that a physician shall counsel women seeking abortion; and a record-keeping requirement. Using the same "undue burden" test, the Court struck down a statutory provision requiring husband notification on the grounds that a state could not allow a husband to veto his wife's abortion decision, despite his interest in the fetus.⁴⁵

A. *The Supreme Court's "Undue Burden" Standard*

The "undue burden" test for state laws on abortion originated in Justice O'Connor's dissent in *Akron v. Akron Center for Reproductive Health*⁴⁶ and was outlined more fully in her dissent in *Thornburgh v. American College of Obstetricians and Gynecologists*.⁴⁷ "[J]udicial scrutiny of state regulation of abortion should be limited to whether the state law bears

44. The Warsaw Voice, October 18, 1992, available in LEXIS, Nexis library, Currnt file.

45. *Casey*, 112 S. Ct. at 2803, 2833.

46. 462 U.S. 416, 468 (1983).

47. 476 U.S. 747, 814 (1986).

a rational relationship to legitimate purposes . . . with heightened scrutiny reserved for instances in which the State has imposed an 'undue burden' on the abortion decision."⁴⁸ "An undue burden will generally be found 'in situations involving absolute obstacles or severe limitations on the abortion decision,' not wherever a state regulation 'may "inhibit" abortions to some degree.'"⁴⁹ Moreover, if a state law does interfere with the abortion decision to an extent that is unduly burdensome so that it becomes "necessary to apply an exacting standard of review," the possibility remains that the statute will withstand the stricter scrutiny.⁵⁰ The burden that Justice O'Connor views as "undue" is evidently serious—a seriousness perhaps best gauged operationally by examining what restrictions the test permits.

Subtle changes in the undue burden test occurred before it reappeared in *Casey*'s plurality opinion, which recognizes "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."⁵¹ "Undue interference" would seem to be anything that prevents a woman from carrying out her decision, but the final effect is more restrained. The new "undue burden" test differs markedly from the reasoning in *Griswold*, where the Court found that a Connecticut law was overbroad. Breadth is no longer the issue: The new "undue burden" test rejects a per se rule that any regulation touching on abortion must be invalidated if it poses "an unacceptable danger of deterring the exercise of that right."⁵²

The *Casey* decision reveals the difficulty of defining and applying the undue burden standard. Justice Stevens, in a partial dissent, approves of the "undue burden" standard but finds that "[a] burden may be 'undue' either because the burden is too severe or because it lacks a legitimate rational justification."⁵³ He would find unconstitutional that section of the Pennsylvania statute that requires physicians or counsellors to provide a woman materials "clearly designed to persuade her to choose not to undergo the abortion" and that section requiring a 24-hour waiting period.⁵⁴

The "undue burden" test as spelled out in *Casey* accepts that state regulation may make a liberty "more difficult to exercise" without

48. *Id.* at 828.

49. *Id.* (citing *Akron*, 462 U.S. at 464).

50. *Id.*

51. *Casey*, 112 S. Ct. at 2804.

52. *Thornburgh*, 476 U.S. at 767-68.

53. *Casey*, 112 S. Ct. at 2843 (Stevens, J., dissenting).

54. *Id.* at 2841 (Stevens, J., dissenting).

being "an infringement of that right."⁵⁵ After comparing the abortion right to a state's right to regulate the "framework" in which voting takes place, the Court defines the limit of the right: "Only where state regulation imposes an undue burden on a woman's ability to make this decision [to procure an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause."⁵⁶ The "heart of liberty" is not a temporal concept; since there is no moment in time before which "the State's interest in protecting the life of the unborn"⁵⁷ cannot reach, the Court eliminates the concept of a first trimester, the period (according to *Roe*) when states could not regulate abortion. The focus on "liberty" leads the Court from the trimester framework of *Roe* to a division of the gestation period determined by fetal viability, the point at which a presumption in favor of the mother's interest in the fetus tips to favor the State's interest. Liberty involves balancing the State's interest against the individual's.

The Court thus defines "undue burden" against a context of balancing interests, i.e., personal liberty weighed against state policy. An "undue burden" is not just any interference, delay, or cost, but a "substantial obstacle" that infringes or hinders free choice:

A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. . . . Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.⁵⁸

The Court stresses, by reiteration, that an "undue burden" is a "substantial obstacle in the path of a woman's choice."⁵⁹

55. *Id.* at 2818.

56. *Id.* at 2819.

57. *Id.* at 2825.

58. *Id.* at 2820-21.

59. *Id.* at 2821.

The language of the Court substitutes one image for another. Cicero said that metaphor is not the language of the law,⁶⁰ and the play of images may lie behind the dissenting opinion that the "undue burden" standard is unpredictable. On the other hand, the image may represent the kind of broad language that characterizes constitutions, a statement of principle left to courts to decide. "The Abbé Sieyès, a veteran of many constitutional draftings, ventured the proposition that a constitution should be both short and obscure."⁶¹ A short text builds consensus; an obscure one "enables new meaning and content to be built into the constitution, according to changing societal conditions and demands."⁶² Criticism "always inheres when the Court draws a specific rule from what in the Constitution is but a general standard."⁶³ The "undue burden" standard turns out to be less a test than a source for what the Court calls the "principles" that "control our assessment of the Pennsylvania Statute."⁶⁴ These principles allow a provision for informed consent as long as the mechanism for ensuring informed consent does not become an "undue burden" on choice.⁶⁵

In basing its decisions on the "undue burden standard," the Court breaks the standard into two parts, first asking if the measure is reasonable to implement a State interest, and second asking if that implementation raises a substantial obstacle in the woman's path of choice. The second part is the concern of this article, for the Court literally considers the *path* to the abortion clinic, in upholding the 24-hour waiting period, by mentioning the plight of women "who must travel long distances."⁶⁶ The Court concludes that cost and delay are obstacles, but not substantial obstacles. "A particular burden is not of necessity a substantial obstacle."⁶⁷ Constitutionality depends on whether a provision places "barriers in the way of abortion on demand."⁶⁸

A "principle" as much as a test, then, the "undue burden" standard undergoes refinement every time the Court applies it. It might

60. CICERO, *TOPICA* (Loeb edition) VII, 32.

61. EDWARD McWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* 57 (1981).

62. *Id.*

63. *Casey*, 112 S. Ct. at 2816.

64. *Id.* at 2821.

65. *Id.*

66. *Id.* at 2824.

67. *Id.* at 2825. The Court seems to leave open the possibility that it would accept statistical evidence that the waiting period actually blocks a woman's path to the abortion clinic. An undue burden would arise if it could be shown that traveling twice to a clinic negated her right to choose an abortion, perhaps by making it impossible to escape detection by her husband. *Id.*

68. *Id.*

be said to be defined operationally by a series of examples of the rule as applied.⁶⁹ Some might find that the undue burden standard has the air of judicial legislating. Yet a single principle seems to emerge. The undue burden standard prevents a state not from interfering or monitoring a woman's right to choose an abortion, but from negating that choice.

B. *European Practice*

The application of the undue burden standard in the *Casey* decision coincides fairly well with contemporary practice in Western Europe where statutes permitting abortion also set forth guidelines for the procedure. For example, the *Casey* Court upheld a statute that "requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'"⁷⁰ This statute has several elements. In comparing this provision with European practice, this article will look at the time requirement and the requirement that there be informed choice based on something more than just the statistics for a safe outcome of an operation.

Statutory provisions that require information to be considered for a certain space of time are common on the Continent. For example, Pennsylvania's twenty-four hour waiting period resembles the pause for reflection required in the Netherlands, which has probably the most liberal abortion law in Europe.⁷¹ Belgium, which imposes complicated procedures, requires a waiting period of six days for a woman to confirm her intention in writing.⁷² Portugal requires that a woman register her signed consent "not less than three days prior to the procedure."⁷³ France, where the state goes much further than in Amer-

69. That is, the court defines the term by showing it in action, not by synonym or metaphor or genus and species (e.g., an undue burden is an interference we will not allow). The rule is like a Rube Goldberg machine, which may be defined not by what it does (transmit motion) but by whatever happens (lever A hits button B, triggering a little ball, etc.).

70. *Id.* at 2822.

71. *Speciale Aborto*, *supra* note 35. The law is liberal because it allows abortion to the moment of birth.

72. *Id.*

73. Law No. 6/84 of 11 May 1984, art. 141 (1), which states that "[t]he consent of the pregnant woman to the performance of an abortion shall be unequivocally

ica to ease and support childbirth, requires a waiting period of one week from the date of the woman's original request and two days from the date of counseling.⁷⁴ Italy requires a seven-day waiting period after counseling.⁷⁵ The Netherlands has a five-day waiting period.⁷⁶ West Germany imposes a three-day wait, except in emergencies (an exception common in the other countries).⁷⁷ Luxembourg requires a one-week waiting period.⁷⁸ Even with such restrictions, however, Italy recorded 170,000 abortions in 1988, while France registered 163,000 and the Netherlands 16,000.⁷⁹ Less liberal West Germany still witnessed 83,000 abortions.⁸⁰ No data are available for Belgium and Portugal, where abortions are difficult to obtain, due to policy in the former and diffident doctors in the latter.⁸¹ Spain, Denmark, the United Kingdom, Austria, Norway, and Sweden do not openly impose waiting periods in their statutes, although what happens in practice may produce substantial delay. Given the contrasting figures, it is hard to conclude that the waiting period alone either stifles choice or signals a country's intention to interfere with a woman's choice. The provision of the Pennsylvania Abortion Control Act upheld in *Casey*, that a woman be given certain information at least 24 hours before the abortion is performed, seems nothing unusual, at least on a comparative basis.

Also in line with European practice is the ruling of the Court in *Casey* upholding a provision that "a woman seeking an abortion give her informed consent prior to the abortion procedure."⁸² Such counseling is required by France,⁸³ West Germany,⁸⁴ the Netherlands,⁸⁵

recorded in a document signed by her or on her behalf, in accordance with the law, not less than three days prior to the date of the procedure." 35 INT'L DIG. OF HEALTH LEGIS. 796 (1984).

74. GLENDON, *supra* note 6, at 146.

75. Italian Law No. 194 of 22 May 1978, *cited in* 29 INT'L DIG. OF HEALTH LEGIS. 589 (1978).

76. GLENDON, *supra* note 6, at 148.

77. *Id.* at 147.

78. *Id.* at 148.

79. *Speciale Aborto*, *supra* note 35.

80. *Id.*

81. *Id.*

82. *Casey*, 112 S. Ct. at 2803.

83. A physician approached by a woman who wishes to terminate her pregnancy must "inform her of medical risks to herself and her future maternity; and of the biological seriousness of the operation requested by her" and "furnish her with an information folder" with laws and offers of assistance for mothers and the possibilities of adoption. A consultation is also required. "This consultation shall be in the form

Denmark,⁸⁶ Norway,⁸⁷ Italy,⁸⁸ Spain,⁸⁹ and Sweden.⁹⁰ There is no effective requirement for informed consent in Portugal,⁹¹ the United Kingdom,⁹² Austria,⁹³ or Greece,⁹⁴ although other factors such as scarce medical resources or unwilling physicians may affect availability.

The *Casey* Court also follows European practice in striking down husband notification. For this issue, the Court uses the language of "undue burden" but avoids talk of paths and obstacles in favor of more fundamental liberty arguments. Because statistics indicate large numbers of women are abused or fear abuse, the Pennsylvania statute "will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid."⁹⁵ More

of a private interview during which the woman shall be provided with assistance and advice appropriate to her situation, as well as the necessary means to resolve the social problems posed." Law No. 75-17 of 17 January 1975, in GLENDON, *supra* note 6, at 156.

84. The West German law requires a "mandatory counseling session in which the pregnant woman must be advised of services available to her, especially ones that would facilitate continuation of the pregnancy." GLENDON, *supra* note 6, at 147.

85. The Dutch statute requires that a pregnant woman be furnished with "information regarding ways of dealing with her distressed situation other than termination of pregnancy." *Id.* at 148. See 37 INT'L DIG. OF HEALTH LEGIS. 734 (1986).

86. The Minister of Health regulates information for the woman on the consequences of pregnancy. 37 INT'L DIG. OF HEALTH LEGIS. 793 (1986).

87. A woman's abortion must be approved by a committee; there is no clear mandate for informed consent, but the act mandates society to ensure guidance to create a "responsible attitude." GLENDON, *supra* note 6, at 153.

88. "In all cases, in addition to guaranteeing the necessary medical examinations, counselling centres and medicosocial agencies shall be required, especially when the request for termination of pregnancy is motivated by the impact of economic, social, or family circumstances upon the pregnant woman's health, to examine possible solutions to the problems in consultations with the woman. . . ." 29 INT'L DIG. OF HEALTH LEGIS. 590, art. 5 (1978).

89. "[H]ealth professionals are required to inform applicants for pregnancy termination of the medical, psychological, and social consequences of the continuation of pregnancy and of its termination, as well as of the existence of means for social assistance and family counselling available to applicants." 38 INT'L DIG. OF HEALTH LEGIS. 264 (1987).

90. In Sweden, a social worker must be consulted after the twelfth week. GLENDON, *supra* note 6, 153.

91. 35 INT'L DIG. OF HEALTH LEGIS. 768 (1984).

92. 42 INT'L DIG. OF HEALTH LEGIS. 37 (1991).

93. Abortion is a criminal offense that is exempt from punishment "when performed by a physician during the first three months of pregnancy after a medical consultation." GLENDON, *supra* note 6, at 151.

94. *Id.* at 152.

95. *Casey*, 112 S. Ct. at 2829.

fundamentally, husband notification implies husband consent, yet such control is "repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."⁹⁶ Husband notification is generally not required in countries that permit abortion, not because of disturbing statistics of abuse, but because European countries tend to recognize female autonomy. Italy requires a woman to consent to consultation with her husband.⁹⁷ Other countries simply do not mention the husband.

European countries require that records of abortions be kept, often as part of the paperwork of public hospitals where the operations are authorized and performed. The Court in *Casey* similarly upholds record keeping requirements, despite protests of excessive record keeping. The Court ruled that the costs of record keeping have not been shown to be so great as to create a substantial obstacle.⁹⁸ However, the Court struck down a requirement that women state their reason for having an abortion, "the precise information we have already recognized that many women have pressing reasons not to reveal."⁹⁹

Provisions regarding minors, who must obtain some form of parental consent, are perhaps the most controversial aspect of abortion regulation both in the United States and Europe. Under the undue burden standard in *Casey*, this method of control is permissible as long as the minor has a judicial bypass procedure. European statutes have similar provisions, although they are being challenged, as in the case of Italy.

C. *Assessing the Undue Burden Standard from a European Perspective*

The undue burden standard as revealed by the *Casey* holdings on Pennsylvania's abortion control statute not only coincides with European practice, but it stands in contrast to a "strict scrutiny" standard that would judge a state provision only by whether it represented a "compelling" interest of the state. "Strict scrutiny" prevails where abortion control is regarded as a violation of a woman's right to privacy.¹⁰⁰

96. *Id.* at 2831.

97. 29 INT'L DIG. OF HEALTH LEGIS. 590 (1978).

98. *Casey*, 112 S. Ct. at 2832.

99. *Id.* at 2833.

100. *Id.* at 2845 (Blackmun, J., concurring in part). "The Court today reaffirms the long recognized rights of privacy and bodily integrity." *Id.* This does not seem an accurate account of the plurality decision. Justice Blackmun's advocacy of strict scrutiny instead of intermediate scrutiny guided by the "undue burden" test is therefore a minority opinion.

Compelling the continuance of pregnancy violates a woman's right to privacy in two ways. First, it infringes the right to bodily integrity. Second, it deprives a woman of critical life choices. Where choice of abortion is regarded as a fundamental liberty, however, as in the plurality opinion of *Casey*, the undue burden standard operates. The Court traditionally conceives of its role as one of drawing a line between individual liberties and state power.¹⁰¹ It appears that a fundamental liberty is less compelling than a right to privacy and requires less strict scrutiny.

If most other countries join the plurality in *Casey* in not resorting to right of privacy arguments in legalizing abortions, they may or may not face the problem of drawing a line between the state's interest in protecting the unborn and a woman's family choices. Decisions over the last several years show that the Italian Supreme Court has been involved in determinations similar to those in *Casey*. The Italian Court also faced the problem of delineation. The differences between Italy's civil law system and the United States common law system should not discourage finding a distinct similarity in the responses of each country's highest court to methods of controlling abortion.

V. ITALIAN LEGAL "PRINCIPLES" THAT RESTRICT LOCAL RESTRAINTS ON ABORTION

A. *Authority in Italian Civil Law and the Role of the Courts*

The new Constitution of the Italian Republic of December 22, 1947, established "a Constitutional Court with the authority to review and to declare invalid laws which conflict with the Constitution."¹⁰² Besides the Constitution, the most important sources of law are codes, which consolidate and sometimes amplify statutes.¹⁰³ Laws are interpreted by a decentralized system of courts. "The country is divided

101. Not only does the plurality opinion fail to ground "fundamental liberty" in the right to privacy, it avoids other traditional bases such as custom, reason, neutral principles, societal consensus, or natural law. Cf. J. Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16-55 (1978). Its bases instead are workable social practice and stare decisis. The former reflects current social thinking that regards social power not as an exercise in dominion but as an interplay between dominant and suppressed groups. Cf. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* (1984); Umberto Eco, *Language, Power, Force*, in UMBERTO ECO, *TRAVELS IN HYPERREALITY* 239 (1990).

102. ANGELO GRISOLI, *GUIDE TO FOREIGN LEGAL MATERIALS: ITALIAN* 15 (1965).

103. *Id.* at 17.

into twenty-three districts each of which has a court of appeals (*Corte d'appello*).''¹⁰⁴

The district of each court of appeals contains a considerable number of lower courts. The lowest rung is the *conciliatore* (or *giudice conciliatore*) of which there is one in each commune and which has only civil jurisdiction in petty affairs; the judge is not a professional judge, but is appointed from among the educated members of the community, and his office is gratuitous and honorary. The lowest professional judge is the *pretore*. He singularly determines civil and labor matters, appeals from the decisions of the *conciliatore* in criminal matters, and matters concerning persons under disability (*materia tutelare*). He also has numerous administrative functions. There are 978 first instance courts (called *pretore*) distributed among the twenty-three districts.¹⁰⁵

"The highest court in the hierarchy of the ordinary courts is the *Corte di cassazione*."¹⁰⁶ "If . . . it finds that there was a violation of the law, it quashes (*cassa*) the decision of the court below and remands the case. . . ."¹⁰⁷

Decentralized courts and the primacy of the civil code contribute to making the Italian system less hierarchical than that of the United States. The *pretore* is not bound by the next higher court, the Tribunal.¹⁰⁸ As a result, judicial precedents are not a source of law; rather, judges interpret and apply legal rules.¹⁰⁹ Unlike common law judges, Italian judges "interpret" law; they do not "make" it. Because there is no judge-made law, there are no binding precedents. Therefore, where there is no law on point, judges resort to "principles prevailing in the Italian system."¹¹⁰

B. Importance of Italian "Principles" Compared to American "Fundamental Liberty"

The general principles of law used by Italian judges to decide difficult cases reside not in natural law but in positive Italian law.

104. *Id.* at 32.

105. *Id.* at 33.

106. *Id.* at 34.

107. *Id.* at 35.

108. *Id.* at 43.

109. *Id.* at 40.

110. *Id.* at 41-42.

Fundamental rules, "such as the equality of citizens before the law,"¹¹¹ emerge from enacted statutes and decrees. These principles take the form of maxims (*regulae juris*) or proverbs (*brocardi*), and may remind us of Bacon's collected sayings in the law or the pithy sentences used by Coke to support arguments.¹¹² Italian jurisprudence, then, is essentially interpretation of the law by all conceivable means. "Through the judge's interpretation, the abstract rules of the codes are related to practical experience."¹¹³ To this end, cases are collected but are not binding.¹¹⁴ The power of the Constitutional Court depends to a great extent on its ability to persuade.

C. *Italy's 1978 Law on Abortion*

A recent article by Maria Cristina Folliero uses the Court's intervention on abortion to analyze its current power.¹¹⁵ The article indicates that the legal control of abortion in Italy depends both on the civil code and the "principles" by which that code is interpreted. "In pre-war Italy, abortion was classified among crimes against the family. . . . During the fascist regime, the emphasis was moved from the individual and the family to the 'race.' . . . These laws survived the postwar republican constitution in 1948 and remained in power until the early 1970s." In the wake of a Constitutional Court ruling in 1971 that held unconstitutional a law prohibiting the publicity of contraceptive methods, pressure to change the abortion law grew. "In the summer of 1978, and after numerous attempts and the fall of one government on the abortion issue, Parliament succeeded in passing a new law and thus avoided [a] referendum."¹¹⁶

1. *Major Provisions of the Law*

Italian abortion laws derive from Law No. 194 of 22 May 1978, "On the social protection of motherhood and the voluntary termination

111. *Id.* at 50.

112. *Id.*

113. *Id.* at 44.

114. *Id.* at 45.

115. Maria Cristina Folliero, *La Legge N. 194 del 1978 nella giurisprudenza della Corte Costituzionale: Dal monito al controllo di come il monito sia attuato*, 33 (II) GIURISPRUDENZA COSTITUZIONALE 1336 (1988) [hereinafter *Controllo*].

116. IRENE FIGÀ-TALAMANCA, INT'L HANDBOOK ON ABORTION 279-81 (Paul Sachdev ed., 1988).

of pregnancy."¹¹⁷ American law and practice, as Glendon complains, tend to separate abortion from the social issue of motherhood and care for women.¹¹⁸ A good instance of American blindness to the larger social context in which abortion might be set occurs in the mistranslation of the title of the Italian law circulated by a standard reference book. It renders as "Rules regarding *the social prevention of maternity* and the voluntary interruption of pregnancy" what, when correctly translated, reads "Guidelines for *the social protection of motherhood* and provisions for the voluntary cessation of pregnancy."¹¹⁹

In addition to not isolating abortion from the larger matrix of family practice and contraception, Italian law recognizes the right of individual choice and the State's interest by providing public assistance to obtain an abortion. Article one of the abortion statute, which idealizes motherhood, serves as a prelude to article two, which provides for counselling and also abortion assistance.¹²⁰ Providing the means for

117. There is no official version of the Italian law other than that published in *GAZZETTA UFFICIALE*, Part 1, 22 May 1978, No. 140, 3642-46. In this article the Italian text will be cited from the version in *CODICE DONNA: NORME INTERNE E ATTI INTERNAZIONALI* 945 (2nd ed., n.d.) [hereinafter *Law No. 194*]. The standard translation is printed in 29 *INT'L DIG. OF HEALTH LEGIS.* 589 (1978). It is reprinted here with additions and corrections based on a fresh comparison with the Italian text.

118. GLENDON, *supra* note 6, at 20.

119. My emphasis. The offending work is *HANDBOOK*, *supra* note 116, at 281. The second quotation is my translation of "Norme per la tutela della maternità e sull'interruzione volontaria della gravidanza."

120. Article two reads:

1. The State guarantees the right to responsible and planned parenthood, recognizes the social value of motherhood, and shall protect human life from its inception.

The voluntary termination of pregnancy as covered by this Law shall not be a means of birth control.

The State, the regions, and local authorities, acting within their respective powers and areas of competence, shall promote and develop medico-social services and shall take other measures necessary to prevent abortion from being used for purposes of birth control.

2. The family counselling centres [*consultori familiari*] established by Law No. 405 of 29 July 1975 shall assist any pregnant woman, subject to the provisions of that Law:

(a) by informing her of her rights under State and regional legislation and of the social, health, and welfare services actually available from agencies in her areas;

(b) by informing her of appropriate ways to take advantage of the provisions of labour legislation designed to protect the pregnant woman;

(c) by taking special actions, or suggesting such actions to the competent

contraception was by itself a breakthrough in the 1970s, but in addition article 3 indicates Italy's willingness to spend public money in assisting women in their abortion choice.¹²¹

local authority or social welfare agencies in the area; wherever pregnancy or motherhood create problems which cannot be satisfactorily dealt with by normal actions under item (a);

(d) by helping to overcome the factors which might lead the woman to have her pregnancy terminated.

For the purposes of this Law, the counselling centres may make use of voluntary assistance, on the basis of pertinent regulations or agreements, from appropriate basic social welfare organizations and voluntary associations, which may also assist mothers in difficulties after the child is born.

The necessary and medically prescriptible [that is, medically legal] means for achieving freely chosen objectives with regard to responsible parenthood may also be supplied to minors by health agencies and counselling centers.

29 INT'L DIG. OF HEALTH LEGIS. 589 (1978).

The original text of the last paragraph reads, "La somministrazione su prescrizione medica, nelle strutture sanitarie e nei consultori, dei mezzi necessari per conseguire le finalità liberamente scelte in ordine alla procreazione responsabile è consentita anche ai minori." Law No. 194, *supra* note 15. The previously published version reads, "The necessary means for achieving freely chosen objectives with regard to responsible parenthood may also be supplied to minors by health agencies and counselling centres, against a medical prescription." 29 INT'L DIG. OF HEALTH LEGIS. 589 (1978). Since the phrase "against a medical prescription" makes little sense, it has been changed.

The end of section 1, above, raises an issue that deserves comment. The statutes seek to prevent abortion from being used as a method of birth control. "In fact in Italy abortion continues to be considered a contraceptive practice. According to the minister of Health, 70% of abortions are prompted by the incorrect use of contraceptive devices or practices" ("Di fatto in Italia l'aborto continua a essere considerato una pratica contraccettiva. Secondo il ministero della Sanità, il 70% degli aborti è provocato dall'uso non corretto di metodi anticoncezionali"). Bruno Bramati, Piergiorgio Crognani, and Carlo La Vecchia, *Contraccezione: Metodi, Efficacia, Diffusione*, IL SOLE 24 ORE, Nov. 17, 1991, at 188 [hereinafter Bramati].

121. Article three reads:

3. In order for the family counselling centers to fulfill the tasks assigned by the present law, their financial support, which rests on art. 5 of law 405 of July 29, 1975, is hereby increased by an annual disbursement of fifty billion lira, to be divided among the base districts following the criteria established by the aforementioned article.

To cover the loss of 50 billion lira relative to the 1978 budget a corresponding reduction is authorized in the disbursement provided in chapter 9001 in the Minister of the Treasury's budget. The Minister of the Treasury is authorized to carry out, through appropriate decrees, the necessary variations to achieve balance.

(My translation). For the text in Italian, see 29 INT'L DIG. OF HEALTH LEGIS. 589, 589 (1978).

Despite its concern for family life, reflected in language that shows concern to discourage (but not disallow) abortion, the Italian abortion statute does not require husband notification. Its language includes references to the woman's and the man's "dignity and freedom," a concept that seems poles apart from the language of "undue burden" and substantial obstacles employed by the *Casey* Court. Italian law also provides for a seven-day waiting period and mandatory counseling and information sessions, designed to be nonthreatening. The tone remains considerate, not admonitory.¹²²

122. Article five reads:

5. In all cases, in addition to guaranteeing the necessary medical examinations, counselling centres and medicosocial agencies shall be motivated by the impact of economic, social, or family circumstances upon the pregnant woman's health, to examine possible solutions to the problems in consultation with the woman and, where the woman consents, with the father of the conceptus, with due respect for the dignity and personal feelings of the woman and the person named as the father of the conceptus, to help her to overcome the factors which would lead her to have her pregnancy terminated, to enable her to take advantage of her rights as a working woman and a mother, and to encourage any suitable measures designed to support the woman, by providing her with all necessary assistance both during her pregnancy and after the delivery.

Where the woman applies to a physician of her choice, he shall: carry out the necessary medical examinations, with due respect for the woman's dignity and freedom; assess, in consultation with the woman and, where the woman consents, with the father of the conceptus, with due respect for the dignity and personal feelings of the woman and of the person named as the father of the conceptus, if so desired taking account of the result of the examinations referred to above, the circumstances leading her to request that the pregnancy be terminated; and inform her of her rights and of the social welfare facilities available to her, as well as regarding the counselling centres and the medicosocial agencies.

Where the physician at the counselling centre or the mediosocial agency, or the physician of the woman's choice, finds that in view of the circumstances termination is urgently required, he shall immediately issue the woman a certificate attesting to the urgency of the case. Once she has been issued this certificate, the woman may report to one of the establishments authorized to perform pregnancy terminations.

If termination is not found to be urgently required, the physician at the counselling centre or the medicosocial agency, or the physician of the woman's choice, shall at the end of the consultation, if the woman requests that her pregnancy be terminated on account of circumstances referred to in Section 4, issue her a copy of a document signed by himself and the woman attesting that the woman is pregnant and that the request has been made, and shall request her to reflect for seven days. After seven days

A unique feature of Italian law allows doctors to register as conscientious objectors, freeing them from participating in state-sponsored abortions.¹²³ Commentators have complained that this feature makes

have elapsed, the woman may take the document issued to her under the terms of this paragraph and report to one of the authorized establishments in order for her pregnancy to be terminated.

29 INT'L DIG. OF HEALTH LEGIS. 589, 590 (1978). The more holistic Italian law contrasts with American statutes, such as that passed in Akron, Ohio. See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983). Cf. GLENDON, *supra* note 6, at 19.

The translation of article 5, above, refers to the "father of the conceptus," 29 INT'L DIG. OF HEALTH LEGIS. 589 (1978), meaning the father of the fetus ("padre del concepito"). "Conceptus" is a neo-Latin neologism, not in my dictionary, that reminds me of the diminutive "homunculus" in the eighteenth-century novel *Tristram Shandy* by Laurence Sterne, where the narrator (rather unnervingly, considering the subject of this article), begins telling his story before he is born. In the Italian statute, the word "concepto" refers to a stage before the "feto," which precedes the "nascituro" (the stage at which abnormalities can be detected) and the "viable fetus." One wonders if *Casey's* rejection of the trimester approach will collapse the fine discriminations of the Italian language (as the influence of American law is, in general, very powerful on foreign countries).

123. Article 9 reads:

9. Health personnel and allied health personnel shall not be required to assist in the procedures referred to in Sections 5 and 7 or in pregnancy terminations if they have a conscientious objection, declared in advance. Such declaration must be forwarded to the provincial medical officer and, in the case of personnel on the staff of the hospital or the nursing home, to the medical director, not later than one month following the entry into force of this Law, or the date of qualification, or the date of commencement of employment at an establishment required to provide services for the termination of pregnancy, or the date of the drawing up of a convention with insurance agencies entailing the provision of such services.

The objection may be withdrawn at any time, or may be submitted after the periods prescribed in the preceding paragraph, in which case the declaration shall take effect one month after it has been submitted to the provincial medical officer.

Conscientious objection shall exempt health personnel and allied health personnel from carrying out procedures and activities specifically and necessarily designed to bring about the termination of pregnancy, and shall not exempt them from providing care prior to and following the termination.

In all cases, hospital establishments and authorized nursing homes shall be required to ensure that the procedures referred to in Section 7 are carried out and pregnancy terminations requested in accordance with the procedures referred to in Sections 5, 7, and 8 are performed. The regions shall supervise and ensure implementation of this requirement, if necessary by the move-

an abortion difficult to produce and creates a black-market for the service.¹²⁴ A similar boycott by doctors in Indiana is said by many to make it impossible to obtain a legal abortion from a local practitioner south of Indianapolis.

Another controversial feature of the law requires minors to notify a parent, unless a judge (the *giudice tutelare*) "finds serious grounds rendering [such notification] impossible or inadvisable."¹²⁵ The issue

ment [mobilità] of personnel.

Conscientious objection may not be invoked by health personnel or allied health personnel if, under the particular circumstances, their personal intervention is essential in order to save the life of a woman in imminent danger. Conscientious objection shall be deemed to have been withdrawn with immediate effect if the objector assists in procedures or pregnancy terminations provided for under this Law, in cases other than those referred to in the preceding paragraph.

29 INT'L DIG. OF HEALTH LEGIS. 589, 592-93 (1978).

124. Irene Figà-Talamanca states that "[b]y removing the abortion practice entirely (often a lucrative one) from the private to the public sector, the new law eliminated the physicians' financial incentives. Previously, a number of physicians working in public services (hospitals, clinics, etc.) privately performed clandestine abortions for a fee. As long as the 'conscience' clause gives them a way out at no loss, they have no reason to offer the services free of charge in the public sector." Figà-Talamanca, *supra* note 116, at 287. An Italian newspaper article summarizes the state of affairs: "There is a kind of emigration from the cities due to an abundance of doctors who are conscientious objectors to abortion and to disorganization in the application of law 194, which regulates abortion. . . . Where this migration does not occur, women are turning to private clinics." ("C'è ormai una sorta di migrazione dalle città dove per un eccesso di medici obiettori e per disorganizzazione l'applicazione della legge 194 che regolamenta l'aborto non è possibile verso altre città dove invece è attuata nei tempi previsti. E, quando questa migrazione non avviene, si va in una clinica privata.") Bramati, *supra* note 120.

125. Article twelve reads:

12. Requests for pregnancy termination under the procedures prescribed by this Law shall be made in person by the woman.

Where the woman is under 18 years of age, the consent of the person exercising parental authority over the woman or her guardian shall be required for the termination of pregnancy. However, during the first 90 days, if there are serious grounds rendering it impossible or inadvisable to consult the persons exercising parental authority or the guardian, or if those persons are consulted but refuse their consent or express conflicting opinions, the counselling centre or medicosocial agency, or the physician of the woman's choice, shall carry out the duties and procedures set out in Section 5 and submit to the magistrate responsible for matters of guardianship [*giudice tutelare*] in the locality in which it (he) operates, not later than seven days following the request, a report giving its (his) views on

was brought to a referendum.¹²⁶ The Italian public, like the Court in *Casey*, upheld parental notification "provided that there is an adequate judicial bypass procedure."¹²⁷

2. *The Role of the Constitutional Court in Promoting Italy's Abortion Statute*

Just as in the United States, Italy's abortion laws are constantly under attack by groups that want deeper restrictions and the Constitutional Court of Italy plays an increasing role in refining abortion statutes. The United States, following *Casey*, views abortion as a *sui generis* fundamental liberty. The presumptive norm against which U.S. abortion law has been played is a debate over the scope of a right to privacy. In Italy the Constitutional Court derives the right to abortion from a complex interplay of positive law, including legal principles of its own creation.

The presumptive norm in Italy, according to an important article by Maria Cristina Folliero, has been the Constitutional Court's ruling of 1975, which prompted the legislature's 1978 law on abortion.¹²⁸ First the Court in 1975 affirmed the "diritti inviolabile" (fundamental right) of a person as superior to that of the "conceptus." There followed the notion that there is no equivalence between the life and health of one who is already a person—the mother—and the well-being of the embryo that will become a person.¹²⁹ According to Folliero, this principle guided the Italian Constitutional Court in later years. The third ruling stated that "it is obligatory that a legislator take the necessary precautions to prevent that abortions be procured without a profound recognition of the reality and gravity of damage or danger that can ensue to a mother who pursues her pregnancy: the freedom of abortion must be

the matter. Within five days, after interviewing the woman and taking account of her wishes, the grounds which she puts forward, and the report submitted to him, the magistrate may issue a decision, which shall not be subject to appeal, authorizing the woman to have her pregnancy terminated.

29 INT'L DIG. OF HEALTH LEGIS. 589, 593-94 (1978).

126. Two proposals have failed to pass in general elections. "One [referendum] aimed at making the law more liberal (extending abortion unconditionally to minors and abrogating the conscience clause), and the other aimed at restricting it (permitting abortion only under certain life-threatening conditions)." Irene Figà-Talamanca, *supra* note 116, at 282.

127. 29 INT'L DIG. OF HEALTH LEGIS. 589, 593 (1978). Cf. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2832 (1992).

128. *Controllo*, *supra* note 115.

129. *Id.* at 1338.

anchored in an alert evaluation of the conditions that justify it."¹³⁰

Guided by this sentence, the Court in the years after the passage of the 1978 abortion law has controlled the otherwise independent judicial interpretation of the statute and local legislation concerning it. The actual issues before the Court concern two portions of the abortion law, parental notification by minors and the conscientious objector provision for doctors. Despite different points of departure, the courts in Italy and the United States charged with ultimate interpretation of the constitution are called on to make unusually close judgments of provisions that threaten to impinge a woman's choice of abortion.

One of the issues Folliero examines in deriving these principles arose from a failed referendum attempt in 1981 to extend abortion unconditionally to minors.¹³¹ Article 12 of Law 194 governs abortion by minors.¹³² A local attack on the constitutionality of this provision raised the issue in a way not dissimilar to what happens in the United States when a state seeks to interfere with a woman's right to an abortion. The Italian statute allows public doctors who register as conscientious objectors to opt out of giving abortions, but medical assistants must attend before and after an abortion despite their feelings. How do these rules affect a judge facing a minor who refuses to inform a parent? What happens, for example, when the *guidice tutelare* is also an objector?¹³³ Is article 12 unconstitutional because it does not make clear whether the judge is comparable to the doctor or the assistant?

The Constitutional Court found no valid comparison and, therefore, no violation of equal protection that would invalidate the statute.¹³⁴ In reaching its decision, the Court distinguished *external* from *internal* actors in the abortion decision process. For an external actor, such as a judge, the option of conscientious objector does not arise, because one cannot create a homology with the functions and roles of other

130. "L'esistenza nella sent. n. 27 del 1975, della formula tassativa "sia obbligo del legislatore di predisporre le cautele necessarie per impedire che l'aborto procurato senza seri accertamenti, sulla realtà e gravità del danno o pericolo, che potrebbe derivare alla madre dal proseguimento della gestazione: la liceità dell' aborto deve essere ancorato ad una previa valutazione delle condizioni atte a giustificarlo." *Id.* at 1379-80.

131. *Id.* at 1355. Cf. Figà-Talamanca, *supra* note 115, at 282. "[T]he difficult and unusual procedure required to bring an issue to a popular vote (referendum) . . . involves collecting, within the span of three months, half a million notary-public-authenticated signatures of citizens requesting modification of a law." *Id.* at 281.

132. See *supra* note 125.

133. *Controllo*, *supra* note 115, at 1356.

134. *Id.* at 1358.

participants.¹³⁵ Folliero laments that article 12 fails to give minors protection equal to what older women enjoy. But she takes consolation in the decision making process, which solidifies the Constitutional Court's active involvement in controlling and protecting abortion laws. The Court's decision isolates the point at which the minor herself makes a decision to resort to the protection of the *giudice tutelare*. This decision opens the way for a future realization of the minor's autonomy. The next step, perhaps imminent in Italy, is to show convincingly that the autonomy of minors is a principle in Italian laws.

Adherence to these principles has allowed the Court to maintain Italy's abortion laws against suits that claim the law conflicts with elements of the Constitution. For example, "the ordinance of the *Pretore* of S. Donà di Piave raised the issue of constitutional legitimacy in the name of a reputed contradiction between articles 29 and 30 of the Constitution (on the protection of the family, the moral and legal equality of spouses, and the rights and duties of spouses to maintain, instruct and raise their children) and article 5 of law 194 (with regard to the provision that does not recognize the relevance of the desire of the father of the conceived, even of the husband)."¹³⁶ Article 29 of the Constitutions reads:

"The State recognizes the family as a natural association founded in marriage.

Marriage is based on the moral and legal equality of husband and wife within the limits laid down by the laws for ensuring family unity."¹³⁷

Article 30 of the Constitution reads:

"It is the duty and right of parents to support, instruct and educate their children, even those born out of wedlock.

135. "Per questo soggetto definito *esterno*, l'opzione in termini di obiezione di coscienza non può porsi così come non può porsi il profilo dell'omologazione a funzioni e ruoli ad altri assegnati." *Id.* at 1360.

136. "L'ordinanza del Pretore di S. Donà di Piava sollevava incidente di legittimità costituzionale, in nome di un ritenuto contrasto tra gli artt. 29 e 30 Cost. (tutela della famiglia e dell'eguaglianza morale e giuridica dei coniugi; diritto-dovere dei coniugi di mantenere, istruire ed educare i figli) e l'art. 5 l. n. 194 (per la parte in cui non riconosce rilevanza alla volontà del padre del concepito, nella specie visto nella veste istituzionale di marito)." *Id.* at 1372.

137. Translated in 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 53 (Gisbert H. Flanz et al. eds. & trans., 1987).

"Should the parents prove incapable, the law states the way in which these duties shall be fulfilled."¹³⁸

These Constitutional provisions, the Court ruled, do not nullify the woman's right not to inform her husband of her abortion decision as guaranteed by article 5 of Law No. 194 (a physician shall consult "with the woman and, where the woman consents, with the father of the conceptus").¹³⁹

The principles that brace this decision also guided the Court's ruling when an ordinance of the *Pretore* of Urbino raised the common problem of the relationship between the extent of the power of the *giudice tutelare* (as in article 12) and the principle of autodetermination of the woman (when a minor). Folliero derides the basis of this case as "not-too solid grounds on the level of a system of formal-hermeneutic appeals."¹⁴⁰ Article 24 of the Constitution guarantees the right to a defense as an "inviolable right," which it was argued should apply to the unborn.¹⁴¹ Article 24 reads,

"All are entitled to institute legal proceedings for the protection of their own rights and legitimate interests. Defence is an inalienable right at every stage of legal proceedings.

"The indigent are entitled, through special provisions, to proper means for action or defence at all levels of jurisdiction.

"The law lays down the conditions and methods for obtaining reparation for judicial errors."¹⁴²

Folliero argues that the Court ruled correctly in determining that the right of the unborn did not enter into a proceeding of voluntary jurisdiction.¹⁴³ She finds an important position developing in the opinion. In her analysis, the Court affirmed the judge's power to respect or deny the will of the minor to the extent that the young woman can adequately appreciate the seriousness and importance of the action she prepares to take.

These brief illustrations show that the Italian constitutional system is itself in flux. On the abortion issue, the Court is still working out

138. *Id.*

139. *See supra* note 122.

140. "[U]n terreno non più solido sul piano dell'impianto ermeneutico-formale del ricorso." *Controllo, supra* note 115, at 1373.

141. *Id.*

142. *See supra* note 137.

143. *Controllo, supra* note 115, at 1374.

the main threads in a dense weave of principles, constitutional decisions, and positive law. The Constitutional Court is also proposing itself as a source of law.¹⁴⁴ At this stage in history, the Court seems both to affirm autodetermination and to deny it. Folliero concludes that this duplication of interpretive position may be less disconcerting than it appears insofar as the Court always respects its initial principles set out in 1975. If she correctly believes that these principles guide the Italian Supreme Court, then they are Italy's equivalent of the "undue burden" standard in *Casey*. The first principle is the state's interest in the health of a woman, broadly understood, with respect to the right to life of the conceived. The second is the principle that a woman can choose for herself. The third is the positive valuation of the procedures and conditions that the legislature believes justify abortion.¹⁴⁵ These principles state what the United States Supreme Court has achieved by a different historical route involving the recognition of a right to privacy in *Roe*, followed by an unwillingness to refer to that legal fiction when affirming the woman's fundamental liberty in *Casey*.

VI. CONCLUSION

The constitutional problem, in both Italy and the United States, is of a court that appears to be micromanaging statutes, or legislating to the legislatures. "The suggestions, the directions, and the warnings contained in the Court's decisions, which influence future legislation, amount to a growing insertion of the Court into the legislative picture."¹⁴⁶ The comparison of the two countries' abortion laws suggests that it is a situation that is here to stay. The thrust of Folliero's argument is that the rights of underage women will be more fully recognized in the future, and the same may be true in the United States. This exception proves the general rule, that the "undue burden" standard is less important as an accurate instrument for judicial determination than a recognition of current practices and debates in America and elsewhere.

European law in general and Italian law in particular offers a platform from which to set in perspective the historically-determined logic by which the American Supreme Court has negotiated its way through the political battles of the abortion issue. Folliero's summary

144. The Court seeks "di potersi comunque autoproporre come fonte nel sistema delle fonti." *Id.* at 1376.

145. *Id.*

146. "[I] suggerimenti, gli indirizzi, i moniti contenuti nelle sentenze della Corte, da cui discende l'attività legislative 'di seguito', si risolvono in intromissioni sempre più penetranti della Corte nel quadro legislativo." *Id.* at 1379.

of the Italian Constitutional Court's principles illustrates another way of understanding the logic that lies behind the "undue burden" standard. The first principle, drawn from the total matrix of Italian law, is the right of women to self-determination. The second is respect for procedures and conditions that the legislature says qualify one for abortion.¹⁴⁷ This summary suggests that the "undue burden" standard, although it will be refined by the Supreme Court, is made of sterner stuff than the dissenting opinions in *Casey* indicate.

147. *Id.* at 1375-76.

