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

Martha F. Davis
Northeastern University - School of Law
United States

Bethany Withers
Harvard University Law School
United States

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Abstract:
Most law school courses approach reproductive rights law from a purely domestic perspective, as an extensive survey of casebooks and course material reveals. The authors argue that a transnational perspective can enhance the teaching of sexual and reproductive health in all of the law school courses and doctrinal settings in which this topic in treated. While the topic of "Global Sexual and Reproductive Rights" can be presented in a free-standing course, transnational perspectives should also be integrated across the curriculum where sexual and reproductive rights are discussed. Expanding reproductive rights pedagogy to address transnational perspectives will aid in exposing a wide range of students to transnational material, will expand students' preparedness to analyze such materials, and will better reflect the debates on sexual and reproductive health currently taking place outside of law school classrooms. Drawing on a range of foreign and international material, the authors provide specific suggestions for integrating such material into courses on Constitutional Law, Family Law and Bioethics.

The pages below are an excerpt from a forthcoming article by Professor Davis and Bethany Withers in the Journal of Legal Education.

Constitutional Law

Right to Procreate and Transnational Law

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

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

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

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

These transnational materials highlight the opposing considerations that *Skinner* resolved under our own constitutional jurisprudence. On the one hand, the U.S. Supreme

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

Abortion and Transnational Law

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

Two venerable West German abortion cases are occasionally cited in domestic constitutional texts. In 1975, the West German constitutional court was heavily influenced by the nation's history of governmental eugenics policies when it struck down a law liberalizing access to abortion on the grounds that the fetus is constitutionally protected. The Supreme Court of a unified Germany reiterated this view in 1993, while also opining that the legislature could permit first trimester abortions "on demand" so long as the procedure was accompanied by legislatively mandated counseling. Surprisingly, less often cited in U.S. casebooks is the Canadian Supreme Court's 1988 decision in *Morgentaler v. Queen*, which construed the Canadian Charter of Rights and Freedom's language concerning "life, liberty and security of the person" to strike down a law that restricted abortion.

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

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

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

It is interesting to contrast the U.S. Supreme Court's approach with the 2006 decision issued by the Constitutional Court of Colombia. Unlike the *Carhart* case, which dealt with only a partial ban on abortion procedures, the Colombian court considered the constitutionality of a law that criminalized all abortions. In striking down the statute, the court addressed the equality of women at some length, noting the protection of reproductive rights as an aspect of the human right to health protected by the Colombian Constitution. Further, the Colombian court expressed clear limits on the legislature's discretion over criminal matters, noting that the absolute ban on abortion violated the "fundamental right to dignity." The court concluded that the law must permit termination of pregnancy when, among other things, the continuation of the pregnancy "presents risks to the life or health of the woman." In short, the *Carhart* case bans a type of abortion regardless of the impact on women's health, while the Colombian case privileges protection of women's health over any objections to particular procedures, using human dignity as the centerpiece of its decision. When integrating the Colombian case into a domestic constitutional law class, it is worth mentioning that the notion of human dignity has also played a central role in recent U.S. jurisprudence, including *Planned Parenthood v. Casey* and *Lawrence v. Texas*. Reva Siegel's recent article, "Dignity and the Politics of Protection: Abortion Restrictions Under *Casey*/*Carhart*," provides excellent supplemental reading on this topic that can be used to draw these themes together.

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

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

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

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

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

- [discussion of K.L. omitted]