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**SERVE AND PROTECT(ION): WHY THE MILITARY  
ABORTION BAN IS AN UNCONSTITUTIONAL  
RESTRICTION ON A WOMAN’S RIGHT TO CHOOSE**

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CONTENTS

INTRODUCTION .....	186
I. THE HISTORY OF ABORTION LEGISLATION AND THE MILITARY RESTRICTION .....	188
A. <i>Finding a Right</i> .....	188
B. <i>Keeping with Precedent</i> .....	191
C. <i>Adopting the Undue Burden Standard</i> .....	193
D. <i>The Military Abortion Ban</i> .....	194
II. CONSENSUAL SEX SHOULD NOT IMPLY AN ASSUMPTION OF THE RISK OF PREGNANCY .....	195
A. <i>Exception to the Ban in the Case of Rape</i> .....	196
B. <i>A Right to Engage in Sex for Itself</i> .....	198
C. <i>Voluntarily Engaging in Sex Should Not Change the Right</i> .....	200
1. <i>AIDS and Pregnancy</i> .....	200
2. <i>The Problem of Organ Transplants</i> .....	201
III. CURRENT MILITARY RATIONALES FOR THE BAN ARE UNFOUNDED.....	202
A. <i>Opposition Based on Federal Funding</i> .....	203
B. <i>Respect for the Host Nation</i> .....	204
C. <i>The Preservation of Human Life</i> .....	204
D. <i>The Ban Actually Impedes Military Preparedness</i> .....	205
IV. THE MILITARY ABORTION BAN FAILS THE UNDUE BURDEN TEST.....	207
A. <i>The Undue Burden Standard as Applied Domestically</i> .....	207
1. <i>Planned Parenthood Arizona, Inc. v. Humble</i> .....	207
2. <i>Jackson Women’s Health Organization v. Currier</i> .....	208
3. <i>Planned Parenthood of Idaho, Inc. v. Wasden</i> .....	209

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<i>B. Subjecting the Military Ban to the Undue Burden Standard</i> .....	209
CONCLUSION.....	211

## INTRODUCTION

“You hear these legends of coat-hanger abortions [in the military] . . . but there are no coat hangers in Iraq. I looked.”<sup>1</sup> The woman who was forced to search for wire hangers abroad was a female Marine who had been stationed in Iraq when she found out she was pregnant.<sup>2</sup> Because she was not eligible for an on-base abortion due to the military prohibition against the procedure and afraid to tell her unit commander for fear of retaliation, she resorted to self-help.<sup>3</sup>

Using herbal abortifacients that she ordered online, she decided to self-abort.<sup>4</sup> “Unable to find a coat hanger she used [a] sanitized rifle cleaning rod and a laundry pin to manually dislodge the fetus while lying on a towel on the bathroom floor.”<sup>5</sup> She continued to work for five weeks, only to realize, amid grave sickness, that she was still pregnant.<sup>6</sup>

She attempted the procedure again and after dangerously hemorrhaging, she finally told a female supervisor, who suggested she take an emergency leave to fly back to the United States where a private abortion clinic could finish the procedure.<sup>7</sup> Because she was afraid that she might miscarry on the plane, she decided to go to the hospital on base and explain to the doctor on call what had happened.<sup>8</sup> While in the hospital, her first sergeant came to her room to announce that she would be punished for having had sex in a war zone, a ban that has now been

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1. Kathryn Joyce, *Military Abortion Ban: Female Soldiers Not Protected by Constitution They Defend*, RELIGION DISPATCHES (Dec. 17, 2009), <http://religiondispatches.org/military-abortion-ban-female-soldiers-not-protected-by-constitution-they-defend/>.

2. *Id.*

3. *Id.* At the time of publication, there was a still a ban on having sexual relations in a war zone. *Id.* That ban has since been lifted. See Nancy Montgomery, *Will Abortion Law Change Help Female Soldiers?*, MILITARY.COM (Feb. 25, 2013), <http://www.military.com/daily-news/2013/02/25/will-abortion-law-change-help-female-troops.html>. There was also a great stigma surrounding pregnancy in the military as many looked upon it as a way to avoid service. *Id.* Many high ranking officials within the military also view pregnancy as an inconvenience and some have even been quoted as preferring abortion over pregnancy due to the burden that pregnancy places on service. *Id.*

4. Joyce, *supra* note 1.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

partially lifted.<sup>9</sup> That night, she miscarried alone in her shower.<sup>10</sup> Fearful that she also might be charged for having obtained an abortion, she flushed the remnants of the fetus down the toilet. She was fined \$500 and given a suspended rank reduction.<sup>11</sup>

After the ordeal, she was ultimately sent home from Iraq, “after a military psychiatrist determined that she was ‘too psychologically unstable’ to remain and diagnosed her with acute anxiety, PTSD, and depression.”<sup>12</sup> She went on to say that “[the military officials] convinced themselves that anyone who would do a self-abortion [was] crazy . . . [but] it’s not a crazy thing. It’s something that rational, thinking women do when they have no options.”<sup>13</sup>

Although the Marine in the story above has, just like every other American female, a right to an abortion as established by *Roe v. Wade*,<sup>14</sup> the right is not an unqualified one, and women who serve in the military bear the burden of a nearly impenetrable restriction to access. Current Department of Defense policy, while allowing for abortion in the case of rape, incest, or danger to maternal health, prohibits any elective abortion from being performed on a military base, even if fully financed by the woman through private funds.<sup>15</sup> This policy raises serious concerns of equal protection since it treats servicewomen as a class separate and apart from the civilian women they are fighting to protect. This Note demonstrates that this debate is not about whether one believes a woman should have this choice, but instead it is about allowing all women, who have a constitutionally granted right, to exercise that right in the same capacity. The military servicewoman is no different than her civilian counterpart—and she has this choice.

The goal of this Note is to demonstrate that the military abortion ban deserves no special deference and should be seen as unconstitutional under *Casey*’s undue burden standard. Part I provides an overview of abortion case law since the inception of the right in 1973 as well as a brief overview of the provisions of the military ban and the

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9. Drew Brown, *Ban on Sex for Soldiers in Afghanistan Lifted . . . Sort of*, FREE REPUBLIC (May 15, 2008), <http://www.freerepublic.com/focus/f-news/2021470/posts>; see Joyce, *supra* note 1.

10. Joyce, *supra* note 1.

11. *Id.*

12. *Id.*

13. *Id.*

14. See generally 410 U.S. 113 (1973), *holding modified*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

15. Amy E. Crawford, *Under Siege: Freedom of Choice and the Statutory Ban on Abortions on Military Bases*, 71 U. CHI. L. REV. 1549, 1554 (2004) (quoting 10 U.S.C. § 1093(b) (2000)).

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reasoning behind its implementation.

Part II discusses in detail why engaging in consensual sex in the military should not mean an assumption of the risk of pregnancy. The importance of this argument is to show that if the military was to view consensual sex as only taking a risk of pregnancy as opposed to assuming it, then it would be faced with a situation similar to the exception it holds in rape cases. Part II also touches upon why the resulting dependency of a third party, in this case the creation of a life, is still not grounds for restricting a constitutional right, even if the creation of that life resulted from a voluntary choice made by the woman. Essentially a woman should not be punished simply because her choice to engage in sex affects another being, even if lending the most conservative definition to when “life” begins.

Part III provides all of the current military rationales for the ban and explains why each is too weak to support a restriction of a fundamental right. Without a strong purpose, such as national security, to support the abortion ban, it should not receive any deference and should instead be subject to the undue burden standard as promulgated in *Casey*.

Finally, Part IV applies the undue burden standard to the military abortion ban and explains why the ban has both the purpose and effect of restricting access to the procedure, making it a per se violation of the standard. The unconstitutionality of the ban is further evidenced by recent circuit court decisions, which have applied the undue burden standard and struck down restrictions that were much less severe than the military ban.

## I. THE HISTORY OF ABORTION LEGISLATION AND THE MILITARY RESTRICTION

The military abortion ban is an outgrowth of a long history of abortion law that has changed since the right was first recognized in the 1970s. While a woman’s right to choose is still a fundamental freedom, how it is now framed is much different than its first iteration.

### A. *Finding a Right*

In 1973, the Supreme Court held in *Roe v. Wade* that all women had a fundamental right to an abortion that could not be taken away by the state.<sup>16</sup> The case reached the Supreme Court after “Jane Roe” brought an action on behalf of herself and all other affected pregnant

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16. *Roe*, 410 U.S. at 154.

women to overturn a Texas statute that criminalized the procurement of an abortion for any reason other than saving the life of the mother.<sup>17</sup> Roe was unmarried and pregnant, and wished to terminate her pregnancy by an abortion “performed by a competent, licensed physician, under safe clinical conditions.”<sup>18</sup> Due to the criminal statute, however, she was unable to obtain a legal abortion because her life did not appear to be threatened by the continuation of her pregnancy.<sup>19</sup> Because she did not have the means necessary to travel to another jurisdiction to secure the procedure, she was ultimately forced to carry the child to term.<sup>20</sup>

In her brief in support of her position, Roe relied on the concept of personal liberty that had been established by the Court in *Griswold v. Connecticut* and *Eisenstadt v. Baird* to assert that the Texas statute invaded a right possessed by a pregnant woman to choose to terminate her pregnancy.<sup>21</sup> The Court had previously decided in *Griswold* that the Constitution included a right to privacy, which was large enough to encompass a penumbra of rights (one of which being reproductive freedom) that must be protected from overt governmental intrusion.<sup>22</sup> In *Eisenstadt*, the Court relied in part on its decision in *Griswold* and invalidated a state statute that prohibited unwed couples from obtaining contraception.<sup>23</sup> The Court held that if the right to privacy is to have any meaning at all it must be construed so that it includes “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision of whether to bear or beget a child.”<sup>24</sup>

In deciding *Roe*, the Court relied on this past precedent and held the Texas statute criminalizing abortion unconstitutional.<sup>25</sup> The Court cautioned, however, that a woman’s right to privacy when terminating a fetus was not an unqualified right.<sup>26</sup> The Court reasoned that since the fetus carried inside the womb had the potential to become a living being, the privacy right retained by the woman was inherently different

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17. *Id.* at 117–18.

18. *Id.* at 120.

19. *Id.*

20. *Id.* at 125.

21. *Roe*, 410 U.S. at 129 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972)).

22. *Griswold*, 381 U.S. at 484–86.

23. *Eisenstadt*, 405 U.S. at 442–43, 450.

24. *Id.* at 453.

25. *Roe*, 410 U.S. at 153–54.

26. *Id.* at 153.

than what had been recognized in previous cases.<sup>27</sup> The Court opined that:

[I]t is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.<sup>28</sup>

The Court declined to comment on the question of when life began, stating that when "respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."<sup>29</sup> The Court, however, agreed with Texas in its point that there did exist a recognizable state interest in matters of abortion and, even if no consensus exists as to the definition of what constitutes life, the Court could still create a tri-partite scheme for regulating the procedure.<sup>30</sup> While Texas was not able to override the rights of a pregnant woman, it did have a legitimate interest in "preserving and protecting" the health of the mother as well as a separate and distinct interest in protecting the potential human life she carried within her womb.<sup>31</sup> Both interests, according to the Court, were not present in the same proportions from conception to birth.<sup>32</sup> Instead, each interest grew in substantiality as the woman approached the end of the pregnancy, and at identifiable points, each became compelling.<sup>33</sup> It was only when these interests became compelling that the state could regulate freely.<sup>34</sup> Because the Court had decided to recognize a specific fundamental right, any state regulation of the procedure would then be subjected to the highest level of review—that of strict scrutiny—thus explaining why the state's justification had to be compelling.<sup>35</sup>

With respect to the state's legitimate interest in protecting the health of the mother, this interest only became compelling at the end of the first trimester.<sup>36</sup> The reason for this decision was that the mortality rate for abortions obtained prior to the end of the first trimester was so

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27. *Id.* at 159.

28. *Id.*

29. *Id.*

30. *Roe*, 410 U.S. at 163–64.

31. *Id.* at 162.

32. *Id.* at 162–63.

33. *Id.* at 163.

34. *Id.*

35. *See generally* *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

36. *Roe*, 410 U.S. at 163.

low that it was actually a less dangerous prospect than carrying a fetus to term; therefore, the state had little room to regulate in any significant way.<sup>37</sup> After this point, a state could regulate the abortion procedure only to the extent that the regulation was “reasonably related” to the protection of maternal health.<sup>38</sup> Regarding the state’s interest in potential life, the Court decided that the compelling point would be when the fetus became viable—that is, when it had the “capability of meaningful life outside the mother’s womb.”<sup>39</sup> After the point of viability, the state had both a logical and biological justification in regulating the decision to abort a fetus and could even go so far as to proscribe abortion so long as the procedure was not deemed necessary to preserve the life of the mother.<sup>40</sup>

In creating the trimester framework, the Court acknowledged a state interest that grew substantially over time, against a mother’s right to reproductive freedom, vested in her right to privacy, which ran throughout the entire framework and remained compelling from beginning to end.<sup>41</sup> The omnipresence of that right throughout the pregnancy ensured, as the Court had promised, that the woman’s right to abortion would not become subordinate to the state’s interest. The establishment of the right, however, did not mark the end of the conversation.<sup>42</sup> After the decision in *Roe*, the controversy over whether or not such a right should be recognized as fundamental heated up tremendously.

### *B. Keeping with Precedent*

In *City of Akron v. Akron Center for Reproductive Health, Inc.*, the Supreme Court held provisions of an ordinance dealing with the performance of all second-trimester abortions unconstitutional and invalid.<sup>43</sup> In coming to its answer, the Court reaffirmed its decision in *Roe* and stated that any regulations, which had the goal of either preventing a woman from obtaining an abortion or which were meant to dissuade a woman from choosing an abortion, were unconstitutional.<sup>44</sup> The decision was a victory for those fighting to protect the right to an

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 163.

41. *Roe*, 410 U.S. at 162–63.

42. *Id.* at 153.

43. 462 U.S. 416, 438–39 (1983), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

44. *Id.* at 438.

abortion, but it was Justice O'Connor's dissent that would soon prove more influential than the reiteration of *Roe*'s core.

Justice O'Connor argued that the *Roe* trimester framework had proven unworkable because it could not be used to support both the state's interest and the woman's right.<sup>45</sup> She argued that advancements in medical technology had now made abortions a much safer option, which was good news for those women seeking an abortion but bad news for a state that was trying to regulate the procedure.<sup>46</sup> The advancements had blurred the line between when the right to privacy controls and when the state could step in to regulate on behalf of maternal health.<sup>47</sup> With so little risk to the mother during the early term, regulations that were once permissible were now held unconstitutional under the *Roe* framework.<sup>48</sup>

According to O'Connor, the *Roe* trimester approach was on a "collision course with itself" because:

As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to[ward] actual childbirth [and a]s medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.<sup>49</sup>

When analyzing *Roe*, the Court had to concern itself not only with the woman's right to an abortion but also with the state's interest, thus making the decision not one of a blanket nullification of every regulation on abortion, but one where the Court had to look at the nature of the interference caused by that specific regulation.<sup>50</sup> This meant, as analyzed by O'Connor, that the right founded in *Roe* only protected the woman from "unduly burdensome interference" with her freedom to decide whether to terminate her pregnancy.<sup>51</sup> In advocating for a lower level of review, Justice O'Connor stated that case law supported the assertion that the state interference must "infringe substantially" or "heavily burden" a right before heightened scrutiny could be applied.<sup>52</sup> If the impact of the regulation does not rise to that level then the inquiry must be "limited to whether the state law bears 'some rational

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45. *Id.* at 453–54 (O'Connor, J., dissenting).

46. *Id.* at 455.

47. *Id.* at 453–54.

48. *City of Akron*, 462 U.S. at 434.

49. *Id.* at 458 (O'Connor, J., dissenting).

50. *Id.* at 461.

51. *Id.*

52. *Id.* at 462.



relationship to legitimate state purposes.”<sup>53</sup>

### *C. Adopting the Undue Burden Standard*

Justice O’Connor’s dissent in *City of Akron* provided the legal basis for the modification of *Roe* that was adopted by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* and which provides the modern reformation and application of the abortion right in today’s legal jurisprudence.

*Casey*, decided in 1992, reaffirmed a woman’s right to an abortion, but it quieted the majority in *City of Akron*, as it upheld some of the same regulations that had been struck down in that case.<sup>54</sup> In a new effort to protect the central right recognized by *Roe* but also to accommodate the state’s profound interest in potential life, the Court echoed Justice O’Connor’s previous dissent and employed the undue burden analysis as binding law.<sup>55</sup> An undue burden existed, the Court rationalized, if the law is meant, in “purpose or effect to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>56</sup> In adopting the undue burden standard, the Court rejected the trimester framework as too rigid and dismissive of the state’s interest in potential life.<sup>57</sup> By extricating the trimester framework from abortion doctrine and lowering the level of review from strict scrutiny to an undue burden analysis, the state was now free to ensure that a woman’s choice was informed.<sup>58</sup> Any measure designed to this end—that is “to inform”—would now be upheld even if the purpose was to persuade the woman to choose childbirth over abortion.<sup>59</sup> Any unnecessary health regulations that had the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion would be viewed as imposing an undue burden on the right.<sup>60</sup> The Court was insistent that adoption of the undue burden standard did not disturb the central holding of *Roe*, since the ultimate decision of whether or not to terminate a pregnancy before viability still rested with

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53. *City of Akron*, 462 U.S. at 462 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973)).

54. *See generally* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879, 881 (1992).

55. *Id.* at 878.

56. *Id.*

57. *Id.* at 872.

58. *Id.*

59. *Casey*, 505 U.S. at 883.

60. *Id.*

the woman.<sup>61</sup>

In reframing the abortion right, the Court recognized that the ability of a woman to control her reproductive health was inextricably linked to her ability to perform equally in the economic and social life of the nation and that “[t]hese matters[] involv[ed] the most intimate and personal choices a person may make in a lifetime.”<sup>62</sup> Choices such as these, which are “central to personal dignity and autonomy,” are also “central to the liberty protected by the Fourteenth Amendment.”<sup>63</sup> Abortion, however, was a “unique act” since it had far-reaching implications not only for the woman but for the “person[] who perform[ed] and assist[ed] in the procedure; for the spouse, [for the] family, and [for] society, which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life.”<sup>64</sup> It was this need for balancing the interests of others against the right of the woman to terminate her pregnancy that caused the Court to adopt the undue burden standard.<sup>65</sup> While *Casey* upheld the fundamental right first recognized in *Roe*, the new standard of review allowed for many restrictions that had once been considered a violation of that right to be upheld as constitutional.<sup>66</sup> An outright prohibition of the right even today, however, is still not allowed until after the fetus has reached viability.<sup>67</sup>

#### *D. The Military Abortion Ban*

Despite the undue burden standard, women in the military who are based overseas are prohibited from obtaining an on-base abortion according to current Department of Defense policy.<sup>68</sup> The statute regarding prepaid abortions, meaning abortions paid for by the woman through personal funds, provides that:

No medical treatment facility or other facility of the Department of Defense may be used to perform an abortion except where the life of the mother would be endangered if the fetus were carried to term or in a case in which the pregnancy is the result of an act of rape or incest.<sup>69</sup>

The military justifies the ban as the only way to ensure that no federal

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61. *Id.* at 879.

62. *Id.* at 851.

63. *Id.* at 851 (emphasis added).

64. *Casey*, 505 U.S. at 852.

65. *Id.* at 876.

66. *Id.*

67. *Id.* at 846.

68. Crawford, *supra* note 15, at 1554.

69. *Id.* (quoting 10 U.S.C. § 1093(b) (2000)).

funds are used to support abortions, which might suggest a federal endorsement of the practice.<sup>70</sup> Members of Congress have also justified the ban as a means of preserving morale, as the mission of the armed forces is “to preserve human life.”<sup>71</sup>

If a woman wishes to obtain an abortion, she must ask for leave from her military commander to travel to the United States, a request he is not required to grant, and even if granted it will be time that is unpaid and may put her job in jeopardy.<sup>72</sup> If she does not wish to request leave, she must seek an abortion in the host country, which can be risky and even impossible if abortion is illegal in the nation where she is stationed.<sup>73</sup>

Due to the military’s need to ensure preparedness in high security situations, courts have always given due deference to such regulations, even when they impinge on a fundamental right.<sup>74</sup> Despite the fact that most women who are in need of abortions on military bases are unable to secure them by going outside of the base, or may not have the funds or opportunity to fly to the United States for the procedure, the Court has not, as of yet, seen this as an undue burden.

## II. CONSENSUAL SEX SHOULD NOT IMPLY AN ASSUMPTION OF THE RISK OF PREGNANCY

In most abortion statutes there are usually exceptions to any restriction placed upon the right, most of which are dependent upon how the fetus was conceived.<sup>75</sup> In the context of the military, an exception is made if it can be proven that the pregnancy was the consequence of a rape.<sup>76</sup> By exempting rape pregnancies, however, the military highlights a disconnection between its policy goals for instituting the ban and the resulting outcome when allowing the exception. From a theoretical perspective, the outcome is totally illogical, and from a legal perspective, the outcome balks at good precedent.

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70. *Id.* at 1555–56.

71. *Id.* at 1557. While the pronoun “he” is used to refer to commanders in the armed forces, I do not mean to suggest that all commanders are men; however, it has been reported that most officers are disproportionately male throughout all branches. *See* Daniel Sagalyn, *Report: Military Leadership Lacks Diversity at Top*, PBS NEWSHOUR (Mar. 11, 2011, 5:11 PM), <http://www.pbs.org/newshour/rundown/military-report/>.

72. Crawford, *supra* note 15, at 1570.

73. *Id.* at 1570–71.

74. *Id.* at 1559.

75. *State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INSTITUTE (Oct. 1, 2015), [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf).

76. Crawford, *supra* note 15, at 1554 (quoting 10 U.S.C. § 1093(b) (2000)).

*A. Exception to the Ban in the Case of Rape*

In the military there are three exceptions to the ban on abortions: if the life of the mother is in danger, if the fetus is the product of incest, or if the fetus is the product of rape.<sup>77</sup> In the case of life endangerment, the military may allow the abortion based on an interest in maternal health. In the case of incest, the military may regulate based on an interest in potential life of the fetus.<sup>78</sup> These are the two interests that the Court has carved out for regulations, meaning that any regulation that the military imposes must serve one of these purposes.<sup>79</sup> The rape exception, however, poses logical complications when trying to regulate based on one of these two interests.

Putting aside the abhorrence that is so closely connected to the act of rape, neither interest—maternal health or life of the fetus—is affected by rape. Biologically, a woman can carry a fetus that is the product of forced sex to term with little risk to her or the potential life. Because of this, the two interests that the military can regulate on behalf of are not present in the case of rape. Therefore, the only difference that distinguishes an abortion because of rape from an abortion because of consensual sex is the consent. Logically it breaks down as follows: when a woman is raped, she is not consenting to the physical act of having sex and therefore she cannot consent to becoming pregnant; in the case of consensual sex, the military assumes that if a woman consents to sex she is implicitly consenting to becoming pregnant, or at least assuming the risk of pregnancy should it occur.<sup>80</sup> It should not have to be stated that many women choose to engage in sex without choosing to become pregnant, essentially consenting to the physical act only, but not to carrying an unwanted pregnancy to term. If consensual sex is analyzed to mean the above, that the woman was only consenting to sex and not to pregnancy, the military would not be able to proscribe abortion. The reason for this is that the consensual sex would now be similar to the case of rape where a woman is allowed to terminate her pregnancy since she did not consent to being held responsible for it. Since the military has already established that non-consent to pregnancy is a legitimate ground for an abortion, then if consensual sex were

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77. Memorandum from the Assistant Sec'y of Def. to the Sec'ys of the Military Dep'ts (Feb. 13, 1996), <http://www.health.mil/~media/MHS/Policy%20Files/Import/96-030.ashx>.

78. *Id.*

79. *See generally* Roe v. Wade, 410 U.S. 113, 117, 154, 163 (1973).

80. Alec Walen, *Consensual Sex Without Assuming the Risk of Carrying an Unwanted Fetus*; *Another Foundation for the Right to an Abortion*, 63 BROOK. L. REV. 1051, 1067 (1997).

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analyzed to mean consent to sex only, the ban would not be able to stand.

To elaborate on this concept further, it is important to distinguish taking a risk, which is what happens during consensual sex, from assuming a risk.<sup>81</sup> There are instances where one thing logically entails another and in such cases an argument could be made that when someone engages in *A*, he or she assumes the risk of *B*.<sup>82</sup> For example, if one consents to a boxing match then one consents to being punched in the face because there is no way to consent to a boxing match without assuming the risk of getting hit in the face—after all, that is the whole concept behind the sport.<sup>83</sup> In another case, a risk can be assumed when *A* is merely a way of reaching an end goal known as *B*, making anything that happens in between an assumption of risk.<sup>84</sup> For example, if a person consents to taking out student loans to go to college then he assumes the risk of suit should he not be able to pay. Between the end of college and his loans coming due he may not get a job and he may default; however, he assumed this risk here because he consented to the loans to reach the end goal—that of going to college.

Consensual sex and pregnancy, however, are two things that are not linked in the same way as the above examples. Sex can be used as a means of having children, but it can also be engaged in for itself. Therefore, pregnancy is not always the end goal and should not be treated as such, unlike the loan example. Sex does not always entail pregnancy, or said another way, it is not always something that naturally occurs when engaged in intercourse, unlike the boxing example.<sup>85</sup> In fact, even when a woman tries to become pregnant, the odds of conceiving on a particular occasion are relatively low.<sup>86</sup>

Therefore, by engaging in consensual sex a woman may take a risk of pregnancy but she should not be thought of as assuming that risk, meaning that her right to choose to abort an unwanted fetus should not be restricted by the military simply because she chose to be sexually active. It is unreasonable to expect women in the military not to engage in sex at all. Both men and women have biological needs that may seem base to some but are nonetheless important to the health and vitality of their lives. Back in 2008, the military recognized this and partially lifted

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81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Walen, *supra* note 80, at 1067–68.

86. *Id.*

the ban on sexual relations in a combat zone.<sup>87</sup> If the military recognizes sexual relations as a human need, then one gender should not be excluded from engaging in the act simply because of a restriction that makes an accident too difficult to rectify.

*B. A Right to Engage in Sex for Itself*

In ruling on right to privacy issues, the Court has stated that men and women engage in sex for many reasons, not just to become pregnant.<sup>88</sup> In *Griswold*, the Court reasoned that not allowing a married couple to engage in sex for itself was a repulsive intrusion into the privacy of the marital relationship.<sup>89</sup> In *Eisenstadt*, building on its work in *Griswold*, the Court stated that it was unconstitutional for a state to prohibit unmarried couples from obtaining contraception.<sup>90</sup> In order to give the right of privacy substance, the Court stated that it must be “the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision [of] whether to bear or beget a child.”<sup>91</sup> In *Skinner v. Oklahoma*, the Court invalidated a statute that allowed for sterilization of criminals based on the nature of the offense.<sup>92</sup> There, the Court argued that the right to procreate is a fundamental interest that cannot be denied by the state.<sup>93</sup> As the Court poignantly wrote, the ability to give over to the state the choice of whether or not to create life may have “subtle, farreaching and devastating effects.”<sup>94</sup> Even in promulgating the undue burden standard in *Casey*, the Court relied upon the idea that a woman’s right to an abortion is more than just the decision to terminate a pregnancy.<sup>95</sup> Instead, it is a right to “personal autonomy,” one that would allow the woman to define her life as she sees fit—a decision which is at the heart of constitutional protections.<sup>96</sup> This idea was first seen in a footnote included in Justice Stevens’s concurrence in *Thornburgh v. College of American Obstetricians*, where Justice Stevens wrote that the ability to define oneself and determine his or her

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87. *Brown*, *supra* note 9.

88. *See Griswold v. Connecticut*, 381 U.S. 479, 486 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

89. *Griswold*, 381 U.S. at 486.

90. *Eisenstadt*, 405 U.S. at 453.

91. *Id.*

92. 316 U.S. 535, 541 (1942).

93. *Id.*

94. *Id.*

95. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 857 (1992).

96. *Id.*

own life are two of the most intimate expressions of liberty, and it is only through allowing a person this space to create his or her own conception of himself that the concept of liberty gains real substance.<sup>97</sup>

In 2003, the Court again took up the concept of intimate conduct in *Lawrence v. Texas*.<sup>98</sup> Here, the Court used *Casey* to come to the decision that Texas did not have the right to criminalize homosexual sodomy.<sup>99</sup> Quoting *Casey*, the Court stated that intimate conduct and how one chooses to practice said conduct are central to the liberty of the Fourteenth Amendment and “beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>100</sup> People “are entitled to respect for their private lives [and t]he state cannot demean their [choices] or control their destiny” by labeling a decision regarding intimate conduct as wrong or criminal.<sup>101</sup>

It is not for the courts or a state legislature to define whether a woman will be a mother or whether any person will be something that they wish not to be. In the 2015 decision *Obergefell v. Hodges*, the Court said as much when it stated that the purpose of the Fourteenth Amendment is to protect personal choices “central to individual dignity and autonomy, including intimate choices that define personal identity.”<sup>102</sup>

Case law clearly supports the idea that sex is much more than a vehicle for procreation. It is an act that two people decide to engage in to define a relationship, a lifestyle, or an expression of deeper feelings. It cannot and should not be simplified to pregnancy alone. While many might engage in sex for that reason, many do not. To conflate the two would be both a denigration of human sexual relationships and a weakening of a body of case law that has been relied upon to suggest that intimate conduct is for the person, not the state, to control. While the military does enjoy deference at times, this deference should not extend so far that it obliterates the application of the constitutional law that is uniformly applied on American soil. The military does not have the right to obstruct a woman’s access to abortion, unless it can proffer a compelling reason that would outweigh her liberty interest in defining her intimate conduct for herself. Vague or incomplete rationales should not be enough to deny the full protections of the Constitution to the

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97. 476 U.S. 747, 777 (1986).

98. 539 U.S. 558 (2003).

99. *Id.* at 574.

100. *Id.* (quoting *Casey*, 505 U.S. at 851).

101. *Id.* at 578.

102. 135 S. Ct. 2584, 2597 (2015).

servicewomen who are risking their lives to protect those same freedoms.

*C. Voluntarily Engaging in Sex Should Not Change the Right*

Those who support the military ban would probably argue that, even in the face of case law or questionable military exceptions, if a woman has engaged voluntarily in the act of sex then she should be held accountable to the fetus due to its dependence on her womb for life. Therefore, if she is frustrated in her attempts to procure an abortion while on duty, that is not the problem of the military. Dependence, however, does not lead to responsibility in regular American society, and so it should not be supplied as a legitimate reason for restricting access in the abortion context. Again, the argument is not about the expansion of a right to abortion for servicewomen but instead about matching a servicewoman's access to the procedure to that of her civilian counterparts.

*1. AIDS and Pregnancy*

To keep within the context of pregnancy, suppose a woman who is infected with AIDS decides to have a child. According to the Centers for Disease Control (CDC), "from 1982 to 1985, children with AIDS who were reported to the CDC survived a median of nine months after diagnosis, and 75% died within two years."<sup>103</sup> With increased awareness of the disease and new methods of treatment, those numbers have decreased dramatically in the United States but perinatal transmission of the disease is still the leading cause of AIDS deaths.<sup>104</sup> "From the beginning of the epidemic through 2009, an estimated 5,626 people who were diagnosed with AIDS died and of that total 89% of them were infected perinatally."<sup>105</sup> A woman, however, is not restricted from carrying a pregnancy to term even if there is a high probability the fetus will die. The woman is also not required to take the appropriate medications to ensure that the fetus does not become infected with the disease.<sup>106</sup> Regardless of the fetus's dependence on the mother, in many

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103. James Bopp, Jr. & Deborah Hall Gardner, *AIDS Babies, Crack Babies: Challenges to the Law*, 7 ISSUES L. & MED. 3, 10 (1991) (citing Martha F. Rogers et al., *Acquired Immunodeficiency Syndrome in Children: Report of the Centers for Disease Control National Surveillance, 1982 to 1985*, 79 PEDIATRICS 1008, 1012 (1987)).

104. *HIV Among Pregnant Women, Infants and Children*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 19, 2015), <http://www.cdc.gov/hiv/risk/gender/pregnantwomen/facts/>.

105. *Id.*

106. Bopp & Gardner, *supra* note 103. In *Cruzan v. Director, Missouri Department of*



ways she is not responsible for protecting its health, unless the activity in which she is engaged is illegal. If she carries the fetus to term and it dies, she is guilty of no crime.

This scenario highlights that even through a conscious failure to protect the potential life of a fetus, the mother cannot be held responsible for its death even though she made the choice to become pregnant and ultimately caused its demise. Both an abortion and the actions of this reckless mother are symptomatic of termination, but it is only the post-conception, pre-birth action that is scrutinized. If dependence is only taken into consideration when it comes to voluntary sex resulting in pregnancy—as opposed to any other set of facts—then its use as a justification for upholding the ban is weak, if existent at all.

## 2. *The Problem of Organ Transplants*

Taking another example, suppose someone voluntarily engages in smoking for many years and then develops emphysema. He is told that his life depends on a lung transplant, and he is put on a recipient list. In the United States, there is a shortage of organ donors, with twenty-two people dying per day while awaiting a transplant.<sup>107</sup> While many factors are taken into account when assigning organ donations, one's worthiness or culpability for his or her own situation are not evaluated during the decision process.<sup>108</sup> This could mean that a child who is born with a biological defect will die because of a self-inflicted choice another made. Some argue that because one knew the risks of smoking, he should assume the risk of disease and be deemed less worthy for a transplant; however, the medical community is loath to make such distinctions.<sup>109</sup>

Making the analogy even more general, whether a person even chooses to donate an organ, whether in life or posthumously, is a choice

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*Health*, the Supreme Court held that an individual has a constitutionally protected right to refuse medical treatment as part of their right to self-definition. 49 U.S. 261, 278 (1990). Currently there is no congressional policy that forces an HIV+ person to treat the disease with medication, just like there is no policy that an individual treat any condition she has, from the most benign to the most severe. See Michael Ulrich, *With Child, Without Rights?: Restoring A Pregnant Woman's Right to Refuse Medical Treatment Through the HIV Lens*, 24 YALE J.L. & FEMINISM 303 (2012). It could be that the state might be able to proffer a compelling interest in the abortion context to insist an HIV+ pregnant woman take medication, but the courts have not entertained this question at this time. *Id.*

107. *Organ Procurement & Transplantation Network*, U.S. DEP'T HEALTH & HUM. SERVS., <http://optn.transplant.hrsa.gov/> (last visited Oct. 25, 2015).

108. Brenda Paul et al., Ctr. for Bioethics, *Ethics of Organ Transplantation*, U. MINN. (Feb. 2004), [http://www.ahc.umn.edu/img/assets/26104/Organ\\_Transplantation.pdf](http://www.ahc.umn.edu/img/assets/26104/Organ_Transplantation.pdf).

109. *Id.*

that many refuse to make. Such choices affect sick individuals across the nation and arguably lead to thousands of deaths every year. While people in the United States are acutely aware of the problem, at least on some level, they do not feel any responsibility to save their fellow man, and neither Congress nor the courts have restricted their right to say no, even if someone else dies as a result.<sup>110</sup>

Based on the foregoing, it cannot be that just because a woman made the voluntary choice to have sex and some sort of dependence by a third party results, she should be held responsible for that third party's welfare. Again, if she has only consented to sex, meaning she was not in the process of trying to conceive, she should be allowed to deal with it in the way she feels to be best, regardless of whether or not the intimate conduct was consensual.

To echo Justice Powell in *Maher v. Roe*, "when stripped of the sensitive moral arguments surrounding the abortion controversy, [abortion and childbirth] are simply two alternative medical methods of dealing with [a] pregnancy."<sup>111</sup> Because of this sentiment, a servicewoman should not be restricted by the military from undertaking whichever procedure she believes to be best, particularly if she is risking her own life to protect these same freedoms for others.

### III. CURRENT MILITARY RATIONALES FOR THE BAN ARE UNFOUNDED

When it comes to the military, the courts will often allow a litigant's constitutional rights to be burdened due to an unwillingness to overturn a military decision.<sup>112</sup> Courts will often bend over backward to uphold decisions made by, and with regard to, the military since deference must be given to ensure national security, even if fundamental rights are constrained in the process.<sup>113</sup> While the military enjoys judicial deference when its policies are reviewed, this does not mean that all regulations will gain blanket approval. If an implemented policy restricts a fundamental freedom and it does not have a purpose tied to national security, then the courts will be much more likely to invalidate it.<sup>114</sup>

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110. See generally Div. of Transplantation, *Legislation and Policy*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.organdonor.gov/legislation/> (last visited Oct. 25, 2015).

111. 432 U.S. 464, 468 (1977).

112. Crawford, *supra* note 15, at 1561.

113. *Id.* at 1560 (citing *Able v. United States*, 155 F.3d 628, 634 (2d Cir. 1998); *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972); *Parker v. Levy*, 417 U.S. 733, 760-61 (1974); *Goldman v. Weinberger*, 475 U.S. 503 (1986)).

114. See generally *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1165 (9th

In *Frontiero v. Richardson*, the Court struck down a military regulation that forced a woman to prove that her husband was at least fifty percent dependent upon her in order to receive military benefits.<sup>115</sup> Men who served in the military did not have to undergo these same procedures, and so the Court struck down the regulation on equal protection grounds.<sup>116</sup> The rationale for the law had simply been administrative efficiency, and the Court said that such an interest, particularly since women were subject to a higher level of review based on gender equality, was not enough to uphold the law.<sup>117</sup>

This case highlights that there is no clear doctrinal dividing line between when to apply a higher standard of review and when to apply a more deferential standard.<sup>118</sup> It is clear, however, that when the purpose for a particular policy is national security, the Court will be loath to overturn a military decision as there does exist a real need to ensure that foreign policy leaders have enough authority and flexibility to deal with matters of extreme national importance as they arise.<sup>119</sup> In the context of the abortion ban, however, the reasons given for implementation of the policy do not suggest necessity based on national security and would be likely to fail even a slightly heightened level of judicial review.

#### A. *Opposition Based on Federal Funding*

The first rationale given to support the ban is congressional opposition to federal funds being used to perform abortions on a military base in violation of the Hyde Amendment.<sup>120</sup> While it is true that military hospitals may be run and funded by the federal government, the abortion ban specifically applies to women who are willing to use private funds to obtain the abortion, meaning all costs would come out of pocket—leaving little room for such a justification to be taken seriously.<sup>121</sup> Even under a deferential standard, the connection between this concern and reality seems too tenuous to count as a legitimate concern.

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Cir. 2011) (rendered moot due to appeal of Don't Ask Don't Tell Policy (DADT) but arguing in favor of the position that DADT was unconstitutional as it restricted a right and had no clear military objective).

115. 411 U.S. 677, 678–79 (1973).

116. *Id.* at 688.

117. *Id.* at 688–89.

118. Crawford, *supra* note 15, at 1562.

119. Thomasson v. Perry, 80 F.3d 915, 925 (4th Cir. 1996).

120. Crawford, *supra* note 15, at 1556 (the Hyde Amendment prohibits federal funds to be used to pay for elective abortions).

121. *Id.* at 1552–53.

*B. Respect for the Host Nation*

Another justification for the ban is the idea that the military should not conduct practices on its bases that host countries oppose.<sup>122</sup> This rationale also seems disingenuous because the mere presence of the military in a host country often presumes that customs and traditions are being violated every day, such as policies of race relations, religious practices, and respect for the foreign government and its leaders.<sup>123</sup> This justification is probably the hardest to support because its mere use as a reason for the ban undermines the options that the military does offer a pregnant woman wishing to abort.

To elaborate, one of the ways that the military has successfully avoided an argument over violation of *Casey*'s undue burden standard is to say that even if the procedure cannot be obtained on base, a woman can still go out into the host country and procure an abortion for herself.<sup>124</sup> If it is in fact the case that abortion is illegal in the host country, then she is certainly not able to obtain one and her right is restricted even further. On the other hand, if one is in a host country where abortion is widely accepted, then a policy of not allowing women to have the procedure would indeed go against the traditions of the host country. No matter if the procedure is legal or illegal in a host nation, this justification is hampered by severe logical cracks.

*C. The Preservation of Human Life*

The last justification proffered for the ban is that due to the controversial nature of abortion, awareness that such a procedure is occurring on a military base could hurt the morale of the armed services since the mission of the military is to "preserve human life."<sup>125</sup> This is a hard argument to support particularly because it can be used to justify either side of the issue.<sup>126</sup> While some may feel uncomfortable about access to the procedure on the base, women who are seeking it may be disheartened by the inability to exercise a constitutional right while defending American freedom.

Moreover, what servicemen and servicewomen must see and go through during war are not for the faint-hearted. Fellow comrades will die and others will lose limbs, capabilities, and perhaps even brain function. Countries will be torn apart in front of one's eyes and what is

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122. *Id.* at 1556.

123. *Id.* at 1556-57.

124. *Id.* at 1570.

125. Crawford, *supra* note 15, at 1557.

126. *Id.*

asked of a soldier during deployment will be more than the average citizen experiences in a lifetime. Bearing all of this in mind, it is hard to see how the awareness of one procedure could so deeply damage these men and women who are expected to live with the knowledge of much worse than a woman choosing to have an abortion while serving her country.

*D. The Ban Actually Impedes Military Preparedness*

History has demonstrated that when a larger public purpose exists, constitutional rights can be legally restricted or even taken away. In the case of the military draft, for example, young men were called to sacrifice their lives as part of a national demand to defend their country.<sup>127</sup> This might have been considered a sort of involuntary servitude by the courts if a mutual relationship did not exist between man and his country—one that is not necessarily present between man and another individual<sup>128</sup> (e.g., the organ donation problem that was analyzed above<sup>129</sup>). As a nation, the government exists to provide for the common welfare, and in return it may call upon the individual to protect those freedoms should the need arise.<sup>130</sup> If the need does indeed arise, the military will enjoy wide latitude to create the necessary policies in times of national crisis.<sup>131</sup>

During World War I, the U.S. Army was small compared with the armies of the European powers, with only 100,000 soldiers in as late as 1914 and by the time war was declared, only 73,000.<sup>132</sup> President Wilson realized that it would be both impossible to win the war with so few soldiers and impossible to increase that number by volunteer service only.<sup>133</sup> Seeing no other option, he thus accepted the Secretary of War's recommendation of a draft.<sup>134</sup> While the draft was a restriction on one's fundamental liberties, the military necessity of it at the time of implementation overrode those concerns.<sup>135</sup> Forcing a woman to carry an unwanted fetus to term, however, does not serve a similar public

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127. Walen, *supra* note 80, at 1071.

128. *Arver v. United States*, 245 U.S. 366, 390 (1918).

129. *See supra* Part II(C)(2).

130. *See id.*

131. *See id.*

132. MARK E. GROTELUESCHEN, *THE AEF WAY OF WAR: THE AMERICAN ARMY AND COMBAT IN WORLD WAR I*, at 11 (2007).

133. HOWARD ZINN, *PEOPLE'S HISTORY OF THE UNITED STATES: 1492–2001*, at 364 (2003).

134. *Id.*

135. *See Arver v. United States*, 245 U.S. 366, 390 (1918); *see also* U.S. CONST. amend. XIV.

purpose. Abortion, like pregnancy, serves a private purpose and should not be regulated or restricted by governmental or military policy. If a public purpose could be realized then perhaps a ban on the procedure, similar to the one seen on military bases, could be justified. For example, if there was a shortage of babies then it is conceivable that women could be drafted to produce more of them, but such is not the case.<sup>136</sup> In fact, in the military context, it might actually impede public purposes if abortion is prohibited.

First, if a woman chooses to undergo an abortion in an area with sub-standard medical practices, her risk of infection or death increases dramatically, and it will be the military's responsibility to absorb the medical costs of treating such injuries.<sup>137</sup> If a woman undergoes a privately funded abortion on a military base, however, the cost to the military is nonexistent.

A preference for childbirth means not only more medical costs for the military, but also more maternity leave and sick days, causing vital personnel to be called away from their duties at times of crisis.<sup>138</sup> Attrition rates will also likely be higher for new mothers in relation to their non-pregnant peers.<sup>139</sup> Finally, "the military assumes a higher degree of responsibility for youth raised on military bases than other employers."<sup>140</sup> "Federal law authorizes the Secretary of Defense to subsidize child care for servicepersons on active duty, and requires every military installation to have a 'youth sponsorship program to facilitate the integration of dependent children . . . into new surroundings' when a parent has relocated."<sup>141</sup>

In the past, the military has been quick to acknowledge the costs of childbirth to military readiness. In fact, it once had a mandatory "discharge of pregnant women" policy due to the high costs associated with children.<sup>142</sup> It was not until the political, anti-abortion movement gained momentum that the military outlawed the practice of abortion on military bases.<sup>143</sup>

Summarily, it seems that providing women with access to abortion procedures is actually better serving the public purpose of military

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136. Walen, *supra* note 80, at 1072–73.

137. Crawford, *supra* note 15, at 1575.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* (quoting 10 U.S.C. § 1785(a) (2000)).

142. Crawford, *supra* note 15, at 1576.

143. *Id.*; see Joyce, *supra* note 1 (regarding the attitude of military officials toward pregnancy).

efficiency than if such procedures are denied. Without a public purpose, the matter then becomes one of private purpose and choice, which as the Court has stated, is in the purview of the woman to decide, far away from governmental intrusion.<sup>144</sup> To burden that right with no important military objective as a justification is an unconstitutional restraint on a woman's right to choose.<sup>145</sup>

Without a legitimate reason to support a more deferential standard of review, the military ban must be subject to the same standard as found in all abortion cases—*Casey's* undue burden.

#### IV. THE MILITARY ABORTION BAN FAILS THE UNDUE BURDEN TEST

The undue burden standard states that if a law is meant in “purpose or effect to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability,” then the law is held to be unconstitutional.<sup>146</sup> Restrictions on the right have been upheld if the purpose is to educate, inform, or even “persuade the woman to choose childbirth over abortion.”<sup>147</sup> Favoring childbirth by making abortion too difficult to access, however, is per se impermissible under the undue burden standard. Thus, without a legitimate military rationale to overcome this standard, the ban must be struck down as unconstitutional on its face.<sup>148</sup>

##### A. *The Undue Burden Standard as Applied Domestically*

The circuit courts have applied the undue burden standard to abortion restrictions across the country and have found unconstitutional many regulations that do not come close to placing as heavy a burden on civilian women as the military ban places on servicewomen.

##### I. *Planned Parenthood Arizona, Inc. v. Humble*

In June of 2014, the Ninth Circuit held that the prohibition on the use of Mifeprex, a type of drug used in medicinal abortions, for off-label practices was an undue burden on a woman's right to choose.<sup>149</sup> The U.S. Food and Drug Administration had previously approved Mifeprex for use through seven weeks of pregnancy, but by the time the

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144. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 875 (1992).

145. *Id.* at 877.

146. *Id.* at 878.

147. Crawford, *supra* note 15, at 1567.

148. *See Casey*, 505 U.S. at 878–79.

149. *See generally* *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014).

approval process was finished, studies had shown that the drug was safe for use through nine weeks of pregnancy.<sup>150</sup> Weighing the extent of the burden against the strength of the state's justifications, the Ninth Circuit ruled that the state's reasoning was not strong enough to overcome the undue burden standard.<sup>151</sup> There was no evidence to suggest that the medicinal abortion would be any less safe than a surgical procedure at eight or nine weeks, and in fact, the only known consequence from the prohibition was increased costs for the woman seeking the abortion.<sup>152</sup>

Because many women fail to realize pregnancy until at least the seventh week, the Court stated that the regulation would have the effect of stopping some women from obtaining an abortion altogether because the additional costs and travel associated with a surgical procedure would pose an obstacle.<sup>153</sup> The Ninth Circuit recognized that even though the burden was seen as undue, not all women would be stopped from obtaining the surgical procedure since many would certainly take the necessary steps to schedule the procedure. The Ninth Circuit, however, was quick to note that the Supreme Court has never "held that a burden must be absolute to be undue."<sup>154</sup>

## 2. Jackson Women's Health Organization v. Currier

In the same year that the Ninth Circuit decided the above case, the Fifth Circuit held that a Mississippi statute, which would effectively close the only abortion clinic in the state, was unconstitutional.<sup>155</sup> The district court held in *Jackson Women's Health Organization v. Currier* that if the only abortion clinic in Mississippi was forced to close, women seeking the procedure would have to travel to a neighboring state, which created an undue burden, notwithstanding the length of distance involved.<sup>156</sup> Even if the travel involved was minimal, accepting the State's argument would result in "a patchwork system where constitutional rights are available in some states but not in others."<sup>157</sup>

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150. *Id.* at 907.

151. *Id.* at 917.

152. *Id.* at 915.

153. *Id.* (quoting *Tucson Women's Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004)).

154. *Humble*, 753 F.3d at 917 (citing *Tucson Women's Clinic*, 379 F.3d at 540–43).

155. *See generally* *Jackson Women's Health Org. v. Currier*, 760 F.3d 448 (5th Cir. 2014).

156. *Id.* at 455.

157. *Id.*



### 3. Planned Parenthood of Idaho, Inc. v. Wasden

In 2004, when reviewing the rights of a minor to obtain an abortion, the Ninth Circuit struck down a parental consent provision for emergency abortions as unconstitutional.<sup>158</sup> Under an Idaho statute, a minor could not receive an abortion in the case of a medical emergency without the consent of her parents.<sup>159</sup> According to the Ninth Circuit,

the Constitution required that a minor be able to bypass a parental consent requirement when she can establish that either: (1) she is mature enough and well-informed enough to make her abortion decision . . . or (2) even if she is not able to make this decision independently, the desired abortion would be in her best interests.<sup>160</sup>

The Ninth Circuit held that the failure to provide adequate exemptions for medical risks that might not be of sudden onset (a necessary element under the then emergency provision) or that might not require an *immediate* abortion was unconstitutional.<sup>161</sup> While the emergency abortion provision may not have inhibited a large number of minors from obtaining the procedure, the number of people affected was not the standard. The Court ruled that the right to an abortion needed more space to breathe, and the way it was then structured under the statute was too strict to be constitutional.<sup>162</sup>

#### *B. Subjecting the Military Ban to the Undue Burden Standard*

The undue burden standard has yet to be applied to the military abortion ban, but the restrictions a woman is faced with are much more severe than those mentioned above. For a woman on a military base who wishes to undergo an abortion, she “must either return to the United States or seek an abortion within the host country.”<sup>163</sup> “This creates risks that include denial of leave by a commanding officer, invasion of privacy, delay, inability to communicate with the operating physician, and substandard medical facilities or treatment.”<sup>164</sup> “A woman who seeks an off-base abortion will need to obtain leave from her commanding officer[, and that] may require revealing the circumstances of her request,” which could cause tension between her

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158. See generally *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908 (9th Cir. 2004).

159. *Id.* at 924.

160. *Id.* at 922 (quoting *Planned Parenthood of S. Ariz. v. Lawall*, 180 F.3d 1022, 1027–28 (9th Cir. 1999)).

161. *Id.* at 936–37.

162. *Id.*

163. Crawford, *supra* note 15, at 1570.

164. *Id.*

and her superior.<sup>165</sup> The superior is not obligated to grant the request, and even if leave is granted, access to timely transportation is not guaranteed.<sup>166</sup> A woman also does not receive medical leave for an abortion and so all time spent away, unless she chooses to use vacation time if available, is time for which she is not paid.<sup>167</sup> Such a pay cut can be difficult, particularly for a servicewoman at the bottom of the ranking system who makes only \$18,000 per year.<sup>168</sup>

If a woman is denied leave or cannot afford travel to the United States, her only other option is to seek the procedure in the host country.<sup>169</sup> Healthcare standards and practices differ from nation to nation, and so a woman may be subjected to much lower standards of medical expertise, safety, and cleanliness than would otherwise exist if allowed to obtain the procedure in a U.S. military facility.<sup>170</sup> Women have reported scenarios where abortions were handled without painkillers and with no English instructions, making it impossible to know what was happening.<sup>171</sup>

Certainly, the above is much harsher than a restriction on a medication use, travelling a minimal distance across state lines to procure the abortion, or asking a parent for consent in certain circumstances. Here, the military is asking a woman to fly thousands of miles and risk her job, her paycheck, and even her reputation to procure the procedure. If a flight home is not granted, then she has no choice but to either take her chances in unsafe foreign conditions or go through with the pregnancy. The military ban operates under the assumption that as long as the procedure is not denied absolutely then the policy is constitutional. By adopting this position, the military is creating a situation where the woman who is likely to be most desperate is the woman who will force herself, no matter what, to overcome the greatest burden.<sup>172</sup> And because her desperation fuels her to go to such great

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165. *Id.* at 1570.

166. *Id.*

167. *Id.* at 1570–71.

168. Laura Bassett, *Abortion for Military Rape Victims Passes Senate*, HUFFINGTON POST (Dec. 5, 2012), [http://www.shaheen.senate.gov/news/in\\_the\\_news/article/?id=4055f809-5056-a032-527d-493d09dce09d](http://www.shaheen.senate.gov/news/in_the_news/article/?id=4055f809-5056-a032-527d-493d09dce09d).

169. Crawford, *supra* note 15, at 1570.

170. *Id.* at 1571.

171. *Id.* (citing Letter from Lieutenant General Claudia J. Kennedy, U.S. Army (retired) on Abortion Ban for Women in the Military to Olympia Snowe, Senator, U.S. Senate & Patty Murray, Senator, U.S. Senate (June 10, 2002), <http://www.reproductiverights.org/document/letter-from-lieutenant-general-claudia-j-kennedy-to-senate>).

172. Susan R. Estrich and Kathleen M. Sullivan, *Abortion Politics, Writing for an*

lengths, the military is able to take the position that its policy still allows women to obtain the procedure. Absolute denial, nor virtual absolute denial, however, has never been the threshold under which a restriction will stand. If that were the case, then as the Court recognized in *Planned Parenthood Arizona, Inc. v. Humble*, the undue burden standard would merely be a hollow formality, offering little protection to servicewomen who seek to exercise their right to access the procedure.<sup>173</sup>

#### CONCLUSION

“The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts.”<sup>174</sup> A fundamental right is created to protect the classes of people that are most vulnerable to criticism and attack from the masses. Such a right establishes an important freedom, and that “freedom . . . [should] not [be] limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”<sup>175</sup> The right to an abortion should be treated no differently than what was envisioned by the framers of the Constitution when recognizing any fundamental right.

A woman who serves in the military may choose to have sex and carry a fetus to term, and she may choose to have sex and undergo an abortion. Either way, she should hold that right absolutely and be able to exercise it without undue interference. Most importantly, she should be able to exercise that right in the same capacity she would if at home—the donning of a military uniform should not change that.

This Note demonstrates that the military abortion ban is exactly what was thought to be impermissible under *Casey*—a policy that has the effect of placing an obstacle in the path of a woman trying to obtain access to an abortion. With no military justification to uphold the policy, the abortion ban must be seen as unconstitutional and subsequently overturned. If the ban is lifted, the precedential value of the decision could lend great support to other groups who are fighting

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*Audience of One*, 138 U. PA. L. REV. 119, 137 (1989).

173. 753 F.3d 905, 914 (9th Cir. 2014).

174. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (finding that compelling public schoolchildren to salute the flag was unconstitutional and compulsory unification of opinion was doomed to failure); see *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 884 (2005) (O’Connor J., concurring).

175. *Barnette*, 319 U.S. at 642.

for equal access to the procedure, such as women in the Peace Corps<sup>176</sup> and women in prison.<sup>177</sup>

Constitutional protections should not evaporate while stationed overseas. A woman chooses to serve her country in order to protect the freedoms that are taken for granted in America, not to see them stripped away. Denying her those same freedoms simply because she chose to defend her country is nothing other than an unconstitutional restriction on her rights as an American citizen.

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176. See Tara Culp-Ressler, *Government Spending Bill Quietly Resolves Peace Corps Abortion Coverage Debate*, THINK PROGRESS (Dec. 15, 2014), <http://thinkprogress.org/health/2014/12/15/3603514/rape-victims-peace-corps/>. Women in the Peace Corps are denied all access to elective abortions, a policy that is even harsher than the military ban since Peace Corps volunteers receive no salary and could never afford to fund the procedure on their own. *Id.*

177. See Diane Kasdan, *Abortion Access for Incarcerated Women: Are Correction Health Practices in Conflict with Constitutional Standards?*, 41 PERSPECTIVES ON SEXUAL & REPROD. HEALTH 59, 59 (2015), <http://www.guttmacher.org/pubs/psrh/full/4105909.pdf>. Women in prison still have a fundamental right to abortion, however, some correctional facilities refuse to offer access either because they see no need or are ignorant to the fact that such a constitutional right does not evaporate once incarcerated. *See id.*