TAKING THE RIGHT TO ABORTION IN CROATIA SERIOUSLY – ONE OF THE BASIC CONSTITUTIONAL RIGHTS OR A RUDIMENT OF THE RIGHT TO REPRODUCTION?

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INTRODUCTION

In the sixties and seventies, liberal concepts of the relation of the individual to the state and his or her autonomic position in society resulted in an understanding of a basic right to make private decisions without the state's interference. In most European countries and the United States, this caused a wave of newly enacted legislation to regulate the conditions of obtaining an abortion. The focus of this article, The Law on Health Care Measures for the Exercising of the Right to Free Decision-Making About Giving Birth,[1] entered into force in 1978 in the Socialist Federative Republic of Yugoslavia (SFRY). The law, (the "1978 Law") is still in force in Croatia, although there is no general acceptance of its provisions. There have been two attempts to amend it, in 1995 and 1996, both of which were unsuccessful. [2]

The abortion issue has been discussed extensively in both academic and popular literature; some critics argue that Croatian legal codes do not handle abortion very well.[3] Opinions for and against legal reformations have left a common impression that legal experts and politicians have reached a "one-way street" regarding this issue.[4] The problem is not only unresolved, but is perhaps not susceptible to resolution in any definitive sense. On the one hand, the

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[1] Zakon o zdravstvenim mjerama za ostavrivanje prava na slobodno odlucivanje o radanju djece [The Law on Health Care Measures for the Exercising of the Right to Free Decision-Making About Giving Birth], NARODNE NOVINE [N.N.] No. 18 (1978) (Yu.) [hereinafter The Law on Health Care Measures], articles 1, 2, 3, 6, 8, paragraph 1, 15, 16, 17, 18, 20, 25.

[2] Nacrt prijedloga Zakona o prekidu trudnoće 1995 [The Termination of Pregnancy Bill 1995], Working Material of the Ministry of Health Commission, available from the author; Prijedlog Zakona o pobačaju 1996 [The Abortion Bill 1996], Class: 543-03/96-01/01, Ref.No.: 62-96-746, available at the Croatian Parliament.

[3] Gordana Cajner-Letica, Prijepor o pobacaju: (ne)mogucnost dijaloga pokreta Za izbor i Za zivot [The Conflict about Abortion: Impossibility of Dialogue between the Pro-Choise and Pro-Life Movements], 28 REVIJA ZA SOCIJOLOGIJU [Review for Sociology] 17 (1997).

[4] *Id.*

resurrection of religious beliefs and conservativism in all spheres of community life generates a source for constant attack on the liberal 1978 law. Traditional beliefs have been advocated by some as the proper foundation for citizens' national values.[5] Still, despite this disparity between public opinion and the 1978 law, no public official, religious leader or other public person directly involved has recognized the need to proceed with legal changes to Croatian abortion policy.

This article attempts to rationalize what the Croatian policy towards abortion should be by looking to a variety of sources. By looking to the constitutional background of the abortion issue, this article will survey what legal tradition Croatia has, if any, regarding reproductive rights. Bearing in mind these circumstances, a comparative legal analysis presents a suitable method for proposing a solution for abortion issues in Croatia. In Part I, this article will compare the international legal sources and the precedent set forth by the highest judicial bodies in the Federal Republic of Germany and the United States, as well as a look at other countries' law regarding abortion. Additionally, this article will discuss the legal nature of abortion in Croatia, and ultimately, present the abortion issue as a battle of compelling state interests: the rights of a mother vis a vis the rights of the unborn. In Part II, this article will go on to analyze the Law of 1978 in further detail. In Part III, this article will present statistical data on abortion performance in Croatia in the last twenty years, calling into question the need to amend the 1978 Law.

Public opinion is also important in determining what policy Croatia should have towards abortion, and unfortunately, a lack of information has caused confusion in this area. Currently, there exist contradictory perceptions amongst Croats who predominantly agree with the assertion that abortion is the taking of a human life.[6] Only 24.9% of these individuals believe that abortion should be forbidden by law.[7] In order to gain a current and truthful view of the public standing on abortion, Part IV of this article also presents research on Croatian students' attitudes towards abortion and compares the results obtained with two previous researches of public opinion on abortion in Croatia.

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[5] *See generally* Rupert Walder, *The Anti-Choice Movement in Eastern Europe and Former Soviet Union*, 28/2 CHOICES (2000) (explaining how transitional changes encouraged a conservative understanding of social values in Eastern Europe, including Croatia).

[6] *See* Stjepan Baloban & Gordan Črpić, *Pobacaj i mentalitet u drustvu* [Abortion and Mentality in Society], 68 BOGOSLOVSKA SMOTRA 641, 647 (1998).

[7] *Id.*

I. PROCREATIVE RIGHTS AS ONE OF THE BASIC HUMAN RIGHTS

A. Legal Sources of Procreative Rights

The right to make free decisions about giving birth in Yugoslavia was announced for the first time by the 1974 Constitution of the SFRY.[8] The same provision was contained in Article 272 of the Constitution of the Socialist Republic of Croatia.[9] The right was not included in the section dedicated to basic human rights and freedoms in the new Croatian Constitution enacted in 1990.[10] Some argue that this indicates that procreative rights are not one of the basic constitutional rights, but this reasoning is flawed. The omission of a basic right from a constitutional provision does not automatically erase its existence if the same right has been promulgated by an international legal act signed by a state. Furthermore, a right still exists if it is possible to find it embodied in some other basic rights still present in the Constitution.

The Republic of Croatia became a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by notification of succession on September 9, 1992.[11] Called the "Bill of Rights for Women," the Convention is the first international legal document on human rights that confirms reproductive rights and identifies culture and tradition as forces that can shape gender rules and relations in a family. For example, the preamble states that "the role of women in procreation should not be a basis for discrimination."[12] Article 5 of the Convention highlights the tight connection between reproductive rights and discrimination against women, advocating a proper understanding of maternity as a social function. Maternity and child-care have been protected as essential rights in all areas targeted by the Convention—employment, family rights, social protection, education.[13] Above all, the Convention confirms the right of a woman to make decisions about family planning.

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[8] USTAV SOCIJALISTIČKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE [Constitution], Službeni list SFRY [S.L. SFRY], No. 9 (1974), art. 191 (S.F.R.Y.) [hereinafter SFRY Constitution] ("It is a right of a man to make free decisions about giving birth. This right can be burdened only to protect someone's health.").

[9] USTAV SOCIJALISTIČKE REPUBLIKE HRVATSKE [Constitution], Narodne novine [N.N.], No. 8 (1974), art. 272 (S.R. Cro.) [hereinafter Constitution of the Socialist Republic of Croatia].

[10] USTAV REPUBLIKE HRVATSKE [Constitution], Narodne novine [N.N.], No. 41 (2001) (complete amended version), 51 (2001) (R. Cro.) [hereinafter 1990 Croatian Constitution], articles 21-69.

[11] United Nations Convention on the Elimination of All Forms of Discrimination Against Women [CEDAW], G.A. Res. 34/180, U.N. GAOR Supp. No. 46, at 193, U.N. Doc. A/34/46 (Dec. 18, 1979). The Republic of Croatia also signed and accepted the 2001 Additional Protocol to the CEDAW Convention by ZAKON O POTVRĐIVANJU FAKULTATIVNOG PROTOKOLA UZ KONVENCIJU O UKIDANJU SVIH OBLIKA DISKRIMINACIJE ŽEN [The Law on Facultative Protocol to the CEDAW Convention], Narodne novine - Međunarodni ugovori [N.N.], No. 3 (2001), 4 (2001), 15 (2003).

[12] *See* CEDAW, *supra* note 11.

[13] *Id.* art. 5.

Participating nations are obligated to provide family planning education.[14] They are also required to adapt their national legislation to guarantee women "the rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights."[15] Comparing this specific provision with Article 191 of the SFRY Constitution[16] and Article 272 of the Croatian Constitution,[17] it is apparent that the CEDAW provision is more specific with regard to what reproductive rights include. The Convention provides that women have the right to decide freely the number of children to have and when to have them.[18] CEDAW's enumerated reproductive rights also include the prohibition of state interference in decisions regarding family planning, and the duty of the state to ensure access to information regarding reproductive rights, means and education.

The right to decide freely and responsibly about giving birth flows directly from rights provided by the Croatian Constitution, such as the right to life from Article 21 and the right to privacy from Article 34 § 1 and Article 35.[19] According to Article 21, every human being has a right to life and a right not to be punished by death. The right to life is also protected by the provisions in the Croatian Penal Code.[20] However, Article 21 does not resolve the abortion dilemma. Advocates both for and against abortion can find elements in this article to support their point. While it cannot be denied that the right to life is an absolute, unrestricted and basic human right that is the highest in the Croatian human rights hierarchy,[21] questions and doubts remain about abortion because of the contentious debate over what "life" is.

The group owed the right to life has been classified in many ways— "every man," "every citizen," "every newborn baby," "everyone born of a woman," and in other definitions, "all human beings have the right to life"[22]—but it is unclear

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[14] *Id.* art. 10 § h.

[15] *Id.* art. 16 § e.

[16] *See* SFRY Constitution, *supra* note 8.

[17] *See* Constitution of the Socialist Republic of Croatia, *supra* note 9.

[18] *See* CEDAW, *supra* note 11.

[19] 1990 Croatian Constitution, *supra* note 10, art. 21, art. 34 § 1, art. 35.

[20] *See* KAZNENI ZAKON [The Penal Code], Narodne Novine [N.N.], No. 110 (1997), 27 (1998), 50 (2000), 129 (2000), 51 (2001), 111 (2003), 190 (2003), 105 (2004), (R.Cro.) [hereinafter The Penal Code] (stating that the taking of someone's life through the criminal act of killing is murder (art. 90), aggravated murder (art. 91), manslaughter (art. 92), infanticide (art. 93), or killing on request (art. 94)). There is no death penalty in Croatia. Therefore, the right to life has also been protected by restricting the state criminal repression as a reaction to committing the heaviest criminal acts.

[21] Article 21 of the Constitution is the first article of Section III, which protects human rights and basic freedoms. By the method of systematic positioning, legislators emphasize that the right to life is the highest basic right and is above all other human rights in the Republic of Croatia. 1990 Croatian Constitution, *supra* note 10, art. 21, art. 34 § 1, art. 35.

[22] *See, e.g.*, STANKO FRANK, KAZNENO PRAVO, POSEBNI DIO [Criminal Law, Special Part], 32 (University in Zagreb, 1st ed. 1934) (supporting the thesis that everyone born of a woman is a human being and entitled to the right to life); Zvonimir Šeparović, Massa Carnis Ili Čovjek? Pravno Medicinski Aspekti Otkrivanja Nakaznih Fetusa [Massa Carnis or a Human? Legal and Medical Aspects of Detecting Malformed Fetuses], *in* ETIČKOPRAVNI PRISTUPI MEDICINI [ETHICAL AND LEGAL

whether a fetus belongs in this group. This complicated issue cannot be resolved simply by applying rules of grammar to clarify the meaning of Article 21. International law containing provisions regarding the right to life cannot resolve the problem because of its nomotechnical nature. These international human rights laws proclaim general legal principles and basic rights, and consequently the provisions are general, abstract and undefined.[23] In these general provisions, the terms "everyone," "human being" and "no one" are general and not specifically defined; consequently, there is a diminished ability to assert that special rights emanate from this general right to life.[24]

Articles 34 and 35 of the Croatian Constitution, which refer to a right of privacy, are similarly unhelpful in defining a woman's right to freedom of decision-making regarding pregnancy, because the Croatian Constitution contains no specific provision that defines the right to privacy. The origins of the right to privacy are laid down in Article 34 § 1 and Article 35 of the Croatian Constitution.[25] According to Article 34, a home shall be inviolable.[26] Article 35 entitles everyone to legal protection of personal and family life, dignity, reputation and honor.[27] These articles describe the right to privacy embodied in U.S. Supreme Court jurisprudence[28] and the German rights to free development of personality[29] and

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APPROACHES TO MEDICINE], 91 (Informator, 1st ed. 1987).

[23] The Universal Declaration of Human Rights states in Article 3 that "everyone has the right to life." Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810, *adopted and proclaimed by General Assembly resolution 217 A (III)* Dec, 10, 1948. Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms defines this right similarly, declaring that "everyone's right to life shall be protected by law." Convention for the Procreation of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S. 222. Norms of the general international law, *ius cogens*, proclaim the right to life as an absolute right. Article 2 § 1 of the Convention states that, "no one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." *Id.* Protocol 6 of the Convention fortifies the right to life by limiting the death penalty to criminal offences committed in time of war or imminent threat of war. *Id.* Protocol 13 of the Convention abolishes the death penalty completely. *Id.* Similarly, Article 6 of the International Covenant on Civil and Political Rights prescribes that "every human being has the inherent right to life" and that "no one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

[24] MIOMIR MATULOVIĆ, LJUDSKA PRAVA, UVOD U TEORIJU LJUDSKIH PRAVA [Human Rights, Introduction to the Theory of Human Rights] 13 (Hrvatsko filozofsko društvo, 1st ed. 1996).

[25] 1990 Croatian Constitution, *supra* note 10, art. 34 §1, art. 35.

[26] *Id.* at art. 34 §1.

[27] *Id.* at art. 35.

[28] The U.S. Supreme Court found the right to personal privacy, or portions of that right, in cases decided before the seminal abortion rights case of Roe v. Wade, 410 U.S. 113 (1973). *See e.g.*, Union Pacific Ry. Co. v. Botsford, 141 U.S. 250 (1891). Roots of the right to privacy can be found in the First Amendment in Stanley v. Georgia, 394 U.S. 557 (1969); in the Fourth and Fifth Amendments in Terry v. Ohio, 392 U.S. 1 (1968); in the penumbras of the Bill of Rights in Griswold v. Connecticut, 381 U.S. 479 (1965); in the Ninth Amendment; or in the concept of liberty which is guaranteed by the first section of the Fourteenth Amendment.

[29] Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] article 2 §1 (F.R.G.) (1949) (*amended* 2002) [hereinafter Constitution of the Federal Republic of Germany] ("Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.").

inviolability of dignity.[30]

Through the years, the problem has been constant because of the variety of ways the term privacy can be defined. For example, fundamental values can be invoked as a basis for finding a woman's right to choose, including different concepts of personal freedom, a right to make freely individual choices, a woman's personhood and autonomy, a woman's right to decide about her own body and way of living, and a right to life and health protection.

Privacy can be considered to be the "right to selective disclosure" to determine oneself when, how, and to what extent information about oneself is communicated to others.[31] Another way to define privacy is as "the right to be let alone." In *Eisenstadt v. Baird,*[32] Justice Brennan, while delivering the opinion for the U.S. Supreme Court, stressed that "[i]f the right of privacy means anything, it is the right of the individual... to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person..."[33] Also, privacy can be interpreted using the concept of intimacy. This is "the right to make decisions for oneself within the sphere of personal intimacy as to have free access to contraceptives or the right to marry the person of one's choice."[34] The intimacy approach to privacy is interesting when examining the abortion issue. The majority of the U.S. Supreme Court in different decisions has embraced this value-based argument in order to reconstruct the right to privacy to apply to the privacy right a person enjoys with respect to their own body.[35] Interpreting the right to privacy in this manner, it should at least be broad enough to encompass a woman's private decision about whether or not to carry out her pregnancy. The decision to terminate a pregnancy is influenced by a woman's private life circumstances as well as her mental and physical health conditions. It is her decision because she will be the one who is directly influenced by its consequences.

The right to freely exercise religious beliefs of Article 40 of the Croatian Constitution[36] can also be invoked as a basis for reproductive rights. The European Court of Human Rights and the German Federal Constitutional Court have both accepted a negative interpretation of religious rights.[37] This means that

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[30] *Id.* at art. 1 §1. ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.").

[31] MACHTED NIJSTEN, ABORTION AND CONSTITUTIONAL LAW, A COMPARATIVE EUROPEAN-AMERICAN STUDY 71 (European University Institute ed., 1990).

[32] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[33] *Id.* at 453.

[34] NIJSTEN, *supra* note 31, at 71.

[35] *See, e.g.,* Washington v. Glucksberg, 117 S.CT. 2258, 138 L.ED.2D 772 (1997); Planned Parenthood v. Casey 505 U.S. 833 (1992); Cruzan v. Director (497 U.S. 261 (1990); Thornburgh v. American College of Obstetricians & Gynaecologists 476 U.S. 747 (1986); Carey v. Population Services International 431 U.S. 678 (1977);

[36] 1990 Croatian Constitution, *supra* note 10, art. 40 (guaranteeing freedom of conscience and religion and freedom to manifest religion and *other convictions*).

[37] *See, e.g.* Leyla Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2004); Buscarini and Others v. San Marino, App. No. 24645/94, Eur. Ct. H.R. Rep. Judgments & Dec. (1999); Kokkinakis v.

every individual has not only the right to believe what he or she likes, but is also free not to have any religious beliefs.[38] Thus, if it is a mother's opinion as a non-believer that a fetus is not a human being from the moment of conception and that consequently, she is allowed to have abortion, her opinion or "non belief" is of equal logical weight as a religious belief and should be taken into consideration.

Although the right to make free decisions about giving birth was omitted from the 1990 Constitution, this reproductive right can still be inferred from the right to privacy that exists in Articles 34 and 35 of the Constitution, the freedom of conscience and religion, and the enumerated rights laid out in the Croatian adopted CEDAW Convention.

B. Legal Nature of Procreative Rights

Having explained the constitutional foundations of reproductive rights in Croatia, the next step is to define their legal nature. Comparative analysis provides many examples of courts' ongoing struggle to weigh the right to life of an unborn child against a woman's right to choose abortion. The Italian Constitutional Court decided in 1975 that it is impossible to give absolute priority to interests of a fetus while neglecting the protection of a woman's health, as an already existing person.[39] This decision found that a woman is a person and an embryo has yet to become a person. [40] In other words, there is no equivalency between the rights of a fetus and those of a pregnant woman, including their rights to protection of health.[41]

Likewise, in the United States, Justice Blackmun in *Roe v. Wade*[42] based his holding on a test of "personhood"[43] and concluded that from constitutional provisions that it was not possible to conclude that a fetus is a person because it lacks the capacity to act as a rational human being—for example, it cannot exercise

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Greece, App. No. 14307/88, 260 Eur. Ct. H.R. (ser. A) (1993); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1979, 52 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 223 (F.R.G.).

38 VICKI C. JACKSON & MARK V. TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1171-1176 (1st ed. 1999).

39 Corte cost., 18 feb. 1975, decision no. 27/1975.

40 *Id.*

41 *See, e.g.*, Corte cost., 18 feb. 1975, decision no. 27/1975, Gazz. Uff.; Corte cost., 7 may 1981, No. 26/1981, No. 109/1981, Gass. Uff.; Corte cost., 21-25 may 1987, No. 196/1987, Gass. Uff.; Corte cost. 30 jan.-10 feb. 1997, No. 35/1997, Gazz. Uff., *available at* http://www.cortecostituzionale.it/eng/attivitacorte/pronunceemassime/pronunce/disclaimer.asp (last visited Sept. 9, 2006).

42 Roe v. Wade, 410 U.S. 113 (1973).

43 *Id.* at 156-157. *But see* NIJSTEN, *supra* note 31 at 50-51, 68. Machteld Nijsten had stressed that this test is not acceptable because it is the opposite to the pure biological criterion of a fetus as a protected human life. There is no doubt that it is a human life because it is conceived by human parents and accordingly, it should be always protected leaving no place for abortion. Nevertheless, the acceptance of the notion that all people are genetic humans confuses the moral and genetic sense of the word "human." Persons are those who have a special moral status and a right to life, not genetic human creations.

the right to vote.[44] Similarly, a 1974 abortion decision by the Austrian Constitutional Court took the position that the doctrine of equal protection of rights and freedoms does not improve the legal position of a fetus.[45] The court stated that the collision of interests should be resolved in favor of a woman because she is already a human being.[46] According to the Austrian Constitutional Court, a fetus that cannot survive outside of a mothers' womb is incapable of surviving outside of a mother's womb is not a human being in the full sense.[47] In all of these international decisions, the courts found that a fetus' rights do not enjoy equal treatment to the constitutional rights of the mother, at least in some—earlier—phases of fetal development.[48]

Focused on balancing the rights of a mother with those of a fetus, the U.S. Supreme Court in *Roe* took a stand by holding that the right to privacy is a fundamental constitutional right.[49] Under Roe, the state must justify any infringement of the right to privacy with a compelling interest.[50] Although the

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[44] *Roe*, 410 U.S. at 156.

[45] Verfassungsgerichtshof [VfGH] [Sole Court for Constitutional Matters] Oct. 11, 1974, Erkenntnisse und Beschlüsse des Verfassungsgerichtshof [VfSlG] 7400 – Juristischer Blätter [JBL] 1975. *See also* Peter Trybus, *Die Entstehung der Fristenregelung in Österreich, Seminar aus Geschichte des Medizinrechts, Universität Wien, 2000/01* [Historical overview of the legal rules on deadlines in Austria, Seminar on History of the Law and Medicine, University of Vienna] (discussing the Austrian 1974 abortion decision); VfSlG 74 – JBL 1975, and VfSlG 310 – JBL 1977.

[46] VfGH 7400 – JBL 1974.

[47] *Id.*

[48] There are a number of different theories regarding the moment when the fetus becomes entitled to constitutional protection. Pro-life advocates, relying on the religious teachings of the Catholic Church, strongly defend the position that from the *moment of conception* onwards an unborn child is a unique individual creature. Susan J. Stabile, *State Attempts to Define Religion: The Remifications of Applaying Mandatory Prescription Contraceptive Coverage Statutes to Religious Employers*, 28 HARV .J. L. & PUB. POL'Y 753 (2004-2005). This argument is not only theological but also genetic because the real value of this point of gestation is fetal genetic code which determines individual personality. (My own conclusion) On the other hand, the "argument of continuity" is that the unborn goes through different phases of development acquiring structures and new characteristics. Nancy K. Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 663 (1985-1986); Therefore, according to this theory, every new characteristic, such as fetal brain activity or the capacity to feel, can be considered as a point necessary to become a human being. (My own conclusion) Nevertheless, none of these phases in human development introduce anything crucial to the perfect solution to our problem. Many have seen the "moment of quickening" as the first decisive stage in pregnancy. Fetal movement is the first sign of communication with the environment. John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 6 (2006). Only at that moment can the fetus be perceived by the mother and others by ordinary means. (notorious fact). Because of this visible interaction between the fetus and others, the common law system of the American Colonies contained a rule which forbade abortion after this precise moment. *See, e.g., Roe*, 420.U.S. at 15 and Stanislaw Frankowski, *The United States of America*, in ABORTION AND PROTECTION OF THE HUMAN FETUS, LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE, 20 (Martinus Nijhoff Publishers, 1987). All of the mentioned stages of gestation share the characteristic that the fetus develops through them. Gary M. Atkinson, *Persons in the Whole Sense*, 22 AM. J. JURIS. 87-88 (1977). No one can assert that any of these points, except the moment when the unborn child is capable of separate and independent existence and the moment of birth, can be said to be anything more than a developed stage of potential personhood.

[49] Roe v. Wade, 410 U.S. 113, 152-155 (1973).

[50] *Id.* at 155-156.

woman's right is fundamental, it is not absolute.[51] There are two possible compelling state interests, the protection of a woman's health or the protection of prenatal life.[52] According to *Roe,* a state has no compelling interest in the first trimester of a pregnancy and cannot interfere with woman's private decision on abortion.[53] In the second trimester, the state can "regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."[54] By the beginning of the final trimester—at the so called stage of viability[55]—a state has a compelling interest to protect potential life and even to ban abortions.[56] According to this *trimester test*, a state is powerless to infringe on a woman's right to privacy in the first three months after conception. It is upon the attending physician, in consultation with his patient, to determine in his medical judgment if the patient's pregnancy should be terminated.

In a subsequent abortion decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[57] the U.S. Supreme Court rejected the trimester test.[58] The majority formally reaffirmed what is called an "essential holding" in *Roe*, although the majority reinterpreted the privacy right, leaving more space for the state's interference in the abortion question.[59] According to the *Casey* majority, *Roe* undervalued a state's interest in the potential life within the pregnant woman.[60] The Court reasoned that if fetuses are allowed to grow and develop—in other words, if they are not aborted—they will eventually gain all the characteristics descriptive of persons.[61] The Supreme Court announced that the state interest in

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51 *Id.* at 155.

52 *See id.* at 155.

53 *Id.* at 163.

54 *Roe*, at 163.

55 IRVING J. SLOAN, LAW GOVERNING ABORTION, CONTRACEPTION AND STERILIZATION 15 (Oceana Publications, Inc. eds., 1988) (explaining that viability means that a fetus has the capability for "meaningful" life outside the mother's womb).

56 *Roe*, at 163.

57 Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) [hereinafter *Casey I*].

58 *Id.*

59 *Id.* at 833-834.

60 *Id.*

61 *Id.* The argument of potential personhood accepted in *Casey I* did not explain why a fetus deserves to be treated as a member of the moral community. The problem remains because there is no precise answer as to how much actualization of potentiality of a person is necessary to prohibit abortion. Also, even if a fetus has the potential to become a person one day, it does not mean that it has an interest to do so. According to the *interest principle*, only beings with interests can have rights. *See* RONALD DWORKIN, LIFE DOMAIN, AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 18-19 (Alfred A. Knopfed ed., 1993). Consequently, as Michael Tooley teaches, a fetus is not a subject of consciousness. It does not have any interest at all and so cannot have an interest, not to mention the right, in its own continued existence. *See more* MICHAEL TOOLEY, ABORTION AND INFANTICIDE (Oxford University Press 1983) *cited in* BONNIE STEINBOCK, LIFE BEFORE BIRTH, THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES 55-58 (Oxford University Press ed., 1992). Moreover, to assert that someone or something is a potential person does not mean that it is a person. If we think about potential persons as a kind of person, we are ascribing to potential persons' rights of other persons, which is definitely a logical error. Jef Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception*, 43 STAN. L. REV. 612 (1990-1991). Furthermore, the idea of potentiality of personhood negates the individual nature of each abortion case. The theoretical

the protection of prenatal life, and the life and health of a woman as well, extends from the time of conception to the time of birth.[62] In other words, either interest could justify the state regulation of abortion during every stage of the pregnancy. This is the reason why the previous strict scrutiny test was replaced with the "undue burden" test as an appropriate standard of the review of state regulation.[63] An undue burden exists, and the statute is constitutionally invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before a fetus attains viability.[64] The *Casey* test—which is the most recent iteration of the U.S. Supreme Court's view on abortion—is a compromise between the central right recognized in *Roe* and the state's interest in potential life.[65]

Germany has adopted a different legal approach; criminalizing abortion completely on the one hand, and drawing out exceptions or waivers of criminal liability for pregnant women seeking abortion in certain instances. In two abortion decisions, the German Constitutional Court has taken the position that it is unjustified to limit the right to life protection offered in Article 2 § 2 of the German Basic Law[66] to the independently liable *nasciturus*, or child being born.[67]

In the first mentioned decision in 1975, the Court concluded that the right belongs to "everyone as every human individual possessing life" including the yet unborn human being after the fourteenth day of conception.[68] Otherwise, if any

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approach should not treat abortion as a uniform category because each woman has different reasons for having an abortion. There is a huge difference between when an abortion is needed because the pregnancy presents a threat to mother's health and life and when woman rejects the pregnancy because it imposes major changes in her life-style.

[62] Planned Parenthood of Se. Pa. v. Casey, 510 U.S. 1309 (1994) [hereinafter *Casey II*].

[63] *Casey I*, 505 U.S. 833, 874 (1992) (finding that the state need not express its compelling interest while regulating the termination of pregnancy, and thereby lowering the level of scrutiny).

[64] *Id.* at 877 (concluding that the undue burden standard should be considered to protect the central right recognized by *Roe* and at the same time accept the state's profound interest in preserving potential life). Roe v. Wade, 410 U.S. 113 (1973).

[65] The different level of scrutiny taken together with different comprehension of the essence of privacy right is undeniable proof that *Roe* is overruled after all. Judges tried to deny this. According to them, no matter the new differences, the Court has reaffirmed Roe's "essential holding." Dividing the holding into essential and non-essential is a failed attempt to hide the fact that the right to privacy became a lower level constitutional right.

[66] Grundgesetz für die Bundesrepublik Deutschland [GG] art. 2 § 2 (F.R.G.).

[67] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 203 (F.R.G.).

[68] *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.); The German Constitutional Court had used biological-physiological findings to determine when the life begins. The prevailing opinion was that the fourteenth day after conception should be considered the beginning of development regardless of the fact that scientists do not know what is the precise ending point of human development. Kara L. Belew, *Stem Cell Division: Abortion Law and Its Influence on the Adoption of Radically Different Embryonic Stem Cell Legislation in the United States, the United Kingdom, and Germany*, 39 TEX. INT'L L.J. 508 (2003-2004). No sharp distinctions between various stages of the development of human life can be made. John D. Gorby, *Introduction to the Translation of the Abortion Decision of the Federal Constitutional Court of the Federal Republic of Germany*, 9 J. MARSHALL J. PRAC. & PROC. 582 (1975-1976). Consequently, a problem emerged. The terms "unborn

distinction to protect only human beings in certain stages of their development is made, "the security of human existence will be put generally in jeopardy."[69] The Court derived additional protection for the unborn fetus from Article 1 § 1 of the German Constitution, which demands the protection of human dignity.[70] In Germany, the fetus—embraced by the definition of "human" in 2 § 2 of the German Basic Law —has a complete right to be treated with respect for its dignity. The Court concluded that "[w]herever human life exists, it merits human dignity" because "the potential capabilities inherent in human existence from its inception are adequate to establish human dignity."[71] Consequently, the Court recognized the state's compelling interest to protect a fetus during the entire pregnancy starting from the fourteenth day of conception.[72]

The Court went on to recognize special situations which would impose a greater burden than usual upon some pregnant mothers. Such special situations are a basis for the *indication test*.[73] According to the Courts' model, abortion must be allowed when pregnancy is life-threatening for a mother or when it is a grave threat to her health.[74] Other exceptions are considered under the model in the presence of eugenic, ethical and social reasons for pregnancy termination; these exceptions are defined as "conflictual situations that, in general, permit no clear-cut moral judgment and may rank as worthy decisions of conscience in making the decision to abort a pregnancy."[75] The legislature has the duty to respond to such situations through the decriminalization of abortion.

In a second 1993 abortion decision, the German Constitutional Court reaffirmed the previously established indication model and unreasonable burden test.[76] Even so, it is interesting to note that the Court declined to apply the balancing test. The usual situation warranting application of the test is when two constitutionally recognized and protected rights are in competition.[77] The Court

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life," "incipient life" and "germinating life" were left without precise definition. Is it an independent legal value or an individual? The Court was not precise because it agreed that it was not a complete person and does not enjoy the same rights as other persons.

69 DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 338 (Duke University Press, 2d ed. 1989).

70 Grundgesetz für die Bundesrepublik Deutschland [GG] art. 1 § 1 (F.R.G.).

71 KOMMERS, *supra* note 69, at 338.

72 *See* Udo Werner, *The Convergence of Abortion Regulation in Germany and the States: A Critique of Glendon's Rights Talk Thesis: Abortion Regulation in Germany and the U.S.*, 18 LOY. L.A. INT'L & COMP. L.REV. 584 (1996).

73 Albin Eser, Reform of German Abortion Law: First Experiences, 34 AM. J. COMP. L. 375-377 (1986).

74 *Id.*

75 Rosemarrie Will, *German Unification and the Reform of Abortion Law*, 3 CARDOZO WOMEN'S L.J. 410 (1996) (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1, 41-42 (F.R.G.)).

76 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 203 (F.R.G.).

77 One of the basic functions of the Constitutional Court is to safeguard fundamental rights guaranteed by the Basic Law. The Court questions whether legislation exceeds the limits of constitutionality overburdening the right or giving prevalence to one right over the other. In such cases

should consider the nature of competing rights in balancing them, resulting in one right prevalence. Nevertheless, in its 1975 and 1993 decisions, the Court expressed that it should be recognized that in this situation competing values could not be balanced.[78] The Court determined that the balancing test is impossible because abortion always results in the death of an unborn child.[79] The Court's position regarding the inability to balance the two subject interests does not comport with its adoption of the indication test, the very purpose of which is to recognize certain instances where the interest in the health of the mother *may* be weighed against the death of an unborn child.[80]

The dichotomy created by the German system is clear. On the one hand, abortion is fundamentally illegal in Germany because the constitutional rights of unborn human life must remain a part of the general legal consciousness. According to Article 218 of the German Criminal Code, termination of pregnancy is a criminal act.[81] Arguably, there is no protection of fetal life more basic than protection through criminal law.[82] Nevertheless, according to Article 218a, if certain exemptions apply and a woman has mandatory counseling, then the criminal sanction of such an act will be waived.[83]

A brief evaluation of these international constitutional standards regarding the legal nature of the right to abortion gives rise to some conclusions. The two abortion decisions of the German Constitutional Court involved the interpretation of human life and its position as a central value of the German legal order. The

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the rights are in collision, and to resolve it, the Court may use the balancing test. The Court is in the position of balancing one right against another. The outcome of it harmonises the rights in conflict and determines a level of their constitutional protection. *See e.g.* Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L. J. 857 (1991).

[78] The unborn life is constitutionally protected under the Article 1, § 1 and Article 2, § 2 of the Basic Law. In the hierarchy of enumerated constitutional basic rights, the Court ruled that human life is a central and supreme value. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 26 (Harvard University Press, ed., 1987). Consequently, if the right to life has supremacy over every other basic right, there is no need to balance them. The supreme position of right to life subordinates women's right to self-determination. *See* Udo Werner, *supra* note 72, at 585 and 586.

[79] Florian Miedel, *Is West Germany's 1975 Abortion Decision a Solution to the American Abortion Debate? A Critique of Mary Ann Glendon and Donald Kommers*, 20 N.Y.U. REV. L. & SOC. CHANGE 496 (1993-1994); Donald P. Kommers, *supra* note 77, at 838.

[80] Rosemarrie Will, *German Unification and the Reform of Abortion Law*, 3 CARDOZO WOMEN'S L.J. 410 (1996) (quoting Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (48) (F.R.G.)).

[81] Strafgesetzbuch [StGB] [Penal Code] 1998 art. 218.

[82] The Court accepted a compromise by holding that even if a woman was not punished it would still mean that abortion is illegal. Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined through Each Country's Leading Abortion Cases*, 11 TUL. J. COMP. & INT'L L. 512-513 (2003-2004). The illegality of the act does not depend on its punishment. The legal order must bring to the general legal consciousness the notion of undesirability of the abortion. It still must be treated as illegal and condemned as morally unacceptable. *id.* The only reason why the criminal sanction is lacking could be the Court's belief that it is not an effective measure for the prevention of high rates of abortion. For the preventive effect of the strict penal sanctions on abortion *see generally* Albin Eser, *Abortion Law Reform in Germany in international comparative perspective*, 1 EUR. J. HEALTH L. 27 (1994).

[83] *Id.* at art. 218a.

Court succeeded in doing this while avoiding the trap of proposing a particular legal interpretation of the term "life."[84] It is interesting to note that the Court had the opportunity to come out the other way, in other words, to draw a right to abortion from the German enumerated right to privacy, as its American colleagues did in *Roe v. Wade*.[85] In fact, the German Court, referencing the Article 2 § 1 right to free development of personality and the Article 1 § 1 inviolability of dignity of the Basic Law,[86] arguably had even more of a constitutional basis to conclude that a decision regarding abortion is a privacy matter. Nonetheless, the Court refused to recognized even a limited lawful right for a woman to choose whether or not to terminate her pregnancy, by determining that a right to life starts from the fourteenth day after conception.[87]

As stated above, the German law adopts the position that a fetus is a human being but there are special burdensome situations when an abortion must be granted.[88] It seems as though the Court could not extract pro-life arguments for the superiority of the fetal rights from the Basic Law. Yet, surprisingly, the Constitutional Court added a fourth exception to allow for the termination of pregnancy without violating the penal code.[89] The social indication exemption, *Notlagenindikation*, is applicable in the event that a pregnant woman, and more importantly, her family, encounters a grave social situation.[90] This circumstance is defined by the Court as a situation that "can generate conflicts of such magnitude that, beyond the certain limit, the measure of the criminal law cannot force further sacrifice in favour of the unborn life."[91] The term "sacrifice" suggests that the burden upon the woman must be so severe and unbearable that the threat of a criminal sanction would not prevent her from seeking the abortion.[92] The social indication test has not been clearly defined by the Court, so it could still be possible to satisfy it with a wide range of situations. For instance, the Court's willingness to consider the mother's family situation in its determination could affect the circumstances under which this test could apply.

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84 The Court invoked Article 2, § 2 of the German Basic Law stressing that life exists according to definite biological-physiological knowledge in any case from the fourteenth day after conception. Therefore, the right to life was extended to born and unborn human beings. *See e.g.* Terry E. Owens, *The Abortion Question: Germany's Dilemma Delays Unification*, 53 LA L. REV. 1317 (1992-1993) The Court determined the exact point in time when life begins, nevertheless, without giving any explanation what qualifies a fetus to be a human being, to have a life.

85 *See* Roe v. Wade, 410 U.S. 113 (1973).

86 Grundgesetz für die Bundesrepublik Deutschland [GG] art. 2 § 1, art. 1 § 1 (F.R.G.).

87 D. A. Jeremy Telman, *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, 24 N.Y.U. REV. L. & SOC. CHANGE 131 (1998).

88 *See supra* notes 73, 74, 75 and accompanying text.

89 *See* Marc Chase McAllister, *supra* note 82, at 514.

90 Albin Eser, *supra* note 69, at 376.

91 *See* Udo Werner, *supra* note 72, at 587.

92 Susanne Walther, *Thou Shall Not (But Thou Mayest): Abortion after the German Constitutional Court's 1993 Landmark Decision*, 36 G.Y.B.INT`LL. 391 (Ducker & Humbolt eds., 1993).

II. THE LAW ON THE HEALTH MEASURES FOR THE EXERCISING OF THE RIGHT TO FREE DECISION-MAKING ABOUT GIVING BIRTH

A. Background

The 1978 Law was enacted to elaborate on the reproductive rights set forth in Article 191 of the SFRY Constitution[93] and Article 272 of the Constitution of the Socialist Republic of Croatia[94] in 1978.[95] The right to decide whether to have a child has been generally acknowledged in Article 1 of the Law on Health Care Measures.[96] It is a basic human right that gives freedom to every member of the community with regard to procreative rights. Under the law, every individual is entitled to make free decisions regarding how many children he or she will have, whether to use contraceptives, and whether to terminate unwanted pregnancies.[97]

B. Protection of Women's Health

It is significant to note that there has been an official recognition of the state's duty to provide medical help to those who want to exercise this right.[98] Moreover, family planning programs and education are also within state officials concern[99]. Procreative rights can be restricted only when it is necessary to do so because of medical indication.[100] Although such restrictions can be imposed when the health of a titular is threatened by undergoing an abortion, they cannot overburden the person and they must be in accordance with the law.[101] These provisions directly acknowledge women's right to freely decide about giving birth and directly proclaim a protection of women's life and health. By enacting such provisions, the

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[93] USTAV SOCIJALISTIČKE FEDERATIVNE REPUBLIKE JUGOSLAVIJE, Službeni list SFRY [S.L. SFRY], No. 9 (1974), art. 191 (S.F.R.Y.).

[94] USTAV SOCIJALISTIČKE REPUBLIKE HRVATSKE, Narodne novine [N.N.], No. 8 (1974), Art. 272 (S.R. Cro.).

[95] The Law on the Health Care Measures, art. 1.

[96] *Id.*

[97] Current legislative provisions for abortion and family planning have encouraged and recommended the prevention of pregnancies. Individuals have two options in order to avoid an unwanted pregnancy: sterilization and contraception. (Article 5 of the Law on the Health Care Measures). The earliest age at which person can obtain contraceptives is fourteen. The Law on the Health Care Measures, art. 3. Under that age, a person is considered immature and incapable of making fully informed decisions. Sterilization as permanent prevention against unwanted pregnancies is available to both men and women, but only upon specific request and not before the age of thirty-five. (The Law on the Health Care Measures, art. 8, §1 of).

[98] The Law on the Health Care Measures, art. 3 and 4.

[99] *Id.* and Article 6, § 2 asserting that citizens are entitled to exercise their right to become familiar with methods and advantages of family planning programs within the health care measures.

[100] The Law on Health Care Measures, art. 16 (prohibiting termination of a pregnancy if such medical procedure could heavily burden woman's health); *Id.*, art. 25 (confirming the protection of a woman's health and life as a primary value protected by the Law on the Health Care Measures and stating that a pregnancy must be terminated regardless of the conditions and procedure of the law if a pregnant woman's life or health is directly threatened or if the termination of a pregnancy has already started).

[101] *Id.* art. 3.

legislature took the position that reproductive rights are basic, undeniable individual rights.

Article 15 of the Law on Health Care Measures asserts that abortion is a medical procedure and a decision about it can only be made by the woman.[102] After classifying abortion as a medical procedure, the state has the duty to regulate conditions in such a manner to prevent the possibility of putting a pregnant woman's life in jeopardy. This is why a legal norm regarding medical standards, which would prohibit hazardous procedures, must be enacted. Like any other medical procedure, abortion must be performed with consideration to the maximum safety to the patient. This attention to safety and preservation of a woman's health must extend at least to the performing physician, his or her staff and the facilities involved, after-care availability, and procedures for possible complications or emergencies. Related to this is the State's right and duty to define the term "physician" to mean only a "specialist currently licensed by the State" and to proscribe abortion by any person who is not a duly defined physician.[103]

C. Spousal Notification

Under the Law, an abortion is "a termination of pregnancy on demand" and therefore, a husband's or a partner's consent is not required.[104] The same position was adjudicated by the U.S. Supreme Court in *Casey II*.[105] The Court refused to require that a pregnant woman's husband needs to give his approval, or even to be notified in the situation when the pregnant mother has already made her choice regarding exercising her right to have an abortion.[106] The *Casey II* Court struck down provision 3209 of the Pennsylvania Abortion Control Act of 1982,[107] which required that—unless certain exceptions applied—a married woman seeking an abortion must sign a statement indicating that she has notified her husband.[108]

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[102] *Id.* art. 6 and 15 (defining contraception as a method aimed to prevent conception and abortion as an interruption of pregnancy which takes place afterward conception). What is more, the legal provisions that regulate a termination of pregnancy are within the Law on Health Care Measures, and are separated from other provisions discussing normative family planning measures. *Id.*, Part III of the Law on Health Care Measures. Therefore, opinions that abortion has been the most frequent form of contraception should be rejected as statistical manipulation.

[103] *See id.* at art. 17.

[104] The Law on Health Care Measures, art. 18, §1 prescribing a termination of pregnancy only on demand of a pregnant woman.

[105] *Casey I*, 505 U.S. 833, 893-894 (1992).

[106] *Id.*

[107] *Id.* For further insight into provision 3209 of the Pennsylvania Abortion Control Act of 1982, see the appendix to the opinion of Justices O'Connor, Kennedy and Justice Souter in *Casey I*, 505 U.S. at 902-911.

[108] An alternative signed statement was provided for the woman if she certified that the pregnancy was not conceived with her husband but with another man, or that her husband could be located. *Casey I*, 505 U.S. at 908-909. In the case of distressed spousal relationship, she could certify that the pregnancy had resulted from spousal sexual assault which she subsequently reported. *Id.* An alternative to spousal notification was also prescribed when the woman believed that notifying her husband would cause him or someone else to inflict bodily injury upon her. *Id.*

While the Pennsylvania Act provided for an "alternative signed statement" in the even that the woman's husband was not the man who impregnated her, her husband could not be located, and in other circumstances,[109] the Court stressed that the exception to spousal notification provided by these alternative statements was too narrow because they did not cover all possible situations in which consent of the husband would not be given.[110]

Spousal notification is considered to be a heavy obstacle to a woman's right to have an abortion. The U.S. Supreme Court has recognized the husband's "deep and proper concern and interest... in his wife's pregnancy and in the growth and development of the fetus she is carrying."[111] A man's interest in child custody is cognizable and substantial and, because of that, equal with the interest of the mother in the child's welfare. Even so, the U.S. Supreme Court has restrained the man's interest as acceptable only after birth.[112] State regulation would affect the woman's liberty more than the father's interest because the regulation is imposed upon the woman's body. She is the one who physically bears the child and who is more directly and immediately affected by the pregnancy. Under the rationale set forth in the U.S. Supreme Court's decision in *Casey II*, in the case of a her husband's disagreement, after balancing their interests, the pregnant woman's choice should prevail.

In the case of *Planned Parenthood of Central Missouri v. Danforth*, the U.S. Supreme Court rejected a spouses' written consent as a precondition for surgical performance on a woman seeking an abortion.[113] The perception that marriage is an institution and that any major change in family status concerns both marriage partners does not support the husband's veto power on abortion, especially within the first trimester of pregnancy. "[A] state cannot delegate to a spouse a veto power

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[109] *Casey* I, 505 U.S. at 887-888.

[110] *Id.* at 892-893. Other situations include but are not limited to domestic violence, marital difficulties, and marital rape. *Id.* at 888-893. The term "spousal assault" covers mainly physical violence. *Id.* at 889. However, regarding abuse, incidents of violence can be established in more forms, like physical and psychological harassment. *Id.* Women whose husbands would provoke further instances of abuse after notification of having had an abortion are not exempt from 3209's notification requirement. *Casey* I, 505 U.S. at 889. In the same position are the wives who may have a reasonable fear that notifying their husbands will provoke "verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family or friends." *Id.* at 874. If the pregnancy resulted from spousal sexual assault, than woman is unable to invoke the statutory exception because it requires that the woman notify law enforcement authorities within ninety days of the assault. *Id.* at 892-893. In other words, her husband will be notified of her report once an investigation begins. *Id.* The majority of domestic violence studies are concluded with certainty that victims of spousal sexual assault are extremely reluctant to report the abuse to the government and such victims cannot be exempt from 3209 requirements. *Id.*

[111] *Casey* I, 505 U.S. at 895 (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976)). [hereinafter *Danforth*].

[112] *See generally*, Stanley v. Illinois, 405 U.S. 645 (1972); Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed 441 U.S. 380 (1979); Lehr v. Robertson 463 U.S. 248 (1983); Michael H v. Gerald D., 491 U.S. 110 (1989); Miller v. Albright, 523 U.S. 420 (1998); Nguyen v. INS 533 U.S. 53 (2001).

[113] *See generally, Danforth*, 428 U.S. at 52.

which the state itself is absolutely and totally prohibited from exercising."[114] The first stage of pregnancy is a period when the state is unable to regulate or proscribe the termination of pregnancy.[115] A decision is to be made only between a physician and his or her patient without any interference from a third party, even if that third party is the husband of a pregnant patient.[116] In any case, "it is the woman who physically bears the child, who is more directly affected by the pregnancy, and the balance weight is in her favor."[117] Regarding the father's interest and concern in his wife's pregnancy, the state still cannot give the spouse unilateral authority to prohibit the wife from terminating her pregnancy, because the state itself lacks that right.[118]

To conclude, the U.S. Supreme Court based its decision regarding spousal consent on three premises. The first premise requires a compelling state interest to override a woman's fundamental right as the only possibility to allow any interference with a woman's decision. The second premise stresses that, within the first trimester, the husband has no right of his own with respect to the unborn child and therefore, no balancing of his right against the women's right to an abortion is necessary. The Court's third premise establishes the rule that spousal consent requirements are not related to the state's interest in the potentiality of life. None of these premises explain why the father's rights are animated only after a child is born. Like the state's interest in potential life, the husband's or the biological father's interest in the continuation of pregnancy is strong enough during the period where the fetus is viable to justify his interference with mother's decision related to her pregnancy.

As discussed above in this section, the Croatian legislature did not accept any compelling state interest to burden the right on abortion other than the interest to preserve the pregnant woman's health. Consequently, there is no justification for requiring a father's approval or even notification about an abortion at any stage of the pregnancy; in fact, such provision would be contrary to Article 1, 15, 16 and 25 of the Law on Health Care Measures.[119]

D. Counseling

According to the Law on Health Care Measures, before an abortion, a pregnant woman is not obliged to participate in counseling.[120] Nevertheless,

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[114] *Id.* at 57.

[115] *See* Roe v. Wade, 410 U.S. at 163.

[116] *Danforth*, 482 U.S. at 75.

[117] DAN DRUCKER, ABORTION DECISIONS OF THE SUPREME COURT 41 (McFarland & Company, eds., 1990).

[118] *Danforth*, 482 U.S. at 57.

[119] The Law on the Health Measures, art. 1, 15, 16, 25.

[120] The Law on Health Care Measures does not contain any provision according to which a pregnant woman mast participate in counselling before obtaining an abortion. A woman terminates her pregnancy on demand, and consequently a counselling requirement would unjustifiably burden her right to freely decide about giving birth.

according to the German Constitutional Court's second abortion decision in 1993, counseling is mandatory.[121] According to this decision, the state cannot leave the abortion decision to the free discretion of the woman even when justified by her capacity to make reasonable decisions. The Court did not have any other option than to accept the concept of mandatory counseling because fetal life has been considered the superior constitutional value in Germany, taking precedence over the woman's rights.[122] Keeping this in mind, "the right to life itself must define the scope and limits of its permissible infringement."[123] Counseling is a minimum fetal constitutional protection. It is a compromise and a new idea to "win women over."[124] The ultimate responsibility for making a decision to have an abortion still rests with the woman herself.[125]

According to the Law on Health Measures, when a woman submits an abortion request before or during the tenth week of pregnancy, a physician must give consent and perform the termination of the pregnancy. The law says nothing about the physician's conscious objection.[126] After the tenth week of pregnancy,

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[121] BverfG, 88 BverfGE 203 May 28, 1993.

[122] *See supra* note 78.

[123] KOMMERS, *supra* note 69, at 353.

[124] The Article 219, paragraph 1, of the German Penal Code explicitly asserts the counseling serves to protect an unborn life. The main purpose of it is to "encourage the woman to continue the pregnancy and to open herself to the prospects of a life with the child." *See* Strafgesetzbuch [StGB] [Penal Code] 1998 art. 219 §1.

[125] The Court clearly stated, "A woman should ultimately be permitted to decide against the pregnancy without the threat of punishment and obtain a medically safe abortion performed by a licensed physician." *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 203 (F.R.G.). During the whole period of counselling, the mother's right to stay anonymous is protected as well as her freedom to come to her own decision without pressures from her family or social environment through criminal law. *See* Schwangerschaftskonfliktgesetz [SchKG] [Law on Conflict Situations during Pregnancy] 1992, 1995 art. 5 § 1 and 6 § 2 However, the U.S. Supreme Court case, Akron v. Akron Center for Reproductive Health, demonstrates how counselling can be used as a method of persuading a woman not to go through with an abortion, rather than a mean to proffer the woman all necessary information regarding abortion procedure. Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983). In that case, the Court struck down provision 1870.07 of the Akron ordinance, which required the physician in each pregnancy case to explain "that the unborn child is a human life from the moment of conception" and to present a detail description of anatomical and physiological characteristic of the unborn. *Id.* The ordinance was also declared to be unconstitutional because it imposed a twenty-four hour waiting period of delay of abortion performance upon the woman after her decision to terminate the pregnancy. *Id.*

[126] The most commonly used legal tool to bypass the constitutional right to freely decide on the termination of pregnancy is to form a statutory provision which protects the rights of persons who provide health care in specialized institutions to refuse to participate in or to perform abortion procedures. In constitutional legal terminology these laws are called "conscience clauses" or "refusal clauses." Ralph Nader & Alan Hirsch, *A Proposed Right of Conscience for Government Attorneys*, 55 HASTINGS L.J. 325 (2003-2004). According to the 1975 German Constitutional Court decision anyone concerned was free to refuse to participate in the performance of an abortion regardless of his motives for the refusal. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.). The Croatian legislator did not accept the German position. The Law on Health Care Measures, art. 4 obligating *inter alia* medical personnel to secure the conditions for exercising citizens' basic right to freely decide about giving birth. Abortion is a medical procedure and the state has a duty to perform such procedures in Croatia. *Id.*, art. 4 and 15, §1. Moreover, there can be no obstacles to exercising reproductive rights as basic

abortions are available only upon the approval of special commission composed of two medical professionals, one of them being a gynecologist and the other being a social worker or a hospital nurse.[127] The commission is empowered to grant the request only for one or more of the kinds of reasons prescribed by the Law on Health Care Measures: a) absolute or relative medical indication; b) eugenic reasons; or c) legal or moral reasons such as rape or incest.[128] Anyone who performs an abortion against the conditions set in the Law commits a criminal act punishable according to Article 97 of the Criminal Code.[129] Performing an abortion without a pregnant woman's consent, in other words against her will, and after the tenth week of pregnancy, aggravates the sentence.[130]

Comprehensive nomotehnical utterance of Article 22 shows how the right of abortion is not absolute during the entire pregnancy. The same logic could be used as a basis for an argument that a state gains a right to protect a fetus as a potential life at the eleventh week of a pregnancy. There must be a point during the gestation period when a potential life is recognized and where a pregnant woman no longer has an unlimited right to do with her body as she pleases.[131] The U.S. Supreme Court in *Roe* had initially accepted the trimester test,[132] and the German Constitutional Court in both abortion decisions took the position that unborn humans after the fourteenth day of conception are entitled to the right to life.[133] It would be possible to conclude that over the course of a pregnancy a woman's right to abortion weakens and fetal rights grow stronger. Nevertheless, the Croatian legislature did not accept such a position. The Croatian Legislative Commission, while presenting the Law on the Health Measures, argued before the Parliament that the tenth week of pregnancy is a medical criterion according to which completing the pregnancy becomes a less dangerous procedure than having an abortion.[134] The

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human rights in medical facilities with public funding. (my own conclusion and a real state of facts)

127 The Law on Health Care Measures, art. 20, § and 35, § 1.

128 The Law on Health Care Measures, art. 22. According to this Article, the abortion must be performed after the tenth week of conception when medical indications designate that there is no other possibility to save mother's life or protect her health during a pregnancy, parturition or after parturition. *Id.* It is also necessary to terminate the pregnancy when according to medical indications and medical scientific findings it is possible to expect that a child is going to be born with severe physical or mental malformations. *Id.* Moral or legal indications exist if a conception is caused by one of the criminal acts against sexual freedom and sexual morality: a rape (art. 188 of the Penal Code), sexual intercourse with a helpless person (art. 189), sexual intercourse by abuse of position (art. 191), sexual intercourse with a child (art. 192) and incest (art. 198 of the Penal Code).

129 The Penal Code, art. 97.

130 The criminal offence of Unlawful Termination of Pregnancy forbids to everyone to terminate a pregnancy against the law, as well as to commence and assist a pregnant woman in termination. If such acts are committed by a pregnant woman herself, this is not considered to be a criminal act according to the art. 97 of the Penal Code.

131 *See Roe*, 410 U.S. at 154 (1973) (citing Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

132 *Id.* at 163-164.

133 Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1975, 39 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 1 (F.R.G.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 88 Entscheidungen des Bundesverfassungsgerichts [BverfGE] 203 (F.R.G.).

134 CONG. REC. Series XIV, Book 42a & 42b (March 1978).

legislative commission felt that the risk abortion may pose to a woman's health demands the opinion of a special medical commission to determine whether the pregnancy should be terminated or not.[135] The law is silent on whether there is an upper time limit in gestation that would preclude an abortion. The Commission clearly stated that protection of women's constitutional rights obligated the legislature to determine a time limit by the end of the gestation period settle on a specific time limit would have negative consequences.[136] There was a fear that a medical commission could endanger women's health by acting irresponsibly and granting abortions without sufficient grounds.[137] Therefore, the position of the Commission is in accordance with Article 3 of the Law on Health Care Measures, upon which abortion restrictions can be imposed only when a woman's health is threatened.[138]

E. Parental Notification

In the case of a minor demanding to have an abortion, the Article 20 of the Law on Health Care Measures recognizes three different situations.[139] If the minor is under sixteen years old, she needs to present parental consent and approval of the Social Care Center to obtain an abortion.[140] Consent is not required if the minor is married.[141] If the minor is older than 16 years old, she has a right to demand termination of her pregnancy without any consent.[142] The Law on Health Care Measures obligates a gynecologist to notify a minor's parents about the minor's demand if the termination presents a great risk for the minor's health or if the minor demands the termination of pregnancy after the tenth week of conception.[143] Notifying the parents restricts a minor's right to privacy however it does not restrict her right to an abortion. Once notified about the minor's demand, parents are powerless to prevent abortion if it is granted by a medical commission. To conclude, the right to abortion is granted to women over sixteen years old when Article 20 is applicable.

Consequently, the law indirectly empowers the minor with legal capacity. According to Article 120, § 1 and 3 of the Family Law, an underage person between the ages of sixteen and eighteen gains a legal capacity by getting married

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135 *Id.*

136 *Id.*

137 *Id.*

138 *See* The Law on Health Care Measures, art. 3.

139 *Id.* at art. 20, § 2.

140 *Id.*

141 *Id.* According to Article 26, § 2 of the Family Law a minor between 16 and 18 can enter into a marriage in exceptional cases. A court must determine that the minor is mentally and physically mature for the marriage and that a good reason exists to allow such marriage. OBITELJSKI ZAKON [The Family Law], Narodne novine [N.N.], No. 116 (2003), 17 (2004), 136 (2004) (R.CRO.).

142 The Law on Health Care Measures at 20, § 1 and § 2.

143 *Id.* at art. 20 § 2.

or becoming a parent.[144] The provisions of the Family Law and the Law on Health Care Measures are contradictory. Nevertheless, the Law on the Health Measures cannot be questioned keeping in mind *lex specialis derogate legi generali*. Bearing in mind that the provisions address underage persons who are legally considered children, it is necessary to resolve conflicts by applying the basic principle of the Family Law—the best interest of a child.[145] To act in a child's best interest is the basic principle of the U.N. 1989 Convention on Children Rights.[146] According to this principle, parents and guardians have a duty to increased care for minors. The state also has a legitimate interest in protecting minors.[147] The protection can be fulfilled directly through state bodies—a court or social care center for example—or indirectly such as through laws stipulating the parental or guardian's consent to a minor's abortion. In the abortion situation, two interests collide: the minor's interest to make a free decision about an abortion and the state's interest to act in the child's best interest by demanding parental consent. The Law on Health Care Measures resolved the conflict, accepting the right of the minor without interference by the state, in accordance with the notion that reproductive rights are basic human rights.

The Law on Health Care Measures does not have any provisions regarding how to resolve situations when the parents decline to give consent to a minor under 16 years old for an abortion. Following the U.S. Supreme Court's logic, a court should have the power to overrule a parental objection. The complexity of the problem was acknowledged in the case of *Bellotti v. Baird*,[148] which did not succeed in providing a complete solution on the constitutionality of parental consent.[149] The Court restrained from making a final decision by introducing an abstention principle.[150] However, the Court tried to make indications for this future determination suggesting that states can at least encourage minors to consult with their parents regarding abortion and in some circumstances, require a minor

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144 OBITELJSKI ZAKON [The Family Law], Narodne novine [N.N.] Art. 120, § 1 and 3 (R.CRO.).

145 *See* DRUCKER, *supra* note 117, at 59. Drucker argues that the rights of adolescents cannot be equal to that of adults because of: 1) their inability to make critical decisions, 2) their vulnerability, and 3) their need for special guidance that can only be provided by parents. *Id.* Drucker says that "[a] popular method used to protect children from their own immaturity and ill-advised decisions is requiring parents to participate in providing guidance and consent!" *Id.* Accordingly, it would be hard to reject the need for at least one parent's notification in the case of a minor's abortion.

146 The Republic of Croatia is a party of the Convention on the Rights of the Child starting from October 6, 1991 according to Decision on Publishing Multilateral International Contracts accepted by Croatia by the notification of succession. *See* Convention on the Rights of the Child, G.A. Res. 44/25, Annex, 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/49 (1989) (entered into force Sept. 2 1990). The Decision was made by the Government of the Republic of Croatia on September 30, 1993, and it is published in the Narodne novine [N.N.], No. 12 (1993). The official version of the Convention is published in the Službeni list SFRY [S.L. SFRY], No. 15 (1990).

147 1990 Croatian Constitution, art. 62.

148 Bellotti v. Baird, 443 U.S. 622 (1979).

149 *See* SLOAN, *supra* note 55, at 22.

150 *Bellotti*, 443 U.S. 622.

woman to obtain parental consent before obtaining an abortion.[151] In *Akron v. Akron Center for Reproductive Health*,[152] the Court rejected *Bellotti's* abstention principle and considered a minor's obligation for obtaining written consent from a parent or legal guardian before getting an abortion.[153] In this case, a municipal ordinance was declared unconstitutional because it failed to accept and acknowledge true emergencies in the case when parental consent is impossible to obtain.[154] It also did not succeed in providing for an adequate judicial bypass allowing the pregnant minor to substitute judicial consent for parental consent when she can show that abortion is in her best interest or that she is mature enough to make such decision herself.[155] The case of *Hodgson v. Minnesota*[156] attacked a Minnesota statute which provides that "no abortion shall be performed on a woman under age of eighteen until at least forty-eight hours after both of her parents have been notified."[157] Justice Stevens, in delivering opinion of the Court, acknowledged that requiring both parents' notification would be more difficult to obtain in numerous situations, for example when parents are separated or divorced, or in abusive or dysfunctional families.[158] The notification requirement did not further any legitimate state interest because one parent notification would satisfy the state's concern for a minor's best interest.[159] Even so, a state has no power or legitimate interest in questioning a one-parent decision not to notify the other parent or to make a presumption that one parent is incapable to decide what is best for the child's health or welfare.[160]

The Italian Constitutional Court has also considered the right of a minor to have an abortion. According to one decision from 1981, the right to have an abortion is a right exclusive to women that is given also to minors.[161] According to the decision No. 196 from 1987, parental consent that is normally needed to supplement a minor's legal incapacity can be bypassed by a decision of a special tutorial judge.[162] There is no obligation to notify the parents about a minor's decision to have an abortion if there are reasonable grounds to believe that the parents would object to such a decision because of religious or moral beliefs.[163] The tutorial judge has a guarantying function which is fulfilled by explaining the

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151 *Id.* at 640-641.
152 Akron v. Akron Ctr. for Reprod. Health, 462 U.S. 416 (1983).
153 *Id.*
154 *Id.*
155 *Id.* at 427.
156 Hodgson v. Minn., 497 U.S. 417, 13-14 (1990).
157 MINN. STAT. §144.343(2) (2005).
158 *Hodgson*, 497 U.S. at 418.
159 *Id.*
160 MARY ANN GLENDON, *supra* note 78, at 13.
161 Corte cost., 7 may 1981, Gass. Uff. No. 109/1981.
162 Corte cost., 21-25 may 1987, Gass. Uff. No. 196/1987.
163 *Id.*

legal nature and meaning of abortion.[164] This judge cannot substitute a minor's decision or call upon conscientious objection.[165] Based on these decisions, it seems that parental consent without judicial bypass or even parental notification such as that prescribed by the Law on Health Care Measures would unconstitutionally burden a minor's reproductive rights in Italy. Similarly in the United States, it was said in *Danforth* that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[166]

III. STATISTICAL ANALYSIS OF ABORTION PRACTICE

The number of legal cases would be the best indicator of whether the state should make the punishment for unlawful abortion more severe. In Croatia, the number of court cases is too small for the state to base any decision on future steps regarding the penalization of unlawful abortion. The Croatian State Institute for Statistics does not register special data on unlawful abortion; instead it is included in the Institute's annual statistical reports under the term "some other criminal acts."[167] Therefore, it was impossible to present the court practice in this article. Nevertheless, the influence of the Law on Health Care Measures on the number of abortions that are performed can be seen from the statistical analysis of the number of suspects of unlawful abortion in the period of 1973 until 2003.[168]

Table 1. Number of persons suspected for the criminal act of unlawful abortion in the period of 1973 until 2003 in the Republic of Croatia.

Year	No. of suspected persons	Year	No. of suspected persons	Year	No. of suspected persons
1973	16	1983	7	1993	2
1974	29	1984	6	1994	1
1975	41	1985	2	1995	-
1976	20	1986	2	1996	-
1977	9	1987	1	1997	-
1978	3	1988	-	1998	4
1979	13	1989	2	1999	10

164 *Id.*

165 *Id.*

http://www.cortecostituzionale.it/eng/attivitacorte/pronunceemassime/pronunce/disclaimer.asp (last visited May 22, 2005).

166 Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74 (1976).

167 DRŽAVNI ZAVOD ZA STATISTIKU, PUNOLJETNI POČINITELJI KAZNENIH DJELA, PRIJAVE OPTUŽBE I OSUDE U 2005 GODINI [The State Institute for Statistics, Criminal Offenders of Age, Indictments, Charges and Sentences], DRŽAVNI ZAVOD ZA STATISTIKU (2005)

168 The data presented in Table 1 was collected by the author as a part of research conducted at the Croatian State Institute for Statistics.

1980	12	1990	2	2000	14
1981	9	1991	-	2001	1
1982	4	1992	2	2002	-
				2003	3

The table above proves that cases of unlawful abortion are extremely rare. The highest number of criminal charges pressed was in 1974—forty-one of them—while in 1988, 1991 and in the period between 1997 until 2002 there were not any charges pressed. After the Law on Health Care Measures came into being in 1978, the number of charges rapidly diminished. 1979, 1980 and 2000 were the only years where there were more than ten cases of suspected unlawful abortion. If we compare the period from the beginning of the research with this one, the statistical findings are insignificant. It is possible to conclude that the number of cases of unlawful abortion is more or less constant but also irrelevant and points to a low level of criminal danger for Croatian society. Therefore, the Law on Health Care Measures has influenced criminal policy against unlawful abortion. It can be presumed its provisions on easily accessible contraceptives and termination of pregnancy also made an impact on abortion performance in general. Table 2 presents statistical data on abortions that were performed legally between 1979 and 2002.

Table 2. Number of abortions performed in the period of 1979 till 2002 and statistical data on age of women who had abortions.[169]

	1979	1990	1993	1996	1999	2002
No. of abortions performed	51549	38644	25179	12339	8064	6191
Adolescents	7%	4.2%	4.55%	5.7%	5.6%	7.8%
Women between 20-29	52%	42.47%	40.67%	37%	35.6%	35.6%
Women between 30-39	34%	40.03%	45.41%	45.8%	44.8%	44.3%
Women between 40-49	5%	6.85%	8.72%	10.8%	11.8%	11%

According to the data from Table 2, the number of terminated pregnancies is constantly dropping. 51,549 abortions were performed in 1979. Eleven years later there were 38,644 abortions and in 1996 there were 12,339 of them. In the final year of the study, 6,191 pregnancies were terminated, which is equivalent to 12% of the abortions performed during the first year of the study. It is interesting to note

[169] http://hzjz.hr/publikacije/prekidi_trud/2002 (last visited May 22, 2005).

that despite what was expected, the number of abortions declined during the years in which Croatia was at war.[170] According to the data collected on the women's ages, adolescents have least of all terminated their pregnancies—between 4.2% and 7.8% of all abortions have been committed by adolescents. Forty-five percent of the female population who have had a legal abortion is more than thirty and less than thirty-nine years old. Statistics show discrepancies in 1979, when fifty-two percent of women who had abortions were in their twenties, and only thirty-nine percent of them in their thirties.

Keeping in mind statistical findings dealing with the number of women who had allegedly committed unlawful abortion and number of abortions performed in general, it may be concluded that calls to restrict abortion have been unfounded. The unlawful termination of pregnancy is almost harmless for criminal legal policy in Croatia. The number of legally performed abortions is constantly dropping. Having in mind that there are no statistical findings to support restrictions on abortions, it is necessary to conduct research on public opinion on abortion and to try to find out reasons for recent antiabortion advocacy.

IV. PUBLIC ATTITUDES ON ABORTION

Authors Baloban and Črpić conducted research and published *Abortion and Mentality in Society*[171] in 1998 because of numerous contradictory statements on abortion problems and religious points of view in the public. The results obtained are indicative of contradictory opinions of Croatians: for example, 64.4 % of research participants supported a woman's right to freely decide to have an abortion, but 80.6% of them thought that abortion is an interruption of human life. Therefore, it can be deduced that abortion is perceived by Croatians as a destruction of human life and, at the same time, perceived as something that should remain a woman's choice. Furthermore, only 24.9% of participants believed that abortion should be made illegal. To conclude, the vast majority of participants agreed that abortion is the equivalent to taking a human life which is, at the same time a right to women that should not be taken away.

One of the possible reasons for Croatians' contradictory views could be the resurgence of traditional thinking and the great influence of the Church at the beginning of nineties. A majority—89.7%—of those examined considered themselves to be Catholic.[172] It is interesting to note that there are only four European countries with such a large majority of Catholics—Poland, Northern Ireland, Spain and Italy. Moreover, the Church tops the list of institutions which that Croatian people most trust. While 84.5% of those examined have predominantly put their trust into Church, only 38.9% of them believe that the

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170 *Id.*

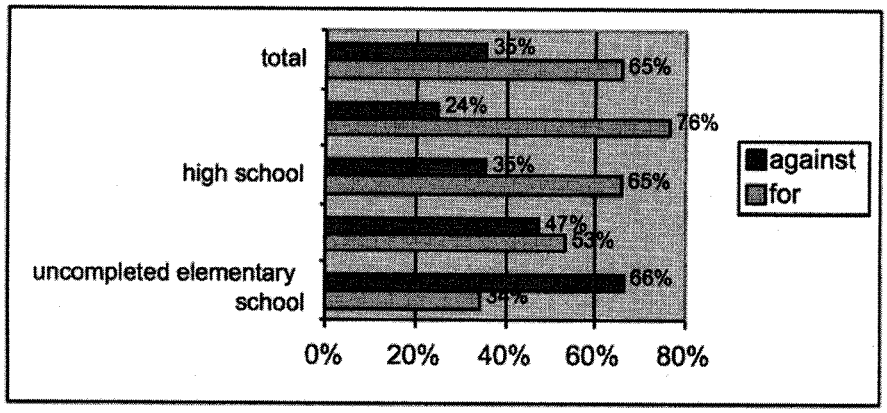
171 *See* Baloban & Črpić, *supra* note 6.

172 *See id.* at 642.

Church should interfere in abortion issues.[173] The contradictory answers in the survey prove that public opinion of abortion is greatly influenced by the mentality of the society. The traditional period swept away predominant values built in the last sixty years, and, faced with a moral vacuum, Croatian citizens have accepted conventional moral beliefs in an effort to substitute the lost ones, trying to fulfill behavioral patterns.

Similar results have been obtained by the Center for Research of the Market in March of 2004. The Center examined public moral attitudes towards contraceptives, abortion, the role of women, and modes of conducting reproductive policy by Croatian government.[174] There were 2116 participants between the ages of eighteen and twenty-four years old, who were divided by sex, age and place of residence for each county as well as Croatia as a whole. The results are presented in Graph 1 and Graph 2.

Graph 1. Participants' attitudes towards a woman's right to have an abortion as related to participants' education.



The research results show connections between educational, social and regional characteristics of participants when abortion is in question. There were no differences between moral attitudes of female and male participants. Sixty-five percent of participants think a woman has a right to an abortion. Those who have a higher education tend to agree more with a woman having a right to an abortion. For example, seventy-six percent of research participants who are in favor of women's reproductive rights have finished college or are faculty, as opposed to thirty-four percent of participants who did not complete elementary school.

Graph 2. Participants' attitudes towards a woman's right to have an

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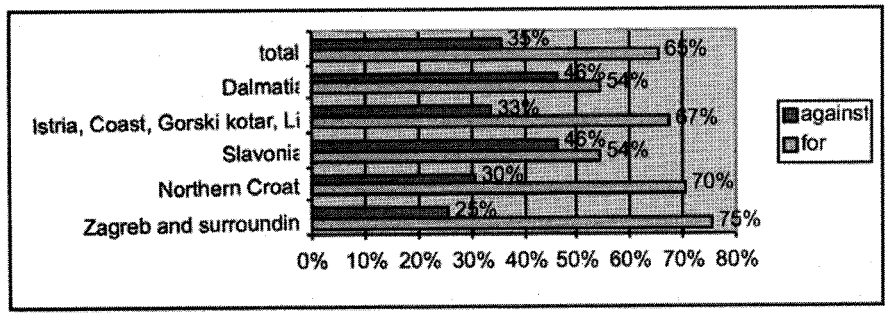
[173] *See id.* at 647.

[174] SLIČICE IZ ISTRAŽIVANJA JAVNOG MNIJENJ [A Center for Research of the Market]-Zagreb, Pictures from the Research of Public Opinion, *available at* http://www.gfk.hr/press/slicice.htm (last visited April 22, 2005).

abortion according to participants' regional place of residence.



According to Graph Two, the acceptance of reproductive rights is higher in urban regions. The majority of participants who do not accept abortions—fifty-five percent of them—live in areas with fewer than two thousand inhabitants. On the other hand, seventy-five percent of participants who live in cities with more than one hundred thousand inhabitants are pro-abortion. These results support the idea that the Church can expect greater support in smaller areas and among an uneducated population. Furthermore, traditionally, religious attitudes are more present in Slavonia and Dalmatia. Fifty-four percent of participants from Slavonia and Dalmatia agree with abortion while sixty-seven percent to seventy-five percent of the population in other regions agree with abortion.

The Center for Research of the Market research results enhance the findings of Baloban and Črpić. Citizen's moral attitudes are influenced by social condition and especially education. It is especially interesting to see what kind of moral attitudes law students have on abortion. Two hundred and seventy-seven students of the Faculty of Law, University in Rijeka, participated in last year's research. Participants were divided into four groups with each group representing the corresponding year of study. For example, the first year students were in the first group composed of one hundred and forty-one students and the fourth year students were in the fourth group composed of twenty-nine students. Table Three shows student's attitudes towards abortion as an interruption of human life and abortion as a woman's right.

Table 3. Students' moral attitudes on abortion as an interruption of human life and as a woman's right.

	I. year			II. year		
	yes	no	I do not know	yes	no	I do not know
Thesis 1.	102	27	12	20	11	2
%	*72*	*19*	*9*	*60*	*33*	*7*
Thesis 2.	117	18	6	24	7	2

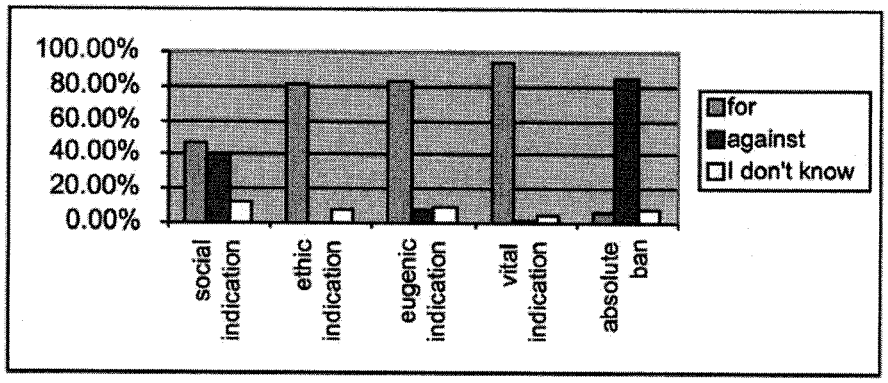
%	*83*	*13*	*4*	*73*	*21*	*6*
	III. year			IV. year		
	yes	No	I do not know	yes	no	I do not know
Thesis 1.	40	18	16	7	13	9
%	*54*	*24*	*22*	*24*	*45*	*31*
Thesis 2.	59	12	3	29	/	/
%	*80*	*16*	*4*	*100*		

Thesis 1: *Abortion is a mean of interrupting human life.*

Thesis 2: *It is a right of a woman to make a decision on abortion by which she freely decides about her private life issues.*

The first year students predominantly agreed with the Thesis One at seventy-two percent. The percentage of students who agreed with Thesis One progressively dropped in the second, third and forth years. For example, only twenty-four percent of the final year students think of abortion as a termination of life. Although most first year students expressed their views that abortion is killing, even more of them believed that abortion is a private life decision that should be given to women at eighty-three percent. All fourth year students agreed with Thesis Two. The table above shows that moral views were the least contradictory among final year students. This was to be expected keeping in mind the fact that they were the oldest and have already started thinking like lawyers. Nevertheless, research findings presented above emphasize the necessity of introducing students to the legal nature and legal provisions regarding the right to an abortion.

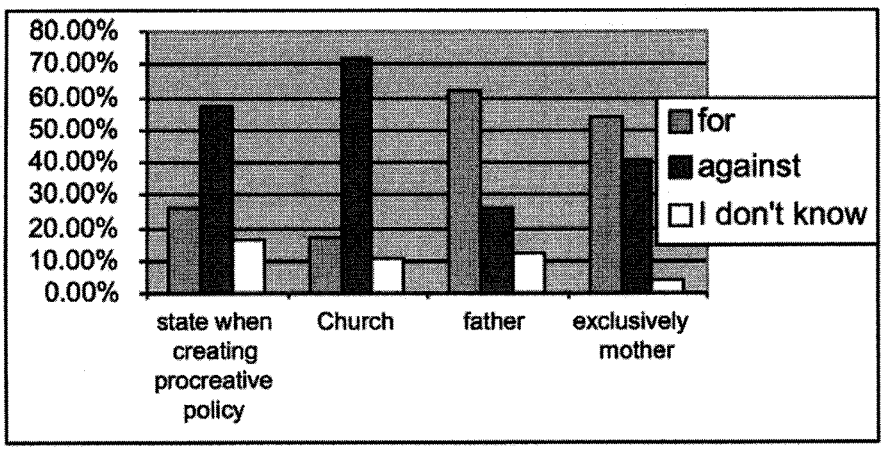
Graph 3. Participants' attitudes on justifiability of abortion according to reasons to have an abortion.



According to data from Graph Three, most students, 93.82%, accept abortion

when pregnancy imposes a threat to a woman's life. Only 1.82% of students are against abortion in cases of vital indication and 4.36% of students can not take a stand on that. Although 6.86% of students support an absolute ban on abortion, in following answers 4% of participants opted for abortion in certain cases. Students' standings on eugenical and ethical indications are almost identical. Two hundred and twenty-nine—82.9%—of them support abortion when a fetus has suffered from malformations, and two additional students—for a total of 83.7%—accept abortion as a solution when a pregnancy was caused by a rape or incest. If a mother does not have economic means to support a child, 47.46% of students support abortion while 40.58% are against it and 11.96% could not make up their mind. It is interesting to note that 11.96%, or thirty-three students, is the highest number of students who could not decide whether to opt for or against abortion.

Graph 4. Participants' attitudes on the right on abortion titular.



According to Graph Four, students do not have a unanimous position on the issue of who is entitled to make abortion decisions. Compared with the results from Table Three and Graph Three, the highest number of students couldn't take a stand on this issue. The smallest number of students think that the state can interfere in abortion decisions when creating its reproductive policy—seventy-two of them or 25.99%. Conversely, students are almost unanimous when deciding whether the Church has the right to intervene—72.2%—which does not vary significantly from results obtained by Baloban and Črpić —61.1%. Almost the same percentage of students believe that a father should be included in the decision-making when abortion is in question—61.7% or 171 students. It is interesting to compare the results presented with results on students' attitudes whether a woman has an exclusive right to decide about an abortion. One hundred and fifty students, or 54.15%, support the thesis on abortion as an exclusive woman's right while one hundred and fourteen participants, or 41.15%, are against it. Only thirteen

students, or 4.35% of them, could not make up their mind on this issue. Such division of views does not support the above-presented findings because certain students who supported a woman's exclusive reproductive right believed the same right should be given to a father.

The results obtained from all three studies points to the inconsistent views of the participants. Nevertheless, the participants were believed to have had a valid attitude on the abortion issue. Moral attitudes of participants greatly depend on participants' social and sociological conditions of living. Although it might be expected that the most unanimous moral attitudes would be among students, the results point at a certain contradiction. One of the reasons could be the fact that the highest number of students who participated in the research were first year students[175] who are young, started with their studies recently and do not have broad legal knowledge, especially of the Criminal and Constitutional Law. Therefore, it is necessary to influence students' attitudes to avoid colloquial, contradictory, and rhetorical thinking on abortion. It is senseless to support liberal or restrictive legal regulations on abortion without being familiar with the legal essence of the right to an abortion.

CONCLUSION

Abortion is a problematic and complex issue which can be put in focus from legal, ethical, religious and philosophical points of view. It has been discussed for a long time. It is easy to forget that moral attitudes cannot be copied and impressed upon a legal provision. On one hand, ethical standards cross over the borders of legal acts. On the other hand, every legal provision is not based on moral findings. Moral attitudes differ deeply and can be in collision. Consequently, sometimes it is necessary to choose between the highest respect for human life and the highest acceptance of woman's autonomy to make free private decisions. Moreover, it was proven than even in communities where human life was considered given the highest value, there was no unanimous view of moral obligation to preserve a human life—for example, in situations when a woman is not responsible for a pregnancy. This is the reason why the perception of the public is different from the legal norms on abortion or from interpretation of these norms. Therefore, basic moral duties cannot be an exclusive basis from which to enact a legal norm.

Comparative analysis shows that abortion has been acceptable in certain cases even in such legal systems where a right to life has been the highest value, given to a fetus on the fourteenth day after conception. Such cases have been expanded with the social indication, that prohibition of abortion has become an exception and permission of it a rule. This is the reason why we should think about abortion in

[175] The sample presented a current number of enrolled students of all four years of studies. The questionnaire was answered by 141 first year students, 33 second year students, 77 third year students and 29 fourth year students.

the terms of Constitutional Law. After applying constitutional standards and tests, the author reached a legally-based solution to the abortion issue and presented it in this article. Provisions of the Law on Health Care Measures have been proven as constitutional, and therefore there is no need to amend them. The only exception concerns the provisions on abortions for minors, which should be harmonized with provisions of the Family Law and principled in best interest of the child. It seems that legislators made the same conclusion after rejecting to have a debate in 1995 and 1996 Law on Health Care Measures amendments.[176] No matter how high the public sensibility is when abortion is in question, there are not going to be new amendments on the Law in the near future. The possible future outcome of the abortion issue in Croatia can accept changes but only in the field of state's duties. It is commonly recognized in Croatian society that the state is unable to restrain the procreative right to have an abortion without improving the economical and social situation of citizens and without strengthening its own duties to protect motherhood and to facilitate the position of the woman when being a mother. There are no doubts that any attempt to make abortion illegal will be strongly opposed.

[176] *See supra* note 2.