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Abortion, the Disabilities of Pregnancy, and the Dignity of Risk

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When abortion is discussed in the context of destigmatizing disability, it is usually in connection with the potential disabilities of the fetus. Disability rights activists increasingly encourage both lawmakers setting abortion policy and women contemplating abortion to think that a life with disabilities is worth living. In particular, they argue that a fetus diagnosed with Down syndrome, let alone one with a cleft palate, should not for that reason be aborted. While taking this line of argument into account, this Chapter will shift the frame of reference to various ways in which the law and bioethics of abortion treat pregnant women as disabled.

The examples presented come from the abortion jurisprudence of the United States and the Federal Republic of Germany. In the U.S. Supreme Court decision of *Gonzales v. Carhart*,[2] a decision about so-called late-term partial-birth abortions often undertaken after a diagnosis of fetal disability, Justice Kennedy's emphasis on the human dignity at stake infamously did not center on the dignity of either the disabled fetus or the pregnant woman, but on the abstract dignity of the human being, which he saw as imperiled by allowing physicians to elect a method of abortion that could be seen to resemble childbirth too closely. Even more infamously, Kennedy used the opinion to validate the claim that a woman might come to regret her abortion and should therefore perhaps be legally disabled from obtaining it. Using concepts developed by disability rights advocates, I shall argue that what Kennedy is denying to women is the dignity of risk: even assuming arguendo that women are indeed likely to regret their abortions, treating them as incompetent to make this potentially regrettable decision denies them their full human dignity.

German abortion law, which also centers on human dignity, treats pregnant women contemplating late-term abortions because of diagnosed fetal disabilities as disabled in a somewhat different way. German law presumes women carrying fetuses with disabilities might be under sufficient mental strain (or will be once their disabled child is born) that they qualify for a legal abortion because of the pregnancy's effect on their mental health. Although more of a legal workaround than a well-thought-out jurisprudential or bioethical position, this approach, like Kennedy's, works to disable (pun intended) pregnant women, albeit in service of facilitating rather than preventing her access to a legal abortion.

Kennedy's retirement from the Supreme Court might call the continuing viability of his approach into question. But, in cases heading toward the Court and in the approach of his successor, there are worrisome echoes of Kennedy's opinion in *Carhart*. For

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[11] Arnold I. Shure Professor of Law, University of Chicago law School. Versions of this paper were presented at the Petrie-Flom Conference on Disability, Health, Law, and Bioethics, the *Wake Forest Journal of Law & Policy* Symposium "Thinking about the Future of Reproductive Freedom on the 45th Anniversary of Roe v. Wade," and as a University of Chicago Law School Work-In-Progress. I am grateful for the patience of Michael Stein and his fellow editors, for the invaluable help of Ute Sacksofsky and her team with complicated questions of German law, and for the research assistance of Lyonette Louis-Jacques, Margaret Schilt, and Emily Vernon. All errors remain my own.

[2] 550 U.S. 124 (2007).

example, two now pending cert. petitions deal with statutory schemes potentially inspired by Kennedy's *Carhart* opinion. And, while a circuit court judge, Justice Brett Kavanaugh, Kennedy's replacement, wrote opinions in cases whose fact patterns centered on particular disabilities faced by two groups of pregnant persons in government custody: pregnant minor immigrants in detention for unlawful entry into the United States and intellectually disabled pregnant women in the care of the District of Columbia Mental Retardation and Developmental Disabilities Administration ("DCMRDDA"). Like Kennedy in *Carhart*, Kavanaugh was disturbingly comfortable allowing government paternalistically to restrict the choices of those who are pregnant.

Conceding that all pregnant women are vulnerable, and those carrying fetuses diagnosed with disabilities perhaps especially so, this Chapter will argue that translating those vulnerabilities into the sort of legal disability that women labored under historically is not a productive way forward. Acknowledging that pregnant women should have the dignity of risk is one of several preferable approaches.

I. Vulnerable Women and Vulnerable Humanity in Kennedy's *Carhart* Opinion

When *Planned Parenthood v. Casey*[3] reaffirmed the abortion right first recognized in *Roe v. Wade*,[4] only Justice Stevens clearly stated that the "authority to make such traumatic and yet empowering decisions is an element of basic human dignity."[5] The joint opinion of Justices Kennedy, Souter, and O'Connor said of dignity only that analysis of abortion began but could not end with the recognition that decisions about procreation were "choices central to personal dignity and autonomy."[6] Rather than a woman's dignity, the *Casey* joint opinion stressed her vulnerability, observing that the "mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear" and "[h]er suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role."[7] Although ultimately endorsing a woman's right to choose, the *Casey* joint opinion expressed concern about the potential adverse effect of a choice to abort on a woman's "psychological well-being," holding that Pennsylvania could mandate the provision of information about the condition of the fetus because this would "reduc[e] the risk" a woman might "discover later, with devastating psychological consequences, that her decision was not fully informed."[8]

Fifteen years later, the seeds of doubt about abortion rights planted in the *Casey* joint opinion blossomed in Kennedy's majority opinion in *Gonzales v. Carhart*.[9] Kennedy often promoted dignity as a legal concept.[10] But the dignity he sought to protect through

[3] 505 U.S. 833 (1992).
[4] 410 U.S. 113 (1973).
[5] Casey, 505 U.S. at 916 (Stevens, J., concurring).
[6] Id. at 851 (plurality opinion).
[7] Id. at 852.
[8] Id. at 882. The Court noted that Pennsylvania law exempted physicians from providing otherwise required information about the fetus and the abortion procedure if it could be proven that "furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." Id. at 883–84.
[9] Carhart, the doctor who lost this case, had earlier succeeded in having the U.S. Supreme Court strike down an essentially identical state statute in *Stenberg v. Carhart*, 530 U.S. 914 (2000). While Kennedy, who dissented in Stenberg, claimed the different result stemmed from a better legislative record for the federal statute, a more plausible explanation is the replacement of Justice O'Connor with Justice Alito.
[10] For further discussion, see, e.g., Mary Anne Case, Of "This" and "That" in Lawrence v. Texas, 2003 S.

the Partial-Birth Abortion Act[11] was not that of women, or even of individual fetuses. It was a purely abstract idea of human dignity Kennedy saw as imperiled by an abortion method both he and Congress viewed as at once too gruesome and too closely resembling childbirth. According to Kennedy, the "Act expresses respect for the dignity of human life"[12] because, as Congress declared: "mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life."[13] Kennedy additionally felt that learning the gruesomeness of the procedure might have an adverse effect on the pregnant woman. His concern was not that it might coarsen her, but that should she later "com[e] to regret her choice to abort [she] must struggle with grief more anguished and sorrow more profound when she learns…what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."[14] Whereas in *Casey* more fully informed consent was seen as the way to prevent the risk of such subsequent psychological harm, in *Carhart*, the risk was seen to justify an outright ban on the potentially disturbing procedure.

Kennedy's avowed concern in *Carhart* for a pregnant woman's future mental health is particularly ironic given the lack of such concern in the Act he upholds. The ban contained within the Partial-Birth Abortion Act notoriously leaves no room for a health exception of any kind, no matter how severe the threat to a woman's physical or mental health. The Act makes the procedure legal only when "necessary to save the life of a mother whose life is endangered by a *physical* disorder, *physical* illness, or *physical* injury."[15] The omission of threats to life arising from mental disorder seems an intentional effort to preclude even physicians for seriously suicidal women from availing themselves of the procedure.

Moreover, as Carol Sanger has argued, the depositions in *Carhart* suggest that a fully informed woman facing the late-term abortion of a wanted pregnancy might actually prefer that her fetus be delivered by the procedure the Act prohibits. She would then be presented with a relatively intact fetal body rather than "a set of disarticulated parts," and her ability to hold, bid farewell to, and bury a dead "child assuming the human form" might enhance rather than jeopardize her subsequent mental health.[16]

The effect of personal testimonies of women who regret their abortions on Kennedy may have been one motivating factor for the growing number of public testimonials from women with the opposite perspective, who now write in poignant detail about the circumstances – including diagnoses of fetal disabilities incompatible with life – that led them sadly but decisively to abort a very much wanted pregnancy after the first

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Ct. Rev. 75 (2004).

[11] Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1202 (2003) (codified as amended at 18 U.S.C. § 1531 (2012)).

[12] Carhart, 550 U.S. at 157. That Kennedy is a Roman Catholic may contribute to his tendency to privilege the abstract idea of human dignity over the concrete concerns of individual humans. For further discussion see Mary Anne Case, Trans Formations in the Vatican's War on Gender Ideology, 44 Signs 639, 653–54 (2019).

[13] Carhart, 550 U.S. at 157 (citing Partial-Birth Abortion Ban Act § 2(14)(N)).

[14] Carhart, 550 U.S. at 159–60.

[15] 18 U.S.C. § 1531(a) (2012), cited in Carhart, 550 U.S. at 141 (emphases added).

[16] Carol Sanger, About Abortion: Terminating Pregnancy in Twenty-First-Century America 151 (2017).

trimester.[17]

II. Kennedy's Legacy

Both aspects of Kennedy's *Carhart* opinion criticized in this Chapter have inspired subsequent anti-abortion legislation. Kennedy's suggestion that abortion might lawfully be regulated in the interests of preventing the disabling effects of what Sandra Cano's *Carhart* amicus brief called "post-abortion syndrome"[18] encouraged those backing abortion restrictions allegedly protective of women.[19] And his view that abortion restrictions could be justified by concerns for preserving abstract human dignity gave rise, for example, to laws mandating the dignified disposal of fetal remains. Presently pending are two cert. petitions arising out of Planned Parenthood's thus far successful challenges to Indiana laws addressing both sets of issues. In one case, the Seventh Circuit struck down as an undue burden on abortion rights a mandatory ultrasound followed by a mandatory reflection period because, although "protecting maternal psychological health is … a legitimate state interest," there was no evidence that "having an ultrasound eighteen hours before an abortion leads to more favorable psychological outcomes."[20] In the other, it held that there was no rational basis to "require abortion providers to dispose of aborted fetuses in the same manner as human remains."[21] Additionally, the Seventh Circuit struck down as contrary to *Casey*'s holding that previability abortions could be neither prohibited nor unduly burdened a provision of Indiana law prohibiting anyone from performing a previability abortion "if the person knows that the pregnant woman is seeking" an abortion "solely because of the sex,…race, color, national origin, or ancestry of the fetus" or "solely because the fetus has been diagnosed with…or has a potential diagnosis of Down syndrome…or any other disability."[22]

If the Supreme Court does not grant certiorari in either of these two Indiana cases, the issues presented by them will likely return to the Court in cases from other states.

III. Kennedy's Successor and Pregnant Women as Children and Imbeciles[23]

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[17] See, e.g., Natalia Megas, The Agony of Ending a Wanted Late-Term Pregnancy: Three Women Speak Out, Guardian (Sept. 20, 2017), https://www.theguardian.com/society/2017/apr/18/late-term-abortion-experience-donald-trump.

[18] Brief for Sandra Cano et al. as Amici Curiae in Supporting Petitioner, Carhart, 550 U.S. 124 (2007) (No. 05-380). In this brief, explicitly inspired by the suggestion in *Casey* that there could be "devastating psychological consequences," id. at 22, if a woman's decision to abort were not fully informed, women who had abortions offered first person accounts of the depression, drug addiction, suicidality, and other disabling psychological effects they attributed to the aftermath of their decision to abort.

[19] For examples of such legislation, see Reva Siegel, The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions, 2007 U. Ill. L. Rev. 991, 992.

[20] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 896 F.3d 809, 830 (7th Cir. 2018).

[21] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of the Ind. State Dep't of Health, 888 F.3d 300, 308 (7th Cir. 2018).

[22] Id. The statute defined "potential diagnosis" as "the presence of some risk factors that indicate that a health problem may occur," Ind. Code § 16-34-4-3, and "any other disability" as "any disease, defect, or disorder that is genetically inherited," including both physical and mental disabilities. Ind. Code § 16-34-4-1.

[23] Cf. Barbara A. Brown, Thomas I. Emerson, Gail Falk, & Ann E. Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women, 80 Yale L.J. 871, 872 (1971) ("Courts classified women with children and imbeciles, denying their capacity to think and act.").

After Brett Kavanaugh's nomination to the Supreme Court, those interested in ascertaining his approach to abortion focused almost exclusively on a single case that had come before him as a circuit judge, *Garza v. Hargan*.[24] JD, the Jane Doe plaintiff in that case, was one of a number of pregnant undocumented immigrant minors in federal custody whom the then-head of the Office of Refugee Resettlement, Scott Lloyd, an implacable opponent of abortion, sought by all means in his power to prevent from aborting their pregnancies.[25] As to JD, after sending her to pro-life counseling and notifying her allegedly abusive mother, he refused to allow her to leave detention to go to a clinic for an abortion, notwithstanding that her guardian ad litem and the government contractor detaining her were prepared to handle all logistics.[26] The lower court's order that JD be given access to an abortion was stayed by a panel of the D.C. Circuit including Kavanaugh in order to allow the government more time to seek a sponsor into whose custody it could release JD.[27] But the D.C. Circuit en banc promptly dissolved the stay and JD obtained her abortion shortly thereafter.

Kavanaugh dissented, claiming that the "en banc majority ha[d] badly erred" by failing to follow "the Supreme Court's many precedents holding that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion."[28] Unlike his colleague Judge Henderson, who also dissented, but on the grounds that unlawful immigrants had no relevant constitutional rights, Kavanaugh couched his dissent in paternalistic tones of concern for JD's welfare, stressing that JD was "not an adult but a minor," "alone and without family or friends," faced with "a major life decision"[29] and, if "transferred to her immigration sponsor, would be "in a better place when deciding whether to have an abortion."[30]

Kavanaugh's approach ignores the facts.[31] As concurring Judge Millett stressed,

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[24] 874 F.3d 735 (D.C. Cir. 2017).

[25] Lloyd demanded a weekly spreadsheet listing every pregnant underage girl in the Office of Refugee Resettlement's custody and insisted that no action concerning these girls, from medical appointments to meetings with lawyers, could take place without his personal approval. See Tessa Stuart, The Health Department's Christian Crusade, Rolling Stone (Oct. 24, 2018), https://www.rollingstone.com/politics/politics-features/health-and-human-services-abortion-policies-738904/. His tactics included attempting to "reverse" a two-step medical abortion by delaying the provision of the second necessary drug, and even personally meeting with pregnant girls in custody to dissuade them from seeking to abort. See Hannah Levintova, The Trump Official Overseeing Migrant Girls Health Care Once Wrote He Couldn't Support Abortion for Any Reason, Mother Jones (Aug. 22, 2018), https://www.motherjones.com/politics/2018/08/scott-lloyd-essay-orr-pregnant-migrants-abortion/.

[26] See Garza, 874 F.3d at 740 (D.C. Cir. 2017) (Millett, J., concurring).

[27] Sponsors, who fulfill a role akin to foster parents, are ordinarily selected only from relatives or others with whom the minor has a preexisting relationship, undergo rigorous background checks, and, if approved, assure the minor's appearance at subsequent immigration hearings. See id. at 739.

[28] Id. at 752 (Kavanaugh, J., dissenting).

[29] Id. at 754.

[30] Id. at 755.

[31] Holding out the prospect, however unrealistic, that a sponsor would timely appear to take JD out of government custody allowed Kavanaugh to avoid taking a position on the question of her abortion rights, which was in his interests as a potential Supreme Court nominee. On the Supreme Court, Kavanaugh appears to have continued this tactic of positing an unrealistic factual scenario to avoid straightforwardly applying or forthrightly calling for an overruling of abortion case law. See June Med. Servs. V. Gee, 139 S. Ct. 663, 663–64 (2019) (Kavanaugh, J., dissenting) (claiming no stay of a requirement that those performing abortions obtain admitting hospital admitting privileges was necessary unless and until those privileges were denied, despite all parties' agreement that forced closure of clinics for want of privileges

JD had already been waiting seven weeks for a sponsor with none on the horizon,[32] and she was already fifteen weeks pregnant, rapidly approaching the point where termination would become legally and practically more cumbersome. The only option the government was offering JD was that she could self-deport to her home country where abortion was illegal. And the paternalistic arguments for delaying until a sponsor could be found were inventions of Kavanaugh. "The only value of sponsorship identified by the government was that sponsorship, like voluntary departure from the United States, would get JD and her pregnancy out of the government's hands." [33]

Like Kennedy's *Carhart* opinion, Kavanaugh's dissent appears solicitous of an unwillingly pregnant person while in reality denying her the dignity of respecting her choices. Not only had JD already decided that an abortion was in her best interests, a Texas judge had affirmed her capacity to make this determination for herself.[34] In declining to release her for a clinic appointment, the federal government was "simply supplanting her legally authorized best interests judgment with its own categorical position against abortion."[35] By allowing JD to effectuate her decision despite Kavanaugh's paternalistic efforts to delay, the D.C. Circuit afforded her "a modicum of the dignity, sense of self-worth, and control over her own destiny that life seems to have so far denied her."[36]

Kavanaugh's opinion in *Garza* presents the question of whether he is properly described not as pro-life but as anti-choice. The evidence for calling him anti-choice is strengthened by his opinion in another, much less discussed case involving Jane Doe plaintiffs in government custody. These plaintiffs were intellectually disabled women in the care of DCMRDDA who alleged that elective surgeries had been performed on them without any attempt to ascertain their wishes. For two of the named class representatives, Jane Does I and III, the elective surgery in question had been abortion. These abortions had been performed "allegedly without either consulting with [the pregnant woman's] legal representative or obtaining substituted judgment from a court," and, in Jane Doe III's case, notwithstanding that "according to plaintiffs, [she had] decided to carry the pregnancy to term."[37] Because the regulations had in the interim been amended to require a court order before "abortion, sterilization or psycho-surgery" could be performed on the relevant class of patients,[38] the constitutionality of the abortions performed on Jane Does I and III was not before the panel for which Kavanaugh wrote denying injunctive relief. But, in finding that the "plaintiffs' constitutional claims are meritless,"[39] Kavanaugh gave no indication his approach would be any different were abortion still one of the procedures in question.

A careful reading of Kavanaugh's language confirms that he seems no more

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would be contrary to existing precedent).

[32] Indeed, JD "remained in ORR custody for months after her abortion." Garza v. Hargan, 304 F. Supp. 3d 145, 165 n.7 (D.D.C. 2018).

[33] Garza, 874 F.3d at 739 (Millett, J., concurring).

[34] See id. at 736.

[35] Id.

[36] Id.

[37] Does I through III v. District of Columbia, 232 F.R.D. 18 (2005), rev'd in part, vacated in part sub nom. Doe ex rel. Tarlow v. District of Columbia, 489 F.3d 376 (D.C. Cir. 2007).

[38] Doe ex rel. Tarlow, 489 F.3d at 379 (citing D.C. Code § 21-2211).

[39] Id. at 384.

willing to protect those in government custody from abortions than from forced continuation of unwanted pregnancies.[40] In a 2017 speech, Kavanaugh praised Justice Rehnquist's limiting approach to unenumerated rights in his *Roe* dissent and in *Washington v. Glucksberg*,[41] while observing, "[o]f course, the *Glucksberg* approach to unenumerated rights was not consistent with the approach of the abortion cases."[42] In *Doe ex rel. Tarlow*, Kavanaugh uses the authority of *Glucksberg* to hold that "plaintiffs have not shown that consideration of the wishes of a never-competent patient is 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'"[43]

As to history and tradition, Kavanaugh is unfortunately correct. There is a long history of disabling women, children, and imbeciles from having input into decisions, even when what is in question is their control over their bodily integrity and reproductive capacity. In explicitly endorsing history and tradition, Kavanaugh is implicitly reaffirming *Buck v. Bell*,[44] in which Justice Holmes upheld the involuntary sterilization of Carrie Buck, a young, allegedly mentally disabled woman in state custody. But women in general have over time emerged from the legal disabilities they labored under, such that, history and tradition to the contrary notwithstanding, their liberty and equality under law are now seen as "implicit in the concept of ordered liberty."[45] As the *Casey* plurality affirmed with respect to state control over abortion decisions, a state can no longer "insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture."[46]

Just as there is reason to doubt that Carrie Buck was in any way mentally disabled,[47] so too may there be reason to reconsider Kavanaugh's assumption that there would be no point in consulting the intellectually disabled about their healthcare preferences. Liz Weintraub, herself intellectually disabled, testified in opposition to Kavanaugh's Supreme Court confirmation, telling Congress his opinion in *Doe* "completely disrespected people's rights and their freedom of choice because of their disability."[48] Invoking the motto "nothing about us without us," she observed that

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[40] As Samantha Crane, legal director of the Autistic Self-Advocacy Network, observed about Kavanaugh's decision concerning the intellectually disabled D.C. women, "it really makes it clear… that the issue isn't abortion. It's about controlling people." See Amanda Marcotte, Brett Kavanaugh's Disturbing Abortion History: He Ruled Against Women Who Were Forced To Abort, Salon (Aug. 20, 2018), https://www.salon.com/2018/08/20/brett-kavanaughs-disturbing-abortion-history-he-ruled-against-women-who-endured-forced-abortions/.

[41] 521 U.S. 702 (1997).

[42] Brett Kavanaugh, Judge, U.S. Court of Appeals for the D.C. Circuit, From the Bench: Judge Brett Kavanaugh on the Constitutional Statesmanship of Chief Justice William Rehnquist, 12 (Sept. 18, 2017), https://www.aei.org/wp-content/uploads/2017/08/from-the-bench.pdf.

[43] Doe ex rel. Tarlow, 489 F.3d at 383 (citing Glucksberg, 521 U.S. at 720–21).

[44] 274 U.S. 200 (1927).

[45] Glucksberg, 521 U.S. at 721.

[46] *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

[47] See, e.g., Paul Lombardo, Three Generations, No Imbeciles: New Light on Buck v. Bell, 60 N.Y.U. L. Rev. 30 (1985).

[48] *Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. 3 (2018) (statement of Elizabeth Weintraub, Senior Advocacy Specialist, Association of University Centers on Disabilities), https://www.judiciary.senate.gov/imo/media/doc/Weintraub%20Testimony.pdf.

"[e]veryone, regardless of their abilities, needs support and help to make decisions"[49] but no one should have to fear, as she now did, "that some people will try to make decisions without me,"[50] without her "even get[ting] a chance to say what [she] wanted."[51]

Although Kavanaugh's opinion for the D.C. Circuit overturned injunctive relief for the class represented by Jane Does I and III, the District Court declined to dismiss the two women's individual claims that "that their rights to have children were unlawfully infringed" by abortions performed on them without "adequa[te] procedural protections," and the plaintiffs subsequently received damages in settlement of their claims.[52]

IV. German Abortion Law's Leap from Fetal to Maternal Disability

As I have previously explained, German abortion law has been a mirror image of that in the U.S. since the 1970s.[53] At about the time of *Roe v. Wade*, the German Federal Constitutional Court overturned an attempt to liberalize abortion law, holding that the state's obligation to hold human dignity inviolable required it to criminalize abortion unless one of four so-called indications was present; these included threats to the mother's life or health, a pregnancy resulting from a criminal act, a fetus suffering from severe birth defects (the so-called "embryopathic" indication), and any other circumstance in which it would be too much to expect the woman to bring the pregnancy to term. At about the time of *Casey*, the Constitutional Court allowed abortion in the first twelve weeks of pregnancy to be decriminalized provided the pregnant woman first took part in state-sponsored counseling designed to "encourage the woman to continue the pregnancy and open up perspectives to her for a life with the child."[54] Shortly after substituting a counseling regime for an indications regime, German law in the 1990s subsumed what had been the embryopathic indication under the medical indication, which in the revised statute made abortion not unlawful if:

> Considering the present and future living conditions of the pregnant woman, the termination of the pregnancy is medically necessary to avert a danger to the life or the danger of grave injury to the physical or mental health of the pregnant woman and if the danger cannot reasonably be averted in another way from her point of view.[55]

This meant, in effect, that it was no longer fetal disabilities that authorized the abortion of a fetus with diagnosed birth defects, but the presumed effect of those disabilities on the health of the pregnant woman. As numerous legal, medical, and bioethical commentators

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[49] Id. at 4.
[50] Id. at 4.
[51] Id. at 3.
[52] Doe v. District of Columbia, 920 F. Supp. 2d 112, 126 (D.D.C. 2013).
[53] See Mary Anne Case, Perfectionism and Fundamentalism in the Application of the German Abortion Laws, 11 F.I.U. L. Rev. 149 (2015).
[54] BVerfG, 2 BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92, May 28, 1993, II. 3 (1). Quotations are taken from the official English translation, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528_2bvf000290en.html.
[55] Strafgesetzbuch [StGB] [Penal Code], § 218a, para. 2, translated in Michael Bohlander, Principles of German Criminal Law 186 (2009).

pointed out, this new statutory workaround led to anomalies in the overall statutory scheme. For example, although counseling followed by a waiting period was required of women seeking a first trimester elective abortion, no such requirements were initially imposed on women whose abortion was motivated by a fetal disability diagnosis; also, because their abortions were seen as medically necessary, there was no limit to how late in the pregnancy they could obtain them. The result was that, despite an overall decline in medically indicated abortion, the number of such abortions undertaken in the second and third trimester rose. Often these were undertaken very shortly after the pregnant women received the results of prenatal diagnostic tests on the fetus and without specific genetic or psychological counseling.[56]

Disability rights advocates and opponents of abortion were not the only ones to raise objections. I have myself written in opposition to the counseling requirement for first trimester abortions in Germany.[57] But even I think that if ever counseling and a mandatory period for reflection were likely to be helpful, it might be in the case of women presented unexpectedly, often late in very much wanted pregnancies, with a diagnosis of fetal disability. Information ranging from a detailed medical prognosis by specialist physicians, to the experiences of children with similar disabilities and their parents, to accounts of services and subsidies available to the parents and the child might help facilitate a woman's transition from shock and horror at the diagnosis to a well-considered decision whether to continue or terminate the pregnancy.

For more than a decade, Germans faced competing proposals for legislative reform. The German Society of Obstetrics and Gynecology sought to give more control to doctors, and each of the major political parties offered its own legislative proposal for psychosocial counseling. Not until 2009, however, were amendments to the German Pregnancy Conflict Act enacted. These provided, inter alia, for a) the development and distribution to affected women of informational material on life for and with children with a mental or physical handicap, the right to psychosocial counseling, and support groups for and of disabled persons and their parents; b) mandatory counseling by a physician and an entitlement to further psychosocial counseling on request; and c) a mandatory waiting period of at least three days between fetal diagnosis and termination of pregnancy, absent a more imminent danger to the mother's life or health.[58]

V. The Enabling of Pregnant Women and the Dignity of Risk

Somewhat paradoxically, German law appears to enable a pregnant woman by requiring her to acknowledge herself disabled; only if her physical or mental health is in grave danger may she abort a fetus diagnosed with disabilities, but, while a physician must sign off on the decision, the woman must also herself determine whether "the danger cannot reasonably be averted in another way from her point of view."[59] This is a major improvement on Kennedy's approach to a pregnant woman's decision making, but it has its limitations.

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[56] See Daniela Reitz and Gerd Richter, Current Changes in German Abortion Law, 19 Cambridge Q. Healthcare Ethics 334, 336–38 (2010).
[57] See Case, supra note 53, at 157–60.
[58] See Reitz & Richter, *supra* note 56, at 340.
[59] Strafgesetzbuch [StGB] [Penal Code], § 218a, para. 2, translated in Michael Bohlander, Principles of German Criminal Law 186 (2009).

While it is perfectly appropriate for a pregnant woman to take into consideration the mental stress that might be placed on her as the mother of a disabled child, first person accounts by affected women suggest that, for many, the principal concern is not their own potential suffering but that of their child. In a survey of German women facing the question whether to abort following an adverse prenatal diagnosis, the overwhelming majority (94.6 percent) considered "their baby's quality of life" to be the most important factor; "the effect that having or not having the baby would have on the woman" was, for most, a secondary consideration.[60]

The paradigmatic case put forward by disability rights and anti-abortion advocates for refraining from abortion when fetal disabilities are diagnosed may be that of a child with Down syndrome,[61] whose prospects are for a relatively long and pain free, albeit intellectually disabled, life. But a growing number of first person accounts, in both Germany and the United States, of pregnant women facing the decision whether to abort a disabled fetus focus on disabilities incompatible with life – of babies that will die shortly after birth or after a few months or years of constant suffering. It is precisely as mothers, not as persons whose mental health is at risk, that many women make the choice to spare their child – not necessarily themselves – such pain. It is also as mothers that such women take into account the effect of continuing the pregnancy on their other children, including the healthy children they hope to conceive after their abortion or may already be carrying simultaneously with the disabled fetus.[62] In a way, these women are offering to the children they are carrying what Kavanaugh's opinion in *Doe* denied the intellectually disabled plaintiffs before him – the opportunity, even if the directly affected disabled individuals are concededly not in a position to make their own decisions, to have the decision about their future made by an informed person who cares about them individually, such as a family member, rather than by the impersonal rubber stamp of a medical bureaucrat.

Acknowledging that pregnant women might be reasoning as mothers out of love for their children in making particular abortion decisions is quite different from insisting that they must inevitably do so, as Kennedy appears to do in *Carhart*.[63] And what German law offers a pregnant woman – namely, the right to an individualized decision as to whether the risks to her psychological health are bearable – Kennedy's *Carhart* opinion denies her. The argument against Kennedy's disabling pregnant women from making their own choices can easily be made in feminist terms, but it can also be made as a matter of disability rights and, in Kennedy's favorite idiom, the language of dignity.

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[60] J. Tsiantis, Eve-Marie Engels, & Marianne Leuzinger-Bohleber, The Janus Face of Prenatal Diagnostics: A European Study Bridging Ethics, Psychoanalysis, and Medicine 186 (2008). Other factors considered were "whether the baby would die, the woman's relationship to the unborn, and what the partner wanted, followed by the effect on the family, the amount of social support, religious beliefs, and how people would respond." Id.

[61] In Germany, the most widely publicized example was that of Tim, the so-called Oldenberg baby, who lived twenty-one years in the care of devoted foster parents after a Down syndrome diagnosis led his mother to schedule, at twenty-five weeks of pregnancy, an abortion both she and her doctors initially expected would lead to his immediate death. See, e.g., Derek Scally, German Man Who Survived Abortion Dies Aged 21, Irish Times (Jan. 9, 2019), https://www.irishtimes.com/news/world/europe/german-man-who-survived-abortion-dies-aged-21-1.3752247.

[62] See, e.g., Megas, supra note 17 (including the story of one mother who aborted a disabled fetus who was compromising the survival of a twin in utero).

[63] See Carhart v. Gonzales, 550 U.S. 124, 159 (2007).

Both feminists and disability rights activists have set their faces against paternalism, the thread that runs through Kennedy and Kavanaugh's abortion jurisprudence. But it is disability rights advocates, with their concept of the dignity of risk,[64] who offer the most pointed rejoinder to Kennedy and Kavanaugh. This concept allows one to accept (at least arguendo) the assumption that the pregnant woman who aborts may come to regret her choice and risks suffering disabling psychological consequences when she does, and nevertheless to argue that this risk is no reason to preclude her from choosing. As advocates for the dignity of risk insist, "Without the possibility of failure, the disabled person lacks true independence and the ultimate mark of humanity, the right to choose for good or evil."[65] So does the pregnant woman.

[64] Sam Bagenstos has suggested that the feminist campaign against sex-specific labor legislation may have been the precursor to anti-paternalistic argument about the dignity of risk. See Samuel L. Bagenstos, Law & the Contradictions of the Disability Rights Movement 91–92 (2009).

[65] Gerben DeJong, Defining and Implementing the Independent Living Concept, in Independent Living for Physically Disabled People 4, 20 (Nancy M. Crewe & Irving Kenneth Zola eds., 1983). See also Robert Peske, The Dignity of Risk and the Mentally Retarded, 10 Mental Retardation 24 (1972) ("[O]verprotection endangers the retarded person's human dignity and tends to keep him from experiencing the normal taking of risks in life which is necessary for normal human growth and development.").