Funding of Medically-Necessary Abortions: A Reexamination of U.S. Law and a Call for EC Federalism

John Nishi
John.Nishi@chicagounbound.edu

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Recommended Citation
Available at: http://chicagounbound.uchicago.edu/uclf/vol1992/iss1/23
Funding of Medically-Necessary Abortions: A Reexamination of U.S. Law and a Call for EC Federalism

John Nishit†

The European Court of Justice ("ECJ") has failed to resolve the question of whether the EEC Treaty requires Member States to fund medically-necessary abortions,1 or whether that decision must be left to the discretion of the individual Member States. Although parties have raised the issue before the Court, the ECJ has not yet addressed this matter directly.2 Since the European Community ("EC" or "Community") Member States disagree whether abortion should be freely available or tightly restricted, this issue remains highly controversial.

The individual Member States have a strong interest in controlling matters of internal public policy.3 However, the Member States' interest in retaining autonomy over their national abortion policies directly conflicts not only with the EC's commitment in the Single European Act ("SEA") to create a unified Europe without internal frontiers,4 but also with EC efforts to guarantee cer-

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† B.A. 1977, Yale University; M.M. 1980, University of Southern California; J.D. Candidate 1993, University of Chicago.

1 An abortion is medically-necessary if needed to avoid permanent or serious injury to the pregnant woman.

2 See Case 182/78, Bestuur van het Algemeen Ziekenfonds Drenthe-Platteland v G. Pierik ("Pierik II"), 1979 ECR 1977, 1980:2 CMLR 88. Although Pierik II involved medical funding in general, both the Advocate General, see 1979 ECR at 1999-2000, and one of the interested parties, see text at note 32, alluded to the issue of abortion funding.

3 As Judge Walsh of the Irish Supreme Court reasoned:
   The fact that particular activities, even grossly immoral ones, may be permitted to a greater or lesser extent in some Member States does not mean that they are considered to be within the objectives of the . . . [EEC Treaty]. A fortiori it cannot be one of the objectives of the European Communities that a Member State should be obliged to permit activities which are clearly designed to set at naught the constitutional guarantees for the protection within the State of a fundamental human right.


4 Treaty Est the Eur Eco Comm, Art 8(a).
tain fundamental rights. Consequently, resolution of the abortion-funding question will inevitably require either that Member States relinquish sovereignty over vital policy areas or that the EC compromise in its efforts toward a truly unified Europe.

In *Harris v McRae*, the U.S. Supreme Court upheld the Hyde Amendment, which denied indigent women Medicaid funding for medically-necessary abortions. Though the Court acknowledged that "financial constraints . . . restrict an indigent woman's ability to enjoy the full range of [her] constitutionally protected freedom of choice . . . ." it concluded that the federal government is not constitutionally obligated to provide funding for medically-necessary abortions. The Court reasoned that, because the State did not cause an indigent woman's poverty, the State had no obligation to supply the funding that would give an indigent woman full freedom of choice.

Part I of this Comment explores ECJ discussion of EEC Treaty provisions relevant to the abortion-funding issue and discusses internal inconsistencies of the EEC Treaty that the abortion funding issue brings into sharp relief. Part II analyzes and criticizes *Harris v McRae* in light of the right to privacy, arguing that the *Harris* majority erred in holding the Hyde Amendment constitutional. Part III examines abortion funding as a sex equality issue under both the U.S. Constitution and the EEC Treaty, concluding that principles of equality central to each document should be interpreted to require the State to fund medically-necessary abortions.

This Comment discusses how ECJ approaches to funding are germane to the constitutional arguments made in *Harris*, concluding that the Supreme Court would profit by adopting ECJ approaches to funding questions. Conversely, this Comment proposes methods by which the ECJ might profit by examining abortion funding in light of American perspectives. Finally, this Comment suggests that the inconsistencies in the EEC Treaty exposed by the abortion funding controversy raise the same federalism issues tackled prior to ratification of the U.S. Constitution: the individual

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* *Harris*, 448 US at 316.
* Id.
Member States will be forced to decide whether or not to trade autonomy over certain areas of national public policy for the benefits of participation in the sort of fully unified community envisioned by the SEA and a Community Bill of Rights.

I. FUNDING FOR MEDICALLY-NECESSARY ABORTIONS IN THE EC

The abortion policies of the twelve EC Member States differ dramatically, ranging from allowing elective abortions early in pregnancy (Denmark and Greece),\textsuperscript{10} to permitting abortions when circumstances pose exceptional hardship for the pregnant woman (the UK and the Netherlands),\textsuperscript{11} to prohibiting all abortions, except those necessary to save the life of the mother (Ireland).\textsuperscript{12} These policy differences raise questions about the extent to which the EEC Treaty preserves, for women residing in Member States with restrictive abortion laws, the right to seek out procedures available in neighboring Member States with more liberal abortion provisions.

Three EEC Treaty Articles aimed at eradicating discrimination on the basis of nationality and sex provide potential answers to the abortion funding issue. Article 48 guarantees workers the right to move freely within the EC; Article 59 assures the freedom to provide services; and Council Directive 79/7,\textsuperscript{13} a corollary to Article 119, guarantees equal treatment for men and women in matters of social security health insurance. ECJ interpretations of both the free movement of workers and the freedom to provide services implicitly mandate Member State funding for medically-necessary abortions. However, public policy exceptions to those Articles may preclude the EC from requiring Member States that have criminalized abortion to fund abortions legally received in other Member

\textsuperscript{10} In Denmark and Greece, “[a]bortion in the early stages of pregnancy does not require any reason and is treated as the decision of the woman, or of the woman and her physician . . . .” Mary Ann Glendon, Abortion and Divorce in Western Law 22 (Harvard U Press, 1987).

\textsuperscript{11} Id at 13-14. “Exceptional hardship,” depending on the particular Member State, might include the health of the woman or fetus, the woman’s mental health, the circumstances under which the pregnancy occurred, and economic or other circumstances that make continuing the pregnancy a hardship for either the woman involved or her family. See id at 21.

\textsuperscript{12} Id at 161 n 12. See also, Irish Const, Art 40, § 3(3) (“The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, so far as practicable, by its laws to defend and vindicate that right.”).

\textsuperscript{13} 1979 OJ L6:24 (cited in note 5) (on the progressive implementation of the principle of equal treatment for men and women in matters of social security).
States. For that reason, Council Directive 79/7, which contains no policy exception, provides the strongest argument that the EC must require all Member States to fund legally obtained abortions.

A. Article 48: Free Movement of Workers

In Bestuur van het Algemeen Ziekenfonds Drenthe-Plateland v G. Pierik ("Pierik II"), the ECJ interpreted Article 48 of the EEC Treaty to require a worker’s Member State to pay for indispensable medical procedures necessarily performed in another Member State. Since medically-necessary abortions are, by definition, indispensable medical procedures, Pierik II implies that Member States must fund those abortions. However, since the public policies of individual Member States can override Article 48, the ECJ would most likely conclude that the EC must allow Member States which have criminalized abortion to refuse funding.

In Pierik II, the plaintiff, a resident of the Netherlands, had claimed repayment for costs incurred when she received medical treatment in Germany for a rheumatic ailment. The ECJ held that, even though the Netherlands had deliberately excluded that treatment from its health benefit plan, the Netherlands must reim-

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14 See discussion in Part III B of this Comment.
16 The text of Article 48 states, in pertinent part:
1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
   (a) to accept offers of employment actually made;
   (b) to move freely within the territory of the Member States for this purpose

17 In Pierik II, the ECJ construed "worker" extremely broadly to include "any person who has the capacity of a person insured under the social security legislation of one or more Member State, whether or not he pursues a professional or trade activity." Case 182/78, Pierik II, 1979 ECR at 1992. Thus, "worker" includes not only employees, but their families, those on disability pensions, the retired, and the formerly employed.
19 See note 16.
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burse the plaintiff. The ECJ explained that the social security health plan of the plaintiff's home state must pay for medically-necessary treatments

where the treatment provided in another Member State is more effective than that which the person concerned can receive in the Member State where he resides and [where] the treatment in question cannot be provided on the territory of the latter State.

As long as the worker's country of residence "acknowledges that the treatment in question constitutes a necessary and effective [medical treatment]," that country has an obligation to pay. This is true even if "the treatment in question is deliberately not included in the scheme of benefits... administered by [the worker's country of residence], for example on medical, medical-ethical or financial grounds..." The Pierik II holding flows naturally from the ECJ's argument in an earlier treatment of the same case that the free movement of workers would be compromised unless workers, regardless of nationality, were entitled to receive health benefits available in any of the Member States.

The ECJ's guarantee of medical funding, however, does not clearly extend to payment for medically-necessary abortions. Pierik II implies that the costs of medically-necessary abortions should be reimbursed by the worker's country of residence, even if that country had deliberately excluded abortion payments from its social security health plan. However, Article 48 of the EEC Treaty states that a worker's right to freedom of movement shall be "subject to limitations justified on grounds of public policy

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21 Id at 1992 and 1997.
24 Id at 1992 (emphasis added). The ECJ did not expressly decide whether a Member State would be required to fund abortion if abortion were "deliberately not included [on] medical-ethical... grounds." The Court apparently heeded the Advocate General's cautionary statement:
I... reserve the case of treatment which would be patently contrary to the public morality of the State of habitual residence. However, I would consider it unprofitable, if not dangerous, in the context of this case to deal in a general and abstract way with various medical-ethical grounds upon which a certain kind of treatment might be deliberately excluded from the scheme of benefits paid for by sickness funds.
Id at 1999-2000.
Thus, the argument that *Pierik II* should apply to the funding of medically-necessary abortions fails if the worker's country of residence defends its refusal to provide funding with a sufficiently powerful public policy justification.

The courts must establish whether a given public policy justifies infringing a worker's freedom of movement as guaranteed by Article 48. The ECJ has narrowly defined "[p]ublic policy [to] relate principally to the prevention of crime and of political subversion, [and] . . . has further limited the use of [public policy] exceptions, mainly by applying the principle of proportionality." In *Adoui and Cornuaille*, the ECJ provided a clear statement of the principle of proportionality. *Adoui and Cornuaille* held that two French prostitutes could not be expelled from Belgium on the basis of their vocation, as the penalty of expulsion applied to foreign nationals was not "proportional" to the relatively lenient penalties imposed on Belgian nationals. As interpreted by the ECJ, the public policy exception to Article 48 requires that Member States impose legal sanctions on domestic violators which are of proportional severity to the restriction of freedom of movement imposed on the non-resident worker. *Pierik II* and *Adoui and Cornuaille* indicate that the determination of whether a Member State's anti-abortion laws represent a sufficiently strong public policy to defeat a worker's right to medical payment would depend on the severity of the sanction imposed on a domestic violator.

Although the ECJ in *Pierik II* did not address abortion funding, the U.K. argued in a brief submitted to the ECJ that the

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27 EEC, Art 48(3).
30 *Joined Cases 115 and 116/81, 1982 ECR 1665.
31 Id at 1707-08. Notice that the ECJ weighed the Belgian prostitution policy and the EC mandated right equally. Ronald Dworkin would maintain that by putting a "right" and a policy on equal footing, the ECJ does violence to the concept of "right" which, properly understood, can be outweighed only by another right, and never by a policy. See Ronald Dworkin, *Taking Rights Seriously* 90-94 (Harvard U Press, 1977).
33 See note 22.
public policy exception contained in Article 48(3) provides that the worker's country of residence

can refuse the authorization [of payment] where it concerns a treatment which is seriously contrary to the ethical rules prevailing in the Member State in question. . . . Thus a competent [health] institution can refuse the authorization to undergo an abortion in another Member State only if abortion is prohibited in the competent institution's own country.^[3]

According to this argument, a Member State's public policy of criminalized abortion outweighs the restrictions on workers' freedom of movement created by the denial of funding.

In summary, the ECJ would probably conclude that if medically-necessary abortions are legal within a worker's nation of residence, but that nation does not provide funding, Article 48 would require the health institution of that nation to pay for the procedure if performed legally in another Member State. If, however, the worker resides in a Member State, such as Ireland, which imposes substantial criminal sanctions against medically-necessary abortions, the health institution of that State need not fund an abortion legally obtained in another Member State. Thus, the public policy exceptions incorporated into Article 48 of the EEC Treaty allow, at the very most, only partial Community regulation of abortion funding.

B. Article 59: Freedom to Provide Services

In the absence of a public policy exception, the ECJ probably would conclude that the Article 59 provisions concerning the freedom to provide services require all Member States to reimburse the costs of legally performed abortions. Like Article 48, however, Article 59 is conditioned by a public policy exception.^[35] Therefore, Article 59 does not necessarily require a Member State that has criminalized abortion to fund abortions legally provided to its citizens in another Member State.


The ECJ held in 1984 in *Luisi and Carbone* that the freedom to provide services guaranteed by Article 59 of the EEC Treaty includes the freedom, for the recipients of the services, to go to another Member State in order to receive a service there, without being obstructed by restrictions, even in relation to payments. Persons receiving medical treatment are to be regarded as recipients of services.

The ECJ reasoned that restricting a recipient's freedom to travel would, as a result, restrict the freedom to provide the service, thus violating the spirit of Article 59.

In *Society for the Protection of Unborn Children (Ireland) Ltd. v Grogan and Others ("Grogan III")*, the ECJ recently held that "medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 EEC." Therefore, since some Member States pay the cost of the service of abortion, the ECJ could construe the freedom to receive services guaranteed by *Luisi and Carbone* to require that all Member States pay for that service.

The Article 59 argument, however, suffers from the same public policy infirmity as does the Article 48 argument. Although Article 59 assures that "restrictions on freedom to provide services within the Community shall be progressively abolished . . . ," Article 59 as it did Article 48 in *Pierik II*. The freedom to provide services, like workers' free movement, would be compromised unless a service which is funded in one Member State is funded in all.

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37 Article 59 provides that "... restrictions on freedom to provide services within the Community shall be progressively abolished . . . in respect of nationals of Member States who are established in a State of the Community other than of the person for whom the services are intended." EEC, Art 59.
35 Id at 401.
41 1991:3 CMLR at 890-91. Article 59 uses the term "service" as it is defined in Article 60.
43 In reaching this conclusion, the ECJ might interpret Article 59 as it did Article 48 in *Pierik II*. The freedom to provide services, like workers' free movement, would be compromised unless a service which is funded in one Member State is funded in all.
44 EEC, Art 59.
Article 56 establishes an exception to Article 59, allowing Member States to provide "by law, regulation or administrative action... for special treatment of foreign nationals on grounds of public policy, public security or public health." Thus, the ECJ might well conclude that Article 59, for the same reasons as Article 48, allows the EC to regulate only those abortion funding decisions involving Member States that have not criminalized abortion.

C. Funding for Medically-Necessary Abortion: The Challenge to Member States' Autonomy

The public policy exceptions limiting the freedoms guaranteed by Articles 48 and 59 of the EEC Treaty clash with the provisions of both the SEA and a Community Bill of Rights. The EC nations, in attempting to take advantage of the benefits inherent in an economic community while retaining sovereignty over political and social matters, pursue fundamentally conflicting goals. The SEA and the goals central to a Community Bill of Rights can be realized fully only if Member States are willing to subordinate their social policies to Community goals. Thus, controversial issues, such as abortion funding, must be regulated by the EC, not by the individual Member States.

The EEC Treaty initially incorporated antidiscrimination measures for economic, not ideological reasons. For instance, the EC adopted Article 119 (the equal pay for equal work provision) because France had implemented equal pay for men and women and wanted to eliminate competition from other Member States that used cheaper female labor. Over time, the jurisprudence of the ECJ has transformed antidiscrimination provisions—initially included in the EEC Treaty as means to economic ends—into judicial mandates resembling fundamental rights. In addition to this trend in ECJ decisions, parties both internal and external to the

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46 See EEC, Art 66 ("The provisions of Articles 55 to 58 shall apply to the matters covered by this Chapter [which includes Article 59].").
44 EEC, Art 56 (emphasis added).
47 See Dominick, 14 Fordham Intl L J at 639 (cited in note 5).
EC advocate the adoption of a Community Bill of Rights as a means of solidifying Community-wide, judicially-articulated, fundamental rights.50

Rights, however, whether derived by the ECJ from the EEC Treaty or contained in a Community Bill of Rights, must supersede policies in order to maintain their character as rights.51 As the abortion-funding example illustrates, the public policy exceptions to Articles 48 and 59 preclude the EC from absolutely guaranteeing the "rights" of free movement and of the freedom to provide services. Attempts to make the EC the guarantor of Community-wide rights will continue to be frustrated as long as the Treaty allows individual Member States' public policies to defeat these "rights."

The EEC Treaty, initially intended only as an economic agreement, allows Member States to retain sovereignty over national public policy. However, EEC Treaty provisions enabling national public policy to trump Community goals render the Treaty inadequate not only as a guarantor of rights, but as an economic agreement as well.

Just as the availability of funding for medical treatment affected the labor force in Pierik II and Luisi, the availability of abortion funding similarly affects the composition of workers within a given Member State.52 This reasoning underlies the justification for all of the antidiscrimination and free movement Articles in the EEC Treaty.53 Thus, the public policy exceptions to the EEC Treaty which likely forbid Community-wide harmonization of abortion-funding law run counter to the economic purpose of the Treaty's anti-discrimination provisions.

II. THE PRIVACY DOCTRINE AND U.S. APPROACHES TO FUNDING FOR MEDICALLY-NECESSARY ABORTIONS

A. Harris v McRae

While the EC Member States fund medical expenses for the vast majority of their citizens, the U.S., through Medicaid, subsidizes only its neediest citizens' necessary health care costs, includ-

50 See Dominick, 14 Fordham Intl L J at 639 (cited in note 5).
51 See Dworkin, Taking Rights Seriously at 90-94 (cited in note 31).
52 Abortion, largely because it is so controversial, carries a symbolic weight which could very well make the absence of funding for medically-necessary abortions a more powerful influence on the composition of the work force than would denial of funding for other medical treatments.
ing those expenses associated with childbirth. Since the adoption of the Hyde Amendment in 1979, however, the federal government has not subsidized the cost of medically-necessary abortions. In *Harris v McRae,* the Court left the funding question to the states, much as the ECJ under Article 48 or 59 might choose to defer to Member States' anti-abortion policies.

While acknowledging that freedom of choice can be restricted by financial constraints, the Supreme Court asserted:

> [A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigence falls in the latter category. The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigence.

The Court reasoned further that:

> [T]he Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services [including childbirth], encourages alternative activity deemed in the public interest.

The federal government, argued the *Harris* majority, has no obligation to subsidize a poor woman's medically-necessary abortion, despite the fact that abortion may be the only means available to protect her health and even though the government has chosen, through Medicaid, to subsidize practically all other medically-necessary procedures, including those associated with childbirth. The majority stated:

> [T]he Hyde Amendment leaves an indigent woman with at least the same range of choice in deciding whether to obtain a medically necessary abortion as she would have had if Congress had chosen to subsidize no health care costs at all.

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64 Pub L No 96-123, § 109, 93 Stat 926 (1979).
66 Id at 316.
67 Id at 315.
68 Id at 317.
The *Harris* majority held that the government's sole obligation is to refrain from penalizing a woman for exercising her free choice. It drew what it considered to be a bright line between government action (penalty) and inaction (failure to subsidize), permitting the latter as constitutional, while prohibiting the former.

**B. Criticisms of the Harris Penalty/Subsidy Distinction**

The *Harris* holding hinges on the majority's determination that the Fourteenth Amendment right to privacy, which guarantees a woman's right to an abortion, does not require the government to subsidize indigent women's abortion costs. The *Harris* majority asserts that the Hyde Amendment is constitutional because the State's refusal to subsidize does not create "a government obstacle in the path of a woman who chooses to terminate her pregnancy." This argument, however, ultimately fails because it presumes as prelegal and natural an obstacle that the State itself placed in the path of indigent women prior to the State's refusal to subsidize abortion. The State, and not the force of nature, ultimately determined that medical services would be a private commodity and not a publicly available good. Put simply, the reason that abortion is inaccessible to those unable to pay is that the State, through the common law of contract and property, chose to place market value on medical services.

In *Roe v Wade,* the Supreme Court determined that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Harris,* decided in light of *Roe,* analyzed abortion as a privacy issue. The right to abortion, as framed in privacy terms in *Roe,* "presumes that government nonintervention into the private sphere promotes a woman's freedom of choice." *Roe* held that the right to privacy, meaning the prohibition of government intervention into women's decisions concerning pregnancy, guarantees the legality of abortion. One might argue that since the privacy guarantee of government nonintervention does not permit the government to act to limit a woman's abortion

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*Harris*, 448 US at 317 n 19.

Id at 315 (emphasis added).


Id at 153.

choice, it cannot mandate intervention\(^6\) by requiring government funding for abortion.

Implicit in this argument and in the *Harris* penalty/subsidy analysis are the traditional notions that the Constitution is a charter of negative liberties\(^6\) and that the Fourteenth Amendment and the right to privacy derived from it confer "rights of protection from rather than by the government."\(^6\) Any interpretation premised on the idea that the Constitution serves to protect citizens from governmental intrusion relies on the distinction between government action and passivity. In light of previous Supreme Court treatment of the Constitution as primarily a doctrine of negative liberties,\(^6\) the Court's decision to deny that the Constitution mandates funding for an indigent woman's medically-necessary abortions should not be surprising.

The distinction between negative and positive rights, and thus the *Harris* penalty/subsidy line, is not nearly so useful an analytical tool as the *Harris* majority assumes. In his dissent in *Harris*, for instance, Justice Brennan avoided the problems inherent in analyzing abortion funding in terms of positive duties and negative rights.\(^6\) Justice Brennan focused on the effect of the governmental decision to fund childbirth but not abortion, and ignored whether that effect results from government's actions or inactions, or from a penalty or subsidy.

\(^6\) Note, however, that the categories of intervention/nonintervention and government action/inaction must be carefully scrutinized. What might at first blush appear to be nonintervention can often, from a different perspective, be described as governmental intervention. See notes 71-73 and accompanying text.


\(^6\) Id at 864, quoting Judge Posner in *Jackson v City of Joliet*, 715 F2d 1200, 1203 (7th Cir 1983), cert denied, 465 US 1049 (1983). Judge Posner argued that the Constitution is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services. *Jackson*, 715 F2d at 1203.


\(^6\) Justice Brennan insisted that:

*Roe* and its progeny established that the pregnant woman has a right to be free from state interference with her choice to have an abortion . . . . The proposition for which these cases stand thus is not that the State is under an affirmative obligation . . ; it is that the State must refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion.

*Harris*, 448 US 297 at 330 (Brennan dissenting) (footnotes omitted).
Justice Brennan's approach mirrors the ECJ's methodology in *Pierik II*. The ECJ interpreted Article 48 of the EEC Treaty to require the Member States to guarantee that funding discrepancies among their health insurance programs would not inhibit workers from moving freely within the EC in pursuit of employment. The ECJ did not inquire whether Article 48 imposed on the Dutch government an affirmative duty to fund and did not ask whether Dutch failure to fund would constitute a governmentally imposed "obstacle" to free movement. Rather, the court looked solely to the discriminatory effect of the government's failure to fund. The ECJ, unlike the *Harris* majority, recognized and sought to protect workers against what one commentator has called "the chilling effect of the denial of benefits as well as the discriminatory effect of differential funding.

Justice Brennan's dissent to *Harris* rejected the majority's contention that the constitutionality of the Hyde Amendment swings on the issue of whether or not the State acted in refusing to fund abortion. The dissent did not, however, explicitly attack the suspect premise on which the majority's penalty/subsidy distinction depends; rather, the Brennan dissent only implicitly acknowledged that the line that the majority placed between governmental intrusion and nonintrusion into the constitutionally protected private realm was determined by government action and was not, as the majority apparently assumes, fixed by nature.

Prior to the government's decision to withdraw abortion funding and prior to the decision to fund other health care needs, including childbirth, the government acted when it made the "quite conscious decision to treat the needed medical procedure as a purely private commodity available only to those who can pay the market price." The *Harris* majority neglected to acknowledge that markets themselves, since they are contingent on the governmentally imposed common law constructs of contract and property law, result from government action. Thus, the government's failure to "subsidize," when judged in light of the government's af-

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firmative act of designating medical services as a private marketable commodity, more properly represents a government penalty denying to those unable to pay the constitutional right to choose medically-necessary abortions over childbirth. Viewed in this manner, the government's refusal to subsidize indigent women's abortions constitutes the failure to remove a constitutionally impermissible obstacle of the government's own making. For that reason, the federal government should require state funding for medically-necessary abortions.

III. SEX EQUALITY AND ABORTION FUNDING UNDER THE U.S. CONSTITUTION AND THE EEC TREATY

The Equal Protection Clause of the Fourteenth Amendment and general antidiscrimination and equality principles central to the EEC Treaty should be interpreted to require the American and EC Member States to fund medically-necessary abortions for indigent women. Although neither the ECJ nor the Supreme Court has adopted this view, a substantial body of scholarship and American state court jurisprudence lends support to the argu-

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73 Public education, unlike medical care, is one example of a service that the government has opted to make publicly available. In light of the state's choice to fund primary and secondary education, if the state denied any of its citizens financing for public education, that decision would look much more like a "government penalty," than the mere refusal to subsidize. Interestingly, though the Supreme Court did not consider the issue as one of penalty and subsidy, it suggested that absolute deprivation of public education to those wholly unable to pay would be unconstitutional under the Equal Protection Clause. San Antonio Independent School District v Rodriguez, 411 US 1, 20 (1973).

74 "[N]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Amend XIV, § 1.

75 See, for example, EEC, Art 119 (guaranteeing equal pay for men and women) and Council Dir 79/7, 1979 OJ L6:24 (cited in note 5) (a corollary to Article 119 that guarantees equal treatment for men and women in matters of social security, including all statutory health insurance plans).

76 See, for example, Ruth Bader Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v Wade, 63 NC L Rev 375 (1985); Kenneth Karst, Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv L Rev 1, 53-59 (1977); Sylvia Law, Rethinking Sex and the Constitution, 132 U Pa L Rev 955, 971-87 (1984); MacKinnon, Feminism Unmodified at ch 8 (cited in note 63); Catherine A. MacKinnon, Reflections on Sex Equality Under Law, 100 Yale L J 1281 (1991). See also, Webster v Reproductive Health Services, 492 US 490, 537 (1989) (Blackmun dissenting). Justice Blackmun criticized intrusions on the right to abortion because they threaten not only the right to privacy, but women's sex equality with men: "I fear for the liberty and equality of the millions of women who have lived and come of age in the 16 years since Roe was decided." Id at 538.

77 See MacKinnon, 100 Yale L J at 1320 n 165 (cited in note 76), citing Doe v Maher, 40 Conn Supp 394, 515 A2d 134 (Conn Super Ct 1986) (restriction of abortion funding to life-threatening situations violates, among other things, the Connecticut Equal Rights Amendment), but also citing Fischer v Department of Public Welfare, 85 Pa Commw 215,
ment that principles of sexual equality require State funding of medically-necessary abortions.

A. Sex Equality and Abortion Funding in the U.S.

American courts traditionally apply a standard of "formal equality" to sex discrimination cases: laws failing to treat similarly situated men and women alike violate the Equal Protection Clause. However, to the extent that a law having greater impact on women than men addresses "real differences" between the sexes, it satisfies Equal Protection Requirements. The Hyde Amendment, for example, primarily affects women and not men.

Under a traditional equality analysis, one might argue that the unequal impact of a childbirth/abortion law is constitutionally acceptable because the differences between men and women that are relevant to childbirth and abortion funding are purely biological as only women can give birth to children or have abortions.

However, traditional equality analysis of abortion funding is unsatisfactory as it assumes that anatomical differences alone cause abortion restrictions to affect primarily women and not men. As Professor Sylvia Law explains, "it is not entirely nature that imposes upon women the devastating burdens of . . . pregnancy;
the social and legal ethos that makes women solely responsible for nurturing the children they bear also plays a part.\[^{81}\] Furthermore,

The traditional patriarchal stereotype of "woman's role" undermines all the equal citizenship values: respect, participation, and responsibility. To the extent that the stereotype is embodied in law or otherwise brought to bear in public life of the society—in other words, to the extent that the phenomenon of women's dependency on men is socially imposed—the principle of equal citizenship presumptively requires intervention by the courts.\[^{82}\]

Traditional approaches to equality also ignore the ways in which the "differences between women and men (real or imagined) have been turned systematically into advantages for men and disadvantages for women."\[^{83}\] Legally enforced social norms simultaneously devalue childcare and create the stereotype that women bear a natural predisposition to and responsibility for childcare. Such legal and social influences discourage women from entering more remunerative occupations. Social pressures have transformed women's biological capacity to bear children and to nurse into an economic disadvantage perpetuating women's social inferiority to men.

\[^{81}\] Law, 132 U Pa L Rev at 999-1000 (cited in note 76). See also Ginsburg, 63 NC L Rev at 382 (cited in note 76) (quoting Karst, 91 Harv L Rev at 57 (cited in note 76)):

It is not a sufficient answer to charge it all to women's anatomy—a natural, not man-made phenomenon. Society, not anatomy, "places a greater stigma on unmarried women who become pregnant than on the men who father their children." Society expects, but nature does not command, that "women take the major responsibility... for child care."

Furthermore, "[s]ocial custom, pressure, exclusion from well paying jobs, the structure of the marketplace, and lack of adequate daycare have exploited women's commitment to and caring for children and relegated women to childrearing and traditional mothering roles." MacKinnon, 100 Yale L J at 1312 (cited in note 76).

\[^{82}\] Karst, 91 Harv L Rev at 55 (cited in note 76).

\[^{83}\] Becker, 1989 Social Service Rev at 499 (cited in note 78), citing MacKinnon, Feminism Unmodified at 32-45 (cited in note 63); Catharine A. MacKinnon, Sexual Harassment of Working Women 101-41 (Yale U Press, 1979). In many cases where courts require gender neutral laws because they deem sex differences irrelevant, gender "neutrality" nonetheless handicaps women. Given that male standards define societal rules, women will not fare equally as well as men if achievement is defined in terms more suited to male characteristics:

Virtually every quality that distinguishes men from women is already affirmatively compensated in this society. Men's physiology defines most sports,... their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit,... their presence defines family,...

MacKinnon, Feminism Unmodified at 36 (cited in note 63).
The law plays a large part in sustaining, and even in creating, sexual stereotypes that blind courts, as well as the general public, to the ways in which women have become dependent on men because of their capacity to bear children. In Muller v Oregon, the Court upheld maximum hour laws for women though it had invalidated a similar provision for men only three years earlier. The Court justified making this gender-based distinction because, "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race," and since a maximum hour law would allow a woman to "properly discharge... her maternal function."

More recently, the Supreme Court has taken the position that "gender-based differentiation created by [statute] is forbidden by the Constitution, at least when supported by no more substantial justification than 'archaic and overbroad' generalizations..." Nevertheless, the Court continues to engage in this sort of stereotyping. In several Supreme Court cases involving the rights of unmarried fathers concerning their biological children, the Justices expressed opinions based on sex stereotypes that portray women as having a greater responsibility than men to care for children. The

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64 See text at note 95.
68 This Comment examines only the legally and socially created inequalities of childbearing. Other significant Equal Protection issues germane to the abortion question include the unequal burdens of pregnancy, the coercive environment in which heterosexual intercourse occurs, and the lack of availability of safe, effective, and socially acceptable forms of contraception. See, for example, MacKinnon, 100 Yale L J at 1281 (cited in note 76).
91 Parham v Hughes, 441 US 347 (1979) (upholding state law barring unmarried fathers, but not unwed mothers, from bringing a tort claim for the wrongful death of their children); Caban v Mohammed, 441 US 380 (1979) (overturning state law denying an unmarried father the right to veto an adoption, while the mother retained that right); Lehr v Robertson, 463 US 248 (1983) (upholding constitutionality of denying father the right to protest the adoption of his child by the mother and her new husband).
92 See also, Michael M. v Superior Court, 450 US 464 (1981), in which the Court upheld a California statutory rape law which made a male, even a male under eighteen, guilty of statutory rape if he had sex with a woman under eighteen. Justice Rehnquist, writing a plurality opinion, reasoned that "[b]ecause virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct." Id at 473 (emphasis added). Justice Rehnquist and the Michael M. plurality failed to examine carefully the gender differences
Court attributed that responsibility to biological, and not socially imposed, considerations, thus removing those sex differences from constitutional scrutiny. In one case, Justice Stevens referred to the mother's "unshakable responsibility for the care of the child," while in another he asserted that the "significance of the biological connection is that it offers the natural father an opportunity . . . to develop a relationship with his offspring."

The difficulty that the Court and the public at large have in recognizing the law's discriminatory effect on women as childbearers and nurturers illustrates the "educative force of law, its use in training women [not to mention men] to accept patriarchy as a gift of nature." Due to women's legally and socially created childrearing role, both married and unmarried women's subordination to men only increases when they have children, particularly when they do not bear those children by choice. As the Supreme Court acknowledged in several unmarried father cases, the same is not true for men when they father children. Thus, a law that funds childbirth while denying abortion monies tends to deny to women choices which remain open to men, and serves to preserve a system that makes women dependent on men. Such a discriminatory impact is constitutionally impermissible because law and society, and not mere biology, have ensured that men and women are not similarly situated with respect to childbirth and abortion.

An analysis of abortion funding that employs a standard for equality which does not acknowledge the systematically disadvantaged position in which law and society place women as childbearers fails because of its narrowness. Only a broader conception of equality recognizing women's socially created handicaps and, therefore, requiring state funding for medically necessary abort-

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that they used to justify the disparate impact that statutory rape law has on men and women. "This failure of analysis means that the plurality . . . mistakes stereotype for biology." Law, 132 U Pa L Rev at 999 (cited in note 76).

** Law, 132 U Pa L Rev at 999 (cited in note 76) (quoting Caban, 441 US at 408 (emphasis added)).

** Id, quoting Lehr, 463 US at 262 (emphasis added).

** Karst, 91 Harv L Rev at 55 (cited in note 76). "No human system of dominance and dependency is older than the system of male-female relations. The system's 'deep structures' are so deep that we have only begun to imagine the features of a society free from inequalities based on sex." Id at 53 (citations omitted).

See also Law, 132 U Pa L Rev at 995 (cited in note 76) ("[A]lthough sex-based classifications are unjust in relation to individuals . . . who do not fit the stereotypes imposed on them, the primary constitutional infirmity in such classifications is not that they are inaccurate, but rather that they are self-fulfilling.").

** See note 91.
tions, adequately upholds the principles of equality expressed in the Fourteenth Amendment.

B. Sex Equality and Abortion Funding in the EC

Council Directive 79/7,\textsuperscript{97} which mandates the progressive implementation of the principle of equal treatment for men and women in matters of social security, could provide the ECJ with a basis for requiring Member States to fund workers'\textsuperscript{98} medically-necessary abortions. This argument, however, has not yet been made before the ECJ. The advantage to an ECJ analysis of the abortion-funding issue based on Directive 79/7 is that the directive, unlike Articles 48 and 59, contains no public policy exception.

Article 4 of Council Directive 79/7 proclaims that "[t]he principle of equal treatment means that there shall be no discrimination whatsoever on ground of sex either directly, or indirectly ... , in particular as concerns ... the scope of [health care] schemes and the conditions of access thereto ... ."\textsuperscript{99}

As this Comment has argued, a sexual equality standard which is faithful to the goal of true equality must not ignore the social preconditions of inequality which make traditional equality analysis insufficient. If the ECJ adopted such a standard, it would conclude, as this Comment argues, that health insurance schemes which fund childbirth but not abortion discriminate on the basis of sex.\textsuperscript{100} Thus, the ECJ should hold that Directive 79 requires those Member States whose statutory health plans fund childbirth to pay for legally performed medically-necessary abortions.

\textsuperscript{97} Council Dir 79/7, 1979 OJ L6:24 (cited in note 5), was derived from EEC, Art 119, which guarantees equal pay to men and women.

\textsuperscript{98} The scope of Council Dir 79/7 is perhaps somewhat more narrow than either Article 48, where the ECJ has construed the term "worker" broadly, or Article 59, which would protect any woman receiving the "service" of abortion. Council Dir 79/7 applies:

to the working population—including self-employed persons, workers and self-employed persons whose activity is interrupted by illness, accident or involuntary unemployment and persons seeking employment—and to retired or invalid workers and self-employed persons.


\textsuperscript{99} Id, art 4, 1979 OJ at L6:25. See also, id. art 3, 1979 OJ at L6:24 (defining the scope of Council Dir 79/7 to include "statutory schemes which provide protection against sickness").

CONCLUSION

Traditional equality analysis and the Harris majority approach to funding fail as useful analytical tools because they assume as natural and prelegal a status quo that works to the disadvantage of women and the poor. Traditional equality analysis of abortion produces unequal outcomes for men and women because law and society have created a system that places a heavier burden on women than men for childrearing. Likewise, an approach to abortion funding that ignores the State's role in making medical treatment unavailable to those who cannot pay unwittingly disguises a legally created market system as a natural phenomenon for which the State bears no responsibility.

The United States would profit by applying the ECJ’s reasoning in Pierik II to the abortion funding question. The ECJ in Pierik II, like Justice Brennan in his dissent to Harris, looked only at the effects of government policies, concluding that the denial of funding would impermissibly curtail guaranteed freedoms. Whether relying on the privacy doctrine or the Equal Protection Clause, the Supreme Court, had it focussed on the law's effects, would have found the Hyde Amendment constitutionally unacceptable.

Instead the Court framed the abortion funding issue as a question of whether the government acted in choosing not to fund medically-necessary abortions and put itself in the position of deciding the case on the basis of an unacknowledged policy choice. That policy decision consisted of differentiating between government action and inaction. The Supreme Court unknowingly did what the EEC Treaty public policy exceptions explicitly require: the Court made a woman’s constitutionally guaranteed right to privacy “subject to limitations justified on grounds of public policy”.

The abortion-funding question challenges the EC and its Member States to scrutinize the conflict between, on the one hand, the retention of national autonomy over controversial policies and,  

101 Note that childrearing burdens are but one of the abortion-related inequalities between men and women. See note 85.
102 See Sunstein, After the Rights Revolution at 19 (cited in note 72) (“Seeing the common law status quo as prelegal and neutral, judges [and many others] . . . regarded them . . . as the state of nature.”). While Professor Sunstein referred specifically to the Lochner era judges, his remarks could just as appropriately be addressed to the Harris majority.
104 EEC, Art 48(3).
on the other, the economic goals embodied in the SEA and the higher aspirations represented by a Community Bill of Rights. As the EC addresses the abortion funding issue, the Member States will be forced to ponder not only the very nature of their current alliance, but also their aspirations for the future of the Community. The Member States’ desire to retain control over controversial policies, as expressed by Judge Walsh of the Irish Supreme Court in *Society for the Protection of Unborn Children (Ireland) v Stephen Grogan and Others,* shows how important resolution of the autonomy and federalism debate will be to the EC’s future.

The tension between the public policy exceptions and the aims of the SEA and the Community Bill of Rights, challenges the Member States to decide whether they will share the benefits of a fully unified Europe, or retain autonomy over internal policies. The EC Member States confront the same sort of dilemma created by the weaknesses of the Articles of Confederation. The American States chose to sacrifice a measure of autonomy in order to gain the strength provided by a unified whole. The EC Member States will soon have to decide which course they will follow.

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