

The Constitutionality of Laws Banning Sex-Selection Abortion

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ABSTRACT: Despite *Roe v. Wade* and *Planned Parenthood v. Casey*, states continue to enact restrictions on abortion. Bans on sex-selection abortion are increasingly popular with state legislatures. Indiana's ban was recently held unconstitutional by a federal court of appeals, and other courts are likely to reach the same result. These bans do, however, serve important educational objectives by emphasizing the humanity of the unborn. Moreover, if it were to consider the constitutionality of a ban on sex-selection abortion, the Supreme Court might choose that occasion to move away from the extremes of *Roe* and *Casey* and perhaps even to overrule those decisions.

IN RECENT YEARS, states have increased efforts to restrict the right to an abortion that the Supreme Court found in *Roe v. Wade*¹ and continues to protect under the undue burden approach set forth in *Planned Parenthood v. Casey*.² Recent efforts include prohibitions of abortion after a fetal heartbeat

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¹ 410 U. S. 113 (1973). For commentary on *Roe*, see Richard S. Myers, "Re-reading *Roe v. Wade*," *Washington & Lee Law Review* 71 (2014): 1025.

² 505 U. S. 833 (1992).

is detectable³ and prohibitions on abortion to prevent fetal pain.⁴ Other restrictions include prohibitions of abortion when the person performing the abortion knows that the woman is seeking an abortion on account of the race, sex, or disability of the unborn.⁵ These prohibitions of abortion for certain discriminatory reasons have been around for years,⁶ but there has been increasing focus on enacting such laws.⁷ There have, too, recently been a number of successful court challenges to such laws. For example, on April 19, 2018, the U.S. Court of Appeals for the Seventh Circuit in *PPINK v. Commissioner* invalidated Indiana's "Sex Selective and Disability Abortion Ban."⁸ In this paper I will focus on the constitutional issues presented by this suit, with a particular focus on the constitutionality of bans on sex-selection abortions.

To understand the constitutional issues presented, it is necessary to review briefly the key Supreme Court's decisions dealing with abortion. In *Roe v. Wade* the Court set forth the trimester framework. The Court did acknowledge that the state had an important interest in the health of the pregnant woman and "another important and legitimate interest in protecting the potentiality of human life[.]"⁹ and that at some point during pregnancy "each becomes 'compelling.'"¹⁰ Perhaps these statements and Chief Justice Burger's comment in his concurring opinion that "the Court today rejects any claim that the

³ *MKB Mgmt. Corp. v. Stenehjem*, 795 F. 3d 768 (8th Cir. 2015), cert. denied, 136 S. Ct. 981 (2016), striking down North Dakota's heartbeat law.

⁴ *Isaacson v. Horne*, 716 F. 3d 1213 (9th Cir. 2013) cert. denied, 571 U. S. 1127 (2014), striking down Arizona's fetal pain law.

⁵ See Emma Green, "Should Women Be Able to Abort a Fetus Just Because It's Female?" in *The Atlantic* (May 16, 2016); <https://www.theatlantic.com/politics/archive/2016/05/sex-disability-race-selective-abortion-indiana/482856/>, discussing wave of state laws banning abortion on account of the sex, race, or genetic abnormality of the unborn child.

⁶ See Thomas J. Molony, "Roe, Casey, and Sex-Selection Abortion Bans," *Washington & Lee Law Review* 71 (2014): 1089 (footnote omitted): "For over twenty years, Illinois and Pennsylvania have prohibited abortion when it is sought solely based on the sex of the fetus."

⁷ Molony, *supra* n6 at 1094-98, discussing sex-selection abortion bans and noting that such bans have increased in recent years.

⁸ 888 F. 3d 300 (7th Cir. 2018). See also *Preterm-Cleveland v. Himes*, 294 F. Supp. 2d 746, 749 (S.D. Ohio 2018), preliminary enjoining Ohio's law that prohibits abortion "if the person performing the abortion knows that one reason, in whole or in part, for the woman's decision to terminate her pregnancy is a fetal indication of Down syndrome."

⁹ 410 U. S. at 162.

¹⁰ *Ibid.* at 163.

Constitution requires abortions on demand[.]”¹¹ created some confusion on this score. It was, however, clear to Justice White that the Court had basically accepted the claim that “for any one or more of a variety of reasons – convenience, family planning, economics, dislike of children, the embarrassment of illegitimacy, etc...or for no reason at all, and without asserting or claiming any threat to life or health, any woman is entitled to an abortion at her request if she is able to find a medical advisor willing to undertake the procedure.”¹² This seems clear from a close reading of *Roe v. Wade* and *Doe v. Bolton*.

Roe’s trimester framework gave states the ability to regulate abortion after the first trimester “in ways that are reasonably related to maternal health.”¹³ Under *Roe* the state had the ability to proscribe abortion after viability, but the Court added the proviso “except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”¹⁴ In discussing the physician’s medical judgment, the Court in *Doe* explained that this would be “exercised in the light of all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient. [The Court noted that a]ll these factors relate to health.”¹⁵ Although there is some ambiguity here (the Court in *Doe* was discussing a vagueness challenge and not addressing the constitutionality of a law that failed to contain this broad formulation of health), the conclusion seems inescapable that the Court thought these factors would inform the interpretation of the “health” exception that *Roe* stated was required by the Constitution.¹⁶

This broad reading of the right to abortion as set forth in *Roe* and *Doe* was made plain in cases decided from 1973 up until and including the Court’s 1986 decision in *Thornburgh v. American College of Obstetricians and Gynecologists*.¹⁷ In *Thornburgh*, the Court invalidated a variety of abortion regulations, including an informed consent provision that required that certain information

¹¹ *Doe v. Bolton*, 410 U. S. 179, 208 (Burger, C.J., concurring).

¹² *Doe*, 410 U.S. at 221 (White, J., dissenting).

¹³ *Roe*, 410 U.S. at 164.

¹⁴ *Roe*, 410 U.S. at 165.

¹⁵ *Doe*, 410 U.S. at 192.

¹⁶ See Clarke D. Forsythe, *Abuse of Discretion: The Inside Story of Roe v. Wade* (2013), pp. 15-52, discussing health exception and concluding that *Roe* and *Casey* allow abortion on demand; Michael Stokes Paulsen, “Five Provocative Pro-Life Proposals,” *Quinnipiac Law Review* 35 (2017): 688-83; but see Stephen G. Gilles, “*Roe*’s Life-or-Health Exception: Self-Defense or Relative-Safety,” *Notre Dame Law Review* 85 (2010): 525, disagreeing with the view that *Roe* and *Casey* result in abortion on demand.

¹⁷ 476 U.S. 747 (1986).

be provided to the woman seeking an abortion. This decision finally drove Chief Justice Burger to realize that his 1973 assessment that *Roe* did not endorse abortion on demand had been undermined by the Court's post-*Roe* decisions. In a dissent that called for the re-examination of *Roe*, he stated: "We have apparently already passed the point at which abortion is available merely on demand. If the statute at issue here is to be invalidated, the 'demand' will not even have to be the result of an informed choice."¹⁸

The Court did begin to move away from these more extreme readings, primarily in the 1989 decision in *Webster v. Reproductive Health Services*¹⁹ and in the 1992 decision in *Planned Parenthood v. Casey*.²⁰ In *Casey* the Court did abandon the trimester framework in favor of the undue burden approach. This approach explicitly acknowledged that prior decisions had not given sufficient weight to the state's "interest in protecting fetal life or potential life."²¹ Under the undue burden approach, the Court accepted certain regulations, such as an informed consent provision and a 24-hour waiting provision, that it would have invalidated under its past decisions. It was this modification that led one prominent scholar to describe *Casey* as a "compromise"²² that has allegedly confined the right to abortion to "a minimal existence, protected only against the most overwhelming of state incursions."²³

This reading is not, however, very persuasive. The joint opinion in *Casey* itself noted that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."²⁴ And, even after viability, the *Roe* "exceptions" were explicitly retained: "We also affirm *Roe*'s holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe,

¹⁸ 476 U.S. at 783-84 (Burger, C.J., dissenting).

¹⁹ 492 U.S. 490 (1989).

²⁰ 505 U.S. 833 (1992). For commentary on *Casey*, see Michael Stokes Paulsen, "The Worst Constitutional Decision of All Time," *Notre Dame Law Review* 78 (2003): 995; Richard S. Myers, "Reflections on the Twentieth Anniversary of *Planned Parenthood v. Casey*" in *Life & Learning XXII: The Proceedings of the Twenty-Second University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2018), pp. 53-67.

²¹ *Casey*, 505 U.S. at 876.

²² Chris Whitman, "Looking Back on *Planned Parenthood v. Casey*," *Michigan Law Review* 100 (2002): 1981. For commentary on Whitman's article, see Richard S. Myers, "Reflections on 'Looking Back on *Planned Parenthood v. Casey*'" in *Life & Learning XIII: The Proceedings of the Thirteenth University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2004), pp. 3-19.

²³ Whitman, *supra* n22 at 1980.

²⁴ *Casey*, 505 U.S. at 879.

abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”²⁵

Under the undue burden standard, a State may regulate but (it seems clear) never actually legally prohibit an abortion. This undue burden standard does not eviscerate the right to an abortion, as some scholars contend. As Justice Scalia’s *Casey* dissent maintained “in the ‘undue burden’ standard as applied in the joint opinion, it appears to be that a State may not regulate abortion in such a way as to reduce significantly its incidence.”²⁶ As Justice Scalia noted, “despite flowery rhetoric about the State’s ‘substantial’ and ‘profound’ interest in ‘potential human life,’ and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful.”²⁷

Justice Scalia’s reading is borne out by the Court’s subsequent cases. In *Gonzales v. Carhart*,²⁸ the Supreme Court in 2007 did affirm the constitutionality of the federal Partial Birth Abortion Act of 2003.²⁹ This move away from its 2000 decision in *Stenberg v. Carhart*³⁰ was a welcome development. But it is important to understand the limits of *Gonzales v. Carhart*. The Court still treated *Casey* as setting forth the controlling legal standard.³¹ And, importantly, the basis for the Court’s holding prohibiting one abortion method was that other legal methods continued to be available. Justice Kennedy, for a majority, concluded that the law was “not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman’s health, given the availability of other abortion procedures that are considered to be safe alternatives.”³² As Justice Ginsburg noted in her dissent in *Gonzales v. Carhart*, the federal Partial Birth Abortion Act “saves not a single fetus from destruction, for it targets only a method of performing abortion.”³³

²⁵ *Casey*, 505 U.S. at 879 (quoting *Roe*, 410 U.S. at 164-165).

²⁶ *Casey*, 505 U.S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

²⁷ *Casey*, 505 U.S. at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

²⁸ 550 U.S. 124 (2007).

²⁹ For commentary on *Gonzales v. Carhart*, see Richard S. Myers, “The Supreme Court and Abortion: The Implications of *Gonzales v. Carhart*” in *Life & Learning XVII: The Proceedings of the Seventeenth University Faculty for life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2008), pp. 103-28.

³⁰ 530 U.S. 914 (2000).

³¹ *Gonzales v. Carhart*, 550 U.S. at 146.

³² 550 U.S. at 166-167.

³³ 550 U.S. at 181 (Ginsburg, J., dissenting).

In 2016 in *Whole Woman's Health v. Hellerstedt*,³⁴ the Court again used the *Casey* undue burden standard in striking down two provisions of a Texas law regulating abortion. The Court concluded that neither of the two provisions of the Texas law (the admitting-privileges requirement or the surgical-center requirement) “offers medical benefits sufficient to justify the burdens upon access [to abortion] that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, ... and each violates the Federal Constitution [as interpreted in *Casey*].”³⁵ In *Whole Woman's Health*, the Court arguably misinterpreted *Casey*'s undue burden test,³⁶ but there is little doubt that *Casey* sets forth the controlling standard to evaluate the constitutionality of laws prohibiting or regulating abortion.

Under *Casey*'s undue burden test, laws banning sex-selection abortion are likely to be held unconstitutional. Most of these laws, such as the Indiana statute that has been challenged successfully, apply both pre- and post-viability.³⁷ The Seventh Circuit emphasized this point in *PPINK v. Commissioner*.³⁸ In striking down Indiana's law, the court interpreted *Casey* to mean that prior to viability the state may not prevent any woman from obtaining an abortion, no matter what the basis is for the woman's choice. As the court stated, “the State may not prohibit a woman from exercising...[the choice to have an abortion] for any reason.”³⁹ The State is not permitted “to invade [the woman's] privacy...to examine the underlying basis for a woman's decision to terminate her pregnancy prior to viability.”⁴⁰ Judge Manion's terrific opinion (concurring in the judgment in part and dissenting in part) agreed with this interpretation of Supreme Court precedent. Judge Manion expressed his disagreement with *Roe* and *Casey*,⁴¹ but as an intermediate appellate court judge considered himself bound by *Roe* and *Casey*.⁴² Under those controlling precedents, he reluctantly agreed with the portion of the court's opinions

³⁴ 136 S. Ct. 2292 (2016).

³⁵ 136 S. Ct. at 2300.

³⁶ See Stephen G. Gilles, “Restoring *Casey*'s Undue-Burden Standard after *Whole Women's Health v. Hellerstedt*,” *Quinnipiac Law Review* 35 (2017): 701, making this point.

³⁷ See Molony, *supra* n6 at 1102.

³⁸ 888 F. 3d 300 (7th Cir. 2018).

³⁹ 888 F. 3d at 302.

⁴⁰ 888 F. 3d at 307.

⁴¹ 888 F. 3d at 314 (Manion, J., concurring in the judgment in part and dissenting in part).

⁴² 888 F. 3d at 311 (Manion, J., concurring in the judgment in part and dissenting in part).

striking down Indiana's law prohibiting abortions for various discriminatory reasons.⁴³

The constitutionality of laws banning sex-selection abortions after viability is less certain. The Court has acknowledged that the state has a compelling interest after viability, but even then the Court has said that the state cannot prohibit abortion if an abortion is necessary to protect the life or health of the mother. And, although there is some debate about this, the health exception (as articulated in *Doe v. Bolton*) essentially creates an unfettered right to abortion on demand.⁴⁴ Since, under *Doe v. Bolton*, health includes psychological and familial reasons, any woman who wants an abortion can obtain one, as long as she can find a willing doctor. Under this reading of the Court's cases, bans on sex-selection abortions, even post-viability sex-selection abortions, would be unconstitutional.

Most scholars, even pro-life scholars, agree with this conclusion.⁴⁵ Some pro-life scholars, however, disagree with this conclusion. For example, Professor Tom Molony has argued that the state's compelling interest in eliminating sex discrimination may allow states to ban sex-selection abortions.⁴⁶ Professor Molony relies on cases allowing the state to override the associational rights of groups such as the Jaycees or Rotary clubs to prevent these groups from discriminating against women.⁴⁷ In those cases, the Court said that the state has a "compelling interest in eliminating discrimination against women."⁴⁸ Professor Molony has argued that this might allow states to ban sex-selection abortions.⁴⁹

I do not think that this argument will carry the day. Those cases involved potential discrimination against women who were already born. The Court would not likely extend this reasoning to the unborn because to do so would threaten the right to an abortion. It is important to recall the *Roe v. Wade* Court's view of the status of unborn life. There, the Court infamously stated: "[w]e need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development

⁴³ 888 F.3d at 317 (Manion, J., concurring in the judgment in part and dissenting in part).

⁴⁴ See supra text accompanying n16.

⁴⁵ See e.g., Paulsen, supra n16 at 691.

⁴⁶ Molony, supra n6.

⁴⁷ See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

⁴⁸ Duarte, 481 U. S. at 549.

⁴⁹ See Molony, supra n6.

of man's knowledge, is not in a position to speculate as to the answer."⁵⁰ This was a false gesture of humility because the Court did decide the issue.⁵¹ In evaluating the state's interests, the Court necessarily rejected the state's view that fetal life deserved protection.⁵² The Court explicitly stated that "we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."⁵³

Under this view, the Court cannot really consider sex-selection abortions to constitute sex discrimination (against a person). Aborting unborn children because they are the "wrong" sex (often because they are girls) does not really involve sex discrimination, defenders of sex-selection abortion contend, because the victims aren't really girls – they are "potential girls" with a "future sex."⁵⁴ These advocates contend that to view sex selection abortion as sex discrimination would necessarily entail granting personhood to the unborn,⁵⁵ which the Court of course rejected in *Roe*.⁵⁶ Under this view, unborn fetuses only become girls (and potential victims of sex discrimination) if they are born. These advocates might then oppose infanticide, although that would not be true for those who favor "after-birth abortion" for the same reasons that abortions are permitted.⁵⁷

Describing this "reasoning" reveals why bans on sex-selection abortion may be useful, even if such bans are likely to be invalidated under current law. These bans serve important educational objectives in much the same way that

⁵⁰ *Roe*, 410 U.S. at 159.

⁵¹ See Myers, *supra* n1 at 1032.

⁵² Myers, *supra* n1 at 1032.

⁵³ *Roe*, 410 U.S. at 162.

⁵⁴ A book review by Sherry Colb notes that Sital Kalantry, who is one of the leading authorities on sex selection abortion, expresses a negative view of the fetus in two ways: "First, she [Kalantry] describes the fetus's sex in various places as its 'future sex' (implying that the fetus does not yet have a sex but will have one in the future). Second, she [Kalantry] says approvingly that the fetus lacks any right against discrimination, because such a right would imply personhood." Sherry F. Colb, "The Lessons of Sex-Selection Abortion," <https://verdict.justia.com/2017/10/25/lessons-sex-selection-abortion> (October 25, 2017).

⁵⁵ See Sital Kalantry, "Harmful Anti-Sex-Selective Abortion Laws Are Sweeping U.S. State Legislatures: Why do Some Pro-choice People Support Them?," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3138601 (March 13, 2018).

⁵⁶ *Roe*, 410 U.S. at 156-162. For a critique of *Roe*'s treatment of the personhood issue, see Michael Stokes Paulsen, "The Plausibility of Personhood," *Ohio State Law Journal* 74 (2012): 13.

⁵⁷ See Christopher Kaczor, "A Dubious Defense of 'After-birth Abortion': A Reply to Rasanen," *Bioethics* 32 (2018): 132-37, critiquing the idea of "after-birth abortion" <https://onlinelibrary.wiley.com/doi/abs/10.1111/bioe.12413>.

bans on partial birth abortion did.⁵⁸ These bans undermine the notion that abortion is essential to women's equality. In reality, the right to abortion is not really about woman's equality. Abortion on demand, in practice, serves to further the subordination of women.⁵⁹ The right to abortion is really about power, the power, as Professor Michael Paulsen has stated, "of some human beings to kill other human beings...for essentially any reason, at any time throughout all nine months of pregnancy."⁶⁰ As I noted on a prior occasion, groups that ostensibly favor equality for women blink when it comes to abortion -- "when faced with a conflict between equality and autonomy, autonomy wins every time."⁶¹

Bans on sex-selection abortions (and bans on abortion in case of disability) also help to further undermine *Roe* and *Casey* on the treatment of the status of and value of the unborn. The practice of sex-selection abortion, which is particularly common in China and India,⁶² makes it clear that human lives are being lost, and supporters of the legality of the practice are forced to make irrational arguments to defend the practice. These laws help to demonstrate the humanity of the unborn. And they are an important part of the ongoing effort to provide legal protection for the unborn. And, despite *Roe* and *Casey*, it has become quite clear in recent decades that unborn children are increasingly accorded legal protection. The federal Unborn Victims of Violence Act (and various state counterparts)⁶³ and the federal Born-Alive Infants Protection Act⁶⁴ are two important examples. The Alabama Supreme Court decision in *Ex Parte*

⁵⁸ See Myers, supra n29 at 122.

⁵⁹ Erika Bachiochi has noted that "rather than promote women's authentic equality, ... the constitutional right to abortion actually hinders women's equality by promoting cultural hostility to pregnancy and motherhood, demanding that women model themselves after the normative 'unencumbered male' with whom they seek to compete in the public sphere. Women's equality so conceived has rendered childbearing a consumer choice with harmful, unintended consequences for disadvantaged women especially, in both the home and workplace." Erika Bachiochi, "A Putative Right in Search of a Constitutional Justification: Understanding *Planned Parenthood v. Casey*'s Equality Rationale and How it Undermines Women's Equality," *Quinnipiac Law Review* 35 (2017): 600.

⁶⁰ Michael Stokes Paulsen, "The Unbearable Wrongness of *Roe*," *The Public Discourse*, (January 23, 2012), <http://www.thepublicdiscourse.com/2012/01/4577/>.

⁶¹ Myers, supra n1 at 1045.

⁶² Michael Stokes Paulsen, "It's a Girl," *The Public Discourse* (Oct. 24, 2011); <http://www.thepublicdiscourse.com/2011/10/4149/>.

⁶³ Myers, supra n1 at 1042, noting these statutes.

⁶⁴ Myers, supra n1 at 1042, citing this statute.

*Ankrom*⁶⁵ is another prominent example. There, the court held that Alabama's chemical endangerment statute protected unborn children. Justice Parker's special concurrence noted that the decision "is in keeping with the widespread legal recognition that unborn children are persons with rights that should be protected by law. Today, [he continued,] the only major area in which unborn children are denied legal protection is abortion, and that denial is only because of the dictates of *Roe v. Wade*."⁶⁶

Courts, or at least lower courts, are likely to invalidate such bans, as the Seventh Circuit did recently. How such bans would fare before the U.S. Supreme Court is not at all clear. Much of course will depend on the composition of the Court at the time the constitutionality of such a ban is considered. The Court might uphold a ban on sex-selection abortion (perhaps influenced by the widespread public support for such laws)⁶⁷ but this would require the Court to change the *Roe/Casey* framework. Such a change might be sweeping or might be on a smaller scale. But a smaller scale change might lay the groundwork for a more sweeping rejection of *Roe/Casey*. If the Court struck down a ban on sex-selection abortion, this might, as Michael Paulsen has stated, "prove the judicial straw that breaks the proverbial camel's back of public support for the decisions of the Supreme Court. Faced with such a prospect [Paulsen speculates], a political, politicized Supreme Court might well choose the path of upholding the ban, and starting the judiciary on the road to a more comprehensive judicial revision or repudiating of the right to abortion."⁶⁸

Despite *Roe* and *Casey*, states continue to enact restrictions on abortion. Bans on sex-selection abortion are increasingly popular with state legislatures. Indiana's ban was recently held unconstitutional by a federal court of appeals and other courts are likely to reach the same result. These bans do, however, serve important educational objectives. Moreover, if it were to consider the constitutionality of a ban on sex-selection abortion, the Supreme Court might choose that occasion to move away from the extremes of *Roe* and *Casey* and perhaps even to overrule those decisions.

⁶⁵ 152 So. 3d 397 (Ala. 2013), cert. denied, 135 S. Ct. 50 (2014).

⁶⁶ 167 So. 3d at 429 (Parker, J., concurring specially).

⁶⁷ See Michael Stokes Paulsen, "War on Women," *The Weekly Standard* (January 22, 2013), noting popularity of bans on sex-selection abortion; <https://www.weeklystandard.com/michael-stokes-paulsen/war-on-women>.

⁶⁸ Paulsen, *supra* n16 at 695.