TESTIMONY

OF

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CONCERNING

THE NOMINATION OF RUTH BADER GINSBURG TO BE AN ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

INTRODUCTION

Mr. Chairman, Senator Hatch, and Members of the Committee, thank you for the opportunity to testify regarding this nomination. My name is Paige Comstock Cunningham. I am an attorney, a graduate of Northwestern University Law School, a wife, and a proud mother of a girl and two boys. It is likely that I have reaped some of the benefits, in my professional career, from the seeds sown by Judge Ginsburg in her efforts to abolish sex-based discrimination in the law.

I am also the President of Americans United for Life (AUL), a national non-profit public interest law firm and educational organization. Both the staff and board of directors are diverse, crossing political, philosophical and religious lines. Indeed, one of AUL's strengths is its nonpartisan, professional and scholarly approach to issues affecting the protection of human life.

Americans United for Life aims to establish, through law and education, protection of innocent persons from conception to natural death against abortion, infanticide and euthanasia.

Although my main area of interest is in state legislation, I have co-authored several amicus briefs. One of those was filed on behalf of the American Association of Prolife Obstetricians and Gynecologists and the American Association of Pro-Life

Pediatricians in Webster v. Reproductive Health Services, in 1989. In her concurring opinion, Justice O'Connor relied on a portion of that brief in her discussion of viability.

The nomination of Judge Ginsburg has evoked much less furor and outcry than the past three or four Supreme Court nominations. This may reflect the Committee's unwillingness to repeat past spectacles, that the majority of the Committee belongs to the President's party, or that special interest groups who have launched massive campaigns against previous nominees are silent because their "ox is not being gored."

In any case, the purpose of this testimony is to address certain aspects of Judge Ginsburg's philosophy and approach to decision making on the Court that may not be fully or fairly explored. Briefly, those issues are: the proper role of the judiciary; Judge Ginsburg's views on judging; her views on gender discrimination; her views on abortion; and the injury to women caused by legalized elective abortion.

Judge Ginsburg is well qualified in many ways to serve on the Supreme Court. Her work as a litigator, advocate, professor, legal analyst and appellate judge have given her broad experience. I hesitate to mention her gender, for that is the very kind of distinction she has worked so tirelessly to eradicate. And if her presence on the bench is promoted as a "good thing" for women, or if she is expected to hold some special regard for "women's rights," then recognition for that reason alone contradicts her entire record as an advocate for the Women's Rights Project she established while General Counsel of the American Civil Liberties Union.

Judge Ginsburg is frequently described as "moderate." If that label holds true when she sits on the Supreme Court, then all of us may be well-served. If she continues ruling carefully, as she has so often done, we would not expect her to support radical shifts in constitutional doctrine.

On the other hand, if Judge Ginsburg brings her personal

views as litigator, academic and advocate to a Court whose rulings are not subject to review, then we have reason to be concerned. For those views cannot fairly be described as moderate. She would be likely to urge the Court to take leaps in constitutional doctrine, leaps that affect issues in which AUL has a direct interest, such as abortion and euthanasia.

I. ABORTION AS THE "LITMUS TEST"

A troubling aspect of this nomination is its unprecedented focus on one single issue: abortion. President Clinton's promise to employ an abortion litmus test is historic. This is the first Supreme Court nomination in American history in which a personal commitment to unlimited abortion rights is the "bottom line." Although Judge Ginsburg has not litigated an abortion rights case, her support of abortion rights has been made quite clear, by the President, by her writings, and by her public statements. Whether or not she was asked the question directly is a distinction without a difference, since her views are plainly evident from her own record.

All other things being equal, this is hardly an appropriate measure of one's fitness to serve on the Supreme Court. There is a clear implication that abortion is the "first right." On behalf of myself and millions of women and families in these United States, I object to this highly political use of abortion advocacy as the determining factor for non-representative, unelected service on the Supreme Court.

II. JUDGE GINSBURG'S VIEWS ON THE ROLE OF A JUDGE

In our constitutional scheme, the Framers secured liberty and controlled the power of the State through a separation of powers among the three branches of the federal government--- executive, legislative, and judicial. It is the people who are the original source of authority for the Constitution and whether

and how it should be amended. Federal judicial power is not inherent; it is derived from Article III of the Constitution.

Nor is the Court intended to be a representative body. Rather than being elected, the Justices are given life tenure precisely to insulate them from temporary political passions that rock any nation from time to time in order for them to interpret faithfully the original design of our government, as modified by the people through the amendment process provided for in Art. V.

Yet, Judge Ginsburg implies that she sees the Court as a representative body and that the Justices do have authority to change the principles of the Constitution through interpretation.[1] This is seen in her view that the judiciary may "repair unconstitutional legislation."[2] This is also seen in her implicit belief that the Constitution requires public funding of abortion and her criticism of the Court's contrary decisions of the 1970's as "incongruous" and "most unsettling."[3] Indeed, her writings have focused not on the legitimacy of different methods of constitutional interpretation, but on the strategic and tactical political advantages that expansive methods of interpretation might provide.[4]

Judge GinsbuRg's dissent in DKT Memorial Fund v. Agency for Intern. Dev., 887 F.2d 275, 277 (D.C. Circuit 1989), illustrates the inconsistencies in her alleged moderate and deferential judicial philosophy. It appears that at least in the case of abortion, Judge Ginsburg may be willing to find new constitutional doctrine in support of policy goals she favors.

DKT was a case in which abortion advocates challenged an executive order prohibiting indirect aid to foreign organizations which promoted abortion as a method of family planning, and denied funding to foreign organizations which used private funds for abortion activities, or which collaborated with organizations which advocated abortion.[5] The majority opinion in DKT upheld the ban of federal foreign aid funding of organizations that perform or promote abortion. Judge Ginsburg would have

invalidated this restriction. In her dissent, she wrote that "government may demand only that public funds be segregated by the grantee so that they are used solely for the specified family planning services, and not for abortion related activity." DKT, 887 F.2d at 300.[6] Judge Ginsburg equated the choice not to fund abortion indirectly with punishing abortion advocates or providers. DKT, 887 F.2d at 305-306.[7]

Two years later, however, the Supreme Court in Rust v. Sullivan, 111 S.Ct. 1759 (1991), upheld regulations prohibiting abortion counseling and referral: "no funds appropriated for the project may be used in programs where abortion is a method of family planning," and a doctor employed by the project may be prohibited in the course of his project duties from counseling abortion or referring for abortion." Rust, 111 S.Ct. at 1772. The Court explained that the regulation was not a case of government suppression of ideas, but a prohibition on a project grantee or its employees from engaging in activities outside of its scope. Rust at 1772-1773. Clearly, Judge Ginsburg would have decided Rust differently, for she wrote in DKT that "it is now settled" that when government funding is dependent upon the restriction of activities paid for through private sources, the government has exacted impermissible penalties on protected expression.[8]

The Rust decision was 5-4, Justice White voting with the majority to uphold the abortion funding-promoting restriction. If Judge Ginsburg had been on the Court instead of Justice White, the vote would have been 4-5, and the funding restriction invalidated. The critical point here is not the wisdom of congressional policy regarding the funding of abortion. Such policies change from time to time as Congress changes and public sentiments change. That, of course, is the role of the legislature, and the genius of elective self-government. But Judge Ginsburg is not a legislator, nor is the Supreme Court an elected body subject to defeat or recall by the voters at the

polls. The disturbing aspect of Judge Ginsburg's dissenting opinion in DKT is that it shows her readiness to override public policy set by the politically accountable branches of government, even to the extreme of overturning public funding decisions which are far removed from the realm of judicial competence. If this is what her supporters mean when they say she is a moderate and not a judicial activist, then they are misstating their case.

Judge Ginsburg's long-standing believe that poverty is cured by abortion can be seen in the phrasing of her dissent in DKT, where she characterizes abortion as both a "facet of comprehensive world population planing,"[9] and also as a "necessary last resort given current conditions of poverty, ignorance, physical insecurity, and fear in which many women live."[10] She wryly notes that U.S. policy at that time meant that "government need not spend public funds on abortion services; it may, instead, encourage the indigent pregnant woman to reproduce by paying the full medical costs of childbirth, as well as child support thereafter (citations omitted)."[11] Judge Ginsburg apparently believes that the government entices poor women to "reproduce" by offering them assistance in their difficult circumstances. This suggests a preference for aborting the children of the poor, rather than seeking other ways to alleviate suffering.[12] "Helping" the poor through abortion may indicate misguided compassion, or an attitude bordering on eugenics; in either case, abortion is seen as a positive good, and its potentially negative effects on individual women are ignored. In her dissent in DKT, Judge Ginsburg makes reference to the legal status of abortion in some foreign countries without addressing the U.S. Government's concern about coerced abortion. Would Judge Ginsburg support foreign nations forced abortion policies as a means of controlling world population? Does she recognize the subtly coercive aspects of U.S. abortion policy in our own country where the Court has declared, in effect, that an untimely pregnancy is the personal problem of each individual woman?

III. JUDGE GINSBURG'S VIEWS ON SEX DISCRIMINATION

A. Her "Immoderate" Recommendations

In April 1977, the United States Civil Rights Commission issued a Report entitled, "Sex Bias in the United States Code" ("Report"). The "initial research and draft" of the Report was developed by Judge Ginsburg, then a professor of law at Columbia Law School, and Brenda Feigen Fasteau, former director of the ACLU's Women's Rights Project.[13] The report which Judge Ginsburg co-authored "was used as the basis for the Commission study."[14] Although some aspects of the Report have merit, others raise disturbing questions regarding how Judge Ginsburg would apply her "equal rights principle" in practice. The Report clearly illustrates the rigidity and formality of her views on sex-based distinctions and, unfortunately, a lack of common sense.

Although the Report addresses a number of areas of sex-based distinctions, it did not mention abortion, which, of course, is not regulated by the U.S. Code. However, other laws which address the sexual exploitation of women were challenged. In her unyielding adherence to gender neutrality, Judge Ginsburg would eradicate laws which protect vulnerable women from coercion and exploitation by men.

Completely outside the opinions of mainstream America, the Report recommends the abolition of statutory rape statutes that punish men who engage in sexual relations with girls, but not women who engage in sexual relations with boys, and lowering the age of consent from 16 to 12.[15] Do these recommendations suggest that Judge Ginsburg would strike down statutory rape statutes that are intended to protect girls from the sexual advances of men? or that she would strike down laws that impose an older age of consent?

The Report suggests that "[p]rostitution, as a consensual act between adults, is arguably within the zone of privacy protected by recent constitutional decisions."[16] The Report

recommends "unqualified decriminalization [of prostitution] as sound policy, implementing equal rights and individual privacy principles."[17] Would Judge Ginsburg would strike down laws against prostitution?

Her perceived moderation may be due more to her skill as a tactician,[18] than to a genuine commitment to centrism or collegiality. In Appellant's Brief in Reed v. Reed, she argued that gender-based classifications should be treated as "suspect," yet in this and subsequent cases, the laws she sought to have declared unconstitutional were fairly minor and without significant public support.

B. The Consequences of Judge Ginsburg's Views on Sexual Equality

It seems clear that, if there is one central purpose that has guided Judge Ginsburg's career, it is her lifelong determination to see her view of "sexual equality" written into American law and she undoubtedly views herself as representing American women to accomplish this.[19] Regrettably, her view of "sexual equality" is formal, abstract, artificial, and narrow, based on a resistance to virtually any gender-based distinctions in the law and a seeming resistance to the survival of traditional roles for any women. Abstractions predominate and the practical impact on women is absent from in her vision.

This is seen in Judge Ginsburg's belief that, under her sexual equality rationale for Roe v. Wade, the Constitution compels publicly funded abortion if government provides financial assistance for childbirth.[20] In the abstract world of "sexual equality," if government provides financial assistance for childbirth, it must fund abortion. In the real world, prenatal care and costs for childrearing are many times more than a $250 abortion, and government assistance can only partially offset the greater cost of childbirth and the pressure toward abortion. It is a fiscal reality that if the state has to fund abortion

whenever it funds childbirth, there are less benefits available for the substantially greater costs of childbirth. Women with the greater cost of childbirth lose and the pressure to abort is compounded.[21]

Rigid formalism is also seen in Ginsburg's view that Roe was justified by the stigma that women faced from unmarried pregnancy.[22] She seems not to have considered that perhaps the stigma was the social problem that needed to be addressed, not abortion, or that the stigma might diminish, as in fact it has over the past 20 years.

Unlimited abortion rights, including strongly stated views on population control,[23] are clearly part of her view of "sexual equality."[24] As she stated in February, 1981, at a dinner for the Women's Rights Collective at Georgetown University, "My optimism rests primarily on social and economic conditions that appear irreversible, among the most prominent, small family norms and effective birth control necessary to preserve the planet . . ."[25]

The abstraction and formalism in her view of sexual equality is seen in her call for an "equal-regard conception of women's claims to reproductive choice . . . unsteered by government."[26] In her view, anti-abortion laws violate a woman's ability "to participate equally in the economic and social life of the Nation." She has said that the problem with Roe is that it did not focus "more precisely on the women's equality dimension" or that it did not "place[] the woman alone . . . at the center of its attention."[27] This forecloses any public policy, expressing the will of the people, protecting the life or health of the unborn child at any time of pregnancy.

Why can we be so certain of the stark and rigid implications of Judge Ginsburg's theories about abortion law? First, because her view that abortion should be viewed under a sexual equality (or Equal Protection) rationale---though never accepted by the Court---has been raised repeatedly by her compatriots in abortion

rights litigation to strike down state regulations.[28] Second, the former ACLU attorneys in the Center for Reproductive Law and Policy---who have opposed any state regulation of abortion in the courts for the past 20 years---instigated a letter writing for Judge Ginsburg's nomination to the Supreme Court, stating that she was their ideal candidate.[29] Perhaps they assume that she will press for abortion rights to be grounded in the Equal Protection clause.

Her criticisms of Roe v. Wade have focused on style or process, not on its outcome.[30] Initially, a superficial reading of that speech raised concern in some quarters that she might not be sufficiently "committed" to Roe and abortion rights. However, in the transcript of that speech, she made her commitment to legalized abortion even clearer and stronger.

It is helpful to look at the law review article upon which that speech is based.[31] Her chief criticism of the majority opinion in Roe is that it went too far, too fast. If the Court had ruled more narrowly, in Ginsburg's view, and simply struck down the Texas statute in question, it would not have sparked the adverse popular reaction.[32] She believes the right to life movement might not have been born but for the extremism of Roe's holding and reasoning.[33] And contrary to popular impression, her alternative rationale would prohibit the parental notice laws and informed consent laws that the Court has finally allowed 20 years after Roe v. Wade in Planned Parenthood v. Casey.[34]

Yet, her apparent deference to the democratic process is clearly conditioned on that process achieving the "right" results. If it does not do so, Judge Ginsburg has insisted that the judiciary has the power to step in.

In the case of her functional critique of Roe v. Wade, she presumed that the democratic process would yield unlimited abortion rights. When it did not, she advocated greater judicial intervention. Judge Ginsburg's statements about leaving abortion to the legislative process are belied by her own opposition to

the Hyde Amendment, which restricts federal funding of medicaid abortions. Although the Hyde Amendment was upheld by the Supreme Court, and is an example of the democratic process at work, apparently Judge Ginsburg would override the will of Congress and require federal abortion funding. She earlier criticized the Court's 1977 decisions upholding refusal to fund non-therapeutic abortions and the right of a public hospital to exclude abortions. She has admitted that courts may need to "legislate a bit" until the legislature comes up with the result she believes to be appropriate.

IV. ABORTION AND THE REALITY OF WOMEN'S LIVES

Because women have been not merely the bearers of life, but also the primary care givers to the young, the old, and the ill, one would hope to see in Judge Ginsburg's writings a deep respect for these customary roles of women. However she has displayed a disappointing lack of respect for women's substantial contributions within the family.

That lack of respect is most poignantly revealed in Judge Ginsburg's advocacy of abortion as necessary for "women's dignity." The notion that elective abortion is necessary for women to achieve equal status in American society is profoundly misguided and wrong. This is part and parcel of the formalistic and abstract way in which Judge Ginsburg views women's rights. It is critical to understand the context of abortion rights before one can clearly see the full impact of abortion on women in America.

It is simplistic and misleading to view abortion as merely a means by which women can alleviate an immediate obstacle to education or career. From a philosophical and biological perspective, it ignores the values of nurturance and connectedness in women that feminism has specifically revered.[35] From a practical perspective, it ignores the pressures which push women toward abortion and away from other alternatives, the

freedom that it gives to men to abandon any sexual responsibility, and the physical and psychological injury to women that surpasses the transitory relief of quickly alleviating what appears to be an obstacle.

Abortion is Not Necessary for Women's Equality

Judge Ginsburg's own record demonstrates that Roe v. Wade is not necessary to secure or preserve equal opportunity for women in American society. Roe struck down no practice relevant to women and their educational and career objectives. In fact, it may have made discrimination against pregnant women in college and the workplace easier.

Before and after Roe, the Supreme Court has shown a sensitivity to sex discrimination claims,[36] but there is no evidence that Roe itself enhanced that sensitivity. No decision of the Supreme Court on gender-based discrimination relies upon Roe v. Wade. Roe has been cited in less than a dozen lower court cases involving sex-discrimination and was dispositive in none.[37]

Under current Supreme Court doctrine, gender-based discrimination is subject to "heightened scrutiny", an intermediate standard of review, more rigorous than rational-basis, less rigorous than strict scrutiny. Under this standard, classifications based upon gender cannot be sustained under the Constitution unless they bear a "substantial relationship" to "important governmental objectives."[38] The Court, however, has not yet said that sex-based classifications must be treated as race-based classifications. A fair reading of Judge Ginsburg's writings suggests that she would adopt the "strict scrutiny" standard of review for laws that discriminate on account of sex. This position, however, fails to reflect an appreciation of and a deference to the exclusive means by which the Constitution may be changed, by an amendment approved by Congress and ratified by three-fourths of the States. Former Justice Powell recognized

this limitation when he refused to adopt, by judicial fiat, the proposed Equal Rights Amendment.[39]

Judge Ginsburg, apparently, would not wait for the people to decide whether the Constitution should be amended. Her willingness to adopt such a standard should give pause because of the rigidity of the strict-scrutiny standard. Moreover, adoption of such a standard is unnecessary. The principal gains in achieving equality of rights for women under the law have been made through the action of legislative bodies, not courts. The Congress has enacted many laws promoting equality of rights under the law by forbidding sex discrimination in public and private employment,[40] public works projects,[41] unemployment compensation,[42] sale or rental of housing,[43] and education,[44] and by mandating equal pay.[45] Many States have supplemented this legal structure with their own anti-discrimination laws and equal rights amendments.[46]

IV. ABORTION LAWS AS A TYPE OF "SEX DISCRIMINATION"

A. Ginsburg's Criticism of the Rationale of Roe; Equal Protection vs. Due Process

In the previously-discussed Madison Lecture delivered at New York University in March, 1993, Judge Ginsburg posited a different approach and rationale for Roe v. Wade. Rather than premising the abortion right on the right of privacy found in the due process clause, she would have treated it is an issue of gender-based discrimination, and grounded the abortion right in the equal protection clause. This view, that laws regulating or restricting abortion are sex-discriminatory, is radical. Not all women think this way, and not even all who call themselves "feminist" would share her view.

Judge Ginsburg argues that abortion implicates "a woman's autonomous charge of her full life course."[47] Autonomy language, of course, is more appropriate for the due process/right of privacy rationale than equal protection

analysis. Nonetheless, this view of the autonomous woman is startling. To argue that abortion laws are, by definition discriminatory, avoids any balancing of the interests at stake. At least with the balancing test, competing interests are taken into consideration. Inclusion of abortion within equality principles is contrary to the doctrine itself. For to do so would require the subordination of others, and other interests.

Even under Roe, there is a recognition of some of those competing interests: that of the state in protecting potential life, which becomes "compelling" at viability; the interest of parents in their minor daughter's decision about abortion; and even the child's interest in life itself. Under this equal protection analysis, there is no competing interest worthy of constitutional consideration, let alone protection. Thus, abortion becomes a matter between a woman and her conscience, with no regard for the father of the child, the grandparents of the child, society's interest in present and future generations, or even the developing daughter or son in the womb. The woman's autonomy would always trump other interests voiced.

The argument that abortion rights should be premised on equal protection, rather than due process, grounds, is an apparent concession that they do not now stand on solid footing, and that an abortion right is not rooted in the Constitution. It would be illuminating for the Committee to ascertain whether Judge Ginsburg believes an Equal Rights Amendment is necessary for constitutional protection of abortion rights. If it is neither necessary for, nor relevant to, the abortion question, then that should be made clear also.

Apart from judicial considerations, an autonomy/equal protection approach to the abortion question contradicts many of the core values of feminism, values which are shared by millions of American women who do not consider themselves to be feminist. These are the values of care, nurturance, compassion, non-violence and inclusion. These values include care for those who

are less fortunate, less able to speak for themselves. For many of us, it requires no great leap to include the preborn child within the circle of care and protection. Out of the natural biological connection between the intrauterine child and mother arises recognition of that dependent relationship which deserves heightened protection, both in law and in society.

Judge Ginsburg's lack of appreciation for the traditional roles of women appears in her statement that some

> feminists argue forcibly (sic) that women, at least as childbearers, perform a service for society that nature did not equip men to perform, a service essential to the survival of the human race, one that should attract special recognition and rewards. (People concerned with population growth, one might note, have doubts about encouraging such service.)[48]

Her view of traditional roles may be colored by her apparent belief that those roles were inferior and that dependency allowed or encouraged considerable suffering and legal disadvantage for women.[49]

It is possible to recognize the historical problems women have faced without denigrating traditional roles, or assuming that only through wholesale restructuring of family life can women have equal "stature" with men.[50] As an advocate for the ERA Judge Ginsburg argued that the Constitution had excluded women,[51] and that gender cases prior to 1971 demonstrated social and legal hostility toward women. She supported the "grand" and general language of the ERA as giving a textual basis for equal rights for women, which would strip away laws which demeaned women, but extend genuine protection to all. In fact, Judge Ginsburg was either telling only part of the story or was just plain wrong on all points.

Most of the Constitution deals with the structure of our government; the bill of rights protecting individuals did not trump states' rights of legislating matters related to the

family, employment and voting, even after the incorporation of the Civil War Amendments--not really until the last three decades of this century. To present cases such as Bradwell (1873) (challenging a law barring women from practicing law) or Happersett (1873) (challenging state law barring women from voting) as evidence of the law's inherent devaluation of women is to misrepresent those cases, which were decided on the basis of the states' right to set policy in these matters, not on a fundamental hostility toward women.[52] The High Court's attitude to many gender rights cases prior to the middle of this century echoes that of the Happersett court: "If the law is wrong, it ought to be changed; but the power for that is not with us.[53] Feminist revisionist readings of cases regarding women's rights can produce a powerful emotional response from an audience, but does not encourage careful, thoughtful analysis of our constitutional principles.

Seeking to ground rights on Constitutional test is laudable, but for Judge Ginsburg to insist that the "grand" language of the ERA is still a workable approach to equity for women requires her to ignore some social changes of the past two hundred years. At the time the Constitution was ratified, it was not intended to embody the whole of our law; state law was taken seriously, and the family and the church were strong social institutions which provided a guide for individual and familial behavior. With the growth of the welfare state, and the increasing reliance on the Constitution as a guarantor of unenumerated fundamental rights, the family and church appear to be weaker, and the absolute language of the amendment could be interpreted in ways that may not help women.

Our recent history suggests that while it may be theoretically possible to envision an ERA that would preserve genuinely protective laws and expand them to include all persons, courts more frequently strip away protective laws than extend them[54] because striking down legislation as unconstitutional is

clearly within the power of the judiciary, while extending benefits of the law to persons not included by legislative mandate edges toward judicial overreaching.

B. The Dangers of an Equal Protection Basis for Legalized Abortion

An equal protection argument would greatly change the cast of constitutional doctrine for abortion regulation. The equal protection rationale was considered and rejected by the Supreme Court, in the recent case of Bray v. Alexandria Women's Clinic, 113 S.Ct. 753 91993). The Court found that protest against abortion did not reflect a class-based (gender-based) animus against women.

An equal protection rationale would also, as noted above, avoid any consideration of the interests of the unborn child. This stands in contradiction to developments in virtually every other area of law pertaining to the unborn child, such as fetal homicide, prenatal injuries and wrongful death. Twenty-one States, by statute or court decision, treat the intentional, knowing, reckless or negligent killing of an unborn child (outside the context of abortion) as a form of homicide, and nearly half of these States do so without regard to the stage of pregnancy when the injury was inflicted or when the death occurred.[55] Virtually all States and the District of Columbia recognize a common law cause of action for nonfatal, prenatal injuries.[56] No case denying a cause of action for such injuries has been decided for almost twenty-five years.[57] And the overwhelming majority of jurisdictions (36 States and the District of Columbia) also recognize a statutory wrongful death action for prenatal injuries, even where those injuries result in stillbirth.[58]

Under an equal protection rationale, abortion could be treated as just a form of "post-coital birth control." Apparently, there is virtually no regulation affecting abortion

that would pass constitutional muster, unless of course, it did not "affect" or "unduly burden" the abortion decision. It is not at all clear that Judge Ginsburg would defer to the will of the Congress, most recently expressed in the significant majority approval of the Hyde Amendment by the House of Representatives. This measure ensures that taxpayer dollars do not pay for elective abortions. Would Judge Ginsburg follow precedent or her own inclinations if faced with a challenge to this appropriations limitation? Would she uphold laws requiring physicians to notify parents before aborting their daughter? What about regulations requiring that a woman receive complete and accurate information prior to undergoing abortion. These are currently constitutional expressions of public policy.

V. The Consequences of Abortion

Continued legalized abortion will only further injure women. Abortion has not solved any of the problems for which it was offered, and its continued legal sanction simply postpones the day when society will have to grapple with some of the serious issues affecting women and families. Abortion has not ameliorated any of these problems: unwed motherhood, teen pregnancy, child abuse, spouse abuse, or the feminization of poverty. A cynic might note that the main "problem" abortion solves, in cold economic terms, is avoiding the cost of having a baby. It is, of course, much less costly to terminate a pregnancy by abortion, than to give birth.

Abortion has negatively affected women's lives in many ways. Its legality does not guarantee its safety for the woman's life, physical or psychological well-being.

There is a growing body of evidence that abortion is a psychological stressor, and for many women, the psychological consequences are severe and long-lasting.

There is also a high social and personal cost for the women who undergo abortion, particularly if they are unmarried. Eighty

percent of all abortions are performed on unmarried women.[59] In such a relationship, the man bears no legal obligation unless the child survives. By its very nature, such a relationship creates the greatest potential for coercion, his denial of responsibility, and abandonment of the woman by her erstwhile partner when pregnancy results.

A study by Carol Gilligan, one of the foremost feminist analysts of women's abortion rights and independent decision-making, revealed that many of the aborted women she studied did not make independent, moral choices, but were influenced by the lack of moral and material support from the men in their lives for continuing their pregnancies.[60]

One survey of women experiencing post-abortion distress revealed that "more than one-third felt they had been coerced into their decision."[61] That coercion is subtly present in the work force as well. A study of female medical residents reported open hostility to pregnant residents from program directors and colleagues. The rate of abortion among female residents was three times that of the control group.[62]

Similarly, women lawyers are aware of the same subtle bias against having children. An article in the National Law Journal noted that law firms have been unable or unwilling to create an environment supportive of working mothers.[63] In another incident, the New York City Department of Corrections settled a lawsuit filed by several female officers who had been told to have abortions; many who refused were given physically grueling jobs.[64]

Pressure to have an abortion is reflected in court cases of various kinds. For example, men have sued to "enforce" a contract to undergo an abortion.[65]

Abortion certainly has not improved the problem of relationships between men and women. Abortion does not stabilize a relationship, whether or not the pregnancy was viewed as a threat.

> The most common male response to unwanted pregnancy when it occurs outside of marriage has been to "take off," leaving the woman to bear the physical, the emotional and, often, the financial brunt of either having an abortion or carrying the pregnancy to term. Studies of abortion and its aftermath reveal that, more often than not, relationships do not survive an abortion: the majority of unmarried couples break up either before or soon after an abortion.[66]

Abortion unfortunately isolates women from those who should bear direct responsibility--fathers of aborted children, and from the society that ought to support her in her decision to give birth.

Judge Ginsburg seems to approve of the notion in Casey that:

> people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the even that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[67]

The implication that women organize their lives around "abortion availability" would come as a great surprise to many women. Abortion is not the defining issue for women. As the 1.8 million members of the National Women's Coalition for Life agree, it is possible--and right--to be both pro-woman and pro-life. Even for those women who do not consider themselves "pro-life," abortion is not a top priority. A New York Times July 1989 poll revealed that most women were more concerned about job discrimination, child care and balancing work and family than about abortion.[68] More men than women favor abortion rights, and women tend to be more protecting of unborn human life than men.[69]

The expectation that women rely on elective surgery to advance a career or continue an education ignores the broader contexts and issues that shape women's lives. This notion is inimical to Carol Gilligan's principles of "care, concern, responsibility and non-violence."[70]

Judge Ginsburg's own life and record provide the solution to the dilemma of women's equality and abortion. She began her career in challenging distinctions in the law based solely on

gender. Under her influence, many discriminatory laws were struck down under the equal protection doctrine. But none of these involved abortion. Although Judge Ginsburg would incorporate abortion rights into the line of cases based on equal protection, this is not necessary to women's full equality and participation in society. Since no case advancing women's opportunity has relied on Roe, abortion is not legally necessary or relevant for preservation of those gains. Indeed, the unsightly thread of the abortion doctrine could easily be removed without unraveling any of the garment.

CONCLUSION

This Committee should carefully look at the impact of a nominee's commitment to abortion rights that supersedes our traditional understanding of the proper role of the judiciary and the legislative process, and should carefully weigh what impact the Court, with Justice Ginsburg, will have on the future of the women and families of this nation.

Thank you.

FOOTNOTES

1. Ginsburg, Inviting Judicial Activism: A "Liberal" or "Conservative" Technique?, 15 Ga. L. Rev. 539, 550 (1981)("the need for interventionist decisions . . . would be reduced significantly if elected officials shouldered their full responsibility for activist decision making"); Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," 28 Clev. St. L. Rev. 301 (1979).

2. In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the Court struck down a provision of the Social Security Act which gave benefits to surviving women of a deceased wage earner (widows) but not to surviving men (widowers). The Court invalidated the provision under the Fifth Amendment and actually ordered Social Security payments by Congress to such men. Judge Ginsburg observed that "the Court wrote into the statute [what] Congress had left out." And she wrote approvingly of "judicial extension of under inclusive statutes" when "the class benefitted by the judicial repair [is] limited, and the legislative will [is] minimally touched." Ginsburg, "Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation," 28 Clev. St. L. Rev. 301, 305 (1979).

3. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375, 386; Ginsburg, Gender in the Supreme Court: The 1976 Term, in Constitutional Government in America 224 (1980).

Judge Ginsburg has also implied that any legislation conferring "uneven" benefits must be subject to careful judicial review under the Equal Protection Clause. Ginsburg, Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation, 28 Clev. St. L. Rev. at 303.

4. See e.g., "Policymaking by judges goes back to Marbury v. Madison in 1803..." Ginsburg, 15 Ga. L. Rev. at 540

5. Congress authorized the President to furnish to foreign nations, assistance with voluntary family planning. President Reagan announced the "Mexico City Policy,' which stated in part:

> The United Nations Declaration of the Rights of the Child (1959) calls for legal protection for children before birth as well as after birth. In keeping with this obligation, the United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations. DKT, at 277.

6. Judge Ginsburg apparently relied on Planned Parenthood v. Arizona, 789 F.2d. 1348 (9th Cir.) aff'd mem. sub nom. Babbitt v. Planned Parenthood Fed'n, 479 U.S. 925, 107 S.Ct., 391, 93 L.Ed.1d 346 (1986). It bears noting that the Court affirmed only eh judgment of the lower court, not the rationale for the judgment, therefore, Judge Ginsburg's reliance is misplaced. Mandel v. Bradley, 432 U.S. 173, 176 (1977).

7. Indirect funding comes when the government subsidizes some family planning activities, thus freeing up private funds to be used for abortions.

8. DKT 887 F.2d at 306-307, citing FCC v. League of Women Voters, 468 U.S. 364 (1984).

9. DKT, at 305.

10. DKT, 887 F.2d at 306.

11. DKT, 887 F.2d at 299.

12. This is a puzzling attitude for Judge Ginsburg to hold, whether applied at home or abroad, given her acknowledgement that there are "communities with poverty so dire and conditions for women so low we cannot comprehend their situation." DKT 887 F.2d 302, n.4.

13. Report at iii (Letter of Transmittal).

14. Id., at v (Acknowledgements).

15. Id. at 102.

16. Report, at 97, citing, in addition to Griswold and Eisenstadt, Roe v. Wade, 410 U.S. 113 (1973).

17. Id., at 215-16. The Report also recommends repeal of the Mann Act, which forbids transportation of women and girls across state lines for prostitution and other illicit purposes. Id., at 96-99. The Report ridicules the Mann Act as one "that was meant to protect weak women from bad men." Id., at 98-99.

18. In a law review article, Judge Ginsburg cautioned the audience to "repeat winning formulas . . . and resist bold initiatives." Ginsburg, Where Do We Go From Here?, 37 Rutgers L. Rev. 1093 (1985).

19. Indeed, many of her law review articles are repetitive in stressing these identical themes with the same phrasing and substance. See e.g., Ginsburg, Sex Equality and the Constitution, 52 Tul. L. Rev. 451 (1978); Ginsburg, Some Thoughts on Benign Classification in the Context of Sex, 10 Conn. L. Rev. 813 (1978); Ginsburg, Sexual Equality under the Fourteenth and Equal Rights Amendment, 1979 Wash. U.L.Q. 161.

20. Ginsburg, 63 N.C.L. Rev. at 384-86.

21. See e.g., Hope v. Perales, 595 N.Y.S. 2d 948, 955 (Murphy, J., dissenting) (1993)

22. Ginsburg, 63 N.C.L. Rev. at 382.

23. "Several factors have contributed to the movement for equal rights and responsibilities for men and women . . . perhaps most important, effective birth control has become possible at a point in history when continued population growth jeopardizes our civilization." Ginsburg, Sex and Unequal Protection: Men and Women as Victims, 11 J. Fam. L. 347, 349 (1971).

24. In Judge Ginsburg's formulation, the "disadvantageous treatment of a woman because of her...reproductive choice is a paradigm case of discrimination on the basis of sex."

She has recognized that Roe v. Wade invalidated the abortion laws of all 50 states and that the states attempted to respond with merely regulations requiring parental notice or fully informed consent. Ginsburg, 63 N.C.L. Rev. at 381-82.

25. Address by Judge Ruth Bader Ginsburg, Susan B. Anthony Dinner of the Women's Rights Collective, Georgetown University Law Center (February 17, 1981).

26. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375, 386 (1985).

27. Ginsburg, 63 N.C.L. Rev. at 382.

28. See e.g., Jane L. v. Bangerter, 794 F.Supp. 1537, 1549 (D. Utah 1992); Brief for Petitioners and Cross-Respondents in Planned Parenthood v. Casey, 112 S.Ct. 2792 (1992), at 46; Brief for the National Coalition Against Domestic Violence as Amicus Curiae Supporting Appellees, in Webster v. Reproductive Health Services, 492 U.S. 490 (1989) at 2, 5-6 (citing Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375 (1985)); Brief for Black Women for Choice, et al., in Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir. 1992), cert. denied sub. nom. Edwards v. Sojourner T., 113 S.Ct. 1414 (1993).

29. Cauchon, Opposition Hard to Come By, USA Today, June 15, 1993, at 10A.

30.Her sentiments expressed in her March, 1993 speech at NYU were

not new or novel, having been expressed in substance in her 1985 article and before. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wadem 63 N.C.L. Rev. 375, 381 (1985).

31. Ginsburg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C.L. Rev. 375 (1985).

32. See e.g., Ginsburg, On Muteness, Confidence, and Collegiality: A Response to Professor Nagel, 61 U. Colo. L. Rev. 715, 718-19 (1990).

33. In fact, on this point Judge Ginsburg may have missed the mark. The movement against the legalization of abortion preceded Roe by several years. Americans United for Life, for example, was founded in 1971.

34. Casey, 112 S.Ct. at 2792 (1992).

35. See e.g., Carr, Neither Sound Nor Sight, 3 Yale J.L. & Fem. 153 (1991).

36. See, e.g., Reed v. Reed, 404 U.S. 71 (1971) (invalidating state law giving preference to men in issuing letters of administration to probate estate); Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down federal laws requiring dependents of servicewomen, but not servicemen, to prove their dependence to receive quarters allowances and medical and dental benefits); Cleveland Board of Education v. LeFleuer, 414 U.S. 632 (1974) (mandatory pregnancy leave policy for public school teachers violated Due Process Clause because policy had no valid relationship to State's interest in preserving continuity of instruction and was based upon an impermissible irrebuttable presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (striking down provisions of Social Security Act that allowed benefits to be paid to widow and minor children of deceased husband and father covered by the Act but only to minor children and not widower of deceased wife and mother) (Due Process Clause of Fifth Amendment); Stanton v. Stanton, 421 U.S. 7 (1975) (striking down state law establishing different ages of majority for males and females) (Equal Protection Clause); Craig v. Boren, 429 U.S. 190 (1976) (same, with respect to statutes setting different ages at which men and women could purchase beer); Califano v. Goldfarb, 430 U.S. 199 (1977) (provision of Social Security Act denying benefits to widower who could not prove that he was receiving at least one-half of his support from his deceased wife but did not require same evidence of dependency from widow violated Equal Protection Clause of the Fourteenth Amendment); Caban v. Mohammed, 441 U.S. 380 (1979) (statute which required consent of natural mother, but not natural father, to adoption of child born out-of-wedlock and never legitimized violated Equal Protection Clause); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (striking down, on equal protection grounds, state statute that allowed husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent).

37. Crawford v. Cushman, 531 F.2d 1114, 1124 (2d Cir. 1976) (striking down former Marine Corps regulation mandating discharge of woman Marine who became pregnant) (decided on constitutional grounds); Buckley v. Coyle Public School System, 476 F.2d 92, 96 n.3 (10th Cir. 1973) (questioning mandatory maternity leave policy--school teachers); In re National Airlines, Inc., 434 F.Supp. 249, 258 (S.D. Fla. 1977) (striking down mandatory maternity leave policy--flight attendants) (decided under Title

VII); Driessen v. Freborg, 431 F.Supp. 1191, 1195 (D. N.D. 1977) (same--school teacher); Ponton v. Newport News School Board, 632 F.Supp. 1056, 1061-62 (E.D. Va. 1986) (same); Lewis v. Delaware State College, 455 F.Supp. 239, 248-49 (D. Del. 1978) (college could not refuse to renew employee's contract because she bore child out-of-wedlock) (impermissible irrebuttable presumption); Brown v. Porcher, 502 F.Supp. 946, 956 n.19 (D. S.C. 1980), aff'd, 660 F.2d 1001 (1981), cert. denied, 459 U.S. 1150 (1983) (women could not be denied state unemployment benefits because they left most recent work due to pregnancy) (decided under Federal Unemployment Tax Act).

38. Craig v. Boren, 429 U.S. 190, 197 (1976).

39. Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J. concurring in the judgment.)

40. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1992), Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), 5 U.S.C. §§ 2302(b)(1) (1989), 7201 (1989).

41. Public Works and Economic Development Act Amendments of 1971, 42 U.S.C. § 3123 (1989), 23 U.S.C. § 324 (1989).

42. Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (1989).

43. Fair Housing Act, as amended, 42 U.S.C. § 3604 (1989).

44. 20 U.S.C. §§ 1681 et seq., 2302(b)(1) (1992).

45. Fair Labor Standards Act of 1938, as amended by the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1989).

46. Seventeen state constitutions have equal rights provisions which prohibit discrimination on account of sex. Alaska Const. art. 1, § 3; Colo. Const. art. II, § 29; Conn. Const. art. I, § 20; Haw. Const. art. I, §§ 3, 5; Ill. Const. art. I, § 18; La. Const. art. I, § 3; Md. Const. art. 46; Mass. Const. part 1, art. CVI [§ 252] (amending § 2); Mont. Const. art. II, § 4; N.H. Const. part 1, art. 2; N.M. Const. art. 2, § 18; Pa. Const. art. I, § 28; Tex. Const. art. I, § 3a; Utah Const. art. 4, § 1; Va. Const. art. I, § 11; Wash. Const. art. XXXI, § 1; Wyo. Const. art. 1, §§ 2, 3 & art. 6, § 1.

47. Ginsburg, 63 N.C.L. Rev. at 383.

48. "Some Thoughts on the 1980's Debate Over Special Versus Equal Treatment for Women," 4 Law and Inequality 143, 145 (1986).

49. See, for example, her discussion of "the law's differential treatment of men and women, typically rationalized as reflecting 'natural' differences between the sexes, historically (which had tended to contribute to women's subordination--their confined 'place' in man's world--even when conceived as protective of the fairer, but weaker and dependent-prone sex." Some Reflections on the Feminist Legal Thought of the 1970's" 198 U. Chicago Legal Forum 9, 11 (1989).

50. "Some Reflections on the Feminist Legal Thought of the 1970's," 1989 . U. Chicago Legal Forum 9, 13, (1989).

51. Judge Ginsburg noted in 1989, that "as framed in 1787, the Constitution was intended to be a document of governance by and for an elite--white, propertied adult males, people free from dependence on others, and therefore considered to be trustworthy citizens, not susceptible to influence or control by master, overlords, or supervisors," "Some Reflections on the Feminist

Legal Thought of the 1970's" 1989 U. Chicago Legal Forum 9, 12 (1989).

52. Judge Ginsburg grudgingly describes the basis for the decisions in Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) and Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), explaining that "from the perspective of nineteenth century jurists, allowing women to contract, control their own earnings, vote, and hold public office was not fit subject matter for federal constitutional resolution." "Sex Equality and the Constitution," 52 Tulane Law Rev. 451, 453. In fact, the Court viewed these matters as subject to state, rather than federal law, but there is no indication that the female plaintiffs, or women in general were disparaged in these opinions.

53. Happersett 88 U.S. (21 Wall.) at 177.

54. The Court in Intern. Union, UAW v. Johnson Controls, 111 S.Ct. 1196 (1991) viewed the moral and ethical concerns of a battery manufacturer about the potential harm to the offspring of female employees as a ruse for keeping women out of high-paying blue-collar jobs. IN a decision sometimes bordering on derisive in tone, the Court notes that "despite evidence in the record about the debilitating effect of lead exposure on the male reproductive system, Johnson Controls is concerned only wit the harms that may befall the unborn offspring of its female employees." Johnson at 1203. Rather than extending protection to the offspring of male employees, however, theCourt concluded that "decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Id at 1207.

55. Nine States define the killing of an unborn child as a form of homicide, regardless of the stage of pregnancy: Ariz. Rev. Stat. § 13-1103(A)(5) (West 1989) (manslaughter); Cal. Pen. Code, § 187(a) (1988) (murder) (an early decision of the California Court of Appeals reading a viability requirement into the statute, People v. Smith, 59 Cal. App.3d 751, 129 Cal.Rptr. 498 (1976), has been rejected recently by another Court of Appeals decision, see People v. Davis, ___Cal.App.4th___, 19 Cal. Rptr.2d 94 (1993); Ill. Comp. Stat., ch. 720, §§5/9-1.2, 5/9-2.1, 5/9-3.2 (1992) (murder, manslaughter); Ind. Code Ann., § 35-42-1-6 (Burns 1985) (feticide); La. Stat. Ann., §§ 14:2(7), 14:32.5-14:32.8 (West 1986 & 1992 Supp.) (murder, feticide); Minn. Stat. Ann., §§ 609.266, 609.2661-609.2665, 609.268(1) (1987 & 1992 Supp.) (murder, manslaughter); Mo. Rev. Stat., §§ 1.205, 565.024 (Vernon 1986) (involuntary manslaughter), as construed by the Missouri Supreme Court in State v. Knapp, 843 S.W.2d 345 (Mo. 1992); N.D. Cent. Code, §§ 12.1-17.1-01 to 12.1-17-04 (1991 Supp.) (murder, manslaughter); Utah Code Ann., § 76-5-201 et seq. (1990 & 1992 Supp.) (any form of homicide).

Six States define the killing of an unborn child after quickening as a form of homicide: Fla. Stat. Ann., § 782.09 (West 1992) (manslaughter); Off. Code Geo. Ann., § 16-5-80 (1992) (feticide); Mich. Comp. Laws Ann., § 750.322 (West 1968) (manslaughter) (limited by judicial decision to viability, see Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176 (1973)); Miss. Code Ann., § 97-3-37 (1972) (manslaughter); Okla. Stat. Ann., tit. 21, § 713 (West 1983) (manslaughter); Wash. Rev. Code Ann., § 9A.32.060(1)(b) (1986) (manslaughter).

Three States define the killing of an unborn child after viability as a form of homicide: Iowa Code Ann., § 707.7 (West 1979) (feticide); Tenn. Code Ann., § 39-13-214 (Michie 1991) (criminal homicide); R.I. Gen. Laws, § 11-23-5 (Michie 1981) (manslaughter).

One State defines the killing of an unborn child after the twenty-fourth week of pregnancy as a form of homicide: N.Y. Pen. Law, § 125.00 (McKinney's 1987) (homicide).

In addition to these nineteen States, two other States--Massachusetts and South Carolina--have held, without the benefit of a specific fetal homicide statute, that the killing of a viable unborn child is a form of homicide. See Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984) (vehicular homicide); Commonwealth v. Lawrence, 404 Mass. 378, 383-84, 536 N.E.2d 571, 575-76 (1989) (involuntary manslaughter); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984) (homicide).

56. Wolfe v. Isbell, 291 Ala. 327, 330-31, 280 So.2d 758, 761 (1973) (express statement in context of wrongful death action); Walker by Pizano v. Mart, 164 Ariz. 37, 41, 790 P.2d 735, 739 (Ct. App. 1990) (dictum in wrongful life action); Cal. Civ. Code, §29 (West 1982); Keleman v. Superior Court, 136 Cal.App.3d 861, 865, 186 Cal. Rptr. 566, 568 (1982) (prenatal injury); Endo Laboratories, Inc. v. Hartford Ins. Group, 747 F.2d 1264 (9th Cir. 1984) (applying California law); Empire Cas. v. St. Paul Fire & Marine, 764 P.2d 1191, 1195-97 (Colo. 1988) (by implication in recognizing pre-conception tort action); Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (1977) (prenatal injury); Worgan v. Greggo & Ferrara, Inc., 50 Del. 258, 128 A.2d 557 (Super. Ct. 1956) (same); Luff v. Hawkins, 551 A.2d 437, 438 n.1 (Del. Super. Ct. 1988) (express statement in context of wrongful death action); Greater Southeast Community Hospital v. Williams, 482 A.2d 394, 396 & n.2 (D.C. Ct. App. 1984) (prenatal injury); Jones v. Howard University, Inc., 589 A.2d 419, 423 n.8 (D.C. Ct. App. 1991) (same); Day v. Nationwide Mut. Ins. Co., 328 So.2d 560, 562 (Fla. Dist. Ct. App. 1976) (same); Horbuckle v. Plantation Pipe Line Co., 212 Geo. 504, 93 S.E.2d 727 (1956) (prenatal injury); Volk v. Baldazo, 103 Idaho 570, 572, 651 P.2d 11, 13 (1982) (express statement in context of wrongful death action); Renslow v. Mennonite Hosp., 67 Ill.2d 348, 352-53, 367 N.E.2d 1250, 1252-53 (1977) (express statement in recognizing cause of action for pre-conception tort); Cowe by Cowe v. Forum Group, Inc., 541 N.E.2d 962, 967-68 (Ind. App. 1989), transfer granted, 575 N.E.2d 630, 636-37 (Ind. 1991) (prenatal injury); Humes v. Clinton, 246 Kan. 590, 596, 792 P.2d 1032, 1037 (1990) (dictum in wrongful death action); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955) (by implication in wrongful death action); Danos v. St. Pierre, 402 So.2d 633 (La. 1981) (by implication in wrongful death action); Group Health Ass'n, Inc. v. Blumenthal, 295 Md. 104, 116-19, 453 A.2d 1198, 1206-07 (1983) (express statement in context of wrongful death action); Torigian v. Watertown News Co., 352 Mass. 449, 225 N.E.2d 926 (1967) (by implication in wrongful death action); Payton v. Abbott Laboratories, 386 Mass. 540, 560-64, 437 N.E.2d 171, 182-85 (1982) (prenatal injury); Womack v. Buchhorn, 384 Mich. 718, 187 N.W.2d 218 (1971) (same); Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949) (by implication in wrongful death action); Rainey v. Horn, 221, Miss. 838, 72 So.2d 434 (1954) (express statement in wrongful death action); Bergstresser v. Mitchell, 448 F. Supp. 10, 14-15 (E.D. Mo. 1977), aff'd, 577 F.2d 22, 25-26 (8th Cir. 1978) (by implication in recognizing cause of action for pre-conception tort); Miller v. Duhart, 637 S.W.2d 183, 186 (Mo. App. 1982) (dictum); Weaks v. Mounter, 88 Nev. 118, 121, 493 P.2d 1307, 1309 (1972) (prenatal injury); White v. Yup, 85 Nev. 527, 532-34, 458 P.2d 617, 620-21 (1969) (express statement in context of wrongful death action); Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958) (prenatal injury); Smith v. Brennan, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960) (same); Davila v. Bodelson, 103 N.M. 243, 704 P.2d 1119 (Ct. App. 1985) (same); Kelly v. Gregory, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953) (same); Stetson v. Easterling, 274 N.C. 152, 155-56, 161

S.E.2d 531, 533-34 (1968) (express statement in context of wrongful death action); Gay v. Thompson, 266 N.C. 394, 399, 146 S.E.2d 425, 429 (1966) (by implication in wrongful death action); Hopkins v. McBane 359 N.W.2d 862, 864 (N.D. 1985) (adopting §869(1) of the Restatement (Second) of the Law of Torts (1979)); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949) (prenatal injury); Evans v. Olson, 550 P.2d 924, 927 (Okla. 1976) (express statement in context of wrongful death action); Mallison v. Pomeroy, 205 Or. 690, 291 P.2d 225 (1955) (prenatal injury); Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (same); Sylvia v. Gobeille, 101 R.I. 76, 220 A.2d 222 (1966) (same); Hall v. Murphy, 236 S.C. 272, 113 S.E.2d 790 (1960) (express statement in context of wrongful death action); Shousha v. Matthews Drivurself Service, Inc., 210 Tenn. 384, 396, 358 S.W.2d 471, 476 (1962) (same); Delgado v. Yandell, 468 S.W.2d 475 (Tex. Crim. App. 1971), writ ref'd n.r.e. per curiam, 471 S.W.2d 569 (Tex. 1971) (prenatal injury); Vaillancourt v. Medical Center Hospital of Vermont, Inc., 139 Vt. 138, 141-43, 425 A.2d 92, 94-95 (1980) (by implication in wrongful death action); Kalafut v. Gruver, 389 S.E.2d 681, 683-84 (Va. 1990) (adopting §869(1) of the Restatement (Second) of Torts); Seattle-First National Bank v. Rankin, 59 Wash.2d 288, 291-92, 367 P.2d 835, 837-38 (1962) (prenatal injury); Harbeson v. Parke-Davis, Inc., 98 Wash.2d 460, 480, 656 P.2d 483, 495 (dictum in wrongful life case); Baldwin v. Butcher, 155 W.Va. 431, 437-38, 184 S.E.2d 428, 431-32 (1971) (express statement in context of wrongful death action); Puhl v. Milwaukee Auto. Ins. Co., 8 Wis.2d 343, 354-57, 99 N.W.2d 163, 169-71 (1959) (dictum in prenatal injury case); Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis.2d 14, 17, 148 N.W.2d 107, 109 (1967) (express statement in context of wrongful death action).

57. See Lawrence v. Craven Tire Co., 210 Va. 138, 169 S.E.2d 440 (1969); Marlow v. Krapek, 20 Mich. App. 489, 174 N.W.2d 172 (1969).

58. In addition to the cases cited in n. 56, supra, from Delaware, the District of Columbia, Idaho, Kentucky, Louisiana, Minnesota, Mississippi, Nevada, North Dakota, Oklahoma, Vermont, West Virginia and Wisconsin, are: Eich v. Gulf Shores, 292 Ala. 95, 300 So.2d 354 (1974); Summerfield v. Superior Court, 144 Ariz. 467, 698 P.2d 712 (Sup. Ct. 1985); Espadero v. Feld, 649 F.Supp. 1480 (D. Colo. 1986); Gorke v. Leclerc, 23 Conn. Supp. 256, 181 A.2d 448 (1962); Porter v. Lassiter, 91 Ga. App. 712, 87 S.E.2d 100 (1955); Wade v. United States, 745 F.Supp. 1573 (D. Haw. 1990); Chrisafogeorgis v. Brandenberg, 55 Ill.2d 368, 304 N.E.2d 88 (1973); Britt v. Sears, 150 Ind.App. 487, 277 N.E.2d 20 (1971); Hale v. Manion, 189 Kan. 143, 368 P.2d 1 (1962); State ex rel. Odham v. Sherman, 234 Md. 179, 198 A.2d 71 (1964); Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); O'Neill v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971); Jarvis v. Providence Hospital, 178 Mich.App. 586, 590, 444 N.W.2d 236, 238 (1989); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); Polinquin v. MacDonald, 101 N.H. 104, 135 A.2d 249 (1957); Salazar v. St. Vincent Hosp., 95 N.M. 150, 619 P.2d 826 (Ct. App. 1980); DiDonato v. Wortman, 320 N.C. 423, 358 S.E.2d 489 (1987), reh'g den., 320 N.C. 799, 361 S.E.2d 73 (1987); Werling v. Sandy, 17 Ohio St. 3d 45, 476 N.E.2d 1053 (1985); Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636 (1974), reh'g den., id., 520 P.2d 361 (1974); Amadio v. Levin, 509 Pa. 199, 501 A.2d 1085 (1985); Presley v. Newport Hospital, 117 R.I. 177, 365 A.2d 748 (1976); Fowler v. Woodward, 244 S.C. 608, 138 S.E.2d 42 (1964); Re Certification of Question of Law from United States District Court, 387 N.W.2d 42 (S.D. 1986); Tenn. Code Ann. § 20-5-106(c) (Supp. 1991) (legislatively overruling Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Moen v. Hanson, 85 Wash.2d 597, 537 P.2d 266 (1975).

59. See Appendix (hereinafter "Butler"), citing Koonin, et al. Abortion Surveillance, United States, 1988, 40 CDC Surveillance Summerier, Morbidity and Mortality Weekly Report 22 (July 1991) (Table 1) (79.7% in 1988).

60. Butler at 120-121.

61. Butler at 120, citing Franco, et al., Psychological profile of dysphoric women post-abortion, 44 J. Amer. Med. Women's Assoc 113 (July/August 1989).

62. Butler at 124, citing Shulkin & Bari, Letter to the editor, 324 New Eng. J. Med. 630 (Feb. 28, 1991).

63.Butler at 124, citing Stern, Female Talent at Lawfirms, Natl. L. J. 15-16 (Mar. 18, 1991).

64. Butler at 124, citing Martin, Women Given Cruelest Choice Now Fight Back, N. Y. Times, Oct. 21, 1989, at A27.

65. Butler at 120, citing Breidenbach v. Hayden, No. 90-CI-00021 (Jefferson Co., Ky., Cir. Ct. Div. 2).

66. Butler at 122, citing K. McDonnell, Not an Easy Choice: A Feminist Re-examines Abortion 59 (1984)(emphasis supplied).

67. Planned Parenthood v. Casey, 112 S.Ct.2791, 2809 (1992). The repeat rate for abortions (abortions sought by women who have had one or more prior abortions) is now close to 40%. This cannot be explained by contraceptive method failure alone, but by use failure.

68. A New York Times July 1989 poll revealed that most women were more concerned about job discrimination, child care and balancing work and family than about abortion. Butler at 103, citing Dionne, Struggle for Work and Family Fueling Women's Movement, N. Y. Times, Aug. 22, 1989, at A18.

In ranking personal issues, women put abortion behind equal pay, day care, rape, maternity leave and job discrimination. Butler at 107, citing Wallis, Onward, Women! Time, Dec. 4, 1989 at 80.

69. Butler at 105-107.

70.Butler at 120, citing C. Gilligan, In A Different Voice: Psychological Theory and Women's Development (1982).