

The Influence of Therapeutic Culture on Abortion Decisions of the U.S. Supreme Court

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EVERY CULTURE OR SOCIETY has certain dominant ways of viewing an individual in relationship to that culture or society. How individuals are viewed in relationship to culture or society also may change over a period of time . As a certain way gains ascendancy, it will begin to influence how law is understood and interpreted by the courts.¹ An important influence in U.S. society over the last forty years has been the therapeutic culture. This article will first briefly describe the individual and collective aspects of the therapeutic culture and how these are different from other models. Second, it will discuss the therapeutic influence on abortion decisions of the U.S. Supreme Court. Third, it will briefly comment on some of the implications of the therapeutic approach to abortion law.

In his book *The Triumph of the Therapeutic* (1966) sociologist Philip Rieff described Western culture as now dominated by the therapeutic model. This therapeutic model depends on a psychologically based view of personality. Phillip Reiff has contrasted this model with other previous models of the human personality and their relationship to society:

In this age, in which technics is invading and conquering the last enemy—man's inner life, the psyche itself—a suitable new character has arrived on the scene: the psychological man. Three character ideals have successfully dominated Western civilization: first, the idea of political man, formed and handed down to us from classical antiquity; second, the ideal of the religious man, formed and handed down to us from Judaism through Christianity, and dominant in the civilization of authority that preceded the Enlightenment; and third, the ideal of the economic man, the very model of our liberal civilization formed and handed to us in the Enlightenment. This last has turned out to be a transitional type, with the shortest life expectancy of all; out of his tenure has emerged the psychological man of the 20th century, a child not of nature but of technology. He is not the

pagan ideal, political man, for he is not committed to the public life. He is most unlike the religious man. We will recognize in psychological man the nervous habits of his father, economic man. He is anti-heroic, shrewd, carefully counting his satisfactions and dissatisfactions, studying unprofitable commitments as sins most to be avoided. From his immediate ancestor, psychological man has constituted his own careful economy of the inner life.ⁱⁱ

Other social critics have also recognized the influence of the therapeutic culture. For example, sociologist Christopher Lasch writing in 1979 noted that “The contemporary climate is therapeutic, not religious. People today hunger not for personal salvation...but for the feeling, the momentary illusion of personal well-being, health, and psychic security.”ⁱⁱⁱ He further concluded that “having displaced religion as the organizing framework of American culture, the therapeutic outlook threatens to displace politics as well, the last refuge of ideology.”^{iv} In an article written in 1975, social critic Thomas Szasz noted a growing alliance between therapy and the state just as in earlier times there had been alliances between religion and the state.^v

WHAT IS THE THERAPEUTIC MODEL?

In the abortion context, the therapeutic model relies upon a health goal based on “wellness.”^{vi} At first glance, this may appear to be consistent with more traditional models of health based upon idealized or optimal functioning. But restoration of optimal or idealized functioning once meant a restoration of natural functioning by the absence of disease or infirmity.^{vii} In the therapeutic model, the natural order is no longer respected. Instead, an artificial construction of order based upon technology is put in its place. If health is no longer idealized or optimal natural functioning but is re-defined as “wellness,” then the definition of health may be expanded to something much more expansive such as a framework for addressing any issue which might relate to the human condition.^{viii} This is confirmed in the re-definition of health by the World Health Organization in 1958 to mean “a state of complete physical, mental and social well-being, not merely the absence of disease or infirmity.”^{ix}

In the therapeutic model, concepts such as free will, guilt, good and

evil have no place.^x The therapeutic tolerates no revealed, eternal or commanding truths. In the absence of objective truth, it relies upon various techniques in an attempt to achieve a manipulable sense of well-being.^{xi} In the therapeutic model, people are considered to be diseased, ill, socially maladjusted, or perhaps immature, unbalanced, or stressed. Pain and anxiety are among its worst evils. “Treatment” is the cure for any illness or defect or problem.

Because it has no enduring values or truths, concepts such as health can be expanded or contracted to fit a desired outcome. It has a plasticity of thought and therefore is hospitable soil for judicial activism. Advocates of therapeutic approaches to law simply describe it as “the study of law as a therapeutic agent.”^{xii} Thus, law is subservient to therapeutic goals, however defined or undefined.

THERAPEUTIC INFLUENCE ON ABORTION DECISIONS OF THE U.S. SUPREME COURT

The therapeutic culture has also influenced the approach of the legal system to abortion. John Noonan observed that abortion arose (1) in the midst of a trend to reject all codes of morality as exterior, authoritarian, and absolute, and above all to reject sexual codes as the most odious and (2) to control one’s environment and life through rational planning.^{xiii} An important factor in this trend was the influence of the therapeutic culture. Phillip Reiff observed that the therapeutic culture “tolerates no revealed, eternal and commanding truths” and thus represents “an assault more and more successful, upon all sacred barriers.”^{xiv} In the period shortly prior to the legalization of abortion, psychiatrists, medical doctors, psychologists, hospital ethics committees and other members of the “helping professions” adopted the concept of “therapeutic abortion,”^{xv} which was subsequently expanded to legal abortion or elective abortion in later U.S. Supreme Court decisions.

ROE V. WADE (1973)

Examples of the loss of influence of long-standing truths are found in *Roe v. Wade* (1973),^{xvi} which legalized abortion in the United States. One of the barriers to the legalization of abortion was the Hippocratic Oath.

Justice Blackmun admitted in his opinion in *Roe v. Wade* that this Oath was famous and had long stood as the ethical guide of the medical profession and had influence, even to this day. He further acknowledged that the prohibition against abortion in the Hippocratic Oath was clear. Nevertheless, he treated the Oath as no more than a Pythagorean manifesto and not an absolute standard of medical conduct due to its “apparent rigidity.”^{xvii}

The therapeutic model is also reflected in *Roe v. Wade* because abortion is treated as no more than a medical procedure. This concept represents psychological man of the therapeutic model as a “child of technology”(in the words of Phillip Reiff). There is no longer any adherence to the natural order; instead, abortion is considered to be no more than a technical procedure performed by a doctor that must be as “safe” as possible. This was the approach adopted by the American Medical Society in 1970 and is relied upon by Justice Blackmun in his opinion. The AMA emphasized (1) the best interests of the patient, (2) sound clinical judgment, and (3) informed patient consent. But the only recognized patient was the woman. The welfare of the child was ignored.^{xviii} The decision in *Roe v. Wade* is an example of loss of the sacred. Sacred is whatever people unconsciously decide to respect.^{xix} When the Hippocratic Oath was no longer recognized as authoritative, and abortion was reduced to a medical procedure, respect for human life in the womb was abandoned.

A further example of the therapeutic influence on law is again found in *Roe v. Wade*. This decision followed the concept of “psychological man” as described by Phillip Reiff as one who is “anti-heroic, shrewd, carefully counting his satisfactions and dissatisfactions, (and) studying unprofitable commitments as the sins most to be avoided.” In the majority opinion, Justice Blackmun uses a therapeutic analysis of the decision-making process between a pregnant woman and her doctor when he states:

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all

concerned, associated with the unwanted child, and there is the problem of bringing a child into a family, already unstable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these factors the woman and her responsible physician necessarily will consider in consultation.”^{xx}

In his concurring opinion in *Roe v. Wade*, Justice Burger similarly observes:

The vicissitudes of life produce pregnancies which may be unwanted or which may impair “health” in the broad sense of the term (which includes both physical and psychological) or which may imperil the life of the mother or which in the full setting of the case may create such suffering, dislocations, misery or tragedy as to make an early abortion the only civilized step to take. Those hardships may be properly embraced in the “health” factor of the mother by a person of insight. Or they may be part of a broader medical judgment based upon what is “appropriate” in a given case, though perhaps not “necessary” in a strict sense.”^{xxi}

This approach to decision-making led dissenting Justice White to conclude that “for any reason 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.”^{xxii}

The broad range of counseling considerations described by Justices Blackmun and Burger reveal that the court intended to adopt a broadly based definition of “health.” In fact, Justice White complained that it would support abortion for any reason or no reason. This is consistent with the companion case of *Doe v. Bolton* (1973) where the court stated that “medical judgment may 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. All of these factors may relate to health.”^{xxiii} Thus, by adopting a therapeutic decision-making model with a broadly based definition of “health,” the pre-born child in the womb has virtually no legal protection from destruction.

PLANNED PARENTHOOD V. CASEY (1992)

Subsequently, another important abortion-related case reached the U.S. Supreme Court in *Planned Parenthood v. Casey*^{xxiv} (decided in 1992), which upheld the legalization of abortion in *Roe v. Wade*. In *Planned Parenthood v. Casey*, the influence of therapeutic jurisprudence is also present. Critics of therapeutic jurisprudence have claimed that it has “not yet provided a way of choosing among competing values or of balancing other values against therapeutic values.”^{xxv} It is also unclear what constitutes a therapeutic value.^{xxvi} Therefore, it has been claimed that therapeutic jurisprudence is simply a form of consequentialism that attempts to maximize the good.^{xxvii} However, defining the good is subject to a variety of interpretations. For example some believe that a therapeutic good is the net balance of pleasure over pain; others believe that the good is wealth; still others believe that satisfying preferences is the good. There are still other possibilities. The court in *Planned Parenthood v. Casey* attempted to utilize elements of each of these in its opinion.

For example, the plurality opinion stated in support of the abortion right that “the woman who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear.... Her suffering is too intimate and personal for the state to insist, without more, upon its own vision of the woman’s role.”^{xxviii} Although the Court discussed pain and suffering from childbirth, it never attempts to counter-balance it by even mentioning the possibility of joy and pleasure from childbirth. Nor does it consider the possibility of pain in women, both physical and psychological, from abortion—in some instances for many years afterward. Nor does it take into consideration the possibility of pain and agony of the unborn child who is torn limb from limb by the abortion. Nor does the Court mention the pain from abortion which may arise in a prospective father upon realizing that perhaps his only child has been aborted. Nor did the Court consider the pain and suffering of those who are conscientiously opposed to abortion and arise each day knowing that approximately 4000 lives in the womb will be deliberately snuffed out by abortion.

The sole reference to pain, anxiety, and suffering from childbirth

reflects a choice based on a hierarchy of values that are deemed higher than other values that would favor allowing nature to take its course. This has been referred to as a lack of balancing of internal issues within the therapeutic model of legal adjudication. The Court appears to use this thinly disguised technique to assert its own value judgment, which it considers superior to other considerations in order to reach a pre-determined result.

This lack of ability to identify and properly weigh various values is evident in other aspects of *Planned Parenthood v. Casey*. For example, the plurality opinion claims that abortion is needed to advance “the ability of women to participate in the economic and social life of the nation”^{xxxix} and cites a single reference in support of its claim. The cited reference makes assertive statements such as this: “[Abortion’s] contribution to the basic health and well-being was most dramatic for poor women who are disproportionately women of color...and greatly relieved economic and social conditions which led to the feminization of poverty.”^{xxx} This statement is made in the same paragraph as an admission that economic and social conditions for these women *worsened* in the decade when abortion was legalized. In contrast to the claim that abortion greatly relieves economic and social conditions for poor women, various published studies have shown that poor women in particular are most likely to have a rapid repeat pregnancy following abortion and their economic and social conditions worsen following abortion as the number of prior abortions increases.^{xxxi}

The Court in *Planned Parenthood v. Casey* in its attempt to establish abortion as a constitutionally protected liberty stated in its plurality opinion that “The abortion decision may originate within the zone of *conscience* and belief.... The destiny of the woman must be shaped to a large extent on her own conception of her *spiritual imperatives* and her place in society” (emphasis added).^{xxxii} These statements were made without any supporting evidence or references. In fact, there is substantial evidence that many women who have abortions violate their conscience or core beliefs when they do so. In a comprehensive article entitled “Abortion Counseling” by Uta Landy, the former Executive Director of the National Abortion Federation, the

various behavior-patterns of women are described at the time they seek abortion. Ambivalence, guilt, anger, and deep confusion are identified as “major themes” that consistently arise in abortion decision-making. She describes four types of reactions at the time of the crisis pregnancy. There are (1) the “spontaneous approach “ in which the woman makes a decision quickly without thinking too much about it; (2) the “rational-analytical” type where the woman weighs her options carefully but is so preoccupied with being rational that she fails to take her emotions into account; (3) the “denying-procrastinating” approach where the woman has many reasons for not making a decision; and (4) the “ no-decision making” approach in which she allows others to make the decision for her. The author identified all of these women as likely candidates for later regret.^{xxxiii} Women who make decisions on any of these grounds are likely to leave their own moral or religious values behind in the process.

Another study by the Alan Guttmacher Institute in 1987-88 of 1900 women who were interviewed at U.S. abortion facilities found that the stated reasons for abortion were pragmatic in nature, with no reference to religious or spiritual reasons.^{xxxiv} In addition, a population-based random telephone interview study of U.S. women conducted by the *Los Angeles Times* in 1989 found that among women who admitted having at least one abortion, 56% expressed a sense of guilt about having had an abortion.^{xxxv} If all of the information had been considered by the Court, it is unlikely that conscience or belief or spiritual imperatives would have been utilized by the Court in support of the abortion “liberty.”

Autonomy of the individual coupled with a perceived need for “social adjustment” have been suggested as possible fundamental reasons for development of a therapeutic approach to law.^{xxxvi} The plurality opinion in *Planned Parenthood v. Casey* held that the pregnant woman is autonomous and independent of others, even to a greater degree than *Roe v. Wade*. In *Roe v. Wade*, the court held that abortion was a medical decision between the woman and her doctor. However, in *Planned Parenthood v. Casey*, the doctor is reduced to the status of a technician, for the court upheld a state law requiring the doctor to offer certain information to the woman, although she need not necessarily consider the information. *Planned Parenthood v. Casey* also held a spousal notice law

prior to abortion was unconstitutional, stating that it embodied a view of marriage they found to be “repugnant” and further stated that “The marital couple is not an independent entity with a heart and mind of its own, but an association of two individuals with a separate intellectual and emotional makeup.” It concluded that “a husband has no enforceable right to require a wife to advise him before she makes her personal choices.”^{xxxvii} This view is consistent with the therapeutic model of the psychological person who is “shrewd, carefully counting satisfactions and dissatisfactions and studying unprofitable commitments as sins most to be avoided.”

STENBERG V. CARHART (2000)

Social critic Thomas Szasz observes: “In the Therapeutic state many medical acts are considered scientific when, in fact, they are moral.... Morals have become medicalized.”^{xxxviii} In the abortion debate, legal and political dimensions have been merged into medical judgment and decision-making.^{xxxix} This is perhaps most evident in the U.S. Supreme Court decision in *Stenberg v. Carhart* (2000).^{xl} In this case the state of Nebraska passed a law banning a form of abortion called partial-birth abortion. In this case the Court was directly faced with methods of killing during the later stages of pregnancy. As part of its defense of the law, the state of Nebraska claimed that partial-birth abortion could be banned because the practice was immoral. This was ignored by a majority of the court, which held that the law was unconstitutional because it contained no exception to protect the health of the woman. This was the holding despite the fact that medical societies could state no circumstances where partial-birth abortion was required to protect the health of the mother. In his dissent, Justice Kennedy complained that “the decision nullifies a law expressing the will of the people of Nebraska that medical procedures must be governed by moral principles having their foundation in the intrinsic value of human life, including the life of the unborn. Through their law the people of Nebraska were forthright in confronting an issue of immense moral consequence.... The Court closes its eyes to these profound concerns.”^{xli} This case demonstrates that “health,” however defined by an abortionist, is controlling. In effect, health has no objective

meaning. It merely means whatever anyone wants it to mean. And any moral considerations are ignored as they are now medicalized, having only a subjective basis.

CONCLUSIONS

The therapeutic culture, because it believes in no enduring sacred values, has undermined the sanctity of human life in the womb. This influence is evident in *Roe v. Wade* where the prohibition against abortion in the Hippocratic Oath was rejected as being “rigid” and by treating abortion as no more than a medical procedure.

The therapeutic model replaces the issues of morality of abortion with a medical model. With a medical model the influence of the medical profession is greatly enhanced and on it the courts have placed substantial reliance. Thus, the therapeutic model facilitates an alliance between medicine and the state (including the judiciary) that is not unlike previously rejected models of an alliance between church and state.^{xlii}

The broad based definition of health and wellness as the goal of the therapeutic model provides courts with a vast range of ill-defined health and wellness considerations and contributes to their role as a “super-legislature” in the abortion debate. This undermines the separation of powers concept that is a cornerstone of constitutional government in the United States. A recent law review article which considered *Stenberg v. Carhart*, *Planned Parenthood v. Casey* and *Roe v. Wade* concluded that “relevant state interests and traditional rules of constitutional adjudication are now completely submerged.”^{xliii}

The therapeutic model coupled with the right of self-determination of women to support legalized abortion has undermined the concept of citizenship. For example, consider the language of the U.S. Supreme Court in *Jacobson v. Massachusetts* (1905), where the court said: “The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the government authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one’s own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the

same right by others. It is then liberty regulated by law.”^{xliiv} Therefore, in a civil society considerations such as whether or not actions constitute a breach of the peace or represent acts of licentiousness are proper considerations. Frequently, these concepts are embodied in state constitutions as limitations on liberty. Because of the subservience of law to therapeutic considerations, these concepts have been virtually ignored in the abortion debate.

NOTES

i. Robert Bork, *The Tempting of America. The Political Seduction of the Law* (New York :The Free Press: 1990) pp. 8-9. Judges tend to accept the assumptions of the culture that surrounds them, often without fully understanding the foundations of those assumptions or their implications.

ii. Philip Rieff, *Freud: The Mind of the Moralizer* (New York: Harper and Row, 1959, 1961); Philip Rieff, *The Triumph of the Therapeutic: Uses of Faith After Freud* (New York: Harper and Row, 1966).

iii. Christopher Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (New York: Warner, 1979) p. 33. Various aspects of the abortion procedure as an illusion of well-being are described in Thomas Strahan, “Therapeutic Influence in Abortion Counseling and Procedures: Creating the Illusion of Well-Being” in *Association for Interdisciplinary Research in Values and Social Change Research Bulletin* 17/1 (2002):1-8.

iv. *The Culture of Narcissism*, p. 43.

v. Thomas Szasz, “The Theology of Therapy: The Breach of the First Amendment Through the Medicalization of Morals” in *New York Review of Law and Social Change*, 5/2 (1975) 127-36.

vi. Philip Rieff, *The Triumph of the Therapeutic*, p. 13.

vii. Galen, *De sanitate tuenda*, 2nd Century, as quoted in “Conditions and Constitutions, Chapter 5,” *Child and Family Quarterly* 10/3 (1971) 224.

viii. Charles Sykes, *A Nation of Victims: The Decay of the American Character* (New York: St. Martin’s Press, 1992) p. 35, quoting Thomas Szasz, *The Myth of*

Psychotherapy (Syracuse: Syracuse Univ. Press, 1988) p. 9.

ix. "World Health Organization: The First Ten Years of the World Health Organization, 1958," as cited in A Stewart et al., "The Meaning of Health: Understanding Functional Limitation" in *Medical Care* 15/11 (1977) 939.

x. Nicholas Kittrie, *The Right to Be Different: Deviance and Enforced Therapy* (Baltimore: The Johns Hopkins Univ. Press, 1972) p. 39.

xi. See n.2 above.

xii. David Wexler, "Therapeutic Jurisprudence in a Comparative Law Context," *Behavioral Sciences and the Law* 15/3 (1997) 233-46; David Wexler, "Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies," *Revista Juridica* 67 (1998) 317.

xiii. John Noonan, *The Morality of Abortion* (Cambridge: Harvard Univ. Press, 1970) p. xv.

xiv. Charles Sykes, *A Nation of Victims: The Decay of the American Character*, p. 50, citing Philip Rieff, *The Triumph of the Therapeutic* (1987) pp. x., xii.

xv. James Burtchaell, *Rachael Weeping: The Case Against Abortion* (New York: Harper and Row, 1982) p. 203: "'Therapeutic abortion' was a term much used before 1973 in the days when elective abortion had to be given credibility (and legal protection) by contrived medical or psychiatric 'indications'." Daniel Callahan, *Abortion: Law, Choice & Morality* (New York: The Macmillian Co., 1970) p. 9, noting that the pressure for liberalization of abortion laws came from doctors, psychiatrists, social workers, and lawyers, citing Harold Rosen, *Therapeutic Abortion* (New York: The Julian Press, 1954); F. Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* (St. Louis: C.V. Mosby Co., 1936); *Proceedings of a Conference of the National Committee on Maternal Health: The Abortion Problem* (Baltimore: Wilkins and Wilkins Co., 1944); American Law Institute, *Model Penal Code*, Proposed Official Draft, Section 230 (Philadelphia: American Law Institute, 1962); Conference sponsored by Planned Parenthood Federation in *Abortion in the United States*, ed. Mary S. Calderone (New York: Hoeber-Harper, 1958).

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

xvii. *Roe v. Wade* at 132.

xviii. *Roe v. Wade* at 143-47; see "Editorial: A New Ethic for Medicine and

Society” in *California Medicine* (Sept. 1970) 68, candidly admitting that a new ethic was now necessary which would separate the idea of abortion from killing.

xix. Jacques Ellul, *The Technological Society* (New York: Knopf, 1964) p. 142.

xx. *Roe v. Wade* at 153.

xxi. *Roe v. Wade* at 216.

xxii. *Roe v. Wade* at 221.

xxiii. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

xxiv. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

xxv. Christopher Slobogin, “Therapeutic Jurisprudence: Five Dilemmas to Ponder,” *Psychology, Public Policy and Law* 1/1 (1995)193-219.

xxvi. *Ibid.*

xxvii. *Ibid.*

xxviii. *Planned Parenthood v. Casey* at 852.

xxix. *Planned Parenthood v. Casey* at 856.

xxx. Rosiland Petchesky, *Abortion and Woman’s Choice: The State, Sexuality and Reproductive Freedom* (New York: Longman, 1984, 1990) p. 155.

xxxi. Thomas Strahan, “Rapid Repeat Pregnancy Following Induced Abortion Among Adolescent and Low Income Women” in *Association for Interdisciplinary Research in Values and Social Change Research Bulletin* 16/3 (2001)1-8.

xxxii. *Planned Parenthood v. Casey* at 852.

xxxiii. Uta Landy, “Abortion Counseling. A New Component of Medical Care,” *Clinics in Obstetrics and Gynecology* 13/1 (1986) 33.

xxxiv. A. Torres and J.D. Forrest, “Why Do Women Have Abortions?” in *Family Planning Perspectives* 20/4 (1988) 169.

xxxv. George Skelton, “Many in Survey Who Had Abortions Cite Guilt Feelings,” *Los Angeles Times* (March 19, 1989) p.28.

xxxvi. Christopher Slobogin, “Therapeutic Jurisprudence: Five Dilemmas to Ponder” in *Psychology, Public Policy and Law* 1/1 (1995) 193-219.

xxxvii. *Planned Parenthood v. Casey* at 898.

xxxviii. Thomas Szasz, "The Theology of Therapy: The Breach of the First Amendment Through the Medicalization of Morals" in *N.Y.U. Review of Law and Social Change* 5/2 (1975) 127-35.

xxxix. Thomas Murphy Goodwin, "Medicalizing Abortion Decisions" in *First Things*, No. 61 (March 1996) 33-36.

xl. *Stenberg v. Carhart*, 120 S. Ct. 2597 (2000).

xli. *Stenberg v. Carhart* at 2628.

xlii. See n.38 above.

xliii. David Smolin, "Fourteenth Amendment Unenumerated Rights Jurisprudence: An Essay in Response to *Stenberg v. Carhart*" in *Harvard Journal of Law and Public Policy* 24/3 (2001) 815.

xliv. *Jacobson v. Massachusetts*, 197 U.S. 27 (1905) citing *Crowley v. Christensen*, 137 U.S. 86,89.