

Transatlantic Conversations: The Emergence of Society-Protective Antiabortion Arguments in the United States, Europe, and Russia

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Transatlantic Conversations *The Emergence of Society-Protective Antiabortion Arguments in the United States, Europe, and Russia*

Susanna Mancini and Kristina Stoeckl

8.1 INTRODUCTION

In 2012, pro life news agency LifeNews reported:

When asked what country should be watched for upcoming pro life initiatives . . . [Joseph Meaney, the director of Human Rights International] replied that pro lifers should look towards Russia.

The Russian presidency and the parliament are both interested in finding concrete solutions to limiting abortion . . . They've already started with a number of measures this year, particularly making it illegal to describe abortion as a "safe medical procedure," and requiring those who advertise for abortion to talk about the health risks associated with it. But I think they're going to move even more in the direction of outright banning of abortions for all kinds of different reasons.¹

A few months later, the US based evangelical periodical *Christianity Today* enthusiastically commented on "Europe's top courts" supposedly "pro life roll":

The European Court of Human Rights (ECHR) upheld Austria's ban on in vitro fertilization in November. Weeks earlier, the European Court of Justice ruled against destroying human embryos for scientific research. In December 2010, the ECHR upheld Ireland's abortion ban.

"It's definitely a trend," said Roger Kiska of the Alliance Defense Fund in Slovakia. "Two or three years ago, you never would have thought that within a year you would have three pro life [victories] in the courts." The cases

¹ "Eastern Europe Sees Growing Pro-Life Effort against Abortion," *LifeNews*, October 26, 2011, www.lifenews.com/2011/10/26/eastern-europe-sees-growing-pro-life-effort-against-abortion/ (accessed April 28, 2017).

coming from the ECHR—Europe’s equivalent of the US Supreme Court show judicial restraint, deciding simply that abortion is not a right and leaving its legality up to each of the Council of Europe’s forty seven member states, Kiska said. But the Court of Justice’s ruling went a step further, ruling that embryos are human beings. This stand was both strong and surprising, he said. “It’s the first international court decision to say that life begins at conception.”²

As these citations suggest, in the past three decades, political and legal discourses over abortion have changed dramatically, both domestically and internationally. Globalization and the rise of supranational constitutionalism have provided a wide range of opportunities to antiabortion movements to widen their networks, but have also brought about new challenges. As Charmaine Yoest, the ex president of Americans United for Life and presently the assistant secretary of the US Department for Health and Human Services, put it: “Let’s face it, the world is getting smaller every day,” and any new abortion right in Europe would be a “distinct threat to American law,” because they give ammunition to domestic judges looking for an international consensus.³

Today, pro life activists from different continents and countries cooperate both formally and informally, unified by an agenda aimed at influencing domestic and international lawmaking and litigation, in the sphere of religious freedom and sexual and reproductive rights. Pro life religious organizations have become key players in regional and international policy making fora such as the United Nations, as well as in norm creating national and international contexts such as the European Union, and also, increasingly, in constitutional and human rights litigation.⁴

This transnational dialogue has resulted in the circulation of antiabortion arguments and strategies across different countries and legal systems. In this chapter we showcase the parallel evolution of antiabortion arguments in North America, Europe, and Russia. While each case has to be assessed in own right and in the light of the specific historical, cultural, and political factors that impact public discourses concerning reproductive rights, we

² “Europe’s Top Courts Are on a Pro-Life Roll,” *Christianity Today*, January 30, 2012, www.christianitytoday.com/ct/2012/january/lifeeurope.html (accessed April 28, 2017). Note by the authors: Austria bans the use of in-vitro fertilization on donor oocytes or sperm.

³ Sarah Wheaton, “Anti-Abortion Groups Inspire Abroad,” *Il Politico*, February 5, 2014, www.politico.com/story/2014/05/europe-anti-abortion-advocates-106285 (accessed May 20, 2017).

⁴ Christopher McCrudden, “Faith-Based Non-Governmental Organizations in the Public Square,” in Malcolm Evans, Peter Petkoff, and Julian Rivers, eds., *Changing Nature of Religious Rights under International Law* (Oxford: Oxford University Press, 2015), 185–210.

identify some surprising convergences among contemporary antiabortion discourses and strategies across these different contexts. These convergences not only testify to the existence of transnational conversations among Western and Russian pro life activists but also signal a new step in the global antiabortion discourse.

As a general observation, the antiabortion discourse has undergone an evolution from the fetus protective arguments that were prevalent in the 1970s and 1980s to the women protective arguments that emerged in the 1980s and 1990s. We argue that in connection with the rise of transnational pro life activism, a new step in the antiabortion discourse has emerged, namely society protective arguments, which shift the focus in the abortion debate away from the woman and the fetus to society as a whole. The three argumentative strategies do not succeed each other, but add up and increase the breadth of the antiabortion discourse.

In what follows, we document the evolution of the antiabortion strategies and rhetoric transnationally. In the unfolding of these developments from fetus protective to society protective, we trace a shifting emphasis in the use of conscientious objection. Whereas traditionally conscientious objection was invoked by individuals to obtain an exemption from generally applicable laws, in the field of reproductive rights it has become a collective instrument designed to subvert existing laws and practices with the purpose of eliminating reproductive rights in the name of the good of society. This evolution is particularly salient in the context of the US culture wars. Remarkably, however, this discourse has now burst well beyond the borders of the United States. In this chapter, we showcase the transposition of the American pro life rhetoric and strategy throughout Western Europe and Russia. Such transposition leads to very different results. In Western Europe, where abortion has not been traditionally highly politicized, but where legal systems have reached long lasting compromises over it, pro life movements seem to be influenced by their US counterparts in a straightforward and substantially passive manner. Courts and legislators, however, have so far not proven receptive to the new antiabortion arguments. Russia, on the other hand, seems to be playing a fundamental role in their spread and consolidation. While in the West antiabortion activism dates back to the 1960s, in Russia it is a recent phenomenon that emerged after the fall of the USSR. Thus, the language and the strategies of US pro life movements appear *prima facie* to be adopted whole sale by their Russian counterparts, who completely lack a tradition in this domain. In the Russian adaptation, however, the meaning of the discourse is significantly altered and supplemented. This is done by combining a society centered collectivist approach to reproductive policies that is rooted in the

Stalinist period with a discourse on traditional values associated with the doctrine of the Russian Orthodox Church, as well as with demographic concerns raised by the dramatic decrease in birthrates following the fall of the USSR. The Russian re-elaboration of Western pro-life arguments reinforces the society protective case for curtailing abortion transnationally.

8.2 FROM THE CONFLICTING RIGHTS MODEL TO WOMEN PROTECTIVE ANTIABORTION ARGUMENTS

In Western Europe and in the United States, abortion became a constitutional issue in the 1970s, mainly under the pressure of the feminist movements.⁵ Between 1973 and 1975, five landmark judicial decisions in the United States, Germany, Italy, France, and Austria decriminalized some forms of abortion.⁶ These decisions framed the constitutional conflict concerning abortion in terms of clashing rights and/or values and interests, pitting women's right (to life, privacy, health, and self-determination) against the right of the fetus (to life and dignity), and/or the value of pre-birth life and the interest of the government to protect it. The aforementioned abortion cases all involved use of the proportionality principle and of judicial balancing. The Italian decision is exemplary in this respect: "The constitutional protection of the fetus might collide with other goods that also enjoy the protection of the Constitution, thus, the legislator may not protect the former in absolute terms, and deny any protection to the latter."⁷ The Court balanced these conflicting goods and concluded that "[t]here is no equivalence between the right to life and to health of a born person, such as the mother, and the safeguard of the embryo, that is in the process of becoming a person."⁸ In the years that followed, virtually all cases decided in stabilized democratic countries or in countries that had transitioned to democracy conformed to this broad standard.⁹

Structuring abortion conflicts in terms of conflicting rights mirrored the moral, social, and political polarization concerning pregnancy termination that emerged in the 1960s. Courts were called to strike a balance in contexts

⁵ Reva B. Siegel, "The Constitutionalization of Abortion," in Michel Rosenfeld and András Sajó, eds., *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), 1057–78.

⁶ Machteld Nijsten, *Abortion and Constitutional Law: A Comparative European-American Study* (Firenze: European University Institute, 1990).

⁷ Constitutional Court, Italy, Final Judgment no. 27/1975. ⁸ *Ibid.*

⁹ See Susanna Mancini and Michel Rosenfeld, "The Judge as Moral Arbiter? The Case of Abortion," in András Sajó and Renáta Uitz, eds., *Constitutional Topography: Values and Constitutions* (Meppel, NL: Boom Eleven International, 2010), 299–316.

characterized by a profound split over ultimate moral values and political conceptions. Contestation of traditional mores and the patriarchal family by the feminist and the youth movements was met with resistance from traditional social actors and with new forms of conservative and religious activism. Feminists upheld “[t]he right of [a] woman to control her reproductive process . . . as a basic, inalienable civil right, not to be denied or abridged by the state.”¹⁰ Pro life movements opposed the legalization of abortion on the ground that “personhood” should be attributed to the fetus. The judges were confronted with a particularly high level of indeterminacy in that no legal system provided a clear answer concerning the existence, the content, and the limitations of the right to have an abortion, nor did it furnish a clear definition of what has to be regarded as a “person.” As a consequence of such indeterminacy, courts had to engage not only with a bitter political split, but also with the moral content of legal provisions, exposing themselves to charges of unfairness or of having imposed contestable moral prescriptions illegitimately.

The five 1970s judicial decisions were contingent on the relevant constitutional provisions, the political climate, and the particular conflicting conceptions of the good in play within the relevant polity. The US Supreme Court conceptualized a constitutional right to abortion, whereas all of the European courts constructed abortion as the exception to the no abortion rule. Paradoxically, however, these *prima facie* incommensurable decisions produced very similar practical outcomes: all courts both required the grant of some access to abortion to a pregnant woman and afforded some degree of protection to the fetus, precluding an unlimited right to abortion.¹¹ As Udo Werner puts it, while the US Supreme Court “recognized a woman’s privilege to remain free from the state’s interference in abortion decisions,” the European courts “granted immunity from the legal power of the state in its application of the penalty law to satisfy its obligation to protect unborn life.”¹² This difference, while important technically and symbolically, did not notably affect women’s actual access to abortion, or the fact that, if abortion was legal, “women make the final choice about their pregnancy.”¹³

¹⁰ Betty Friedan, “Speech at the First National Conference for the Repeal of Abortion Laws, Chicago, January 1969,” in Betty Friedan, ed., *It Changed My Life* (New York: Random House, 1976), 171.

¹¹ Richard E. Levy and Alexander Somek, “Paradoxical Parallels in the American and German Abortion Decisions,” *Tulane Journal of International and Comparative Law* 9 (2001): 109–66.

¹² Udo Werner, “The Convergence of Abortion Regulation in Germany and the United States: A Critique to Glendon’s Rights Talk Thesis,” *Loyola of Los Angeles International and Comparative Law Review* 18 (1996): 571–603, at 599.

¹³ *Ibid.*, 599.

In Europe, the 1970s abortion decisions (and the subsequent laws that granted access to abortion) displeased several political and social actors, but did not turn the abortion into a perennial political struggle, nor did they damage the institutional authority and legitimacy of the judiciary. Thus, unlike in the United States, in Europe abortion controversy has remained at the margin of political life. For a long time, Western European pro life movements kept a low profile, avoiding direct attacks on abortion laws and concentrating their action on mainly local initiatives aimed at spreading the “culture of life” and on charitable programs for women facing unwanted pregnancies.¹⁴ Pro life activism regained momentum in the 1990s and 2000s as a direct consequence of the fall of the Berlin Wall, of the dramatic demographic changes that had occurred especially in Eastern Europe, and of the turn toward neoliberal economies.¹⁵ In Western Europe the cultural and political climate had deeply changed since the 1970s: the feminist movement was hardly visible, Catholic ideology was regaining importance “as a factor of political consensus,” and scientific and medical developments, such as image diagnostics, assisted reproduction techniques, abortion drugs, and so forth, had taken place, allowing for new antiabortion discourses.¹⁶ In Central and Eastern Europe, “abortion rights had been restricted . . . due to the political revitalization of religious institutions . . . and the general ‘remasculinization’ of the region, manifested in a backlash against the gender equality ideology presumably imposed by communism.”¹⁷ These factors set the premises for the intensification of antiabortion activism and for a shift in its strategy and agenda. Pro lifers have become more visible and vocal and have regained interest in the legal and political dimensions of abortion. The European institutions as well as the very existence of a European public sphere provide new opportunities for pro life movements. Thus, antiabortion groups work at the national as well as at the European level, challenging legal measures, submitting briefs, monitoring the work of national and European institutions, and attempting to influence political actors and decision making processes. The reawakening of European antiabortion movements has been met with much enthusiasm by their American counterparts: it has inaugurated a phase of intense transatlantic dialogue among pro life supporters.

¹⁴ Claudia Mattalucci, “Contesting Abortion Rights in Contemporary Italy: Discourses and Practices of Pro-Life Activism,” in Silvia de Zordo, Joanna Mishtal, and Lorena Anton, eds., *A Fragmented Landscape: Abortion Governance and Protest Logics in Europe* (New York: Berghahn Books, 2017), 85–101, at 87.

¹⁵ Silvia de Zordo, Joanna Mishtal, and Lorena Anton, “Introduction,” in *ibid.*, 6.

¹⁶ Mattalucci, “Contesting Abortion Rights,” 87–88.

¹⁷ De Zordo, Mishtal, and Anton, “Introduction,” 6.

Unlike in Europe, abortion took center stage in American politics since the 1973 US Supreme Court decision in *Roe v. Wade*.¹⁸ This decision raised awareness of the counter majoritarian difficulty, exacerbated issues of federalism, and deepened social and political polarization, leading, according to many commentators, to the birth of the New Right.¹⁹ The rise of fundamentalist Protestantism as a political force played a key role in the radicalization of US pro life activism in the years following *Roe*. The commingling of radical Christian narratives and the post Vietnam War paramilitary culture charged the abortion discourse to an epic dimension, depicting it as a sort of American Armageddon.²⁰ In the decades following *Roe*, the pro life movement interiorized the narrative according to which abortion is an ultimate war between Christ and the Antichrist. Antiabortion terrorism hit the United States, culminating in the murder of “abortion doctor” David Gunn in 1993, which signaled, as Carol Mason explains, “a move away from protest and toward retribution . . . to restore the order of God.”²¹

Pro life extremism and violence did not prove a successful strategy. It alienated mainstream Americans, and especially women, who felt that their rights and needs had been disregarded in the light of the absolute protection of the fetus, and had difficulties engaging with an openly misogynist movement and narrative. In the hope to recuperate popularity among the “middle majority” and to become more attractive to potential women activists, the antiabortion movement began to rethink its strategy, shifting the focus from the fetus to the woman. David Reardon, in his 1996 book *Making Abortion Rare*, a sort of manifesto of the new antiabortion argumentative line, articulated the need to “change the abortion debate so that we are arguing with our opponents on their own turf, on the issue of defending the interests of women.”²² Reardon argued that the conflicting rights model had to give way to a narrative of reconciliation, on the ground that “[t]he middle majority is paralyzed by competing feelings of compassion for *both* the unborn and for women.”²³ Hence, “[a]ccepting the fact that the middle majority’s concerns are primarily focused on the woman is a prerequisite to developing

¹⁸ *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁹ Robert Post and Reva B. Siegel, “Roe Rage: Democratic Constitutionalism and Backlash,” *Harvard Civil Rights Civil Liberties Law Review* 42, no. 2 (2007): 373–434.

²⁰ Carol Mason, *Killing for Life: The Apocalyptic Narrative of Pro-Life Politics* (Ithaca, NY: Cornell University Press, 2002), 4.

²¹ *Ibid.*, 4.

²² David Reardon, *Making Abortion Rare: A Healing Strategy for a Divided Nation* (Randburg, ZA: Acorn, 1996), Introduction, www.afterabortion.org/MAR/marsum.html.

²³ David Reardon, “Chapter II,” *Making Abortion Rare*, <http://afterabortion.org/MAR/IGCHA/P2.htm>.

a successful pro woman/pro life strategy. Rather than trying to reduce public sympathy for women, we want to increase it and align it with our own outrage at how women are being victimized.”²⁴

To feminize the antiabortion discourse, the pro life movement reduced the space of morality in opposing abortion. As Reardon puts it,

Rather than getting bogged down in arguments with moral agnostics, we can simply capitalize on their refusal to judge. To do so we need simply to ask the relativists: Who are we to say that post aborted women have not suffered? Who are we to say they should not be allowed compensation for their pain? If we are to be fair and compassionate, shouldn't they be allowed their day in court?²⁵

Instead of focusing primarily on the representation of the fetus as a person, the antiabortion discourse shifted its attention to women's rights and women's health. It appropriated feminist language and human rights rhetoric as well as scientific and medical jargon. Instead of showing graphic images of aborted fetuses and blaming women for killing their unborn babies, it began to suggest that women were hurt by abortion. Central to the growing success of the new antiabortion strategy were the alleged link between abortion and breast cancer and the invention of the post abortion syndrome (PAS). Thus, the previous focus on morality and emotions gave way to a “rational” (scientific) message: abortion jeopardizes women's physical and mental health. This message achieved two important results: it turned women from murderers into victims, eliminating altogether the notion that a conflict of rights exists, and it provided a new legal platform to challenge abortion regulation. As Ellie Lee explains, “Central to the PAS claim is a critique of the legal concepts and arguments that have tended to legitimize abortion”: courts and legislators have wrongly assumed that abortion is a safe procedure, but under the new frame, government should restrict or prohibit abortion to protect women's health.²⁶ This

²⁴ Reardon, *Making Abortion Rare*, 32–33. “The abortion debate has typically been framed as a conflict between women's rights and the rights of the unborn. Pro-abortionists have consciously defined the issue in these terms to polarize public opinion and paralyze the middle majority – the ‘fence sitting’ 50 percent or more who feel torn between the woman and the child – so they will remain neutral. Unfortunately, many pro-lifers are all too willing to accept this characterization of the issue. In practice, they even reinforce it by rushing to announce the conclusion, which the middle majority refuses to embrace, that the right of the unborn child to live must always prevail over the needs and desires of the woman. This conclusion, however morally sound, does not help the middle majority in its search to escape the paralysis of compassion for both the unborn and their mothers.” Reardon, *Making Abortion Rare*, 25–26.

²⁵ Reardon, “Chapter II,” *Making Abortion Rare*, <http://afterabortion.org/MAR/IGCHAP2.htm>.

²⁶ Ellie Lee, *Abortion, Motherhood, and Mental Health: Medicalizing Reproduction in the United States and Great Britain* (New York: Aldine de Gruyter, 2003), 38.

paved the way for the implementation of new political and legal antiabortion strategies, including the spreading of therapeutic services offered to post-abortion women, as well as attempts to change the law concerning informed consent, on the ground that women need to be aware of the health risks associated with abortion, and the “mounting of malpractice suits against abortion clinics and physicians with the intent of making them uninsurable.”²⁷ In *City of Akron v. Akron Center for Reproductive Health*²⁸ the US Supreme Court struck down, together with other abortion restrictions, an “informed consent” provision, according to which women willing to terminate their pregnancy had to be informed “[t]hat abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.”²⁹ In *Planned Parenthood of Southeastern Pa. v. Casey*,³⁰ however, the Court opened the door to women protective antiabortion arguments, holding that “[i]n attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”³¹ Since the mid 1990s, informed consent legislation in the United States has become a battlefield. Several states, for example, have introduced legislation concerning the use of medically unnecessary ultrasound in connection with abortion services. In North Carolina and Kentucky, laws that compelled doctors to display and narrate in detail an ultrasound to a woman prior to providing an abortion, even if the woman objects and the doctor believes that this is harmful to the patient, were struck down by the courts³² on the ground

²⁷ Patricia Jasen, “Breast Cancer and the Politics of Abortion in the United States,” *Medical History* 49, no. 4 (October 1, 2005): 423–44, notes that “[e]arly in 1995, the *British Medical Journal* noted the growing importance of malpractice suits in the US aimed at forcing abortionists out of business. The author described how an organization called Life Dynamics assembled evidence of the alleged harm caused to individual women following abortion, including the danger of breast cancer, while helping to link lawyers with potential clients. Their long-term goal was to establish the legal understanding that women could sue, even years later, for any adverse effects of abortion.”

²⁸ *City of Akron v. Akron Center for Reproductive Health* 462 U.S. 416 (1983). ²⁹ *Ibid.*, 445.

³⁰ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882–83 (1992).

³¹ *Ibid.*, 882.

³² US Court of Appeal for the Fourth Circuit, *Gretchen S. Stuart v. Paul S. Camnitz* No. 14-1150 (2014) (Wilkinson) and US District Court Western District of Kentucky Louisville Division, *EMW Women’s Surgical Center, P.S.C., et al. v. Andrew G. Beshear, et al.* (2017) (Hale).

that: “[t]his compelled speech, even though it is a regulation of the medical profession, is ideological in intent and in kind.”³³

No scientific study could conclusively establish that abortion augments the risk of developing breast cancer,³⁴ nor that women develop a specific posttraumatic disorder after terminating a pregnancy.³⁵ The narratives according to which these cause and effect relations actually exist and have been irrefutably proven has, however, permeated the abortion discourses well beyond the United States. Women protective arguments, being focused on individual health rather than on religious and moral principles, proved particularly appealing in Western European secularized and strongly individualistic societies.³⁶ In the United Kingdom, where Vincent Rues, the American inventor of PAS, spoke at a 1989 meeting of pro life politicians,³⁷ the argument according to which abortion objectively damages women’s health has become dominant in the leaflets and books disseminated by pro life activists.³⁸ These arguments made their appearance in British decision making bodies in the late 1980s. In 1987, for example, during a debate concerning a bill aimed at restricting the legal time for abortion, a Member of Parliament expressed his concern over the “psychiatric morbidity experience[d] by a woman after an abortion.”³⁹ PAS began to appear across Europe and Latin America, to be discussed in the press and to be used in a variety of debates concerning abortion legislation, for example in opposing early and chemical abortions, on the ground that their “easiness” conceals to women abortion’s side effects.

Aciprensa, the world’s largest Spanish language Catholic website, with sister websites in Italian and Portuguese, disseminates countless articles

³³ US Court of Appeal for the Fourth Circuit, *Gretchen S. Stuart v. Paul S. Camnitz* No. 14-1150 (2014) (Wilkinson).

³⁴ For a comprehensive review of the literature, see Jasen, “Breast Cancer.” See also American Cancer Society, “Abortion and Breast Cancer Risk,” www.cancer.org/cancer/cancer-causes/medical-treatments/abortion-and-breast-cancer-risk.html (accessed May 20, 2017).

³⁵ The existence of PAS has not been acknowledged by any accredited medical or scientific association. The Council of Representatives of the American Psychological Association charged the Task Force on Mental Health and Abortion (TFMHA) with “collecting, examining, and summarizing the scientific research addressing the mental health factors associated with abortion, including the psychological responses following abortion, and producing a report based upon a review of the most current research.” None of the literature reviewed adequately addressed the prevalence of mental health problems among women in the United States who have had an abortion: *Report of the APA Task Force on Mental Health and Abortion*, www.apa.org/pi/women/programs/abortion/mental-health.pdf (accessed May 22, 2017).

³⁶ Lee, *Abortion, Motherhood, and Mental Health*. ³⁷ *Ibid.*, 25. ³⁸ *Ibid.*, 25.

³⁹ *Ibid.*, 21.

maintaining that abortion hurts women and advocating for “[a] new strategy to strengthen the pro life movement, focusing on the damages that abortion causes to women, who are the second victim of the anti life laws and mentality.”⁴⁰ Social media looms as the most powerful means of disseminating misleading information concerning the health risks associated with abortion. In 2017, the French Parliament adopted a law criminalizing the online “spreading or transmitting allegations or indications liable to intentionally mislead, on the characteristics or medical consequences of a voluntary interruption of abortion with the purpose of deterring” women from abortion.⁴¹ According to the French health minister, Marisol Touraine, the bill was made necessary by recent attacks against the right to abortion and by a “cultural backdrop that tends to make women feel guilty when they consider terminating a pregnancy.”⁴²

8.3 FROM WOMEN PROTECTIVE TO SOCIETY PROTECTIVE ARGUMENTS

The French health minister’s observation signals an important evolution of the women protective antiabortion arguments, namely the shifting focus from women’s health rights to women’s reproductive role. The narrative of PAS contained the seeds for this shift since its existence was put forward by Vincent Rue, a family therapist and a close ally of David Reardon, who made his name when he testified before the US Congress in 1981, claiming that women who undergo an abortion suffer from a variant of posttraumatic stress: “post abortion syndrome.”⁴³ Rue associated it with “psychic numbing”: post abortion women may not exhibit any sign of posttraumatic stress for a long time, and may spend years in a state of denial and actually never acknowledge that they suffer from PAS. Said differently, women’s perception of their experiences is irrelevant, and the absence of medical evidence suggesting the existence of posttraumatic symptoms does not invalidate the claim that

⁴⁰ “¿Cómo afecta el Aborto a las mujeres?,” *ACI Prensa*, www.aciprensa.com/recursos/como-afecta-el-aborto-a-las-mujeres-84/ (accessed April 20, 2017) (authors’ translation).

⁴¹ LOI no. 2017-347 du 20 mars 2017 relative à l’extension du délit d’entrave à l’interruption volontaire de grossesse, JORF no. 0068 du 21 mars 2017. This law was upheld by the Constitutional Council in Decision no. 2017-747 DC, March 16, 2017.

⁴² Natalie Huet, “France to Sanction ‘Misleading’ Anti-Abortion Websites,” *Politico*, February 2, 2017, www.politico.eu/article/france-to-sanction-misleading-anti-abortion-websites/ (accessed May 22, 2017).

⁴³ Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 18, S.J. Res. 19, and S.J. Res. 110 Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong. 329-39 (1981) (testimony of Vincent Rue).

abortion objectively hurts women and that its consequences will ultimately hit their lives. These consequences, other than depression, include anger, difficulties in maintaining relationships, poor parenting skills, low self esteem, eating disorders, substance abuse, sexual problems, inability to communicate, and suicidal tendencies.⁴⁴ Moreover, as is the case with other posttraumatic stress disorders, the damage done to the woman by abortion, if not addressed, is likely to “pass to the next generation,” resulting in the post abortion woman damaging her subsequent children.⁴⁵

Assuming that abortion — unlike other much more invasive medical procedures — is an objective affront to women’s mental health that generates lifelong consequences that especially hurt women’s emotional sphere, their intimacy, and parenting skills infers that abortion runs counter to women’s nature and, thus, compromises women’s domestic and social role. As Reva Siegel puts it, “a woman who has an abortion has been injured in her very womanhood — she is impaired in her capacity to perform as a wife and mother.”⁴⁶ What follows is that government should protect women, by outlawing abortion, to protect them from themselves, so that their traditional role is safeguarded. Such gender paternalistic justifications for restricting access to abortion turn the very notion of reproductive rights on its head: the law needs to protect women’s “natural” role as wives and mothers by taking away from them the very possibility of making reproductive choices. This narrative has become a fundamental tenet of contemporary antiabortion discourses across continents. Reva Siegel has powerfully tracked its spread across the United States,⁴⁷ showing how from social movements, gender paternalistic antiabortion arguments have made their way into the Supreme Court. In 2007, in the case of *Gonzales v. Carhart*,⁴⁸ which upheld a federal ban to a particular abortion procedure that the majority deemed “gruesome,” the Court held that “[t]he State has an interest in ensuring so grave a choice is well informed,” because “[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”⁴⁹

⁴⁴ Anne C. Speckhard and Vincent M. Rue, “Post-Abortion Syndrome: An Emerging Public Health Concern,” *Journal of Social Issues* 48, no. 3 (Fall 1992): 95–119.

⁴⁵ Nick Hopkins, Steve Reicher, and Jannat Saleem, “Constructing Women’s Psychological Health in Anti-Abortion Rhetoric,” *Sociological Review* 44, no. 3 (August 1996): 539–64, at 557.

⁴⁶ Reva B. Siegel, “The Rights’ Reasons: Constitutional Conflict and the Spread of Woman-Protective Anti-Abortion Argument,” *Duke Law Journal* 57 (2008): 1641–92, at 1655.

⁴⁷ *Ibid.*, 1655. ⁴⁸ *Gonzales v. Carhart*, 550 U.S. 124 (2007). ⁴⁹ *Ibid.*, 128.

Gender paternalistic antiabortion arguments have reached well beyond the United States. In 2005, for example, Hungarian extreme right wing politician Krisztina Morvai, then a member of the UN Committee for the Elimination of Discrimination against Women, and presently a member of the European Parliament, maintained that “[n]o woman actually wants to have an abortion. We have this illusion that women have free choices. But abortion is a terribly damaging thing psychologically, spiritually and physically.” Morvai expressed her hope that one day “abortion will be the past” and that it will be looked upon as “like torture in the field of human rights.” She also pointed out that many women resort to abortion because of pressure put upon them by their male partners and called for a greater focus on the “responsibility of men.”⁵⁰ In 2013, the Spanish minister of justice, Alberto Ruis Gallardon, attempted to repeal the progressive abortion law adopted during the Zapatero government with a heavily restrictive one, entitled “Protection of Life and of the Rights of Pregnant Women.” Gallardon justified the need to restrict abortion rights “to protect the weakest subjects, the unborn children, but always in the interest of women,” who are “the victims of abortion” and of the “structural gender violence” that is conducive to abortion. “Abortion is a personal tragedy,” he added, before explaining that the law should liberate women from it in order to fulfill their natural role: “Motherhood is what makes women real women.”⁵¹

Morvai’s and Gallardon’s reference to coercion and violence are typical of gender based paternalistic arguments. The assumption is that if women were informed and not coerced into having abortion, they would never engage in an unnatural act fraught with traumatic consequences. The narrative according to which women are pressured or compelled to abort is widespread in pro life propaganda. The US based website Unchoice.com, for example, states: “Over half of abortions in America are unwanted or coerced, and many here and elsewhere are forced, followed by serious aftereffects, ranging from physical injury and post traumatic stress to death of the mother, too.”⁵² The website heavily relies on narratives that echo feminist battles, such as that against domestic violence.

⁵⁰ “‘Abortion Bad for Women,’ Protests United Nations Women’s Representative,” *LifeSiteNews*, www.lifesitenews.com/news/abortion-bad-for-women-protests-united-nations-womens-representative (accessed April 20, 2017).

⁵¹ Luis A. Sanz, “Gallardon: ‘La libertad de maternidades lo que a las mujeres les hace auténticamente mujeres,’” *El Mundo*, March 27, 2012, www.elmundo.es/elmundo/2012/03/27/espana/1332867371.html (accessed May 22, 2017).

⁵² “Abortion Is the Unchoice: Unwanted, Unsafe, Unfair,” *Unchoice*, <http://theunchoice.org/in tro.htm> (accessed April 20, 2017).

Many pregnant women have been killed by partners trying to prevent the birth. Simply being pregnant places women at higher risk of being attacked. Homicide is the leading cause of death among pregnant women. Women are aware of these risks. 92% of women surveyed list domestic violence and assault as the women's issue that is of highest concern to them.⁵³

The correlation between coercion and abortion has also made its appearance in legal documents. In 2010, for example, the Canadian Parliament tabled Bill C 5, entitled "An Act to Prevent Coercion of Pregnant Women to Abort." The bill, which was ultimately defeated, protected pregnant women against coerced abortions on the grounds that "many pregnant women have been coerced to have an abortion and have suffered grievous physical, emotional and psychological harm as a result."⁵⁴

Reproductive rights are a crucial component of women's equality. As the US Supreme Court recognized in *Casey*, women's ability to realize their full potential is intimately connected to "their ability to control their reproductive lives."⁵⁵ Thus, restrictions on abortion access affect women's autonomy to determine the course of their lives, and to enjoy equal citizenship stature.⁵⁶ Restrictions motivated by arguments centered on women's nature are particularly pernicious in this respect, because their effect is not limited to interference with women's equal rights. These restrictions question women's agency and women's wholeness as rights holders, because they are founded on the claim that the law should recognize that men and women have different roles based on their biology. This claim is reminiscent of nineteenth century biological and medical arguments supporting opinions about the existence of a "natural" difference between men and women. These natural differences centered on women's reproductive role and supported their intellectual inferiority and legal status. As Cesare Lombroso, the Italian founder of Positivist Criminology, explained in 1893, "intelligence varies inversely to fecundity . . . [T]here is an antagonism between the reproductive and intellectual functions. Today the work of reproduction has for the most part devolved onto the woman and for this biological reason she has been left

⁵³ "Forced Abortion in America," *Unchoice*, 2, [www.theunchoice.com/pdf/FactSheets/Forced Abortions.pdf](http://www.theunchoice.com/pdf/FactSheets/Forced%20Abortions.pdf) (accessed April 20, 2017).

⁵⁴ [www.parl.gc.ca/HousePublications/Publication.aspx?Language E&Mode 1& DocId 4427296&File 24#1](http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=4427296&File=24#1).

⁵⁵ 505 U.S., at 856.

⁵⁶ Reva B. Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," *Stanford Law Review* 44 (1992): 261–365.

behind in intellectual development . . . Women of high intelligence . . . are often sterile.”⁵⁷

The fight against reproductive rights in the name of preserving gender roles has unsurprisingly shifted from abortion to contraception. This shift indicated without ambiguities that the value of pre birth life is not the fundamental interest at stake in the struggle against reproductive rights. Like women protective antiabortion arguments, anti contraception ones are presented prima facie as scientific evidence of health risks associated with the use of certain drugs and devices. The discourse, however, reaches well beyond women’s health and translates into a general critique of liberal gender equality. An article published in 2015 by the *Linacre Quarterly*, the official journal of the Catholic Medical Association, explores the “[p]sychological, social, and spiritual effects of contraceptive” drugs, and concludes that “[c]oincidental to the use of ‘the pill’ there has been an increase in depression, low sexual desire, ‘hook ups,’ cohabitation, delay of marriage and childbearing.”⁵⁸ In the United States, conservative Christian actors and legal scholars have made claims against public policies in favor of contraception, challenging the notion, supported by the Obama administration as well as by “other influential groups and organizations—for example the United Nations and leading medical organizations” that “access to contraception, and in some cases abortion, is an essential and basic aspect of women’s health care and even overall flourishing.”⁵⁹ Helen Alvare, a law professor at George Mason University, claims that contraception does not prevent unintended pregnancies, because, inter alia, “a woman’s opinion might shift over the course of the pregnancy”⁶⁰ and because “increased access to contraception is associated with the normalization of nonmarital sex and an increase in teen sexual behaviors leading to more teen pregnancies and abortions overall.”⁶¹ Moreover, “increasing access to contraception—associated with a message of sexual expression as freedom, and the good of sexual expression outside of the context of a relational commitment, or parenting—might itself harm women’s health.”⁶²

These developments show that antiabortion discourses are increasingly characterized as protective of collective societal values, such as the

⁵⁷ Cesare Lombroso and Guglielmo Ferrero, *Criminal Woman, the Prostitute, and the Normal Woman*, ed. Nicole Hahn Rafter and Mary Gibson (Durham, NC: Duke University Press, 2004), 87.

⁵⁸ Hanna Clause and Manuel Cortes, “Psychological, Social, and Spiritual Effects of Contraceptive Steroid Hormones,” *Linacre Quarterly* 82, no. 3 (August 2015): 283–300.

⁵⁹ Helen M. Alvare, “No Compelling Interest: The ‘Birth Control’ Mandate and Religious Freedom,” *Villanova Law Review* 58, no. 3 (2013): 379–436, at 389.

⁶⁰ *Ibid.*, 396. ⁶¹ *Ibid.*, 401. ⁶² *Ibid.*, 414.

preservation of patriarchal structures and gender hierarchies, as well as sensitive to demographic preoccupations. An explicit assertion of the societal damages of abortion is contained in the “Report of the South Dakota Task Force to Study Abortion,” which the legislature of South Dakota created in 2005 with the aim to prepare a report that included proposals to change legislation. The report heavily relies on women protective justifications for banning abortion. It also, however, elaborates at length on the societal harm it produces:

The impact this pain, sadness, and anger has on our society is difficult to measure. We know it results in parenting problems, substance abuse, problems with relationships and personal issues, and sexual dysfunction. We do not know the cost of abortion to our society, in the form of the lack of productivity of the women, but we fear it is far greater than we can imagine.

We do not know the cost to our society of losing the children who die in abortions, but we fear that the loss of their talent, productivity, and their love for their families and companionship with their mothers is far too great for us to imagine.

We do not know the cost to our society by the shattered and broken relationships caused by abortion, and the anger and pain resulting from abortion, but we fear it is far worse than what we are able to comprehend. What we do know, and what we can say, is that abortion is unethical and immoral and our support of it as a society wounds all of us. It exploits the mother, destroys her rights, destroys her interests, and damages her health, and does so by killing her child. It isolates her in her pain by placing all of the blame for the loss of her child upon her. It kills an innocent human being, and in the process creates the illusion that a mother and her child—who in reality have interests in harmony with each other—are somehow enemies. It portrays life, the greatest of gifts, as an intruder of no worth. It portrays the role of mother as valueless.⁶³

The Task Force emphasizes also the economic damages resulting from the legalization of abortion:

By 1996, the cumulative effect of legalized abortion in the state was the loss of over 13,000 annually in the South Dakota K-12 school systems, and this number has remained at over 13,000 fewer students annually for the period 1996-2003. Declining enrollment is a major problem for our K-12 school system. We cannot begin to estimate the earnings and other contributions that these citizens would have made to our State.⁶⁴

⁶³ “Report of the South Dakota Task Force to Study Abortion, 2005,” *Dakota Voice*, 33–34. www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf (accessed May 31, 2017).

⁶⁴ *Ibid.*, 34.

By relying on society protective arguments, conservative social movements pursue a political agenda that reaches well beyond the regulation of reproductive rights, and is centered on the defense of the “natural family” as the fundamental unit of society. This agenda is clearly articulated in the “Manifesto of the Natural Family” written by Allan Carlson in 2005. The manifesto upholds the notion of gender equality not as equal treatment, but as complementarity:

We affirm that women and men are equal in dignity and innate human rights, but different in function. Even if sometimes thwarted by events beyond the individual’s control (or sometimes given up for a religious vocation), the calling of each boy is to become husband and father; the calling of each girl is to become wife and mother. Everything that a man does is mediated by his aptness for fatherhood. Everything a woman does is mediated by her aptness for motherhood. Culture, law, and policy should take these differences into account.⁶⁵

We believe wholeheartedly in women’s rights. Above all, we believe in rights that recognize women’s unique gifts of pregnancy, birthing, and breastfeeding. The goal of androgyny, the effort to eliminate real difference between women and men, does every bit as much violence to human nature and human rights as the old efforts by the communists to create “Soviet Man” and by the Nazis to create “Aryan Man.”⁶⁶

Interestingly, Carlson’s manifesto relied, inter alia, on the work of Pitirim A. Sorokin, a Russian émigré Harvard sociologist (1889–1968), who, together with Carle Zimmerman, wrote several influential studies in rural sociology, according to which only a rural lifestyle, based on a traditional model of family, an economy of manual work and home business, and a strong link of the individual to the inhabited territory, is sociologically, demographically, and economically sustainable.⁶⁷ Sorokin furthermore abhorred the changes in American society, which he denounced in his pamphlet *The American Sex Revolution*,⁶⁸ and he argued that “marriage and the family must be restored to their place of dignity among the greatest values in human life, not to be trifled with. As a socially sanctioned union of husband and wife, of parents and children, the family is to be radically differentiated from all unsanctioned sex association.”⁶⁹

⁶⁵ Allan C. Carlson and Paul T. Mero, *The Natural Family: A Manifesto* (Dallas, TX: Spence Publishing, 2007), 25.

⁶⁶ *Ibid.*, 25.

⁶⁷ Pitirim A. Sorokin and Carle C. Zimmerman, *Principles of Rural Urban Sociology* (New York: H. Holt, 1929).

⁶⁸ Pitirim A. Sorokin, *The American Sex Revolution* (Boston, MA: P. Sargent, 1956).

⁶⁹ Pitirim A. Sorokin, *The Reconstruction of Humanity* (Boston, MA: Beacon Press, 1948), 148.

Sorokin's theses are among the foundations for the secular, professional pro family discourse advocated by Carlson and the organization he helped to found, the World Congress of Families (WCF).⁷⁰ These foundations gained prominence when, in 1997, Carlson started to act as bridge builder between American and Russian pro family activists. He traveled to Moscow in order to meet a Russian scholar of similar views, demographer Anatoly Antonov. Carlson and Antonov shared an understanding of the crisis of the family and the roots of this crisis, and together, the men founded the WCF,⁷¹ which today functions as a transnational nongovernmental pro family organization and has organized yearly congresses in support of the natural family across Europe, the United States, and the former Soviet Union. The important place of Russia in the global pro family and pro life movement is corroborated by WCF managing director Larry Jacobs, who said that “[g]iven its traditional support for faith and family, Russia will play an increasingly important part in the international struggle to preserve the natural family.”⁷²

The WCF created a space for a partnership between various stocks of right wing conservative actors across the United States, Europe, and Russia,⁷³ motivated by different domestic and regional preoccupations, but unified by certain common transnational strategies, including that to “rebalance international human rights back towards the local and the indigenous, weakening the pull of a homogenizing, universal, and liberal agenda.”⁷⁴ Women's equality, especially in the sphere of reproductive rights, constitutes a particularly powerful obstacle in the pursuance of this agenda. Thus, just as had been the case in Europe, Russian moral conservatives have developed a powerful anti reproductive rights discourse, which, as we show in more detail, is heavily influenced by the rhetoric of US pro life propaganda.

⁷⁰ Dmitry Uzlaner and Kristina Stoeckl, “The Legacy of Pitirim Sorokin in the Transnational Alliances of Moral Conservatives,” *Journal of Classical Sociology*, November 14, 2017, <http://journals.sagepub.com/doi/abs/10.1177/1468795X17740734>.

⁷¹ Christopher Stroop, “The Russian Origins of the So-Called Post-Secular Moment: Some Preliminary Observations,” *State, Religion and Church* 1, no. 1 (2013): 59–82.

⁷² “Jacobs Finds Support for International Pro-Family and Pro-Life Movement in Moscow,” *Christian News Wire*, December 13, 2010, www.christiannewswire.com/news/4302615709.html (accessed May 24, 2017).

⁷³ Doris Buss and Didi Herman, *Globalizing Family Values: The Christian Right in International Politics* (Minneapolis: University of Minnesota Press, 2003).

⁷⁴ Christopher McCrudden, “Human Rights, Southern Voices and ‘Traditional Values’ at the United Nations,” *University of Michigan Public Law Research Paper No. 419* (May 28, 2014): 1–44, at 3, <https://papers.ssrn.com/sol3/papers.cfm?abstractid=2474271>.

8.4 ANTIABORTION DISCOURSE IN RUSSIA

8.4.1 *The Russian Orthodox Church's Antiabortion Discourse and the Role of Conscientious Objection*

Russia's history of abortion can hardly be compared with that of Western countries. The very nature of the legal and political system of the Soviet Union prevented the emergence of any constitutional struggle over abortion, together with the conceptualization of the latter as a "right." Abortion was treated as an issue of public health, and its space was determined chiefly by demographic preoccupations: concerning population containment in the 1920s and concerning population growth under Stalin. Moreover, the absence of religion in the Soviet public sphere and the collectivistic socialist philosophy prevented any public discourse concerning the morality of abortion. After the fall of the USSR, however, abortion quickly became a central topic both for the Russian Orthodox Church (ROC) and for lay religious actors.

The ROC tackled the abortion issue through a twofold lens. On one hand, it associated abortion with the dramatic population decrease of the 1990s, raising demographic concerns. On the other, it developed a theological discourse, in which abortion emerged in the first place as a pastoral issue: in a country where the average woman had undergone six or seven abortions in her life, and many Russians were in the process of rediscovering their faith, the mass abortions conducted during the Soviet past became a question for both personal and collective atonement. Thus, for example, the narrative of PAS was successfully transposed in Russia. Its significance, however, must be understood in the specific post Soviet context, as a form of "collective affliction."⁷⁵ As Sonja Luehrmann explains, PAS is filtered through the Orthodox religion and collective trauma. The existence of the syndrome is taken for granted and used as a scientific explanation by activists as to "why women who had abortions need to participate in the struggle against it."⁷⁶ In post Soviet Russia, women who became involved in religious practice traumatically "discovered" that they had committed a terrible sin: engaging in antiabortion activism thus acquired the significance of saving the next generation of women and giving a chance to a new generation of Russian children: "Russian activists interpret [PAS] through the lens of teaching about the consequences of sinful and virtuous actions that they learn through their

⁷⁵ Sonja Luehrmann, "Innocence and Demographic Crisis: Transposing Post-Abortion Syndrome into a Russian Orthodox Key," in De Zordo, Mishtal, and Anton, *Fragmented Landscape*, 103–22, at 116.

⁷⁶ *Ibid.*, 112.

involvement with the Church.”⁷⁷ Thus, unlike in the West, PAS is not used by antiabortion activists to lower the moralistic tone of pro life battles and to emphasize the materialistic individual dimension of the damage produced by abortion. To the contrary, “the trauma associated with abortion is imbued with moral significance.” Unborn children, the victims of a collective sin, simultaneously represent the horrors of the Soviet system and a hope for the future. And, as Luehrmann further notices, they are easier to mourn than other victims of the past regime, “because they pose no threat to the political elites.”⁷⁸

The ROC has never hidden its preference for a complete ban on abortions. The teaching of the ROC on abortion has been elaborated in detail in the document *The Basis of the Social Teaching of the Russian Orthodox Church* (2000).⁷⁹ The cardinal point of the ROC’s position is the rejection of abortion as murder:

Since the ancient time the Church has viewed deliberate abortion as a grave sin. The canons equate abortion with murder. This assessment is based on the conviction that the conception of a human being is a gift of God. Therefore, from the moment of conception any encroachment on the life of a future human being is criminal.⁸⁰

As a consequence of this rejection, the ROC elaborates two strategic attitudes vis à vis abortion as a social fact and legal act. These attitudes appear contradictory at first, because one includes strategies of retreat and conscientious objection of the lay Christian living in a society judged as apostatic, whereas the other consists of active engagement of the Christian with public and political life in order to “improve” society and change existing laws. From the ROC’s perspective, the two attitudes are complementary and mutually reinforcing through a division of tasks: the lay Christian believer is called to bear witness to his or her faith through actions, and the Church hierarchies commit to an active dialogue with state authorities in view of “guiding” public morality, also in legislative terms.

The first strategic attitude is expressed in the Social Doctrine as follows: “If the authority forces Orthodox believers to apostatize from Christ and His Church and to commit sinful and spiritually harmful actions, the Church should refuse to obey the state. The Christian, following the will of his

⁷⁷ This and the following quote are from *ibid.*, 113. ⁷⁸ *Ibid.*, 116.

⁷⁹ “The Basis of the Social Concept,” *Mospat*, 2000, www.mospat.ru/en/documents/social-concepts/ (accessed June 13, 2017). Official translation of ROC social doctrine by Moscow Patriarchate.

⁸⁰ *Ibid.*

conscience, can refuse to fulfill the commands of state forcing him into a grave sin.”⁸¹

The second strategy is formulated by the ROC as a solution to the conflict arising from the first:

If the Church and her holy authorities find it impossible to obey state laws and orders, after a due consideration of the problem, they may take the following action: enter into direct dialogue with authority on the problem, call upon the people to use the democratic mechanisms to change the legislation or review the authority’s decision, apply to international bodies and the world public opinion and appeal to her faithful for peaceful civil disobedience.⁸²

Conscientious objection, therefore, is contemplated as a last resort rather than preferred strategy.

The Social Doctrine further clarifies this issue. Conscientious objection is evaluated by the Church in the first place as a harmful principle, because it

testifies that in the contemporary world, religion is turning from a “social” into a “private” affair of a person. This process in itself indicates that the spiritual value system has disintegrated and that most people in a society which affirms the freedom of conscience no longer aspire for salvation . . . The adoption of the freedom of conscience as legal principle points to the fact that society has lost religious goals and values and become massively apostate and actually indifferent to the task of the Church and to the over coming of sin.⁸³

Freedom of conscience is recognized only at a second step, as a last resort that “has proved to be one of the means of the Church’s existence in the non religious world, enabling her to enjoy a legal status in a secular state and independence from those in society who believe differently or do not believe at all.”⁸⁴

Interestingly, an analogous view of conscientious objection was put forward in 2009 by a coalition of conservative Christian leaders in the United States, who signed the Manhattan Declaration, a “call for Christian unity on issues of life, marriage, and religious liberty.”⁸⁵ The coalition of advocacy groups and ministries cuts across Christian traditions: in addition to many US evangelical and conservative Catholic leaders, its signatories include the primate of the Anglican Church of Nigeria, and the primate of the Orthodox Church in

⁸¹ Ibid. ⁸² Ibid. ⁸³ Ibid. ⁸⁴ Ibid.

⁸⁵ “A Call of Christian Conscience,” Manhattan Declaration, 2009, http://manhattandecaration.org/man_dec_resources/Manhattan_Declaration_full_text.pdf (accessed May 30, 2017).

America. Eric Teetsel, the executive president of the Manhattan Declaration, was featured as a speaker at the 2015 World Congress of Families in Salt Lake City. The declaration calls Christians “to affirm our right and, more importantly, to *embrace our obligation* to speak and act in defense” of Christian principles. “We pledge to each other, and to our fellow believers, that no power on earth, be it cultural or political, will intimidate us into silence or acquiescence.” Like the ROC, the drafters of the Manhattan Declaration deplore the forced complicity of Christian taxpayers in providing abortion services, stating that “[m]any in the present administration want to make abortions legal at any stage of fetal development, and want to provide abortions at taxpayer expense” and indicate the correct legislative regulation of abortion, criticizing “[t]he President [who] has also pledged to make abortion more easily and widely available by eliminating laws prohibiting government funding, requiring waiting periods for women seeking abortions, and parental notification for abortions performed on minors. The elimination of these important and effective pro life laws cannot reasonably be expected to do other than significantly increase the number of elective abortions.”⁸⁶ In its final statement, the declaration openly vows civil disobedience:

Because we honor justice and the common good, we will not comply with any edict that purports to compel our institutions to participate in abortions, embryo destructive research, assisted suicide and euthanasia, or any other anti life act; nor will we bend to any rule purporting to force us to bless immoral sexual partnerships, treat them as marriages or the equivalent, or refrain from proclaiming the truth, as we know it, about morality and immorality and marriage and the family. We will fully and ungrudgingly render to Caesar what is Caesar’s. But under no circumstances will we render to Caesar what is God’s.⁸⁷

In the Social Doctrine of 2000, the ROC formulates a dual strategy for dealing with the issue of abortion. On one hand (strategy 1), the Church insists on the right of Christian doctors to refuse to conduct abortions on the ground of conscience, and promotes the rights of the Christian taxpayer not to be forced into compliance with public funding of abortions; and on the other (strategy 2), the ROC offers itself as a partner of the state to implement measures that will “align” public morality with the Church’s teachings.

Strategy 1 is repeated several times throughout the Social Doctrine and not restricted to the question of abortion:

⁸⁶ Ibid. ⁸⁷ Ibid.

When compliance with legal requirements threatens his eternal salvation and involves an apostasy or commitment of another doubtless sin before God and his neighbor, the Christian is called to perform the feat of confession for the sake of God's truth and the salvation of his soul for eternal life. He must speak out lawfully against an indisputable violation committed by society or state against the statutes and commandments of God. If this lawful action is impossible or ineffective, he must take up the position of civil disobedience.⁸⁸

Chapter 11 of the Social Doctrine is dedicated to "Personal and national health." The very fact that "national health" is correlated with personal health in the heading of the section suggests that the ROC sees individual health as instrumental to the health of the people. This becomes especially clear in the section dealing with abortion, which is introduced by an assessment of Russia's demographic crisis:

The Russian Orthodox Church has to state with deep concern that the peoples she has traditionally nourished are in the state of demographical crisis today . . . The Church has been continually occupied with demographic problems. She is called to follow closely the legislative and administrative processes in order to prevent decisions aggravating the situation. It is necessary to conduct continuous dialogue with the government and the mass media to interpret the Church's stand on the demographic and healthcare policy. The fight with depopulation should be included in the effective support of medical research and social programs intended to protect motherhood and childhood, the embryo and the newborn. The state is called to support the birth and proper upbringing of children.⁸⁹

Only after this explicit elaboration of strategy 2, is strategy 1, conscientious objection, again brought into play: "Sin also lies with the doctor who performed the abortion. The Church calls upon the state to recognize the right of medics to refuse to procure abortion for the reasons of conscience." ROC extends the "responsibility for the sin of the murder of the unborn child" also "to the father if he gave his consent to the abortion" and concludes "[i]f a wife had an abortion without the consent of her husband, it may be grounds for divorce." The ROC also condemns the use of "some contraceptives [that] have an abortive effect, interrupting artificially the life of the embryo on the very first stages of his life."⁹⁰ Other means of contraception, however, are not ruled out.

Every single one of the points contemplated in the ROC Social Doctrine of 2000 with the view of changing the situation of abortion legislation in Russia

⁸⁸ "Basis of the Social Concept," *Mospat*. ⁸⁹ *Ibid.* ⁹⁰ *Ibid.*

has subsequently been developed in public and, specifically, political debates about abortion, and in some cases has been incorporated in the legislative frame.⁹¹ The Russian government proved sensitive to both the analysis and the remedy proposed by the ROC. In the next section we showcase the contemporary legal frame and political discourse in Russia, influenced by the ROC position as well as by Western language and rhetoric.

Since 2000, Russia has:

1. Created a joint committee of the ROC and the Ministry of Health to devise strategies reducing the numbers of abortion in 2010, which led to
2. Adopting a new law on public health that
 - a. adds consultation and a waiting period to the procedure of having an abortion and
 - b. gives medical personnel the right to refuse abortions;
3. Seeing the emergence of pro life charity organizations;
4. Putting forward a legal proposal that makes the consent of male partners obligatory for women to have an abortion;
5. Adopting legislation that forbids advertisement for abortion and “abortive contraceptives”; moreover,
6. In 2016, proposed a referendum to abolish abortion in Russia; and
7. In 2016, debated taking abortion off the social health care system.

8.4.2 *The Changing Landscape of Abortion Legislation in Russia*

In the Soviet Union, abortion was legalized in 1920 by the Bolsheviks, making Russia the first modern state that offered women medical abortion services on demand. Abortion was once again criminalized in 1936 and finally decriminalized in 1954. Subsequently, abortion became one of the main means of birth control as contraceptives were unavailable or unreliable and sexual education was lacking.⁹² In 1987, when the abortion rate had already

⁹¹ Not only has the ROC’s position on abortion found political implementation, also the ROC’s teaching on homosexuality has been written into law with the “Gay-Propaganda Legislation” in 2012.

⁹² Cf. Alexandre Avdeev, Alain Blum, and Irina Troitskaya, “The History of Abortion Statistics in Russia and the USSR from 1900 to 1991,” *Population: An English Selection* 7 (1995): 39–66, at 61–62, www.jstor.org/stable/2949057; A. A. Popov, “Family Planning in the USSR: Sky-High Abortion Rates Reflect Dire Lack of Choice,” *Entre Nous Cph Den* 16 (September 1990): 5–7, www.ncbi.nlm.nih.gov/labs/articles/12222340; A. A. Popov, A. P. Visser, and E. Ketting, “Contraceptive Knowledge, Attitudes and Practices in Russia during the 1980s,” *Studies in Family Planning* 24, no. 4 (1993): 227–35, www.ncbi.nlm.nih.gov/labs/articles/8212092/; Victoria I. Sakevich and Boris P. Denisov, “Birth Control in Russia: Overcoming the State System Resistance,” *National Research University Higher School of Economics Working Paper*

decreased compared to the past decades, the average Soviet woman had five abortions over her reproductive life span.⁹³ Today, even though more than twenty years have passed since the demise of the USSR, the rate of abortions in Russia, albeit much lower than in the Soviet period, remains among the highest in Europe.⁹⁴ Against this background, since the beginning of the 2000s, Russia has seen a number of measures and initiatives aimed at reducing abortions and increasing fertility and population growth. These measures – on one side, legal restrictions on abortions; on the other, nonlegal initiatives aimed at preventing abortions – have turned Russia from being the country with one of the most liberal policies on access to abortion to a situation comparable to many European countries, where relatively restrictive measures are in place.

The path to the present abortion regulations in Russia, in place since 2012, was accompanied by fierce debates that unfolded at all three levels of argumentation previously identified, at one and the same time: the fetus's right to life, women's health, and protection of society. Compared to Western countries, pro life movements and activism in Russia are a recent phenomenon. Thus, while in the West there has been a temporal shift from fetus protective to women protective and to society protective arguments in opposing abortion, in Russia the three arguments came to prominence simultaneously and merged in the public debate as a general narrative. What is special about the Russian situation is that antiabortion debates continue to be highly politicized, with a new wave of society and fetus protective arguments paving the way for potentially more restrictive legislation in the future.

In the early 1990s, during the wave of democratic reforms taking place in Russia, the government adopted a federal target program on "Family Planning," which was designed to change societal attitudes toward reproductive rights and sexual education. These efforts proved effective and by 2012, the number of abortions was 25 percent of the 1990s figure.⁹⁵

Since then, however, the official position of the government has changed under the influence of the Russian Orthodox Church. Denisov and others write that "the Orthodox Church agitates extensively against advances in

Series: Sociology 42 (June 2014): 1–25, June 2014, hse.ru/data/2014/06/02/1324958898/42SO_C2014.pdf.

⁹³ Luehrmann, "Innocence," 105.

⁹⁴ Francesca Stella and Nadya Nartova, "Sexual Citizenship, Nationalism and Biopolitics in Putin's Russia," in Francesca Stella, Yvette Taylor, Tracey Reynolds, and Antoine Rogers, eds., *Sexuality, Citizenship and Belonging: Transnational and Intersectional Perspectives* (New York: Routledge, 2016), 24–42.

⁹⁵ Sakevich and Denisov, "Birth Control in Russia," 16–18.

reproductive health and rights . . . [I]t successfully penetrated the public health decision making process.” One source even states that between 1998 and 2012, reproductive health centers decreased from more than 400 to 21.⁹⁶

Under the influence of segments of society holding traditionalist and fundamentalist views, the advances in federal policies on family planning in the 1990s have been reversed:

Today, they [traditionalists] constitute an influential social force, which stirs up negative associations with and agitates against family planning. The belief in the myth that birth control is synonymous to low fertility and that broader access to family planning services inevitably leads to fertility reduction has become rather widespread. This myth has not only become part of folk common sense, but also has successfully penetrated the level of decision makers. The resumption of a program, similar to “Family planning,” is hardly possible given the current pronatalist course proclaimed by the Government of Russia.⁹⁷

Legal initiatives geared toward restricting access to abortions in Russia started around the year 2000. The Russian law “Fundamentals of the Health Care of Russian Citizens” from 1993 had legislated that abortions can be performed upon women’s request up to twelve weeks of gestation or up to twenty two weeks in the presence of certain “social reasons.” The definition of what constitutes eligible “social reasons” changed several times during the 1990s and 2000s. In 2003, the list of eligible causes for legal abortions after week 12 (except for medical reasons) was reduced drastically on the grounds of a women protective argument, with the legislator arguing that late abortions carry high risks for women’s health.⁹⁸ The list was finally reduced, in 2012, to only one point, namely rape.⁹⁹

In 2011, the World Congress of Families (WCF) had held its first Demographic Summit in Moscow, bringing together leading US evangelicals, Orthodox Church leaders and prominent Russian politicians. In promotional

⁹⁶ Adam Federman, “How US Evangelicals Fueled the Rise of Russia’s ‘Pro-Family’ Right,” *The Nation*, January 7, 2014, www.thenation.com/article/177823/how-us-evangelicals-fueled-rise-russiaspro-family-right (accessed April 6, 2017).

⁹⁷ Boris P. Denisov, Victoria I. Sakevich, and Aiva Jasilioniene, “Divergent Trends in Abortion and Birth Control Practices in Belarus, Russia and Ukraine,” *PLoS ONE* 7, no. 11 (2012): 1–14, at 8, <http://dx.doi.org/10.1371/journal.pone.0049986>.

⁹⁸ Steven Lee Myers, “After Decades, Russia Narrows Grounds for Abortions,” *New York Times*, August 24, 2003.

⁹⁹ Denisov et al. have found that abortions for “social reasons” represented only less than 1 percent of reported abortions (Denisov, Sakevich, and Jasilioniene, “Divergent Trends,” 4).

materials the WCF claimed that the summit “helped pass the first Russian laws restricting abortion in modern history.”¹⁰⁰ In effect, the draft bill submitted to the Duma stipulated, among other things, that before signing a consent form for abortion, a woman was required to visualize the fetus by means of ultrasound, to listen to the fetal heartbeat, to consult with a psychologist “that has to explain the right to refuse abortion.”¹⁰¹ While this rhetoric and language previously had no place in the Russian legal system, we have seen in our previous analysis that it is widespread in the US pro life propaganda, and that analogous provisions have been adopted in several US states’ law.

Erofeeva, and Denisov and others, associate the gradual tightening of reproductive rights in Russia over the past two decades with the official rhetoric of traditional family values and demographic crisis. In 2006, President Vladimir Putin made Russia’s demographic decline a major point of his annual address to the nation. One year later, the Russian government launched a program entitled “Demographic Policy for the Russian Federation Present to 2025.” The program included monetary incentives for women to have more children and was almost exclusively built around a one time monetary measure called “maternal capital.”¹⁰² During the same years, several legislative proposals were discussed, for example a complete ban on abortions, or the requirement to get a husband’s approval for abortions, none of which made it beyond the proposal stage.¹⁰³ However, things began to change, according to Erofeeva, when in 2010 the Russian State Duma installed a Women, Family and Children Issue Committee with the participation of the Russian Orthodox Church. This committee, she concludes, had a decisive impact on the new Russian health law, which changed access to abortion significantly in 2012.

The new law, “On the Fundamental Health Care Principles in the Russian Federation” (N232 FZ), included measures such as establishing a mandatory “week of silence” from seven days to forty eight hours between the visit to a medical facility and the termination of pregnancy, depending on gestational age (Article 36), and the right of the doctor to refuse to perform medical “termination of pregnancy if it does not directly threaten the patient’s life and health of others” (Article 70).¹⁰⁴

¹⁰⁰ Federman, “US Evangelicals.” ¹⁰¹ Stella and Nartova, “Sexual Citizenship,” 8.

¹⁰² Michele Rivkin-Fish, “Pronatalism, Gender Politics, and the Renewal of Family Support in Russia: Toward a Feminist Anthropology of ‘Maternity Capital,’” *Slavic Review* 69, no. 3 (Fall 2010): 701–24.

¹⁰³ Lyubov Vladimirovna Erofeeva, “Traditional Christian Values and Women’s Reproductive Rights in Modern Russia – Is a Consensus Ever Possible?,” *American Journal of Public Health* 103, no. 11 (2013): 1931–34, at 1931–32, <http://dx.doi.org/10.2105/AJPH.2013.301329>.

¹⁰⁴ Stella and Nartova, “Sexual Citizenship,” 8–9.

The 2012 law on fundamental health care principles effectively rendered the Russian abortion legislation similar to the situation in many Western European countries. It soon became quite evident, however, that the battle against abortions in Russia was not over with this step.¹⁰⁵

8.5 PARALLELISMS IN TRANSNATIONAL SOCIETY PROTECTIVE ANTIABORTION STRATEGIES

Despite the deep divergences in the history of abortion in Russia and the West, and despite the different significances of contemporary antiabortion struggles, current strategies against abortion in Russia and the West show some surprising similarities. In both cases antiabortion activism targets simultaneously the legal frame that allows for abortion as well as the de facto access to abortion services. Moreover, in all cases, antiabortion movements exhibit an incremental strategy: they pursue a particular legal change, but, once they obtain it, conflict is not settled. To the contrary, each victory galvanizes pro life activists, who raise the threshold and engage in new battles.

Several legal initiatives have followed the 2012 health law reform in Russia, all of which have the intention to further restrict access to abortion. This new set of initiatives thrives on society protective arguments, such as in 2014, legislation on advertising (N38 FZ “On Advertisement,” Article 7) that rendered advertisement for abortions illegal, or, in 2015, an initiative to exclude abortions from the public health service. This last initiative resulted from the joint effort by members of Parliament Elena Mizulina and Vitaly Milonovand, and the ROC, with Patriarch Kirill arguing that believers have to be “liberated” from their obligatory compliance with the murdering of children through the state imposed social security tax.¹⁰⁶ This initiative failed to get support from the government. Yet, starting in December 2017 all medical facilities that offer abortions will have to obtain a special license. Interestingly, while the US and Russian health systems can hardly be compared, a strategy aimed at drastically reducing the number of abortion providers through clinic licensing has been at play in the United States for many years. In 2017, in *Whole Woman’s Health v. Hellerstedt*¹⁰⁷ the US Supreme

¹⁰⁵ It is important to add that sociologists, based on comparative studies, have predicted that Russia’s exclusive focus on reducing abortions as a means to increase fertility levels will fail to achieve its goal if not combined with an equal investment in sexual education and family-planning programs (Denisov, Sakevich, and Jasilioniene, “Divergent Trends”).

¹⁰⁶ “B Moskve Sostoyalos’ Sobranie Pravoslavnoj Obshestvennosti, Vystupayushchej Protiv Abortov,” *Mospat*, June 29, 2015, www.mospat.ru/archive/41595.htm.

¹⁰⁷ *Whole Woman’s Health v. Hellerstedt*, 579 U.S. (2016).

Court struck down a number of provisions in Texas that required abortion providers to obtain admitting privileges and adhere to prohibitively expensive building requirements (like down to the inch dimensions for hallways and janitors' closets). These requirements would have shut down most clinics in Texas and in other states, such as Alabama, Mississippi, and Wisconsin, where efforts to enforce similar abortion restrictions fell. These restrictions have been traditionally defended by conservative politicians and pro life activists on the ground that they aim at protecting women's health.¹⁰⁸ In Russia, the new government decree on clinic licensing was interpreted in the media as a bargain of the government with the pro life movement: the government did not take abortions off the free social health care services, but has tightened the control over abortion facilities.¹⁰⁹ This licensing policy creates the preconditions for taking abortions off the public health care service in the future, since it will allow, for the first time, the obtaining of precise statistics and information on abortions performed in Russia. It may also lead to banning private clinics from offering abortions. Consequently, the law could, in the long run, pave the way for even more restrictions on abortions.¹¹⁰

The ROC furthermore appears to be contemplating additional measures in terms of conscientious objection of medical personnel. When the 2012 law on health was passed, church commentators were not satisfied with Article 70 and would have preferred a more extensive article on conscientious objection to abortion following the model of the Declaration of the World Medical Association (WMA) of Oslo on Therapeutic Abortions.¹¹¹ Given the Church's active participation in the antiabortion struggle, its doctrinal stance on conscientious objection, and the influence of US pro life movements, it is conceivable that the conflict over conscientious objection will escalate in Russia similarly to how it has escalated in the West. Article 70, while rather

¹⁰⁸ On the implications of this decision see Linda Greenhouse and Reva Siegel, "The Difference a Whole Woman Makes: Protection for the Abortion Right after *Whole Woman's Health*," *Yale Law Journal Forum* 126 (2016) ("Yale Law School Public Law Research Paper No. 578," SSRN, August 16, 2016, <https://ssrn.com/abstract=2838562>).

¹⁰⁹ "Litsenziya Na Abort: Orenburgskie Kliniki Obyazali Poluchit' Spetsial'noe Razreshenie," *RIA* 56, December 13, 2016, www.ria56.ru.

¹¹⁰ Dmitriy Ivanov, "Litsenziya Na Abort – Novyj Kamen' Pretkoveniya Na Puti Otechestvennogo Zdravookhraneniya," February 15, 2017, *Pravo-Med*, www.pravo-med.ru.

¹¹¹ Iumena Kseniya (Chernega), "Reply to the Question Chto možhno posovetovat' akusheru-ginekologu, ne zhelayushchemu v svoej rabote proizvodit' aborty? (What Advice Should Be Given to the Obstetrician-Gynecologist Who Does Not Want to Perform Abortions in His Work?)," *Pastyr'/Priest.today*, February 12, 2017. The WMA Declaration states that "If the physician's convictions do not allow him or her to advise or perform an abortion, he or she may withdraw while ensuring the continuity of medical care by a qualified colleague."

restrictive compared to US and European provisions protecting medical personnel unwilling to participate in abortion procedures, is remarkable in the Russian legal frame, which did not traditionally recognize conscience based exemptions to general laws. In Western democracies, the right to conscientious objection arose in the context of individuals refusing to bear arms or to serve in the army, and was invoked by marginal minorities (such as Jehovah's Witnesses or pacifists) holding anomalous religious or moral views. With the decriminalization of abortion, most countries introduced provisions providing the right to conscientious objection for medical personnel. Such provisions were very similar to Article 70 of the Russian 2012 law. In Italy, for example, Article 9 of Law 194/1978 states that medical personnel may object to participating in abortion procedures, but that this does not apply to ancillary activities (pre and post abortion care) and that objection may not be invoked if a woman's life is in danger. Moreover, this provision requires public health care facilities to ensure that women have access to abortion procedures and regional authorities to supervise and ensure the implementation of the law.

In Italy, just as in other Western countries, the rationale of conscientious objection provisions was to shield medical personnel hired prior to the decriminalization of abortion. In other words, in Western countries conscientious objection was introduced as a necessary complement to the liberalization of abortion: in the words of the UK Supreme Court, "[t]he conscience clause was the quid pro quo for a law designed to enable the health care profession to offer a lawful, safe and accessible service to women."¹¹² In Russia, by contrast, Article 70 was adopted together with other provisions aimed at restricting access to abortion, in a context where medical personnel had traditionally treated pregnancy terminations as a morally irrelevant form of contraception.

Since the 1970s, in Western countries, the claimed space for conscientious objection in the field of reproductive rights has expanded dramatically. Against the backdrop of a rather restrictive conscientious objection provision, in today's Italy more than 70 percent of medical personnel object to performing abortions, young doctors are not trained to perform abortions, and those who do not object often suffer career damages. The European Committee for Social Rights condemned Italy in 2013¹¹³ for the "shortcomings [that] exist in the provision of abortion services," which violated the right to health care

¹¹² *Greater Glasgow Health Board (Appellant) v. Doogan and Another (Respondents)* (Scotland) [2014] [2015] AC 640, [2015] 2 All ER 1, [2015] 1 AC 640, [2014] UKSC 68.

¹¹³ *International Planned Parenthood Federation European Network (IPPF-EN) v. Italy*, Complaint no. 87/2012 (ECSR, decision adopted on September 10, 2013 and delivered on March 10, 2014).

alone and read in conjunction with the nondiscrimination clause. According to the Committee, discriminatory treatment occurred on the grounds of socioeconomic and territorial status, health status, and gender, which constituted a case of “overlapping,” “intersectional,” and “multiple” discriminations.¹¹⁴ In a subsequent decision of 2016,¹¹⁵ the Committee condemned Italy also for the violation of the right to work, and of the right of dignity at work, on the grounds of the difference in treatment between objecting and non objecting medical practitioners. In 2017, a heated debate followed the decision of the Rome Region (where objecting personnel is more than 90 percent) to set a public competition to select physicians for hire in a major hospital. A prerequisite to access to the competition was a declaration that they did not object to performing abortions. The regional authority justified this decision on the ground that women’s right to health care could not have been guaranteed under the current predicament.

Many countries have also experienced a multiplication of refusals to deliver services and perform activities that do not imply direct participation in an activity that the individual considers incompatible with his or her religion, such as selling contraceptives, prescribing prenatal tests, providing reproductive health related information, and so forth. The UK Supreme Court recently ruled against the widening of conscientious objection to activities not directly related to performing abortions in the *Doogan* case, which concerned the claim by Catholic midwives employed as Labour Ward Coordinators who objected to “delegating, supervising and/or supporting staff to participate in and provide care to patients throughout the termination process.” The court clarified that the words “to participate in” an abortion procedure mean “taking part in a ‘hands on’ capacity” and do not extend to the managerial and supervisory tasks required of a Labour Ward Coordinator, which are administrative in nature, and do not amount to taking part directly in the treatment bringing about the termination of pregnancy.¹¹⁶

In the United States, following the *Roe v. Wade* decision, Congress adopted the Church Amendment in 1973,¹¹⁷ which provided that receipt of federal funds would not provide a basis for requiring a physician or nurse “to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion

¹¹⁴ Ibid., para. 190.

¹¹⁵ *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy*, Complaint no. 91/2013 (ECSR, decision adopted and delivered on April 11, 2016).

¹¹⁶ *Greater Glasgow Health Board (Appellant) v. Doogan and Another*, at para. 38.

¹¹⁷ The Church Amendment was passed as part of the Health Programs Extension Act of 1973, Pub. L. No. 93-45, § 401(b)-(c), 87 Stat. 91, 95.

would be contrary to his religious beliefs or moral convictions,”¹¹⁸ and that no “entity” could be compelled to “make its facilities available for the performance of any sterilization procedure or abortion if [such] performance . . . is prohibited by the entity on the basis of religious beliefs or moral convictions.”¹¹⁹ “In the 1990s and 2000s, laws at the state and federal levels grew to include contraception and to cover a much broader range of acts and actors. This new generation of laws went beyond the Church Amendment and plainly sought to accommodate objections to many more forms of conduct, interactions, and associations thought to make the objector complicit in the wrongdoing of another person.”¹²⁰ The escalation of religiously motivated exemption claims reached its peak in 2014 with the *Hobby Lobby* case,¹²¹ in which the claimants, closely held for profit corporations, objected to providing their employees’ health insurance benefits that covered certain contraceptives (such as the morning after pill and intrauterine devices that they deemed “abortifacient”), under the Affordable Care Act. The latter, colloquially known as “Obamacare,” mandated individual health insurance and employers of a certain size to insure their employees as part of the employment relationship. In particular, this insurance explicitly included an obligation to offer contraceptive coverage to any woman who wished to avail herself of it. This was an important change from the previous insurance arrangement that often denied women the essentials of reproductive health coverage, which put women at a disadvantage in obtaining equal access to health care. Obamacare sought to remedy these deficiencies but immediately ignited a heated debate that coalesced libertarian interests set against government intervention and religious interests rigidly opposed to promotion of reproductive rights. The Supreme Court upheld the claim by Hobby Lobby that offering to their employees the required health care substantially burdened their free exercise of religion under the Religious Freedom Restoration Act (RFRA).¹²² The Court did however find that the employees would not lose their contraception coverage because the state itself could provide for it. Remarkably, as of this writing, the Trump administration has proposed to expand the exemption from contraceptive coverage in two essential ways. First, unlike the result in the *Hobby Lobby* decision, the exemption would not allow women to get alternative insurance coverage. Second, the exemption would extend not only

¹¹⁸ 42 U.S.C. § 300a-7(b)(1) (2012). ¹¹⁹ 42 U.S.C. § 300a-7(b)(2)(A) (2012).

¹²⁰ Douglas NeJaime and Reva B. Siegel, “Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics,” *Yale Law Journal* 124 (2015): 2516–91, at 2538.

¹²¹ *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751 (2014).

¹²² Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993).

to religious but also to any moral objection asserted by the employer. To buttress this expansion, the proposed rule insinuates that contraception is not effective in preventing pregnancy and abortion for unmarried women and that it fosters extramarital sex.¹²³ As Priscilla Smith highlights, this is reminiscent of the inclusion in an 1873 anti-obscene literature bill of a ban on contraceptive devices and abortifacients on the ground that “[w]here obscene literature inflame desires, contraceptives and abortion enabled people to act on their sexual desires and engage in sex while escaping the fear of procreation and sexually transmitted diseases.”¹²⁴

These developments indicate that the antiabortion movements do not in fact pursue the reasonable accommodation of conscientious objectors, but an incremental agenda, whereby each accommodation is a step further toward the ultimate victory over reproductive rights. This agenda heavily interferes with the democratic process by camouflaging policy objectives under individual claims of conscience. Thus, while traditional invocations of conscientious objection were aimed at protecting minority views and minority religious practices, today religious exemptions in the field of reproductive rights are overstretched and invoked to thwart the implementation of laws intended to advance the equality of women, in the name of traditional religious views. The latter often overlap with and reinforce a broader political agenda. The controversy surrounding the adoption of Obamacare also suggests that *Hobby Lobby* is part of a larger political strategy by social conservatives aimed at preserving the traditional prejudice of conservative American politics against government interventionism and socialized medicine.

In Russia, the introduction of a conscientious objection clause in Article 70 of the 2012 law, and its critical reception by the ROC, seems to suggest that antiabortion activism foresees a similar incremental path as in the United States. In fact whereas the Russian Orthodox Church’s strategy has been one of influencing public policy in order to change the legal situation of abortion in Russia, radical pro-life civil society movements have mobilized to ban abortion in Russia altogether. In 2015/2016, the Orthodox Christian Association For Life (Zazhizn’) launched a popular referendum to ban abortions completely. The referendum gained little support among politicians, but gathered around half a million signatures according to the organizers. In the pro-life strategy of Zazhizn’, the connection between fetus protective arguments and the cult of

¹²³ “Proposed Rule Coverage of Certain Preventive Services under the Affordable Care Act” [Billing Codes: 4830-01-P; 4510-029-P; 4120-01-P; 6325-64], <https://assets.documentcloud.org/documents/3761268/Preventive-Services-Final-Rule-0.pdf> (accessed June 6, 2017).

¹²⁴ Ibid.

the Russian nation is apparent. Vladimir Potikha, at the time the vice president of the organization, has argued that the prohibition of abortion in Russia should contribute to making Russia a great power again, much like the Soviet Union in the past. For this purpose he even created an emblem based on the state emblem of the Soviet Union, replacing the hammer and sickle in the center with a baby inside a uterus, his organization's symbol. He explained that the slogan "Proletarians of the world unite" had a hidden meaning, because the Latin term *proles* originally meant "offspring." Potikha glosses over the paradox that abortion in the Soviet Union was legal; as a matter of fact, he blames the legalization of abortion in the Soviet Union on "Jewish doctors" and hails the Stalinist period of criminalization of abortion as a successful project and as a response to eugenics in Nazi Germany.¹²⁵ In short, the ideology fueling the pro life agenda of the organization Zazhizn' is nationalist, Orthodox, and anti Semitic. These ingredients—nationalism, Orthodoxy, anti-Semitism, and Stalinism—are a common feature of the Russian right.¹²⁶

The Russian pro life movement looks attentively to the West and in particular to the United States. Activists interviewed by us confirmed that already during the 1990s there were contacts with pro life movements from the United States, who shared informational material with them: "When we saw pictures . . . from the United States [of aborted children], well, from the American prolife movement, yes, we realized that . . . it is necessary to stop the killing of children," one interviewee said to us.¹²⁷ Another interviewee recalled that the two most influential pieces of information imported from the United States in the early 1990s were the film *Silent Scream* (1984), for which they acquired the rights and prepared a professional translation, and the translation of the *Handbook on Abortion* (1971) by John C. Willke.¹²⁸ This activist explained that he has almost daily contacts with pro life organizations in the West, many of them connected with the Catholic Church, but also with American Protestants and Anglicans. The Russian activists interviewed by us,

¹²⁵ Vladimir V. Potikha, "Iz Istorii Prenatal'nogo Infantitsida: Vekhi I Daty Proshedshego Stoletiya," *YouTube*, March 2, 2017 (video uploaded by Festival Za Zhizn', registered January 27, 2017 in the context of the XXV Christmas Readings, Hotel Salyut, Moscow, 2017).

¹²⁶ Alexander Verkhovsky, "The Role of the Russian Orthodox Church in Nationalist, Xenophobic and Antiwestern Tendencies in Russia Today: Not Nationalism, but Fundamentalism," *Religion, State, and Society* 30, no. 4 (2002): 333–45.

¹²⁷ Person B, interview by Olena Kostenko, Moscow, January 2017 (conducted in the context of the Project Postsecular Conflicts [PI Kristina Stoeckl], with a Russian pro-life activist).

¹²⁸ Person A, interview by Olena Kostenko, Moscow, January 2017 (conducted in the context of the Project Postsecular Conflicts [PI Kristina Stoeckl], with a Russian pro-life activist).

who use the anglicized term “pro life” in Russian (*pro laiff*), freely admit to obtaining and translating informational material from the West, and to discovering topics previously not in the focus of the Russian pro life movement, for example the battle against contraceptives that are considered to have an abortive effect. Russian pro life activists interpreted the election of Donald Trump as president of the United States as an opportunity for antiabortionists in Russia and worldwide. A few days after President Trump signed an executive order on January 23, 2017, barring federal funds from organizations that promote abortion around the world,¹²⁹ including the International Planned Parenthood Federation (the policy, known as the Mexico City Policy or the Global Gag Rule, was ushered in under Ronald Reagan and bars federal funds from going to foreign organizations that perform abortions overseas or lobby for the practice’s legalization in other countries), one Russian activist was on record as having expressed the hope that this act will have beneficial effects on Russia, preventing “such organizations from destroying family values here in Russia.” It was up to Russian pro life organizations, this activist concluded, to fill the void left by no longer funded prochoice groups.¹³⁰

Importantly, pro life activists in Russia do not feel that they have the Russian government on their side; rather, they lobby and mobilize the public for their ideas in order to force the government into action. Galina Semionova, who directs a crisis center in Saint Petersburg, characterized her work as an “anti state activity.”¹³¹ However, they also feel in a minority position inside their own society. One activist interviewed by us lamented the fact that an antiabortion rally in Moscow collects no more than 2,000 to 3,000 people, whereas the March for Life in Washington regularly gathers large support,¹³² and another activist commented that Russian society was ready neither for a complete prohibition of abortion nor for militant antiabortion actions as common in the United States.¹³³ As Luehrmann notices, Russian antiabortion activists portray themselves as anti state as well as patriots “because of the specific history of abortion and reproductive legislation in the Soviet Union.”¹³⁴ It also became apparent from our fieldwork that the Russian pro life movement is divided in strategic terms, with one civil society branch

¹²⁹ “Presidential Memorandum Regarding the Mexico City Policy,” www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-mexico-city-policy.

¹³⁰ Sergey Chesnokov, “Sovremennaya Diskusiya,” *YouTube* March 2, 2017 (video uploaded by Festival Za Zhizn’, registered January 27, 2017 in the context of the XXV Christmas Readings, Hotel Salyut, Moscow, 2017).

¹³¹ Quoted by Luehrmann, “Innocence,” 103.

¹³² Person B, interview by Olena Kostenko, Moscow, January 2017.

¹³³ Person A, interview by Olena Kostenko, Moscow, January 2017.

¹³⁴ Luehrmann, “Innocence,” 104.

aiming at maximalist solutions (like the complete ban on abortions), and another branch, closely related to the Patriarchate of Moscow, more focused on pastoral care, education, and legislative influence in small steps.

8.6 CONCLUSIONS: ANTIABORTION MEASURES “IN THE NAME OF SOCIETY”

In this chapter, we have demonstrated parallelisms between and in some places a direct influence of antiabortion arguments and strategies matured in the United States and antiabortion debates in Europe and Russia. We have made a distinction between fetus centered, women centered, and society centered strategies and have shown that arguments against abortion in the name of society as a whole are gaining increasing appeal across all three regions. In Russia, in particular, society centered arguments have been reshaped against the backdrop of the collective trauma resulting from Soviet abortion practices. Hence, while in Western democracies the focus of abortion discourses has traditionally been the individual, in Russia the question of abortion structurally acquires a collective dimension. This collective appeal has been heavily reinforced by the demographic preoccupations raised by the Russian government and the ROC following the collapse of the USSR. Thus, in Russia, antiabortion arguments translate predominantly into society protective arguments, even if they are articulated in terms of fetuses' rights or women's health. Echoes of the society protective antiabortion arguments are increasingly perceivable in the contemporary Western debate. They constitute, on one hand, an evolution of fetus and women protective justifications for restricting reproductive choices. In the United States, they thus represent a further step of escalation in the ongoing culture wars that are characteristic of an American society heavily divided over moral issues. On the other hand, society protective arguments may be gaining global appeal precisely through the persuasiveness they have acquired in the Russian context and, for that matter, all over Central and Eastern Europe. The political rhetoric of defending traditional values and the natural family are at the heart of an organization like the WCF or the ecumenical contacts of the ROC. The global activism of these actors spreads the message beyond narrow circles of pro life activists and church leaders and contributes to raising the stakes in the transatlantic and transnational antiabortion discourse.

The evidence presented here suggests that, on the question of abortion, reasonable accommodation may reach its limits. Antiabortion movements pursue an incremental agenda, whereby each accommodation is a step further toward the ultimate victory over reproductive rights. The venues for this

agenda are multifold: political parties, national governments, national and international courts, transnational civil society. Antiabortion activism thereby indicates a broader trend in the politicization of social conservative values: in liberal democratic societies claims based on morality and conscience will usually find reasonable accommodation through the instrument of legal exemptions. The abortion debate is one instance of such claims where social conservatives no longer merely want to be accommodated by the legal system; they want to give shape to it.¹³⁵ In countries where antiabortionists do not achieve this goal through majoritarian political means (by being voted into political positions that would allow them to pursue their program), they pursue their policy objectives in a way that thwarts the implementation of laws, that is, through mass objection to abortion and through the extension of conscientious objection and religious exemptions to arenas that no longer represent a close and direct nexus between the objector and the objected action, such as refusal to pay for health services in the *Hobby Lobby* case and in recent policy proposals in Russia.

Disagreement over fundamental moral and religious questions is an inevitable feature of modern pluralistic societies. Indeed, robust disagreement that forces opponents to make compromises is a motor for democratic politics. If we look at the evolution of antiabortion arguments as described in this chapter through the lens of Habermas's theory of a "post secular society," what strikes us is that today's society centered antiabortion strategies appear ever less conducive to the "complementary learning process" envisioned by the German philosopher and thus to compromise.¹³⁶ In the past, fetus and women protective arguments may have served as correctives in debates over reproductive rights. When abortion was decriminalized in Western Europe and in the United States in the 1970s against the opposition of the Catholic Church and of conservative social actors, the compromise found pitting women's rights against the interests of the fetus proved remarkably durable. This compromise is objectionable on many levels: first, it prioritizes privacy over equality and, second, it seems to privilege the physician's expertise over the woman's autonomy.¹³⁷ In spite of all its shortcomings, on pragmatic grounds, this compromise remains preferable to the new lines of argumentation that are bent on quashing all conflicts of rights in the name of society.

¹³⁵ Kristina Stoeckl, "Political Liberalism and Religious Claims: Four Blind Spots," *Philosophy and Social Criticism* 43, no. 1 (2017): 34–50.

¹³⁶ Jürgen Habermas, "Religion in the Public Sphere," *European Journal of Philosophy* 1, no. 14 (2006): 1–25.

¹³⁷ See Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," *North Carolina Law Review* 63, no. 2 (1985): 375–86, and Catharine Mackinnon, "Reflections on Sex Equality under Law," *Yale Law Journal* 100, no. 5 (1991): 1281–328.

The “conflict of rights” model de facto left space for the expression and interaction between a plurality of views, whereas the new rhetoric in effect cuts off all discussion and imposes a unidimensional ideological and political point of view.

The compromises that matured out of heavy controversy decades ago seem at risk today. Society protective strategies that rely on overstretched conscientious objection claims no longer aim at finding rules valid for all, which everybody can more or less live with, but rather desire purity for a selected group of people at the expense of access to rights for others. In this sense, society centered arguments are profoundly divisive: they divide hospitals, communities, and entire populations into those who consciously object and those who do not. Furthermore, they construct an enemy (the “culture of death”) where, in reality, we have conflicting claims that should be handled, with responsibility and reasonability, in the light of the fact that in complex societies complete partisan victories are unattainable and ultimately undesirable. Legal exemptions for conscientious objectors are a last resort of accommodation of divergent views in pluralistic democratic societies. If they become majoritarian, as in the case of some regions of Italy, or if they extend to causes such as paying taxes, as in the case of American or Russian debates, they become democratically problematic. The criteria for granting such exemptions must therefore be handled with care.

Opposition to abortion and contraception has become a standard feature of right wing populist political agendas across Europe and the United States. It frequently comes with advocating for isolationism, nationalism, anti immigration policies, and cultural protectionism. The Trump administration provides a salient example of this new ideological campaign, by combining the dismantling of the mainstays of reproductive freedom with xenophobic and Islamophobic language and immigration measures. The antiabortionists’ dream, just like the populist dream, is a self selected purity in a world they divide between “us” and “them.” For liberal democracies, this aspiration, which is fueled by transnational activism and shared arguments and strategies across countries, constitutes a major challenge.