"WOMAN" IN THE EUROPEAN HUMAN RIGHTS SYSTEM: HOW IS THE REPRODUCTIVE RIGHTS JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS CONSTRUCTING NARRATIVES OF WOMEN'S CITIZENSHIP?

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Abstract

Reproductive rights are constructed through a gender-conscious reading of already recognized human rights. We argue that despite the increasingly strong recognition of reproductive rights in international human rights law by the treaty-monitoring bodies and international tribunals, the jurisprudence of the European Court of Human Rights ("ECtHR" or "the Court") reflects a limited understanding of women's experiences, does not adequately challenge gender stereotypes, and often ignores reproductive rights dimensions in the standards it is setting, as well as the narratives it is creating. Our analysis of the Court's jurisprudence on abortion, home birth, non-consensual gynecological examinations, forced sterilizations, and assisted reproduction reveals that a woman's reproductive capacity continues to be her defining feature. Motherhood is seen as a woman's default life plan, her decisions regarding her body, health, and ultimately life, are perpetually under scrutiny and the contours of her agency subject to medical professionals' views, the legislators and the general public.

INTRODUCTION

In her much-celebrated novel *The Handmaid's Tale*, Margaret Atwood created a society where women's function was reduced to breeding, and those who failed or tried to escape from this labor were labeled as "Unwomen" and punished.[1] Atwood's 1985 book may

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have been science fiction, but the story she tells is distressingly not too dissimilar from women's stories in the twenty-first century—even in what is known as the most progressive of regions: Europe. Indeed, when we study how "woman" has been constructed in the human rights system that was founded upon the European Convention on Human Rights (hereafter, "the Convention"), we find disturbingly essentialist gender roles.

The ECtHR is the judicial forum of the most established regional human rights system in the world, grounded in the norms of the European Convention on Human Rights. The Court's decisions are binding upon the forty-seven member states of the Council of Europe, and are implemented through domestic legislation and regulations. Moreover, the ECtHR's jurisprudence is regularly looked to and cited by other regional tribunals, treaty-monitoring bodies that adjudicate cases, and domestic courts.[2] Thus, the ECtHR sets standards in human rights law both within and beyond Europe and presents an important construction site for rights narratives, including reproductive rights narratives. As questions around women's reproductive health are often deeply contested, the ECtHR arguably has an especially important role to play in fostering public learning regarding reproductive rights as integral to the full participation of women in European society. Indeed, we argue in this Article that by using the law to "publicly and authoritatively proclaim and transform" unacknowledged harmful experience into legally cognizable wrongs requiring redress, the Court could play a potentially transformative role in narratives of women's citizenship in the European context.[3]

The Court has decided a number of cases concerning the matters of human reproduction (for example, restrictive abortion laws and access to *in vitro* fertilization). Nevertheless, the ECtHR itself has neither referred to reproductive rights as human rights (and accordingly forming a part of the Convention) nor specified that cases about reproduction entail questions of reproductive and decisional autonomy that go beyond private sphere and could entail needed shifts in social norms as well as institutional practices. Through examining how the Court has addressed specific issues relating to reproduction, we reflect on what

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1 MARGARET ATWOOD, THE HANDMAID'S TALE (1985). Other authors have drawn parallels between Atwood's novel and surrogacy. *See* Karen Busby & Delaney Vun, *Revisiting The Handmaid's Tale: Feminist Theory Meets Empirical Research On Surrogate Mothers*, 26 CAN. J. FAM. L. 13 (2010).

2 *See, e.g*, Kaija H. v. Stora Enso Ingerois Oy, (2010) KKO 93 (Fin.) (the Finnish Supreme Court based part of its ruling expressly on ECtHR's judgments in this case).

3 REBECCA J. COOK & SIMONE CUSACK, GENDER STEREOTYPING: TRANSNATIONAL LEGAL PERSPECTIVES 39, 44 (2010).

the ECtHR's jurisprudence tells us about narratives of women's identity and citizenship in Europe more broadly.

Based on a systematic review of the Court's jurisprudence from 2003 to 2015, we consider nineteen cases that the Court has decided regarding issues of reproductive freedoms and entitlements: four abortion cases,[4] two cases concerning home birth,[5] six cases about assisted reproduction,[6] three forced sterilization cases,[7] three forced gynecological examination cases,[8] and one landmark domestic violence decision.[9] Although women's reproductive rights are closely linked to sexual orientation and gender identity, the scope of the Article does not permit analysis of those cases.

The Article is divided into four Sections. After setting out a brief overview of gender and citizenship narratives and reproductive rights in relation to human rights, in subsequent Sections we present the case law of the ECtHR regarding each of the above issues, dividing them into the following Sections: women, birth and pregnancy; women and assisted reproduction; and women, dignity and violence. Analysis of cases relating to each of these issues reveals that the way in which the Court addresses (or fails to address) harmful gender stereotypes implicitly, if not explicitly, reinforces narratives that paint a reductionist portrait of women's agency and role in the society. Following the argument set out by Rebecca Cook and Simone Cusack, we suggest that for the Court to play a transformative role would require first, identifying the gender stereotype (for example, does a policy/law imply that women are sexually passive and/or only should be mothers) and second, asking whether this gender stereotype denies women a benefit or imposes an undue burden, and whether it diminishes their dignity or otherwise marginalizes them.[10] We conclude that it is

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4 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219; A, B & C v. Ir, 2010-VI Eur. Ct. H.R. 185; R.R. v. Poland, 2011-III Eur. Ct. H.R. 209; P. & S. v. Poland, Eur. Ct. H.R (2012).

5 Ternovszky v. Hungary, Eur. Ct. H.R. (2010); Dubska v. Czech Republic, Eur. Ct. H.R (2014).

6 Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99; Mennesson v. France, Eur. Ct. H.R. (2014) together with Labassee v. France, Eur. Ct. H.R. (2014); S.H. v. Austria, 2011-V Eur. Ct. H.R. 295; Costa v. Italy, Eur. Ct. H.R. (2012); Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353; Paradiso v. Italy, Eur. Ct. H.R. (2015).

7 N.B. v. Slovakia, Eur. Ct. H.R. (2012); I.G. v. Slovakia, Eur. Ct. H.R. (2012); V.C. v. Slovakia, 2011-V Eur. Ct. H.R. 381.

8 Y.F. v. Turkey, 2003-IX Eur. Ct. H.R. 171; Juhnke v. Turkey, Eur. Ct. H.R. (2008); Yazgül Yilmaz v. Turkey, Eur. Ct. H.R (2011).

9 Opuz v. Turkey, 2009-III Eur. Ct. H.R. 107.

10 COOK & CUSACK (2010), *supra* note 3, at 50–70.

only through consciously naming and dismantling the narratives that exist that the ECtHR can begin to build an alternative construction of women's identity in the European context, as have other international human rights tribunals.[11]

I. CITIZENSHIP, GENDER, AND REPRODUCTIVE RIGHTS

Feminist scholars have engaged with the relation between citizenship and gender quite extensively, and offered nuanced understandings of what citizenship means in different circumstances.[12] For the purpose of our enquiry into the stories of the "woman" in the ECtHR's reproductive rights jurisprudence, we use the term citizenship in a fairly loose and broad sense to describe a person's status and belonging: who is included and who is excluded from decision-making, from being a full and autonomous subject. Women have been historically excluded from full legal citizenship—from being able to vote and run for office, to having property rights, educational opportunities, and parental authority. The status of women in Europe began to formally change only in the twentieth century, and is indeed enshrined in the European Convention. Yet gender stereotypes—generalized views or preconceptions concerning sex, sexual characteristics or qualities, and sex roles[13]—continue to be embedded in some national laws as well as practices, and to limit women's citizenship in the sense of their ability to participate fully in their communities and societies as equals in different ways across Europe, often in response to cultural and religious traditions ranging from Catholicism to Islam. As Europe is today in the throes of re-thinking notions of citizenship beyond state borders and formal legal notions of citizenship, questions regarding narratives of women's identities—considering that they make up over half the population—and the extent to which women are able to carry out their chosen life projects, present a fundamental part of that larger social deliberation.

Empowering women through the human rights law that governs the Council of Europe requires naming, understanding, and acknowledging the impacts of harmful gender stereotypes that are often taken for granted as "the way things are" and then articulating

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11 *See* González et al. ("Cotton Field") v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 205, ¶ 401 (Nov. 16, 2009) (the court explains how the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes and how the creation and use of stereotypes becomes one of the causes and consequences of gender-based violence against women).

12 *See, e.g.*, WOMEN AND CITIZENSHIP (Marilyn Friedman ed., 2005); BEYOND CITIZENSHIP? FEMINISM AND THE TRANSFORMATION OF BELONGING (Sasha Roseneil ed., 2013).

13 COOK & CUSACK (2010), *supra* note 3, at 45.

the ways in which norms can transform social roles for women in the European context.[14] Understanding the importance of language in structuring our thoughts makes the converse equally true; that is, it is critical to explicitly name reproductive rights as human rights, rather than merely as cultural, religious or moral issues. International human rights documents provide guidance in this regard. The Report of the U.N. International Conference on Population and Development ("ICPD") describes the concept of reproductive rights as follows:

> [R]eproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other [relevant United Nations] consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest attainable standard of sexual and reproductive health. It also includes the right to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights documents.[15]

Further, the ICPD Programme of Action "appears to recognise the ways in which culture and law are shaped by patriarchal assumptions about women and their capacity for roles other than motherhood. These underlying assumptions must be subverted in order for society to accept the need for reproductive rights for women."[16] The 1995 Platform of Action of the Fourth World Conference on Women, which extended the ICPD, added: "The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality including sexual and reproductive health, free of coercion, discrimination and violence."[17] In short, reproductive rights are constructed by making visible the gender dimensions of human rights.[18] It is through this

14 *Id.* at 9–70.

15 U.N. Population Division, *Programme of Action of the International Conference on Population and Development*, ¶ 7.3, U.N. Doc. A/CONF.171/13 (Oct. 18, 1994).

16 ERIN NELSON, LAW, POLICY AND REPRODUCTIVE AUTONOMY 65 (2013).

17 Fourth World Conference on Women, *Report of the Fourth World Conference on Women*, ¶ 96, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995).

18 This approach has been supported by the majority of human rights law scholars. *See, e.g.*, Rebecca J. Cook, *Human Rights and Reproductive Self-Determination,* 44 AM. U. L. REV. 975 (1995); Martin Scheinin, *Sexual Rights as Human Rights—Protected under Existing Human Rights Treaties?,* 67 NORD. J. INT'L. L.

conscious process of naming and exposing what is often so taken for granted as to be invisible that women's reproductive interests can be advanced through the rights that are already enshrined in international law, which range from affirmative entitlements to care to freedoms from coercion.[19] Explicit references to violations of reproductive rights can be found in, *inter alia*, the decisions of the treaty-monitoring bodies for the International Covenant on Civil and Political Rights (UN Human Rights Committee),[20] and the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Committee),[21] as well as the Inter-American Court of Human Rights.[22] Indeed, there is a notable trend in international law to explicitly articulate standards relating to reproductive rights as human rights, as evidenced by the 2016 General Comment on the Right to Sexual and Reproductive Health issued from the UN Committee on Economic, Social and Cultural Rights.[23]

II. WOMEN, BIRTH, AND PREGNANCY

A. Abortion Cases

One fundamental element of a woman's reproductive self-determination is her choice not to reproduce. In practice this requires that a woman can control her own sexuality, determine her own sex life, get information about/acquire contraception, and access abortion if she chooses to terminate a pregnancy. The ECtHR's abortion jurisprudence has been analyzed in the literature quite extensively,[24] but not in the context of other reproduction

17 (1998); Eszter Kismödi et al., *Advancing Sexual Health through Human Rights: The Role of the Law,* 10 GLOBAL PUB. HEALTH 252 (2015).

19 Cook, *supra* note 18, at 979. According to Cook, reproductive interests are: reproductive security and sexuality, reproductive health, reproductive equality, and reproductive decision-making.

20 K.L. v. Peru (1153/03), Views, CCPR/C/85/D/1153/2003.

21 A.S. v. Hungary (4/2004), Views, CEDAW/C/36/D/4/2004; Alyne da Silva Pimentel v. Brazil (17/2008), Views, CEDAW/C/49/D/17/2008.

22 Artavia Murillo et al. ("In vitro fertilization") v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

23 U.N. Comm. on Econ., Soc., and Cultural Rights (CESCR), General Comment No. 22 on the Right to Sexual and Reproductive Health (Article 12), U.N. Doc. E/C.12/GC/22 (2016).

24 *See, e.g.*, Johanna Westeson, *Reproductive Health Information and Abortion Services: Standards Developed by the European Court of Human Rights*, 122 INT'L. J. GYNECOLOGY & OBSTETRICS 173 (2013); Joanna Erdman, *The Procedural Turn: Abortion at the European Court of Human Rights*, *in* ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 121 (Rebecca J. Cook, Joanna Erdman & Bernard

cases and women's citizenship narratives. There are four principal judgments to consider.[25]

1. *Tysiac v. Poland*

In *Tysiac v. Poland* (2007),[26] the Polish applicant was seeking an abortion as pregnancy and birth constituted a serious risk to her eyesight. Since the consulting doctors disagreed about the certainty of this health risk the applicant could not get an abortion, gave birth, and suffered from severely deteriorated eyesight.[27] She submitted that Articles 3, 8, and 14 of the Convention had been violated. Article 3 is the prohibition of torture and inhuman or degrading treatment,[28] Article 8 protects private and family life,[29] and Article 14 prohibits discrimination, including on the basis of gender.[30] Regarding inhuman or degrading treatment, the Court found that the facts of the case did not disclose a breach of Article 3.[31] The Court also established that it was not necessary to examine the complaint under

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Dickens eds., 2014) [hereinafter Erdman, *Procedural Turn*]; Chiara Cosentino, *Safe and Legal Abortion: An Emerging Human Right? The Long-lasting Dispute with State Sovereignty in ECHR Jurisprudence*, 15 HUM. RTS. L. REV. 569 (2015).

25 Open Door & Dublin Well Woman v. Ireland, Eur. Ct. H.R. (1992) is left out.

26 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219.

27 *Id.* at ¶¶ 14, 16.

28 Article 3 of the Convention states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

29 Article 8 of the Convention states:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

30 Article 14 of the Convention states:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

31 *Tysiac*, 2007-I Eur. Ct. H.R. at ¶ 66.

Article 14 (prohibition of discrimination).[32] Rather, it found only the right to private life (Article 8) relevant as "legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus."[33] The Court also noted that "[w]hile the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must—in case of a therapeutic abortion—also be assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be."[34] In considering how the availability of a therapeutic abortion in Polish law was applied to the applicant's case, the Court concluded that the procedures put in place to determine whether the applicant had met the conditions for obtaining a lawful abortion were inadequate.[35] Although the Court held that there had been a breach of the right to private life (Article 8) due to the lack of adequate information and procedural mechanisms, it made no reference to reproductive rights nor did it acknowledge that having effective access to legal abortion is a matter of gender equality and women's dignity, not merely a question relating to procedures regarding any clinical intervention.

The separate opinion of Judge Bonello quite explicitly supports this approach. Namely, according to Judge Bonello, the Court was neither concerned with "any abstract right to abortion" nor "with any fundamental human right to abortion lying somewhere in the penumbral fringes of the Convention."[36] The dissenting opinion of Judge Borrego Borrego goes further and does not consider the impact on the legitimacy of norms created without meaningful legislative deliberation, due to the considerable influence of the Catholic Church; he argued that "the Court is neither a charity institution nor the substitute for a national parliament," and if "five experts . . . did not think that the woman's health would be threatened by the pregnancy and the delivery" then this should have been decisive.[37] Borrego Borrego concluded that the violation was found "only on the sole basis of the

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32 *Id.* at ¶ 144.

33 *Id.* at ¶ 106.

34 *Id.* at ¶ 107.

35 The Court noted at ¶ 117 that in the context of access to abortion a relevant procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision.

36 Tysiac v. Poland, 2007-I Eur. Ct. H.R. 219, ¶ 1 (Bonello, J., separate opinion).

37 *Id.* at ¶¶ 3, 10 (Borrego Borrego, J., dissenting).

applicant's fears."[38] We will see below (in Part B) how both these dissenting views, which cast a woman's right to choose as in the shadows of rights protection, together with the majority's approach to framing abortion through the Convention's right to privacy, contribute to the larger narrative about women's roles and status.

2. *A, B & C v. Ireland*

In the case of *A, B & C v. Ireland* (2010),[39] three women were forced to travel to the United Kingdom to have abortions as the domestic laws prevented them from getting legal abortions in another heavily Catholic country: Ireland. A, B, and C were seeking abortions for different reasons: A felt that an unwanted pregnancy would harm her mental health and socioeconomic well-being, B did not want to be a mother without a partner, and C was advised against pregnancy due to her cancer. The Court dismissed applicants' allegations of degrading treatment (Article 3) and discrimination (Article 14), and considered again only Article 8—right to respect for private life. The applicants accepted that the abortion restrictions were in accordance with Irish law and pursuing the aim of protecting fetal life, but claimed that the law's restrictiveness did not reflect popular sentiment on abortion in Ireland anymore—thus, they argued for a substantive violation.[40] In rejecting this claim, the Court provided the Irish Government a wide "margin of appreciation," which refers to the amount of discretion the ECtHR gives national authorities in fulfilling their obligations. [41] In *A, B & C v. Ireland* this margin—which is analogous to the level of scrutiny with which courts in other countries assess the reasonableness of state laws and policies—could have been narrowed by the existence of relevant European consensus to which the Court referred.[42] Instead, under the cloak of "moral views" the Court showed

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38 *Id.* at ¶ 14.

39 A, B & C v. Ireland, 2010-VI Eur. Ct. H.R. 185.

40 Erdman, *Procedural Turn*, *supra* note 24.

41 Jeffrey A. Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 COLUM. J. EUR. L. 115 (2005).

42 *A, B & C*, 2010-VI Eur. Ct. H.R. at ¶ 235 states:

> In the present case, and contrary to the Government's submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified

extraordinary deference, finding no violation of the right to private life (Article 8) regarding applicants A and B, as they were able to travel abroad and secure access to abortion:

> [H]aving regard to the right to travel abroad lawfully for an abortion . . . the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people . . . exceeds the margin of appreciation . . . .[43]

The Court separated C's case from the rest as she was seeking an abortion due to her cancer and there was a risk to her life—which is an accepted exception in Irish abortion law. The Court held, as in *Tysiac* (2007), that the state had failed to comply with its positive obligation to put procedures in place for women to obtain therapeutic abortions, finding a violation of the right to private life (Article 8).[44] In sum, by framing abortion as an exclusively private issue subject to a wide margin of appreciation, the Court discounted the social and economic costs of travelling abroad and the ensuing burdens on a woman's exercise of reproductive autonomy. Moreover, the Court's limited procedural approach failed to articulate and challenge the gender stereotypes embedded in laws based on ideological grounds, which discriminate against women.

3. *R.R. v. Poland*

In *R.R. v. Poland* (2011),[45] the applicant gave birth after being refused a therapeutic abortion although several ultrasounds confirmed the likelihood of the fetus suffering from severe malformation. For five months, the doctors delayed the applicant from getting a genetic test, which confirmed a serious congenital disease, by forcing her to obtain continuous referrals to different hospitals.[46] Noting there were no objective reasons for

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> on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than Ireland namely, a prohibition on abortion regardless of the risk to the woman's life.

43 *Id.* at ¶ 241. This conclusion was criticized by Judges Rozakis, Tulkens, Hirvelä, Malinverni and Poalelungi in their joint partial dissent.

44 *A, B & C*, 2010-VI Eur. Ct. H.R. at ¶¶ 267–68.

45 R.R. v. Poland, 2011-III Eur. Ct. H.R. 209.

46 Turner syndrome is a chromosomal condition that affects development in females. The most common feature of Turner syndrome is short stature, which becomes evident by about age five. An early loss of ovarian function (ovarian hypo function or premature ovarian failure) is also very common. *See Turner Syndrome*, NAT.

the delays in genetic tests, the Court found that as a result of "procrastination of the health professionals" the applicant had to "endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment."[47] The Court concluded that the applicant was treated "shabbily" and the required minimum threshold of severity for establishing a violation of the prohibition of degrading treatment (Article 3) had been reached.[48]

The Court distinguished *R.R.* from *Tysiac* (2007), saying the question was not access to abortion as such, but "essentially timely access to a medical diagnostic service that would . . . make it possible to determine whether the conditions for a lawful abortion [were] obtained."[49] It confirmed with *R.R.* that if the domestic laws allow for abortion in cases of fetal malformation, "there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus' health is available to pregnant women."[50]

Even this narrow construction of lack of information and procedural access to abortion as a form of degrading treatment is questioned by Judge Bratza in his partial dissent, where he argues that the Court's analogy with cases of enforced disappearances is erroneous. In such cases, authorities "systematically prevaricate or provide false information to applicants about the whereabouts and fate of their missing relatives," but he insists that the actions of the doctors in the *R.R.* case even if they were "prompted . . . to deter the applicant from pursuing the possibility of a termination of her pregnancy" are not comparable to institutional deception.[51]

4. *P. & S. v. Poland*

In *P. & S. v. Poland* (2012),[52] the Court combined its procedural approach with the prohibition on degrading treatment. In that case, a minor sought an abortion after she was

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LIBR. MED., https://ghr.nlm.nih.gov/condition/turner-syndrome [https://perma.cc/RV4S-BLSE].

47 *R.R.*, 2011-III Eur. Ct. H.R. at ¶ 159.

48 *Id.* at ¶¶ 160–61.

49 *Id.* at ¶ 196.

50 *Id.* at ¶ 200.

51 *R.R.*, 2011-III Eur. Ct. H.R. at ¶ 5 (Bratza, J., dissenting in part).

52 P. & S. v. Poland, Eur. Ct. H.R. (2012).

raped. The applicant's mother tried to get a referral for an abortion, but was met with suggestions to "meet the Catholic priest" and "get her daughter married," and was asked to sign a statement "I am agreeing to the procedure of abortion and I understand that this procedure could lead to my daughter's death." Moreover, the underage applicant was separated from her parents; locked up in a juvenile shelter; harassed by media, anti-abortion activists, and a Catholic priest. She was finally forced to seek the abortion 500 kilometers away from her home. In this case, the Court found a violation of the prohibition of degrading treatment (Article 3) and the right to private life (Article 8). The Polish legislation allowed abortion "where there are strong grounds for believing that the pregnancy was the result of a criminal act, certified by a prosecutor."[53]

The Court again focused on the question whether procedural requirements were complied with (positive obligations), but also put emphasis on the underage applicant's suffering. But once again, the Court was reticent in terms of recognizing abortion as a service only needed by women, and therefore these barriers as constituting an institutionalized form of gender-based violence.

B. Abortion Narratives

One of the major stereotypes about women is expressed in what has been termed as "normative motherhood": regardless of women's individual choices or capacities, society ascribes "motherhood" as an essential attribute of being a woman.[54] In other words, "all women, regardless of their actual intention of having children" become defined in important ways "by the mere possibility of them becoming mothers."[55] Julia Hanigsberg gives examples of how normative motherhood impacts gender equality and the sexual division of labor as well as the treatment of women in other spheres of life:

> A woman's position in the work force can be altered because of her presumed fertility and its ramifications and social signification . . . . Employers act on a presumption that women are likely to leave their jobs in order to bear and raise children at some point in their work lives . . . .[56]

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53 *Id.* at ¶ 100.

54 Julia E. Hanigsberg, *Homologizing Pregnancy and Motherhood: A Consideration of Abortion*, 94 MICH. L. REV. 371, 374 n.12 (1995–1996) (referring to Martha Fineman's work).

55 *Id.* at 374–75.

56 *Id.* at 374.

An excessive focus on motherhood can undermine women's full citizenship because if the value of women is perceived to arise solely through motherhood, women acquire status only through pregnancy and childbirth.[57] Thus, women's (biological) capacities are replacing "women" as full human beings and equal members of society and consequently, while women who choose not to mother can come to be seen as representing anti-maternalism.[58] Because the Court fails to name and explore the inherent damage done to women by this "normative motherhood narrative," abortion is never construed in terms of access to a service only needed by women and fundamental to controlling their bodies and lives.

Rather, the Court's reliance on privacy doctrine fails to take into account the need for enabling conditions in the public sphere and in the broader scope of women's lives, which are necessary to enjoy reproductive rights in practice.[59] As Patricia Londoño explains, "[t]his exceptionally limited approach marginalises entirely the reproductive rights of women in terms of substantive human rights protections and is out of keeping with international and European moves in this regard."[60] Conceptualizing abortion or other women's reproductive health issues through a private life doctrine creates two risks: it might create a space that might be private, but also not safe—where the woman is left alone. In this example, hospitals, medical settings, doctor's offices might be closed private systems just as family settings were traditionally a private sphere where abuse and violence were taking place out of the reach of the state's protection.[61] Second, a narrow reading of the right to respect for private life frames abortion as something that is not a concern of the state—something that women should be ashamed of—this, in turn, feeds into what Lisa M. Kelly has termed as "innocent suffering narrative"—cases that involve an adolescent girl who has been raped (emphasis on her sexual innocence), becomes pregnant, and with the support of her parents seeks to terminate the pregnancy and that reinforce narrow conceptions of "reasonable" or "deserved" abortions.[62] The Court makes implicit

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57 Cook, *supra* note 18, at 984 (referring to Mahmoud F. Fathalla's work).

58 Hanigsberg, *supra* note 54, at 375.

59 *Id.* at 331.

60 Patricia Londoño, *Redrafting Abortion Rights Under the Convention: A, B and C v. Ireland*, *in* DIVERSITY AND EUROPEAN HUMAN RIGHTS: REWRITING JUDGMENTS OF THE ECHR 95, 101 (Eva Brems ed., 2013).

61 For more on how maintaining the dichotomy between the public and the private sphere within the human rights framework hinders addressing intimate partner violence as traditionally human rights deals with acts taking place in the public sphere, see Charlotte Bunch, *Women's Rights as Human Rights: Towards a Re-envision of Human Rights*, 12 HUM. RTS. Q. 486 (1990).

62 Lisa M. Kelly, *Reckoning with Narratives of Innocent Suffering in Transnational Abortion Litigation*,

references to suffering narratives first in *R.R. v. Poland* (2011), where it established that the applicant's treatment by the doctors amounted to degrading treatment (Article 3), and second in *P. & S. v. Poland* (2012) where a minor seeking an abortion after being raped was harassed, mistreated by the media and doctors, and finally forced to have an abortion—that she had a legal right to—500 kilometers away from home. However, as Kelly notes, framing cases through the suffering narrative seeks to avoid "the contested terrains of wanted sex, non-procreative desire, and family discord."[63] This, in turn, is directly linked to the normative motherhood stereotype, which prescribes roles for women in both the public and private spheres.

If read without analyzing abortion law as an intersection of gender, power distribution and health, the procedural guarantees afforded by the Court have indeed been lauded. For example, *R.R.* has been described as a case that does not primarily revolve around abortion, but is about the right to information in the reproductive healthcare context[64] and has been praised for addressing—for the first time—conscientious objection in the abortion context and emphasizing that "the state must put procedures in place so that services are available and accessible regardless of whether individual doctors refuse to perform them."[65] Similarly, *P. & S. v. Poland* has been described as a case about the access to reproductive health services for adolescents: Johanna Westeson has suggested that the Court established the minimum standard for conscientious objection according to which refusals should be at the least in writing and referrals must be secured, and that proper regard must be had for a minor's personal autonomy.[66] Following the argument of Cook and Cusack, however, naming and dismantling the power of the "normative motherhood narrative" would offer a more transformative and qualitative change by enabling abortion to be framed in explicit human rights terms. The Council of Europe Parliamentary Assembly has already used such language:

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in ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 303, 304 (Rebecca J. Cook, Joanna Erdman & Bernard Dickens eds., 2014).

63 *Id.* at 305.

64 Westeson, *supra* note 24, at 174.

65 *Id.*

66 *Id.* Lisa M. Kelly, however, offers a slightly different reading of the case and indicates how it gives the parents of a pregnant minor—mother and father—a right to be "heard and [have] their views fully, and objectively considered," thus leaving open the possibility that where parent and child conflict, the minor's abortion decision may become subject to some form of balancing inquiry. *See* Kelly, *supra* note 62, at 322.

> [T]he right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this *right* (emphasis added) in an effective way.[67]

And similarly, by the UN Special Rapporteur on Violence against Women, who has emphasized that: "Acts deliberately restraining women . . . from having an abortion constitute violence against women by subjecting women to excessive pregnancies and childbearing against their will, resulting in increased and preventable risks of maternal mortality and morbidity."[68]

To date, the ECtHR's abortion jurisprudence has not treated abortion as a women's rights issue and a construction site for substantive equality and decisional autonomy where gender, health, and power intersect, but rather as a "moral" issue. In the cases involving threats to life and health, the Court's majority, and often dissent, show an extraordinary deference to medical professionals without engaging in an inquiry as to the systemic and institutional biases and personal incentives that may undermine "authoritative" opinions on such a contested issue. The Court does indeed set a legal threshold for states' positive obligations in terms of making the service accessible and condemns institutional delays. But by not identifying and articulating how the procedural obstacles are actually used as mechanisms to enforce and institutionalize ideological barriers to a life-saving service only needed by women, the Court fails to challenge the gender stereotypes underlying the narrative of normative motherhood.

C. Home Birth Cases

A woman's control over the circumstances of delivering a wanted child is also a fundamental aspect of reproductive rights. Human rights can be deployed to open medical and other institutions that are cloaked in 'technical authority' to scrutiny regarding their reasoning, and thereby challenge hierarchies of knowledge and power that have

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67 *Access to Safe and Legal Abortion in Europe*, COUNCIL OF EUROPE, PARLIAMENTARY ASSEMBLY, http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638&lang=en [https://perma.cc/F2QC-H365] (emphasis added).

68 United Nations, Econ. & Soc. Council, Integration of the Human Rights of Women and the Gender Perspective. Violence against Women. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Res. 1997/44, E/CN.4/1999/68/Add.4 at (d) ¶ 57 (1999).

historically been used against women.[69] Over-medicalization can reduce women to objects of interventions without agency, just as neglect of women's differential needs in pregnancy and delivery can harm women.[70] To date, the ECtHR has discussed women's autonomy over their birth experience in only these two cases.

1. *Ternovszky v. Hungary*

In *Ternovszky v. Hungary* (2010),[71] the applicant wished to give birth at home. A government decree, however, provided that any health professional assisting a home birth would face the risk of being convicted for a regulatory offence. While there was no legislation banning home birth *per se* in Hungary, the applicant submitted that since this decree prevented her from getting professional assistance in case she did opt for home birth, there was a discriminatory interference with her right to respect for private life. The Court affirmed that private life under Article 8 "incorporates the right to respect for both the decisions to become and not to become a parent," and "the notion of freedom implies some measure of choice as to its exercise."[72] The Court continued:

> Therefore the right concerning the decision to become a parent includes the right of choosing the *circumstances* (emphasis added) of becoming a parent. The Court is satisfied that the circumstances of giving birth incontestably form part of one's private life . . . .[73]

When analyzing the interference with the applicant's private life, the Court noted that "the right to choice in matters of child delivery includes the legal certainty that the choice is lawful and not subject to sanctions, directly or indirectly."[74] The Court concluded that the "lack of legal certainty and the threat to health professionals has limited the choices of

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69 Alicia E. Yamin, *Will We Take Suffering Seriously? Reflections on What Applying a Human Rights Framework to Health Means and Why We Should Care*, 10 HEALTH & HUM. RTS. 45 (2008). *See also* ALICIA E. YAMIN, POWER, SUFFERING, AND THE STRUGGLE FOR DIGNITY HUMAN RIGHTS FRAMEWORKS FOR HEALTH AND WHY THEY MATTER (2015).

70 Joanna Erdman, *Bioethics, Human Rights, and Childbirth*, 17 HEALTH & HUM. RTS. 43, 47 (2015) [hereinafter Erdman, *Bioethics*].

71 Ternovszky v. Hungary, Eur. Ct. H.R. (2010).

72 *Id.* at ¶ 22.

73 *Id.*

74 *Id.* at ¶ 24.

the applicant considering home delivery," and therefore violates the right to respect for private life (Article 8).[75] Therefore, in the first of the two home birth cases of the ECtHR the Court established that as with abortion, home birth touches upon a woman's right to private life and although privacy rights are not absolute, the Hungarian regulation violated the Convention by creating undue uncertainty for women considering home birth.

2. *Dubska & Krejzova v. the Czech Republic*

In a later case, *Dubska & Krejzova v. the Czech Republic* (2014),[76] the factual circumstances were similar, but the outcome opposite to *Ternovszky* (2010). In *Dubska & Krejzova* the applicants' wish to give birth at home was met with the state's denial to offer the midwife service in a private home. The applicants submitted that the right to respect for their private lives (Article 8) had been violated. The legitimate aim of that denial according to the Czech government was the health and life of the mother and the child during and after the birth.[77] The applicants contested this, saying that the aim was rather to "actively prevent mothers-to-be from benefiting from healthcare provided by midwives, in order to protect the financial and power monopoly of the . . . providers of institutional health care."[78] In this case, the Court sided with the government and granted the Czech Republic a wide margin of appreciation. Although the Court conceded that "the majority of the research studies presented to it do not suggest that there is an increased risk for home births compared to births in hospital,"[79] it still concluded that if something goes wrong, then a hospital setting is safer for the newborn (and the mother).[80] The Court's determination that there had been no violation of the right to private life (Article 8) in this case indicates the concern focused on the manner in which the regulations were drafted and implemented rather than questioning effects on women's decisional autonomy.

D. Birth Narratives

Gender stereotypes play an important role in the over-medicalization of women's

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75 *Id.* at ¶ 26.

76 Dubska v. Czech Republic, Eur. Ct. H.R. (2014). The case has been referred to the Grand Chamber.

77 *Id.* at ¶ 84.

78 *Id.* at ¶ 85.

79 *Id.* at ¶ 96.

80 *Id.* at ¶ 97.

bodies during pregnancy and childbirth.[81] In no area of medicine are the recipients of interventions so often not the actual beneficiaries of that care, much less active agents in the design of the kind of care they wish to receive. The instrumentalization of women as childbearers can lead to disciplining of women's bodies, for example, as women are required to birth in positions convenient for doctors and their bodies are controlled with "medication, technology, and institutional rules that are for woman's 'own good'" and above all, "the baby's safety."[82] Over-medicalization is so common that it has been deemed *the* unquestionably correct way to give birth in many countries, which is reflected in, *inter alia*, highly elevated Caesarean rates and the use of medical interventions not based in evidence.[83]

Both qualitative and quantitative studies demonstrate that women's experience of birth, and the care provided during the birth, have both immediate and long-term effects on their well-being and health.[84] Moreover, there are widespread patterns of women's mistreatment during labor and delivery, a phenomenon now referred to as "obstetric violence" throughout Latin America. Joanna Erdman points out examples of this violence: physical and verbal abuse, neglect and abandonment, humiliation and punishment, and coerced and forced care.[85] The World Health Organization has characterized these birth-related violations as human rights violations.[86] Thus, it is not only important to ensure that facility-based childbirth is available, but the quality of care must be beyond technical and clinical competence and be respectful and humane.[87] In neither home birth case does the Court assess the choice of delivery as related to a paradigm of reproductive health and rights.

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81 Karin A. Martin, *Giving Birth Like a Girl*, 17 GENDER & SOC'Y 54, 55 (2003). Legal scholarship has not given much attention to childbirth, but this lack of legal research is compensated by expansive sociological work. For example, see Claudia Malacrida & Tiffany Boulton, *The Best Laid Plans? Women's Choices, Expectations and Experiences in Childbirth*, 18 HEALTH 41 (2014); *see also* Jessica C.A. Shaw, *The Medicalization of Birth and Midwifery as Resistance*, 34 HEALTH CARE WOMEN INT'L. 522 (2013).

82 Martin, *supra* note 81, at 55.

83 Richard Johanson, Mary Newburn & Alison Macfarlane, *Has the Medicalisation of Childbirth Gone Too Far?* 324 BRIT. MED. J. 13 (2002).

84 Charlotte Overgaard et al., *The Impact of Birthplace on Women's Birth Experiences and Perceptions of Care*, 74 SOC. SCI. & MED. 973 (2012); Meghan A. Bohren et al., *The Mistreatment of Women During Childbirth in Health Facilities Globally: A Mixed-Methods Systematic Review*, PLOS MED. (2015).

85 Erdman, *Bioethics*, *supra* note 70, at 43.

86 *Id.*

87 *Id.* at 44–45.

But in *Dubska & Krejzova v. the Czech Republic*, although the Court does refer to WHO materials and CEDAW Committee recommendations,[88] it implicitly accepts assumptions about the benefits of medicalized childbirth, in the manner it portrays the hospital setting as a necessary safety net for giving birth. The Court referred to the CEDAW Committee's Concluding Observations on the Czech Republic from 2010 where the CEDAW Committee observes that there are:

> [R]eports of interference with women's reproductive health choices in hospitals, including the routine application of medical interventions . . . a rapid increase in the caesarean section rate, separation of newborns from their mothers for up to several hours without health-related reasons, refusal to release the mother and the child from hospital before 72 hours after childbirth, and patronizing attitudes of doctors which impede the exercise by mothers of their freedom of choice. [89]

Accordingly, the CEDAW Committee recommended the Czech Republic "consider taking steps to make midwife-assisted childbirth outside hospitals a safe and affordable option for women."[90] In *Dubska*, the Court also refers to WHO's report on care in birth which concludes that "[i]t is safe to say that a woman should give birth in a place she feels is safe, and at the most peripheral level at which appropriate care is feasible and safe."[91] Judge Yudkivska argues in his concurring opinion in *Dubska & Krejzova*[92] that the circumstances of a delivery cannot have a comparable level of importance as other things protected with Article 8, calling it something that is a matter of "level of comfort" or preference, rather than an issue of control over a fundamental milestone in life.

Both the majority and concurrence fail to capture how, in Nancy Ehrenreich's words: "together, law and medicine operate to enforce coercive gender norms on women."[93]

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88 Dubska v. Czech Republic, Eur. Ct. H.R ¶¶ 56–58 (2014).

89 CEDAW Committee, Concluding Observations on the Czech Republic, CEDAW/C/CZE/CO/5 ¶ 36 (Oct. 22, 2010).

90 *Id.* ¶ 37.

91 World Health Organization, *Care in Normal Birth: A Practical Guide*, WHO/FRH/MSM/96.2.

92 Dubska v. Czech Republic, Eur. Ct. H.R. (2014) (Yudkivska, J., concurring).

93 Nancy Ehrenreich, *Introduction*, *in* THE REPRODUCTIVE RIGHTS READER: LAW, MEDICINE, AND THE CONSTRUCTION OF MOTHERHOOD 1, 9 (Nancy Ehrenreich ed., 2008).

Nevertheless, in his dissent Judge Lemmens points the way toward recognition of reproductive rights:

> The impugned legislation has a "serious impact on the freedom of choice of the applicants, who were required, if they wished to give birth at home, to do so without the assistance of a midwife and, therefore, with the attendant risks that this posed to themselves and to the newborns, or to give birth at a hospital." While only relatively few mothers might prefer to give birth at home, I have no reason to doubt that for these women this is a very important matter of personal choice. [94]

The dissent thus properly situates the choice of delivery as a gendered issue that reflects women's most elemental agency over their bodies as well as a pivotal moment in their lives.

III. WOMEN AND ASSISTED REPRODUCTION

Assisted reproduction touches upon intersecting gender stereotypes that relate to the roles that are assumed to be "natural" for women and families, which sometimes play out in inconsistent ways. For example, although women's identities are closely tied to child rearing, they are also identified with their physical wombs, which calls into question surrogacy arrangements. Stereotyped roles for women are, in turn, closely related to traditional conceptions of the patriarchal family structure, based on a heterosexual father and mother. The ECtHR's assisted reproduction jurisprudence reveals missed opportunities to expose the assumptions and stereotypes underlying "non-normative" forms of family creation, and characterize these issues in terms of rights as well as ethical questions.

A. Surrogacy Cases

1. *Mennesson v. France*

Mennesson v. France (2014)[95] involved a husband and wife holding French citizenship (first and second applicants) and their two children who were born through a surrogacy arrangement in the United States (third and fourth applicants). The embryo was created with the husband's sperm and a donor's egg (the wife was infertile) and implanted into

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94 Dubska v. Czech Republic, App. Nos. 28859/11 and 28473/12, ¶ 4 (2014) (Lemmens, J., dissenting).

95 Mennesson v. France, App. No. 65192/11, together with Labassee v. France, App. No. 65941/11 (2014).

a surrogate's uterus in California. A Californian court ruled that the applicants were the parents, but the French authorities refused to register these birth certificates. The ECtHR first observed that "there is no consensus in Europe on the lawfulness of surrogacy arrangements or the legal recognition of the relationship between intended parents and children thus conceived abroad," and argued consequently that "[t]his lack of consensus reflects the fact that recourse to a surrogacy arrangement raises sensitive ethical questions."[96]

Characterizing the issue as "ethical" led the Court to grant France a margin of appreciation in this matter—but since "an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned," that margin was reduced.[97] This distinction enabled the Court to differentiate between the first and second "applicants' right to respect for their family on the one hand and the right of the third and fourth applicants to respect for their private life on the other."[98] It held there was no violation of the first and second applicants' right to respect for their family life (Article 8), since France's denial to register the birth certificates did not prevent the applicants from living in France with their children, and thus France had struck a fair balance "between the interest of the community in ensuring that its members conform to the choice made democratically within that community and the interest of the applicants."[99]

Regarding the children (the third and fourth applicants), however, the Court found that although "the children have been identified in another country as the children of the first and second applicants, France nonetheless denies them that status under French law" and that "a contradiction of that nature undermines the children's identity within French society."[100] According to the Court, France had overstepped the permissible margin of appreciation by not recognizing the importance of biological parentage as a component of each individual's identity and the child's legal relationship with their biological father.[101] In holding that France had violated the children's right to respect for their private life (Article 8), it is important to note that the Court did not actually analyze surrogacy *per se*, but focused on the post-surrogacy arrangement situation. Indeed, they communicate that

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96 *See* Mennesson v. France, Eur. Ct. H.R. ¶¶ 78–79 (2014).

97 *Id.* at ¶ 80.

98 *Id.* at ¶ 86.

99 *Id.* at ¶¶ 84–85.

100 *Id.* at ¶ 96.

101 *Id.* at ¶ 100.

surrogacy is another ethical issue to be left within a state's margin of appreciation, rather than a rights issue.

2. *Paradiso & Campanelli v. Italy*

In *Paradiso and Campanelli v. Italy* (2015),[102] the Court also showed concern for the child born of a surrogacy arrangement. In that case, the Italian Government had placed the child, who had no genetic link to the parents, in social-service care. The ECtHR noted that the public-policy considerations underlying Italian authorities' decisions, i.e., that the applicants had attempted to circumvent the surrogacy prohibition in Italy—could not take precedence over the best interests of the child, in spite of the absence of any biological relationship and the short period during which the applicants had cared for him. Reiterating that the removal of a child from the family setting was an extreme measure that could be justified only in the event of immediate danger to that child, the Court considered that the conditions justifying such a removal had not been met.[103] However, as in the *Mennesson* case, the Court did not analyze the underlying assumptions about the meaning of family implicit in Italy's proscription on surrogacy, nor in turn the gendered impacts of those assumptions.

B. Access to Assisted Reproductive Technologies Cases

The four cases in which the Court has addressed assisted reproductive technologies present different fact patterns: one concerns the usage of an embryo without a person's consent, the second is about access to artificial insemination in prison, the third case deals with the ban on gamete donation, and the fourth relates to access to pre-implantation genetic diagnosis. Nevertheless, the way the Court frames these judgments contributes to the broader narrative of women and their reproductive capacities and identities.

1. *Evans v. the United Kingdom*

In *Evans v. the United Kingdom* (2007),[104] the applicant and her partner created six embryos before her ovaries were removed due to cancer. They both consented to the procedure and signed a document stating that these embryos would be implanted into the applicant's uterus. However, after their relationship ended the partner requested the clinic

102 Paradiso v. Italy, Eur. Ct. H.R. (2015). The case has been referred to the Grand Chamber.

103 *Id.* at ¶ 86.

104 Evans v. United Kingdom, 2007-I Eur. Ct. H.R. 353.

destroy the embryos. The applicant claimed that if she could not use these embryos she would never be able to have a child to whom she is genetically related, which amounted to a violation of her right to privacy (Article 8).[105] The Court noted that in the case "each person's interest is entirely irreconcilable with the other's" since if the applicant is permitted to use the embryos, her partner will be forced to become a father, whereas if the partner's refusal is upheld, the applicant will be denied the opportunity to become a genetic parent.[106] Although it acknowledged that both interests were protected under Article 8, and it had "great sympathy for the applicant, who clearly desires a genetically related child above all else,"[107] "it did not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s [the partner's] right to . . . not to have a genetically related child with her."[108] Thus, the Court considered that "given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention."[109]

2. *Dickson v. the United Kingdom*

In *Dickson v. the United Kingdom* (2007),[110] the applicant was a male prisoner who wanted to use artificial insemination facilities to have a child with his wife. Their request was denied and they claimed that this denial violated the right to privacy and family life (Article 8). The UK argued that losing the opportunity to have children was an inevitable and necessary consequence of imprisonment. In this case, the ECtHR found that the applicant's interests in having a family were not given the weight due a fundamental choice about his life plans.[111] Thus, the Court held that that the UK had not struck a justified balanced between private and public interests and a blanket ban exceeded the afforded margin of appreciation, constituting a violation of Article 8.

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105 *Id.* at ¶ 72.

106 *Id.* at ¶ 73.

107 *Id.* at ¶ 90.

108 *Id.*

109 *Id.* at ¶ 92.

110 Dickson v. United Kingdom, 2007-V Eur. Ct. H.R. 99.

111 *Id.* at ¶ 85.

3. *S.H. & Others v. Austria*

The case of *S.H. & Others v. Austria* (2011)[112] concerned two couples with fertility problems wanting to take advantage of assisted reproductive technologies—one couple needed ova donation and the other couple sperm donation. Both procedures were banned under Austrian law. The Court found that the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose was protected by the right to private life (Article 8), as such a choice is "an expression of private and family life."[113] In discussing the breadth of the margin of appreciation, it stated that "where . . . there is no [European] consensus" and the case "raises sensitive moral or ethical issues, the margin will be wider."[114] In this case, the Court did indicate an emerging consensus by referring that "there is now a clear trend in the legislation of the Contracting States towards allowing gamete donation for the purpose of *in vitro* fertilization."[115] It continued, however, that this emerging trend is not "based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development within a particularly dynamic field of law and does not decisively narrow the margin of appreciation of the State:"

> Since the use of in vitro fertilisation treatment gave rise then and continues to give rise today to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the present case touch on areas where there is not yet clear common ground among the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one . . . .[116]

In finding that within that wide margin of appreciation, a fair balance had been struck by the Austrian Government, the Court referred to a list of factors which justified the ban:

> [T]he donation of gametes involving the intervention of third persons in a highly technical medical process was a controversial issue in Austrian

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112 S.H. v. Austria, 2011-V Eur. Ct. H.R. 295.

113 *Id.* at ¶ 82.

114 *Id.* at ¶ 94.

115 *Id.* at ¶ 96.

116 *Id.* at ¶¶ 96–97.

> society, raising complex questions of a social and ethical nature on which there was not yet a consensus in society and which had to take into account human dignity, the well-being of children thus conceived and the prevention of negative repercussions or potential misuse.[117]

And the Court added that "there is no prohibition under Austrian law on going abroad to seek treatment of infertility."[118] As a result, the Court found no violation of the European Convention.

4. *Costa & Pavan v. Italy*

In *Costa & Pavan v. Italy* (2012),[119] the applicants were carriers of cystic fibrosis—a hereditary disease that manifests itself in breathing difficulties and generally culminates in severe respiratory failure. The applicants wanted to take advantage of assisted reproductive technologies ("ART") and pre-implantation genetic diagnosis ("PGD"), but Italian law had a blanket ban on PGD at the time. PGD allows the identification of genetic abnormalities in embryos conceived by IVF. The Court considered that the applicants' desire to conceive a child unaffected by cystic fibrosis and to use ART and PGD was protected under the right to privacy and family life.[120] The Court stressed that "the concept of 'child' cannot be put in the same category as that of 'embryo'"[121] and found that the Italian legislation lacked consistency in that area—allowing therapeutic abortion in cases of fetal malformation, but banning PGD.[122] That is, it would have been possible for the applicants to start the pregnancy by natural means and then terminate it if a prenatal genetic test showed that the fetus was unhealthy. In finding that that the applicant should not be faced with such a scenario, the Court very importantly noted in this case that although "access to PGD raises sensitive moral and ethical questions . . . the solutions reached by the legislature are not beyond the scrutiny of the Court."[123]

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117 *Id.* at ¶¶ 105, 113.

118 *S.H.*, 2011-V Eur. Ct. H.R. at ¶ 114.

119 Costa v. Italy, Eur. Ct. H.R. (2012).

120 *Id.* at ¶ 57.

121 *Id.* at ¶ 62.

122 *Id.* at ¶¶ 58, 62.

123 *Id.* at ¶ 68.

C. Fertility and Parenthood Narratives

On the one hand, the ECtHR's jurisprudence appears to reflect compassion towards the interests and desires of people to use different forms of reproduction to create families. On the other hand, by relegating the issues surrounding ARTs and surrogacy to being solely ethical issues (with the exception of *Costa* and *Pavan*), it missed the opportunity to unpack the constructions of gender and family roles embedded in the national legislation. Surrogacy and ARTs are not gender-neutral questions falling under the scope of medicine, private life or morality alone, as the jurisprudence of the Court would suggest. For example, Ilana Löwy has explained that the even in the process of *in vitro* fertilization, egg retrieval is not only medically much more complicated, but also culturally and socially more loaded than sperm retrieval.[124] Maura Ryan has likewise shown how a conventional bioethical analysis would ignore the interplays of gender, status and health, revealing why discussions around ARTs should go beyond choice and access.[125] Ryan has argued that the social meaning of ART can be deployed in both directions—it can be celebrated as a remedy for the suffering experienced by infertile women or denounced as a tool for the further manipulation of women's bodies. For precisely this reason, the Court's jurisprudence regarding these issues could be meaningfully used to draw attention to and create public learning with respect to the expectations and values concerning motherhood and childbearing.[126]

Identifying and dismantling family and gender role stereotypes would have concrete implications on, for example, whether ARTs and surrogacy can be used to empower single women and gay couples through the right to privacy and "family life." When these stereotypes are left unquestioned, ARTs become in Katha Pollitt's words just "high-tech ways" to replicate the traditional family structure, just as "the woman undergoing IVF is fulfilling her traditional motherly role."[127]

Interestingly, Linda Hart draws a similar conclusion about the adoption cases of the ECtHR.[128] Hart suggests that in addition to biological, legal, and social relations in the order

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124 Karène Parizer-Krief, *Gender Equality in Legislation on Medically Asssited Procreation in France*, 29 INT'L. J.L., POL'Y & FAMILY 205, 208 (2015) (referring to Ilana Löwy's work).

125 Maura A. Ryan, *The Introduction of Assisted Reproductive Technologies in the "Developing World": A Test Case for Evolving Methodologies in Feminist Bioethics*, 34 SIGNS 805 (2009).

126 *Id.* at 808–09.

127 KATHA POLLITT, PRO: RECLAIMING ABORTION RIGHTS 33, 166 (2014).

128 Linda Hart, *Individual Adoption by Non-Heterosexuals and the Order of Family Life in the European*

of family life there is also the symbolic order, made up of gendered, structural relations that set out the rules of genealogy and the normative complementarity of the sexes in procreation and child rearing.[129] Her analysis of the Court's adoption jurisprudence finds that extra-familial adoption or other forms of family formations comply with the symbolic order then they show resemblance to "natural facts" and are more likely to be accepted by the Court.[130]

IV. WOMEN, DIGNITY, AND VIOLENCE

A. Forced Sterilization Cases

There are three ECtHR cases that concern forced sterilization, all of which relate to Romani women in Slovakia. In *V.C. v. Slovakia* (2011),[131] *N.B. v. Slovakia* (2012),[132] and *I.G., M.K. & R.H. v. Slovakia* (2012),[133] the applicants were all Romani women who were sterilized without their consent and without medical emergency when they went to the hospital to give birth. The applicants argued for violations of respect for private life, degrading treatment and discrimination based on their ethnicity, but the Court found violations of prohibition of degrading treatment (Article 3), and the right to private life (Article 8) only and "did not find it necessary to separately determine whether the facts of the case give rise to a breach of Article 14" relating to discrimination. The Court did not hesitate to establish that sterilizing without a woman's consent is degrading treatment, but did not consider the violation targeted especially against Romani women, and in a reproductive health setting. In not doing so, the Court missed opportunities to articulate the sterilizations as intersectional discrimination based on gender and ethnicity—as only women face the particular impacts of the stigma associated with being Roma in Slovak society—as well as how the health system was acting to reinforce such patterns of marginalization in the overall society.

Court of Human Rights, 36 J.L. & SOC'Y 536 (2009).

129 *Id.* at 554.

130 *Id.* at 555.

131 V.C. v. Slovakia, 2011-V Eur. Ct. H.R. 381.

132 N.B. v. Slovakia, Eur. Ct. H.R. (2012).

133 I.G. v. Slovakia, Eur. Ct. H.R. (2012).

B. Forced Gynecological Examination ("FGE") Cases

Another important piece of understanding the narratives that the Court's jurisprudence accepts and creates with respect to women is provided by cases that deal with society's expectations for women's sexuality. The ECtHR has thus far seen three cases—all from Turkey—where women are subjected to forced gynecological examinations, i.e. virginity testing.

1. *Y.F. v. Turkey*

In *Y.F. v. Turkey* (2003),[134] the applicant's wife was taken into custody with a suspicion of aiding and abetting an illegal terrorist organization, the PKK (Workers' Party of Kurdistan), and brought to a gynecologist for an examination without her consent. The applicant's wife submitted that her right to privacy (Article 8) had been breached. The Court found that, "in the circumstances, the applicant's wife could not have been expected to resist submitting to such an examination in view of her vulnerability at the hands of the authorities that exercised complete control over her . . . ."[135] The Court evaluated whether the gynecological examination had been prescribed by law, and whether it was necessary in a democratic society. The Turkish Government argued that the gynecological examination of female detainees was necessary to avoid false accusations of sexual violence being directed against the security forces.[136] Although the Court found that the Government failed to demonstrate the existence of a medical necessity, in accordance with the national law, in the instant case, the Court "accept[ed] the Government's submission that the medical examination of detainees by a forensic doctor can prove to be a significant safeguard against false accusations of sexual molestation or ill-treatment."[137] Thus, the Court framed the forced gynecological examination as a violation of the right to privacy, entirely ignoring the gendered aspect of such an examination or the stereotypes of women as manipulative liars, as "false accusers" of men. As Cusack and Cook note, the context for such stereotypes is important, and in this case they reflected and exacerbated political biases against the PKK.[138]

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134 Y.F. v. Turkey, App. No. 24209/94 (2003).

135 *Id.* at ¶ 34.

136 *Id.* at ¶ 38.

137 *Id.* at ¶ 43.

138 Cook and Cusack discuss the importance of context. *See* COOK & CUSACK, *supra* note 3, at 31–36.

2. *Juhnke v. Turkey*

In *Juhnke v. Turkey* (2008),[139] the applicant was a woman who was also arrested under the suspicion of having links to the PKK, and taken to a gynecologist for an examination like in the *Y.F.* case. She did not consent freely to the examination, but was "persuaded" into it. Again the justification the Turkish Government communicates in the decision is that gynecological examination was necessary to prevent accusations of rape.[140] The applicant submitted that her treatment was degrading (Article 3) and her right to private life (Article 8) had been violated. The Court found that there was no breach of Article 3 as the necessary severity threshold was not met. Minimizing both the process entailed physically and psychologically in a gynecological examination, and abuse of power exacerbated when a political prisoner is involved, the Court stated that the "mere fact of being taken to a hospital for a gynecological examination does not attain the required minimum level of severity" for degrading treatment.[141] The Court did, however, find that as the gynecological examination was imposed on the applicant without her free and informed consent and the Government did not show how the examination had been "in accordance with the law'" or "necessary in a democratic society" there had been a violation of the applicant's right to privacy (Article 8).[142]

3. *Yazgül Yilmaz v. Turkey*

In *Yazgül Yilmaz v. Turkey* (2011),[143] the applicant was arrested and taken to a doctor without her consent for a gynecological examination in order to check if her hymen was still intact. Different from the other two FGE cases described above, the Court found that the severity threshold of degrading treatment had indeed been met and thus that the prohibition of degrading treatment under the Convention had been violated. It appears from the Court's analysis that the applicant's age, i.e. her being a minor, was relevant to the Court in qualifying this specific FGE as an Article 3 violation.[144] In other words, imposing virginity examinations on girls is construed as inherently more degrading than imposing

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139 Juhnke v. Turkey, Eur. Ct. H.R. (2008).

140 *Id.* at ¶ 30.

141 *Id.* at ¶ 70.

142 *Id.* at ¶ 82.

143 Yazgül Yilmaz v. Turkey, Eur. Ct. H.R. (2011).

144 *Id.* at ¶¶ 47–48, 54.

the same procedure on women who are not claiming to be virgins.

C. Domestic Violence Case

1. *Opuz v. Turkey*

The first time the Court held that domestic violence constitutes a form of gender discrimination was in *Opuz v. Turkey* (2009).[145] The case concerned an applicant who was severely battered by her violent husband. The Court coupled Articles 2 (right to life) and 3 (prohibition of torture and degrading treatment) with Article 14 (prohibition of discrimination) to demonstrate that domestic violence has a distinct gender dimension and women suffer from it disproportionally more than men. In this case the domestic violence involved battering, pushing, and detectable physical injuries—all elements recognized by criminal law. And in this straightforward case, the Court felt comfortable citing provisions from the CEDAW, relevant human rights case law, and reports about domestic violence.[146]

> The Court notes at the outset that when it considers the object and purpose of the Convention provisions, it also takes into account the international-law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty . . . . In this connection, when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case law . . . the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women.[147]

Thus, the Court characterized the case as violating Article 2 (right to life), Article

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145 Opuz v. Turkey, 2009-III Eur. Ct. H.R. 107.

146 *Id.* at ¶¶ 2–90, 187–90.

147 *Id.* at ¶¶ 184–85.

3 (prohibition of degrading treatment and torture) and Article 14 (prohibition of discrimination).[148]

At the same time, the Court's own contribution with respect to the connections between violence against women and gender discrimination remained relatively modest:

> [T]he Court considers that the applicant has been able to show, supported by unchallenged statistical information, the existence of a prima facie indication that the domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.[149]

Opuz was called a landmark case and a significant advance in the Court's approach, and it was hoped that it would signal a path for the Court in related cases in the future.[150] However, despite the recognition of the gender dimension of domestic violence, this 2009 case has not had a spill-over effect on ECtHR's case law concerning women's rights since then. Indeed, the great majority of cases discussed in this Article are from after 2009, but in none of them did the Court explicitly emphasize the linkages between discrimination in Article 14 and women's rights.

D. Dignity Narratives

One way of reinforcing harmful gender narratives is by failing to name stereotypes that underlie specific laws and practices and ignoring how these in turn have differential impacts on men and women.[151] We grouped together ECtHR's jurisprudence concerning forced sterilization and forced gynecological examination, since these both serve as tools of repression/punishment used exclusively against women, and in the above-cited cases—against women from *marginalized* groups (Kurdish in Turkish FGE cases and Roma in

148 *Id.* at ¶ 202.

149 *Id.* at ¶ 198.

150 Carmelo Danisi, *How Far Can the European Court of Human Rights Go in the Fight Against Discrimination? Defining New Standards in its Non-Discrimination Jurisprudence*, 9 INT'L. J. CONST. L. 793, 800 (2011). Similar hope has been also expressed by Patricia Londoño in *Developing Human Rights Principles in Cases of Gender-based Violence:* Opuz v Turkey *in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 657, 667 (2009). Londoño ends the article with: "It is hoped that this finding will lead to greater efforts on the part of States to tackle violence against women with renewed vigour." *Id.*

151 COOK & CUSACK, *supra* note 3.

Slovak sterilization cases). The *Opuz* case serves as an example of both the possibilities and the limitations of how the Court has indeed engaged with gender in its analysis.

The Court found that Article 3 (the prohibition of torture and degrading treatment) had been violated in all of the cited forced sterilizations cases and also acknowledged Roma community as a marginalized group, but by not explicitly recognizing that forced sterilizations were targeted intentionally against Roma women because they were Roma, it failed to engage with how gender, torture/inhuman and degrading treatment, and ethnicity intersect. In these, as in other cases regarding women's reproductive autonomy, the Court also ignores the ways in which the health system serves as a site for constructing citizenship, reinforcing or potentially mitigating patterns of exclusion in the larger society.[152] Thus, violence in the health system is not merely a private matter.

Similarly, the Court has not considered the sociological, cultural, and historical dimensions of gynecological testing in the FGE cases, and how these examinations are powerful tools used to reinforce stereotypes about women in a situation of political struggle as manipulative "false accusers" and humiliate them.[153] By comparison, it is quite unthinkable that a male detainee, even a political prisoner, would be required to have a doctor check his genitals. And while that would also violate dignity, FGE symbolizes power distribution between the woman (detainee) and the authority—the woman is intentionally made to feel inferior and with no control.

Explicitly acknowledging the ways in which laws and practices deprive women of control over their bodies—and therefore their dignity—is essential for constructing these, and the other issues discussed in this Article, as rights issues rather than as merely moral questions. As Ronli Sifris argues:

> [W]omen who are legally prevented from accessing abortion services or who are subjected to involuntary sterilisation procedures are powerless. In the case of restrictions on abortion, women are helpless in that they are unable to act to terminate their pregnancies safely. In the case of involuntary sterilisation procedures, women are helpless in that they are unable to act to retain their bodily integrity (in this case, their fertility).[154]

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152 YAMIN, *supra* note 69, at 99–130 (2016).

153 Anna Mondekova, *Virginity: Political Implications and Misuse of the Concept in Today's Middle East*, *in* STUDIES IN BIOPOLITICS 127, 132 (Judit Sandor ed., 2014).

154 RONLI SIFRIS, REPRODUCTIVE FREEDOM, TORTURE AND INTERNATIONAL HUMAN RIGHTS: CHALLENGING

Acknowledging the ways in which specific forms of torture and degrading treatment, including FGE and forced sterilization are gendered, in turn allows these acts to be understood as deprivations of *equal* dignity and therefore as discrimination on the basis of gender as well as intersectional axes of identity.

CONCLUSION

In Atwood's book the main character avoids looking at her body and thinks: "I don't want to look at something that determines me so completely."[155] An analysis of the reproductive rights-related jurisprudence of the Court reveals, even when violations of the Convention are found, there have been many missed opportunities to challenge and change prevailing narratives. In these narratives the well-being, status, and lives of the women in Europe are, as in Atwood's novel, determined by what women can do with their reproductive bodies, and what cultural and social meanings have been assigned to their biological functions.

Although we have not aspired to analyze the cited case law in an exhaustive manner, the pattern that emerges in ECtHR's treatment of issues related to reproduction is one that largely discounts, or even disregards, the gendered aspects and implications of these issues. For example, the Court has framed access to therapeutic abortion as largely a procedural issue rather than a fundamental matter of equal dignity, and home birth as a question of gender-neutral preferences and medical arguments rather than a woman's autonomous choice over her birthing experience. Similarly, the Court has largely not considered the cultural and sociological meanings of forced gynecological examinations used on female detainees, and has looked for "innocent suffering" in order to bring medical treatment within the scope of the prohibition of degrading treatment and torture. We have argued that the Court should go beyond narrow or formalistic interpretations of the Convention and be explicit about what issues such as abortion, forced sterilizations and forced virginity tests represent in women's lives, naming these issues explicitly as matters of reproductive rights.

Indeed, we have argued that language is itself an exercise of power and if the Court were to use reproductive rights language explicitly, it would begin to lay ground for different narratives regarding women's identities and citizenship by emphasizing the structural discrimination underlying restrictive abortion laws, domestic violence, denial of home birth, and forced sterilizations. In this way, it could create the architecture for

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155 ATWOOD, *supra* note 1, at 73.

new transformative narratives based on substantive equality, and women's rights as full and equal members of society, defined by their humanity and not by their sexuality or reproductive capacities. We have further indicated that inspiration for such an approach can be found in the jurisprudence of other regional courts and treaty monitoring bodies.

But moreover, it may also be found within the Court itself. In the concurring opinion for *Valiulienė v. Lithuania*, Judge Pinto de Albuquerque wrote "domestic violence has emerged as an autonomous human rights violation" and continued:

> Hence, the full *effet utile* of the . . . Convention . . . can only be achieved with a gender-sensitive interpretation and application of its provisions which takes in[to] account the factual inequalities between women and men and the way they impact . . . women's lives. In that light, it is self-evident that the very act of domestic violence has an inherent humiliating and debasing character for the victim, which is exactly what the offender aims at. Physical pain is but one of the intended effects. A kick, a slap or a spit is also aimed at *belittling the dignity of the partner*, conveying a message of humiliation and degradation. It is precisely this intrinsic element of humiliation that attracts the applicability of Article 3 of the Convention. The imputation of an Article 8 violation would fall short of the real and full meaning of violence in the domestic context, and would thus fail to qualify as a "gendered understanding of violence".[156]

As Europe struggles to come to terms with a panoply of evolving social, economic and political issues, the Court in turn will likely be called upon to define aspects of its social identity in multiple ways, which will invariably implicate questions of gender. By adopting an approach in its case law that explicitly names and exposes gender stereotypes, and analyzes the culture and power dynamics that underlie laws and practices, the Court would go far toward constructing "women" as protagonists of their lives who determine what happens to their bodies and not vice versa. If that were the case, Atwood's book would indeed read like science fiction.

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156 Valiulienė v. Lithuania, Eur. Ct. H.R. (2013) (Pinto de Albuquerque, J., concurring) (emphasis added).