

## Notes

# RECONCILING REPRODUCTIVE RIGHTS: EUGENIC ABORTION AND HOME BIRTH DISPUTES AT THE EUROPEAN COURT OF HUMAN RIGHTS

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### ABSTRACT

*Reproductive autonomy has been at the heart of culture clashes across the world for decades. Judicial intervention has proven necessary to resolve the rights and interests clashes between pregnant women, medical care providers, and fetuses. At the European Court of Human Rights (“ECtHR”), judges have carefully parsed Article 8 of the European Convention on Human Rights to balance the various rights implicated, including the right to abortion, the right to agency in giving birth, and the right to conscientious objection. Further, decision-makers may take into account state interests in fetal life. As the ECtHR prepares to face the next stages of litigation concerning reproductive rights—eugenic abortions and home births—its decisions will set an example for the rest of the world, as many governments face and prepare to tackle similar questions and rights clashes. This Note turns to international human rights law to derive three legal principles that should guide the ECtHR in its upcoming decisions. Applying this original framework, this Note argues, the ECtHR can effectively balance the rights of pregnant women, the rights of medical care providers, and the interests of fetuses. In doing so, the European*

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*human rights system will ensure women retain legal agency when it comes to decisions about whether and where to give birth.*

## INTRODUCTION

To some, her candor was unsettling. Had she known her fetus carried a Down syndrome diagnosis, the unnamed Latvian woman argued, she would have exercised her legal right to an abortion.<sup>1</sup> Before the European Court of Human Rights (“ECtHR” or “the Strasbourg Court”), the anonymous applicant alleged physicians had therefore violated her human rights by failing to provide her with antenatal screening tests.<sup>2</sup> In her view, her right to an abortion under Latvian law should not be restricted simply because her fetus had been diagnosed with a genetic disease.<sup>3</sup> Yet, over the past year, at least one European country has proposed a complete ban on “eugenic abortions,”<sup>4</sup> an evolving term describing elective abortions on the basis of fetal disability or abnormality.<sup>5</sup>

But agency in reproductive decision-making expands beyond the choice of *whether* to give birth to also encompass *where* to give birth. In 2014, Sânziana Ioni -Ciurez wished to birth her second child at her

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1. A.K. v. Latvia, App. No. 33011/08, ¶ 30 (Eur. Ct. H.R. 2014), <http://hudoc.echr.coe.int/eng?i=001-145005> [<https://perma.cc/8KMQ-SN3S>].

2. *Id.* ¶¶ 66–67.

3. *See id.* ¶ 30 (“[H]ad [the applicant] known that the child had a congenital disease, she would have chosen to undergo an abortion on medical grounds.”).

4. Poland has banned such abortions, sparking mass protests across the country. *Poland Enforces Controversial Near-Total Abortion Ban*, BBC (Jan. 28, 2021), <https://www.bbc.com/news/world-europe-55838210> [<https://perma.cc/6RQA-U7XV>].

5. This terminology has been in use since the late twentieth century, during which pro-life activists in the United States argued that permitting eugenic abortions “exposed the larger damage legalization [of abortion] would do to society—the denigration of all vulnerable and disabled persons before and after birth.” Mary Ziegler, *The Disability Politics of Abortion*, 2017 UTAH L. REV. 587, 591. Recently, it has enjoyed significant use by conservative civil society groups in Europe. *See, e.g.*, Grégor Puppincq, *Abortion and Eugenics Before the European Court of Human Rights*, CTR. FOR FAM. & HUM. RTS. (Apr. 4, 2012), [https://c-fam.org/turtle\\_bay/abortion-and-eugenics-before-the-european-court-of-human-rights](https://c-fam.org/turtle_bay/abortion-and-eugenics-before-the-european-court-of-human-rights) [<https://perma.cc/9AXN-UTCX>] (arguing that the ECtHR should condemn eugenic abortions); Nicolas Bauer, *Towards a Ban on Eugenic Abortion in Hungary?*, EUR. CTR. FOR L. & JUST. (Feb. 2021), <https://eclj.org/eugenics/un/vers-une-interdiction-de-lavortement-eugenique-en-hongrie--> [<https://perma.cc/9GKK-JEX9>] (advocating for Hungary to find eugenic abortions unconstitutional in 2021). This Note adopts an inclusive interpretation of “eugenic abortions,” which covers both immediately fatal and nonfatal disabilities and fetal impairments. *See* discussion *infra* Part III.A.

home alongside a supervising midwife or obstetrician.<sup>6</sup> Despite her “low risk pregnancy with no complications,” Romanian law made it impossible for Ioni -Ciurez to find a medical professional willing to supervise her home birth.<sup>7</sup> During the birth, which was “forced” to occur at a public hospital, Ioni -Ciurez alleged “during labour she was separated from her husband, kept immobilised in a wheelchair for about an hour after arriving at the hospital, and had three consecutive [and unnecessary] pelvic examinations by three different individuals.”<sup>8</sup> Ioni -Ciurez’s physical and emotional trauma is far from unusual when it comes to sexual and reproductive healthcare experiences across Eastern Europe.<sup>9</sup>

Both issues—eugenic abortions and home births—are incorporated by the human right to reproductive health.<sup>10</sup> The two issues are intrinsically linked by the scope of reproductive autonomy. Pregnant individuals<sup>11</sup> are not only obstructed in deciding whether to give birth; they also experience intense regulatory challenges in electing the circumstances surrounding birth.<sup>12</sup> The ECtHR has

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6. Ioni -Ciurez v. Romania, App. No. 42594/14 (Mar. 7, 2017), <http://hudoc.echr.coe.int/eng?i=001-172633> [<https://perma.cc/FF5F-S7JS>].

7. *Id.*

8. *Id.*

9. See discussion *infra* Part III.B.1.

10. The right to sexual and reproductive health is derived from the right to health. See U.N., Econ. & Soc. Council, Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (Article 12 of the International Covenant on Economic, Social and Cultural Rights)*, ¶ 15, U.N. Doc. E/C.12/GC/22 (2016) (“Health facilities, goods, information and services related to sexual and reproductive health care should be accessible to all individuals and groups without discrimination and free from barriers.”).

11. Pregnancies, abortions, and childbirth affect more than those who self-identify as cisgender women and use feminine pronouns. Reproductive justice advocates are currently developing inclusive language and policies that acknowledge the reproductive health, rights, and justice of different and often intersecting gender, racial, and cultural identities. Sophia Serrao, *We Must Promote Gender-Inclusive Reproductive Health Care*, NAT’L P’SHIP FOR WOMEN & FAMS. (July 2, 2020), <https://www.nationalpartnership.org/our-impact/blog/general/we-must-promote-gender-inclusive-reproductive-health-care.html> [<https://perma.cc/WG2Y-AW9A>]. To engage directly with existing jurisprudence on reproductive rights, this Note uses the terms “pregnant women” and “pregnant individuals” interchangeably, but it acknowledges the important distinctions between the two, particularly when it comes to reproductive justice issues beyond the scope of this Note.

12. See Daniela Drandi & Bashi Hazard, *EU Governments Must Give Women Access to Midwifery Care For Home Births*, EURO NEWS (Nov. 3, 2021), <https://www.euronews.com/2021/03/10/eu-governments-must-give-women-access-to-midwifery-care-for-home-births> [<https://perma.cc/JAX7-2C3V>] (describing regulatory impediments to home births across Eastern Europe); Kathi Valeii, *People Who Want Home Births Have To Jump Through All Kinds of Hoops*, VICE (Aug.

demonstrated its willingness over the past two decades to engage directly with the competing rights and interests implicated by reproductive health decisions.<sup>13</sup> Such decisions often trigger difficult rights conflicts as well as moral and ethical questions. For example, does a pregnant woman's right to an abortion or choice to give birth at home instead of in a hospital infringe upon a fetus's rights to life and health? Is a fetus even a holder of rights in the first instance? If so, who should exercise these rights on the fetus's behalf? Relatedly, does a physician have a right to conscientiously object to performing an abortion or supervising a home birth? If so, does the exercise of this right infringe upon a pregnant woman's reproductive freedom?

This Note proposes a novel analytic framework for the ECtHR to adopt when resolving conflicts in reproductive health cases that implicate the competing rights and interests of pregnant women, fetuses, and medical care providers.<sup>14</sup> This approach is based upon insights extracted from case law and scholarship on a cluster of issues that have not previously been examined together—eugenic abortion,<sup>15</sup>

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8, 2018, 6:40 PM), <https://www.vice.com/en/article/pawxyz/home-birth-midwife-restrictions> [<https://perma.cc/GTW2-82KC>] (describing a similar situation in the United States, where “some states’ midwifery regulations end up limiting birth options for families”).

13. This is in contrast to the United States, where the Supreme Court has been noncommittal on the future of reproductive rights. *See, e.g.*, Ruth Dawson, Megan K. Donovan, Adam Sonfield & Lauren Cross, *An Even-More-Conservative U.S. Supreme Court Could Be Devastating for Sexual and Reproductive Health and Rights*, GUTTMACHER INST. (Oct. 28, 2020), <https://www.guttmacher.org/article/2020/09/even-more-conservative-us-supreme-court-could-be-devastating-sexual-and-reproductive> [<https://perma.cc/JP4K-77CS>] (warning that the new makeup of the U.S. Supreme Court “threatens reproductive rights, LGBTQ+ rights and health care rights broadly”).

14. Existing scholarship has thus far primarily addressed the Strasbourg Court's abortion and home birth jurisprudence as separate matters. *See generally, e.g.*, Federico Fabbrini, *The European Court of Human Rights, the EU Charter of Fundamental Rights, and the Right to Abortion: Roe v. Wade on the Other Side of the Atlantic*, 18 COLUM. J. EUR. L. 1 (2011) (chronicling the ECtHR's earlier abortion jurisprudence); Caitlin McCartney, “Childbirth Rights”? *Legal Uncertainties Under the European Convention After Ternovszky v. Hungary*, 40 N.C. J. INT'L L. & COM. REG. 543 (2015) (examining the apparent conflict in the ECtHR's home birth jurisprudence); Julia Kapela ska-Pr gowska, *The Scales of the European Court of Human Rights: Abortion Restriction in Poland, the European Consensus, and the State's Margin of Appreciation*, 23 HEALTH & HUM. RTS. J. 213 (2021) (advising the ECtHR to revisit its reproductive rights through the lens of abortion only).

15. Eugenic abortion in the ECtHR context has only recently begun to receive attention from scholars. *See generally* Bríd Ní Ghráinne & Aisling McMahon, *Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?*, 19 HUM. RTS. L. REV. 561 (2020) (arguing that the ECtHR will soon align itself with the U.N. Human Rights Committee to find that a prohibition of abortion in the case of fatal fetal abnormality constitutes torture under the European Convention of Human Rights).

home birth, conscientious objection, and other human rights principles.<sup>16</sup> It applies this framework to abortions<sup>17</sup> and home births, two areas where the Strasbourg Court's jurisprudence has thus far failed to converge, revealing the relevance of this inquiry across different types of reproductive choices—from deciding whether to give birth at all to exercising control over how and where to give birth. This Note focuses on how the ECtHR should resolve these conflicts. Yet it also identifies the larger implications of its proposed framework, as the rights in the European Convention of Human Rights (“ECHR”) are similarly protected in other global and regional human rights instruments and in most national constitutions, including in the United States.<sup>18</sup>

This Note is divided into three parts. Part I introduces the European human rights system, discussing the right to respect for private and family life protected by Article 8 of the ECHR—the central provision in the ECtHR's reproductive rights jurisprudence—and relevant accompanying legal doctrines. This Part subsequently provides a brief overview of the international human rights law landscape and its relevance to the ECtHR. Part II turns to international human rights law more broadly. Drawing from various sources, including the ECHR, ECtHR case law, U.N. human rights treaties, U.N. treaty body case law, and existing scholarship, this Part derives three original, core principles of reproductive rights: the right to reproductive freedom; the right to conscientious objection; and state

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16. For a discussion of how some of these legal issues have masked the voices of women in reproductive-rights standard-setting, see generally Liiri Oja & Alicia Ely Yamin, “*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?, 32 COLUM. J. GENDER & L. 62 (2016).

17. The scope of this Note's discussion of abortions is limited to elective, or therapeutic, abortions within the first trimester of pregnancy, as permitting such abortions is “[t]he standard practice across Europe.” *European Abortion Law: A Comparative Overview*, CTR. FOR REPROD. RTS. (Mar. 3, 2021), <https://reproductiverights.org/european-abortion-law-comparative-overview-0> [<https://perma.cc/FD93-MCCS>].

18. Notably, the Sixth Circuit has upheld eugenic abortion restrictions as constitutional. *See Preterm-Cleveland v. McCloud*, 994 F.3d 512, 550 (6th Cir. 2021) (“The people of Ohio were entitled to enact into law their considered judgment that those with Down syndrome are worth protecting.”). The U.S. Supreme Court is currently poised to make difficult decisions about the scope of abortion rights; already, Justice Clarence Thomas has termed abortion generally as “an act rife with potential for eugenic manipulation” and identified eugenic abortion to be a global problem. *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring); *see id.* at 1790–91 (identifying the rates of abortions due to fetal disabilities in Iceland, Denmark, France, the United Kingdom, and Asia).

representation of fetal interests, not rights. Part III applies these principles to the European human rights system in the context of nascent eugenic abortion and home birth issues. Ultimately, this Part demonstrates the utility of Part II's principles and offers the ECtHR a template of elements to consider when it confronts future conflicts over rights and interests in the reproductive health space. This Note concludes by considering the global implications of implementing the proposed framework.

## I. BACKGROUND: REGIONAL AND INTERNATIONAL HUMAN RIGHTS LAW

In Europe, there are three relevant levels of human rights law: domestic, regional, and international. This Part introduces the latter two categories<sup>19</sup> and explores their intersection. First, it discusses the European human rights system and its institutions, instruments, and core guarantees. Then, it turns to international human rights law, introducing the United Nations and its core human rights treaties and treaty bodies, before demonstrating how international human rights law informs jurisprudence at the regional level.

### A. *Regional Human Rights Law: The European System*

As the regional judicial body established by the ECHR,<sup>20</sup> the ECtHR is a court within the Council of Europe. Founded in 1949, the Council of Europe is distinct from and larger than the European Union.<sup>21</sup> All forty-seven Council of Europe member states are parties to the ECHR and thus subject to the ECtHR's jurisdiction.<sup>22</sup> Once a complaint, which may be submitted by an individual or another

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19. As this Note is not focused on any particular state within Europe, rather the Council of Europe states generally, domestic human rights jurisprudence is only relevant insofar as it conflicts with either regional or international human rights law.

20. European Convention on Human Rights art. 19, *opened for signature* Nov. 4, 1950, E.T.S. No. 005.

21. *See* Statute of the Council of Europe, May 5, 1949, E.T.S. No. 001 (establishing the Council of Europe following the Second World War).

22. *Chart of Signatures and Ratifications of Treaty 005*, COUNCIL OF EUR. (Oct. 30, 2021), [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=Hee1pMgM](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=Hee1pMgM) [<https://perma.cc/J85F-VYRV>]. After exhausting domestic remedies, individuals may bring claims to the ECtHR alleging violations of one or more of the rights protected by the ECHR. European Convention on Human Rights arts. 32–35, Nov. 4, 1950, E.T.S. No. 005. The ECtHR also permits third parties to intervene in cases by submitting written comments and participating in hearings. *Id.* art. 36.

member state, passes the Strasbourg Court's preliminary review of its admissibility, it is communicated to the respondent state, which has a chance to submit a response on the claim's admissibility and merits, before either a settlement or hearing.<sup>23</sup> Each individual complaint is communicated and judged on its merits by an ECtHR committee of three judges in the event the complaint is "already covered by well-established case-law of the Court."<sup>24</sup> Complaints not already covered by existing ECtHR case law are heard by a chamber of seven judges.<sup>25</sup> In exceptional circumstances, the ECtHR's Grand Chamber, which is composed of seventeen judges, issues judgments on the merits of complaints; such cases must have either received a final chamber judgment and been "referred" for review to the Grand Chamber or have been "relinquished" to the Grand Chamber at the lower level because the complaint "raises a serious question affecting the interpretation of the [ECHR] or if there is a risk of inconsistency with a previous judgment of the Court."<sup>26</sup>

The ECHR itself protects many foundational rights guarantees,<sup>27</sup> but the rights enshrined in Article 8 are of particular relevance to this Note. Article 8(1) guarantees that "[e]veryone has the right to respect for his private and family life, his home and his correspondence."<sup>28</sup> The ECtHR has interpreted this provision as protecting, for example, gay rights,<sup>29</sup> domestic violence victims,<sup>30</sup> and reproductive rights.<sup>31</sup>

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23. *Information to Applicants: Procedure Following Communication of an Application Non-Contentious Phase*, EUR. CT. OF HUM. RTS. (July 30, 2020), [https://www.echr.coe.int/Documents/Applicants\\_communication\\_non\\_contentious\\_ENG.pdf](https://www.echr.coe.int/Documents/Applicants_communication_non_contentious_ENG.pdf) [<https://perma.cc/N8CT-R4F5>].

24. EUR. CT. OF HUM. RTS., *THE ECHR IN 50 QUESTIONS 4* (2021), [https://www.echr.coe.int/Documents/50Questions\\_ENG.pdf](https://www.echr.coe.int/Documents/50Questions_ENG.pdf) [<https://perma.cc/U442-UDCZ>].

25. *Id.*

26. *Id.* at 4–5.

27. *See* European Convention on Human Rights art. 2, Nov. 4, 1950, E.T.S. No. 005 (protecting the right to life); *id.* art. 2 (protecting the right to a fair trial).

28. *Id.* art. 8(1).

29. *See, e.g.,* *Dudgeon v. United Kingdom*, App. No. 7525/76, ¶ 41 (Oct. 22, 1981), <http://hudoc.echr.coe.int/eng?i=001-57473> [<https://perma.cc/Y5T9-HVYZ>] (finding that the United Kingdom's domestic legislation criminalizing homosexual acts between consenting adults "constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8").

30. *See, e.g.,* *Bevacqua & S. v. Bulgaria*, App. No. 71127/01, ¶ 84 (June 12, 2008), <http://hudoc.echr.coe.int/eng?i=001-86875> [<https://perma.cc/UT4S-UPUR>] (noting the state's failure to adopt sufficient legal protections for domestic violence victims violated its obligations under Article 8).

31. *See* discussion *infra* Parts II.A–B.

Importantly, the ECtHR has interpreted Article 8 as creating both negative and positive obligations.<sup>32</sup> States have positive obligations to take affirmative measures to ensure individuals' rights are fully realized and not infringed upon by private actors.<sup>33</sup> To determine whether a state has met its positive obligations, the Strasbourg Court asks whether a “fair balance [has been] struck between the competing interests of the individual and of the community as a whole.”<sup>34</sup> For example, the Strasbourg Court found Croatia in violation of Article 8 when it lacked a procedure to compel a suspected father to comply with court-ordered DNA testing; there, the domestic law failed to “strike a fair balance between the right of the applicant to have her uncertainty as to her personal identity eliminated without unnecessary delay and that of her supposed father not to undergo DNA tests.”<sup>35</sup>

On the other hand, states have negative obligations not to arbitrarily interfere—for example, through their domestic laws, regulators, or courts—with individuals' private and family lives.<sup>36</sup> Once an applicant demonstrates the state has interfered with any rights listed in Article 8(1),<sup>37</sup> the ECtHR will determine the interference is permitted only where it pursues a “legitimate aim” identified in Article 8(2)<sup>38</sup> and is “necessary in a democratic society.”<sup>39</sup> When assessing the

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32. EUR. CT. OF HUM. RTS, GUIDE ON ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS ¶¶ 4–13 (2020), [https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf) [<https://perma.cc/KW96-4UNG>].

33. *See, e.g., Oliari & Others v. Italy*, App. Nos. 18766/11, 36030/1, ¶ 185 (July 21, 2015), <http://hudoc.echr.coe.int/eng?i=001-156265> [<https://perma.cc/9NVH-QKXY>] (finding Italy, which legalized neither same-sex marriage nor alternative legal recognition of same-sex partnerships, “failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions”).

34. *Powell & Rayner v. United Kingdom*, App. No. 9310/81, ¶ 41 (Feb. 21, 1990), <http://hudoc.echr.coe.int/eng?i=001-57622> [<https://perma.cc/3WLH-S5FU>].

35. *Mikuli v. Croatia*, App. No. 53176/99, ¶¶ 64–66 (Feb. 7, 2002), <http://hudoc.echr.coe.int/eng?i=001-60035> [<https://perma.cc/T5AT-Y5DN>].

36. *See, e.g., Libert v. France*, App. No. 588/13, ¶ 41 (Feb. 22, 2018), <http://hudoc.echr.coe.int/eng?i=001-181273> [<https://perma.cc/EX5L-8AX6>] (“Since the interference was by a public authority, the complaint must be analysed from the angle not of the State’s positive obligations, . . . but of its negative obligations.”).

37. European Convention on Human Rights art. 8(1), Nov. 4, 1950, E.T.S. No. 005.

38. The second paragraph of Article 8 permits interferences sanctioned by law and “necessary in a democratic society in the interests of national security, public safety or the economic well-being 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.” *Id.* art. 8(2).

39. *Dubská & Krejzová v. Czech Republic*, App. Nos. 28859/11, 28473/12, ¶¶ 84–101 (Dec. 11, 2014), <http://hudoc.echr.coe.int/eng?i=001-148632> [<https://perma.cc/6X8X-Q5JZ>].

necessity prong of this inquiry, the ECtHR asks both “whether there existed a pressing social need for the interference” and “whether [the interference] was proportionate to the legitimate aim pursued.”<sup>40</sup>

In its necessity analysis, the ECtHR relies heavily on the margin of appreciation doctrine.<sup>41</sup> The margin of appreciation doctrine acknowledges that domestic legislators and judiciaries may be best situated to effectively balance ECHR rights and societal interests at the state level.<sup>42</sup> According to the ECtHR, “The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background . . . .”<sup>43</sup> A wide or broad margin means states have ample room to regulate. Even though it is still possible to run afoul of the ECHR in this context, the ECtHR is less likely to find a state has done so.<sup>44</sup> Conversely, a narrow margin means the ECtHR applies a more stringent level of scrutiny.<sup>45</sup> The Strasbourg Court expressly identifies the margin of appreciation as going “hand in hand with a European supervision.”<sup>46</sup> A lack of European consensus among member states on an issue usually results in a wider margin; an existing

40. *Id.* ¶ 87.

41. *See* A, B & C v. Ireland, App. No. 25579/05, ¶ 231 (Dec. 16, 2010), <http://hudoc.echr.coe.int/eng?i=001-102332> [<https://perma.cc/Q999-NGJ6>] (“The Court considers that the breadth of the margin of appreciation to be accorded to the State is crucial to its conclusion as to whether the [interference] struck that fair balance.”).

42. *See* Handyside v. United Kingdom, App. No. 5493/72, ¶ 50 (Dec. 7, 1976), <http://hudoc.echr.coe.int/eng?i=001-57499> [<https://perma.cc/46ZK-QZH6>] (“[I]t is in no way the Court’s task to take the place of the competent national courts but rather to review . . . the decisions they delivered in the exercise of their power of appreciation.”); *see also* BERNADETTE RAINEY, ELIZABETH WICKS & CLARE OVEY, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 80 (6th ed. 2014) (explaining that the margin of appreciation doctrine encompasses the space in which states may regulate according to their own policy preferences, and potentially interfere with rights guarantees, without violating the ECHR).

43. *Schalk & Kopf v. Austria*, No. 30141/04, ¶ 98 (June 24, 2010), <http://hudoc.echr.coe.int/eng?i=001-99605> [<https://perma.cc/3UDY-HE5D>].

44. RAINEY ET AL., *supra* note 42, at 80–81.

45. *See* Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 HUM. RTS. L. REV. 495, 499 (2018) (“[W]hen the Court accords a narrow margin of appreciation, it requires that a justification for a restriction be convincingly established and it strictly assesses the quality and persuasiveness of the justification advanced by the government.”).

46. *Handyside*, App. No. 5493/72, ¶ 49; *see also id.* (“Such supervision concerns both the aim of the measure challenged and its ‘necessity’; it covers not only the basic legislation but also the decision applying it, even one given by an independent court.”).

or emerging European consensus weighs in favor of a narrower margin.<sup>47</sup>

Overall, the ECtHR applies a particularly broad margin to states' regulations around moral and ethical questions, particularly when it comes to Article 8 matters.<sup>48</sup> In these cases, Professor Clare Ryan argues that the ECtHR has shown a tendency "to grant special deference to a subset of cases that it deems 'sensitive.'"<sup>49</sup> The remainder of this Note engages with how the ECtHR and human rights law generally have conceptualized reproductive freedoms and the rights and interests conflicts inherent in their resolution. It then proposes a set of principles for the ECtHR to use moving forward and applies this framework to two cutting edge issues of reproductive freedom: eugenic abortions and home births.

### *B. International Human Rights Law: The U.N. System*

European states are not only bound by Council of Europe human rights instruments and bodies; they are also bound by any U.N. human rights treaties that they have ratified in their capacities as sovereign states.<sup>50</sup> The Office of the United Nations High Commissioner for Human Rights identifies the nine core international human rights instruments as the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social, and Cultural Rights ("ICESCR"), the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Convention for the Protection of All Persons from Enforced

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47. See Shai Dothan, *Judicial Deference Allows European Consensus To Emerge*, 18 CHI. J. INT'L L. 393, 397 (2018) ("The emerging consensus doctrine is used by the ECHR to discover the minimal human rights standards that are respected by at least a *majority* of the countries in Europe. This minimal standard is then required from *all* European countries.").

48. See Clare Ryan, *Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights*, 56 COLUM. J. TRANSNT'L L. 467, 473 (2018) ("[T]he Court's references to 'sensitive moral and ethical' issues have increased and migrated almost exclusively to cases implicating private life and family life.").

49. *Id.*

50. In other words, the U.N. treaties bind states, not international organizations like the Council of Europe or supranational bodies like the European Union. See Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 (defining a "treaty" as "an international agreement concluded between *States*" (emphasis added)).

Disappearance, the Convention Against Torture, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities (“CRPD”).<sup>51</sup>

States that are parties to these treaties are bound by their text under international law.<sup>52</sup> Further, each of the nine core U.N. human rights treaties has a treaty monitoring body, composed of independent experts.<sup>53</sup> Treaty monitoring bodies offer authoritative, but not legally binding, written interpretations of their associated treaties.<sup>54</sup> These bodies may also hear complaints brought by individuals against states, issue nonbinding opinions on these complaints, assess states’ compliance with their obligations under a given treaty, and initiate investigations into states’ practices.<sup>55</sup> Despite the limitations of treaty monitoring bodies—their substantive decisions lack legal effect under international law—Professor Nigel Rodley maintains these bodies have the potential to, and often do, “contribute to community expectations of appropriate state behaviour under human rights treaty obligations,” much like nonbinding U.N. General Assembly resolutions.<sup>56</sup>

As a result, treaty monitoring bodies shape human rights law across the world.<sup>57</sup> Scholar Kerstin Mechlem argues that the bodies’ interpretations of treaties “extend[] beyond the parties to a treaty, promoting the general understanding of a particular right at the

51. *The Core International Human Rights Instruments and Their Monitoring Bodies*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> [<https://perma.cc/4TUK-LNQZ>].

52. This legal binding is subject to the existence of “reservations”—when permitted by the treaty—by ratifying states. *See* Vienna Convention on the Law of Treaties, *supra* note 50 (defining “reservation” as “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”).

53. *Human Rights Treaty Bodies*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> [<https://perma.cc/QR4L-HZVG>].

54. *Monitoring the Core International Human Rights Treaties*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/EN/HRBodies/Pages/WhatTBDo.aspx> [<https://perma.cc/9734-QE29>].

55. *Id.*

56. Nigel S. Rodley, *The Role and Impact of Treaty Bodies*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 621, 640 (Dinah Shelton ed., 2013).

57. *See* Kerstin Mechlem, *Treaty Bodies and the Interpretation of Human Rights*, 42 *VAND. J. TRANSN’L L.* 905, 908 (2009) (explaining that treaty monitoring bodies “play an important role in establishing the normative content of human rights and in giving concrete meaning to individual rights and state obligations”).

national and international level by states, [nongovernmental organizations], academia, and others.”<sup>58</sup> The ECtHR, in particular, looks to the treaty monitoring bodies for interpretive guidance, as many rights are enshrined in both the ECHR and the U.N. treaties.<sup>59</sup> Thus, the relevance of U.N. human rights jurisprudence cannot be understated on both the international and regional human rights law planes. The remainder of this Note focuses on how the ECtHR should continue its practice of drawing from both European and international sources of international human rights law to shape its jurisprudence relating to reproductive autonomy.

## II. HEALTH AND REPRODUCTIVE CHOICE IN HUMAN RIGHTS LAW

Throughout the reproductive health litigation space, different groups of stakeholders interact with one another, often resulting in interests and rights conflicts. This Note focuses on the three most directly involved: pregnant women, fetuses, and medical care providers. Applying original methods by drawing from varied sources of international human rights law, including U.N. treaties, U.N. treaty monitoring bodies, regional human rights treaties, and international and regional human rights case law, this Part derives three principles to characterize international human rights in the reproductive health context: the right to reproductive freedom, the right to conscientious objection, and the existence of fetal interests. Because these principles emanate from multiple human rights systems, they are not framed as specific guarantees tied to any particular treaty or legal instrument. Rather, the principles constitute doctrinal tools for adjudicating and accommodating conflicts of rights and interests that arise in reproductive health litigation.

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58. *Id.*

59. *See, e.g.,* *Mocanu & Others v. Romania*, App. Nos. 10865/09, 45886/07, 32431/08, § II.A.1 (Sept. 17, 2014), <http://hudoc.echr.coe.int/eng?i=001-146540> [<https://perma.cc/4YR2-UZ3K>] (considering commentary issued by the Committee Against Torture as authoritative when considering a claim under Article 6 of the ECHR); *see also* Rodley, *supra* note 56, at 641 (explaining that the ECtHR “frequently invoke[s]” jurisprudence from the Human Rights Committee “with approval”).

A. *Principle I: The Right to Reproductive Freedom*

None of the nine core U.N. human rights treaties<sup>60</sup> expressly protect the right to reproductive autonomy.<sup>61</sup> Still, in advocating for the right to safe, legal abortions, human rights defenders have invoked treaty provisions relating to reproductive decisions, including the rights to privacy, health, equality, life, and freedom from torture and other cruel, inhuman, or degrading treatment or punishment.<sup>62</sup> As a result, four U.N. human rights treaties have been interpreted by their monitoring bodies to apply to the right to reproductive freedom.<sup>63</sup> The CRPD alone expressly guarantees the right to sexual and reproductive health.<sup>64</sup> CEDAW, however, secures the right to nondiscrimination in accessing health care services, such as “those related to family planning,” and obliges states to “ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period.”<sup>65</sup> Perhaps most importantly, CEDAW’s Article 16 requires that women are afforded “rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.”<sup>66</sup> Both ICESCR and the ICCPR protect the right to abortion via the rights to health and to equality, life, privacy, and protection against cruel, inhuman, or degrading treatment, respectively.<sup>67</sup>

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60. See *supra* note 51 and accompanying text.

61. Lance Gable, *Reproductive Health as a Human Right*, 60 CASE W. L. REV. 957, 959 (2010).

62. See *Sexual and Reproductive Health and Rights*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/issues/women/wrgs/pages/healthrights.aspx> [<https://perma.cc/L52E-8EVW>] (“Women’s sexual and reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education, and the prohibition of discrimination.”).

63. See *id.*; *infra* notes 64–75 and accompanying text.

64. Convention on the Rights of Persons with Disabilities art. 25(a), Dec. 6, 2006, 2515 U.N.T.S. 3. The specificity in this instrument is largely due to the history of “forced abortion, contraception or sterilization against [disabled individuals’] will or without their informed consent.” *Stop Regression on Sexual and Reproductive Rights of Women and Girls*, UN Experts Urge, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS. (Sept. 5, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23503&LangID=E> [<https://perma.cc/E78M-WGPY>].

65. Convention on the Elimination of All Forms of Discrimination Against Women art. 12, Dec. 18, 1979, 1249 U.N.T.S. 1.

66. *Id.* art. 16.

67. International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights arts. 2(1), 6, 7, 17, 26, Dec. 16, 1966, 999 U.N.T.S. 171.

Although the text of the treaties themselves does not directly ensure the right to abortion, the treaty monitoring bodies have been more explicit. In 2018, the CEDAW and CRPD monitoring bodies jointly called upon states to “decriminalize abortion in all circumstances and legalize it in a manner that fully respects the autonomy of women, including women with disabilities.”<sup>68</sup> Earlier, in 2016, the Committee on Economic, Social, and Cultural Rights confirmed ICESCR’s Article 12 right to health encompasses sexual and reproductive health, and it characterized restrictive abortion laws as “undermin[ing] autonomy and right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health.”<sup>69</sup> Further, the U.N. Human Rights Committee (“HRC”), which monitors the ICCPR, has identified several barriers to abortion access in interpreting the right to abortion as implicated by the ICCPR’s Article 6 right to life; these include, but are not limited to, conscientious objection by medical care providers, domestic criminalization of abortion, and insufficient privacy protections for abortion seekers.<sup>70</sup> The HRC recommended that states “not introduce new barriers and . . . remove existing barriers” to abortion access.<sup>71</sup>

Decisions of the U.N. treaty monitoring bodies in response to individual complaints have confirmed the right to reproductive freedom. The HRC has rendered nonbinding decisions on restrictions to abortion access in states where abortion is legal under domestic law.<sup>72</sup> The HRC has also considered whether domestic laws prohibiting

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68. Comm. on the Rts. of Pers. with Disabilities & Comm. on the Elimination of All Forms of Discrimination Against Women, *Guaranteeing Sexual and Reproductive Health and Rights for All Women, in Particular Women with Disabilities*, OFF. OF THE U.N. HIGH COMM’R FOR HUM. RTS. (Aug. 29, 2018), <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDStatements.aspx> [<https://perma.cc/78BJ-2DB6>]; see *id.* (“Access to safe and legal abortion . . . are essential aspects of women’s reproductive health and a prerequisite for safeguarding their human rights to life, health, equality before the law and equal protection of the law, non-discrimination, information, privacy, bodily integrity and freedom from torture and ill treatment.”). This statement was released as a response to “increasing rollback and regression on respect for international human rights norms that threaten sexual and reproductive health and rights.” *Id.*

69. Comm. on Econ., Soc. & Cultural Rts., *supra* note 10, ¶ 34.

70. Hum. Rts. Comm., *General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, ¶ 8, U.N. Doc. CCPR/C/GC/35 (Oct. 30, 2018).

71. *Id.*

72. See, e.g., Hum. Rts. Comm., *K.L. v. Peru*, Communication No. 1153/2003, ¶ 6.3, U.N. Doc. CCPR/C/85/D/1153/2003 (Nov. 22, 2005) (finding that a minor seeking a therapeutic abortion in Peru suffered cruel, inhuman, or degrading treatment or punishment (Article 7

nontherapeutic abortions, such as the law in effect in Ireland until 2018,<sup>73</sup> constitute ICCPR violations. In *Siobhán Whelan v. Ireland*,<sup>74</sup> the HRC found Ireland had violated the ICCPR when a woman facing a nonviable pregnancy was forced to leave the country in order to obtain a legal abortion.<sup>75</sup> This jurisprudence confirms what the HRC has expressed in its general comment: the right to abortion is not expressly protected, but it is recognized and given substance by evolving human rights practices.<sup>76</sup>

The ECtHR itself has not taken so broad and definitive a stance, particularly when it comes to abortion. The ECtHR has declined to find a right to abortion within the ECHR, expressly finding Article 8's right to respect for private and family life "cannot be interpreted as conferring a right to abortion."<sup>77</sup> Nonetheless, the Grand Chamber previously issued a complicated opinion in the context of the since-repealed Irish nontherapeutic abortion ban.<sup>78</sup> In *A, B, & C v. Ireland*,<sup>79</sup> the ECtHR explained because Irish women had "the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland," the Irish prohibition on abortion did not exceed the wide margin of appreciation awarded to states on the issue

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violation) due to "mental suffering" when the hospital director refused to provide the termination).

73. See Health (Regulation of Termination of Pregnancy) Act 2018 (Act. No. 31) (Ir.), <https://www.irishstatutebook.ie/eli/2018/act/31> [<https://perma.cc/7YUV-AU5Q>] (legalizing certain forms of abortion in Ireland). Therapeutic abortions typically refer to those performed to save the life or health of the pregnant woman or when the woman has become pregnant due to rape or incest. Nontherapeutic abortions refer to abortions that are not deemed medically necessary (for example, to save the life or health of the pregnant woman) and are instead elective.

74. Hum. Rts. Comm., *Whelan v. Ireland*, Communication No. 2425/2014, U.N. Doc. CCPR/C/119/D/2425/2014 (Mar. 17, 2017).

75. *Id.* ¶ 8 (finding breach based on mental suffering, privacy violation, and discrimination between Whelan and women who chose to carry unviable pregnancies to term).

76. Hum. Rts. Comm., *General Comment No. 36*, *supra* note 70, ¶ 8 ("Although States parties may adopt measures designed to regulate voluntary terminations of pregnancy, such measures must not result in violation of the right to life of a pregnant woman or girl.").

77. *P. & S. v. Poland*, App. No. 57375/08, ¶ 96 (Oct. 30, 2012), <http://hudoc.echr.coe.int/eng?i=001-114098> [<https://perma.cc/7TYJ-PHGP>].

78. See generally *A, B & C v. Ireland*, App. No. 25579/05 (Dec. 16, 2010), <http://hudoc.echr.coe.int/eng?i=001-102332> [<https://perma.cc/73HS-KN7X>] (finding no right to abortion under the ECHR but nonetheless finding that Ireland had failed to fulfill its Article 8 obligations when it did not "implement[ a ] legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland").

79. *A, B & C v. Ireland*, App. No. 25579/05 (Dec. 16, 2010), <http://hudoc.echr.coe.int/eng?i=001-10233> [<https://perma.cc/73HS-KN7X>].

of abortion.<sup>80</sup> But the ECtHR also determined one of the applicants, who suffered from a rare cancer and endured increased health risks due to her pregnancy, was not afforded sufficient procedures through which to establish that she qualified for a legal therapeutic abortion under Irish law.<sup>81</sup> This constituted an Article 8 violation.<sup>82</sup>

When it comes to states that legalize nontherapeutic abortions, however, the ECtHR has developed an access-oriented jurisprudence. In 2007, in *Tysi c v. Poland*,<sup>83</sup> the ECtHR determined that “[o]nce the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.”<sup>84</sup> The ECtHR reiterated this principle in 2012: “[T]he State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion.”<sup>85</sup> In short, where domestic laws permit abortions, the state must ensure this is a meaningful right by ensuring its accessibility within its jurisdiction.

But the ECtHR also interprets reproductive freedom beyond decisions to terminate a pregnancy; in addition to encompassing the decision *not to* give birth, reproductive freedom via Article 8 protects decisions about *where to* give birth. In *Ternovszky v. Hungary*,<sup>86</sup> the ECtHR found Hungary’s “ambiguous legislation on home birth,” which dissuaded health professionals from assisting with home births, violated the applicant’s Article 8 rights.<sup>87</sup> The ECtHR explained, “In the context of home birth, regarded as a matter of personal choice of the mother, . . . the mother is entitled to a legal and institutional environment that enables her choice, except where other rights render necessary the restriction thereof.”<sup>88</sup> As a result, the Strasbourg Court recognized a “right to choice in . . . child delivery[, which] includes the

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80. *Id.* ¶ 241.

81. *Id.* ¶¶ 250, 263.

82. *Id.* ¶ 268.

83. *Tysi c v. Poland*, App. No. 5410/03 (Mar. 20, 2007), <http://hudoc.echr.coe.int/eng?i=001-79812> [<https://perma.cc/FBE6-DX5H>].

84. *Id.* ¶ 116.

85. *P. & S. v. Poland*, App. No. 57375/08, ¶ 99 (Oct. 30, 2012), <http://hudoc.echr.coe.int/eng?i=001-114098> [<https://perma.cc/7TYJ-PHGP>].

86. *Ternovszky v. Hungary*, App. No. 67545/09 (Dec. 14, 2010), <http://hudoc.echr.coe.int/eng?i=001-102254> [<https://perma.cc/VD4A-XHS7>].

87. *Id.* ¶¶ 12, 27.

88. *Id.* ¶ 24.

legal certainty that the choice is lawful and not subject to sanctions, directly or indirectly,” independent of the state’s legal treatment of abortion.<sup>89</sup>

In sum, the current international human rights landscape confirms that the right to reproductive freedom encompasses a right to sexual and reproductive health, the right to access abortion where it is legal, and the right to choice in where one gives birth.

### B. Principle II: The Right to Conscientious Objection

Conscientious objection rights have historically been developed and recognized in the context of military service.<sup>90</sup> More recently, however, conscientious objection has become a tool used by states, medical care providers, and conservative civil society groups in their quest to restrict abortion access.<sup>91</sup> The right to conscientious objection is a civil and political right embedded in the ICCPR’s Article 18.<sup>92</sup> But this provision makes clear that external manifestations of one’s faith or beliefs is not an absolute guarantee: “Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.”<sup>93</sup> In advocating for states to ensure abortion access, the HRC made its position on conscientious objection protections clear: “States

89. *Id.*

90. See generally Jeremy K. Kessler, *The Invention of a Human Right: Conscientious Objection at the United Nations, 1947–2011*, 44 COLUM. HUM. RTS. L. REV. 753 (2013) (chronicling the development of the right to conscientious objection “as a universal right, good against all nations” and affirmed by the HRC and ICCPR).

91. See, e.g., Grégor Puppink, *Abortion: Three ECHR Judges Undermine the Right to Conscientious Objection*, EUR. CTR. FOR L. & JUST. (Mar. 2020), <https://eclj.org/conscientious-objection/echr/avortement-trois-juges-de-la-cedhsapent-le-droit-a-lobjection-de-conscience> [<https://perma.cc/LX5X-HA6T>] (describing medical professionals who are not legally permitted to opt out of performing certain procedures as having been “sacrificed to the dogma of abortion,” an act which “puts an end to a human life” and would cause the ECHR drafters to “turn over in their graves”); Christina Zampas & Ximena Andión-Ibañez, *Conscientious Objection to Sexual and Reproductive Health Services: International Human Rights Standards and European Law and Practice*, 19 EUR. J. HEALTH L. 231, 233 (2012) (“[C]onscientious objection clauses are being applied too broadly and sometimes even abused . . . result[ing] in serious violations of women’s right to access quality sexual and reproductive health services with potentially detrimental impact on their health and lives.”).

92. International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171.

93. *Id.* (emphasis added).

parties . . . should remove existing barriers . . . caused as a result of the exercise of conscientious objection by individual medical providers.”<sup>94</sup> In 2010, for example, the HRC expressed concern about Poland’s “conscience clause,” which it described as “often inappropriately applied” and inhibiting access to safe, legal abortions.<sup>95</sup>

On the national level, legal conscientious objection protections abound in Europe.<sup>96</sup> This trend pervades despite the fact that the ECtHR is “not a soaring champion of religious freedom.”<sup>97</sup> In the context of abortion, the ECtHR has addressed Article 9 rights (almost identical to those in the ICCPR’s Article 18) in states where conscientious objection rights are guaranteed and those where it is not legally protected.<sup>98</sup> But its treatment of each has been inconsistent.

In *P. & S. v. Poland*,<sup>99</sup> the ECtHR issued a judgment respecting, in principle, a Polish law providing physicians with a procedure for raising a conscientious objection to personally participating in an abortion.<sup>100</sup> On the facts presented, however, the Strasbourg Court found the physicians did not properly comply with the procedure, resulting in the abortion-seeking applicants receiving “misleading and contradictory information” and enduring an experience “marred by procrastination and confusion.”<sup>101</sup> As a result, the ECtHR invoked the *Tysi c* principle of accessibility<sup>102</sup> and found Poland had failed to comply with its “positive obligation to secure to the applicants effective

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94. Hum. Rts. Comm., *supra* note 70, ¶ 8.

95. Hum. Rts. Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 12, U.N. Doc. CCPR/C/POL/CO/6 (Nov. 15, 2010).

96. Paola Tamma, *Even Where Abortion Is Legal, Access Is Not Granted*, EUR. DATA JOURNALISM NETWORK (May 24, 2018), <https://www.europeandatajournalism.eu/eng/News/Data-news/Even-where-abortion-is-legal-access-is-not-granted> [<https://perma.cc/YYE4-W3S3>] (presenting data indicating that as of 2018, at least twenty-one states in Europe legally protect conscientious objection, and five states (Bulgaria, the Czech Republic, Finland, Iceland, and Sweden) do not permit conscientious objections to performing abortions).

97. Stijn Smet, *Conscientious Objection Under the European Convention on Human Rights: The Ugly Duckling of a Flightless Jurisprudence*, in *THE EUROPEAN COURT OF HUMAN RIGHTS AND THE FREEDOM OF RELIGION OR BELIEF* 282, 282 (Jeroen Temperman, Jeremy Gunn & Malcolm Evans eds., 2019).

98. *See infra* notes 99–117 and accompanying text.

99. *P. & S. v. Poland*, App. No. 57375/08 (Oct. 30, 2012), <http://hudoc.echr.coe.int/eng?i=001-114098> [<https://perma.cc/S396-CGME>].

100. *Id.* ¶ 107.

101. *Id.* ¶ 108.

102. *Tysi c v. Poland*, App. No. 5410/03, ¶ 116 (Mar. 20, 2007), <http://hudoc.echr.coe.int/eng?i=001-79812> [<https://perma.cc/6XK8-TE3T>].

respect for their private life.”<sup>103</sup> Nonetheless, the ECtHR did not question the physicians’ rights to conscientiously object to performing abortions; it merely took issue with the ways in which physicians exercised such rights.<sup>104</sup>

The Strasbourg Court did not, however, employ the same analysis in 2020, when it declined to uphold conscientious objection rights in Sweden. In both *Grimmark v. Sweden*<sup>105</sup> and *Steen v. Sweden*,<sup>106</sup> the ECtHR considered claims by midwives who sought to opt out of performing abortions contrary to a Swedish law that requires employees to perform all employer-prescribed duties.<sup>107</sup> The ECtHR reasoned the interference with freedom of religion was justified by the “legitimate aim of protecting the health of women seeking an abortion,” and the law was “necessary in a democratic society and proportionate” to this aim.<sup>108</sup> But the ECtHR’s analysis was conclusory. The Strasbourg Court merely stated that, given the state’s positive obligation to ensure abortion access,<sup>109</sup> a “requirement that all midwives should be able to perform all duties inherent to the vacant posts was not disproportionate or unjustified.”<sup>110</sup> Thus, Sweden had struck a “proper balance . . . between the different, competing interests.”<sup>111</sup>

The Strasbourg Court declined to reconcile its reasoning with, or even acknowledge, *P. & S.* In contrast to the Polish law permitting conscience objection in *P. & S.*,<sup>112</sup> the Swedish law was more categorical—it required employees to perform duties associated with their positions without providing any process for exercising

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103. *P. & S.*, App. No. 57375/08, ¶¶ 96, 112. This was an Article 8 violation. *Id.* ¶ 12.

104. *See id.* ¶ 107 (accepting the existence of Polish law permitting conscience objection but determining the physicians had not complied with the “procedural requirements” of that law).

105. *Grimmark v. Sweden*, App. No. 43726/17 (Feb. 11, 2020), <http://hudoc.echr.coe.int/eng?i=001-201915> [<https://perma.cc/52HH-UA7J>].

106. *Steen v. Sweden*, App. No. 62309/17 (Feb. 11, 2020), <http://hudoc.echr.coe.int/eng?i=001-201732> [<https://perma.cc/QP8X-NJWH>].

107. *Grimmark*, App. No. 43726/17, ¶ 25; *Steen*, App. No. 62309/17, ¶ 20.

108. *Grimmark*, App. No. 43726/17, ¶¶ 25–26; *Steen*, App. No. 62309/17, ¶¶ 20–21.

109. *See Grimmark*, App. No. 43726/17, ¶ 26 (stating that Sweden “has a positive obligation to organise its health system in a way as to ensure that the effective exercise of freedom of conscience of health professionals in the professional context does not prevent the provision of [abortion] services”); *Steen*, App. No. 62309/17, ¶ 21 (same).

110. *Grimmark*, App. No. 43726/17, ¶ 26; *Steen*, App. No. 62309/17, ¶ 21.

111. *Grimmark*, App. No. 43726/17, ¶ 27; *Steen*, App. No. 62309/17, ¶ 22.

112. *P. & S. v. Poland*, App. No. 57375/08, ¶¶ 107–08 (Oct. 30, 2012), <http://hudoc.echr.coe.int/eng?i=001-114098> [<https://perma.cc/S396-CGME>].

conscientious objection rights.<sup>113</sup> To reconcile its decision with *P. & S.*, the ECtHR should have inquired as to whether the Swedish midwives' desire to opt out of performing abortions meaningfully limited abortion access for pregnant women.<sup>114</sup> Although at least one scholar has interpreted the Swedish cases as “clarifying that there is no right under the [ECHR] for healthcare providers to refuse to participate in abortion services,”<sup>115</sup> such a categorical conclusion seems unwarranted. It would require a repudiation of the principles expressed in *P. & S.*—which the Strasbourg Court expressly failed to do in both *Grimmark* and *Steen*.<sup>116</sup>

In sum, some human rights bodies have recognized a right to conscientious objection—at least when such a right is protected by domestic law.<sup>117</sup> However, when conscientious objection becomes a barrier to abortion access guaranteed by the domestic law, states are obliged to balance the rights and ensure abortion is accessible.<sup>118</sup> The recent Swedish cases, however, signify a conceptual gap in the Strasbourg Court's jurisprudence, creating uncertainty for both future abortion access *and* conscientious objection complaints.

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113. *Grimmark*, App. No. 43726/17, ¶ 25; *Steen*, App. No. 62309/17, ¶ 20.

114. See *P. & S.*, App. No. 57375/08, ¶ 99 (“[T]he State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion.” (citing *Tysi c v. Poland*, App. No. 5410/03, ¶¶ 116–24 (Mar. 20, 2007), <http://hudoc.echr.coe.int/eng?i=001-79812> [<https://perma.cc/6XK8-TE3T>])).

115. Niklas Barke, *Grimmark v. Sweden and Steen v. Sweden: No Right for Healthcare Professionals To Refuse To Participate in Abortion Services, and Framing Strategies by Anti-Abortion Actors*, STRASBOURG OBSERVERS (Apr. 6, 2020), <https://strasbourgoobservers.com/2020/04/06/grimmark-v-sweden-and-steen-v-sweden-no-right-for-healthcare-professionals-to-refuse-to-participate-in-abortion-services-and-framing-strategies-by-anti-abortion-actors> [<https://perma.cc/6G5B-VTLG>].

116. See generally *Grimmark*, App. No. 43726/17 (failing to cite or acknowledge the *P. & S.* decision); *Steen*, App. No. 62309/17 (same).

117. This has become the legal norm in human rights. See Zampas & Andi3n-Iba3nez, *supra* note 91, at 232 (“According to established international human rights and medical standards, states should regulate conscientious objection to both accommodate health care providers’ beliefs and also ensure women’s access to adequate and timely sexual and reproductive health care services.”).

118. See Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 14 (2000) on the Right to the Highest Attainable Standard of Health (Article 12)*, ¶ 12, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (stating that affordability, information accessibility, and physical accessibility are necessary to realize the right to health); *P. & S.*, App. No. 57375/08, ¶ 99 (“[T]he State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion.”).

C. *Principle III: Fetal Interests, Not Fetal Rights*

The international human rights law community has reached a general consensus that “human rights begin at birth.”<sup>119</sup> And the ECtHR has directly addressed the question of fetal rights. In 2004, in *Vo v. France*,<sup>120</sup> the ECtHR determined a fetus was not a “person” within the scope of the ECHR’s Article 2 right to life.<sup>121</sup> Further, it noted that even “if the unborn do have a ‘right’ to ‘life,’ it is implicitly limited by the mother’s rights and interests.”<sup>122</sup> The ECtHR nevertheless acknowledged a fetus’s “lack of a clear legal status does not necessarily deprive it of all protection.”<sup>123</sup> Specifically, the ECtHR was careful not to “rule[] out the possibility that in certain circumstances safeguards may be extended to the unborn child.”<sup>124</sup> This unsatisfying conclusion does clarify at least two issues. First, under the ECHR, fetuses are not guaranteed right to life protections. Second, despite not being persons—and thus rightsholders—fetuses certainly have interests, which the ECtHR is willing to consider.

The U.N. treaty monitoring bodies have weighed in on this issue in an important context: whether impaired or disabled fetuses are afforded human rights protections. The Committee on the Rights of Persons with Disabilities (“CRPD Committee”) issued observations on Hungary’s proposed abortion law in 2012.<sup>125</sup> The CRPD Committee challenged a provision allowing a longer time window for women to decide whether to abort disabled fetuses than that available to women

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119. E.g., Rhonda Copelon, Christina Zampas, Elizabeth Brusie & Jacqueline DeVore, *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights*, 13 REPROD. HEALTH MATTERS 120, 120, 126 (2005); Rebecca J. Cook & Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, 25 HUM. RTS. Q. 1, 22–28 (2003); see also Philip Alston, *The Unborn Child and Abortion Under the Draft of the Convention on the Rights of the Child*, 12 HUM. RTS. Q. 156, 178 (1990) (“[O]n the issue of the status of the unborn child, the Convention [on the Rights of the Child] conforms with existing international human rights law. While recognizing that the fetus is deserving of appropriate protection, its right to life *per se* is not recognized.” (footnote omitted)).

120. *Vo v. France*, App. No. 53924/00 (July 8, 2004), <http://hudoc.echr.coe.int/eng?i=001-61887> [<https://perma.cc/C7R5-JL26>].

121. *Id.* ¶ 80; see *id.* ¶ 85 (“[I]t is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 . . .”).

122. *Id.* ¶ 80.

123. *Id.* ¶ 86.

124. *Id.* ¶ 80.

125. Comm. on the Rts. of Pers. with Disabilities, *Concluding Observations on the Initial Periodic Review of Hungary*, U.N. Doc. CRPD/C/HUN/CO/1 (Oct. 22, 2012).

deciding whether to abort nondisabled fetuses.<sup>126</sup> This, the CRPD Committee determined, constituted discrimination on the basis of disability.<sup>127</sup> The CRPD Committee subsequently recommended Hungary “abolish the distinction . . . on the protection of the life of the foetus in the period allowed under law within which a pregnancy can be terminated, based solely on disability.”<sup>128</sup> The CRPD Committee’s concern thus appeared to be with a law that is more permissive of aborting fetuses with disabilities, *not* with a blanket law permitting abortion of disabled and nondisabled fetuses on equal terms. Professor Carole J. Petersen offers two interpretations of the CRPD Committee’s statements.<sup>129</sup> First, she suggests the CRPD Committee was recognizing fetal rights to be free from discrimination, which would be a “departure from the predominant approach in international law.”<sup>130</sup> Alternatively, Petersen proposes the CRPD Committee believed “permitting abortion on the ground of fetal impairment devalues, and therefore discriminates against, people who are already living with disabilities.”<sup>131</sup>

By 2018, however, the CRPD Committee appeared to step back from fetal rights, or even interests, in its reproductive freedom discourse. Pro-life advocates have been disappointed by the CRPD Committee’s overall failure (in the context of prior statements) to “state[] that abortion is a violation of the right to life . . . [or] that disabled persons should be protected from abortion altogether.”<sup>132</sup> In

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126. *See id.* ¶ 17 (explaining that the Hungarian law “makes ‘abortive treatment possible for a wider circle than in general for the foetuses deemed to have health damage or some disability’” (quoting Comm. on the Rts. of Pers. with Disabilities, *Implementation of the Convention on the Rights of Persons with Disabilities*, ¶ 71, U.N. Doc. CRPD/C/HUN/1 (June 28, 2011))).

127. *Id.*

128. *Id.* ¶ 18.

129. Carole J. Petersen, *Reproductive Justice, Public Policy, and Abortion on the Basis of Fetal Impairment: Lessons from International Human Rights Law and the Potential Impact on the Convention on the Rights of Persons with Disabilities*, J.L. & HEALTH 121, 154–55, 159 (2015).

130. *Id.* at 159.

131. *Id.*

132. Susan Yoshihara, *Another UN Committee Says Abortion May Be a Right, But Not on the Basis of Disability*, CTR. FOR FAM. & HUM. RTS. (Oct. 26, 2017), [https://c-fam.org/friday\\_fax/another-un-committee-says-abortion-may-right-not-basis-disability](https://c-fam.org/friday_fax/another-un-committee-says-abortion-may-right-not-basis-disability) [<https://perma.cc/B4AV-JNW7>]. As a result, critics interpret the CRPD as saying an abortion due to fetal disability is acceptable as long as the stated purpose of the abortion “is not eugenic.” *Id.* These critiques were grounded in the CRPD’s request that the HRC remove language about fetal impairment from its draft general comment. *Id.* The original language stated, “States parties must provide safe access to abortion to protect the life and health of pregnant women, and in situations in which carrying a pregnancy to term would cause the woman substantial pain or suffering, most notably where the

its Concluding Observations on Poland's Initial Periodic Report, the CRPD Committee expressed concern about pregnancy terminations only as they related to "barriers faced by women with disabilities when they seek to gain access to services for safe abortion."<sup>133</sup> Further, in a joint statement coauthored by the CEDAW Committee, CRPD Committee Chairperson Theresia Degener emphasized that "opponents of reproductive rights and autonomy often actively and deliberately refer to disability rights in an effort to restrict or prohibit women's access to safe abortion."<sup>134</sup> Such behavior, she explained, is a "misinterpretation" of the CRPD.<sup>135</sup> Throughout the statement, which expressed the need for "safe and legal abortion," Degener did not offer any qualifications in the case of fetal disability.<sup>136</sup> In fact, no mention was made of either fetal rights or interests.<sup>137</sup> Taking these recent statements together with other sources of human rights law,<sup>138</sup> the authorities agree: fetuses may have interests, but they do not have human rights.

But how are these interests represented? Scholars have identified the state as an operative actor here, particularly in the context of fetal impairments.<sup>139</sup> Further, the ECtHR has confirmed pregnant women do not necessarily safeguard fetal interests, especially as there may be conflicts with pregnant women's rights.<sup>140</sup> In *Vo*, the ECtHR left open

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pregnancy is the result of rape or incest or when the foetus suffers from fatal impairment." Hum. Rts. Comm., Advance Unedited Version of General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life ¶ 9, [www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6\\_EN.pdf](http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf) [https://perma.cc/GTM4-BTET].

133. Comm. on the Rts. of Pers. with Disabilities, *Concluding Observations on the Initial Periodic Review of Poland*, ¶ 43, U.N. Doc. CRPD/C/POL/CO/1 (Oct. 29, 2018).

134. OFF. OF THE U.N. HIGH COMM'R FOR HUM. RTS., *supra* note 64.

135. *Id.*

136. *Id.*

137. *Id.*

138. *See infra* notes 144–45.

139. *See, e.g.*, Rosamund Scott, *The English Fetus and the Right to Life*, 11 EUR. J. HEALTH L. 347, 356 (2004) (discussing how the state can protect fetal *interests* without recognizing *rights* through the provision of unbiased, factual information on fetal disability to pregnant women considering abortions); Marsha Saxton, *Disability Rights and Selective Abortion*, in THE DISABILITY STUDIES READER 97–98 (4th ed. 2013) (concluding that a priority in addressing selective abortion on the basis of fetal disability should be *informing* but not *restricting* a patient's choice).

140. *See A, B & C v. Ireland*, App. No. 25579/05, ¶ 213 (Dec. 16, 2010), <http://hudoc.echr.coe.int/eng?i=001-102332> [https://perma.cc/4HSJ-4LTD] ("The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child . . ."); *Vo v. France*, App. No. 53924/00, ¶ 80 (July 8, 2004),

the possibility that “in certain circumstances safeguards may be extended” to fetuses.<sup>141</sup> In other words, even though fetuses are not rightsholders, they are “not necessarily deprive[d] . . . of all protection.”<sup>142</sup> It logically follows if pregnant women are unable to always represent fetal interests, and if international human rights law binds states not individuals, the state may represent fetal interests in the reproductive freedom context. This is not to say the state may not delegate such responsibility. Borrowing from the legal framework in the children’s rights context,<sup>143</sup> fetal interests may be represented, for example, by domestic court officers, guardians ad litem, health or social services inspectors, or even medical professionals.

Ultimately, even though some continue to argue human rights drafters “were mindful that birth was not to be the starting point for legal personality,”<sup>144</sup> neither the core U.N. human rights treaties nor the ECHR expressly recognize fetal rights.<sup>145</sup> As a result, the human

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<http://hudoc.echr.coe.int/eng?i=001-61887> [<https://perma.cc/T23R-QPPD>] (“[T]he unborn child is not regarded as a ‘person’ directly protected by Article 2 of the Convention and . . . if the unborn do have a ‘right’ to ‘life’, it is implicitly limited by the mother’s rights and interests.”).

141. *Vo*, App. No. 53924/00, ¶ 80.

142. *Id.* ¶ 86.

143. *See, e.g.*, Ursula Kilkelly, *The Best of Both Worlds for Children’s Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child*, 23 HUM. RTS. Q. 308, 325 (2001) (discussing how to actualize “independent representation for children,” which is secured by Article 12 of the Convention on the Rights of the Child); Paul McCafferty, *Implementing Article 12 of the United Nations Convention on the Rights of the Child in Child Protection Decision-Making: A Critical Analysis of the Challenges and Opportunities for Social Work*, 23 CHILD CARE IN PRAC. 327, 328–29 (2017) (emphasizing the role of social work in representing children’s interests under the Convention on the Rights of the Child).

144. Delphine Loiseau, *For the Recognition of the Legal Personality of the Foetus in Utero*, EUR. CTR. FOR L. & JUST. (Apr. 2020), <https://eclj.org/abortion/echr/pour-la-reconnaissance-de-la-personnalite-juridique-du-ftus-in-utero> [<https://perma.cc/F69D-Z2YC>].

145. Copelon et al., *supra* note 119, at 120. Importantly, the U.N. and European human rights systems recognize children’s rights. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; EUR. UNION AGENCY FOR FUNDAMENTAL RTS. & COUNCIL OF EUR., HANDBOOK ON EUROPEAN LAW RELATING TO THE RIGHTS OF THE CHILD 3 (2015). The Committee on the Rights of the Child’s recognition of the importance of abortion access for pregnant children affirms that it does not recognize fetal rights. *See, e.g.*, Comm. on the Rts. of the Child, *Concluding Observations*, ¶ 30, U.N. Doc. CRC/C/15/Add.107 (Aug. 24, 1999) (expressing concern of the negative impacts of illegal abortion and punitive abortion laws on pregnant adolescent girls). Notably, the American Convention on Human Rights (“ACHR”) does appear to recognize fetal rights. *See* American Convention on Human Rights art. 4(1) Nov. 22, 1969, O.A.S.T.S. No. 36 (“Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.” (emphasis added)). But the Inter-American Court of Human Rights has since clarified that this provision does not preclude a right to abortion. *See* *Murillo v. Costa Rica*, Preliminary Objections,

rights landscape confirms fetuses are *not* rightsholders, though states may still take fetal interests in account when shaping policies and decisions.<sup>146</sup>

#### D. Summarizing the Principles

Derived from the existing human rights landscape, Principles I, II, and III clarify the relevant stakeholders in any issue implicating abortion and pregnancy rights. Table 1 provides an overview of the principles, summarizing their essence and to whom they most directly apply.

*Table 1: Overview of Principles*

	<b>Stakeholder</b>	<b>Relevant Human Rights Guarantees</b>
<b>Principle I:</b> The Right to Reproductive Freedom	Pregnant women	Right to access abortion services when abortion is legal under domestic law; right to exercise agency over reproductive decisions throughout pregnancy and birth
<b>Principle II:</b> The Right to Conscientious Objection	Medical professionals	Right to conscientious objection when protected by domestic law to the extent that exercise of the right does not inhibit abortion access
<b>Principle III:</b> Fetal Interests, Not Fetal Rights	Fetuses	Recognition of fetal interests (not fetal rights), which may be represented by the state or its delegates

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Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 223 (Nov. 28, 2012) (“[T]he historic and systematic interpretation of precedents that exist in the inter-American system confirms that it is not admissible to grant the status of person to the embryo.”); *see also* Baby Boy v. United States, Case 2141, Inter-Am. Comm’n H.R., Report No. 23/81, OEA/Ser.L./V/II.54, doc. 9 rev. ¶¶ 20–30 (1981) (concluding that, based on the ACHR’s drafting history, Article 4 does not impose legal restrictions on abortion on the basis of fetal rights to life).

146. *See supra* notes 121–143 and accompanying text.

But this table reveals a number of critical questions that remain unanswered. The most pressing is whether and how the state can safeguard fetal interests without infringing upon the human rights of pregnant women and medical care providers.

As the preceding discussion reveals, where domestic law provides for access to abortion services or conscientious objection in the healthcare context, those legal protections are recognized and ensured by international human rights law. The subsequent application of these principles to specific case studies will explore how states should grapple with balancing positive and negative obligations, the rights and interests of relevant stakeholders, and domestic law and policy in the reproductive healthcare context.

### III. A BALANCING ACT: RETHINKING EUGENIC ABORTIONS & HOME BIRTHS AT THE ECtHR

As the discussion in Part II demonstrates, the ECtHR is no stranger to reproductive health and agency matters. In determining the breadth of states' margin of appreciation, the ECtHR has thus far avoided providing answers to related moral and ethical questions.<sup>147</sup> But two important dimensions of reproductive healthcare—eugenic abortions and home births—are presently implicated in cases pending at the ECtHR. Although raising distinct parts of reproductive health, these two issues concern the same set of key stakeholders: pregnant women, medical professionals, and fetuses. This Part engages with the background and current status of each issue. It then engages the human rights principles derived in Part II to recommend a framework for the ECtHR to apply in resolving the rights and interests conflicts inherent in both types of disputes.

#### A. *Eugenic Abortions*

Selective abortions on the basis of fetal impairment have garnered increasing concern in both Europe and the United States.<sup>148</sup>

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147. Ryan, *supra* note 48, at 473–74.

148. See, e.g., Little Rock Fam. Plan. Servs. v. Rutledge, No. 19-2690, 2021 U.S. App. LEXIS 84, at \*24 (8th Cir. Jan. 5, 2021) (Shepherd, J., concurring) (requesting that the U.S. Supreme Court reverse its precedent on abortion in order to uphold an Arkansas law banning abortions of fetuses diagnosed with or expected to have Down syndrome, else precedent serve as “a tool of modern-day eugenics” (citation omitted)); Pasquale Toscano & Alexis Doyle, *Legal Abortion Isn't the Problem To Be Solved*, ATLANTIC (June 19, 2019), <https://www.theatlantic.com/ideas/>

Conservative activists have termed these pregnancy terminations “eugenic abortions.”<sup>149</sup> This Note adopts use of this term, acknowledging the loaded rhetoric intrinsic to its connotations but recognizing the value in clarity and identifying exactly how opposition to these abortions is currently framed. As a result, this Note engages with the term “eugenic abortions” to refer to all decisions to terminate pregnancies caused in whole or in part by a diagnosis or suspicion of fetal disability, including both impairments that may result in death prior to, during, or soon after birth (e.g., fatal holoprosencephaly) and those that are associated with longevity (e.g., Down syndrome or cystic fibrosis).<sup>150</sup> This definition thus only encompasses abortions characterized by conditions of a fetus as opposed to conditions of a pregnant woman.<sup>151</sup>

1. *Relevant Case Law and State Practice.* Even though the ECtHR has yet to confront laws directly implicating eugenic abortions, several prior decisions are relevant in considering how it may approach pending and future cases. First, as discussed in Part II, in *Tysi c*, the ECtHR clarified that once abortion is permitted by a state’s domestic law, the state has a positive obligation under Article 8 to ensure abortions are accessible.<sup>152</sup> But the ECtHR also acknowledged that in striking a “fair balance . . . between the competing interests of the

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archive/2019/06/selective-abortion-bans-treat-disability-tragedy/592000 [https://perma.cc/6A7R-MJD3] (“[A]bortion-rights opponents are reinforcing the dangerous idea that disabilities are an unbearable burden and, in the absence of government coercion, might be snuffed out altogether.”); Patryk Regalski, *Eugenic Abortion Before the Polish Constitutional Court*, EUR. CTR. FOR L. & JUST. (Nov. 2020), https://eclj.org/eugenics/eu/lavortement-eugenique-devant-le-tribunal-constitutionnel-polonais [https://perma.cc/3X9R-V69M] (describing the then-pending decision of the Polish Constitutional Court on outlawing selective abortions on the basis of fetal impairment as a decision “of great importance” that “will no doubt be followed by another decision, this time by the U.S. Supreme Court”).

149. E.g., Regalski, *supra* note 148; Puppink, *supra* note 5.

150. See discussion *supra* note 5. The definition of “eugenic abortion” may be expanded to include abortion decisions based on fetal race or sex, but these considerations are beyond the scope of this Note.

151. As a result, this Note focuses on any eugenic abortions, regardless of how the pregnant woman might be characterized under abortion laws. In other words, there is no difference, for these purposes, between a woman seeking a eugenic abortion after she became pregnant on purpose and one seeking a eugenic abortion after she became pregnant via rape or incest.

152. *Tysi c v. Poland*, App. No. 5410/03, ¶ 116 (Mar. 20, 2007), http://hudoc.echr.coe.int/eng?i=001-79812 [https://perma.cc/MK35-W2LL].

individual and of the community as a whole[,] . . . the State enjoys a certain margin of appreciation.”<sup>153</sup>

Seven years later, the ECtHR faced, but side-stepped, eugenic abortion as a legal matter in *A.K. v. Latvia*.<sup>154</sup> The applicant had given birth to a child with Down syndrome.<sup>155</sup> She alleged Latvian physicians had denied her prompt and adequate medical care by not providing her with antenatal screening tests; due to her age, she was guaranteed a certain level of antenatal care under Latvian law.<sup>156</sup> The applicant stated had she known, via antenatal screening tests, of the fetal impairment, she would have obtained an abortion.<sup>157</sup> In the closest it has come to the eugenic abortion issue, the ECtHR found there had been an Article 8 violation on procedural grounds, but it did not address legal issues of eugenic abortions, which were not regulated under Latvian law.<sup>158</sup>

More recently, significant changes impacting eugenic abortions are occurring in two European states. In October 2020, the highest court in Poland ruled a domestic law permitting abortions for fetuses with impairments later in a pregnancy than for nonimpaired fetuses was unconstitutional.<sup>159</sup> As 98 percent of abortions obtained in 2019 were carried out under this provision, this decision effectively outlaws all nontherapeutic abortions not involving rape or incest.<sup>160</sup> The ruling

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153. *Id.* ¶ 111.

154. *A.K. v. Latvia*, App. No. 33011/08 (June 24, 2014), <http://hudoc.echr.coe.int/eng?i=001-145005> [<https://perma.cc/3FM8-TH6K>].

155. *Id.* ¶ 11.

156. *Id.* ¶¶ 66–67.

157. *Id.* ¶ 30.

158. *See id.* ¶ 94 (“[T]he domestic courts[] . . . did not properly examine the applicant’s claim that she had not received medical care and information in accordance with domestic law in a manner sufficient to ensure the protection of her interests.”). Importantly, this did not stop intervening conservative groups like the European Centre for Law and Justice from raising the issue. *See id.* ¶¶ 79–83 (describing the third-party submission as alleging “screening for genetic diseases in order to eliminate the [fetus] rather than cure the diseases constituted a systemic incitement to discrimination and violence on the grounds of disability”).

159. Wyrok [Judgment] TK [Constitutional Tribunal] z [of] Oct. 22, 2020, K 1/20 (Pol.), <https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/11300-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy> [<https://perma.cc/YP3D-99DF>] (translated by Google Translate); Monika Scislowska, *Poland’s Top Court Rules Out Abortions Due to Fetal Defects*, ASSOCIATED PRESS (Oct. 22, 2020), <https://apnews.com/article/international-news-poland-abortion-europe-birth-defects-9258358858a72911663cd1d276a8fbd2> [<https://perma.cc/PF5K-CGZ3>].

160. *Poland Abortion Ban: Thousands Protest for Third Day*, BBC (Jan. 29, 2021), <https://www.bbc.com/news/world-europe-55866162> [<https://perma.cc/86FG-7ZRG>]. Prior to this ruling,

garnered approval from the European Centre for Law and Justice (“ECLJ”), a conservative nongovernmental organization, which described it as lifesaving and a step towards eradicating discrimination on the basis of disability.<sup>161</sup> But the decision also provoked mass protests across Poland.<sup>162</sup> Notably, “Polish feminists with disabilities stressed that pitting reproductive rights against disability rights discounts the perspectives of women with disabilities and undermines the human rights approach to disability rights as encapsulated in the [CRPD].”<sup>163</sup> In October 2021, the ECtHR communicated twelve applications challenging Poland’s law under Article 8 of the ECHR.<sup>164</sup>

In Hungary, which has similar abortion laws to Poland, the Constitutional Court recently declined to further consider a similar issue in the context of interpreting a domestic statute’s conditions for when a fetus is considered disabled and thus abortable.<sup>165</sup> The case arose in the context of tort law; parents of a disabled child brought suit against the hospital where their disabled child was born, requesting

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only approximately one thousand abortions were performed annually in Poland, which already had “one of Europe’s most restrictive abortion laws.” *Poland: Regression on Abortion Cases Harms Women*, AMNESTY INT’L (Jan. 26, 2022), <https://www.amnesty.org/en/latest/news/2022/01/poland-regression-on-abortion-access-harms-women> [<https://perma.cc/M8E3-DXMH>]. As a result, even prior to the decision, “thousands of women [would] leave Poland to access abortion care in other European countries, while others [would] import medical abortion pills or seek extra-legal abortion in Poland.” *Id.* Now, however, Poland has eliminated one of the few remaining legal grounds for abortion, exacerbating these dangerous trends. *Id.*

161. Grégor Puppincq, *Poland: The End of Eugenic Abortion*, EUR. CTR. FOR L. & JUST. (Dec. 2020), <https://eclj.org/eugenics/eu/pologne—le-tribunal-constitutionnel-abroge-lavortement-eugenique> [<https://perma.cc/4YHX-D9NB>].

162. Monika Pronczuk, Isabella Kwai & Anatol Magdziarz, ‘Declaration of War’: Protesters in Poland Vow To Fight Abortion Ban, N.Y. TIMES (Jan. 28, 2021), <https://www.nytimes.com/2021/01/28/world/europe/poland-protests-abortion-ban.html> [<https://perma.cc/B46H-H73L>].

163. Magda Szarota & Suzannah Phillips, *In Battle over Abortion, Polish Feminists with Disabilities Are Claiming Their Rights*, MS. MAG. (Dec. 15, 2020), <https://msmagazine.com/2020/12/15/abortion-poland-polish-feminists-women-with-disabilities-fetal-defect> [<https://perma.cc/88FR-YVLD>]; *see id.* (“[M]eaningful reproductive autonomy is a priority for women with disabilities all around the world, both as women and persons with disabilities, and access to abortion is an important part of that reproductive autonomy—and more broadly of their inherent and inalienable right to dignity.”).

164. *Notification of 12 Applications Concerning Abortion Rights in Poland*, EUR. CT. OF HUM. RTS. (July 8, 2021), <http://hudoc.echr.coe.int/eng-press?i=003-7074470-9562874> [<https://perma.cc/FBV6-KS5B>].

165. Eur. Ctr. for L. & Just., *The Hungarian Constitutional Court Rejected the Initiative Against Abortion Law*, EUR. CTR. FOR L. & JUST. (May 2021) [hereinafter ECLJ, *Rejected Initiative*], <https://eclj.org/abortion/eu/the-hungarian-constitutional-court-refused-to-accept-the-initiative-against-abortion-law> [<https://perma.cc/NRU5-56K2>].

damages for “wrongful birth of their child.”<sup>166</sup> The ECLJ submitted an amicus brief to the Constitutional Court, arguing eugenic abortion itself is a violation of international human rights law.<sup>167</sup> The ECLJ’s analysis relied largely on the Convention on the Rights of the Child and rights under the ECHR, and its conclusions were premised on fetal rights being considered within the scope of children’s, and other natural persons’, rights.<sup>168</sup> But the Constitutional Court chose not to hear the case in the spring of 2021 on procedural, not substantive, grounds.<sup>169</sup> Nonetheless, the ECLJ emphasizes the high number of dissenting judges, implying there is room for future eugenic abortion challenges to reach the bench.<sup>170</sup>

## 2. *Applying Human Rights Law Principles to Eugenic Abortions.*

Although the ECtHR has thus far avoided ruling on the legality of eugenic abortions, recent case law and state practice imply a decision

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166. Eur. Ctr. for L. & Just., *Hungary: Wrongful Birth Compensation?*, EUR. CTR. FOR L. & JUST. (Jan. 2021), <https://eclj.org/abortion/eu/prejudice-detre-ne-la-loi-hongroise-sur-laces-a-lavortement-devant-la-cour-constitutionnelle?lng=en> [<https://perma.cc/UQC7-QGCR>].

167. Eur. Ctr. for L. & Just., *Amicus Curiae Brief Submitted to the Constitutional Court of Hungary in the Case No. III/01838/2020*, EUR. CTR. FOR L. & JUST. 8 (Jan. 2021) [hereinafter ECLJ, *Amicus Curiae Brief*], <https://eclj.org/abortion/eu/constitutional-court-of-hungary-noiii/01838/2020> [<https://perma.cc/45W3-7QRS>]. This argument was based in part upon Hungary’s October 2020 signature to the Geneva Consensus Declaration on Promoting Women’s Health and Strengthening Families, which was also signed by Poland and the United States under the Trump administration, and espouses a commitment to restrict abortion access. *Joint Statement Promoting Women’s Health and Strengthening the Family (WHA 73)*, U.S. MISSION TO INT’L ORGS. IN GENEVA, <https://geneva.usmission.gov/2020/11/11/joint-statement-promoting-womens-health-and-strengthening-the-family-wha-73> [<https://perma.cc/J6J9-HCT3>]. Thirty-one additional states were signatories; these are described as “largely authoritarian governments.” Julian Borger, *US Signs Anti-Abortion Declaration with Group of Largely Authoritarian Governments*, GUARDIAN (Oct. 22, 2020, 1:06 PM), <https://www.theguardian.com/world/2020/oct/22/us-trump-administration-signs-anti-abortion-declaration> [<https://perma.cc/28H5-7V2L>]. In January 2021, President Joe Biden removed the United States from the instrument. *Memorandum on Protecting Women’s Health at Home and Abroad*, WHITE HOUSE (Jan. 28, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/28/memorandum-on-protecting-womens-health-at-home-and-abroad> [<https://perma.cc/LPF3-WEQQ>].

168. See ECLJ, *Amicus Curiae Brief*, *supra* note 167, at 4 (relying on the Convention on the Rights of the Child); *see also id.* at 5 (implying the ECtHR, by acknowledging “legitimate interests involved” in abortion disputes, should take the next step by prohibiting abortions).

169. ECLJ, *Rejected Initiative*, *supra* note 165.

170. See *id.* (“It is clear from the dissenting opinions how much the issue divides the panel. Moreover, the rejection was not based on the merits of the case but merely on procedural inadequacy. Hopefully this leaves room for opportunity for the future ban of eugenic abortion as it has happened in Poland.”).

on the issue may be imminent.<sup>171</sup> By identifying the relevant stakeholders and applying the core relevant principles of international human rights law developed in Part II, this Subsection proposes a guide for the ECtHR to follow when reviewing a national law on eugenic abortions which seeks to protect fetal interests and ensure the requisite rights guarantees. The analysis below assumes that a state both permits some abortions and recognizes conscientious objection under its domestic law, as most Council of Europe states do.<sup>172</sup>

First, the Strasbourg Court should identify the three key stakeholders and their respective rights and interests: pregnant women, fetuses, and medical care providers. Pregnant women in a state where abortion is legal have an undisputed right to reproductive agency.<sup>173</sup> Fetuses have no rights under Article 8, but they do have interests.<sup>174</sup> In the context of eugenic abortion, these interests could be in both life and nondiscrimination on the basis of disability. Medical care providers have their own rights to conscientious objection<sup>175</sup> and, in exercising those rights, may serve as a proxy for fetal interests. Assuming the relevant state permits both abortion and conscientious objection under its domestic law, it must perform a balancing act in line with Part II's core human rights principles. In reviewing the balance struck, the ECtHR must identify the discretionary space within which the state may prescribe policies to regulate the relevant rights and interests.

Next, the ECtHR should examine the state's positive and negative obligations—the actions it *must* and *must not* take. Principle I clarifies

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171. Notably, two communicated complaints have tangentially raised eugenic abortion as an issue, but neither have directly challenged the legality of eugenic abortion, unlike the Polish situation, and are thus not covered by the scope of this analysis. See generally *B.B. v. Poland*, App. No. 67171/17 (Jan. 29, 2020), <http://hudoc.echr.coe.int/eng?i=001-201485> [<https://perma.cc/CFM8-VPHN>] (alleging Polish physicians intentionally prevented the applicant from obtaining an abortion after she discovered her fetus was disabled by wielding their conscientious objection rights); *De Pracomtal v. France*, App. Nos. 34701/17, 35133/17 (Aug. 31, 2020), <http://hudoc.echr.coe.int/eng?i=001-204781> [<https://perma.cc/X4GE-9FAT>] (alleging that the French censorship of an advertisement containing testimonials from disabled individuals thanking their mothers constituted discrimination on the basis of disability when the advertisement was removed due to potential trauma it may cause women who had obtained eugenic abortions).

172. See *The World's Abortion Laws*, CTR. FOR REPROD. RTS. (2022), <https://maps.reproductiverights.org/worldabortionlaws> [<https://perma.cc/UX67-KAAN>] (mapping liberal abortion laws across much of Europe); Eur. Parl. Ass., *Resolution 1763*, 35th Sess., Doc. No. 12347 (2010) (concluding that “[t]here is a comprehensive and clear legal and policy framework governing the practice of conscientious objection by health-care providers” in “the vast majority of Council of Europe member states”).

173. See *supra* Part II.A.

174. See *supra* Part II.C.

175. See *supra* notes 90–118 and accompanying text.

the state cannot materially restrict abortion access once it has legalized abortion. In positive terms, this means that, to the extent abortion is legal, the state must ensure abortions are accessible within its jurisdiction. Further, Principle III provides the state cannot limit eugenic abortions on the basis of fetal rights (as opposed to interests). Taken together, these principles indicate a state that has legalized abortion has a negative obligation not to restrict eugenic abortions either directly (by prohibiting eugenic abortions on the basis of fetal rights) or indirectly (by permitting providers to exercise their rights to conscientious objection in ways that make eugenic abortions inaccessible). The state thus has a positive obligation to ensure the accessibility of all legal abortions, including eugenic abortions, to the extent abortion is legal in the general sense. As a result, domestic regulations governing abortion cannot distinguish between eugenic and non-eugenic abortions without running afoul of Principles I and III.

Next, the ECtHR should consider what a state *may* do within the bounds of both international human rights law and its margin of appreciation. To operate appropriately within this discretionary space in which pregnant women's rights to reproductive autonomy (protected by Article 8) and medical care providers' rights to conscientious objection (protected by Article 9) are implicated, the state must have a legitimate aim, and its regulations must be necessary and proportional to achieving this legitimate aim.<sup>176</sup> Both articles indicate "the protection of health or morals" and "the protection of the rights and freedoms of others" constitute legitimate aims of the state.<sup>177</sup> But because there are no fetal rights under Article 8 according to Principle III, fetal interests may be encompassed only by the health and morals justification. Further, the lack of fetal rights precludes a rights clash between pregnant women, who are rightsholders under Principle I, and fetuses, who are not rightsholders. As a result, the only rights clash remaining under the ECHR is between pregnant women and objecting medical professionals.<sup>178</sup> The presence of fetal interests nonetheless complicates this dynamic; their amorphous and open-ended nature may, as shown below, lead states to claim a fairly broad margin of appreciation in an attempt to shield their laws and policies from international judicial scrutiny.

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176. *See supra* Part I.

177. European Convention on Human Rights arts. 8(2), 9(2), Nov. 4, 1950, E.T.S. No. 005.

178. *See supra* Part II.

In achieving balance, several policy routes are available. In line with Principle III, the state may, for example, provide pregnant women with objective, truthful, and non-misleading information about a child's quality of life with disability as resources relevant to making an informed decision. The state may also, in accordance with Principle II, permit medical care providers to opt out of performing eugenic abortions as long as the state ensures, via its positive obligations, pregnant women will nonetheless be able to access providers willing to perform such abortions. In these two areas, the state has room to shape specific policies in light of national interests and values. For example, the state can regulate the type of disability-related information, if any, that is provided to pregnant women in exercising its Principle III obligations.

With regard to conscientious objections, the state may permit, but not require, medical care providers to freely inquire about the reasons why a pregnant woman is seeking an abortion, engaging Principles II and III. Similarly, the state may provide a notification system to ensure that abortion is not becoming inaccessible in certain geographic areas by monitoring the number of conscientious objection requests relative to abortion demand. In contrast to the more categorical direct and indirect regulations that the state expressly cannot enact, these policies are more likely to satisfy the margin of appreciation's necessity and proportionality standard. The state may frame these as necessary to achieve the legitimate aim of protecting morals (safeguarding fetal interests), but these policies are proportionate in that they neither restrict women's access to abortion (Principles I and II) nor demote women's rights below medical care providers' conscientious objection rights and fetuses' interests (Principle III). As a result, the state may safeguard fetal interests in the context of eugenic abortion, but it must do so without infringing upon the rights ensured under international human rights law.

### *B. Home Births*

Both human rights law and the ECtHR have clarified the right to reproductive freedom encompasses not only decisions about whether to continue a pregnancy and give birth, but also decisions about *where* to give birth.<sup>179</sup> Researchers have found there is psychological value for

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179. See *Ternovszky v. Hungary*, App. No. 67545/09, ¶ 24 (Dec. 14, 2010), <http://hudoc.echr.coe.int/eng?i=001-102254> [<https://perma.cc/3QT8-CK3Z>] (“[T]he mother is entitled

women who feel they were able to exert agency, make choices, and exercise control over their childbirth experiences.<sup>180</sup> Different factors may influence women's decisions about where to give birth, including health care coverage, geographic location, socioeconomic status, and cultural or religious beliefs.<sup>181</sup> Some states have historically enjoyed particularly high levels of safe home births, and the COVID-19 pandemic in particular has augmented the attractiveness of a home birth option for many across the world.<sup>182</sup> But though human rights law secures, in Principle I, women's rights to choose where to give birth, the ECtHR will decide future home birth cases against a complicated backdrop of conflicting state practice and case law.

1. *Relevant Case Law and State Practice.* On a macrolevel, there is a general divide between Western and Eastern Europe when it comes to home birth policies.<sup>183</sup> In countries like the United Kingdom, both home births and midwives' attendance at them are legal.<sup>184</sup> The Netherlands leads Europe in home births; there, giving birth at home, with the assistance of a midwife or other medical professional, is the standard practice for uncomplicated pregnancies.<sup>185</sup> Eastern European states, on the other hand, have taken a narrower approach to the legality of home births.

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to a legal and institutional environment that enables her choice [in childbirth], except where other rights render necessary the restriction thereof.”).

180. Katie Cook & Colleen Loomis, *The Impact of Choice and Control on Women's Childbirth Experiences*, 21 J. PERINATAL EDUC. 158, 158 (2012).

181. Jane Sandall, *Place of Birth in Europe*, 81 ENTRE NOUS 16, 16–17 (2015).

182. Julia Ries, *Interest in Home Births Rises During the COVID-19 Pandemic*, HEALTHLINE (June 17, 2020), <https://www.healthline.com/health/pregnancy/home-births-rise-with-covid-19> [<https://perma.cc/93AV-RTHK>].

183. Notably, this is far from the only area in human rights where such a divide exists between Western Europe and more recent signatories to the ECHR. See, e.g., Jeff Diamant & Scott Gardner, *In EU, There's an East-West Divide Over Religious Minorities, Gay Marriage, National Identity*, PEW RSCH. CTR. (Oct. 29, 2018), <https://www.pewresearch.org/fact-tank/2018/10/29/east-west-divide-within-the-eu-on-issues-including-minorities-gay-marriage-and-national-identity> [<https://perma.cc/B4CZ-SK4K>] (“Majorities in all of the surveyed Western European countries favor same-sex marriage, while majorities in almost all of the Central and Eastern European countries oppose it.”).

184. *Where To Give Birth: The Options*, NAT'L HEALTH SERV. (Apr. 8, 2021), <https://www.nhs.uk/pregnancy/labour-and-birth/preparing-for-the-birth/where-to-give-birth-the-options> [<https://perma.cc/W7AV-YG6M>].

185. See Stephanie van den Berg, *Home Birth in the Netherlands: Why the Dutch Cherish Them*, EXPATICA (Apr. 22, 2020), <https://www.expatica.com/nl/healthcare/womens-health/home-births-in-the-netherlands-100749> [<https://perma.cc/ER3D-769U>] (claiming that 30 percent of women in the Netherlands give birth at home).

In 2010, the ECtHR decided the aforementioned *Ternovszky* case against Hungary.<sup>186</sup> The applicant challenged Hungary's lack of "comprehensive legislation on home birth," which she alleged "effectively dissuade[d] health professionals from assisting those wishing home birth."<sup>187</sup> The ECtHR ultimately found this lack of certainty constituted an interference with the applicant's Article 8 rights.<sup>188</sup> Though acknowledging states have a wide margin of appreciation on most Article 8 matters, the ECtHR explained that

the regulation should ensure a proper balance between societal interests and the right at stake. In the context of home birth, regarded as a matter of personal choice of the mother, this implies that the mother is entitled to a legal and institutional environment that enables her choice, except where other rights render necessary the restriction thereof. For the Court, 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. At the same time, the Court is aware that, for want of conclusive evidence, it is debated in medical science whether, in statistical terms, homebirth as such carries significantly higher risks than giving birth in hospital.<sup>189</sup>

Ultimately, because pregnant women were limited in their choices about where to give birth, the ECtHR concluded Hungary's policy was incompatible with both "foreseeability" and "lawfulness."<sup>190</sup>

Four years later, however, the ECtHR appeared to reverse course. In *Dubská & Krejzová v. Czech Republic*,<sup>191</sup> the applicant challenged a Czech law that regulated *where* healthcare providers could offer services, including in the context of childbirth.<sup>192</sup> The domestic law imposed liability on midwives who assisted in home births.<sup>193</sup> Despite its decision in *Ternovszky* and third-party submissions from the World Health Organization advocating for the general safety of home birth,<sup>194</sup>

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186. *Ternovszky v. Hungary*, App. No. 67545/09, ¶ 27 (Dec. 14, 2010), <http://hudoc.echr.coe.int/eng?i=001-102254> [<https://perma.cc/2JGU-GXHF>].

187. *Id.* ¶ 6.

188. *Id.* ¶ 22.

189. *Id.* ¶ 24.

190. *Id.* ¶ 26.

191. *Dubská & Krejzová v. Czech Republic*, App. Nos. 28859/11, 28473/12 (Dec. 11, 2014), <http://hudoc.echr.coe.int/eng?i=001-148632> [<https://perma.cc/WC2P-BFPW>].

192. *Id.* ¶ 82.

193. *Id.* ¶¶ 37–44.

194. *Id.* ¶ 57.

the ECtHR found the Czech law did not constitute an Article 8 violation.<sup>195</sup> The ECtHR determined the Czech Republic had a legitimate aim when interfering with pregnant women's right to choice in childbirth—"protect[ing] the health and safety of the newborn during and after delivery and, at least indirectly, that of the mother."<sup>196</sup> In considering whether the interference was necessary in a democratic society, the ECtHR concluded the state had a wide margin of appreciation in part due to the lack of European consensus on home births.<sup>197</sup>

Balancing the relevant rights and interests at stake, the ECtHR determined "while there is generally no conflict of interest between the mother and her child, certain choices made by the mother as to the place, circumstances or method of delivery may be seen to give rise to an increased risk to the health and safety of the newborns."<sup>198</sup> The ECtHR acknowledged "the majority of the research studies . . . do not suggest that there is an increased risk for home births compared to births in a hospital" as long as certain preconditions are present.<sup>199</sup> Finding that the state had failed to "carefully consider[] the possible alternatives and assess[] the proportionality of their policy in respect of home births,"<sup>200</sup> the ECtHR did not clarify why the Czech law could, or should, not be adapted to permit medical attendance at home births meeting the preconditions making them safe procedures.<sup>201</sup> In his dissent, Judge Paul Lemmens criticized the majority's framing of the Czech state's obligations as negative ones, and he instead advocated for applying a positive obligation analysis to the Czech law.<sup>202</sup> He concluded that the relevant question should be "whether the State

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195. *Id.* ¶ 101.

196. *Id.* ¶ 86.

197. *Id.* ¶ 93 ("[T]here is no clear common ground amongst the member States . . . and [home birth regulation] involves general social and economic policy considerations for the State, including the allocation of financial means . . .").

198. *Id.* ¶ 94.

199. *Id.* ¶ 96. The preconditions are (1) the pregnancy is low-risk, (2) a qualified midwife attends the home birth, and (3) if necessary, transport from home to the hospital should be easily and quickly accessible. *Id.* The ECtHR continued, arguing that in light of the preconditions, the Czech situation, "where medical professionals are not allowed to assist mothers who wish to give birth at home and where no specialised emergency aid is available, may be said to increase rather than reduce the risk to the life and health of the mother and newborn." *Id.*

200. *Id.* ¶ 99.

201. *See id.* ¶ 100 (requiring the Czech Republic merely to "keep the relevant provisions under constant review, reflecting medical, scientific and legal developments").

202. *Id.* ¶ 2 (Lemmens, J., dissenting).

fail[ed] to protect their right to respect for their private life, understood as including the right to define the circumstances in which one gives birth.”<sup>203</sup>

Scholars have struggled to reconcile the ECtHR’s complicated case law on reproductive health. Professor Fleur van Leeuwen notes the ECtHR missed an opportunity in *Ternovszky* to align its home birth jurisprudence with its abortion jurisprudence.<sup>204</sup> Instead of using a positive obligations framework to conclude Hungary had an obligation to ensure the accessibility of home birth, which was permitted under domestic law, the ECtHR simply used a negative obligations framework to assess whether the Article 8 interference was justified.<sup>205</sup> *Dubská* further complicated the doctrine. *Ternovszky* involved a law that was ambiguous as to the legality of midwives participating in home births,<sup>206</sup> and *Dubská* involved a law that flatly prohibited midwives from participating in home births.<sup>207</sup> But despite this technical difference, these decisions nonetheless “suggest[] that the ECtHR is internally conflicted and inconsistent.”<sup>208</sup>

Recent decisions have compounded the confusion. In 2018 and 2019, the ECtHR decided *Pojatina v. Croatia*<sup>209</sup> and *Kosait - ypien v.*

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203. *Id.* Lemmens went on to assess whether despite this positive obligation, a fair balance had been struck between societal and individual interests, concluding in the negative. *Id.* ¶¶ 2–6. He concluded that because women could still choose to give birth at home, but would be prohibited from having a midwife in attendance, the “system, taken as a whole, can[not] be seen as compatible with the stated aim of protection of the health of the mothers and their children.” *Id.* ¶ 3.

204. Fleur van Leeuwen, *Milestone or Stillbirth? An Analysis of The First Judgment of The European Court of Human Rights on Home Birth*, in *EQUALITY AND HUMAN RIGHTS: NOTHING BUT TROUBLE?* 197, 203 (Marjolein van de Brink, Susanne Burri & Jenny Goldschmidt eds., 2015).

205. *Id.* Writing prior to *Dubská*, van Leeuwen expressed hope that *Ternovszky* provided “decent” basis upon which the ECtHR “can build in its future judgments” to further ensure the right of pregnant women to decide where to give birth. *Id.* at 209.

206. *Ternovszky v. Hungary*, App. No. 67545/09, ¶ 6 (Dec. 14, 2010), <http://hudoc.echr.coe.int/eng?i=001-102254> [<https://perma.cc/2JGU-GXHF>].

207. *Dubská & Krejzová v. Czech Republic*, App. Nos. 28859/11, 28473/12, ¶ 82 (Dec. 11, 2014), <http://hudoc.echr.coe.int/eng?i=001-148632> [<https://perma.cc/WC2P-BFPW>].

208. Chao-Yuan Chen & Marie Cheeseman, *European Court of Human Rights Rulings in Home Birth Set To Cause Trouble for the Future: A Review of Two Cases*, 25 *MED. L. REV.* 115, 124 (2016).

209. *Pojatina v. Croatia*, App. No. 18568/12 (Oct. 4, 2018), <http://hudoc.echr.coe.int/eng?i=001-186446> [<https://perma.cc/HF8C-CCPZ>].

Lithuania,<sup>210</sup> respectively. Both cases involved domestic legislation like that in the Czech Republic, prohibiting midwives from assisting with home births.<sup>211</sup> The ECtHR found no violation of Article 8 in both situations.<sup>212</sup> In *Kosait - ypien*, the ECtHR conducted a legitimate aim and necessity and proportionality analysis almost identical to that in *Dubská*.<sup>213</sup> The ECtHR concluded, however, even though pregnant women technically retained the right to give birth at home—albeit without medical assistance—under domestic law, “while it would be possible for [Lithuania] to allow planned home births, it is not required to do so under the Convention.”<sup>214</sup> This statement creates an inconsistency between home birth and abortion regulation. The ECtHR is unequivocal: to the extent a state permits abortion, it is required to ensure abortions are accessible.<sup>215</sup> But it has not addressed, let alone justified, why the same analysis does not apply in the home birth context—that is, to the extent a state permits home birth, it must ensure home births are accessible.

Currently, *Ioni -Ciurez v. Romania*,<sup>216</sup> in which the applicant alleged she was “forced” to give birth in a hospital instead of at home, is pending before the ECtHR.<sup>217</sup> This case will be particularly significant in the development of home birth jurisprudence because unlike *Dubská*, *Pojatina*, and *Kosait - ypien*, it does not involve a legal prohibition on midwives participating in home births.<sup>218</sup> Instead, this case involves a regulatory structure of uncertainty, much like the Hungarian legal ambiguity at issue in *Ternovszky*.<sup>219</sup> The ECtHR may choose either to find an Article 8 violation for the same reasons it did in *Ternovszky*, completely rebuke its *Ternovszky* reasoning and

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210. *Kosait - ypien v. Lithuania*, App. No. 69489/12 (June 4, 2019), <http://hudoc.echr.coe.int/eng?i=001-193452> [<https://perma.cc/8KXV-KFLG>].

211. *Pojatina*, App. No. 18568/12, ¶ 8; *Kosait - ypien*, App. No. 69489/12, ¶ 44.

212. *Pojatina*, App. No. 18568/12, ¶ 91; *Kosait - ypien*, App. No. 69489/12, ¶ 112.

213. *Kosait - ypien*, App. No. 69489/12, ¶¶ 90–110.

214. *Id.* ¶ 107.

215. *Tysi c v. Poland*, App. No. 5410/03, ¶ 116 (Mar. 20, 2007), <http://hudoc.echr.coe.int/eng?i=001-79812> [<https://perma.cc/EZ68-YCL9>].

216. *Ioni -Ciurez v. Romania*, No. 42594/14 (Mar. 7, 2017), <http://hudoc.echr.coe.int/eng?i=001-172633> [<https://perma.cc/A7JQ-639T>].

217. *Id.*

218. *Id.* § B.

219. *Compare id.* (“Under Romanian law home birth is neither expressly prohibited nor allowed.”), with *Ternovszky v. Hungary*, App. No. 67545/09, ¶ 6 (Dec. 14, 2010), <http://hudoc.echr.coe.int/eng?i=001-102254> [<https://perma.cc/2JGU-GXHF>] (“[T]here is no comprehensive legislation on home birth in force in Hungary . . .”).

abandon attempts to reconcile it with more recent case law by finding no Article 8 violation, or revisit the right to choice in childbirth entirely. The following Subsection thus encourages the ECtHR to align its home birth jurisprudence with its abortion jurisprudence—although states may have some leeway in regulating home births, once they permit home births, they should make them accessible to all pregnant women.

2. *Applying Human Rights Law Principles to Home Births.* This Subsection uses the core international human rights law principles to map the various rights- and interests-holders in the home birth space, advocating a framework for the ECtHR to use in its next home birth decision. The analysis below assumes that a state both permits home births and recognizes conscientious objection under its domestic law.

First, as with eugenic abortions, the core stakeholders are pregnant women, fetuses, and medical care providers. Pregnant women have the right to choose how to give birth, including the location.<sup>220</sup> Fetuses hold only interests, not Article 8 rights; in the home birth context, fetuses are on the cusp of becoming children and thus rightsholders, so one can identify a strong interest in—arguably approaching a right to—a safe birth.<sup>221</sup> Finally, medical care providers can act as a proxy for fetal interests and also retain their conscientious objection rights not to participate in procedures to which they are morally opposed.<sup>222</sup> The state may protect and represent the various rights and interests, namely the health and safety of mothers and newborns.<sup>223</sup> Again, assuming that the relevant state permits both home birth and conscientious objection under its domestic law, the ECtHR should use the core human rights principles to determine the margin within which the state may prescribe policies to regulate the rights and interests conflicts under the ECHR.

As in the eugenic abortion context, the Strasbourg Court should next consider what the state *must* and *must not* do, or its positive and negative obligations. Under Principle I, once the state has decided to allow women to choose to give birth at home under domestic law, its negative obligations prescribe that it may not inhibit the safety of or

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220. *See supra* Part II.A.

221. *See supra* Part II.C.

222. *See supra* Part II.B.

223. *See supra* Part II.D.

access to home births through restrictions on medical care providers attending them. Additionally, the state has a positive obligation to ensure the availability of safe home birth options by ensuring that private actors do not inhibit the exercise of the right to choice.<sup>224</sup> According to Principle III, the state must not restrict home births on the basis of alleged fetal rights. And as with abortion, states may permit medical care providers to exercise conscientious objection and opt out of attending and providing medical assistance at home births under Principle II. In line with Principle I, however, the state must simultaneously ensure permitting conscientious objection does not eradicate the meaning of the right to home birth. A medical care provider may be able to opt out, but this should not impair a pregnant woman's access to medical assistance at her home birth.

Subsequently, the ECtHR should consider what the state *may* do within the bounds of both human rights law and its margin of appreciation. Principle III does not prohibit the state from considering the rights of children, including newborns, in formulating home birth regulations. Further, Principles I and III permit the state to regulate the conditions under which home births may be allowed to occur under the supervision of a medical care provider, as long as the right to home births is not rendered inaccessible.

Once again, these limitations on what is permissible leave a significant space in which states may shape their own home birth policies. Even when finding home birth regulations did not constitute an Article 8 violation, the ECtHR itself acknowledged home births do not pose significant safety concerns for women with low-risk pregnancies.<sup>225</sup> Fetal interests may warrant increasing protection as birth—and thus the existence of a child, who is a rightsholder—approaches. In line with representing fetal interests in and securing children's rights to safety in childbirth, pursuant to Principle III, the state may set its own pregnancy risk threshold to identify women who should give birth in a medical facility as opposed to at home. In order

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224. See EUR. CT. OF HUM. RTS., *supra* note 32, at 8 (“[A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition . . . , there may be positive obligations inherent in an effective respect for private life.”).

225. See *Dubská & Krejzová v. Czech Republic*, App. Nos. 28859/11, 28473/12, ¶ 96 (Dec. 11, 2014), <http://hudoc.echr.coe.int/eng?i=001-148632> [<https://perma.cc/WC2P-BFPW>] (noting in the cases of low-risk pregnancies attended by midwives, “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 a hospital”).

to achieve this, the state might require all women who intend to give birth at home to be regularly screened for certain higher risk factors months or weeks prior to exercising their right to give birth at home. For those pregnancies in which the pregnant woman's or fetus's health appears to meet the risk threshold, the state may condition access to medical attendance during birth on it occurring in a medical facility. Similarly, in line with Principle III, the state may set standards of the conditions in which home births attended by medical care providers are permitted to occur. For example, the state may require the home be within a certain geographic radius from a hospital in case of emergency or certain sanitation standards must be met during the weeks and days prior to the home birth. In doing so, states can simultaneously pursue their legitimate aims of protecting health and safety *and* operate within their margins of appreciation, all while upholding a meaningful right to reproductive choice when it comes to birth locations. As with abortions, it is certainly possible to balance the relevant rights and interests without resorting to effective bans on home births in violation of pregnant women's human rights.

#### CONCLUSION

The ECtHR has thus far failed to acknowledge the inconsistencies in its reproductive rights jurisprudence. For the right to reproductive health to be meaningful, ensuring access to abortion services is insufficient. The ECtHR must confirm abortion rights are not subject to limitations based on women's motivations, *and* it must apply the same access standard to other reproductive rights, such as the right to choice in determining how and where to give birth. By ensuring equivalent protections for rights that are comparably vital to women's agency, the ECtHR will give effect to the full meaning of the right to reproductive health. Through the international human rights law framework proposed in this Note, the ECtHR has the tools it needs to resolve these matters consistently and in accordance with globally recognized standards.

In fact, the proposed reproductive rights framework may, and should, be expanded via further research. In addition to applying to abortion and home birth disputes, it may be effective in the contexts of reproductive health issues like in vitro fertilization and gestational surrogacy. A version of this framework may also be exported beyond Europe. As countries across the world prepare to face similar questions around reproductive decision-making, medical care providers' rights,

and fetal interests, consideration of the three core principles should guide courts' analyses and ensure compliance with human rights standards.<sup>226</sup>

Ultimately, reproductive freedom remains a divisive issue in various national contexts. At their core, many cultural wars embody the struggle between religious interests and reproductive autonomy. Purporting neither to advance a final resolution for such conflicts nor to develop a rights hierarchy, this Note advocates for the centrality of human rights law in balancing the various rights and interests at stake in each given conflict. As a result, when the international human rights landscape evolves to expand certain rights—even at the expense of others—judicial decision-makers should take note and conform their analytical frameworks to the direction of human rights norms.

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226. For example, in November 2020, the U.S. Court of Appeals for the Sixth Circuit lifted a preliminary injunction on a Tennessee law that bans abortions motivated by fetal race, sex, or a Down syndrome diagnosis. Order at 3, 5, *Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969 (6th Cir. Nov. 20, 2020). In February 2021, South Dakota's governor introduced a bill seeking to ban abortions obtained on the basis of a fetal Down syndrome diagnosis. H.B. 1110, 2021 Leg., 96th Sess. (S.D. 2021). It has since been signed into law. S.D. CODIFIED LAWS § 34-23A-90 (2021). In Mexico, a ruling decriminalizing abortion by the Supreme Court has been undermined in practice by an expansive conscientious objection law. Natalie Kitroeff & Oscar Lopez, *Abortion Is No Longer a Crime in Mexico. But Will Doctors Object?*, N.Y. TIMES (Sept. 13, 2021), <https://www.nytimes.com/2021/09/13/world/americas/mexico-abortion-objectors.html?referringSource=articleShare> [<https://perma.cc/HX58-KB9H>]. Mexico's Supreme Court is expected to take up the conscientious objection issue in the coming weeks. *Id.*