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REPRODUCTIVE INJUSTICE IN THE NEW MILLENNIUM

SYBIL SHAINWALD*

INTRODUCTION

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INTRODUCTION

Recent attempts to curb abortion rights through enactment of new, restrictive regulations have sparked fresh debate, and the need to learn from history, rather than be “condemned to repeat it.”¹ Forty-three new abortion restrictions were passed by nineteen states in 2012.² The previous year, a staggering ninety-two restrictions were

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1. GEORGE SANTAYANA, *THE LIFE OF REASON, OR, THE PHASES OF HUMAN PROGRESS* 284 (1905) (noting that “[t]hose who cannot remember the past are condemned to repeat it”).

2. *Laws Affecting Reproductive Health and Rights: 2012 State Policy Review*, GUTTMACHER INST., <http://www.guttmacher.org/statecenter/updates/2012/statetrends42012.html> (last visited Nov. 3, 2013).

passed, the largest number ever reported.³ Simultaneously, no new laws were passed in 2012 to improve access to abortion, family planning services, or comprehensive sex education.⁴

State restrictions can be broken down into four general areas: (1) mandating unnecessary medical procedures, such as ultrasounds; (2) increased level of scrutiny on abortion providers (e.g., requiring abortion providers to have facilities with technology as advanced as hospitals); (3) requirements for abortion providers to have admitting privileges at hospitals; and (4) time limits, such as the Arizona and Louisiana bans on abortions performed after twenty weeks.⁵

Abortion is an issue so charged with emotion that it is probably the most misrepresented subject in the history of Anglo-American law. That the misrepresentors have been legal scholars of the reputation . . . of a Bracton or a Coke, is indeed cause for astonishment, but our surprise must not blind us to the facts.⁶

Had twentieth century doctors known the history of abortion—that the real reason for the nineteenth century abortion ban was the danger of infection and death due to the lack of antiseptic procedures and the need to protect the patient—“there would have been no need for *Roe v. Wade*.”⁷ So testified Professor Cyril W. Means, Jr., before Congress in opposition to a proposed constitutional amendment to outlaw abortion.⁸

A reexamination of the history of abortion law in the United States is essential to an understanding of recent changes. Part I of this Article will provide a synopsis of the early Anglo-American view of abortion at common law, the early anti-abortion statutes, and the state of abortion during the early twentieth century. Part II will discuss the liberalization of abortion laws, as well as the ways in which the law pertaining to a woman’s right to choose has evolved since 1973. Finally, Part III will analyze the constitutionality of the current wave of restrictions.

3. *Id.*

4. *Id.*

5. Jeffrey Toobin, *The Abortion Issue Returns*, DAILY COMMENT (May 28, 2013), <http://www.newyorker.com/online/blogs/comment/2013/05/abortion-returns-to-the-supreme-court.html>.

6. *Hearings on Proposed Constitutional Amendments on Abortion Before the Subcommittee on Civil and Constitutional Rights of the H. Committee on the Judiciary*, 94th Cong. 2, 35–36 (1976) (statement of Professor Cyril W. Means, Jr.) [hereinafter *Hearings*].

7. *Id.* at 32.

8. *Id.*

I. COMMON LAW, THE EARLY STATUTES, AND THE EMBERS OF REFORM

During the late seventeenth, the whole of the eighteenth, and early nineteenth centuries, English and American women were totally free from all restraints, ecclesiastical as well as secular, in regard to the termination of unwanted pregnancies . . .

—Cyril C. Means, Jr.⁹

In 1973, Justice Harry Blackmun wrote in *Roe v. Wade*:¹⁰

[i]t is undisputed that at common law, abortion performed *before* “quickening”—the first recognizable movement of the fetus *in utero*, appearing from the 16th to the 18th week of pregnancy—was not an indictable offense.¹¹

Furthermore, Justice Blackmun referred to a “recent review” that argued that even post-quickening abortion was never established as a criminal offense under the common law.¹² The review referred to was written by Professor Cyril Means, Jr., a Professor of Law at New York Law School.¹³

9. Cyril C. Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?*, 17 N.Y.L.F. 335, 373 (1971) [hereinafter Means 2]. Professor Means previously wrote *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) [hereinafter Means 1].

10. *Roe v. Wade*, 410 U.S. 113, 132 (1973).

11. *Id.* at 132. For a further discussion of *Roe v. Wade*, see *infra* Part II.

12. *Id.* at 135.

13. See JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 13 (2006). Although Dellapenna’s book criticizes Professor Means’ analysis and those other scholars who have confirmed his work, the book is deeply flawed. *Id.* at 684. It contains numerous typographical errors such as the second “waive” of feminism and “phased” for “fazed,” *Id.* at 99, 641, 644, 684, 764, 848, and is filled with self contradictions. For example, the account of *Roe v. Wade* indicates that attorney Sarah Weddington did not use plaintiff’s claim that her pregnancy resulted from rape (a story that the plaintiff recanted years later). *Id.* at 680. Yet, elsewhere in the same account, the author says that “this lie, repeated frequently in open court, was carried up without question and appears in the Supreme Court opinion as well.” *Id.* at 678–83, n.392. But the page cited in the *Roe* opinion does not support a claim of rape. *Roe*, 410 U.S. at 143. It merely refers to a policy on rape and abortion proposed by a committee of the American Medical Association. *Roe*, 410 U.S. at 142, 113, 120, 124–25. The *Roe* opinion’s description of “Jane Roe” says nothing about a rape claim. *Id.* at 120.

An extremely serious misstatement is contained at page 592 of the book, where Dellapenna says that a group of people who had handicaps as children “unanimously agree that they should have been allowed to die.” DELLAPENNA, at 592. The essay by C. Everett Koop, which Dellapenna cites, actually reads “not have been allowed to die.” C. Everett Koop, *Ethical and Surgical Considerations in the Care of the Newborn with Congenital*

Up until 1968, scholars had neglected to produce or analyze the history of abortion in Anglo-American law.¹⁴ Professor Means was a member of the Governor's Commission Appointed to Review New York State's Abortion Law¹⁵ and his exhaustive research was incorporated into that Report, which was the first history of abortion.¹⁶ The Report noted that abortion was not illegal in either England or America before the nineteenth century,¹⁷ and that even when abortion was banned in the 1800s, the purpose was solely to protect the life of the mother.¹⁸ Professor Means' history, described as the "new orthodoxy,"¹⁹ is now accepted by the vast majority of legal scholars.²⁰

Abnormalities, in *INFANTICIDE AND THE HANDICAPPED NEWBORN* 94–95 (Dennis J. Horan and Melinda Delahoyde eds., 1982).

The book also claims that the Supreme Court had actually sustained abortion statutes in several earlier cases. *Id.* at 689 n.445 (citing *Wolf v. Colorado*, 338 U.S. 25, 25 (1949); *Missouri ex rel. Hurwitz v. North*, 271 U.S. 40, 41 (1926); *United States v. Holte*, 236 U.S. 140, 145 (1915); *Hawker v. New York*, 170 U.S. 189, 190 (1898); *Ex parte Jackson*, 96 U.S. 727 (1877)). Dellapenna credits another author for this information, Frank Scaturro, and chides the Court for not mentioning them. See DELLAPENNA, at 689 n.445 (citing Frank Scaturro, *Abortion and the Supreme Court: Roe, Casey, and the Myth of Stare Decisis*, 3 HOLY CROSS J. OF L. & PUB. POL'Y 133 (1998)). Although the cases did concern abortion prosecutions, the constitutionality of such a prosecution was never raised. See *Hawker*, 170 U.S. at 190; see also *Holte*, 236 U.S. at 145. As a first year law student learns, "the most that can be said is that the point was in the case if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925); see also *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (Jackson, J.) (an issue not "raised in briefs or argument nor discussed in the opinion of the Court" cannot be taken as "a binding precedent on this point"). To the extent that Dellapenna contends that the earlier cases must have "assumed" constitutionality, even if he correctly characterized this "assumption," it is sufficient to note that the "[Supreme] Court is not bound by its prior assumptions." *Lopez v. Monterey Cnty.*, 525 U.S. 266, 281 (1999).

14. See, e.g., 3 JAMES FITZJAMES STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 54 (1883) (concluding merely that abortion was a crime exclusively under the jurisdiction of the ecclesiastical courts); 11 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 537 (23 vol., 7th ed. 1956) (barely mentioning abortion in his multivolume history).

15. See CHARLES W. FROESSEL ET AL., *REPORT OF THE GOVERNOR'S COMM'N APPOINTED TO REVIEW NEW YORK STATE'S ABORTION LAWS* (1968) (proposing revisions to New York's abortion laws) [hereinafter *REPORT OF THE GOVERNOR'S COMM'N*]. The Commission was chaired by the Honorable Charles W. Froessel, a former Judge of the New York Court of Appeals, that State's Court of last resort. *Id.*

16. See DELLAPENNA, *supra* note 13, at 13.

17. See Means 2, *supra* note 9, at 336, 351–54, 374–75, 409–10, n.175.

18. See *id.* at 382–92; see also Means 1, *supra* note 9, at 511–15.

19. DELLAPENNA, *supra* note 13, at 13.

20. See, e.g., DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT OF PRIVACY AND THE MAKING OF ROE V. WADE* 271–72 (2d ed. 1998); JAMES MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF A NATIONAL POLICY, 1800–1900*, at 265 (1978); LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND THE LAW IN THE UNITED STATES, 1867–1973*, at 8–14 (1997); Ronald Dworkin, *The Great Abortion Case*, N.Y. REV. BOOKS 49–50, n. 10 (1989); Cass Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 36–37, n.134 (1992).

A. Legal Abortions (c. 1250–1803)

The practice of abortion was common throughout history.²¹ Records show that the Romans relied on the juice of the now extinct silphium plant to induce abortions, while the Greeks employed the herb pennyroyal for the same purpose.²² However, the starting point for the present discussion must be the common law decisions that preceded the first state anti-abortion laws passed in America.²³

In England between 1327 and 1803, and in the United States between 1607 and 1830, the common law afforded women the right to have an abortion.²⁴ The bases for this law were primarily two anonymous cases: (1) “The Twinslayer’s Case,” also known as *Rex v. de Bourton*, involved a defendant who had beaten a woman in an advanced stage of pregnancy, terminating her pregnancy with twins.²⁵ The justices were not willing to consider the matter as a felony.²⁶ (2) “The Abortioneer’s Case,” *Rex v. Anonymous*, involved a defendant who was indicted for killing a child in a mother’s womb, but was not convicted because of the difficulty in proving his responsibility for the death.²⁷

The writings of Henry de Bracton, an English jurist in the mid-thirteenth century, indicate that these cases involved problems of procedural proof rather than the legality of abortion.²⁸ Bracton wrote that if someone “[hit] a pregnant woman or g[ave] her poison in order to procure an abortion, if the foetus [was] already formed or quickened, especially if it [was] quickened, he commit[ted] homicide.”²⁹

It must be emphasized that Bracton used the word “quickened.”³⁰ The reasoning behind this phrase was that the central issue, even at common law, was at what point a fetus became a person.³¹ Professor

21. See N.E.H. HULL & PETER C. HOFFER, *ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY* 12 (2001).

22. See *id.* at 12–13.

23. See *infra* Part I.B. For a thorough discussion of Roman, Greek, and other early cultural views on abortion, see *Special Project: Survey of Abortion Law*, 1980 ARIZ. ST. L.J. 67, 73–83 (1980) [hereinafter *Survey*].

24. See Means 2, *supra* note 9, at 336–37.

25. *Id.* at 337 (translating *Rex v. Anonymous*, Y.B. 1 Edw. 3, fol. 23, pl. 18 (1327) (Eng.)). This case comes from a “Yearbook,” which reports the legal discussions in the royal courts of England. See J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 204–06 (3d ed. 1990).

26. Means 2, *supra* note 9, at 337.

27. *Id.* at 339 (translating *Rex v. Anonymous*, Y.B. 22 Edw. 3 (K.B. 1348)).

28. 2 HENRY DE BRACON, *THE LAWS AND CUSTOMS OF ENGLAND* 341 (in Latin, c. 1250) (Samuel E. Thorne ed., 1968).

29. *Id.*

30. *Id.*

31. See Means 1, *supra* note 9, at 420.

Means cited the writings of Sir William Staunford (1509–1558), a judge of the Court of Common Pleas, and William Lambarde (1536–1601), a legal critic, who both claimed that an unborn child was not a person *in rerum natura* and consequently its death was not murder.³²

The term “animated” was interpreted to have both “physical and philosophical underpinnings.”³³ While doctors during the Middle Ages had no dependable methods of determining when a woman was pregnant,³⁴ both theologians and philosophers alike argued that a fetus was not a human being until “ensoulment, or animation, the point between conception and birth at which the fetus acquires a rational soul.”³⁵

Furthermore, at the time Bracton wrote his commentary, abortion cases were primarily within the jurisdiction of ecclesiastical courts³⁶ rather than the secular courts. Consequently, there would have been very meager secular case law on the subject, and other sources had to be examined to determine the common law.³⁷ One English historian believed that Bracton’s discussion of abortion was actually developed from a twelfth century handbook on Canon law.³⁸

By the seventeenth century, cases dealing with abortion fell within the jurisdiction of the Crown.³⁹ At this point, commentators began to place a greater emphasis on whether a woman was “quick with child,”⁴⁰ rather than pregnant, in discussions on abortions.

The doctrine of quickening was originally developed by St. Thomas Aquinas in the twelfth century.⁴¹ Aquinas taught that the fetus did not have a soul until the point of quickening,⁴² that fetal

32. *See id.* (citing WILLIAM STAUNFORD, *LES PLEAS DEL CORON* ch. 13 (1557); WILLIAM LAMBARDE, *OF THE OFFICE OF THE JUSTICE OF THE PEACE* 217–18 (1581)).

33. Amy Johnson, *Abortion, Personhood, and Privacy in Texas*, 68 *TEX. L. REV.* 1521, 1522 (1990).

34. *See MOHR, supra* note 20, at 4.

35. Johnson, *supra* note 33, at 1522 (citing Catechism of the Council of Trent (1545–1563), Creed, pt. I, art. III, no. 4 (“Whereas no human body, when the order of nature is followed can be informed by the soul of man except after the prescribed interval of time.”)); H. de Dorlodot, *A Vindication of the Mediate Animation Theory*, in *A SHORT HISTORY OF EMBRYOLOGY* 272, 275, 278 (E. Messenger ed., 1949).

36. The ecclesiastical courts were established after the Norman Conquest and dealt with religious matters and moral crimes such as abortion. *See Survey, supra* note 23, at 86.

37. *See id.*

38. *See Maitland, Selected Passages from Bracton and Azo*, in 8 *SHELDON SOCIETY* 225 (1894). Professor Dellapenna concedes that Bracton used canon law to “fill in the gaps” in the common law.

39. *See JOHN KEOWN, ABORTION, DOCTORS AND THE LAW* 6 (1988).

40. “Quickening” refers to the first time a pregnant woman feels fetal movements, which occurs between sixteen and twenty weeks. *See STEDMAN’S MEDICAL DICTIONARY FOR THE HEALTH PROFESSIONS AND NURSING* 1243 (5th ed. 2005).

41. *See Survey, supra* note 23, at 87–88.

42. A. PEGIS, 1 *BASIC WRITINGS OF SAINT THOMAS AQUINAS Q.* 709 (1945).

movement should be used to differentiate between pregnancy stages,⁴³ and that abortion prior to this point was not the same as killing a person.⁴⁴ Once abortion fell within the jurisdiction of the common law courts, the quickening doctrine was adopted as the legal standard for differentiating between legal and illegal abortions.⁴⁵

Evidence to support the use of this standard is found in the commentaries written by Sir Edward Coke in which he observes that abortions that took place after the “quickening” of a fetus was a felony, but not murder.⁴⁶ Sir Matthew Hale’s *Summary of the Pleas of the Crown* echoes these sentiments: “[Abortion] must be a person *in rerum natura*. If a woman quick with Child take a potion to kill it, and accordingly it is destroyed without being born alive, a great misprision, but no Felony; but if born alive, and after dies of that potion, it is Murder.”⁴⁷

The difference between Bracton’s and Justice Coke’s accounts of abortion law is due to the evolution of English law between 1200 and 1600.⁴⁸ Bracton’s use of the terms “formed” or “animated” was derived from church law, not the common law of the secular courts.⁴⁹ In contrast, Coke’s quickening doctrine gained widespread acceptance centuries after Bracton had written his work when abortion cases were being heard by secular courts.⁵⁰ Thus, while the Church may have treated abortion before fetal movement as a crime, the common law did not.

Another factor supporting a common law distinction between “pregnant” and “quick with child” comes from the procedural rule of reprieve.⁵¹ As Sir William Blackstone wrote:

But if she once hath had the benefit of this reprieve, and been delivered, and afterward becomes pregnant again, she shall not be entitled to the benefit of a farther respite for that cause. For she may now be executed before the child is quick in the womb; and shall not, by her own incontinence, evade the sentence of justice.⁵²

43. *Id.* at 706.

44. See J. NOONAN, THE MORALITY OF ABORTION—LEGAL AND HISTORICAL PERSPECTIVES 23 (1970).

45. See *Survey*, *supra* note 23, at 88.

46. See EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 50–51 (Garland Publ’g 1979) (1644).

47. SIR MATTHEW HALE, PLEASE OF THE CROWN: OR A METHODOLOGICAL SUMMARY OF THE PRINCIPLE MATTERS RELATING TO THAT SUBJECT 53 (1682).

48. See *Survey*, *supra* note 23, at 89.

49. *Id.*

50. *Id.*

51. See Means 2, *supra* note 9, at 421.

52. 4 WILLIAM BLACKSTONE, COMMENTARIES *394–95 (1769).

Justice Blackstone also supported Justice Coke's born-alive rule,⁵³ believing that the act of abortion while "quick with child" was merely a misdemeanor.⁵⁴

Professor Means stated that "at common law, abortion, even after quickening, was not even a misprision,"⁵⁵ although there is some evidence that an abortion performed after quickening could be prosecuted as a misdemeanor,⁵⁶ as Coke contended.⁵⁷ Be that as it may, abortions before quickening certainly were not chargeable offenses under English Common law.⁵⁸

There was an obvious distinction made involving the period in a pregnancy between twenty and twenty-four weeks, i.e., from the moment the woman can feel the fetus, until viability.⁵⁹ This distinction is analogous to the modern constitutional thinking concerning state regulation and involvement at later stages of pregnancy.⁶⁰ While it is evident that at common law an abortion during this period could be considered a crime,⁶¹ this can be explained by the lack of medical knowledge regarding the point at which a child is able to survive on its own outside the womb.⁶² The important point to take away from this portion of history, is that up until the enactment of anti-abortion laws in the nineteenth century abortion was, in fact, legal under the common law, as Professor Means documented.⁶³

B. Abortion Becomes a Crime: The Birth of Anti-Abortion Legislation (1803–1900)

In 1803, abortion became a felony offense in England.⁶⁴ The statute⁶⁵ was developed by the Chancellor of England, Lord Ellenborough, a moralist and traditionalist.⁶⁶ No adequate explanation has

53. See *supra* notes 46–47 and accompanying text.

54. See DELLAPENNA, *supra* note 13, at 239; see also WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 80 (Richard & Lintot, eds, 4th Ed. 1762) ("But at this Day, it is said to be a great Misprision [misdemeanor] only, and not Murder, unless the Child be born alive . . .").

55. See Means 1, *supra* note 9, at 353.

56. See *Regina v. Webb* (Q.B. 1602), CALENDAR OF ASSIZE REC., SURREY INDICTMENTS, ELIZ. I, at 512 (no. 3146) (J. Cockburn ed., 1980); see also *Regina v. Sims*, 75 ENG. REP. 1075 (Q.B. 1601).

57. See *supra* note 46 and accompanying text.

58. See Means 2, *supra* note 9, at 353.

59. See HALE, *supra* note 47, at 53.

60. For a more thorough discussion of fetus viability, see *infra* Parts II & III.

61. See *Survey*, *supra* note 23, at 88.

62. See *supra* notes 39–45 and accompanying text.

63. See Means 1, *supra* note 9, at 420.

64. See *Survey*, *supra* note 23, at 91.

65. 43 Geo. III c. 58.

66. See HULL & HOFFER, *supra* note 21, at 19. For a short biography of Lord Ellenborough, see DELLAPENNA, *supra* note 13, at 246.

been given for Lord Ellenborough's Act,⁶⁷ but it is clear that this law criminalized abortions at *all stages of pregnancy*.⁶⁸ Incredibly, the Act made successful abortions prior to quickening a crime punishable only by a fine, while the mere attempt to perform an abortion after quickening could yield a death sentence.⁶⁹ The inconsistencies in Lord Ellenborough's Act were "rectified" in 1828, when all surgical abortions were made illegal, and the punishment for pre-quickening abortions reduced.⁷⁰

The English abortion law was not immediately adopted in the United States.⁷¹ In fact, prior to 1821 prosecutions for abortion in the United States were "virtually nonexistent."⁷² There is evidence that abortion after quickening had indeed been a crime in the colonies prior to the Revolution.⁷³ However, after the United States gained its independence, there is no evidence to suggest abortion was treated as a crime during the first few decades of the new nation. Instead, reform movements in America sought to adopt laws that lacked the "brutality of the English criminal code."⁷⁴ Thus, when the first reported abortion cases took place in Massachusetts in 1812, the Supreme Judicial Court dismissed the charges when the prosecution failed to prove that the woman had quickened.⁷⁵

In 1821, Connecticut became the first state to ban post-quickening abortions.⁷⁶ The primary purpose of the law was to prosecute abortionists, rather than women.⁷⁷ In practice, charges were only brought when a woman died or was grievously injured.⁷⁸ In the following decade, Missouri, Illinois, and New York legislators adopted laws with a wording similar to the Connecticut statute;⁷⁹ however, the statutes in Missouri and Illinois notably excluded the quickening doctrine.⁸⁰

67. KEOWN, *supra* note 39, at 12; *see also* DELLAPENNA, *supra* note 13, at 246 (conceding that there was "no reported public outcry against abortion" to explain the act). *But see* DELLAPENNA, *supra* note 13, at 256–57 (arguing that protection of the fetus was part of the purpose of the act).

68. *See* KEOWN, *supra* note 39, at 25 (emphasis added).

69. *See Survey*, *supra* note 23, at 92 (arguing that this inconsistency resulted from the legislation being poorly drafted).

70. Lord Lansdowne's Act, 1828, 9 Geo. IV, c. 31 (1828).

71. *See* HULL & HOFFER, *supra* note 21, at 19; *see also Survey*, *supra* note 23, at 93.

72. *See Survey*, *supra* note 23, at 93.

73. *See* DELLAPENNA, *supra* note 13, at 211–28 (claiming that "no one has advanced any reason to suppose that public attitudes towards abortions changed during . . . the early years of the Republic" despite any supporting case law).

74. HULL & HOFFER, *supra* note 21, at 19.

75. *Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812).

76. *See* MOHR, *supra* note 20, at 20–21 n.8 (citing 1821 Conn. Pub. Acts tit. 22 §§ 14, 16, at 152–53).

77. *See* MOHR, *supra* note 20, at 20–21.

78. *See* HULL & HOFFER, *supra* note 21, at 20.

79. *Id.*

80. *Id.*

Nevertheless, prior to 1840, all but eight of the states retained the common-law right to pre-quickening abortions.⁸¹

It remains somewhat of a mystery as to why some states, including New York, legislatively advanced the quickening doctrine by treating abortion before quickening as a misdemeanor.⁸² Although it has been argued that the phrase “quick with child” was synonymous with all stages of pregnancy, even in 1829,⁸³ the argument is dispelled by the very language of the New York statute, which explicitly distinguished between “any woman pregnant with a quick child” and simply a “pregnant woman.”⁸⁴ The best explanation is that the few prosecutions that took place suggest that the change was not intended to treat the embryo as a victim of a crime.⁸⁵ Other facts also support the proposition that the earliest American abortion laws were designed to protect the woman rather than the fetus.⁸⁶ For example, it is indicative that in the two decades after Connecticut passed its law, no state abortion law punished the pregnant woman.⁸⁷ In fact, a New Jersey case in 1858 explicitly states that the legislature’s intent was not to prevent abortions, but rather to guard the “health and life of the mother.”⁸⁸ Professor Means attributed this reasoning to the passage of the New York statutes in 1828.⁸⁹ Thus, until the 1840s state abortion laws were passed because of a greater recognition that abortion procedures were unsafe and a threat to the life of the mother.⁹⁰

There were, however, several cases in the nineteenth century in which a court rejected the protection of fetal life as a purpose for banning abortion.⁹¹ This shift necessitates an inquiry into the cause of the mid-nineteenth century spread of anti-abortion legislation designed to protect the unborn.⁹² Attitudes towards abortion in America began to change around the 1840s due to three factors: “(1) the perceived frequency of abortions by white, middle-class, Protestant,

81. *Id.* at 20–21.

82. *See* N.Y. REV. STAT. pt. IV, ch. 1, tit. 2, §§ 8, 9, at 550, pt. IV, ch. 1, tit. 6, § 21, at 578 (1829).

83. DELLAPENNA, *supra* note 13, at 278.

84. *See* N.Y. REV. STAT. pt. IV, ch. 1, tit. 2, art. 1, §§ 9, 21 (1829).

85. *See* HULL & HOFFER, *supra* note 21, at 20.

86. *Id.*

87. *See* MOHR, *supra* note 20, at 43.

88. *State v. Murphy*, 27 N.J.L. 112, 114 (1858) (construing Act of March 1, 1848, 1849 N.J. Laws 266).

89. Means 2, *supra* note 9, at 391 (“The protection of the life of the pregnant woman is therefore the only reason ever advanced for the passage of the New York statutes in 1828 . . .”).

90. *Id.* at 391.

91. *See, e.g., Dougherty v. People*, 1 Colo. 514, 522 (1872); *Murphy*, 27 N.J.L. at 114.

92. *See* Means 2, *supra* note 9, at 382.

married women, (2) the dangers of abortion, and (3) the activism of physicians in opposition to abortion.”⁹³

Regarding the first factor, evidence shows that Americans originally believed abortion to be a problem particular to the lower classes of society.⁹⁴ As James Mohr, Professor of History at the University of Oregon, indicates: “[b]efore 1840 abortion was perceived in the United States primarily as a recourse of the desperate, especially of the young woman in trouble who feared the wrath of an over-exacting society.”⁹⁵ In 1798, Thomas Malthus had published his *Essay on the Principle of Population*, in which he predicted that populations would eventually grow out of control, and suggested voluntary abstinence from sex as a solution.⁹⁶ This was a “sobering warning to an English nation already concerned with agricultural rioting and urban unrest by large numbers of poor people.”⁹⁷ Considering that most abortions Americans had heard of involved the poor, it is not surprising that abortion was often “overlooked.”⁹⁸

The process of commercialization brought abortion to the forefront of public attention in the early 1840s.⁹⁹ Members of the medical community competed fiercely for clients in the new abortion industry.¹⁰⁰ As a result, advertisements quickly became common practice,¹⁰¹ appearing in urban and rural newspapers, popular magazines and journals.¹⁰² In addition, some abortionists even gained fame and public attention.¹⁰³ For instance, Madame Restell of New York City was arrested in 1841 for performing abortions on a large scale.¹⁰⁴ She was convicted of only minor infractions, and then went on to open several East Coast branches after the publicity provided a boost to her career.¹⁰⁵

93. Johnson, *supra* note 33, at 1523.

94. *Id.* at 1527.

95. MOHR, *supra* note 20, at 86.

96. See THOMAS MALTHUS, *ESSAY ON THE PRINCIPLE OF POPULATION* (Donald Winch ed., Cambridge Univ. Press 1993).

97. HULL & HOFFER, *supra* note 21, at 22.

98. *Id.* at 23.

99. MOHR, *supra* note 20, at 47.

100. *Id.* For a more thorough analysis of competition within the medical field during this time, see Barnes Riznik, *The Professional Lives of Early Nineteenth-Century New England Doctors*, 19 J. HIST. MED. & ALLIED SCIS. 1, 1–16 (1964). See also Edward C. Atwater, *The Medical Profession in a New Society, Rochester, New York (1811–1860)*, 47 BULL. HIST. MED. 3, 228 (1973).

101. See Atwater, *supra* note 100, at 228.

102. See MOHR, *supra* note 20, at 47.

103. *Id.* at 48.

104. *Id.*

105. See WILLIAM F. HOWE & A.H. HUMMEL, *IN DANGER; OR LIFE IN NEW YORK, A TRUE HISTORY OF A GREAT CITY'S WILES AND TEMPTATIONS. TRUE FACTS AND DISCLOSURES 155–67* (J.S. Ogilvie & Co. 1888); see also Editorial Dep't, *Madame Restelle, and Some of Her Dupes*, 1 N.Y. MED. & SURGICAL REP. 10, 158–65 (1846).

Ms. Restelle was not an isolated case, but was the most famous of the 1840s abortionists.¹⁰⁶

After 1840, abortions increased,¹⁰⁷ and rates rose from one abortion for every twenty-five to thirty live births at the turn of the century to one for every five or six by the middle of the nineteenth century.¹⁰⁸ One potential reason for this change was that married women began to desire limiting their family size.¹⁰⁹ A further piece of evidence for an increase in abortions is an almost four percent decline in birth rates from 1800 to 1900.¹¹⁰ However, it is worth noting that the increase in abortion rates was not simply due to more abortions taking place, but also due to the increased visibility of abortion.¹¹¹ This had the important effect of changing public perception towards the belief that abortions were more common than earlier in American history.¹¹² As a result, physicians and politicians alike grew concerned that white married women had begun using abortion as a method of birth control.¹¹³

In the mid-1800s, scholars writing on abortion were describing the practice as common to “every village, hamlet, and neighborhood in the United States.”¹¹⁴ As the idea that abortion was common took hold, so did an awareness that existing abortion procedures were dangerous.¹¹⁵ Abortions performed in New York as late as 1884, by competent physicians during the early stages of pregnancy, were ten to fifteen times more dangerous than childbirth.¹¹⁶ Thus, if protecting the health of the mother was the only reason anti-abortion laws were passed during the nineteenth century, then their reasoning was justified.¹¹⁷

Nonetheless, arguments in opposition began to emerge within a segment of the medical profession at the newly founded American

106. See MOHR, *supra* note 20, at 48.

107. See *id.* at 48–49.

108. See *id.* at 50.

109. See *Survey*, *supra* note 23, at 96–97; see also MOHR, *supra* note 20, at 90 (citing REPORT TO THE NEW YORK MEDICO-LEGAL SOCIETY (June 4–7, 1889), reprinted as 7 MEDICO-LEGAL J. 183 (1889) (noting that seventy-five to ninety percent of abortions were for Protestant married women)).

110. See N. COTT & E. PLECK, A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN 226 (1979) (noting that birth rates declined from 7.04 percent in 1800 to 3.56 percent by 1900).

111. See *id.* at 225.

112. See Johnson, *supra* note 33, at 1523.

113. See *id.* (citing MOHR, *supra* note 20, at 93–95).

114. See MOHR, *supra* note 20, at 100 (citing J. Miller, *Criminal Abortion*, 1 KAN. CITY MED. RECORD, no. 8, 295 (1884)).

115. See Means 2, *supra* note 9, at 382.

116. *Id.* at 382–87. A thorough discussion of death rates from infection during the nineteenth century is also included in this source.

117. See *id.* at 382.

Medical Association (AMA).¹¹⁸ The campaign was led by Doctor Horatio Robinson Storer, who introduced a resolution in Massachusetts in 1857, recommending that the Suffolk County Medical Society consider whether further anti-abortion legislation was necessary in the Commonwealth.¹¹⁹ The AMA argued that the fetus was alive before quickening and that it possesses “inherent rights, for civil purposes.”¹²⁰

Several reasons have been put forth to explain the surge in physician opposition.¹²¹ The main one was the claim that physicians saw in the abortion controversy an opportunity to force “irregulars from the profession.”¹²² “The regulars felt that if they could prohibit abortion it would eliminate most of the irregulars’ practice and make it financially undesirable to continue.”¹²³ Additionally, the majority of physicians were white Anglo-Saxons who were prejudiced against Catholic immigrants based on fears of developing a Catholic majority.¹²⁴

On the religious front, both the Roman Catholic Church as well as the Presbyterian Church began to oppose abortion with increasing frequency.¹²⁵ The strongest opposition came from the Puritans.¹²⁶ Puritan attacks were based on the notion that female morality could be upheld by instilling fear of pregnancy in women.¹²⁷ Anthony Comstock, a politician dedicated to ideas of Victorian morality, used his connections to Congressional lobbyists to stifle the abortion advertisements and products.¹²⁸ After Comstock was appointed as a special agent for the Post Office Department in 1873, he had almost “unlimited authority over American vice” by having the power to open mail and judge for himself what was obscene.¹²⁹

Many early suffragettes had mixed views on the abortion issue.¹³⁰ Elizabeth Cady Stanton saw the practice as part of the “degradation of woman,” and thought that denying children to “those [husbands] who have made the ‘strong minded’ women of this generation the target for gibes and jeers” was just.¹³¹ Nevertheless, most suffragettes of

118. See MOHR, *supra* note 20, at 147.

119. MOHR, *supra* note 20, at 152 (citing *Criminal Abortion*, 56 BOSTON MED. & SURGICAL J. 14, 282–84 (1857)).

120. See *Survey*, *supra* note 23, at 98 (quoting 12 TRANSCRIPT OF THE AMERICAN MEDICAL ASSOCIATION 73–78 (1859)).

121. See *id.* at 97.

122. *Survey*, *supra* note 23, at 99.

123. *Id.* (citing MOHR, *supra* note 20, at 37).

124. See MOHR, *supra* note 20, at 166–67.

125. See HULL & HOFFER, *supra* note 21, at 32.

126. See *Survey*, *supra* note 23, at 99.

127. See LAWRENCE LADER, ABORTION 90 (1966) [hereinafter LADER 1].

128. *Id.* at 100.

129. *Id.* at 91.

130. See MOHR, *supra* note 20, at 111.

131. See *id.* (quoting Elizabeth Cady Stanton, *Infanticide and Prostitution*, 1 REVOLUTION 65, 65 (1868)).

the time thought that the solution to high rates of abortion was not legalization, but “the education and enfranchisement of women,” which they believed would render abortion unnecessary in the future.¹³²

During the anti-abortion movement of the mid-nineteenth century, more states introduced statutes that made abortion illegal at all stages of pregnancy.¹³³ In 1860, Pennsylvania made it a felony offense to attempt the abortion of a fetus at any period during gestation.¹³⁴ In 1872, New York amended its anti-abortion laws even further, banning abortion advertisements, prohibiting advising women to have an abortion, and making it a crime for a woman to agree to an abortion.¹³⁵ These two laws are representative of the changes that were taking place throughout the country.¹³⁶

In the nineteenth century the erosion of the quickening doctrine was replaced with the belief that a fetus is a living human person from the moment of conception.¹³⁷ This was the result of discoveries regarding the process of fertilization, as well as new medical literature.¹³⁸ Most notably, Dr. John Beck, Professor of Medical Jurisprudence at the College of Physicians and Surgeons of the University of the State of New York, wrote a treatise in which he supported anti-abortion laws on the theory that the practice amounted to the killing of a human being¹³⁹ and that life began at conception.¹⁴⁰ Views began to shift away from the idea that abortion laws were designed to protect the life of the mother,¹⁴¹ and cases reflected this shift. In *Regina v. Wycherley*,¹⁴² the court interpreted “quick with child” to mean after conception rather than after fetal movement.¹⁴³

The idea that abortion was illegal at all stages of pregnancy received a blow, however, in 1884 when Judge, later Justice, Oliver Wendell Holmes, Jr. introduced the concept of viability,¹⁴⁴ which had been initially discussed during the nineteenth century.¹⁴⁵ An English attorney, Joseph Chitty, even argued that deciding whether killing

132. See MOHR, *supra* note 20, at 112 (quoting Stanton, *supra* note 131, at 65).

133. See Survey, *supra* note 23, at 100.

134. 1860 PA. LAWS NO. 374 §§ 87–89 (1860).

135. N.Y. GEN. STATS. Ch. 181, §§ 1, 2, 3, 4, at 71 (1872).

136. See Survey, *supra* note 23, at 101.

137. See DELLAPENNA, *supra* note 13, at 256–61 nn.205–46, 281–84 nn.149–79.

138. See A HISTORY OF SCIENCE 461 (René Taton ed., 1965) (describing the process in which Jean Louis Prevost and Jean-Baptiste André Dumas fertilized frog eggs in 1824).

139. JOHN BECK, AN INAUGURAL DISSERTATION ON INFANTICIDE 13 (1817).

140. See *id.* at 34.

141. See *supra* Part I.A.

142. 173 ENG. REP. 486 (N.P. 1838).

143. *Id.*

144. Dietrich v. Inhabitants of Northampton, 138 Mass. 14 (1884).

145. See A.S. TAYLOR, A MANUAL OF MEDICAL JURISPRUDENCE 420 (7th Eng. Ed. 1866).

an infant was homicide should depend on viability.¹⁴⁶ But as Holmes explained: “Lord Coke’s rule requires that the woman be quick with child, which, as this court has decided, means more than pregnant, and requires that the child shall have reached some degree of quasi-independent life at the moment of the act”¹⁴⁷

In England, viability was introduced as a legal concept through the passage of the *Infant Life (Preservation) Act*, in which a presumption of viability existed at twenty-eight weeks.¹⁴⁸ In the United States, however, the concept of viability remained limited to prenatal injury cases and was not used in the context of abortion until *Roe v. Wade* was decided.¹⁴⁹

C. Abortion is Illegal (1900–1960)

By the early twentieth century, anti-abortion laws were firmly entrenched, and the chances of securing their repeal seemed impossible. By 1910, every state except for Kentucky¹⁵⁰ had anti-abortion laws on the books.¹⁵¹ Until 1967, forty-nine states and the District of Columbia made abortion a felony offense.¹⁵² In the span of time between the first anti-abortion law in 1821¹⁵³ and the turn of the twentieth century, the quickening doctrine had all but been abandoned as the distinction between legal and illegal abortions.¹⁵⁴ Most states did,

146. See DELLAPENNA, *supra* note 13, at 463 (citing JOSEPH CHITTY, A PRACTICAL TREATISE ON MEDICAL JURISPRUDENCE 415 (1st Am. Ed. 1835)).

147. See Means 1, *supra* note 9, at 423 (quoting Dietrich, 138 Mass. at 15).

148. See 19 & 20 Geo. V ch. 34 § 1(2). The presumption was changed to twenty-four weeks in 1990.

149. See *infra* Part II.

150. Although Kentucky had no statutes making abortion illegal, the state courts had declared the practice illegal in 1883. See *Peoples v. Comm’r*, 9 S.W. 509, 511 (1883).

151. See *Survey*, *supra* note 23, at 102.

152. *Id.* at n.174.

153. See *supra* note 76 and accompanying text.

154. As noted in *Survey*, most states enacted two statutes, the first of which punished the willful killing of an unborn quick child, while the second punished attempts to aid in procuring an abortion *at any point in the pregnancy*. See *Survey*, *supra* note 23, at 102. An example of these types of statutes is KAN. GEN. LAWS ch. 28, §§ 9, 10 (1859), reprinted in *Survey*, *supra* note 23, at 102 n.176:

Section 9: The wilful killing, of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Section 10: Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree.

however, include exceptions for “therapeutic” abortions.¹⁵⁵ The most common form of exception permitted abortions where those necessary to save the mother’s life.¹⁵⁶

In the first half of the twentieth century, abortion laws effectively created a two-tiered system.¹⁵⁷ Privileged women were able to pay doctors for abortions, and persuade them to perform the procedure.¹⁵⁸ The poor and destitute faced restrictive laws which forced them to have an unwanted child or seek out illegal abortions,¹⁵⁹ or travel to foreign countries to seek abortion services.¹⁶⁰ In the years preceding the onset of the First World War, public discussion of sex was considered taboo.¹⁶¹

Additionally, before 1950, there was no unified movement to repeal abortion laws in the United States.¹⁶² Instead, birth control advocates had focused on promoting the legalization and availability of contraception.¹⁶³ The greatest pioneers of the movement were Emma Goldman and Margaret Sanger,¹⁶⁴ whose efforts finally met success when a constitutional right to privacy was recognized in 1965.¹⁶⁵

During the 1930s and 1940s, police raids on abortion clinics were sensationalized in the press.¹⁶⁶ Raids in 1941, 1942, and 1947 in Chicago targeted both the abortionists, Dr. Josephine Gabler and Mrs. Ada Martin, of the Gabler-Martin abortion clinic, as well as their patients.¹⁶⁷ In the Martin case, Chicago newspapers presented the arrests as a crackdown that had brought down an organized crime

155. “Therapeutic” abortion “refers to those abortions done pursuant to statutory exceptions to the general prohibition of abortion. Therapeutic abortions may be called for where there are dangers to the mother’s life or health, permanent serious fetal defects, or pregnancies resulting from rape or incest.” *Survey*, *supra* note 23, at 103 n.177.

156. These statutes are printed in *Survey*, *supra* note 23, at 103 n.178.

157. See Brief for American Historians as Amici Curiae Supporting Appellees, at 39, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (No. 88-605).

158. See *id.* at 22.

159. See *infra* Part II.

160. See *Survey*, *supra* note 23, at 105.

161. Chelsea Mageland, *What’s Going on in the Early 1900s?*, HISTORY OF HUMAN SEXUALITY IN WESTERN CULTURE, <http://historyofsexuality.umwblogs.org/topic-1/early-1900s/>.

162. See GERMAIN GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 229, 230 (1970).

163. See *id.* at 229; see also HULL & HOFFER, *supra* note 21, at 54–65.

164. See HULL & HOFFER, *supra* note 21, at 54. It is worth noting that Sanger herself was opposed to abortion, having watched in horror as large numbers of destitute women lined up outside the offices of incompetent abortionists for hire. See LAWRENCE LADER, A PRIVATE MATTER 28 (1995). But see HULL & HOFFER, *supra* note 21, at 66 (claiming that although Sanger publicly opposed abortion, she privately believed that “women should be free to terminate pregnancies where it is not desired”).

165. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *infra* Part II.

166. See HULL & HOFFER, *supra* note 21, at 70.

167. See *id.*

ring, stating that a single abortion clinic “ranked with the Capone crime syndicate.”¹⁶⁸ These sensational stories and the resulting trials, however, were exceptions rather than the norm.¹⁶⁹

Despite the continued illegality of abortions, from the mid-1940s to the 1960s doctors were given considerable leeway to decide when a pregnancy constituted a risk to the mother’s health.¹⁷⁰ Nevertheless, the physician choosing to defend abortions under the therapeutic exception provisions¹⁷¹ took a grave risk, as the danger that a prosecutor might choose to pursue an indictment was a real concern.¹⁷² Furthermore, as a result of these risks, hospitals imposed strict rules, and abortions needed to be approved by special committees or boards of directors.¹⁷³ This obviously had the effect of reducing the number of hospital abortions.¹⁷⁴

Although the pro-choice movement had yet to develop, several organizations and scholars began to give abortion greater attention. The National Committee on Maternal Health held a conference in New York in 1942 on “The Abortion Problem.”¹⁷⁵ In April, 1955, Planned Parenthood hosted a conference in New York on “Abortion in the United States.”¹⁷⁶ One common theme in these discussions was that despite the illegality of abortions, procedure abortion rates were still high.¹⁷⁷ Dr. Mary Calderone, participated in one of these conferences titled “Therapeutic Abortion” in 1954, and noted several conclusions that the symposium had reached, including: (1) abortion in hospitals was no longer a dangerous procedure; (2) pregnant women were continuing to obtain abortions in large numbers; and, (3) improper procedures used in many illegal abortions was a public health concern that needed to be addressed.¹⁷⁸

By 1955, however, abortions had become dramatically safer.¹⁷⁹ With the combined effects of improved techniques, analgesics, antibiotics, and antiseptics, the mother was safer than delivering a child.¹⁸⁰

168. *Id.*

169. *See id.* at 71.

170. *Id.* at 72; *see also infra* Part II for a further discussion of the ways in which doctors tried to get around the anti-abortion laws.

171. *See infra* Part II.

172. *See HULL & HOFFER, supra* note 21, at 72.

173. *Id.* at 72–73.

174. *Id.*

175. EVA R. RUBIN, *THE ABORTION CONTROVERSY: A DOCUMENTARY HISTORY* 37 (1994) [hereinafter *THE ABORTION CONTROVERSY*].

176. *Id.*

177. *Id.*

178. Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 *AM. J. PUB. HEALTH* 7, 948, 948–53 (1960).

179. *See DELLAPENNA, supra* note 13, at 454.

180. *Id.* at 457.

These advances “precipitated—for the first time—a deep culture-wide debate on abortion.”¹⁸¹ Sociologist Nanette Davis explained that before abortion became safe, the practice was considered as a “lesser evil” or “act of desperation.” But the advances in science made abortion truly a “choice.”¹⁸²

The first major vocal challenge to abortion involved a series of lectures delivered by law professor Glanville Williams at Columbia University School of Law in 1956.¹⁸³ Although not a member of the American Law Institute, Professor Williams was asked to participate in drafting the *Model Penal Code* (MPC), which would play an important role in abortion reform.¹⁸⁴ Williams argued that abortion should be legal before the point of viability, which he placed at twenty-eight weeks.¹⁸⁵ This argument became the standard for abortion proponents.¹⁸⁶

II. THE TIDE CHANGES

Above all, we must achieve complete repeal of all existing abortion statutes, eliminating abortion from every criminal code, ending forever the feudal degradation of women that lumps them with criminals on the statute books.

—Lawrence Lader¹⁸⁷

A. *The Liberalization Movement (1960–1973)*

In 1962, Sherri Finkbine, a mother of four and well-known television personality, sought an abortion after she had unintentionally taken thalidomide and faced the very real possibility that her child would be born deformed.¹⁸⁸ In this instance, “[a]lthough there was a universal chorus of horror against the drug itself, hardly a newspaper

181. BEVERLY WILDUNG HARRISON, *OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION*, 168, 194, 201–30 (1983).

182. NANETTE DAVIS, *FROM CRIME TO CHOICE*, at xiii, 3–4 (1985).

183. GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 220–21 (1957, reprinted 1972). For alternative views on the first challenges to abortion laws, see NANETTE DAVIS, *FROM CRIME TO CHOICE* 4 (1985) (identifying the *Kinsey Report*); KERRY JACOBY, *SOULS, BODIES, SPIRITS: THE DRIVE TO ABOLISH ABORTION SINCE 1973*, at 3 (1998) (identifying a book by Joseph Fletcher); LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 220 (1997) (identifying the 1955 Planned Parenthood Conference).

184. *See infra* Part II.

185. WILLIAMS, *supra* note 183, at 225–33.

186. *See* DELLAPENNA, *supra* note 13, at 595.

187. *Introduction* to LAWRENCE LADER, *ABORTION II: MAKING THE REVOLUTION* (1973) [hereinafter LADER 2].

188. *See* LADER 1, *supra* note 127, at 1.

or pulpit in the country attacked the hypocrisy of the system that denied this mother the right to protect herself and her family, and eventually forced her to seek abortion in Sweden.”¹⁸⁹

By 1965, forty-nine of fifty-one American jurisdictions (fifty states, plus the District of Columbia) had criminal abortion statutes, limiting abortions to the single purpose of saving the life of the mother.

Violations of these abortion laws carried serious repercussions for all parties. However, penalties were harshest for physicians, who confronted the possibility of losing their licenses to practice and facing criminal charges.¹⁹⁰ In fifteen states, the punishment for providing an abortion was a maximum sentence of ten years’ imprisonment.¹⁹¹ Fourteen states also made it a crime for women to obtain an abortion; however, these patients were rarely prosecuted and the laws were more often used as leverage to coerce women to testify against their doctors.¹⁹²

In 1962, the American Law Institute published its Model Penal Code, which included an abortion statute, extending the justifiable reasons for abortion to include the risk of grave impairment to the mother’s physical or mental health, the risk of bearing a child with a grave physical or mental defect, and pregnancy resulting from rape, incest or other felonious intercourse.¹⁹³ These reforms were supported by the medical profession, led by obstetrician Alan Guttmacher and his brother Manfred, a prominent psychiatrist.¹⁹⁴ Colorado became the first state to follow the American Law Institute’s recommendation by reforming its abortion law in 1967.¹⁹⁵

The 1965 decision in *Griswold v. Connecticut*¹⁹⁶ was the catalyst for bringing the abortion debate to the forefront of American politics.¹⁹⁷ The case involved a clinic, which provided birth control counseling services and distributed contraceptives.¹⁹⁸ Writing for the majority, Justice William O. Douglas found that the case “concern[ed] a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”¹⁹⁹ Scholars soon took notice of the fact that

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. MODEL PENAL CODE § 230.3 (1962).

194. See HULL & HOFFER, *supra* note 21, at 97.

195. See Rachel Benson Gold, *Lessons from Before Roe: Will Past Be Prologue?*, 6 THE GUTTMACHER REPORT ON PUB. POL’Y 8, 9 (2003).

196. *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965).

197. ROSEMARY NOSSIFF, *BEFORE ROE: ABORTION POLICY IN THE STATES* 37 (2001).

198. See *Griswold*, 381 U.S. at 480.

199. *Id.* at 485.

by establishing a right to privacy, the Court had opened the possibility “for an attack upon significant aspects of the abortion laws.”²⁰⁰

The California Supreme Court issued the first decision extending *Griswold*'s privacy doctrine to women as individuals, declaring that:

The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgment of a “right to privacy” or “liberty” in matters related to marriage, family, and sex.²⁰¹

Shortly thereafter, a federal district court explicitly acknowledged that this right “may well include the right to remove an unwanted child at least in the early stages of pregnancy.”²⁰²

In New York, a partnership of women's groups, doctors, the Community of Action Legal Services Office, and other activists challenged the state's abortion statute on the grounds of unconstitutionality.²⁰³ Although the statute was repealed before trial,²⁰⁴ the challenge is noteworthy.

From 1966 through 1972, the year before *Roe* was decided, thirteen states²⁰⁵ amended their abortion statutes along the lines suggested in the Code.²⁰⁶ Alaska, Hawaii, New York, and Washington repealed their abortion laws altogether.²⁰⁷ In 1970, Hawaii legalized all abortions of non-viable fetuses performed by licensed physicians.²⁰⁸

The public debate that took place in New York during the late 1960s typified the abortion movement's struggle. In January 1968, Governor Nelson A. Rockefeller appointed an eleven member commission²⁰⁹ under the leadership of Charles W. Froessel, a retired Judge

200. Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 232 (1965). For other scholarly reviews supporting *Griswold* as a basis for the constitutionality of abortion, see Roy Lucas, *Federal Constitutional Limits on the Enforcement and Administration of State Abortion Statutes*, 46 N.C.L. REV. 730, 752 (1968); see also LADER 2, *supra* note 187, at 12.

201. *People v. Belous*, 458 P.2d 194, 199 (Cal. 1969).

202. *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969), *rev'd*, 402 U.S. 62 (1971). For a further discussion of *Vuitch*, see LADER 2, *supra* note 187, at 1–16.

203. *Abramowicz v. Lefkowitz*, 305 F. Supp. 1030, 1030–32 (S.D.N.Y. 1969).

204. See *supra* Part I.A.

205. Rachel Benson Gold, *Abortion in the United States: Two Centuries of Experience*, ISSUES IN BRIEF (Guttmacher Institute 1982) (specifying Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina, and Virginia).

206. See *id.*

207. *Id.*; see *supra* notes 5–20 and accompanying text.

208. 1970 HAW. SESS. LAWS c. 1, § 2; Am. L. 2006, c. 35, § 2; Am. L. 2008, c. 5, § 18. Codified at HAW. REV. STAT. § 453-16 (2013).

209. The Commission was created shortly after the well-publicized prosecution of a physician for the death of a young college student who obtained an illicit abortion. *F.B.I. Presses Hunt In Abortion Death*, N.Y. TIMES, June 9, 1962, at 50.

of the New York Court of Appeals, to study the state of abortion law in New York.²¹⁰ The Governor's Commission Appointed to Review New York State's Abortion Law issued its report in March 1968.²¹¹ The Governor's Commission Report was instrumental in changing the law in New York, and was the underpinning for *Roe*.

All members of the Commission agreed that abortion to preserve the mother's life was justifiable, but a substantial majority found this single ground too limited.²¹² They felt that this lone justification prevented doctors from practicing what they believed to be good medicine, and placed a "physician in an intolerable conflict between his medical duty to his patient and his duty as a citizen to uphold the law."²¹³ In the past, New York doctors had attempted to circumvent the State's abortion laws by using the diagnosis "psychiatric indication (threatened suicide)," to justify abortions,²¹⁴ even though the actual suicide rate of pregnant women was much lower than that of women of the same age who were not pregnant.²¹⁵ Doctors also justified abortions for women who contracted rubella in the first trimester, even though the disease threatened only the health of the child, and not the life of the mother.²¹⁶ Despite these justifications, prior to the liberalization of New York's abortion law, only four-hundred legal abortions were performed within the State annually.²¹⁷

At the outset of their discussion, the majority of the Commission declined to enter into the theological debate that had divided members of the clergy. These words still ring true today:

The minority of this Commission virtually base their entire position on the premise that, by modern secular standards, the foetus is at all times a human being, possessed of corresponding legal rights. The premise is clearly fallacious. Let it first be noted that we are in the State of New York, governed by its laws. The differences in views among the early and modern theologians and their followers are of little assistance to us here.²¹⁸

210. See REPORT OF THE GOVERNOR'S COMM'N, *supra* note 15, at 7. For a summary of Judge Froessel's distinguished career see Cyril Means, Jr., *Charles William Froessel*, 18 N.Y.L.F. 289 (1972).

211. REPORT OF THE GOVERNOR'S COMM'N, *supra* note 15, at 7.

212. *Id.* at 8–9, 14.

213. *Id.* at 16–17.

214. *Id.* at 15.

215. Richard Bruce Sloan, *The Unwanted Pregnancy*, 280 NEW ENG. J. MED. 1206, 1207 (1969).

216. See REPORT OF THE GOVERNOR'S COMM'N, *supra* note 15, at 15.

217. Steven Polgar & Ellen S. Fried, *The Bad Old Days: Clandestine Abortions Among the Poor in New York City before Liberalization of the Abortion Law*, 8 FAM. PLAN. PERSP. 3, 125 (1976).

218. REPORT OF THE GOVERNOR'S COMM'N, *supra* note 15, at 13.

Inasmuch as no law could compel a woman to have an abortion, the “morals” of abortion, said the majority, was the province of “religious institutions and philosophic traditions” and not an issue on which they could be expected to give an opinion.²¹⁹ In fact, the report tracked the history of the entire controversy from both moral and secular points of view.²²⁰ It noted that there was a strong difference of opinion among religious scholars concerning the point at which life begins and, accordingly, whether, and at what point, abortion was permissible.²²¹

The majority of the Governor’s Commission found that even if the lowest estimates were used, approximately 200,000 abortions were performed in the United States each year.²²² It found that the restrictive laws created an abortion racket, operated by doctors without regard for the law, and performed by untrained persons who used the most primitive instruments under the most unsanitary conditions.²²³ They also found that New York’s restrictive law unfairly discriminated against the poor.²²⁴ New York’s underprivileged could neither travel to other jurisdictions where abortion was safe and legal, nor pay the prices charged by the in-state doctors who were willing to perform illegal abortions.²²⁵ In effect, the poor often faced the choice between having a child that they could not afford to care for, or turning to one of the incompetent persons willing to sell their services for cheap. The majority cited estimations suggesting that 5,000 to 10,000 maternal deaths per year could be attributed to “botched, illegal abortions.”²²⁶

While many individuals and groups had urged the adoption of an “abortion upon request” statute, the majority of the Governor’s Commission recommended that abortion be justified only if one of several conditions were satisfied.²²⁷ These conditions were: (1) to preserve the life of the woman; (2) to prevent grave impairment of the

219. *Id.* at 34.

220. *Id.* at 13.

221. The Commission heard from Mrs. William S. Harrington, who spoke for the Episcopal Diocese of Long Island and who submitted a resolution that had been adopted by a convention of both clergy and lay people, in support of liberalization of the abortion laws. Hearing Minutes, p. 100 et seq. Recognizing both points of view, she said that Episcopalians on Long Island did not believe that such a stance was “anti-religious,” but was, on the contrary, “moral and humane and thoroughly consistent with our Christian beliefs.” *Id.* at 102.

222. *Id.* at 15.

223. *Id.* at 15–17.

224. *Id.* at 23–25.

225. *Id.* at 23–25.

226. *Id.* at 15. *But see id.* at 15–16 (noting that these estimates might be exaggerated, but that “even though it may be in the hundreds—it must be contrasted with the relative safety of the procedure when performed by a qualified physician under hospital conditions”).

227. *Id.* at 17.

physical or mental health of the woman; (3) where the woman had a permanent physical or mental condition which would render her incapable of caring for the child if it were born; (4) where there was a substantial risk that the child, if born, would be so grossly malformed or have serious physical or mental abnormalities as to be permanently incapable of caring for himself/herself; (5) where the pregnancy resulted from rape in the first degree; (6) where the pregnancy resulted from incest; (7) where the pregnancy occurred out of wedlock while the woman was under sixteen years of age, and she remained unmarried at the time of the abortion; and, (8) where the woman already had four living children.²²⁸

The majority concluded that:

to be workable, an abortion statute must recognize the central position of the physician, and manifest faith and confidence in the medical profession as a whole. To enact restrictions on abortion without regard to good medical practice is futile. Any statute affecting so vitally the medical field must of necessity rely upon the integrity of the physician, and leave to already established procedures the discipline of the comparatively few unethical or unscrupulous doctors who refuse to practice within the framework of reasonable legislation.²²⁹

Three members of the Commission filed a minority report, contending that child *en ventre sa mere* (“in his/her mother’s belly”) had constitutional and legal rights to live.²³⁰ They anticipated that the social consequences of a liberalized abortion law would be an increase in abortions to the point where the abortion rate would eventually outstrip the birth rate, a dilution in the traditional concept of the sanctity of human life, and the erosion of family values.²³¹

The Commission’s recommendations for a liberalized abortion law were proposed as bills to the Legislature in 1968 and 1969, but failed to pass on both occasions.²³² On July 1, 1970, the New York Legislature passed the “justifiable abortifacient act,”²³³ which amended Section 125.05 of the New York Penal Law, providing that “[t]he submission by a female to an abortifacient act is justifiable when she

228. *Id.* at 20–23.

229. *Id.* at 17–18.

230. *Id.* at 62. The minority began and ended with the proposition that a “fetus is a human child; his life is sacred.”

231. *Id.* at 62.

232. See LAWRENCE LADER 2, *supra* note 187, at 109 (outlining the history of state abortion law reform, particularly in New York).

233. Virginia Nolan Duin, *New York’s Abortion Reform Law: Unanswered Questions*, 37 ALB. L. REV. 22, 22 (1972).

believes that it is being committed by a duly licensed physician, acting under a reasonable belief that such act is necessary to preserve her life, or, within twenty-four weeks from the commencement of her pregnancy.”²³⁴

At the time, New York had a Republican Governor and Republicans controlled both houses of the State Legislature.²³⁵ Passage in the New York legislature turned on a last-minute change in a vote.²³⁶

The amendment was immediately met with opposition.²³⁷ Professor Robert Byrn, of Fordham University School of Law, who had been a member of the Governor’s Commission, led an offensive to the New York Court of Appeals in 1972.²³⁸ Byrn attempted to have himself appointed legal guardian of the fictitious “Infant Roe,” meant to “symboliz[e] all unborn fetuses between four and twenty-four weeks of gestation scheduled for abortion.”²³⁹ The New York Court of Appeals upheld the statutory provision against this constitutional challenge, holding that embryos are not recognized as legal persons, and have no right to life under the state and federal constitutions.²⁴⁰

In 1972, the New York Legislature voted to repeal the statute, but Governor Rockefeller vetoed it, saying:

I do not believe it right for one group to impose its vision of morality on an entire society Neither is it just or practical for the state to attempt to dictate the innermost personal beliefs and conduct of its citizens. The extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reforms represented the will of a majority

The truth is that this repeal of the 1970 reforms would not end abortions. It would only end abortions under safe and supervised medical conditions. The truth is that a safe abortion would remain the optional choice of the well-to-do woman, while the poor would again be seeking abortions at a grave risk to life in back-room abortion mills.

The truth is that, under the present law, no woman is compelled to undergo abortion. Those whose personal and religious principles

234. N.Y. PENAL LAW § 125.05(3) (McKinney 1972) (amending N.Y. PENAL LAW § 125.05(3) (1965)).

235. Richard Perez-Pena, *'70 Abortion Law: New York Said Yes, Stunning the Nation*, N.Y. TIMES, Apr. 9, 2000, at A1.

236. *Id.*

237. See LADER 2, *supra* note 187, at 159.

238. See *id.* at 163; MOHR, *supra* note 20.

239. *Id.*

240. See *Byrn v. N.Y.C. Health & Hosps. Corp.*, 286 N.E.2d 887, 890 (1972), *appeal dismissed*, 410 U.S. 949 (1973).

forbid abortion are in no way compelled against their convictions. Every woman has the right to make her own choice.²⁴¹

B. The Decision in Roe and its Aftermath (1973–1982)

By 1973, abortion statutes had been challenged on several constitutional grounds, including vagueness,²⁴² privacy,²⁴³ and equal protection of the laws.²⁴⁴ Based on these developments, the Supreme Court granted certiorari to hear two cases challenging the right of government to limit access to abortion.²⁴⁵ In *Roe v. Wade*, the Court considered a challenge to a Texas law outlawing abortion in all cases, except those in which the life of the mother was at risk.²⁴⁶ The second case, *Doe v. Bolton*, focused on a Georgia law that allowed women to terminate a pregnancy only if either her life or her health were in danger.²⁴⁷ In both cases, lower federal courts had declared the statutes unconstitutional, holding that denying a woman the right to decide whether to carry a pregnancy to term violated basic privacy and liberty interests enumerated by the Constitution.²⁴⁸

In *Roe*, Justice Harry Blackmun, writing for the majority, concluded that constitutional rights to privacy and liberty protected a woman's rights to terminate her pregnancy.²⁴⁹ The Court held that access to abortion is a fundamental right, and only a "compelling state interest" could justify the enactment of state laws or regulations that limit this right.²⁵⁰ Nonetheless, the Court also recognized that the state has an "important and legitimate interest in preserving and protecting the health of the woman" and "the potentiality of human life" inside her.²⁵¹

241. Jay Maeder, *Certain Religious Convictions Repealing the Abortion Law, May 1972 Chapter 397*, N.Y. DAILY NEWS (July 10, 2001), <http://www.nydailynews.com/archives/news/religious-convictions-repealing-abortion-law-1972-chapter-397-article-1.935928>.

242. See, e.g., *United States v. Vuitch*, 402 U.S. 62, 64 (1971) (finding that a statute was not unconstitutionally vague); *Babbitz v. McCann*, 310 F. Supp. 293, 295 (E.D. Wis. 1970); *State v. Abodeely*, 179 N.W.2d 347, 354 (Iowa 1970), cert. denied, 402 U.S. 936 (1971). But see *People v. Belous*, 458 P.2d 194, 205 (Cal. 1969) ("we are satisfied that the statute may not be construed to adopt the relative safety test as against a claim of vagueness . . .").

243. See, e.g., *Steinberg v. Brown*, 321 F. Supp. 741, 745 (N.D. Ohio 1970). But see *People v. Belous*, 458 P.2d 194, 205 (Cal. 1969).

244. E.g., *Steinberg v. Brown*, 321 F. Supp. 741, 747 (N.D. Ohio 1970); *State v. Abodeely*, 189 N.W.2d 347, 354 (Iowa 1970).

245. See *Roe v. Wade*, 410 U.S. 113, 113 (1973); see also *Doe v. Bolton*, 410 U.S. 179, 179 (1973).

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

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

248. See *Roe*, 314 F. Supp. 1217, 1222 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U.S. 113 (1973); see also *Doe*, 319 F. Supp. 1048, 1056 (N.D. Ga. 1973), *modified*, 410 U.S. 179 (1973).

249. See *Roe*, 410 U.S. at 154.

250. *Id.* at 156–57.

251. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

To determine when a state's legitimate concern for maternal and fetal protection rises to the level of compelling interest, Justice Blackmun created a three-tiered legal framework based on the nine month period of pregnancy, which gave progressively greater interest and regulatory latitude for each successive tier.²⁵²

The Court found that the state has no real interest in limiting abortion to protect a woman's health during the first trimester, given that the risks associated with abortion are actually lower than those associated with childbirth.²⁵³ During this period, states can only impose basic health safeguards, such as requiring that the procedure be performed by a qualified health professional, but cannot limit access to abortion in any way.²⁵⁴

The point of fetal viability typically takes place between twenty-four and twenty-eight weeks into a pregnancy.²⁵⁵ The interim stage between the end of the first trimester and this point of viability is the period in which a state may regulate the abortion procedure in ways that are reasonably related to maternal health.²⁵⁶ Regulations must be directed toward ensuring maternal health, and cannot be aimed at protecting a fetus, or limiting access to abortion services.²⁵⁷ Thus, a state law requiring a doctor to describe the risks associated with the abortion procedure to a woman seeking an abortion before she may consent to the procedure would be constitutional only if the requirement aimed to protect maternal health and was not created to dissuade a woman from terminating her pregnancy.²⁵⁸

The third tier encompasses the period after the point of fetal viability.²⁵⁹ During this time, the state has an interest in protecting "potential life" and can even ban abortion, as long as the procedure is still allowed in cases where the life or health of the mother is at risk.²⁶⁰

In *Doe*, the same seven justice majority largely restated and fleshed out its ruling in *Roe*.²⁶¹ The Court found that state regulations that create procedural obstacles to abortion, such as the requirement that an abortion be performed in a hospital or be approved by two doctors, violate a woman's right to terminate her pregnancy.²⁶²

252. *Id.* at 162–63.

253. *Id.* at 149.

254. *See id.* at 150.

255. *Id.* at 160.

256. *Id.* at 163.

257. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

258. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 967–68 (1982).

259. *See id.* at 872.

260. *Id.* at 914–15.

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

262. *See id.* at 194.

Reactions to these decisions were mixed. The Roman Catholic Church immediately voiced its disapproval at the National Conference of Catholic Bishops on January 24, 1973.²⁶³ The conference issued a statement, which claimed that the Court had “deprived the unborn child of his or her human rights.”²⁶⁴ Edwin A. Roberts, Jr., writing for the National Observer, called the decision “puzzling both in substance, for what it allows, and in style, for the way it allows it.”²⁶⁵ In Congress, Senator James B. Allen filed a speech condemning the decision, a sentiment joined by Senator James L. Buckley and Representative Lawrence J. Hogan.²⁶⁶ A number of law professors likewise criticized the Court’s rationale, including John Hart Ely and Robert M. Byrn.²⁶⁷

On the other hand, the *Washington Post* called the decision “both wise and sound.”²⁶⁸ Law professor Lawrence Friedman stated that although “neither the Constitution nor the Court can accommodate all sides,” the decision in *Roe* was not out of the ordinary and was based on precedent.²⁶⁹ These conflicting views demonstrated that the controversy surrounding abortion was far from over, and that proponents and critics alike would continue to mount legal challenges to state abortion laws.

C. Twenty-Five Years of Legal Abortions (1982–2007)

In the years immediately following *Roe*, the Supreme Court grappled with a host of issues that arose from their landmark decision. New laws involved requirements of informed consent,²⁷⁰ parental consent,²⁷¹ spousal consent,²⁷² and waiting periods for women seeking abortions.²⁷³ The Court generally struck down most of these laws regulating abortion and upheld only a few that did not significantly limit a woman’s right to terminate her pregnancy.²⁷⁴

263. See NAT’L CONFERENCE OF CATHOLIC BISHOPS, *Statement of the Committee for Pro-Life Affairs* (1973), reprinted in THE ABORTION CONTROVERSY, *supra* note 175, at 141.

264. *Id.* at 143.

265. Edwin A. Roberts, Jr., *High Court’s Abortion Legislation*, NAT’L OBSERVER, Mar. 10, 1973, reprinted in THE ABORTION CONTROVERSY, *supra* note 175, at 147.

266. THE ABORTION CONTROVERSY, *supra* note 175, at 152.

267. *Id.* at 160–66.

268. *Abortion: Out of the 19th Century*, WASH. POST, Jan. 31, 1973, reprinted in THE ABORTION CONTROVERSY, *supra* note 175, at 144.

269. Lawrence M. Friedman, *The Conflict over Constitutional Legitimacy*, in THE ABORTION DISPUTE AND THE AMERICAN SYSTEM 22–23, 27–28 (1983).

270. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. at 838, 844 (1992).

271. See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 426 (1983).

272. See, e.g., *id.*

273. *Id.*

274. See, e.g., *Maher v. Roe*, 432 U.S. 464, 469 (1977); *Beal v. Doe*, 432 U.S. 438, 438 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977).

Meanwhile, abortion politics entered the election arena as politicians began to voice their views, to improve their chances of election and reelection.²⁷⁵ President Gerald Ford supported the passage of a constitutional amendment to allow the states to regulate abortion policy.²⁷⁶ In the early 1980s, President Ronald Reagan approved a proposed anti-abortion constitutional amendment and a “right to life” bill.²⁷⁷ However, neither of these measures passed in Congress.²⁷⁸

The pro-life movement redoubled its efforts. Dr. Bernard Nathanson, one of the founders of NARAL, had reversed his position on the abortion controversy, and released a film entitled *Silent Scream*, which presented footage of an actual abortion.²⁷⁹ Nathanson, narrating the film, referred to the fetus’ opening its mouth as “a silent scream.”²⁸⁰ Although modern medical science has since demonstrated that a fetus, for example, cannot actually feel pain, at the time the film was released it caused much reaction.²⁸¹

In some instances, the anti-abortion movement even turned violent. The first bombings of abortion clinics began in the early 1980s.²⁸² When Ronald Reagan left office, seventy-seven abortion clinics had been bombed and another 117 burned.²⁸³ These acts of terrorism were soon attributed to the actions of three men, all of whom were Christian religious zealots.²⁸⁴

Although *Roe* remained controversial, the Court remained steadfast in its adherence to the decision until 1989 when it decided *Webster v. Reproductive Health Services*.²⁸⁵ *Webster* involved a Missouri statute that barred public facilities from being used to conduct abortions, and prohibited public health workers from performing abortions unless the life of the mother was at risk.²⁸⁶ The statute also defined life as beginning at conception, and directed physicians to perform fetal viability tests on women seeking abortion who were twenty weeks pregnant or more.²⁸⁷

275. See HULL & HOFFER, *supra* note 21, at 189.

276. *Id.*

277. *Id.* at 207.

278. *Id.*

279. *Id.* at 209.

280. *Id.* at 210.

281. See e.g., *Fetus Can't Feel Pain Before 24 Weeks, Study Says*, ASSOCIATED PRESS (June 25, 2010), <http://www.nbcnews.com/id/37920310#.UoLTfax3fMh>; *New York Times Examines 'Highly Complex' Science on Fetal Pain*, NAT'L PARTNERSHIP FOR WOMEN AND FAMILIES (Sept. 17, 2013), http://go.nationalpartnership.org/site/News2?abbr=daily2_&page=NewsArticle&id=41972.

282. See HULL & HOFFER, *supra* note 21, at 210.

283. *Id.* at 211.

284. *Id.*

285. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 490 (1989).

286. *Id.* at 499.

287. *Id.* at 501.

Chief Justice William Rehnquist, in upholding the statute, stated that the law's declaration that life begins at conception did not contradict *Roe* because the declaration was contained in the preamble, and "this [did] not by its terms regulate abortion."²⁸⁸ The majority also ruled that prohibiting the use of government workers, or facilities to perform abortions, is acceptable because the right to an abortion established in *Roe* does not include the right to government assistance in obtaining one.²⁸⁹ The decision also held that the requirement of viability testing at twenty weeks was constitutional.²⁹⁰

Chief Justice Rehnquist, joined by Justices Byron White and Anthony Kennedy, also argued for the elimination of the second tier of *Roe*'s system, which only allows laws aimed at protecting the mother's health.²⁹¹ Rehnquist argued that the framework had come to resemble a "web of legal rules," rather than a "constitutional doctrine."²⁹² He also maintained that the state has an interest in protecting potential life *before* viability.²⁹³

Justice Antonin Scalia concurred in the judgment, but argued that the plurality opinion was "indecisive" and "stingy" and that *Roe* should be overturned.²⁹⁴ Justice Sandra Day O'Connor, also concurred with the judgment, albeit for very different reasons.²⁹⁵ Unlike her colleagues in the majority, O'Connor argued that *Roe*'s trimester system, while problematic, should neither be modified nor overturned.²⁹⁶ She determined that the testing requirement was in fact, constitutional because it does not impose an "undue burden" on a woman considering an abortion.²⁹⁷

Despite the fractured decision in *Webster*, the stage was set for the significant changes that were established by *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁹⁸ *Casey* involved a challenge to a wide-ranging abortion law that included an informed consent

288. *Id.* at 506 (stating that the preamble can be read simply as the type of value judgment that a State is entitled to make).

289. "The Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government may not deprive the individual." *Id.* at 491 (citing *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.*, 489 U.S. 189, 194–95 (1989)).

290. *See Webster*, 492 U.S. at 495–99 (1989).

291. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 494 (1989).

292. *Id.* at 494.

293. *Id.* at 519 (citing *Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists*, 476 U.S. 747, 795 (1986) (Burger, J., dissenting)) (emphasis added).

294. *Webster*, 492 U.S. at 532–37.

295. *Id.* at 522.

296. *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 529–30 (1989).

297. *Id.* at 530.

298. *Planned Parenthood v. Casey*, 505 U.S. 833, 838 (1992).

requirement, as well as a twenty-four hour waiting period for women seeking abortions.²⁹⁹

In *Casey*, Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter overruled the trimester framework established by *Roe*,³⁰⁰ and instead adopted the "undue burden" language from Justice O'Connor's opinion in *Webster* as the new standard to test the constitutionality of all state abortion regulations before viability.³⁰¹ The opinion held that an undue burden existed when

a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends.³⁰²

Casey abandoned a strict scrutiny analysis when considering abortion.³⁰³ Despite this significant change in the abortion doctrine, the Court reaffirmed several sections of the holding in *Roe*.³⁰⁴ Most importantly, the Court reaffirmed a woman's right to have an abortion before viability without "undue interference from the State," and that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."³⁰⁵ Second, the Court held that a state may restrict abortions after viability, so long as exceptions are made for the protection of the woman's "life or health."³⁰⁶ And finally, that the states have a "legitimate interest" in protecting both the health of the woman and the "fetus that may become a child."³⁰⁷

Coinciding with the decision in *Casey*, President Clinton soon appointed Justices Ruth Bader Ginsburg and Stephen G. Breyer to the Supreme Court, both of whom supported a woman's right to an abortion.³⁰⁸ Additionally, pro-choice supporters won a major victory

299. *See id.* at 844.

300. *Id.* at 872.

301. *Id.* at 876.

302. *Id.* at 877.

303. *Id.* at 953.

304. *Parenthood v. Casey*, 505 U.S. 833, 845–46 (1992).

305. *Id.* at 846.

306. *Id.*

307. *Id.*

308. *See* Richard L. Berke, *The Supreme Court: The Overview; Clinton Names Ruth Ginsburg, Advocate for Women, to Court*, N.Y. TIMES (June 15, 1993), <http://www.nytimes>

in 1993, when Congress passed the Freedom of Access to Clinic Entrances Act (FACE), which made it a crime for protestors to prevent women, through force or threat, from entering clinics.³⁰⁹

*Gonzales v. Carhart*³¹⁰ arose in response to the passage of the Partial-Birth Abortion Ban Act in 2003,³¹¹ which prohibits dilation and evacuation (D&E), during the second trimester.³¹² At the time the Act was passed, D&E abortions were the most common type of second trimester abortion in the United States.³¹³ In a 5–4 decision, the Court upheld the act, holding that it did not constitute an “undue burden” on the right to terminate a pregnancy.³¹⁴ Additionally, the majority found that a health exception to the prohibition was unnecessary because “whether the Act creates significant health risks for women has been a contested factual question.”³¹⁵

If *Casey* “opened the door to more regulation than had been acceptable under *Roe*,” the Supreme Court’s 2007 decision in *Carhart* blew the door off its hinges.³¹⁶ The holding was seen as a victory by anti-abortion forces, who saw an opportunity to “chip away” at the abortion doctrine established by *Roe*.³¹⁷ Equally as important, the 2010 midterm elections created a political shift, as “many of the newly elected governors and legislators are solidly anti-abortion, causing advocates of abortion rights to brace for a year of even tougher battles than usual.”³¹⁸ These fears appear to have been well founded, considering the record-breaking number of abortion regulations and restrictions passed by the states in 2011 and 2012.³¹⁹

.com/1993/06/15/us/supreme-court-overview-clinton-names-ruth-ginsburg-advocate-for-women-court.html?pagewanted=all&src=pm; Aaron Epstein, *High Court Nominee Is Expected To Sail Through Confirmation Hearings May Offer Insights into the Judge, Whose Appeal Spans the Political Spectrum*, INQUIRER (July 10, 1994), http://articles.philly.com/1994-07-10/news/25845310_1_judge-stephen-g-breyer-utah-and-strom-thurmond-high-court-nominee.

309. 18 U.S.C.A. § 248 (2012).

310. *Gonzales v. Carhart*, 550 U.S. 124, 124 (2007).

311. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 1, 117 Stat. 1201, 1201 (2003) (codified at 18 U.S.C. § 1531 (2003)).

312. See Morgan Arnett, *Update: Phasing Out Abortion: One Step Closer to Terminating a Woman’s Constitutional Right*, in *Gonzales v. Carhart*, 24 T.M. COOLEY L. REV. 597, 604 (2007) (discussing the process of D&E abortions).

313. See *Gonzales v. Carhart*, 550 U.S. 124, 135 (2007) (citing *Planned Parenthood Fed’n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 961 (N.D. Cal. 2004)).

314. *Id.* at 160–61.

315. *Id.* at 161.

316. John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 329 (2011).

317. See *id.* at 329–30.

318. *Id.* at 330 (quoting Erik Eckholm, *Across Country, Lawmakers Push Abortion Curbs*, N.Y. TIMES, Jan. 22, 2011, at A14).

319. See *supra* notes 2–4 and accompanying text; see also *infra* Part III.

In spite of these setbacks, it is important to note that *Carhart* reiterated the fundamental holding of *Roe*: Before viability, a State “may not prohibit any woman from making the ultimate decision to terminate her pregnancy.”³²⁰ The majority also wrote that the undue burden standard remains the test to judge the constitutionality of pre-viability abortion regulations.³²¹ With this in mind, we now turn to an examination of some of the most recent anti-abortion laws.

III. A CONSTITUTIONAL ANALYSIS OF RECENT STATE RESTRICTIONS ON ABORTION RIGHTS

Seizing upon language in *Carhart* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,³²² which allowed some state regulation of abortion providers,³²³ members of various state legislatures have sought to implement major restrictions on abortion procedures and access to reproductive healthcare.³²⁴ Although the Court had not overturned *Roe*, anti-abortion lawmakers interpreted the rulings in *Carhart* and *Casey* as an indication to reverse *Roe*'s main principles.³²⁵ One line in Chief Justice William Rehnquist's dissent in *Casey* stood out as a banner for further undermining abortion rights: “*Roe* continues to exist, but only the way a storefront on a western movie set exists: a mere façade to give the illusion of reality.”³²⁶

The new strategy became to systematically test the boundaries of what the Court meant by “undue burden” and “substantial obstacle.”³²⁷ Pro-life lawyers hatched a series of legal restrictions that defined the abortion wars for more than a decade.³²⁸ These regulations have resulted in a steady stream of legislation that continues to chip away at *Roe*'s principles, in an attempt to limit access to abortion services for women in the United States.³²⁹

State laws can be characterized in the following way: Near-Total Abortion Bans; Abortion Bans After Twelve Weeks; Biased Counseling

320. *Planned Parenthood v. Casey*, 505 U.S. 833, 879 (1992).

321. *Id.* at 877.

322. *Id.* at 878.

323. *Id.*

324. *Id.* at 833.

325. *Roe v. Wade: Then and Now*, CTR. FOR REPROD. RIGHTS (July 01, 2007), <http://reproductiverights.org/en/document/roe-v-wade-then-and-now>.

326. *Planned Parenthood v. Casey*, 505 U.S. 833, 954 (1992).

327. *Who Decides? The Status of Women's Reproductive Rights in the United States*, NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUND. 10–21 (21st ed. 2012) [hereinafter NARAL], available at <http://www.prochoiceamerica.org/assets/download-files/2011-who-decides.pdf>.

328. See CTR. FOR REPROD. RIGHTS, *supra* note 325.

329. NARAL, *supra* note 327, at 10–20.

and Mandatory Delays; Counseling Bans and Gag Rules; Insurance Prohibition for Abortion; Refusal to Provide Medical Services; Restrictions on Low-Income Women's Access to Abortion; Restrictions on Young Women's Access to Abortion; and Targeted Regulation of Abortion Providers (TRAP).³³⁰

This section will provide an overview of the current abortion restrictions that have been enacted by the states. Most of these laws are clearly unconstitutional, and fly in the face of *Roe*.³³¹ Several state and federal courts have agreed with this judgment.³³²

An Overview of Recent Abortion Restrictions in the States

Fifteen states³³³ have near-total criminal bans on abortion that are clearly unconstitutional.³³⁴ Louisiana and Utah enacted the bans in 1991, almost two decades after *Roe* was decided.³³⁵ Louisiana, Mississippi, North Dakota and South Dakota have so-called “trigger” laws that would immediately result in a criminal ban on abortion should *Roe* be overturned.³³⁶

One type of near-total ban which several states have considered, are “personhood” bills that would amend the state’s constitution, to grant legal “personhood” rights to a fetus from the point of fertilization.³³⁷ These bills are intended to impose near-total bans on abortion;³³⁸ however, none have been enacted.³³⁹

In 2011, Ohio became the first state to consider a bill that would ban abortion as soon as a fetal heartbeat can be detected.³⁴⁰ This “heartbeat” bill, while not technically a near-total ban, would effectively outlaw abortion in most circumstances, with no exceptions for rape, incest, or fetal anomaly because a fetal heartbeat can be detected as early as six weeks into a pregnancy.³⁴¹ These laws are clearly unconstitutional.³⁴²

330. *Id.* at 10.

331. *Id.*

332. *Id.* at 11.

333. *Id.* at 10.

334. *Id.* at 11.

335. See 1991 La. Sess. Law Serv. Act 26 (H.B. 112) (West); 1991 Utah Laws 1 (S.B. 23).

336. See LA. REV. STAT. ANN. § 40:1299.30 (2006); MISS. CODE ANN. § 41-41-55 (West 1986); N.D. CENT. CODE ANN. § 12.1-31-12 (West 2007); S.D. CODIFIED LAWS § 22-17-5.1 (2005).

337. See, e.g., H.B. No. 1 (Va. 2012).

338. See NARAL, *supra* note 327, at 10.

339. *Id.*

340. *Id.*

341. H.B. 125, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (as passed by Ohio House, June 28, 2011).

342. See Jessica L. Knopp, *The Unconstitutionality of Ohio's House Bill 125: The Heartbeat Bill*, 46 AKRON L. REV. 253, 285–86 (2013) (“Under Casey, H.B. 125 places an

Furthermore, despite *Roe*'s prohibiting states from banning abortions in the first trimester, "[twenty] states have unconstitutional and unenforceable bans that could outlaw abortion as early as the twelfth week of pregnancy, with no exception to protect a woman's health."³⁴³

Nebraska enacted a pre-viability abortion ban that prohibits access to abortion care after twenty weeks,³⁴⁴ and five states followed this path.³⁴⁵ While the original Nebraska ban rests rhetorically on the claim of fetal pain as its justification, its sponsors readily admitted that it was intended as a challenge to *Roe v. Wade*.³⁴⁶ In fact, the true intent of these laws has become clearer as several states introduced twenty-week bans that were not predicated on fetal pain.³⁴⁷ Instead, they ban abortion pre-viability, disregarding Supreme Court precedent.³⁴⁸

The idea that a fetus can feel pain at twenty weeks was put forth by Dr. Kanwaljeet Anand, a University of Tennessee professor, but his theory lacks medical support.³⁴⁹ In fact, available medical evidence rejects such a claim. The best evidence on the point at which a fetus can feel pain comes from a 2005 review of the medical literature on the subject by the *Journal of the American Medical Association* (JAMA). The article states that:

Pain is an emotional and psychological experience that requires conscious recognition of a noxious stimulus. Consequently, the capacity for conscious perception of pain can rise only after thalamocortical pathways begin to function, which may occur in the third trimester around 29 to 30 weeks' gestational age, based on the limited data available. Small-scale histological studies of

undue burden on a woman's reproductive decision by completely eliminating her decision to choose abortion, in direct violation of her right to privacy derived from the Fourteenth Amendment's concept of liberty. Even if H.B. 125 were enacted as a consent-only bill, it still arguably places an undue burden in the path of a woman seeking an abortion under *Casey* because it would require a woman to acknowledge an extensive amount of information prior to exercising her constitutionally protected right to an abortion.").

343. See NARAL, *supra* note 327, at 11 (naming AL, AK, FL, ID, IL, IN, IA, KY, MI, MS, NE, NJ, ND, OK, RI, SC, SD, TN, WV, WI).

344. See NEB. REV. STAT. §§ 28-3,102 to 111 (2010).

345. In *Edwards v. Beck*, No. 4:13CV00224SWW, 2013 WL 2302323 (E.D. Ark. May 23, 2013), the Court granted a preliminary injunction against such a "heartbeat" law as it essentially prohibited abortions after twelve weeks and a fetus was not viable in twelve weeks. *MKB Mgmt. Corp. v. Burdick*, No. 1:13-CV-071, 2013 WL 3779740 (D.N.D. July 22, 2013) reached the same conclusion with respect to a North Dakota fetal heartbeat law, issuing a preliminary injunction.

346. See *Burdick*, 2013 WL 2302323, at *4.

347. NARAL, *supra* note 327, at 11.

348. See *Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992); see also *Gonzales v. Carhart*, 550 U.S. 124, 171-72 (2007).

349. *Robertson*, *supra* note 316, at 368.

human fetuses have found that thalamocortical fibers begin to form between 23 and 30 weeks' gestational age, but these studies did not specifically examine thalamocortical pathways active in pain perception.³⁵⁰

Since 2005, no new scientific discoveries have been published to dispute these findings.³⁵¹ Thus, the “substantial evidence” referenced by the Nebraska bill is meager, lacking and disputed is not supported by the majority of the medical community.

A state cannot simply get around the issue of viability by amending the language of its laws to say, for example, that viability takes place at twenty weeks. The Tenth Circuit rejected the attempt of the Utah legislature to do so in *Jane L. v. Bangerter*.³⁵² The opinion cited the Supreme Court's decision in *Danforth*, which held that the medical community should be the only ones determining at what point viability occurs, and not the courts or the legislature.³⁵³ The Tenth Circuit thus struck down the ban, noting that the law prohibited abortions of fetuses that may not have been viable.³⁵⁴

In *Isaacson v. Horne*,³⁵⁵ the Ninth Circuit struck down an Arizona statute containing a twenty-week ban.³⁵⁶ The Court explained:

Under controlling Supreme Court precedent, Arizona may not deprive a woman of the choice to terminate her pregnancy at any point prior to viability. Section 7 effects such a deprivation, by prohibiting abortion from twenty weeks gestational age through fetal viability. The twenty-week law is therefore unconstitutional under an unbroken stream of Supreme Court authority, beginning with *Roe* and ending with [*Carhart*]. Arizona simply cannot proscribe a woman from choosing to obtain an abortion before the fetus is viable.³⁵⁷

Thirty-two states have enacted laws that subject women seeking abortions to biased counseling requirements, mandatory delays,

350. Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947 (2005), available at <http://jama.jamanetwork.com/article.aspx?articleid=201429>.

351. See I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J.L. MED. & ETHICS 235, 239 (2011) (citing Stuart W.G. Derbyshire, *Fetal Pain: Do We Know Enough to Do the Right Thing?*, REPROD. HEALTH MATTERS, May 2008, at 117–26).

352. *Jane L. v. Bangerter*, 102 F.3d 1112, 1115 (10th Cir. 1996).

353. *Id.* (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976)).

354. *Jane L.*, 102 F.3d at 1115–18.

355. *Isaacson v. Horne*, 716 F.3d 1213, 1213 (9th Cir. 2013).

356. *Id.* at 1231.

357. *Id.*

or both.³⁵⁸ The first state to do so was South Dakota, purportedly to ensure a pregnant woman's voluntary and informed consent before she underwent an abortion.³⁵⁹ The Act³⁶⁰ contained four major provisions: (1) the Pregnancy Help Center Requirement; (2) the 72-Hour Requirement; (3) the Risk Factors Requirement; and (4) the Coercion Provisions.³⁶¹

The Pregnancy Help Center Requirement required a pregnant woman to consult with a registered "pregnancy help center" prior to undergoing an abortion procedure.³⁶² The 72-Hour Requirement established a minimum three-day waiting period between the pregnant woman's initial consultation with her physician and the abortion.³⁶³ The Coercion Provisions imposed a duty on physicians to certify that the pregnant woman had not been coerced, as explained in the Act.³⁶⁴ Finally, the Risk Factors Requirement established certain information, which a physician must tell a pregnant woman with regard to the "complications" associated with abortion.³⁶⁵

A preliminary injunction was granted by the United States District Court for the District of South Dakota.³⁶⁶ The court held that a provision requiring a woman to visit a pregnancy help center "humiliates and degrades her as a human being."³⁶⁷

In Delaware, a statute requiring a twenty-four hour waiting period was declared unconstitutional because it did not contain a health exception.³⁶⁸ Despite the Delaware District Court's ruling, mandatory waiting periods of twenty-four hours have been declared constitutional by the Supreme Court.³⁶⁹ Informed consent laws, which go beyond simply providing information regarding the risks associated with abortion procedures, however, have received a great deal of criticism, and have recently been challenged in state and federal courts alike.³⁷⁰ The most recognized and controversial of these informed consent laws

358. See NARAL, *supra* note 327, at 12; Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity, and Relational Autonomy*, 37 AM. J. L. & MED. 567, 581 n. 89 (2011); see also Alice X. Chen, *Crisis Pregnancy Centers: Impeding the Right to Informed Decision Making*, 19 CARDOZO J.L. & GENDER 933 (2013).

359. NARAL, *supra* note 327, at 5.

360. S.D. CODIFIED LAWS § 34-23A-10.1.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Planned Parenthood of Minn. v. Daugaard*, 799 F. Supp. 2d 1048, 1060 (D.S.D. 2011).

367. *Id.* at 1060.

368. *Planned Parenthood of Del. v. Brady*, 250 F. Supp. 2d 405, 410 (D. Del. 2003) (striking DEL. CODE ANN. tit. 24, § 1794(b)).

369. See *Planned Parenthood v. Casey*, 505 U.S. 833, 969 (1992).

370. *Daugaard*, 799 F. Supp. 2d at 1052.

involve statutes that regulate the use of ultrasounds, which are otherwise a standard tool used by obstetricians to establish the date of pregnancy,³⁷¹ have, instead been transformed into an instrument of harassment.³⁷²

An inquiry into the constitutionality of these laws must examine whether the purpose of these laws is to create “a substantial obstacle in the path of a woman seeking an abortion.”³⁷³ The Court has found an undue burden to exist if either the purpose or effect of imposing a law imposes such an obstacle.³⁷⁴ Proponents of ultrasound requirements contend that requiring a woman to view ultrasounds simply provides additional information.³⁷⁵

For some women, viewing an ultrasound will have no effect on her decision, but for others, the sight of an unborn fetus with a beating heart may cause significant distress.³⁷⁶ It is apparent that the primary purpose behind these laws is to reduce the number of abortions.

A court faced with a challenge to such a law should find that these ultrasound laws have the effect of creating a substantial obstacle to the right to choose. Laws that have time requirements of two to twenty-four hours create logistical problems such as scheduling barriers and increased costs.³⁷⁷ Since the Court has upheld the constitutionality of twenty-four hour mandatory waiting periods, these laws will likely not be struck down on these grounds alone.³⁷⁸

The psychological effects of having the images and sounds of an ultrasound placed in front of a woman are surely traumatic. The director of one abortion clinic noted that “[n]ot one patient would look at the screen and they all closed their eyes or turned their heads . . . But it’s hard to turn your ears off . . . Several of the patients were in tears afterwards. No one changed their mind.”³⁷⁹ However, a woman’s failure to change her mind does not mean she is unburdened by the traumatic experience. The Oklahoma State Supreme Court implicitly agreed with this logic in its decision in *Pruitt v. Nova Health Systems*, finding that “the challenged measure is facially unconstitutional pursuant to *Casey* and affirmed a permanent injunction.”

371. Robertson, *supra* note 316, at 347.

372. *See, e.g.*, *Stuart v. Huff*, 700 F.3d 424, 427 (4th Cir. 2012).

373. *Casey*, 505 U.S. at 877.

374. *Id.*

375. *See* Robertson, *supra* note 316, at 350.

376. *Id.* at 352.

377. *Id.* at 350.

378. *See* *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

379. Robertson, *supra* note 316, at 352 (quoting Susan Donaldson James, *Oklahoma Abortion Law: No Exceptions, Even Rape*, ABC NEWS (Apr. 29, 2010), <http://abcnews.go.com/Health/okla-abortion-law-exceptions-rape/story?id=10507849&singlePage=true>).

Ultrasound laws are also subject to First Amendment challenges on the grounds that they compel speech.³⁸⁰ State governments must show that “the compelled speech portions of the Act further a compelling governmental interest and are narrowly tailored to achieve that interest.”³⁸¹

The Fifth Circuit found that a Texas ultrasound law did not constitute compelled speech, relying on the conclusion in *Casey* that “‘the giving of truthful, nonmisleading information’ which is ‘relevant . . . to the decision,’ [does] not impose an undue burden on the woman’s right to an abortion and [is] thus permitted by the Fourteenth Amendment.”³⁸²

Although the Fifth Circuit interpreted *Casey*’s general acceptance of informed consent as rendering all informed consent laws constitutional without qualification, a North Carolina district court pointed out this is not the case.

In *Stuart v. Huff*,³⁸³ the North Carolina district court enjoined enforcement of N.C. Gen. Stat. § 90-21.85, which required that images of an ultrasound be shown and described to a woman before she could undergo an abortion, was enjoined because the compelled speech did not survive First Amendment strict scrutiny. The opinion noted that “the Act [went] well beyond requiring disclosure of those items traditionally a part of the informed consent process, which include in this context the nature and risks of the procedure and the gestational age of the fetus.”³⁸⁴ The court further distinguished the North Carolina law from the statute in *Casey*, stating that the provision approved in *Casey* only required providers to “make available” written materials.³⁸⁵ The court concluded that the State had failed to establish that such requirements furthered a compelling state interest, either in protecting abortion patients from psychological and emotional distress, or in preventing women from being coerced into having abortions.

As of January 2012, “[twenty-one] states have laws that prohibit some or all state employees, or organizations that receive state funds, from providing, counseling, or referring women for abortion services.”³⁸⁶ Further, “[s]everal federal laws constitute back-door [sic] gag rules by allowing health-care employees and companies to refuse

380. See *Casey*, 550 U.S. at 884.

381. See Robertson, *supra* note 316, at 355 (quoting *Tex. Medical Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, at *42 (W.D.Tex. Aug. 31, 2011)).

382. *Tex. Medical Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012) (quoting *Casey*, 550 U.S. at 882).

383. *Stuart v. Huff*, 834 F. Supp. 2d 424 (M.D.N.C. 2011).

384. *Id.* at 431.

385. See *id.* at 431–32 (citing *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992)).

386. See NARAL, *supra* note 327, at 13.

to provide, pay for, counsel for, or even refer [women] for abortion services.”³⁸⁷ The most restrictive federal law was implemented in 2009 through a Department of Health and Human Services (HHS) regulation enacted in the final days of the Bush administration.³⁸⁸ The regulation,³⁸⁹ known as the Federal Refusal Rule, expanded the ability of healthcare providers to refuse to provide, cover, or refer women for medical services.³⁹⁰ In February 2011, the Obama administration rescinded the key elements of the HHS regulation.³⁹¹

Currently, twenty-four states prohibit insurance plans for public employees or private-sector individuals, or both, from covering abortion services.³⁹² Of these twenty-four states, three states prohibit abortion coverage in the entire private insurance market.³⁹³ Rhode Island has two separate insurance prohibition laws.³⁹⁴ The First Circuit found the first law to be unconstitutional and unenforceable, and the second law to be partially unconstitutional and unenforceable.³⁹⁵ In Kansas, the district court set down the question of whether a similar insurance prohibition statute³⁹⁶ places an undue burden on a woman seeking an abortion.³⁹⁷

Forty-seven states, and the District of Columbia, have laws that

include provisions known as “refusals,” which permit a broad range of individuals and institutions—including hospitals, hospital employees, health-care providers, pharmacists, employers, and

387. *Id.* (“The key laws include the Church amendment (1973, 1974), the Coats amendment to the Public Health Service Act (1996), and the Federal Refusal Clause (also known as the Weldon amendment, 2004).”)

388. H.R. 3293, 111th Cong. (2009).

389. Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 C.F.R. § 9968-02 (2011).

390. *Id.*

391. *Id.*

392. See NARAL, *supra* note 327, at 14–15.

393. *Id.* at 15.

394. R.I. GEN. LAWS ANN. § 27-18-28 (West 1956); R.I. GEN. LAWS ANN. § 36-12-2.1 (West 1956).

395. National Educ. Ass’n of Rhode Island v. Garrahy, 779 F.2d 790, 790 (1st Cir. 1986), *affg.* 598 F. Supp. 1374 (D. R.I. 1984); see also Am. Coll. of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 293 (3d Cir. 1984) (demonstrating insurance restriction adds a barrier to obtaining abortion; state’s asserted interest in lowering insurance costs impinges on a fundamental right and cannot withstand strict scrutiny). The Eighth Circuit found summary judgment should not have been granted to a plaintiff who “introduced no evidence that insurance policies covering elective abortions are unavailable or prohibitively expensive” as a result of the law, and where the state claimed the law rationally furthered a legitimate governmental purpose of “reducing the cost of insurance and in protecting the interests of citizens who object to subsidizing abortions through payment of their insurance premiums.” Coe v. Melahn, 958 F.2d 223, 225–26 (8th Cir. 1992).

396. KAN. STAT. ANN. § 40-2,190 (West 2011).

397. ACLU v. Praeger, 917 F. Supp. 2d 1204, 1221 (D. Kan. 2013).

insurance companies—to refuse to provide, pay for, counsel for, or even refer patients for medical treatment that they oppose.³⁹⁸

In *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*,³⁹⁹ the Arizona Court of Appeals held that a challenge to such a law could not succeed because reproductive rights could only be asserted against governmental acts, not the decisions of private individuals.⁴⁰⁰

All women should have access to reproductive health care, regardless of their economic status; however, discriminatory restrictions on public funding make abortion services an unavailable choice for many low-income women. Banning public funding for certain services limits reproductive health options for those who rely on the government for their healthcare. These policies put women's health in danger, and allow politicians to interfere with the doctor-patient relationship.⁴⁰¹

Currently, thirty-three states, and the District of Columbia, restrict access to abortion for low income women, while seventeen states “fund abortion services for low-income women in extremely limited circumstances beyond federal restrictions.”⁴⁰²

Several federal laws, most notably the Hyde amendment,⁴⁰³ bar access to abortion care for most low-income women who rely on the federal government for their health care, with exceptions only to preserve the woman's life or if the pregnancy results from rape or incest.⁴⁰⁴ Women affected by these bans include recipients of Medicaid, Medicare, the State Children's Health Insurance Program, and Indian Health Service clients.⁴⁰⁵

398. NARAL, *supra* note 327, at 16; *see also supra* notes 386–91 and accompanying text.

399. *Planned Parenthood Ariz., Inc., v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 196 (Ariz. Ct. App. 2011).

400. *Id.*

401. NARAL, *supra* note 327, at 13.

402. *Id.* at 17 (specifying AK, AZ, CA, CT, HI, IL, MD, MA, MN, MT, NJ, NM, NY, OR, VT, WA, WV).

403. Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-112, §§ 502-03.

The Hyde Amendment is a rider to the annual Labor/Health and Human Services (HHS)/Education appropriations bill which prevents Medicaid and any other programs under these departments from funding abortions, except in limited cases. It is named after Rep. Henry J. Hyde (R-IL) who, as a freshman legislator, first offered the amendment.

The Hyde Amendment, NAT'L COMM. FOR A HUMAN LIFE AMENDMENT 1 (Apr. 2008), <http://www.nchla.org/datasource/ifactsheets/4FSHydeAm22a.08.pdf>.

404. The constitutionality of the Hyde Amendment was upheld in *Harris v. McRae*, 448 U.S. 297, 325 (1980).

405. NARAL, *supra* note 327, at 17. “Because of the Hyde Amendment, more than a million women have been denied the ability to make their own decisions about bringing a child

The Affordable Care Act[s] . . . [a]bortion coverage restrictions in the law, known as the Nelson provisions . . . , require plans participating in health insurance exchanges to segregate monies used for abortion services from all other funds and also require those purchasing a plan with abortion coverage to make separate premium payments. These restrictions compel both individuals and insurance companies to incur increased administrative burdens and could jeopardize insurers' willingness to offer full reproductive health coverage, affecting low- and middle-income women's access to care.⁴⁰⁶

At least "forty-four states have parental-notice or -consent laws that restrict young women's access to abortion."⁴⁰⁷ For a parental consent statute to be constitutional it must contain a bypass provision that meets four criteria: (i) allows the minor to bypass the consent requirement if she establishes that she is mature enough, and well enough informed to make the abortion decision independently; (ii) allows the minor to bypass the consent requirement if she establishes that the abortion would be in her best interest; (iii) ensures the minor's anonymity; and (iv) provides for expeditious bypass procedures.⁴⁰⁸

Although these criteria may sound adequate in the abstract, in practice, they are illusory. *In re Doe*⁴⁰⁹ is illustrative. *Doe* involved a minor who had applied for judicial authorization for an abortion.⁴¹⁰ During a confidential hearing, the minor indicated that she was a high school senior who intended to attend college, and that she was aware of the procedure, risks, and alternatives in making the decision to have the abortion.⁴¹¹ Further, she indicated that she had not

into the world in the context of their own circumstances and those of their families." Stephanie Poggi, Executive Director of the National Network of Abortion Funds, *quoted in Whose Choice? How the Hyde Amendment Harms Poor Women* 4, CTR. FOR REPROD. RIGHTS (Sept. 2010), available at http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Hyde_Report_FINAL_nospreads.pdf.

406. NARAL, *supra* note 327, at 17; *see also* Patient Protection and Affordable Care Act, 11 Pub. L. No. 148, 124 Stat. 119 (2010).

407. NARAL, *supra* note 327, at 19.

408. *Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (upholding parental notification requirement); *H.L. v. Matheson*, 450 U.S. 398, 412–13 (1981) (upholding parental notification requirement). For thoughtful discussions about judicial interpretation and issues specific to parental notification and consent statutes, *see generally* J. Shoshanna Ehrlich, *Journey Through the Courts: Minors, Abortion, and the Quest for Reproductive Fairness*, 10 YALE L.J. & FEMINISM 1 (1998); Jennifer C. Friedman, *Parental Notice in State Abortion Statutes: Filling the Gap in Constitutional Jurisprudence*, 29 COLUM. HUM. RTS. L. REV. 437 (1998); Catherine Grevers Schmidt, *Where Privacy Fails: Equal Protection and the Abortion Rights of Minors*, 68 N.Y.U. L. REV. 597 (1993).

409. *In re Doe*, 33 A.3d 615, 615 (Pa. 2011).

410. *Id.* at 618.

411. *Id.*

sought her mother's consent because she feared being thrown out of the house.⁴¹²

The trial court denied the request, finding, among other things, that the minor's failure to seek parental consent indicated that she was not "mature and capable" of giving informed consent independently.⁴¹³ The intermediate appellate court affirmed the decision, finding that the trial court did not abuse its discretion.⁴¹⁴ In reviewing the decision, the Pennsylvania Supreme Court, applied an abuse of discretion standard, rather than a more stringent one recommended by the ACLU.⁴¹⁵ Nonetheless, it concluded that the trial court had abused its discretion, because it lacked statutory authority to deny the minor's petition for judicial authorization based on her failure to obtain parental consent.⁴¹⁶

In re Doe should be contrasted with the recent decision of the Nebraska Supreme Court, which reached the opposite conclusion. *In re Anonymous*⁴¹⁷ involved a sixteen year old, who was ten weeks pregnant. The trial court denied the application upon a finding that she was "not sufficiently mature to decide whether to have an abortion" after telling her "'when you have the abortion it's going to kill the child inside you.'"⁴¹⁸ A majority of the Supreme Court upheld the finding, despite the dissent's observation that

[t]he petitioner has no legal parents; the juvenile court terminated their parental rights. Her legal guardian, the Department [of Health and Human Services]—by regulation—will not give her consent. And although the district court has required her to get her foster parents' consent to obtain an abortion, their consent would be meaningless under the law because they are neither parents nor guardians. She is in a legal limbo—a quandary of the Legislature's making.⁴¹⁹

Decisions such as *Anonymous* and *In re Doe* show that the judicial bypass mechanism often depends upon the personal viewpoint of the judge hearing the application.⁴²⁰ Although some young women will consult with a parent, many feel that they cannot tell a parent about the pregnancy for various reasons, including abuse, rape, or

412. *Id.*

413. *Id.*

414. *Id.* at 621.

415. *In re Doe*, 33 A.3d 615, 624 (Pa. 2011).

416. *Id.* at 628.

417. *In re Anonymous* 5, 286 Neb. 640 (2013).

418. *Id.* at 643, 644.

419. *Id.* at 654.

420. Helena Silverstein & Leanne Speitel, "Honey I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion, 88 IOWA L. REV. 75, 77 (2002).

incest.⁴²¹ Forcing a young woman to tell an abusive parent about her decision to terminate a pregnancy could also lead to family violence.⁴²² Furthermore, placing restrictions on a young woman's access to abortion can delay her from seeking earlier, safer care, thus putting her health at risk.⁴²³

The recent imposition of unnecessary and burdensome regulations targeting abortion providers over other medical professionals is an obvious attempt to increase costs, prevent ease of access to abortion care, and drive these physicians out of practice.⁴²⁴

Such proposals are known as TRAP laws: Targeted Regulation of Abortion Providers. Common TRAP regulations include those that restrict where abortion care may be provided. Regulations limiting abortion care to hospitals or other specialized facilities, rather than physicians' offices, require doctors to obtain medically unnecessary additional licenses, needlessly convert their practices into mini-hospitals at a great expense, or provide abortion services only at hospitals, an impossibility in many parts of the country.⁴²⁵

Forty-five states have enacted such laws.⁴²⁶ The American College of Obstetricians and Gynecologists (ACOG), however, has explicitly stated on more than one occasion that admitting privileges are not necessary to the provision of safe abortions, and publicly opposes laws that make abortion access contingent on the availability of such privileges.⁴²⁷ Instead of admitting privileges, ACOG and other health organizations emphasize the need for clearly established policies and protocols to govern the transfer of patients needing emergency care to a hospital.⁴²⁸

421. Council on Judicial and Ethical Affairs, Mandatory Parental Consent to Abortion, 2–4 (1993), available at <http://www.ama-assn.org/resources/doc/code-medical-ethics/2015a.pdf>.

422. *Id.*

423. Silverstein & Speitel, *supra* note 420, at 111–12.

424. Lisa M. Brown, *The TRAP: Targeted Regulations of Abortion Providers*, NAT'L ABORTION FED'N, http://www.prochoice.org/about_abortion/facts/trap_laws.html.

425. NARAL, *supra* note 327, at 20.

426. *Id.*

427. See *Statement on State Legislation Requiring Hospital Admitting Privileges for Physicians Providing Abortion Services*, ACOG (Apr. 25, 2013), <http://www.acog.org/About%20ACOG/News%20Room/News%20Releases/2013/Hospital%20Admitting%20Privileges%20for%20Physicians%20Providing%20Abortion%20Services.aspx>; Ralph Hale, *Analysis of the Possible FDA Mifepristone Restrictions*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS 3 (July 27, 2000), available at <http://www.aaplog.org/wp-content/uploads/2002/05/ACOGAnalysisMifepristone7-27-00.pdf> (“Privileges at a hospital are not necessary for prescribing [medication abortion] safely The prescribing physician does not need to be in the emergency room or to be the admitting physician if a patient requires follow-up emergency care. Women experiencing miscarriages and spontaneous abortions frequently require the same services and care and appropriately receive this care at their physicians' offices.”).

428. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, GUIDELINES FOR WOMEN'S HEALTH CARE: A RESOURCE MANUAL 433 (Paula Hillard et al., eds., 3d ed. 2007) (“Clinicians who

In fact, the admitting privileges requirement is irrelevant to the optimal provision of care to abortion patients.⁴²⁹ In the exceedingly rare event that hospitalization is required, the physician who provided the abortion may not be the appropriate physician to manage the patient's care in the hospital.⁴³⁰ For example, if the patient has suffered a vascular or bowel injury, it is critical that she be treated by the appropriate subspecialist; similarly, a woman with a cardiac or lung related complication should be seen by a cardiologist or pulmonologist.⁴³¹

Moreover, the admitting privileges requirement is only applied to abortion clinics, while physicians frequently perform surgeries that are far more complicated and riskier than abortions in ambulatory surgical centers.⁴³² In the field of gynecology, this can include laparoscopy, laparoscopic hysterectomy, and vaginal hysterectomy.⁴³³ These procedures also generally involve general anesthesia, requiring the patient to be paralyzed and intubated, which is not normally used in an abortion procedure.⁴³⁴ The use of general anesthesia in itself is riskier than an abortion.⁴³⁵

Federal courts have not hesitated to strike down laws that use admitting privileges, or similar measures, to delegate arbitrary and unreviewable authority, with no standards, over abortion providers to private hospitals.⁴³⁶ In *Birth Control Centers, Inc. v. Reizen*,⁴³⁷ a federal district court in Michigan held that a law that required abortion clinics to secure either a written transfer agreement with a hospital

perform abortions in their offices, clinics, or freestanding ambulatory care facilities should have a plan to provide prompt emergency services if a complication occurs and should establish a mechanism for transferring patients who require emergency treatment.”); *2013 Clinical Policy Guidelines*, NAT'L ABORTION FED'N, at i, 55 (2012), available at http://www.prochoice.org/pubs_research/publications/documents/2013NAFCPGsforweb.pdf (“Protocols for the management of medical emergencies must be in place. These protocols must include indications for emergency transport and written, readily available directions for contacting external emergency assistance (i.e., an ambulance).”).

429. Imani Gandy, *Why Admitting Privileges Laws Have No Medical Benefit*, RH REALITY CHECK (July 24, 2013, 3:30 PM), <http://rhrealitycheck.org/article/2013/07/24/why-admitting-privileges-laws-have-no-medical-benefit/>.

430. *Id.*

431. *Id.*

432. Elizabeth Flock, *Docs: Texas Abortion Bill Doesn't Make Sense*, U.S. NEWS AND WORLD REPORT (June 27, 2013), <http://www.usnews.com/news/articles/2013/06/26/obgyn-docs-say-provisions-in-filibustered-texas-abortion-bill-dont-make-sense>.

433. See Bulent Berker et al., *Complications of Laparoscopic Gynecologic Surgery*, SOCIETY OF LAPAROENDOSCOPIC SURGEONS, http://laparoscopy.blogs.com/prevention_management_3/2010/07/complications-of-laparoscopic-gynecologic-surgery.html.

434. Crimando Laurie, *Total Laparoscopic Hysterectomy*, UNIV. OF MICHIGAN: VON VOIGTLANDER WOMEN'S HOSP. 3–4 (2011), <http://www.med.umich.edu/11libr/gyn/TLH.pdf>.

435. See Flock, *supra* note 432.

436. *Birth Control Ctrs. v. Reizen*, 508 F. Supp. 1366, 1374 (E.D. Mich. 1981), *aff'd on other grounds*, 743 F.2d 352 (6th Cir. 1984).

437. *Id.*

or a written agreement with a physician with staff privileges at a local hospital “violate[d] due process concepts because [it] delegate[d] a licensing function to private entities without standards to guide their discretion.”⁴³⁸

As the court explained,

The defect lies in the delegation of unguided power to a private entity, whose self-interest could color its decision to assist licensure of a competitor. Similar delegations of licensing functions have met with judicial disapproval. . . . The power to prohibit licensure may not constitutionally be placed in the hands of hospitals. Such an impermissible delegation without standards or safeguards to protect against unfairness, arbitrariness or favoritism is void for lack of due process.⁴³⁹

Similarly, in *Hallmark Clinic v. North Carolina Department of Human Resources*,⁴⁴⁰ the court ruled unconstitutional a law requiring abortion clinics either to have a written transfer agreement with local hospitals, or to ensure that all its physicians have full admitting privileges at a local hospital.⁴⁴¹ The court held the state had given “hospitals the arbitrary power to veto the performance of abortions for any reason or no reason at all.”⁴⁴² Similarly, the court recognized that “[s]taff privileges, like transfer agreements, depend on the whim or good will of a hospital . . . and the Department ha[d] not undertaken to superimpose its own criteria or even guidelines to control admission to staff privileges.”⁴⁴³

As the court concluded,

the state cannot confer upon a private institution the exercise of arbitrary and capricious power. If the state is determined to utilize hospitals as a control factor for the protection of patients in free-standing abortion clinics then it must establish and enforce standards for admission to hospital staff privileges. To do otherwise

438. *Id.*

439. *Id.* at 1375 (internal citations omitted).

440. *Hallmark Clinic v. North Carolina Dep’t of Human Res.*, 380 F. Supp. 1153, 1159 (E.D.N.C. 1974).

441. *Id.* at 1153–54.

442. *Id.* at 1158.

443. *Id.* at 1159; *Women’s Med. Prof’l Corp. v. Baird*, 438 F.3d 595, 610 (6th Cir. 2006) (holding the nondelegation doctrine inapplicable where the state had ability to waive hospital transfer agreement requirement thus “prevent[ing] the hospitals from having an unconstitutional third-party veto over [abortion clinic’s] license”). Indeed, the lack of any supervisory or waiver power over the process distinguishes an admitting privileges requirement from other such requirements that have been upheld by the federal courts. See *Women’s Med. Prof’l Corp. v. Baird*, 438 F.3d 595, 610 (6th Cir. 2006); *Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health & Env’t. Control*, 317 F.3d 357, 362–63 (4th Cir. 2002).

is government by caprice and cannot withstand fourteenth amendment challenges.⁴⁴⁴

A notable exception recently occurred in the Fifth Circuit. In *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* a motions panel of that Court granted a stay of a judgment enjoining enforcement of a Texas statute that required abortion providers to have hospital admitting privileges.⁴⁴⁵ The panel concluded that “the State has made a strong showing that it is likely to prevail on the merits.”⁴⁴⁶ In doing so, the panel relied upon the Eighth Circuit’s decision in *Women’s Health Center of West County, Inc. v. Webster*.⁴⁴⁷ But that case is inapposite. As the Eighth Circuit pointed out, the statute at issue was not an attempt to regulate the licensing of abortion clinics, but rather to regulate the qualifications of physicians who perform abortions.⁴⁴⁸ The Texas statute on the other hand was directly related to the regulation of abortion clinics.⁴⁴⁹

TRAP legislation has, at its core, the aim of reducing the availability of abortion services and with no real health justification.⁴⁵⁰ Accordingly, such legislation has not withstood constitutional attack.⁴⁵¹ Legislation “that has the effect of forcing all or a substantial portion of a state’s abortion providers to stop offering such procedures creates a substantial obstacle to a woman’s right to have a pre-viability abortion, thus constituting an undue burden under *Casey*.”⁴⁵²

Despite these clear authorities, state legislatures have not stopped trying to impose these restrictive regulations.⁴⁵³ On June 14, 2013, the Wisconsin Legislature passed Section 1 of 2013 Wisconsin Act 37, which, among other things, requires physicians providing abortion services in Wisconsin to have admitting privileges at a hospital

444. *Id.*; *cf.* *Women’s Med. Ctr. of Nw. Houston v. Bell*, 248 F.3d 411, 422 (5th Cir. 2001).

445. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 2013 U.S. App. LEXIS 22231 (5th Cir. Oct. 31, 2013). *Planned Parenthood* made an application to the Circuit Justice to vacate the stay granted by the Fifth Circuit. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 2013 U.S. Dist. LEXIS 154069 (W.D. Tex. Oct. 28, 2013). The Supreme Court declined to vacate the stay by a 5–4 vote. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 2013 U.S. LEXIS 8415 (U.S. Nov. 19, 2013).

446. *Id.* at *3.

447. *Women’s Health Ctr. v. Webster*, 871 F.2d 1377 (8th Cir. 1989).

448. *Id.* at 1382.

449. *Abbott*, 2013 U.S. App. at *1.

450. *See supra* note 425 and accompanying text.

451. NARAL, *supra* note 327, at 20.

452. *Okpalobi v. Foster*, 190 F.3d 337, 357 (5th Cir. 1999) (citation omitted), *superseded on reh’g en banc on other grounds*, 244 F.3d 405 (5th Cir. 2001); *accord* *Tucson Woman’s Clinic v. Eden*, 379 F.3d 531, 541 (9th Cir. 2004) (“A significant increase in the cost of abortion or [decrease in] the supply of abortion providers and clinics can, at some point, constitute a substantial obstacle to a significant number of women choosing an abortion.”).

453. NARAL, *supra* note 327, at 2.

within thirty miles of their clinic.⁴⁵⁴ Finding that the impact of this legislation would be the closure of a vast majority of clinics in the state, the court in *Planned Parenthood of Wisconsin v. Van Hollen*,⁴⁵⁵ granted a preliminary injunction against its enforcement.⁴⁵⁶

State Legislatures have also sought to ban mifepristone (RU486). The Court was referring to ingestion of mifepristone (RU486), commonly known as the abortion pill, which can only be used in the early weeks of pregnancy.⁴⁵⁷ Oklahoma passed such a law in 2011 that rendered the abortion pill unavailable to a majority of women.⁴⁵⁸ Thirteen additional states have also passed laws in recent years that restrict the availability of medical abortions.⁴⁵⁹

Since the FDA approved the drug in 2000, the number of early abortions has increased to 90% of abortions performed in the first twelve weeks.⁴⁶⁰

The abortion pill debate raises several interesting constitutional questions. For instance, courts face the problem of whether the abortion pill should be classified as contraception or an abortifacient.⁴⁶¹ Although Mifepristone is approved by the FDA, the drug is used in conjunction with another drug, misoprostol, which is not approved, to terminate pregnancy.⁴⁶² As a result, the Oklahoma law has effectively banned the abortion pill by banning the off-label use of misoprostol.⁴⁶³

The act harms women in two ways: (1) “the Act removes a safe, non-invasive treatment option for women seeking termination of ectopic pregnancies, which are health- and life-threatening pregnancies occurring outside the uterus in approximately two percent of pregnancies,” and, (2) “the Act will prevent women seeking termination of intrauterine pregnancies from accessing safe, effective and non-invasive treatment options.”⁴⁶⁴

The Supreme Court initially granted certiorari to consider the issue, but held all proceedings in abeyance pending a response to

454. 2013–2014 Wis. Legislative Serv. Act 37 (2013 S.B. 206) (West).

455. *Planned Parenthood of Wisconsin v. Van Hollen*, 2013 U.S. Dist. LEXIS 110097 (W.D. Wis. Aug. 2, 2013).

456. *Van Hollen*, 2013 U.S. Dist. Lexis 110097, at *70.

457. See Robertson, *supra* note 316, at 339.

458. OKLA. STAT. tit. 63, § 1-729a (2010).

459. See *State Policies in Brief: Medication Abortion*, GUTTMACHER INSTITUTE 2 (Nov. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_MA.pdf.

460. See *id.* (citing JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 63–66 (1994)).

461. Samantha Harper, Note, “*The Morning After*”: *How Far Can States Go to Restrict Access to Emergency Contraception?*, 38 COLUM. HUM. RTS. L. REV. 221, 243 (2006).

462. *Id.*

463. OKLA. STAT. tit 63, § 1-729a (2010).

464. Plaintiff’s Response in Opposition to Defendants’ Motion to Dismiss, with Supporting Brief, at 3, *Okla. Coal. for Reprod. Justice v. Cline*, 2011 WL 7463407 (D. Okla. 2011).

questions that it certified to the Oklahoma Supreme Court.⁴⁶⁵ The Oklahoma Supreme Court answered those questions and held that the law that it had struck “prohibits the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration and prohibits the use of methotrexate to treat ectopic pregnancies.”⁴⁶⁶ The Supreme Court then dismissed the writ of certiorari as improvidently granted.⁴⁶⁷

It has been noted

that had the justices been certain from the start that the Oklahoma law banned drug-induced abortions, they would have denied the state’s appeal at the outset. . . . [T]he decision suggests that the court is unwilling to revisit what it called the ‘core holding’ of *Roe v. Wade*, which found a constitutional right to abortion procedures.⁴⁶⁸

Decisions involving abortion restrictions should follow history, logic, and basic personal rights of women and reaffirm that the determination to have an abortion is a personal choice, between a woman and her doctor. This decision should be free of roadblocks designed, not to protect the life of the patient, but rather to support the religious and moral views of individuals who have no nexus with the circumstance facing the woman and patient.⁴⁶⁹ No woman is compelled to undergo abortion, and those whose personal and religious principles forbid abortion are in no way compelled to do anything against their conviction.⁴⁷⁰

CONCLUSION

“The more things change, the more they stay the same.”⁴⁷¹ So said novelist and journalist Jean-Baptiste Alphonse Karr (albeit in

465. *Cline v. Okla. Coal. for Reprod. Justice*, 133 S.Ct. 2887 (2013). The certified questions were “[w]hether H.B. No. 1970, Section 1, Chapter 216, O.S.L. 2011 prohibits: (1) the use of misoprostol to induce abortions, including the use of misoprostol in conjunction with mifepristone according to a protocol approved by the Food and Drug Administration; and (2) the use of methotrexate to treat ectopic pregnancies.”

466. *Cline v. Okla. Coal. for Reprod. Justice*, 2013 OK 93, 2013 Okla Lexis 124, at *31 (2013).

467. *Cline v. Okla. Coal. for Reprod. Justice*, 2013 U.S. LEXIS 7855 (2013).

468. Jess Bravin, *Supreme Court Snubs Oklahoma Abortion Case*, WALL ST. J., Nov. 5, 2013, at A6.

469. *Planned Parenthood v. Casey*, 505 U.S. 833, 848–50 (1992).

470. *See, e.g.*, Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, *supra* note 389.

471. GREGORY Y. TITELMAN, RANDOM HOUSE DICTIONARY OF POPULAR PROVERBS AND SAYINGS (Random House, New York, 1996).

French), highlighting, of course, that as tumultuous as times are, nothing really changes. He certainly wasn't talking about abortion, but he could have been. The arguments made to undermine a woman's reproductive freedom are not new. As the testimony before the Governor's Commission demonstrates, witnesses argued fetal pain, life at conception, and morals. They were convincingly refuted at that time and in the *Roe* opinion. Thus, as Professor Means so well put it,

*. . . [O]ver the long pull, the Roe v. Wade opinion will outlast its critics. . . . [T]he work of the Court, like the Constitution it interprets, is not designed for seasons, silly or otherwise, but for the ages.*⁴⁷²

472. *Hearings*, *supra* note 6, at 36.