Reproductive Injustice in the New Millennium

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

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.

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.

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.” So testified Professor Cyril W. Means, Jr., before Congress in opposition to a proposed constitutional amendment to outlaw abortion.

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.
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.

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

[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.

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. The review referred to was written by Professor Cyril Means, Jr., a Professor of Law at New York Law School.

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

12. *Id.* at 135.

13. See JOSHD. 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. Professor Means was a member of the Governor’s Commission Appointed to Review New York State’s Abortion Law and his exhaustive research was incorporated into that Report, which was the first history of abortion. The Report noted that abortion was not illegal in either England or America before the nineteenth century, and that even when abortion was banned in the 1800s, the purpose was solely to protect the life of the mother. Professor Means’ history, described as the “new orthodoxy,” is now accepted by the vast majority of legal scholars.

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.

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.
A. Legal Abortions (c. 1250–1803)

The practice of abortion was common throughout history. 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. 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.

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. 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. The justices were not willing to consider the matter as a felony. (2) “The Abortionist’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.

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. Bracton wrote that if someone “[h]it a pregnant woman or [gave] 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.”

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


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.


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).


42. A. PEGIS, 1 BASIC WRITINGS OF SAINT THOMAS AQUINAS 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 \textit{Summary of the Pleas of the Crown} echoes these sentiments: “[Abortion] must be a person \textit{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.
\(^45\) See Survey, supra note 23, at 88.
\(^47\) 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, believing that the act of abortion while “quick with child” was merely a misdemeanor.

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

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. This distinction is analogous to the modern constitutional thinking concerning state regulation and involvement at later stages of pregnancy. While it is evident that at common law an abortion during this period could be considered a crime, 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. 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.

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

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

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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.
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.
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, but it is clear that this law criminalized abortions at all stages of pregnancy. 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. 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.

The English abortion law was not immediately adopted in the United States. In fact, prior to 1821 prosecutions for abortion in the United States were “virtually nonexistent.” There is evidence that abortion after quickening had indeed been a crime in the colonies prior to the Revolution. 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.” 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.

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

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.
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.
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.”

Regarding the first factor, evidence shows that Americans originally believed abortion to be a problem particular to the lower classes of society. As James Mohr, Professor of History at the University of Oregon, indicates: “before 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.” 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. This was a “sobering warning to an English nation already concerned with agricultural rioting and urban unrest by large numbers of poor people.” Considering that most abortions Americans had heard of involved the poor, it is not surprising that abortion was often “overlooked.”

The process of commercialization brought abortion to the forefront of public attention in the early 1840s. Members of the medical community competed fiercely for clients in the new abortion industry. As a result, advertisements quickly became common practice, appearing in urban and rural newspapers, popular magazines and journals. In addition, some abortionists even gained fame and public attention. For instance, Madame Restell of New York City was arrested in 1841 for performing abortions on a large scale. 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.

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 & HOFER, supra note 21, at 22.
98. Id. at 23.
99. MOHR, supra note 20, at 47.
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.\textsuperscript{106}

After 1840, abortions increased,\textsuperscript{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.\textsuperscript{108} One potential reason for this change was that married women began to desire limiting their family size.\textsuperscript{109} A further piece of evidence for an increase in abortions is an almost four percent decline in birth rates from 1800 to 1900.\textsuperscript{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.\textsuperscript{111} This had the important effect of changing public perception towards the belief that abortions were more common than earlier in American history.\textsuperscript{112} As a result, physicians and politicians alike grew concerned that white married women had begun using abortion as a method of birth control.\textsuperscript{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.”\textsuperscript{114} As the idea that abortion was common took hold, so did an awareness that existing abortion procedures were dangerous.\textsuperscript{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.\textsuperscript{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.\textsuperscript{117}

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

\textsuperscript{106} See Mohr, supra note 20, at 48.
\textsuperscript{107} See id. at 48–49.
\textsuperscript{108} See id. at 50.
\textsuperscript{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)).
\textsuperscript{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).
\textsuperscript{111} See id. at 225.
\textsuperscript{112} See Johnson, supra note 33, at 1523.
\textsuperscript{113} See id. (citing Mohr, supra note 20, at 93–95).
\textsuperscript{114} See Mohr, supra note 20, at 100 (citing J. Miller, Criminal Abortion, 1 Kan. City Med. Record, no. 8, 295 (1884)).
\textsuperscript{115} See Means 2, supra note 9, at 382.
\textsuperscript{116} Id. at 382–87. A thorough discussion of death rates from infection during the nineteenth century is also included in this source.
\textsuperscript{117} See id. at 382.
Medical Association (AMA). 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. The AMA argued that the fetus was alive before quickening and that it possesses “inherent rights, for civil purposes.”

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

On the religious front, both the Roman Catholic Church as well as the Presbyterian Church began to oppose abortion with increasing frequency. The strongest opposition came from the Puritans. Puritan attacks were based on the notion that female morality could be upheld by instilling fear of pregnancy in women. Anthony Comstock, a politician dedicated to ideas of Victorian morality, used his connections to Congressional lobbyists to stifle the abortion advertisements and products. 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.

Many early suffragettes had mixed views on the abortion issue. 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. Nevertheless, most suffragettes of
the time thought that the solution to high rates of abortion was not legis-

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).
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).
140. See id. at 34.
141. See supra Part I.A.
143. Id.
an infant was homicide should depend on viability. 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 . . . .”

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. 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.

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 Kentucky had anti-abortion laws on the books. Until 1967, forty-nine states and the District of Columbia made abortion a felony offense. In the span of time between the first anti-abortion law in 1821 and the turn of the twentieth century, the quickening doctrine had all but been abandoned as the distinction between legal and illegal abortions. 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).
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. The most common form of exception permitted abortions where those necessary to save the mother’s life. In the first half of the twentieth century, abortion laws effectively created a two-tiered system. Privileged women were able to pay doctors for abortions, and persuade them to perform the procedure. The poor and destitute faced restrictive laws which forced them to have an unwanted child or seek out illegal abortions, or travel to foreign countries to seek abortion services. In the years preceding the onset of the First World War, public discussion of sex was considered taboo.

Additionally, before 1950, there was no unified movement to repeal abortion laws in the United States. Instead, birth control advocates had focused on promoting the legalization and availability of contraception. The greatest pioneers of the movement were Emma Goldman and Margaret Sanger, whose efforts finally met success when a constitutional right to privacy was recognized in 1965.

During the 1930s and 1940s, police raids on abortion clinics were sensationalized in the press. 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. In the Martin case, Chicago newspapers presented the arrests as a crackdown that had brought down an organized crime
ring, stating that a single abortion clinic “ranked with the Capone crime syndicate.” These sensational stories and the resulting trials, however, were exceptions rather than the norm.

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. Nevertheless, the physician choosing to defend abortions under the therapeutic exception provisions took a grave risk, as the danger that a prosecutor might choose to pursue an indictment was a real concern. Furthermore, as a result of these risks, hospitals imposed strict rules, and abortions needed to be approved by special committees or boards of directors. This obviously had the effect of reducing the number of hospital abortions.

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.” In April, 1955, Planned Parenthood hosted a conference in New York on “Abortion in the United States.” One common theme in these discussions was that despite the illegality of abortions, procedure abortion rates were still high. 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.

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

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.
176. Id.
177. Id.
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.” 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.”

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. 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. Williams argued that abortion should be legal before the point of viability, which he placed at twenty-eight weeks. This argument became the standard for abortion proponents.

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 Lader

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. In this instance, “[a]lthough there was a universal chorus of horror against the drug itself, hardly a newspaper...
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.
194. See Hull & Hoffer, supra note 21, at 97.
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.”

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.

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.”

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. Although the statute was repealed before trial, the challenge is noteworthy.

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

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 commission under the leadership of Charles W. Froessel, a retired Judge.


204. See supra Part I.A.


206. See id.

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


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. The Governor’s Commission Appointed to Review New York State’s Abortion Law issued its report in March 1968. 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. 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.” 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, even though the actual suicide rate of pregnant women was much lower than that of women of the same age who were not pregnant. 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. Despite these justifications, prior to the liberalization of New York’s abortion law, only four-hundred legal abortions were performed within the State annually.

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.

212. Id. at 8–9, 14.
213. Id. at 16–17.
214. Id. at 15.
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. In fact, the report tracked the history of the entire controversy from both moral and secular points of view. 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.

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. 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. They also found that New York’s restrictive law unfairly discriminated against the poor. 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. 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.”

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. These conditions were: (1) to preserve the life of the woman; (2) to prevent grave impairment of the

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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 abortional act,”233 which amended Section 125.05 of the New York Penal Law, providing that “[t]he submission by a female to an abortional 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).
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."  

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

The amendment was immediately met with opposition. 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. 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.” 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.

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)).
236. Id.
237. See LADER 2, supra note 187, at 159.
238. See id. at 163; MOHR, supra note 20.
239. Id.
forbid abortion are in no way compelled against their convictions. Every woman has the right to make her own choice.241


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

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 . . . ”).
249. See Roe, 410 U.S. at 154.
250. Id. at 156–57.
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.\footnote{252. Id. at 162–63.}

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.\footnote{253. Id. at 149.} 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.\footnote{254. See id. at 150.}

The point of fetal viability typically takes place between twenty-four and twenty-eight weeks into a pregnancy.\footnote{255. Id. at 160.} 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.\footnote{256. Id. at 163.} Regulations must be directed toward ensuring maternal health, and cannot be aimed at protecting a fetus, or limiting access to abortion services.\footnote{257. Roe v. Wade, 410 U.S. 113, 163 (1973).} 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.\footnote{258. See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 967–68 (1982).}

The third tier encompasses the period after the point of fetal viability.\footnote{259. Id. at 163.} 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.\footnote{260. Roe v. Wade, 410 U.S. 113, 163 (1973).}

In \emph{Doe}, the same seven justice majority largely restated and fleshed out its ruling in \emph{Roe}.\footnote{261. Doe v. Bolton, 410 U.S. 179, 179 (1973).} 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.\footnote{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. The conference issued a statement, which claimed that the Court had “deprived the unborn child of his or her human rights.” 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.” 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. A number of law professors likewise criticized the Court’s rationale, including John Hart Ely and Robert M. Byrn.

On the other hand, the Washington Post called the decision “both wise and sound.” 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. 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, parental consent, spousal consent, and waiting periods for women seeking abortions. 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.
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.
282. See HULL & HOFFER, supra note 21, at 210.
283. Id. at 211.
284. Id.
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 \textit{Roe} because the declaration was contained in the preamble, and “this [did] not by its terms regulate abortion.”\textsuperscript{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 \textit{Roe} does not include the right to government assistance in obtaining one.\textsuperscript{289} The decision also held that the requirement of viability testing at twenty weeks was constitutional.\textsuperscript{289}

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

Justice Antonin Scalia concurred in the judgment, but argued that the plurality opinion was “indecisive” and “stingy” and that \textit{Roe} should be overturned.\textsuperscript{294} Justice Sandra Day O’Connor, also concurred with the judgment, albeit for very different reasons.\textsuperscript{295} Unlike her colleagues in the majority, O’Connor argued that \textit{Roe}’s trimester system, while problematic, should neither be modified nor overturned.\textsuperscript{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.\textsuperscript{297}

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

\begin{itemize}
\item \textsuperscript{288} \textit{Id.} at 506 (stating that the preamble can be read simply as the type of value judgment that a State is entitled to make).
\item \textsuperscript{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.” \textit{Id.} at 491 (citing DeShaney v. Winnebago Cnty. Dept. of Soc. Servs., 489 U.S. 189, 194–95 (1989)).
\item \textsuperscript{290} \textit{See Webster}, 492 U.S. at 495–99 (1989).
\item \textsuperscript{291} \textit{See Webster v. Reprod. Health Servs.}, 492 U.S. 490, 494 (1989).
\item \textsuperscript{292} \textit{Id.} at 494.
\item \textsuperscript{293} \textit{Id.} at 519 (citing Thornburgh v. Am. Coll. Of Obstetricians and Gynecologists, 476 U.S. 747, 795 (1986) (Burger, J., dissenting)) (emphasis added).
\item \textsuperscript{294} \textit{Webster}, 492 U.S. at 532–37.
\item \textsuperscript{295} \textit{Id.} at 522.
\item \textsuperscript{296} \textit{Webster v. Reprod. Health Servs.}, 492 U.S. 490, 529–30 (1989).
\item \textsuperscript{297} \textit{Id.} at 530.
\end{itemize}
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.
305. Id. at 846.
306. Id.
307. Id.
308. See Richard L. Berke, *The Supreme Court: The Overview; Clinton Names Ruth Ginsberg, 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.\footnote{18 U.S.C.A. § 248 (2012).}

\textit{Gonzales v. Carhart}\footnote{Gonzales v. Carhart, 550 U.S. 124, 124 (2007).} arose in response to the passage of the Partial-Birth Abortion Ban Act in 2003,\footnote{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)).} which prohibits dilation and evacuation (D&E), during the second trimester.\footnote{See Morgan Arnett, \textit{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).} At the time the Act was passed, D&E abortions were the most common type of second trimester abortion in the United States.\footnote{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)).} 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.\footnote{Id. at 160–61.} 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.”\footnote{Id. at 161.}

If \textit{Casey} “opened the door to more regulation than had been acceptable under \textit{Roe},” the Supreme Court’s 2007 decision in \textit{Carhart} blew the door off its hinges.\footnote{John A. Robertson, \textit{Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis, 14 U. PA. J. CONST. L. 327, 329 (2011).} The holding was seen as a victory by anti-abortion forces, who saw an opportunity to “chip away” at the abortion doctrine established by \textit{Roe}.\footnote{See id. at 329–30.} Equally as important, the 2010 midterm elections created a political shift, as “[m]any 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.”\footnote{Id. at 330 (quoting Erik Eckholm, \textit{Across Country, Lawmakers Push Abortion Curbs, N.Y. TIMES, Jan. 22, 2011, at A14}).} 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.\footnote{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

321. Id. at 877.
322. Id. at 878.
323. Id.
324. Id. at 833.
328. See CTR. FOR REPROD. RIGHTS, supra note 325.
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).  

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.

An Overview of Recent Abortion Restrictions in the States

Fifteen states have near-total criminal bans on abortion that are clearly unconstitutional. Louisiana and Utah enacted the bans in 1991, almost two decades after Roe was decided. 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.

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. These bills are intended to impose near-total bans on abortion; however, none have been enacted.

In 2011, Ohio became the first state to consider a bill that would ban abortion as soon as a fetal heartbeat can be detected. 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 detected as early as six weeks into a pregnancy. These laws are clearly unconstitutional.

330. Id. at 10.
331. Id.
332. Id. at 11.
333. Id. at 10.
334. Id. at 11.
338. See NARAL, supra note 327, at 10.
339. Id.
340. Id.
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

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).
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.
347. NARAL, supra note 327, at 11.
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.\textsuperscript{350}

Since 2005, no new scientific discoveries have been published to dispute these findings.\textsuperscript{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.\textsuperscript{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.\textsuperscript{353} The Tenth Circuit thus struck down the ban, noting that the law prohibited abortions of fetuses that may not have been viable.\textsuperscript{354}

In Isaacson v. Horne,\textsuperscript{355} the Ninth Circuit struck down an Arizona statute containing a twenty-week ban.\textsuperscript{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.\textsuperscript{357}

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


\textsuperscript{352} Jane L. v. Bangerter, 102 F.3d 1112, 1115 (10th Cir. 1996).

\textsuperscript{353} Id. (citing Planned Parenthood v. Danforth, 428 U.S. 52, 64 (1976)).

\textsuperscript{354} Jane L., 102 F.3d at 1115–18.

\textsuperscript{355} Isaacson v. Horne, 716 F.3d 1213, 1213 (9th Cir. 2013).

\textsuperscript{356} Id. at 1231.

\textsuperscript{357} Id.
or both. 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. The Act 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.

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

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

In Delaware, a statute requiring a twenty-four hour waiting period was declared unconstitutional because it did not contain a health exception. Despite the Delaware District Court’s ruling, mandatory waiting periods of twenty-four hours have been declared constitutional by the Supreme Court. 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. The most recognized and controversial of these informed consent laws


359. NARAL, supra note 327, at 5.


361. Id.

362. Id.

363. Id.

364. Id.

365. Id.


367. Id. at 1060.


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

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.” The Court has found an undue burden to exist if either the purpose or effect of imposing a law imposes such an obstacle. Proponents of ultrasound requirements contend that requiring a woman to view ultrasounds simply provides additional information.

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. 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. 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.

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.” 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.”

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371. Robertson, supra note 316, at 347.
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.
Ultrasound laws are also subject to First Amendment challenges on the grounds that they compel speech. 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.”

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.”

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, 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.” 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. 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.” 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.
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 statute 396 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).”)
390. Id.
391. Id.
392. See NARAL, supra note 327, at 14–15.
393. Id. at 15.
395. National Educ. Ass’n of Rhode Island v. Garrahy, 779 F.2d 790, 790 (1st Cir. 1986), affg. 508 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).
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.
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).
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 abortion 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.

At least “forty-four states have parental-notice or -consent laws that restrict young women’s access to abortion.” 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.

Although these criteria may sound adequate in the abstract, in practice, they are illusory. In re Doe is illustrative. Doe involved a minor who had applied for judicial authorization for an abortion. 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. Further, she indicated that she had not


407. NARAL, supra note 327, at 19.


410. Id. at 618.

411. Id.
sought her mother’s consent because she feared being thrown out of the house.  

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. The intermediate appellate court affirmed the decision, finding that the trial court did not abuse its discretion. In reviewing the decision, the Pennsylvania Supreme Court, applied an abuse of discretion standard, rather than a more stringent one recommended by the ACLU. 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.

In re Doe should be contrasted with the recent decision of the Nebraska Supreme Court, which reached the opposite conclusion. In re Anonymous 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.’” 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.

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. 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.
416. Id. at 628.
418. Id. at 643, 644.
419. Id. at 654.
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

422. Id.
423. Silverstein & Speitel, supra note 420, at 111–12.
425. NARAL, supra note 327, at 20.
426. Id.
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. 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. 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.

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. In the field of gynecology, this can include laparoscopy, laparoscopic hysterectomy, and vaginal hysterectomy. These procedures also generally involve general anesthesia, requiring the patient to be paralyzed and intubated, which is not normally used in an abortion procedure. The use of general anesthesia in itself is riskier than an abortion.

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. In Birth Control Centers, Inc. v. Reizen, a federal district court in Michigan held that a law that required abortion clinics to secure a written transfer agreement with a hospital that performed abortions in their office, 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.

430. Id.
431. Id.
435. See Flock, supra note 432.
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

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

446. Id. at *3.
447. Women’s Health Ctr. v. Webster, 871 F.2d 1377 (8th Cir. 1989).
448. Id. at 1382.
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.\textsuperscript{454} Finding that the impact of this legislation would be the closure of a vast majority of clinics in the state, the court in \textit{Planned Parenthood of Wisconsin v. Van Hollen},\textsuperscript{455} granted a preliminary injunction against its enforcement.\textsuperscript{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.\textsuperscript{457} Oklahoma passed such a law in 2011 that rendered the abortion pill unavailable to a majority of women.\textsuperscript{458} Thirteen additional states have also passed laws in recent years that restrict the availability of medical abortions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{462} As a result, the Oklahoma law has effectively banned the abortion pill by banning the off-label use of misoprostol.\textsuperscript{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.”\textsuperscript{464}

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

\textsuperscript{456} Van Hollen, 2013 U.S. Dist. Lexis 110097, at *70.
\textsuperscript{457} See Robertson, supra note 316, at 339.
\textsuperscript{458} OKLA. STAT. tit. 63, § 1-729a (2010).
\textsuperscript{460} See id. (citing JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 63–66 (1994)).
\textsuperscript{462} Id.
\textsuperscript{463} OKLA. STAT. tit 63, § 1-729a (2010).
questions that it certified to the Oklahoma Supreme Court. 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.” The Supreme Court then dismissed the writ of certiorari as improvidently granted.

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.

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. 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.

CONCLUSION

“The more things change, the more they stay the same.” 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]ether 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.”


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,

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

\[472.\text{Hearings, supra note 6, at 36.}\]