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## Some Form of Punishment: Penalizing Women for Abortion

Mary Ziegler

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# SOME FORM OF PUNISHMENT: PENALIZING WOMEN FOR ABORTION

Mary Ziegler\*

## ABSTRACT

In 2016, Donald Trump ignited a political firestorm when he suggested that women should be punished for having abortions. Although he backtracked, Trump’s misstep launched a debate about whether women have been or should be punished for having abortions. At the same time, Trump’s comments revealed that punishing women has become far more than an abstraction. In 2016, Indiana resident Purvi Patel became just the most recent visible example when she was sentenced to twenty years for feticide and child neglect for inducing an abortion.

But in spite of the furor created by Trump’s comment and Patel’s conviction, the history surrounding abortion and the punishment of women has remained obscure. Using original archival research, this Article closes that gap, exploring the history of pro-life debates about when, whether, and why to punish women. From this history, a paradox emerges. Over time, the pro-life movement committed more to a woman-protective strategy at the same time that pro-lifers justified the prosecution of women who violated laws on abortion and drug use.

If those on opposing sides of the abortion debate actually agree on the need to protect women, this paradox should be resolved. This Article proposes several legal steps that those on either side could take to demonstrate an interest in protecting women. As an initial matter, both movements should eliminate vague language in feticide laws that could apply to women having abortions and repeal any statute explicitly authorizing such punishment. As importantly, both sides should work for alternatives to criminalization. These steps should include a campaign for additional funding for drug treatment programs at the state and federal level and laws to check some of the reasons that make women so desperate to terminate a pregnancy, including domestic violence. This kind of reform campaign would ensure that the reality and rhetoric surrounding the punishment of pregnant women finally match.

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#### INTRODUCTION

In 2016, Donald Trump ignited a political firestorm when he suggested that women should receive “some form of punishment” for having abortions.<sup>1</sup> Although he immediately backtracked, Trump’s misstep launched a debate about whether women have been or should be punished for abortion.<sup>2</sup> Pro-lifers and feminists alike denounced the idea of penalizing women.<sup>3</sup> At the same time, Trump’s comments

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<sup>1</sup> See Tessa Berenson, *Donald Trump Backs ‘Punishment’ for Women Who Get Abortions, Then Backtracks*, TIME (Mar. 30, 2016, 5:44 PM), <http://time.com/4276862/donald-trump-abortion-ban-punishment/> [<https://perma.cc/F2VT-LCJ3>]; Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes ‘Punishment’ for Women, Then Recants*, N.Y. TIMES (Mar. 30, 2016), <https://nyti.ms/2ktWd00>; Jessica Glenza, *Donald Trump Retracts Call for Women Who Have Abortions to Be ‘Punished,’* GUARDIAN (Mar. 31, 2016, 2:29 EDT), <https://www.theguardian.com/us-news/2016/mar/30/donald-trump-women-abortion-punishment> [<https://perma.cc/UTF2-SAWS>].

<sup>2</sup> For a sample of the debate on the subject, see Rachel M. Cohen, *The Conviction of Purvi Patel and the Criminalization of Abortion*, AM. PROSPECT (May 25, 2016), <http://prospect.org/article/conviction-purvi-patel-and-criminalization-abortion> [<https://perma.cc/6BSE-AYAB>]; William Saletan, *The Pro-Life Case for Murder*, SLATE (Apr. 5, 2016, 11:07 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2016/04/donald\\_trump\\_abortion\\_comments\\_exposed\\_the\\_incoherence\\_of\\_the\\_anti\\_abortion.html](http://www.slate.com/articles/news_and_politics/politics/2016/04/donald_trump_abortion_comments_exposed_the_incoherence_of_the_anti_abortion.html) [<https://perma.cc/D8PB-V85V>]; Robert Schlesinger, Opinion, *How Trump Was Trapped by Logic*, U.S. NEWS & WORLD REP. (Mar. 31, 2016, 4:45 PM), <https://www.usnews.com/opinion/blogs/robert-schlesinger/articles/2016-03-31/donald-trump-was-trapped-by-pro-lifers-anti-abortion-logic>.

<sup>3</sup> For a sample of statements condemning Trump’s comment, see Press Release, March for Life, No Pro-Life American Advocates Punishment for Abortion (Mar. 30, 2016), <http://www.marchforlife.org/no-pro-life-american/> [<https://perma.cc/MS4H-QQTW>]; Brittney Cooper, *The Pro-Life Movement’s Disingenuous Response to Trump’s Controversial Abortion Remarks*, COSMOPOLITAN (Mar. 31, 2016), <http://www.cosmopolitan.com/politics/a56072/pro-life-movement-trump-punish-women-abortion/> [<https://perma.cc/8YHA-XU24>]; Saletan, *supra* note 2.

revealed that punishing women has become far more than an abstraction.<sup>4</sup> In 2016, Indiana resident Purvi Patel became just the most recent visible example when she was sentenced to twenty years for feticide and child neglect for inducing an abortion.<sup>5</sup>

But in spite of the furor created by Trump's comment and Patel's conviction, the history surrounding abortion and the punishment of women has remained obscure. While some historians have documented patterns of prosecution when abortion was a crime, current studies offer little insight into the aims of the pro-life legal reform movement from 1973 to the present.<sup>6</sup> Trump's election makes the reexamination of this history both timely and significant. Are cases like Patel's rare, or would women and abortion providers face punishment if abortion were once again a crime?

Using original archival research, this Article explores the history of pro-life debates about when, whether, and why to punish women. Starting in the 1970s, movement members prioritized a fetal-protective constitutional amendment designed to maximize protection for the unborn child.<sup>7</sup> Without directly discussing the punishment of women, movement members tried to maximize protection for the unborn child and did not rule out penalties for women who terminated their pregnancies.<sup>8</sup> By the mid-1980s, the movement's focus had changed; in this period, pro-lifers pushed restrictions designed to undercut popular approval of abortion, including stigmatizing

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<sup>4</sup> On the punishment of women for illegal abortion today, see, for example, Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POL'Y REV. 70, 70–74 (2015).

<sup>5</sup> On Patel's case, see, for example, Pooja Mehta, *The Medical Community Must Come to the Defense of Purvi Patel*, HUFFPOST (May 26, 2016, 9:00 AM), [https://www.huffingtonpost.com/pooja-mehta/purvi-patel-feticide-womens-health\\_b\\_10142974.html](https://www.huffingtonpost.com/pooja-mehta/purvi-patel-feticide-womens-health_b_10142974.html) [<https://perma.cc/WY7P-JX5X>]; Lynn M. Paltrow, *Purvi Patel, Abortion, and the Feticide Playbook*, HUFFPOST: THE BLOG (May 27, 2016, 12:09 PM), [https://www.huffingtonpost.com/lynn-m-paltrow/purvi-patel-abortion-and\\_b\\_10165284.html](https://www.huffingtonpost.com/lynn-m-paltrow/purvi-patel-abortion-and_b_10165284.html) [<https://perma.cc/86HP-9SSQ>]; Molly Redden, *Purvi Patel's Lawyers Appeal 20-Year Sentence Over Induced Abortion*, GUARDIAN (May 23, 2016, 16:40 EDT), <https://www.theguardian.com/world/2016/may/23/purvi-patel-appeal-abortion-sentence-feticide> [<https://perma.cc/TW83-G9SD>].

<sup>6</sup> For a sample of the historical scholarship on abortion before 1973, see, for example, JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006); *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING* (Linda Greenhouse & Reva Siegel eds., 2010) [hereinafter *BEFORE ROE V. WADE*]; JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900* (1978); LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973* (1997).

<sup>7</sup> See, e.g., DANIEL K. WILLIAMS, *DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE ROE V. WADE* 212–16 (2016).

<sup>8</sup> See *id.*; Mary Ziegler, *Everyone Agrees Women Who Have Abortions Shouldn't Be Penalized. Or Do They?*, WASH. POST (Apr. 1, 2016), [https://www.washingtonpost.com/post-everything/wp/2016/04/01/everyone-agrees-women-who-have-abortions-shouldnt-be-penalized-or-do-they/?utm\\_term=.3f2c0de4a6e6](https://www.washingtonpost.com/post-everything/wp/2016/04/01/everyone-agrees-women-who-have-abortions-shouldnt-be-penalized-or-do-they/?utm_term=.3f2c0de4a6e6) [<https://perma.cc/F6W9-CXFF>] (describing, in part, the anti-abortion movement's interest in penalizing women who received abortions).

laws outlawing abortions chosen as a method of birth control.<sup>9</sup> At the same time, movement leaders campaigned for the extension of homicide, child abuse, and child neglect laws to unborn children.<sup>10</sup> This strategy included an effort to punish pregnant drug users and even women who self-induced abortions.<sup>11</sup>

Ironically, pro-lifers in the period also began more often presenting their cause as an effort to protect women, not punish them.<sup>12</sup> In the following decades, as woman-protective laws gained favor, pro-lifers consistently emphasized that they would never punish women if abortion were a crime.<sup>13</sup>

From this history, a paradox emerges. The movement's commitment to protecting women increasingly stood in tension with the way activists dealt with the prosecutions of women who violated laws on abortion and drug use or self-induced abortion. There is a gap between the rhetoric of abortion opponents—describing women as victims of abortion—and the willingness of abortion opponents to sign off on the prosecutions of women for related conduct.

If those on opposing sides of the abortion debate actually agree on the need to protect women, this paradox should be resolved. This Article proposes several legal steps that those on either side could take to demonstrate an interest in protecting women. As an initial matter, both movements should eliminate vague language in feticide laws that could apply to women having abortions and repeal any statute explicitly authorizing such punishment. As importantly, both sides should work for alternatives to criminalization. These steps should include a campaign for additional funding for drug treatment programs at the state and federal level, particularly those that include child care, training for nurses and other medical staff to recognize the signs of addiction, and laws to check some of the reasons that make women so desperate to terminate a pregnancy, including domestic violence. This kind of reform campaign would ensure that the reality and rhetoric surrounding the punishment of pregnant women finally match.

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<sup>9</sup> See Burke Balch, *NRLC Proposes a Post-Webster State Legislative Program*, NAT'L RIGHT TO LIFE NEWS, Oct. 19, 1989, at 6; see also MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* 29–30, 58–60 (2015) (discussing shifts in the tactics of anti-abortion activists in the 1980s); Ziegler, *supra* note 8.

<sup>10</sup> See Ziegler, *supra* note 8.

<sup>11</sup> See *id.*

<sup>12</sup> See ZIEGLER, *supra* note 9, at 169–75 (discussing both the pro-life and pro-choice movements' move towards arguments emphasizing the protection of women); Ziegler, *supra* note 8; see also Mary Ellen Jensen, *Speech at the Legislators Educational Conference: How Public Opinion Polls Should Guide Pro-Life Strategy* (Aug. 1991) (on file at Papers of Mildred Jefferson, Box 13, Folder 6, Schlesinger Library, Harvard University); Laurie Ann Ramsey, *How Public Opinion Polls Should Guide Pro-Life Strategy* (1991) (on file at Papers of Mildred Jefferson, Box 13, Folder 8, Schlesinger Library, Harvard University).

<sup>13</sup> See J.C. Willke, *The Woman Should Not Be Punished*, NAT'L RIGHT TO LIFE NEWS, June 6, 1989, at 3 [hereinafter Willke, *The Woman Should Not Be Punished*]; J.C. Willke, *Letter to the Editor, Never the Mother*, N.Y. TIMES, Oct. 23, 1988, at E22 [hereinafter Willke, *Never the Mother*]; Ziegler, *supra* note 8.

The Article proceeds in five parts. Part I begins by briefly canvassing the history of criminal abortion laws before *Roe v. Wade*.<sup>14</sup> Part I then explores the proposals set forth by abortion opponents in the immediate aftermath of *Roe*. In the 1970s, movement members rarely discussed the punishment of women, at least not directly.<sup>15</sup> However, the constitutional proposals set out by movement members generally assumed that the unborn would not be protected until the law did something about the decisions of non-state actors, including women.<sup>16</sup> Without directly endorsing the punishment of women, movement leaders did not rule it out and often described women and physicians as murderers.<sup>17</sup>

Part II describes the changes that took place in the mid-1980s. In this period, pro-lifers pursued two sometimes conflicting strategies. On the one hand, movement members invested in woman-protective arguments.<sup>18</sup> Pro-lifers sponsored post-abortion support groups and crisis pregnancy centers, and movement members used injuries to women as a rationale for restricting abortion.<sup>19</sup> On the other hand, movement members promoted laws suggesting that some pregnant women deserved punishment.<sup>20</sup> Thus, as movement leaders called for the prosecution of pregnant women for drug use, woman-protective arguments fell into question.

Part III brings the story from the late 1980s to the present. As the Supreme Court has narrowed abortion rights, pro-lifers have relied more than ever on woman-protective arguments.<sup>21</sup> In *Planned Parenthood of Southeastern Pennsylvania v.*

<sup>14</sup> 410 U.S. 113 (1973); see discussion *infra* Part I.

<sup>15</sup> See discussion *infra* Part I; Ziegler, *supra* note 8.

<sup>16</sup> See discussion *infra* Part I; see, e.g., Memorandum from D. J. Horan, Legal Advisory Comm., NRLC, to the Pub. Policy Comm., NRLC (Sept. 5, 1973) (on file with Gerald R. Ford Presidential Library) (outlining, in part, concerns that a constitutional amendment restricting abortion would not prohibit privately performed abortions).

<sup>17</sup> See discussion *infra* Part I; Ziegler, *supra* note 8.

<sup>18</sup> See ZIEGLER, *supra* note 9, at 169–75 (discussing both the pro-life and pro-choice movements' moves towards emphasizing the protection of women); Ziegler, *supra* note 8. See generally also Jensen, *supra* note 12; Ramsey, *supra* note 12.

<sup>19</sup> See SARA DIAMOND, *SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT* 97 (1989) (explaining the founding of Women Exploited by Abortion (WEBA), a support group for women who had abortions); ELLIE LEE, *ABORTION, MOTHERHOOD, AND MENTAL HEALTH: MEDICALIZING REPRODUCTION IN THE UNITED STATES AND GREAT BRITAIN* 22–24 (2003) (describing various pro-life support groups and mental health centers that viewed abortion as damaging to women's health).

<sup>20</sup> See, e.g., Marney Rich, *A Question of Rights: Birth and Death Decisions Put Women in the Middle of Legal Conflict*, CHI. TRI., Sept. 18, 1988, at F1 (describing an AUL attorney's support for prosecution of women for "willful" or "malicious" harm to unborn children); Ziegler, *supra* note 8; Newsletter, NRLC STATEHOUSE UPDATE (Nat'l Right to Life Comm., Washington, D.C.), Aug. 12, 1983, at 1–6 [hereinafter STATEHOUSE UPDATE] (discussing potential legislative actions against wrongful birth suits).

<sup>21</sup> See Willke, *Never the Mother*, *supra* note 13; Minutes of Board Meeting: Saturday, April 24, 1993, Ams. United for Life (on file at Papers of Mildred Jefferson, Box 13, Folder

*Casey*<sup>22</sup> and *Gonzales v. Carhart*,<sup>23</sup> the Court seemed receptive to these arguments, and pro-lifers made them more prominent.<sup>24</sup> Although the Court's recent decision in *Whole Woman's Health v. Hellerstedt*<sup>25</sup> made it harder for states to claim to protect women from the supposed adverse effects of abortion, the impact of the case on the debate about punishing women seems unclear.<sup>26</sup> On the one hand, *Whole Woman's Health* might give second thoughts to lawmakers who have considered following those states that have introduced new laws or interpreted old ones to allow the prosecution of pregnant drug users and women having illegal abortions.<sup>27</sup> On the other hand, the Court's decision makes woman-protective arguments less strategically advantageous, ensuring that pro-lifers who wish to prosecute women for behavior during pregnancy have less to lose.<sup>28</sup> Part IV proposes legal alternatives to the status quo,<sup>29</sup> and Part V briefly concludes.<sup>30</sup>

#### I. PUNISHMENT BEFORE AND AFTER *ROE V. WADE*

Before 1973, abortion was a crime, and some state laws did at least technically authorize the prosecution of women for solicitation, conspiracy, or accomplice liability.<sup>31</sup> In practice, few women went to prison for having an abortion, although many faced embarrassment and stigma during the very public prosecution of doctors or lovers.<sup>32</sup> Instead, as this Part shows, prosecutors, members of law enforcement,

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8, Schlesinger Library, Harvard University) [hereinafter Minutes of Board Meeting (Apr. 24, 1993)] (recording a shift in emphasis to harm to the mother).

<sup>22</sup> 505 U.S. 833 (1992).

<sup>23</sup> 550 U.S. 124 (2007).

<sup>24</sup> See, e.g., Minutes of Board Meeting (Apr. 24, 1993), *supra* note 21, at 3.

<sup>25</sup> 136 S. Ct. 2292 (2016).

<sup>26</sup> See, e.g., Camila Domonoske, *Supreme Court Strikes Down Abortion Restrictions in Texas*, NPR (June 27, 2016, 10:12 AM), <https://www.npr.org/sections/thetwo-way/2016/06/27/483686616/supreme-court-strikes-down-abortion-restrictions-in-texas> [<https://perma.cc/Z5U7-DAKF>].

<sup>27</sup> See generally *Whole Woman's Health*, 136 S. Ct. 2292; see also discussion *infra* Section III.B.

<sup>28</sup> See generally Domonoske, *supra* note 26 (indicating that it will be harder to make women's protection arguments).

<sup>29</sup> See discussion *infra* Section IV.C.

<sup>30</sup> See discussion *infra* Part V.

<sup>31</sup> For examples of solicitation laws, see, for example, OKLA. STAT. tit. 21 § 862 (1971), *invalidated by* *Henrie v. Derryberry*, 358 F. Supp. 719 (N.D. Okla. 1973); S.D. CODIFIED LAWS § 22-17-2 (1967) (repealed 1976). On conspiracy laws covering abortion, see, for example, *People v. Stone*, 202 P.2d 333, 339–42 (Cal. Dist. Ct. App. 1949), and *Williams v. State*, 182 P. 718, 719, 723–25 (Okla. Crim. App. 1919). On laws regarding accomplice liability for abortion, see *Wandell v. State*, 25 S.W. 27, 28 (Tex. Crim. App. 1894), and *People v. Vedder*, 98 N.Y. 630, 630–32 (1885). See also Ziegler, *supra* note 8.

<sup>32</sup> See, e.g., REAGAN, *supra* note 6, at 23–28, 115, 123–27.

and the press framed women as victims, duped into both sexual relationships and abortion.<sup>33</sup> These cases drew heavily on sex stereotypes about women's interest in sex and ability to operate competently outside the home.<sup>34</sup>

Although the pro-life movement organized well before 1973, the *Roe* decision prompted the movement to nationalize and intensify its discussion of strategy.<sup>35</sup> Movement leaders prioritized a constitutional amendment designed to reinstate the right to life many felt had been lost.<sup>36</sup> In the following decade, activists' discussion of the ideal amendment revealed how open the question of punishing women remained.

This Part begins by exploring the image of women at the center of pre-*Roe* prosecutions of women. Starting with an analysis of the campaign to criminalize abortion, this Part next illuminates the contradictory ideas of women that emerged after abortion was a crime. While insisting that women were victims of abortion, some states also held open the possibility that they should face punishment for terminating a pregnancy. This Part then turns to the legal proposals of the pro-life movement in the immediate aftermath of *Roe*. While movement members did not focus on whether to punish women, they seemed open to any measure that would restrict abortion and protect fetal life. The possibility of punishing women was never out of reach.

#### A. Prosecuting Women Before *Roe*

Until the mid-nineteenth century, abortion was not a crime early in pregnancy.<sup>37</sup> In the 1700s and early 1800s, abortion was generally legal until quickening, the point at which fetal movement could be detected (usually in the fourth month of pregnancy).<sup>38</sup> The legal status quo came into question after 1840, when the nation's abortion rate spiked dramatically.<sup>39</sup> By 1920, some estimated that twenty percent of all pregnancies ended in abortion.<sup>40</sup> The increase from 1840 came mostly among married, Protestant, adult women.<sup>41</sup>

The uptick in abortions helped to inspire a campaign led by physicians and the American Medical Association (AMA) to expand criminal prohibitions on the

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<sup>33</sup> See, e.g., *id.* at 23, 115, 125.

<sup>34</sup> See, e.g., *id.*; MOHR, *supra* note 6, at 114; *Supreme Court Finds No Error*, SUNDAY HERALD, Jan. 10, 1904, at 12 (writing that the events surrounding Ida Lafferty's attempted abortion was the story of a "pitiful" girl wronged by a male protector).

<sup>35</sup> See discussion *infra* Section I.B.

<sup>36</sup> See WILLIAMS, *supra* note 7, at 212–13; ZIEGLER, *supra* note 9, at xv, 2, 38–44.

<sup>37</sup> See JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 253–54 (1994); MOHR, *supra* note 6, at 43; REAGAN, *supra* note 6, at 8.

<sup>38</sup> See, e.g., MOHR, *supra* note 6, at 3–6, 163–64; MARVIN OLASKY, ABORTION RITES: A SOCIAL HISTORY OF ABORTION IN AMERICA 85, 123–25 (1992); REAGAN, *supra* note 6, at 9.

<sup>39</sup> See, e.g., MOHR, *supra* note 6, at 46, 52–53, 59, 119.

<sup>40</sup> See, e.g., REAGAN, *supra* note 6, at 23.

<sup>41</sup> See, e.g., *id.* at 10.



procedure.<sup>42</sup> The purposes of this effort were complex. In part, AMA members like Horatio Storer reacted to increasing competition from midwives and other alternative practitioners.<sup>43</sup> Campaigning against abortion allowed physicians to display what they framed as superior knowledge of fetal life and a better understanding of the morality of abortion.<sup>44</sup>

While doctors had many reasons for fighting to ban abortions, the physician-led campaign developed contradictory ideas about women who terminated their pregnancies, describing them both as selfish killers and victims of unscrupulous men. Some doctors blamed higher abortion rates on selfish, economically secure women who no longer accepted conventional roles.<sup>45</sup> Writing in 1868, Dr. Montrose Pallen wrote: “[T]he woman who has been well educated, who occupies high stations in society, . . . whose character has not been impugned, will deliberately resort to any and every measure which may effectually destroy her unborn offspring.”<sup>46</sup>

At other times, the physician campaigners also described women as victims of self-serving men who demanded abortions. “When the reformation begins in earnest,” wrote John Trader, a Missouri physician in 1874, “it must begin with us men who have been the aggressors, who in every age have first suggested the crime, and who in every age have compelled the execution of it.”<sup>47</sup> Trader’s statement brought to the surface the contradictory ideas of women at the heart of the campaign to ban abortion in the mid-nineteenth century. Physician-campaigners demonized women who chose abortion for “selfish and personal ends” while swearing off their duties as mothers.<sup>48</sup> At the same time, these activists reaffirmed that “normal” women sought out neither sex nor abortion.<sup>49</sup> Men were the “aggressors” and the ones with the competence to locate and pay for an abortion.<sup>50</sup>

In spite of the contradictions in their portrayal of women, physicians seeking to ban abortion had tremendous success; by the mid-nineteenth century, state laws criminalized abortion under all but a handful of circumstances.<sup>51</sup> Nevertheless, the application

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<sup>42</sup> See, e.g., KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 24, 28–31 (1984); MOHR, *supra* note 6, at 147–70; OLASKY, *supra* note 38, at 109–28.

<sup>43</sup> See, e.g., LUKER, *supra* note 42, at 20–21; REAGAN, *supra* note 6, at 10–12; LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 30–31 (1990).

<sup>44</sup> See, e.g., LUKER, *supra* note 42, at 20–23; REAGAN, *supra* note 6, at 10–12.

<sup>45</sup> See MOHR, *supra* note 6, at 104–05; REAGAN, *supra* note 6, at 13.

<sup>46</sup> MOHR, *supra* note 6, at 104 (quoting Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 MED. ARCHIVES 193, 202 (1869)).

<sup>47</sup> *Id.* at 114 (quoting John W. Trader, *Criminal Abortion*, 11 ST. LOUIS MED. & SURGICAL J. 575, 588 (1874)).

<sup>48</sup> *Id.* at 108.

<sup>49</sup> *Cf. id.* at 86–90, 108 (discussing anti-abortion physicians’ concern over women’s “self-indulgence” and eschewing of traditional roles).

<sup>50</sup> See *id.* at 86–90, 108, 114.

<sup>51</sup> See ROSEMARY NOSSIFF, BEFORE *ROE*: ABORTION POLICY IN THE STATES 31–34 (2001); REAGAN, *supra* note 6, at 5, 13.

of these laws remained unpredictable; physicians disagreed about when therapeutic exceptions to abortion bans should apply, as did members of law enforcement.<sup>52</sup>

When (and whether) prosecutors should focus on women also remained up in the air. In practice, women might have experienced the publicity, interrogations, and extensive trials as punishment.<sup>53</sup> The trials themselves also exposed contradictions in the images of women written into the law. Courts and legislators repeated that women who had abortions were victims.<sup>54</sup> At the same time, many women knew that they could theoretically face criminal charges; the law sent conflicting messages about women who chose abortion, simultaneously denouncing and pitying them.<sup>55</sup>

Consider the story of Ida Lafferty, a nineteen-year-old who made headlines in the first years of the twentieth century.<sup>56</sup> In Lafferty's native Connecticut, the media ate up what it called "a pitiful story of a girl wronged by a man whom she thought was her only protector."<sup>57</sup> Coverage of the trial made clear how much prosecutors and members of the public conflated the crimes of abortion and seduction; written into criminal laws or treated as a tort, many states penalized seduction, a crime reaching sex obtained by misrepresentation, lies, or fraud.<sup>58</sup> Lafferty had been seeing a man, Michael Carey, who allegedly seduced her with promises of marriage.<sup>59</sup> When Lafferty learned she was pregnant, Carey refused to marry her.<sup>60</sup> Instead, he took her to a hotel room, where Marion Beebe unsuccessfully attempted to perform an abortion.<sup>61</sup> Prosecutors cut a deal with Beebe and Lafferty and relied on them in their prosecution of Carey.<sup>62</sup>

At trial and on appeal, Lafferty's culpability took center stage, but the ambiguity of her position soon became impossible to miss.<sup>63</sup> In some ways, reporters portrayed

<sup>52</sup> See DONALD T. CRITCHLOW, *INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA* 133 (1999); LUKER, *supra* note 42, at 47–50, 56–58; REAGAN, *supra* note 6, at 4–13.

<sup>53</sup> See, e.g., REAGAN, *supra* note 6, at 115, 125.

<sup>54</sup> See, e.g., MOHR, *supra* note 6, at 136–38 (describing state legislation which permitted women to obtain "immunities" for receiving an abortion, and instead punished individuals who facilitated abortions); REAGAN, *supra* note 6, at 23, 116–18 (highlighting prosecutors' focus on cases where women were "victim[s]" who had died from abortion procedures).

<sup>55</sup> See, e.g., MOHR, *supra* note 6, at 140, 201; REAGAN, *supra* note 6, at 13, 23, 116–18; see also *supra* notes 42–54 and accompanying text.

<sup>56</sup> On Lafferty's story, see *State v. Carey*, 56 A. 632, 633–37 (Conn. 1904); *Supreme Court Finds No Error*, *supra* note 34.

<sup>57</sup> *Supreme Court Finds No Error*, *supra* note 34.

<sup>58</sup> See, e.g., Brian Donovan, *Gender Inequality and Criminal Seduction: Prosecuting Sexual Coercion in the Early-20th Century*, 30 L. & SOC. INQUIRY 61, 64–67 (2005); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 17–19 (2012); *Supreme Court Finds No Error*, *supra* note 34.

<sup>59</sup> See *Supreme Court Finds No Error*, *supra* note 34.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*; *State v. Carey*, 56 A. 632, 633–34 (Conn. 1904).

<sup>62</sup> See *Supreme Court Finds No Error*, *supra* note 34; *Carey*, 56 A. at 633.

<sup>63</sup> See *Supreme Court Finds No Error*, *supra* note 34; *Carey*, 56 A. at 633.

Lafferty as an innocent victim, a woman who wanted nothing more than marriage and children.<sup>64</sup> During the trial, reporters claimed that Carey could free himself of legal trouble if he agreed to marry Lafferty and “save the stigma that will attach to her unborn child.”<sup>65</sup> Carey emphasized that she was anything but innocent.<sup>66</sup> Lafferty “knew other fellows,” one of whom might have caused her “delicate condition.”<sup>67</sup>

Whether Lafferty herself was a criminal remained unclear after Carey’s conviction; following his conviction, Carey appealed, challenging the trial court’s instructions on witness credibility.<sup>68</sup> The trial judge had told jurors that they could hold doubts about Lafferty’s credibility because she had violated several laws, including those on fornication and abortion.<sup>69</sup> Nevertheless, the judge informed the jury that Lafferty was not an accomplice.<sup>70</sup>

On appeal, Carey argued that Lafferty’s legal status was far more complex than the trial judge had suggested.<sup>71</sup> The Supreme Court of Errors of Connecticut rejected his argument, clarifying that women were victims of abortion.<sup>72</sup> As the Court explained, “[t]he public policy which underlies this legislation is based largely on protection due to the woman—protection against her own weakness as well as the criminal lust and greed of others.”<sup>73</sup> In this way, the court reinforced a narrative that described women as sexless and led to abortion because of the wrongdoing of others.

In practice, Lafferty’s position was far more complex. While she was never prosecuted, the law authorized charges that would have shaped her conduct; in fact, Connecticut had recently amended its abortion laws to create a separate offense for women who “attempt[ed] to produce unnecessary miscarriage, whether through the use of her own hands or those of an agent.”<sup>74</sup> While women were victims of abortion, they could still be considered criminals.<sup>75</sup> Other states resolved the question in similar ways: indeed, more than one-third of states criminalized the actions of women who terminated their own pregnancies or asked others to do so.<sup>76</sup>

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<sup>64</sup> See *Supreme Court Finds No Error*, *supra* note 34.

<sup>65</sup> *Id.*

<sup>66</sup> See *id.*

<sup>67</sup> *Id.*

<sup>68</sup> See *Carey*, 56 A. at 633–34.

<sup>69</sup> See *id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.* at 635.

<sup>72</sup> See *id.* at 635–36.

<sup>73</sup> *Id.* at 636.

<sup>74</sup> *Id.*

<sup>75</sup> See *id.* (distinguishing the offenses of women self-inducing miscarriages and men facilitating or performing the abortion).

<sup>76</sup> See Paul Benjamin Linton, *The Legal Status of Abortion in the States if Roe v. Wade Is Overruled*, 23 ISSUES L. & MED. 3, 6 n.15 (2007). A handful of states signed off on the prosecution of women for self-inducing an abortion. See, e.g., *Commonwealth v. Weible*, 45 Pa. Super. 207, 208, 210 (1911); *Crissman v. State*, 245 S.W. 438, 438–39 (Tex. Crim. App.

Women continued to find themselves in a contradictory legal position for decades after Lafferty's case. In the 1930s, abortion rates climbed in the face of the Great Depression.<sup>77</sup> More physicians began viewing economic issues as a valid consideration in the analysis of therapeutic abortion.<sup>78</sup> Hospitals expanded their abortion practices, and some freestanding abortion clinics emerged.<sup>79</sup>

The growing legitimacy of medical abortion sparked a crackdown.<sup>80</sup> Prosecutors turned from targeting "seducers" like Michael Carey or doctors who killed or injured women during a procedure, instead going after physicians with established practices.<sup>81</sup> Prosecutors also brought women into much deeper contact with the criminal justice system, making clear the contradiction in laws that treated them as both victims and perpetrators.<sup>82</sup>

Contradictory images of women's role in abortion were impossible to miss in the 1940s and 1950s. In 1910, the Pennsylvania Superior Court held that a woman could not be prosecuted for her own abortion,<sup>83</sup> but in the mid-1950s, a woman facing similar charges could not convince a court to dismiss charges against her.<sup>84</sup> In the late 1950s, Barbara Ann Snyder arrived at a Pennsylvania hospital because of complications she suffered after an illegal abortion.<sup>85</sup> During the prosecution against the doctor who performed her abortion, Snyder refused to testify and was jailed on contempt charges.<sup>86</sup> Her reasons for not testifying were likely several: in addition to the stigma of a trial, she recognized that other prosecutors had the authority to bring conspiracy charges against her for seeking an abortion.<sup>87</sup>

Snyder appealed her contempt conviction, and the Superior Court of Pennsylvania affirmed.<sup>88</sup> "[I]t is well settled in this Commonwealth that a woman who submits

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1922). Some states explicitly did punish women who self-induced abortion. *See, e.g.*, *People v. Caffey*, 119 P. 901, 906 (Cal. 1911) ("But if a woman voluntarily solicits the performance of such an operation upon herself and to that extent induces it, it is impossible to see how she can fail to have been an instigator and encourager of the crime, and so an accomplice.").

<sup>77</sup> *See, e.g.*, REAGAN, *supra* note 6, at 132; JODI VANDENBERG-DAVES, *MODERN MOTHERHOOD: AN AMERICAN HISTORY* 202 (2014); WILLIAMS, *supra* note 7, at 20.

<sup>78</sup> *See, e.g.*, REAGAN, *supra* note 6, at 132–33 (describing physicians' consideration of social circumstances such as the Great Depression); VANDENBERG-DAVES, *supra* note 77, at 202.

<sup>79</sup> *See* REAGAN, *supra* note 6, at 133; WILLIAMS, *supra* note 7, at 20–21.

<sup>80</sup> *See* REAGAN, *supra* note 6, at 160–73; KAREN WEINGARTEN, *ABORTION IN THE AMERICAN IMAGINATION: BEFORE LIFE AND CHOICE, 1880–1940*, at 140 (2014); Leslie J. Reagan, *Crossing the Border for Abortions: California Activists, Mexican Clinics, and the Creation of a Feminist Health Agency in the 1960s*, in *WOMEN, HEALTH, AND NATION: CANADA AND THE UNITED STATES SINCE 1945*, at 355, 360 (Georgina Feldberg et al. eds., 2003).

<sup>81</sup> *See* REAGAN, *supra* note 6, at 160–67.

<sup>82</sup> *See, e.g., id.* at 116, 132–33, 160–67.

<sup>83</sup> *See* *Commonwealth v. Weible*, 45 Pa. Super. 207, 208–10 (1911).

<sup>84</sup> *See* *Commonwealth v. Hauze*, 4 Pa. D. & C.2d 61, 62–65 (1955).

<sup>85</sup> *See* *Commonwealth v. Fisher*, 149 A.2d 666, 667 (Pa. Super. Ct. 1959).

<sup>86</sup> *See id.*

<sup>87</sup> *See id.* at 667–69.

<sup>88</sup> *See id.* at 669.

herself to a doctor to have an abortion performed is not an accomplice,” the court explained.<sup>89</sup> “She is regarded rather as a victim.”<sup>90</sup> Even though Snyder could have been prosecuted for fornication if she had testified, the court concluded that she should still face contempt charges for refusing to testify.<sup>91</sup> Although Snyder still was formally considered a victim, she faced punishment herself when she failed to cooperate with the state.<sup>92</sup>

After *Roe* legalized abortion, the question of who should be punished for abortion never faded from view; pro-lifers mobilized to promote a constitutional amendment outlawing abortion.<sup>93</sup> As some proposals made their way before Congress, movement members engaged in an intense debate about what an ideal solution would involve.<sup>94</sup> These discussions did not center on the issue of punishing women; nonetheless, movement members did not rule out anything that would limit abortion, and women’s status if abortion were made illegal remained uncertain.<sup>95</sup>

#### *B. Roe v. Wade Leads to a Rethinking of Punishment and Abortion*

The movement to reform or repeal criminal laws on abortion picked up momentum in the 1960s when Colorado became the first state to adopt the American Law Institute’s model abortion-reform statute.<sup>96</sup> By 1973, over a dozen states had passed similar legislation, and a handful repealed all criminal abortion restrictions.<sup>97</sup> In countering this campaign, as Part I shows, the early anti-abortion movement rarely discussed the punishment of women.

The anti-abortion movement of the twentieth century began within the Catholic Church in the 1930s.<sup>98</sup> Concerned about the spread and improvement of contraceptive technology, the Church launched a campaign against contraception and abortion, denouncing both.<sup>99</sup> Through the 1960s, the movement did not move much beyond

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See id.*

<sup>92</sup> *See id.* (concluding that women who submit to abortions are considered victims, but upholding the conviction of a woman for refusing, at trial, to testify regarding her abortion).

<sup>93</sup> WILLIAMS, *supra* note 7, at 212–16; ZIEGLER, *supra* note 9, at xv, 2, 38–44.

<sup>94</sup> *See* discussion *infra* Section I.B.

<sup>95</sup> *See* Rich, *supra* note 20; STATEHOUSE UPDATE, *supra* note 20, at 1–6; Ziegler, *supra* note 8.

<sup>96</sup> *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 323–25 (1994); LUKER, *supra* note 42, at 41, 143.

<sup>97</sup> BEFORE *ROE V. WADE*, *supra* note 6, at 121; NOSSIFF, *supra* note 51, at 41.

<sup>98</sup> GENE BURNS, THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES 106–09, 129–49 (2005) (discussing Catholic involvement in the early Twentieth Century anti-abortion movement); WILLIAMS, *supra* note 7, at 10–20, 58.

<sup>99</sup> *See, e.g.*, BURNS, *supra* note 98, at 129–49; WILLIAMS, *supra* note 7, at 20, 58–62.

the Catholic Church.<sup>100</sup> In the mid-twentieth century, approval of contraception grew, even among Catholics, and a strategy linking abortion to opposition to birth control faltered.<sup>101</sup> In the 1960s, movement leaders put more of an emphasis on constitutional arguments for a right to life rooted in the Fourteenth Amendment.<sup>102</sup> Pro-lifers had their greatest successes on the state level, and the largest organizations in the early 1970s drew their leadership from state struggles.<sup>103</sup>

Rather than worrying about the victimization of women, movement members emphasized that science and the common law had irrefutably established the personhood of the fetus.<sup>104</sup> Citing rights in property and tort law, Martin F. McKernan, Jr., an attorney for the National Right to Life Committee (NRLC), the largest national anti-abortion organization, asserted that “[a]ll in all, the law has consistently established certain procedural safeguards around fundamental rights to which the unborn was entitled.”<sup>105</sup> Americans United for Life (AUL), a group that would later lead the movement’s litigation efforts, insisted that the movement could win the abortion wars by educating the public about fetal life.<sup>106</sup> As the organization explained in a fundraising letter: “[I]f the American public at large can be educated [about] . . . abortion—what it really is—what really is done to . . . the child in the womb, they will reject abortion.”<sup>107</sup>

After 1973, movement members fixated on a constitutional amendment that would not only overrule *Roe* but also ban abortion across the country.<sup>108</sup> In the mid-1970s, leading movement lawyers and activists discussed the details of an ideal fetal-protective amendment.<sup>109</sup> These discussions never squarely addressed the punishment of women, but for many in the movement, the key was to protect fetal life as much as possible.<sup>110</sup>

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<sup>100</sup> See generally WILLIAMS, *supra* note 7, at 10–28, 58 (describing heavy Catholic involvement in anti-abortion and contraception activities, with members of other denominations mostly staying away from the debate).

<sup>101</sup> See, e.g., *id.* at 58–62.

<sup>102</sup> See, e.g., David W. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLAL. REV. 233, 234–37, 250–54 (1969); A. James Quinn & James A. Griffin, *The Rights of the Unborn*, 31 JURIST 577, 578–80 (1971); Thomas L. Shaffer, *Abortion, the Law and Human Life*, 2 VAL. U. L. REV. 94, 106 (1967); Note, *The Unborn Child and the Constitutional Conception of Life*, 56 IOWA L. REV. 994, 996–1003 (1971).

<sup>103</sup> See, e.g., ZIEGLER, *supra* note 9, at 30–33, 40–41.

<sup>104</sup> See, e.g., Mary Ziegler, *Originalism Talk: A Legal History*, 2014 B.Y.U. L. REV. 869, 870–71.

<sup>105</sup> Martin F. McKernan, Jr., Legal Report: Court Cases 4 (July 1970) (on file at American Citizens Concerned for Life Records, Box 4, Gerald Ford Presidential Library).

<sup>106</sup> See ZIEGLER, *supra* note 9, at 33.

<sup>107</sup> *Id.* (quoting Americans United for Life Fundraising Letter (Sept. 20, 1972) (on file at Americans United for Life, Executive Box File, Folder 91)).

<sup>108</sup> See, e.g., WILLIAMS, *supra* note 7, at 212–16; ZIEGLER, *supra* note 9, at xv, 2, 38–44.

<sup>109</sup> See, e.g., WILLIAMS, *supra* note 7, at 213–15; ZIEGLER, *supra* note 9, at 39–43.

<sup>110</sup> See, e.g., ZIEGLER, *supra* note 9, at 38–44.

In 1973, pro-life members of Congress had already proposed several fetal-protective amendments.<sup>111</sup> The Hogan Amendment extended due process and equal protection guarantees “from the moment of conception.”<sup>112</sup> The Buckley Amendment instead clarified that the word “person” included in the Fourteenth Amendment included fetal life.<sup>113</sup> Representative G. William Whitehurst (R-VA) proposed what movement members called a “permissive” amendment, allowing Congress and the states to prohibit abortion without requiring them to do so.<sup>114</sup>

Movement members saw something wrong with each of these proposals. The Whitehurst Amendment said nothing about fetal rights,<sup>115</sup> and the Buckley and Hogan Amendments seemed only to reach the actions of state actors.<sup>116</sup> Dissatisfied by the existing options, movement members began offering ideas of their own, including model laws that could apply once a constitutional amendment had been ratified.<sup>117</sup>

The possibility of punishing women came into view when movement leaders began developing what they saw as a more ideal constitutional proposal. To be sure, movement members were particularly disturbed by the actions of doctors, and in July 1973, NRLC passed a resolution describing the “primary task of the medical profession” as the duty “to preserve human life.”<sup>118</sup> But by July 1973, movement attorneys began proposing their own amendments, shedding light on the ambiguity of the movement’s position on the punishment for women.<sup>119</sup> Joseph Witherspoon, a law professor at the University of Texas, worried that both the Hogan and Buckley Amendments prohibited only state action, doing nothing to “operate upon the private action of physicians

<sup>111</sup> See *id.* at 42.

<sup>112</sup> See, e.g., *Human Life Amendments: Major Texts*, HUM. LIFE ACTION 1, 3, <https://www.humanlifeaction.org/sites/default/files/HLAMajortexts.pdf> [<https://perma.cc/X92N-M2HL>] (last visited Feb. 21, 2018) [hereinafter *Human Life Amendments*].

<sup>113</sup> See *id.* at 1.

<sup>114</sup> See *id.* at 6; see also ZIEGLER, *supra* note 9, at 42, 86.

<sup>115</sup> See ZIEGLER, *supra* note 9, at 42 (noting a pro-life academic’s concession that “Whitehurst’s approach could result in the ‘liberalization of abortion’ or ‘its entire decriminalization.’”); see also *Human Life Amendments*, *supra* note 112, at 1, 3, 6.

<sup>116</sup> See, e.g., Memorandum from Nellie J. Gray to NRLC Bd. of Dirs. 7–8 (Sept. 24, 1973) (on file at American Citizens Concerned for Life Records, Box 4, Gerald Ford Presidential Library) [hereinafter Gray to NRLC Bd. of Dirs.]; Memorandum from Dennis J. Horan, Chairman, Legal Advisory Comm., Nat’l Right to Life Comm. to NRLC Bd. of Dirs. 2 (Jan. 19, 1974) (on file at American Citizens Concerned for Life Records, Box 4, Gerald Ford Presidential Library) [hereinafter Horan to NRLC Bd. of Dirs.]; Memorandum from Joseph P. Witherspoon, Consultant, Pub. Pol’y Comm., NRLC, to Exec. Comm., NRLC 5 (Aug. 14, 1973) (on file at American Citizens Concerned for Life Records, Box 4, Gerald Ford Presidential Library) [hereinafter Witherspoon to Exec. Comm.].

<sup>117</sup> See, e.g., Horan to NRLC Bd. of Dirs., *supra* note 116, at 1–5.

<sup>118</sup> ZIEGLER, *supra* note 9, at 165 (quoting NAT’L RIGHT TO LIFE COMM., RESOLUTION 7 (July 10, 1973) (on file at American Citizens Concerned for Life Records, Box 4, 1973 National Right to Life Committee, Folder 4)).

<sup>119</sup> See, e.g., Witherspoon to Exec. Comm., *supra* note 116, at 5.

in performing or of parents in seeking abortions.”<sup>120</sup> Witherspoon proposed an amendment that would mirror the Thirteenth Amendment’s prohibition of slavery, and he saw a close parallel between the two issues.<sup>121</sup> Except in circumstances in which “reasonable medical certainty” indicated that a woman’s life would be at risk, Witherspoon’s amendment provided that “[n]o abortion shall be performed by any person.”<sup>122</sup>

Witherspoon’s amendment did not spell out whether women could face prosecution for self-inducing abortion, but his focus on the actions of private citizens, rather than agents of the state, reflected the movement’s broader purpose.<sup>123</sup> Maximizing protection for the unborn mattered most to Witherspoon, and he did not foreclose the possibility of prosecuting anyone who performed an abortion, including women who tried to terminate their own pregnancies.<sup>124</sup>

Dennis Horan, a leading AUL member and the head of the NRLC Legal Advisory Committee, similarly asked the movement for an amendment that would reach “the bulk of abortions in America [which] are done by private clinics, not through public hospitals.”<sup>125</sup> Nellie Gray, a prominent movement member and the founder of March for Life, also favored an amendment that reached state action, further recommending a registry that would require all women to get a certificate that they had given birth, miscarried, or had an abortion.<sup>126</sup> This requirement would make it easier to smoke out abortions and, in Gray’s words, ensure that “society would protect the unborn child just as it is beginning to protect the battered child.”<sup>127</sup>

By the fall of 1974, leading movement lawyers worked to reach a consensus about the contours of an ideal amendment.<sup>128</sup> The lawyers proposed a constitutional amendment that reached private actors and a model statute making it a crime for a person to use “any instrument, medicine, or other drug or other substance whatever, with the intent to procure a miscarriage on any woman.”<sup>129</sup> The model statute also made it a crime to perform, aid or abet, or conspire with another to perform an abortion.<sup>130</sup>

<sup>120</sup> *Id.* (emphasis omitted).

<sup>121</sup> *See id.* (“What is needed is a Human Life Amendment that prohibits abortions by private persons much as the Thirteenth Amendment prohibits slavery. . . . Indeed, there is a very close resemblance between killing human beings by abortion and submitting them to slavery. . . . Slaves were also beaten and killed by their masters.”).

<sup>122</sup> *Id.* at 1.

<sup>123</sup> *See id.* at 6.

<sup>124</sup> *See id.*

<sup>125</sup> Memorandum from Dennis J. Horan, Legal Advisory Comm., NRLC, to NRLC Pub. Pol’y Comm. (Sept. 5, 1973) (on file at American Citizens Concerned for Life Records, Box 4, Gerald Ford Memorial Library, University of Michigan) [hereinafter Horan to NRLC Pub. Pol’y Comm.].

<sup>126</sup> Gray to NRLC Bd. of Dirs., *supra* note 116, at 4.

<sup>127</sup> *Id.*

<sup>128</sup> *See* Horan to NRLC Bd. of Dirs., *supra* note 116, at 1–3; *see also* Horan to NRLC Pub. Pol’y Comm., *supra* note 125, at 1–2.

<sup>129</sup> Horan to NRLC Bd. of Dirs., *supra* note 116, at 4.

<sup>130</sup> *See id.* at 4–5.



The lawyers did not spell out who would be punished under the statute, but a press release suggested that NRLC had not eliminated the possibility of penalizing women.<sup>131</sup> NRLC suggested that the amendment would ensure that the proposal would “protect the lives of unborn children not only against action of the state and federal governments but also against the action of private individuals, such as pregnant women and physicians.”<sup>132</sup>

The campaign for a fetal-protective amendment stalled, putting off further discussion of the desirability of punishing women;<sup>133</sup> Congress held several rounds of hearings, but the full Senate never considered any of them. After the election of Ronald Reagan, however, movement members had new hope.<sup>134</sup> Since 1976, Reagan had been the pro-life movement’s most visible ally, and a majority in both houses of Congress seemed open to a far-reaching solution that would undo *Roe*.<sup>135</sup> In 1981, Congress again considered two proposals that would have overruled *Roe*.<sup>136</sup> One would simply have undone the Court’s decision and allowed the states and Congress to criminalize abortion.<sup>137</sup> Another, the human life bill, defined an unborn child as a person from the moment of conception.<sup>138</sup>

Seeking to stoke opposition to the bill, pro-choice groups seized on the possibility that women would be punished.<sup>139</sup> A reporter asked Senator Orrin Hatch (R-UT),

<sup>131</sup> See Press Release, NRLC 3–4 (Mar. 14, 1974) (on file at American Citizens Concerned for Life Records, at Gerald Ford Presidential Library).

<sup>132</sup> *Id.* at 4.

<sup>133</sup> See *Human Life Amendments*, *supra* note 112, at 1–3; *Human Life Amendments Highlights: United States Congress (1973–2003)*, HUM. LIFE ACTION, <https://www.humanlifeaction.org/sites/default/files/HLAHighlights.pdf> [<https://perma.cc/5JWN-ZSP7>] (last visited Feb. 21, 2018).

<sup>134</sup> On Reagan’s relationship to pro-life movement, see, for example, LEE EPSTEIN & JOSEPH F. KOBYLKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* 231 (1992) (“Pro-life forces took [the 1980 elections, including the election of Ronald Reagan,] as portents that the political tide had shifted in their direction.”); WILLIAMS, *supra* note 7, at 239–42 (detailing the pro-life movement’s support of Reagan); ZIEGLER, *supra* note 9, at 83 (“The election of Ronald Reagan . . . united the movement. Indeed, the 1980 election season inspired profound optimism.”).

<sup>135</sup> On the movement’s prospects in 1980, see, for example, ZIEGLER, *supra* note 9, at 83.

<sup>136</sup> See, e.g., *id.* at 84–88 (discussing both the human life bill and the Hatch Amendment); see also TRIBE, *supra* note 43, at 161–62.

<sup>137</sup> See, e.g., TRIBE, *supra* note 43, at 162–63 (explaining that the Hatch Amendment “would let the states or Congress decide whether or not abortion should be outlawed”); ZIEGLER, *supra* note 9, at 86 (stating that the Hatch Amendment “would give Congress and the states joint jurisdiction over abortion”).

<sup>138</sup> See, e.g., ZIEGLER, *supra* note 9, at 84; Joan Beck, *The Pro-Life Groups Turn to Congress on Abortion*, CHI. TRIB., Jan. 30, 1981, at B2.

<sup>139</sup> See, e.g., *As Congressmen Take Up the Abortion Issue, Two Sides Debate: When Does Life Begin?*, N.Y. TIMES, Apr. 19, 1981, at E16 [hereinafter *When Does Life Begin*]; see also TRIBE, *supra* note 43, at 161–65 (acknowledging pro-choice opposition to Senator Jesse Helms’s proposed human life bill).

the champion of a states' rights amendment undoing *Roe*, whether women would be prosecuted if they sought out abortion after being raped.<sup>140</sup> Hatch responded that this was the kind of detail that would have to be worked out after the ratification of the amendment.<sup>141</sup> When the reporter pushed Hatch to elaborate, he explained:

I think we would have a much better chance of getting it through the Congress if those two exceptions were put in. I personally prefer the constitutional amendment. That makes no exception except to save the life of the mother. But on the other hand, let's face it, the amendment to the Medicaid funding, which was already on the books, did provide for abortions to save the life of the mother and for rape or incest. Those of us who believe in the sanctity of human life were not totally happy with that, but we thought it was better than leaving it up to bureaucrats which human life can be taken and using federal dollars to have indiscriminate abortions all over America. I believe we should do whatever we can to protect the sanctity of human life. If that's as far as we can go, then I'd rather do that than not have any protection.<sup>142</sup>

Hatch's comment reflected the ambiguity of pro-lifers' position on punishing women; the idea of punishing women did not preoccupy movement members, but Hatch seemed open to the idea if the unborn child would receive more protection.<sup>143</sup> Although movement leaders had not shown particular interest in the idea of punishing women, movement members had not ruled out anything that would make abortion harder to access.<sup>144</sup>

With Ronald Reagan in the White House and an anti-abortion majority in Congress, pro-lifers had hope that a fetal-protective amendment would pass, but internal divisions spelled the end of any meaningful progress.<sup>145</sup> Movement absolutists, led by Judie Brown of the American Life League (ALL), actively opposed any amendment that did not ban abortion outright.<sup>146</sup> In March 1982, Senator Jesse Helms (R-NC) proposed a different version of his bill, and the Senate Judiciary Committee approved Hatch's amendment for consideration by the full Senate.<sup>147</sup> Senator

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<sup>140</sup> See *When Does Life Begin*, *supra* note 139.

<sup>141</sup> See *id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *id.* (quoting Senator Hatch as saying, "I believe we should do whatever we can to protect the sanctity of human life").

<sup>144</sup> See, e.g., *id.*

<sup>145</sup> See, e.g., ALESHA E. DOAN, OPPOSITION & INTIMIDATION: THE ABORTION WARS & STRATEGIES OF POLITICAL HARASSMENT 82–83 (2007); WILLIAMS, *supra* note 7, at 244–45; ZIEGLER, *supra* note 9, at 77–91.

<sup>146</sup> See, e.g., ZIEGLER, *supra* note 9, at 77–80.

<sup>147</sup> See, e.g., *id.* at 84, 88.

Robert Packwood (R-OR), a stalwart supporter of abortion rights, filibustered the amendment, and pro-lifers were too divided to overcome it.<sup>148</sup> Hatch tried a last time, working with Senator Thomas Eagleton (D-MO) to propose an amendment stating simply that the Constitution did not protect an abortion right.<sup>149</sup> With pro-lifers bitterly divided, the Hatch-Eagleton Amendment went down in the Senate by a vote of 49–50, with one abstaining.<sup>150</sup>

The demise of the Hatch-Eagleton Amendment began a new chapter in pro-life discussions of abortion and punishment; in the mid-1980s, movement leaders gave up on pursuing a constitutional amendment, at least in the near term.<sup>151</sup> At the same time, movement members saw new promise in the courts.<sup>152</sup> In *City of Akron v. Akron Center for Reproductive Health, Inc. (Akron I)*,<sup>153</sup> Justice Sandra Day O'Connor dissented, calling into question the workability of *Roe*'s trimester framework.<sup>154</sup> O'Connor's vote focused movement leaders on statutes that a reconfigured Supreme Court might uphold.<sup>155</sup>

While the movement's strategy had changed, the contradictions in its position on punishing women only deepened. On the one hand, in an effort to expand protection for the unborn child and convince the public of the extremism of the *Roe* Court, pro-lifers proposed measures that demonized some choices during pregnancy.<sup>156</sup> Some within AUL and NRLC worked to ban abortions for particular reasons that the public would find offensive, such as sex-selection or convenience.<sup>157</sup> In support of these laws, movement members denounced women who terminated their pregnancies for such frivolous reasons.<sup>158</sup> In the same period, anti-abortion activists campaigned

<sup>148</sup> See, e.g., *id.* at 88.

<sup>149</sup> See, e.g., *id.* at 88–89.

<sup>150</sup> See, e.g., *id.* at 89.

<sup>151</sup> See, e.g., Reginald Stuart, *Abortion Foes End Meeting Optimistic Despite Setbacks*, N.Y. TIMES, July 10, 1983, at 16.

<sup>152</sup> See ZIEGLER, *supra* note 9, at 89, 223 (describing how activists began to invest more in the vetting of judicial nominees); Letter from Americans United for Life to AUL Donor (May 21, 1984) (on file at Papers of Mildred Jefferson, Schlesinger Library, Harvard University) [hereinafter AUL Fundraising Letter (1984)] (“We may be only one Supreme Court Justice away from a Court that would reverse the abortion ruling—with five pro-abortion Justices probably very close to retirement.”).

<sup>153</sup> 462 U.S. 416 (1983).

<sup>154</sup> See *id.* at 452–59 (O'Connor, J., dissenting) (“The trimester or ‘three-stage’ approach adopted by the Court in *Roe* . . . cannot be supported as a legitimate or useful framework for accommodating the woman’s right and the State’s interests.”).

<sup>155</sup> See, e.g., Mary Ziegler, *Liberty and the Politics of Balance: The Undue-Burden Test After Casey/Hellerstedt*, 52 HARV. C.R.-C.L. L. REV. 421, 443–46 (2017); Stuart, *supra* note 151. For more on the movement’s response to the O’Connor dissent, see discussion *infra* Part II.

<sup>156</sup> See, e.g., AUL Fundraising Letter (1984), *supra* note 152, at 2 (stating laws preventing women from having “sex-selective” abortions must be passed).

<sup>157</sup> See *id.*

<sup>158</sup> See, e.g., *id.* (criticizing abortions done for reasons such as sex-selection).

to expand laws against homicide or child abuse to fetal life, in the process seeking to criminalize drug use and other actions taken by women during pregnancy.<sup>159</sup>

At the same time, pro-lifers began putting much more emphasis on the idea that women were victims, not perpetrators. In the early 1980s, organizations like Project Rachel and Women Exploited by Abortion (WEBA) hosted support sessions for women who felt that they had been traumatized by abortion.<sup>160</sup> Groups like NRLC and AUL had always welcomed the participation of WEBA, but had not initially stressed the victimization of women; in the mid- to late 1980s, for several reasons, mainstream organizations stressed these arguments far more often.<sup>161</sup> The increasing importance of crisis pregnancy centers convinced movement members of the importance of persuading individual women not to terminate their pregnancies; new members, like David Reardon and Wanda Franz, put woman-protective claims in the spotlight.<sup>162</sup> Confronted by new poll data and focus groups studies, the AUL and NRLC concluded that no one would support abortion if it hurt women.<sup>163</sup>

## II. FETAL-ABUSE LAWS AND WOMAN-PROTECTIVE ARGUMENTS: THE NEW CONTRADICTION

In the 1980s and early 1990s, debate about whether women would or should ever be punished for abortion took a much more prominent place in movement discussions.<sup>164</sup> At first, after the Supreme Court struck down a promising model ordinance in *Akron I*,<sup>165</sup> pro-lifers scrambled to see what was still possible.<sup>166</sup> Some favored non-legal solutions, including a larger investment in crisis pregnancy centers.<sup>167</sup> Others preferred to seek out solutions in other legal areas, bolstering fetal protections in criminal law and eliminating tort actions for wrongful life or birth.<sup>168</sup>

At a major 1983 strategy conference, movement members developed a long-term plan of attack that pointed in two directions when it came to punishing

<sup>159</sup> Cf. FLORA DAVIS, *MOVING THE MOUNTAIN: THE WOMEN'S MOVEMENT IN AMERICA SINCE 1960*, at 243–44 (1991); ZIEGLER, *supra* note 9, at 64–68; AUL Fundraising Letter (1984), *supra* note 152, at 2; Ziegler, *supra* note 8.

<sup>160</sup> See DIAMOND, *supra* note 19, at 97 (explaining the founding of WEBA); LEE, *supra* note 19, at 22–24 (describing pro-life support groups which viewed abortion as psychologically damaging).

<sup>161</sup> See, e.g., LEE, *supra* note 19, at 22–24.

<sup>162</sup> See *id.* at 23–24.

<sup>163</sup> Cf. *id.* at 22–24. See generally Jensen, *supra* note 12; Ziegler, *supra* note 8.

<sup>164</sup> See Willke, *The Woman Should Not Be Punished*, *supra* note 13, at 3.

<sup>165</sup> See *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416 (1983); see also ZIEGLER, *supra* note 9, at 76 (discussing pro-lifers' use of a model Akron ordinance).

<sup>166</sup> See, e.g., Stuart, *supra* note 151, at 16.

<sup>167</sup> See, e.g., *id.* (highlighting pro-lifers' pursuance of “alternatives to abortion,” including “establishing . . . counseling centers and temporary homes for young women who are pondering abortion”).

<sup>168</sup> Cf. DAVIS, *supra* note 159, at 243–44; STATEHOUSE UPDATE, *supra* note 20, at 1–2.

women.<sup>169</sup> Pro-lifers saw the government's interest in protecting women's health as a potential opening for attacking *Roe*.<sup>170</sup> If the Court defined some restrictions as beneficial to women, states would have much more latitude, and pro-lifers could undermine the political case for abortion rights altogether. Many movement members sincerely believed that abortion hurt women, and some had themselves experienced what they viewed as post-abortion trauma.<sup>171</sup> At the same time, finding (or creating) new sources of evidence about the effect of abortion had clear strategic advantages.

At the same time, movement members hoped to stoke resentment of *Roe* by convincing the public of the Court's extremism.<sup>172</sup> This led movement members to spotlight women who supposedly chose abortion for objectionable or offensive reasons.<sup>173</sup> Moreover, the effort to expand fetal rights came into conflict with the movement's emphasis on protecting women; as activists set out to apply child abuse, neglect, and homicide laws to unborn children, they justified penalties based on the actions of pregnant women.<sup>174</sup>

#### *A. Post-Akron Strategy Carries Forward a Contradiction*

Notwithstanding O'Connor's dissent, the *Akron I* decision was devastating for the pro-life movement; the Court struck down an Akron, Ohio, ordinance that pro-lifers had used as a blueprint for multi-restriction laws across the country.<sup>175</sup> NRLC President Dr. John Willke denounced the Court's "extremism," and a demoralized movement gathered on several occasions to determine what tactical possibilities remained.<sup>176</sup>

At a series of meetings in the aftermath of *Akron*, the movement developed an approach that sent a contradictory message about the punishment of women; at the 1983 NRLC National Convention, for example, movement lawyers suggested that the most obvious choice was to create fetal rights in legal areas disconnected from

<sup>169</sup> See AUL Fundraising Letter (1984), *supra* note 152, at 1.

<sup>170</sup> See, e.g., Victor G. Rosenblum & Thomas J. Marzen, *Strategies for Reversing Roe v. Wade Through the Courts*, in *ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS* 201 (Dennis J. Horan, Edward R. Grant & Paige C. Cunningham eds., 1987) ("If pregnancy and childbirth are rendered safer than abortion . . . [t]he claim that certain abortion practices should not be regulated . . . would no longer be valid.").

<sup>171</sup> See LEE, *supra* note 19, at 22–24; see also DIAMOND, *supra* note 19, at 97.

<sup>172</sup> See AUL Fundraising Letter (1984), *supra* note 152, at 2 (noting "just how radical *Roe v. Wade* is").

<sup>173</sup> See *id.* (noting sex-selection as one offensive reason).

<sup>174</sup> Compare Willke, *The Woman Should Not Be Punished*, *supra* note 13, at 3 (discussing punishment of women who had abortions), with Ziegler, *supra* note 8 (stating the anti-abortion movement backed prosecutions of women for actions like drug use during pregnancy).

<sup>175</sup> See *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983); ZIEGLER, *supra* note 9, at 76.

<sup>176</sup> See NC News Service, *Pro-Lifers Seek Congressional Aid*, *COURIER-J.*, June 22, 1983, at 4.

abortion.<sup>177</sup> NRLC attorney James Bopp, Jr., and AUL Attorney Maura K. Quinlan encouraged sympathetic state legislators to take aim at wrongful birth and wrongful life suits in tort, establishing the personhood of the unborn child directly.<sup>178</sup>

Optimists hoped to pass laws restricting the reasons that certain women had abortions.<sup>179</sup> AUL leaders had introduced a law in Illinois that would have outlawed sex-selection abortions.<sup>180</sup> NRLC leaders saw this kind of legislation as the key to understanding the *Akron* Court's extremism.<sup>181</sup> "None of the major regulations before the Court even restricted the reasons for which abortions could be obtained—but the Court struck them down anyway," Willke explained in criticizing the decision.<sup>182</sup> Chastising women for seeking out abortions for selfish, immoral, or offensive reasons seemed to many to be one of the cornerstones of a new strategy.<sup>183</sup>

An AUL conference, "Reversing *Roe v. Wade* Through the Courts," set forth a more ambitious strategic vision, one that sent conflicting messages about punishing women.<sup>184</sup> Energized by *Akron I*, AUL members hosted a conference "to unite the entire movement around a relatively non-controversial proposition, that the Court should reverse itself."<sup>185</sup> AUL organized the conference in response to "Justice O'Connor's encouraging dissent plus the fact that most of the *Roe* majority would face the question of retirement following the 1984 presidential election."<sup>186</sup>

Those assembled saw the most immediate promise in destabilizing the idea of fetal viability.<sup>187</sup> O'Connor's dissent had flagged the changing science of viability as one of the weaknesses of *Roe*'s trimester framework, and those at the AUL conference hoped to capitalize on it.<sup>188</sup> Victor Rosenblum and Thomas Marzen of AUL

<sup>177</sup> STATEHOUSE UPDATE, *supra* note 20, at 1–2.

<sup>178</sup> *See id.*

<sup>179</sup> *See id.* at 3–6 (providing examples of proposed legislation aimed at restricting the reasons for which women may have abortions).

<sup>180</sup> *See id.* at 4; *see also* AUL Fundraising Letter (1984), *supra* note 152, at 2.

<sup>181</sup> *See* NC News Service, *supra* note 176; STATEHOUSE UPDATE, *supra* note 20, at 1–2, 4.

<sup>182</sup> Press Release, Nat'l Right to Life Comm. 3 (June 15, 1983) (on file at Morton Blackwell Files, Box 14, Ronald Reagan Presidential Library).

<sup>183</sup> *See, e.g.*, AUL Fundraising Letter (1984), *supra* note 152, at 2 (supporting laws prohibiting abortion for sex-selection purposes).

<sup>184</sup> *See, e.g., id.* at 1–2; *see also* Steven Baer, Report of the Education Division, Americans United for Life Legal Defense Fund (Mar. 30, 1984) (on file at Papers of Mildred Jefferson, Box 13, Folder 5, Schlesinger Library, Harvard University).

<sup>185</sup> Baer, *supra* note 184, at 1.

<sup>186</sup> *Id.*

<sup>187</sup> *See* Rosenblum & Marzen, *supra* note 170, at 198–200; *see also* ZIEGLER, *supra* note 9, at 89 (explaining how O'Connor's *Akron I* dissent energized the pro-life movement and opened the possibility that the Court would overrule itself).

<sup>188</sup> *See* *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 455–58 (1983) (O'Connor, J., dissenting) ("As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."); *see also* Rosenblum & Marzen, *supra* note 170, at 198–200.

laid out an alternative strategy closely linked to the undue-burden test that O'Connor had articulated.<sup>189</sup> The movement might have more success promoting laws that supposedly benefitted women if pro-lifers could gather enough "favorable statistical data."<sup>190</sup> As the two explained:

"Accepted medical practices" must change before barriers to reversal can be broken down; whether or not abortion is "acceptable" is determined by the views and customary practices of the very people who perform abortions. They are unwilling to increase the state's authority to regulate abortion. A possible long-term approach to meeting this dilemma is the development of new sources for abortion data.<sup>191</sup>

Attendees also favored tactics intended to expose "just how radical *Roe v. Wade* is."<sup>192</sup> This strategy had less to do with any immediate gains in the courts than it did with the political conversation about abortion; by championing "[l]aws against abortion because the child's sex is 'wrong,' or when the child can feel pain,"<sup>193</sup> the movement could make voters and justices uncomfortable and more willing to accept new abortion restrictions.<sup>194</sup>

The strategies emerging from the AUL conference would point the movement in two directions when it came to the issue of women's culpability. In seeking to show that abortion hurt women, movement members committed more and more deeply to a strategy that could never be reconciled with punishing women.<sup>195</sup> At the same time, in persuading the public that *Roe* was too radical to support, movement members highlighted the blameworthiness of women who chose abortion for bad reasons.<sup>196</sup>

Moreover, as the movement tried to establish fetal personhood, the tension in the movement's position on women only increased. Believing that the Court would not redefine fetal viability any time soon, pro-lifers instead tried to establish fetal rights in other legal arenas, including criminal law.<sup>197</sup> As part of this effort, pro-lifers signed off on the criminal punishment of pregnant drug users and women who had

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<sup>189</sup> See Rosenblum & Marzen, *supra* note 170, at 201–03 (stating, in part, that some Justices would hold a "compelling interest" on the part of the government in maternal health would be sufficient to warrant restrictions on abortion).

<sup>190</sup> See *id.* at 201.

<sup>191</sup> *Id.*

<sup>192</sup> See AUL Fundraising Letter (1984), *supra* note 152, at 2.

<sup>193</sup> *Id.*

<sup>194</sup> See *id.*

<sup>195</sup> See LEE, *supra* note 19, at 22–24, 31–33 (discussing some anti-abortion activists' focus on women who had abortions as victims).

<sup>196</sup> See, e.g., AUL Fundraising Letter (1984), *supra* note 152, at 2 (criticizing abortions performed for the purpose of sex-selection).

<sup>197</sup> See DAVIS, *supra* note 159, at 243–44; Ziegler, *supra* note 8.

illegal abortions—a position hard to square with the movement’s stated view on the problems with punishing women.<sup>198</sup>

*B. Child-Abuse Laws and the Rise of Woman-Protective Arguments*

From the mid- to late 1980s, the pro-life movement became involved in the increasingly visible battle about prenatal treatment; early in the decade, women who refused caesarean sections found themselves in court.<sup>199</sup> These cases partly reflected improving obstetric care and new technologies that made it much easier to visualize the fetus as a patient.<sup>200</sup> In this climate, physicians were more willing to intervene to protect fetal life when women refused certain forms of treatment during pregnancy.<sup>201</sup> Later in the decade, the issue gained more public attention when crack use by pregnant women made headlines.<sup>202</sup>

Pro-lifers took public interest in pregnant drug users and forced caesareans as an opportunity to expand fetal rights.<sup>203</sup> AUL took the lead in this effort; in 1986, the organization got involved in the case of Pamela Rae Stewart, a twenty-seven-year-old woman whose child was born brain dead with amphetamines in his system and died five weeks later.<sup>204</sup> Prosecutors charged Stewart with a misdemeanor linked to her failure to seek appropriate medical care for her son.<sup>205</sup>

Pro-lifers, including AUL members, applauded the move; Edward Grant, then the leader of AUL, stated that “the law should hold the mother-fetal relationship in the same manner in which parents are held accountable for a child’s welfare.”<sup>206</sup> The head of an NRLC affiliate in San Diego explained that a campaign against fetal abuse would bolster the movement’s case against legal abortion: “[W]hat about the woman who has salt solution injected into her womb for the purpose of an abortion?” he asked.<sup>207</sup> “It would be madness to rule that taking cocaine, for example, and then harming the infant is prosecutable but injecting salt to kill it isn’t.”<sup>208</sup>

<sup>198</sup> See DAVIS, *supra* note 159, at 243–44; Ziegler, *supra* note 8.

<sup>199</sup> See, e.g., DAVIS, *supra* note 159, at 244; SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA 116 (2011); SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION 54 (2007).

<sup>200</sup> See, e.g., JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 174 (1994).

<sup>201</sup> See, e.g., *id.*

<sup>202</sup> See, e.g., DUBOW, *supra* note 199, at 137, 140; JEAN REITH SCHROEDEL, IS THE FETUS A PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES 101 (2000).

<sup>203</sup> See DUBOW, *supra* note 199, at 112–14; Rich, *supra* note 20; see also Dennis Georgatos, *Controversy Rises Over Charges of Pre-Natal Fetal Abuse*, SUN SENTINEL, Oct. 5, 1986, at 5A; Cynthia Gorney, *Whose Body Is It Anyway? The Legal Maelstrom that Rages When the Rights of Mother and Fetus Collide*, WASH. POST, Dec. 13, 1988, at D1.

<sup>204</sup> See Georgatos, *supra* note 203, at 5A.

<sup>205</sup> See *id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*



The new legal and political focus on fetal treatment came at a time when pro-lifers took fresh interest in arguments about protecting women. Post-abortion support groups had already operated for some time; in 1982, Nancy Jo Mann, a devoutly religious woman, founded WEBA as a support group for women who regretted their abortions.<sup>209</sup> Formed in 1984 by Victoria Thorn in Milwaukee with the help of the local archdiocese, Project Rachel offered counseling and support to women who felt traumatized or guilty about abortion.<sup>210</sup> As early as 1983, NRLC argued that *Roe* “defended the interests not of women but of the assembly line abortion industry,”<sup>211</sup> and AUL members called for new sources of data that would prove abortion hurt women.<sup>212</sup> While movement leaders always welcomed the presence of WEBA and Project Rachel, activists did not initially invest many strategic resources in the organizations or adopt a focus on women.<sup>213</sup>

By the mid-1980s, movement leaders had several reasons to put more emphasis on woman-protective arguments. In the early part of the decade, Planned Parenthood, a group that had always fought for abortion rights, became more directly involved, and pro-life groups responded by campaigning to cut off the organization’s Title X family planning funding.<sup>214</sup> In the period, movement members tried to make Planned Parenthood a symbol of what pro-lifers described as a deeply flawed abortion industry.<sup>215</sup> Movement members soon realized that Planned Parenthood would be a formidable—and popular—enemy; a 1985 poll conducted by the Lewis Harris Foundation found overwhelming majorities in favor of Planned Parenthood’s family planning work.<sup>216</sup> When pro-lifers put out a film, *The Silent Scream*,<sup>217</sup> that narrated an abortion in real time, Planned Parenthood responded by emphasizing the rights

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<sup>209</sup> On the founding and early years of WEBA, see, for example, DIAMOND, *supra* note 19, at 97; DUBOW, *supra* note 199, at 161.

<sup>210</sup> On the founding and early years of Project Rachel, see, for example, CYNTHIA BURACK, *TOUGH LOVE: SEXUALITY, COMPASSION, AND THE CHRISTIAN RIGHT* 76 (2014); LEE, *supra* note 19, at 24.

<sup>211</sup> Linda Greenhouse, *Court Reaffirms Right to Abortion and Bars Variety of Local Curbs: Strict Akron Ordinance Is Held Unconstitutional—Women’s Choice Advocates See Big Victory*, N.Y. TIMES, June 16, 1983, at A1.

<sup>212</sup> See, e.g., Rosenblum & Marzen, *supra* note 170, at 201.

<sup>213</sup> See, e.g., PAUL SAURETTE & KELLY GORDON, *THE CHANGING VOICE OF THE ANTI-ABORTION MOVEMENT: THE RISE OF “PRO-WOMAN” RHETORIC IN CANADA AND THE UNITED STATES 198–206* (2015).

<sup>214</sup> On the campaign to cut off Title X funding for Planned Parenthood, see SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 134 (1991); RAYMOND TATALOVICH, *THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA: A COMPARATIVE STUDY* 179 (1997).

<sup>215</sup> See, e.g., STAGGENBORG, *supra* note 214, at 134; TATALOVICH, *supra* note 214, at 179.

<sup>216</sup> See Janice Mall, *Public Favors Birth Control Messages*, L.A. TIMES, Nov. 17, 1985, at H3.

<sup>217</sup> See Dena Kleiman, *Debate on Abortion Focuses on Graphic Film*, N.Y. TIMES, Jan. 25, 1985, at B8.

and needs of women.<sup>218</sup> Countering this tactic required pro-lifers to demonstrate more effectively that they cared about women.

In the same period, pro-lifers believed that the spread of crisis pregnancy centers bolstered the movement's claims to have women's best interests at heart.<sup>219</sup> By 1985, Jerry Falwell's Moral Majority had founded the Save-A-Baby program, maternity and adoption centers intended to create alternatives to abortion.<sup>220</sup> Over 250 centers affiliated with Save-A-Baby were in operation by the mid-1980s.<sup>221</sup> Anti-abortion counseling centers also spread after 1984 when Robert Pearson put out a handbook on how to run a crisis pregnancy center.<sup>222</sup> By the end of 1986, the number of centers had grown from a handful to over 3,000.<sup>223</sup> With so many centers in place, pro-lifers could more credibly claim to focus on women.

Finally, David Reardon, an activist who had worked closely with WEBA, began publishing his own research on the after-effects of abortion.<sup>224</sup> Reardon took WEBA members as his subjects and used their experiences to show that post-abortion harms were demonstrable.<sup>225</sup> Reardon spotlighted those he believed to be at particular risk for post-abortion trauma, but he suggested that many women suffered after having abortions.<sup>226</sup>

Later in the 1980s, as woman-protective arguments took on more importance, movement members took more interest in punishing women for behavior during pregnancy.<sup>227</sup> Between 1988 and 1989, mainstream anti abortion groups, such as AUL, remained involved in fetal-abuse cases in Illinois, including drug abuse and forced-caesarean cases.<sup>228</sup> Clarke Forsythe, a leading attorney in AUL, told the *Chicago*

<sup>218</sup> See, e.g., Elizabeth Mehren, *A Family's Pain Echoes in 'Choices,'* L.A. TIMES, Feb. 15, 1986, at SDC1; see also Elizabeth Mehren, *Medical Group Cites Flaws in 'Silent Scream,'* Response, L.A. TIMES (Dec. 3, 1985), [http://articles.latimes.com/1985-12-03/news/vw-12959\\_1\\_silent-scream](http://articles.latimes.com/1985-12-03/news/vw-12959_1_silent-scream) [https://perma.cc/2M7Y-HZHA].

<sup>219</sup> See Bill Lohmann, *New-Style Maternity Homes Offer Religion with Prenatal Care,* L.A. TIMES, Dec. 17, 1987, at AO10; see also DIAMOND, *supra* note 19, at 97; LEE, *supra* note 19, at 22–24.

<sup>220</sup> See, e.g., Sarah Oates, *Maternity Homes Try to Abort Abortion,* L.A. TIMES, Nov. 22, 1985, at B5; see also Lohmann, *supra* note 219.

<sup>221</sup> See Oates, *supra* note 220.

<sup>222</sup> See Nancy Blodgett, *Abortion Clinics That Aren't,* 72 A.B.A. J., Dec. 1, 1986, at 21; *Anti-Abortion Clinics Focus of Hearing in House Today,* N.Y. TIMES, Dec. 17, 1986, at B12 [hereinafter *Anti-Abortion Clinics*].

<sup>223</sup> See *Anti-Abortion Clinics,* *supra* note 222.

<sup>224</sup> On Reardon's claims and influence, see BURACK, *supra* note 210, at 62–64, 66, 75; DUBOW, *supra* note 199, at 161; JOHANNA SCHOEN, *ABORTION AFTER ROE* 238–39 (2015).

<sup>225</sup> See, e.g., BURACK, *supra* note 210, at 63, 206; DUBOW, *supra* note 199, at 161; SCHOEN, *supra* note 224, at 146, 238–39.

<sup>226</sup> For a sample of Reardon's writing on the effects of abortion on women, see DAVID C. REARDON, *ABORTED WOMEN: SILENT NO MORE* (1987); DAVID C. REARDON, *MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION* (1996).

<sup>227</sup> See Rich, *supra* note 20; see also Georgatos, *supra* note 203.

<sup>228</sup> See Rich, *supra* note 20.

*Tribune* about the organization's position on the issue, insisting that "[p]unishing women is not the answer."<sup>229</sup> Nevertheless, Forsythe signed off on the punishment of some actions taken by pregnant women, so long as penalties were reasonable.<sup>230</sup> "A clear, high standard should be placed on the prosecutor to determine willful, malicious child abuse before any woman is charged," he explained, "[t]hat would exclude misconduct like smoking and nutrition, which is not willful and malicious misconduct."<sup>231</sup>

Forsythe carved out a strategy that would have some staying power; AUL claimed not to punish women and opposed the practice.<sup>232</sup> Nevertheless, Forsythe recognized a category of women deserving punishment—those who willfully or intentionally harmed their children.<sup>233</sup> This category encompassed women willing to break existing criminal laws.<sup>234</sup> It seemed clear that women breaking some abortion laws could fall in the same category as women abusing illegal drugs.<sup>235</sup>

Through the end of 1988, AUL continued emphasizing this approach, working alongside hospitals compelling caesarean sections and calling for the prosecution of women who used drugs during pregnancy.<sup>236</sup> As the organization explained in its newsletter, members viewed this work as an important step in the attack on legal abortion.<sup>237</sup> Such cases, as AUL explained, offered "yet another opportunity for AUL to defend the state's compelling interest to protect viable fetal life, a critical element in the strategy to reverse *Roe*."<sup>238</sup>

However, by the summer of 1989, it had become far more important for the movement to denounce punishing women. First, during an election-season debate, George H.W. Bush had mishandled a question on abortion, suggesting that he favored punishing and perhaps even jailing women who had abortions.<sup>239</sup> The statement prompted a public backlash, a retraction from Bush, and a renewed effort by pro-lifers to reassure voters that women would never be punished if abortion were a crime.<sup>240</sup>

<sup>229</sup> *Id.*

<sup>230</sup> *See id.*

<sup>231</sup> *Id.*

<sup>232</sup> *See id.*

<sup>233</sup> *See id.*

<sup>234</sup> *See id.*

<sup>235</sup> *Cf. id.*; Ziegler, *supra* note 8 (stating that the mainstream anti-abortion movement supported criminal prosecution of women for acts such as drug abuse).

<sup>236</sup> *See* Gorney, *supra* note 203; *ACLU Contests C-Section Delivery of Viable Fetus*, LIFE DOCKET (Ams. United for Life, Chi., Ill.), Aug. 1988, at 2 (on file at Southern Baptist Historical Library and Archives) [hereinafter *ACLU Contests C-Section*]; Ziegler, *supra* note 8.

<sup>237</sup> *See ACLU Contests C-Section*, *supra* note 236, at 2.

<sup>238</sup> *Id.*

<sup>239</sup> On Bush's comments, see E. J. DIONNE, JR., WHY AMERICANS HATE POLITICS 316 (1991); WILLIAM SALETAN, BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR 60 (2003).

<sup>240</sup> On pro-lifers' reaction to Bush's comments, see Gerald M. Boyd, *Bush Camp Offers a Clarified Stand About Abortions*, N.Y. TIMES, Sept. 27, 1988, at A1; Willke, *Never The Mother*, *supra* note 13.

The following summer, the Supreme Court convinced many pro-lifers that it would be possible in the near term for states to ban abortion again.<sup>241</sup> *Webster v. Reproductive Health Services*<sup>242</sup> involved a multi-restriction Missouri law.<sup>243</sup> The Court's plurality decision not only upheld a public-funding ban and a statutory definition of viability but also suggested that *Roe*'s trimester framework was deeply flawed.<sup>244</sup> "The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle," the Court explained.<sup>245</sup>

While the *Webster* Court did not overrule *Roe*, the 1989 decision convinced many that the end for the decision would come soon.<sup>246</sup> To raise fears about the consequences of reversal, pro-choice activists began searching for cases in which women had been punished for having abortions.<sup>247</sup> John Willke of the NRLC assured the media that pro-lifers would never want to see women penalized for having an abortion.<sup>248</sup> Willke took the same position internally. "With rare exceptions, [the woman] is the second victim," he wrote in the *National Right to Life News*.<sup>249</sup> "She needs help, counseling, education, [and] love . . . She does not need aid in killing her own baby nor should she be given criminal punishment."<sup>250</sup>

Between 1989 and 1993, pro-lifers invested much more in the woman-protective arguments than had circulated since the 1980s.<sup>251</sup> In this period, with a pro-choice president in office for the first time in decades and anti-abortion violence in the news, pro-lifers desperately wanted to convince ambivalent Americans that abortion, not abortion opponents, hurt women.<sup>252</sup> For this reason, movement leaders played down any effort to criminalize women's conduct during pregnancy, instead spotlighting the harms produced by abortion itself.<sup>253</sup>

After 1992, when the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>254</sup> pro-lifers channeled resources into laws, like targeted regulations of abortion providers (TRAP) statutes and informed-consent measures,

<sup>241</sup> See *The Pro-Life Movement One Year Later: In the Wake of Webster*, AUL F. (Ams. United for Life, Chi., Ill.), Fall 1990, at 7 [hereinafter *Wake of Webster*].

<sup>242</sup> 492 U.S. 490 (1989).

<sup>243</sup> See *id.* at 499.

<sup>244</sup> See *id.* at 510–11, 518.

<sup>245</sup> *Id.* at 518.

<sup>246</sup> See *Wake of Webster*, *supra* note 241, at 7.

<sup>247</sup> For an example of this strategy, see Walter Dellinger, *The Abortion Decision: Monument to Confusion*, WASH. POST, July 9, 1989, at B1.

<sup>248</sup> See Willke, *The Woman Should Not Be Punished*, *supra* note 13.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> See *id.*

<sup>252</sup> See *id.*; see also Minutes of Board Meeting (Apr. 24, 1993), *supra* note 21, at 3.

<sup>253</sup> See Willke, *The Woman Should Not Be Punished*, *supra* note 13.

<sup>254</sup> 505 U.S. 833 (1992).

that fit easily within a woman-protective agenda.<sup>255</sup> When the Court upheld the Partial-Birth Abortion Ban Act in *Gonzales v. Carhart*<sup>256</sup> in 2007, pro-lifers pursued a more aggressive agenda, one anchored to woman-protective claims.<sup>257</sup> As state legislators and prosecutors believed that they had more room to work, they also passed laws authorizing the punishment of women who terminated their own pregnancies.<sup>258</sup> Without foregrounding these laws, pro-lifers did nothing to oppose these prosecutions.<sup>259</sup> While committing fully to a woman-protective agenda, pro-lifers left open important questions about what it meant to protect women in the first place.<sup>260</sup>

### III. PROVING ABORTION-RELATED HARMS AND THE PROSECUTION OF WOMEN

From 1988 to the present, pro-lifers have developed a potent woman-protective rhetorical strategy that shapes everything from the movement's message to its legislative strategy.<sup>261</sup> This Part traces how this tactic took on so much importance at a time when prosecutors began bringing charges against certain women for having abortions. First, this Part explores the attempt to collect evidence about the effects of abortion on women. When Surgeon General C. Everett Koop concluded that there was not enough evidence to establish any post-abortion syndrome, pro-lifers did not lose interest in woman-protective arguments.<sup>262</sup> Next, this Part explores the emphasis pro-lifers put on woman-protective strategies after *Casey*. After 2003, as this Part shows, pro-life lawmakers believed that the Court would uphold a much wider range of abortion restrictions, including those that came much closer to punishing women for having an abortion.<sup>263</sup>

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<sup>255</sup> See Neal Devins, *How Planned Parenthood v. Casey (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1329 (2009); see also Ziegler, *supra* note 155, at 440–51.

<sup>256</sup> 550 U.S. 124 (2007).

<sup>257</sup> See Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U ILL. L. REV. 991 [hereinafter Siegel, *The New Politics*]; Mary Ziegler, *Substantial Uncertainty: Whole Woman's Health v. Hellerstedt and the Future of Abortion Law*, 2016 SUP. CT. REV. 77, 78–79, 98–99, 114–15.

<sup>258</sup> See Michelle Goldberg, *Abortions Return to Back Alleys Amid Restrictive New State Laws*, DAILY BEAST (June 3, 2011, 5:44 PM), <https://www.thedailybeast.com/abortions-return-to-back-alleys-amid-restrictive-new-state-laws> [<https://perma.cc/Z3X5-SZC9>]; Rowan, *supra* note 4.

<sup>259</sup> See Goldberg, *supra* note 258; Rowan, *supra* note 4.

<sup>260</sup> See Goldberg, *supra* note 258; Rowan, *supra* note 4; Siegel, *The New Politics*, *supra* note 257.

<sup>261</sup> See *supra* Section II.B; see also Ziegler, *supra* note 155, at 450–51. See generally Mary Ziegler, *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232 (2013) (discussing, in part, pro-life woman-protective arguments and strategy).

<sup>262</sup> See Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Arguments*, 57 DUKE L.J. 1641, 1663–68 (2008) [hereinafter Siegel, *The Right's Reasons*]; Letter from David C. Reardon to C. Everett Koop, U.S. Surgeon Gen. (July 1, 1988) (on file with author).

<sup>263</sup> See discussion *infra* Section III.B.

*A. Pro-Lifers Try to Prove that Abortion Hurts Women*

In 1988–1989, pro-lifers eagerly awaited the findings of Surgeon General C. Everett Koop about the effects of abortion on women.<sup>264</sup> Koop had openly aligned himself with the pro-life movement in the early 1980s, and his involvement inspired optimism among pro-lifers.<sup>265</sup>

David Reardon, the author of several books on the subject, wrote Koop in 1987 about the strategic importance of the issue: “It is my belief that abortion should no longer be presented as a moral issue to which people will close their minds, but rather as a public health issue.”<sup>266</sup> In July 1988, Reardon wrote again, highlighting research that he claimed would identify the women most at risk of psychological damage after abortion.<sup>267</sup> Reardon stated that a majority of aborting women face “a great deal of pressure from their circumstances, their society, and from their family and friends, to submit to the ‘commonsense’ of abortion as a solution to their problems.”<sup>268</sup> Reardon insisted that there was certainly enough proof to justify further studies about the effects of abortion on women.<sup>269</sup>

Ultimately, Koop met with twenty-seven groups, including leading pro-life and abortion-rights organizations with their own views about the effects of abortion on women.<sup>270</sup> In January 1989, Koop wrote the President that the existing evidence did not support any conclusion whatsoever.<sup>271</sup> He cited methodological problems with published studies and obstacles to accumulating better evidence: women did not often report abortions, clinics did not keep records, and causation was hard to prove.<sup>272</sup> Meaningful results, Koop wrote, would take years and hundreds of millions of dollars.<sup>273</sup> “[T]he available scientific evidence about the psychological sequelae of abortion simply cannot support either the preconceived beliefs of those of the pro-life or of those pro-choice” movements, Koop wrote.<sup>274</sup>

<sup>264</sup> See Siegel, *The Right’s Reasons*, *supra* note 262, at 1662–64; D. MICHAEL LINDSAY, FAITH IN THE HALLS OF POWER: HOW EVANGELICALS JOINED THE AMERICAN ELITE 39–40 (2007).

<sup>265</sup> On Koop’s ties to the pro-life movement, see LINDSAY, *supra* note 264, at 39–40; NEIL J. YOUNG, WE GATHER TOGETHER: THE RELIGIOUS RIGHT AND THE PROBLEM OF INTERFAITH POLITICS 161 (2016).

<sup>266</sup> Letter from David C. Reardon to C. Everett Koop, U.S. Surgeon Gen. (Sept. 14, 1987) (on file with the author).

<sup>267</sup> See Letter from David C. Reardon to C. Everett Koop, U.S. Surgeon Gen. (July 1, 1988) (on file with the author).

<sup>268</sup> *Id.*

<sup>269</sup> See *id.*

<sup>270</sup> See Letter from C. Everett Koop, U.S. Surgeon Gen., to Ronald Reagan, U.S. President (Jan. 9, 1989) (on file with author).

<sup>271</sup> See *id.* at 2.

<sup>272</sup> See *id.* at 3.

<sup>273</sup> See *id.*

<sup>274</sup> *Id.* at 2.

When the letter leaked, Koop refrained from commenting, but the outcome was clear.<sup>275</sup> Reardon hoped that the White House would push for further studies about the effects of abortion, but the movement had clearly suffered a setback.<sup>276</sup> Some thought that it might no longer make sense to stress woman-protective arguments that even a sympathetic surgeon general refused to embrace.<sup>277</sup>

After *Webster*, pro-lifers rebounded, strategizing about how best to exploit the best news the movement had received from the Court since 1973.<sup>278</sup> To be sure, *Webster* energized the movement; for example, the AUL's donations topped \$1 million for the first time.<sup>279</sup> NRLC plotted legislation in states willing to criminalize abortion after *Roe*.<sup>280</sup> However, *Webster* also exposed strategic differences between the movement's leading organizations.<sup>281</sup> AUL leaders saw *Webster* as an important step but believed that the movement could make headway only if members could bring a perfect test case.<sup>282</sup> While Jim Bopp of the NRLC boasted about what he called "the 'de facto over-ruling' of *Roe v. Wade* by [*Webster*],"<sup>283</sup> AUL described *Webster* as "an invitation to pursue [an] incremental strategy."<sup>284</sup>

These different ideas about *Webster* informed the organization's contrasting strategies; AUL suggested that legislators focus on the circumstances in each individual state, pursuing realistic statutes and avoiding any sign of weakness.<sup>285</sup> By contrast, NRLC was less cautious about measures that alienated or demonized women.<sup>286</sup> If abortion could be banned again, NRLC lawyers planned to lay traps for providers that would trigger far-reaching injunctions and severe penalties.<sup>287</sup> The organization reconfirmed that women should not face punishment and introduced

<sup>275</sup> See LINDSAY, *supra* note 264, at 41.

<sup>276</sup> On Reardon and other pro-lifers' efforts to keep the issue alive, see Warren E. Leary, *Koop Challenged on Abortion Data: Doctors Say They Can Show Long-Term Effect Is Slight*, N.Y. TIMES, Jan. 15, 1989, at 1; Letter from David C. Reardon to C. Everett Koop, U.S. Surgeon Gen. (Apr. 10, 1989) (on file with author).

<sup>277</sup> See Siegel, *The Right's Reasons*, *supra* note 262, at 1664–68; Ziegler, *supra* note 261, at 94–96.

<sup>278</sup> See *Legislating to Restore the Sanctity of Human Life After Webster: A Statement of Principle, Policy, and Strategy*, AUL BRIEFING MEMO (Ams. United for Life, Chi., Ill.), Dec. 1990; *Wake of Webster*, *supra* note 241.

<sup>279</sup> See Minutes of Board Meeting: October 28, 1989, Ams. United for Life (on file at Papers of Mildred Jefferson, Box 13, Folder 8, Schlesinger Library, Harvard University).

<sup>280</sup> See, e.g., *id.* at 3.

<sup>281</sup> See *id.* at 2–3.

<sup>282</sup> See *id.*

<sup>283</sup> *Id.* at 3.

<sup>284</sup> *Wake of Webster*, *supra* note 241, at 1.

<sup>285</sup> See, e.g., *id.* at 1–2.

<sup>286</sup> See, e.g., Balch, *supra* note 9.

<sup>287</sup> See J.C. Willke, *Our Primary Goal—To Stop the Killing*, NAT'L RIGHT TO LIFE NEWS, June 22, 1989, at 3 (stating that NRLC supported punishments of abortion providers).

a legislative agenda that included woman-protective informed-consent laws.<sup>288</sup> “Women facing the possibility of abortion should have the right to hear the facts and arguments from both sides, not just the abortionists,” the *National Right to Life News* confirmed.<sup>289</sup>

At the same time, NRLC pushed aggressive laws that portrayed women as shallow and selfish.<sup>290</sup> The organization sponsored laws banning abortion as a method of birth control or outlawing the procedure for reasons of sex-selection.<sup>291</sup> NRLC lawyers also reinvigorated the campaign for spousal-notification laws, representing men that attorneys claimed were victimized by women who chose abortion without consulting their partners.<sup>292</sup> In 1988, Bopp developed and circulated a handbook for attorneys who wanted to bring fathers-rights cases.<sup>293</sup> The organization’s agenda centered on what pro-lifers believed were unpopular reasons for choosing abortion.<sup>294</sup> That these laws sent conflicting messages about the blameworthiness of women’s decisions was a secondary consideration.<sup>295</sup>

In the meantime, AUL leaders concluded that pro-lifers could never pass the kinds of laws championed by NRLC unless the movement distanced itself from the idea of punishing women.<sup>296</sup> This move seemed particularly important at a time when a new clinic-blockade movement, led by Randall Terry’s Operation Rescue, had grabbed much of the media attention for itself.<sup>297</sup> While pro-lifers had always picketed outside of clinics, the scale and aggressiveness of Operation Rescue’s campaign in the late 1980s and early 1990s was unprecedented.<sup>298</sup> Some associated with the clinic blockade movement formally endorsed violence, while many others

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<sup>288</sup> See Balch, *supra* note 9; Willke, *The Woman Should Not Be Punished*, *supra* note 13.

<sup>289</sup> Balch, *supra* note 9 (emphasis removed).

<sup>290</sup> Cf. *id.* (criticizing abortions for sex-selection and birth control).

<sup>291</sup> See *id.*

<sup>292</sup> See Martha Brannigan, *Suits Argue Fathers’ Rights in Abortion*, WALL ST. J., Aug. 23, 1988, at 29; David G. Savage, *Fathers’ Appeals to Justices Ask Equal Rights to Children, Even Unborn*, L.A. TIMES (Sept. 25, 1988), [http://articles.latimes.com/1988-09-25/news/mn-3861\\_1\\_equal-rights](http://articles.latimes.com/1988-09-25/news/mn-3861_1_equal-rights) [<https://perma.cc/SV6K-9E56>]; see also Balch, *supra* note 9.

<sup>293</sup> See Brannigan, *supra* note 292.

<sup>294</sup> See Balch, *supra* note 9.

<sup>295</sup> See, e.g., *id.*

<sup>296</sup> See, e.g., Jensen, *supra* note 12, at 1, 4–7; Ramsey, *supra* note 12, at 4 (discussing the need for the pro-life movement to take a more moderate approach to win support).

<sup>297</sup> See, e.g., DOAN, *supra* note 145, at 86; MARKENS, *supra* note 199, at 53; Susan Faludi, *Where Did Randy Go Wrong?*, MOTHER JONES, Nov. 1989, at 22, 24–25.

<sup>298</sup> On the clinic blockade movement, see MICHAEL STEWART FOLEY, FRONT PORCH POLITICS: THE FORGOTTEN HEYDAY OF AMERICAN ACTIVISM IN THE 1970S AND 1980S, at 318 (2013); CAROL MASON, KILLING FOR LIFE: THE APOCALYPTIC NARRATIVE OF PRO-LIFE POLITICS 102 (2002); JENNIFER NELSON, MORE THAN MEDICINE: A HISTORY OF THE FEMINIST WOMEN’S HEALTH MOVEMENT 147 (2015).



worked to shut clinics down for as long as possible.<sup>299</sup> For groups like AUL, Operation Rescue sent the wrong message about the movement's identity; rather than making a home for respectable, reasonable advocates working through the law, the pro-life movement described in the media seemed to shelter anti-woman extremists.<sup>300</sup>

To present a different image to the public, AUL leaders argued that pro-lifers needed to try twice as hard to appear pro-woman.<sup>301</sup> At a conference hosted for state legislators, AUL leaders drove home the importance of appealing to women.<sup>302</sup> “[W]e are also viewed as extremists, . . . violent, intolerant and unconcerned about women, poverty and homelessness,” explained Laurie Ann Ramsey, the organization's public relations strategist.<sup>303</sup> Mary Ellen Jensen urged pro-lifers to follow a strategy shaped by public opinion polls—one that ruled out any punishment for women.<sup>304</sup> “The naturally strong focus on concern for the unborn child neglects mention of the mother of that [unborn] child,” Jensen stated.<sup>305</sup> “Communicating greater concern for the women who face the challenge of an unplanned pregnancy must be a key objective of any pro-life communications strategy.”<sup>306</sup>

In 1992, *Casey* intensified pro-life interest in woman-protective arguments, including those denouncing the punishment of women.<sup>307</sup> The Court's opinion focused on women, entertaining arguments that the procedure was both potentially harmful to women and a necessary option on which generations of women had relied.<sup>308</sup> That case involved a Pennsylvania statute requiring, among other things, parental notification, spousal notification, informed consent, and a waiting period.<sup>309</sup> In the lead-up to the case, movement members asked the Court to overrule *Roe*.<sup>310</sup> The justices declined the invitation, preserving what the plurality called the “essential holding” of *Roe*.<sup>311</sup> Nevertheless, the Court reworked its understanding of the abortion right, describing abortion as a matter of equal treatment for women as well as autonomy.<sup>312</sup> A woman's “suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role,” the plurality explained.<sup>313</sup> “The

<sup>299</sup> See, e.g., DOAN, *supra* note 145, at 85; NELSON, *supra* note 298, at 147.

<sup>300</sup> Compare DOAN, *supra* note 145, at 85, and NELSON, *supra* note 298, at 147, with Jensen, *supra* note 12, at 4–7.

<sup>301</sup> See Jensen, *supra* note 12, at 1, 4–7.

<sup>302</sup> See, e.g., Jensen, *supra* note 12, at 1, 4–7; Ramsey, *supra* note 12, at 5.

<sup>303</sup> Ramsey, *supra* note 12, at 4.

<sup>304</sup> See Jensen, *supra* note 12, at 4–7.

<sup>305</sup> *Id.* at 5.

<sup>306</sup> *Id.*

<sup>307</sup> See, e.g., Minutes of Board Meeting (Apr. 24, 1993), *supra* note 21, at 3.

<sup>308</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844, 846, 860–61, 875–78 (1992).

<sup>309</sup> See *id.* at 844.

<sup>310</sup> See *id.*

<sup>311</sup> *Id.* at 870–71.

<sup>312</sup> See *id.* at 852–57.

<sup>313</sup> *Id.* at 852.

destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”<sup>314</sup>

The Court’s spotlight on women ran through the remainder of the opinion.<sup>315</sup> While refusing to overrule *Roe*, the Court also undid *Roe*’s trimester framework, putting in its place the undue-burden standard.<sup>316</sup> Under that standard, a law would be unconstitutional if it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>317</sup>

Whether abortion hurt or helped women was central to much of the Court’s analysis of the undue-burden standard.<sup>318</sup> In upholding the Pennsylvania informed-consent law, the Court reasoned: “In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”<sup>319</sup> Informed-consent laws, as *Casey* framed them, benefitted women rather than creating an impermissible burden.<sup>320</sup>

By contrast, in striking down the spousal-notification law, the Court emphasized the damaging sex stereotypes written into the Pennsylvania provision.<sup>321</sup> The plurality denounced the idea of subservient women implied in the law “repugnant to [this Court’s] present understanding of marriage and of the nature of the rights secured by the Constitution.”<sup>322</sup> The *Casey* Court concluded that “[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children.”<sup>323</sup>

Because of *Casey*’s focus on women, pro-lifers insisted more often than ever that their movement protected women rather than demanding their punishment.<sup>324</sup> To solidify this argument, pro-lifers had elevated women to positions of power in both AUL and NRLC.<sup>325</sup> In 1993, Paige Comstock Cunningham, an activist interested in woman-protective arguments, became the head of AUL.<sup>326</sup> Wanda Franz, a developmental psychologist, had taken over the leadership of NRLC the year before *Casey*.<sup>327</sup> Franz had long challenged the conclusions of the American Psychological

<sup>314</sup> *Id.*

<sup>315</sup> *See, e.g., id.* at 852–53, 856, 858–61.

<sup>316</sup> *See id.* at 876–77.

<sup>317</sup> *Id.* at 877.

<sup>318</sup> *See id.* at 882–83.

<sup>319</sup> *Id.*

<sup>320</sup> *See id.*

<sup>321</sup> *See id.* at 887–99.

<sup>322</sup> *Id.* at 898.

<sup>323</sup> *Id.*

<sup>324</sup> *See Minutes of Board Meeting (Apr. 24, 1993), supra note 21, at 3.*

<sup>325</sup> *See Marlene Cimons, Koop Backed in Call for Research on Abortion Effects, L.A. TIMES, Jan. 12, 1989, at 21.*

<sup>326</sup> *See Minutes of Board Meeting (Apr. 24, 1993), supra note 21, at 1; Cimons, supra note 325.*

<sup>327</sup> *See Cimons, supra note 325; Linda Feldmann, Two Voices on Abortion, CHRISTIAN*

Association regarding post-abortion syndrome, arguing that professional organizations unfairly dismissed the idea out of hand.<sup>328</sup> Cunningham saw woman-protective strategies as central to the movement's success.<sup>329</sup> "We must help people to understand that abortion hurts the woman too," she told her colleagues in April 1993.<sup>330</sup> Casey helped movement members achieve this goal by enabling them to start "passing and enforcing laws relating to the woman, and that such laws will also save some children."<sup>331</sup>

In October 1993, to put these arguments before the public, AUL developed a fifteen-year plan.<sup>332</sup> The first step involved legislation and arguments that would "shatter the myth that abortion helps women."<sup>333</sup> To accomplish this goal, AUL and NRLC prioritized "right to know" laws that would require women to listen to a script about abortion.<sup>334</sup>

Movement leaders also saw potential in TRAP regulations; AUL had first emphasized this tactic in 1989 in defending an Illinois law with an unusual history.<sup>335</sup> This kind of law had first gained support in the state after a 1978 exposé by the *Chicago Sun-Times* on the state's abortion industry.<sup>336</sup> Working undercover, reporters revealed unsterile, dangerous, dishonest, and unprincipled practices at four Chicagoland clinics.<sup>337</sup> The forty stories published by the *Sun-Times* sparked new targeted clinic regulations, and in 1982, at the urging of the pro-life movement, the state introduced more detailed and onerous regulations.<sup>338</sup> In the decades to come, pro-lifers would renew the push for similar regulations when clinic scandals emerged in other states and cities.<sup>339</sup>

When providers challenged those regulations in 1989, pro-life incrementalists celebrated; the leader of the Illinois Right to Life Committee, a NRLC state affiliate,

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SCI. MONITOR (Nov. 25, 1991), <https://www.csmonitor.com/1991/1125/25121.html> [<https://perma.cc/QB5Q-6FTZ>].

<sup>328</sup> See Cimons, *supra* note 325; Feldmann, *supra* note 327.

<sup>329</sup> See Minutes of Board Meeting (Apr. 24, 1993), *supra* note 21, at 3.

<sup>330</sup> *Id.*

<sup>331</sup> *Id.*

<sup>332</sup> Minutes of Board Meeting: October, 22, 1993, Ams. United for Life (on file at Papers of Mildred Jefferson, Box 13, Folder 8, Schlesinger Library, Harvard University).

<sup>333</sup> *Id.* at 3.

<sup>334</sup> See, e.g., *id.*; cf. Ziegler, *supra* note 155, at 451–52.

<sup>335</sup> See Kathleen Best, *Coalition Gave Life to Illinois Abortion Law*, ST. LOUIS POST-DISPATCH, July 30, 1989, at 1A.

<sup>336</sup> On the *Chicago Sun-Times* series, see BROOKE KROEGER, UNDERCOVER REPORTING: THE TRUTH ABOUT DECEPTION 248 (2012); SCHOEN, *supra* note 224, at 96.

<sup>337</sup> See KROEGER, *supra* note 336, at 248–49.

<sup>338</sup> See, e.g., Best, *supra* note 335.

<sup>339</sup> For examples of this strategy, see Ed Anderson, *Bill Would Regulate Abortion Clinics in La. Is Filed*, TIMES-PICAYUNE, Apr. 18, 1991, at B4; Donna O'Neal, *Martinez to HRS: Shut Clinic—Governor Calls for New Abortion Rules*, ORLANDO SENTINEL, Sept. 23, 1989, at D1. Cf. Devins, *supra* note 255, at 1339–44 (describing, in part, TRAP laws arising after Casey).

told reporters that his colleagues hoped that the Court would agree to hear the case *Ragsdale v. Turnock*.<sup>340</sup> “We want [the Court] to have as many opportunities as possible to look at [*Roe v. Wade*] to overturn it or chip away at it some more,” he explained.<sup>341</sup> Paige Cunningham, a leader of AUL, presented the state’s targeted regulations as a necessary means of protecting women from abortion.<sup>342</sup> Not only did the law not create an undue burden, the Illinois measure was needed to keep women safe from “unqualified physicians, unsanitary conditions or debilitating injury.”<sup>343</sup>

The Court never heard *Ragsdale* because Illinois settled the suit,<sup>344</sup> but pro-lifers continued using TRAP laws to demonstrate that pro-lifers would never punish women.<sup>345</sup> In 1999, for example, South Carolina used this strategy in defending its targeted clinic regulations before the Fourth Circuit and in Supreme Court filings.<sup>346</sup> The State had introduced a law requiring the licensure of clinics that performed more than a threshold number of abortions and mandated that the state health department promulgate regulations to govern all abortion clinics.<sup>347</sup> Regulators responded by issuing a complex set of rules, requiring among other things that all clinics (and no other freestanding medical facility) undertake extensive physical plant changes, test all patients for both pregnancy and sexually transmitted diseases, and ensure that only a registered nurse, rather than a physician, supervise nursing staff.<sup>348</sup> Citing the importance of defending the regulations, Clarke Forsythe told other AUL members: “In most states, veterinary clinics face more regulations than abortion clinics, which has resulted in numerous deaths of women (the second victims of abortion).”<sup>349</sup>

Pro-lifers’ deep belief in the harm done to women by abortion always seemed hard to reconcile with statements suggesting that abortion was murder. After 2009, however, when states began more often prosecuting women for self-inducing abortion

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<sup>340</sup> 841 F.2d 1358 (7th Cir. 1988), *postponing juris.*, 492 U.S. 916 (1989) (mem.) and *dismissing appeal*, 503 U.S. 916 (1992) (mem.); Lynn Sweet, *Abortion Foes Fight Deal on Key Case*, CHI. SUN-TIMES, Aug. 31, 1989, at 14.

<sup>341</sup> Sweet, *supra* note 340.

<sup>342</sup> See, e.g., Jim Merriner, *Another Group Opposes Settling of Abortion Case*, CHI. SUN-TIMES, Sept. 1, 1989, at 8.

<sup>343</sup> *Id.* (quoting AUL attorney Paige Cunningham).

<sup>344</sup> *Turnock v. Ragsdale*, 503 U.S. 916 (1992) (mem.); see *Justices Let Stand Agreement to Ease Abortion Regulations*, HOUSTON CHRON., Dec. 3, 1990, at A4; see also *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 159 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

<sup>345</sup> See, e.g., *Bryant*, 222 F.3d at 159.

<sup>346</sup> See Brief of Appellants at 57–58, *Bryant*, 222 F.3d 157 (Nos. 99-1319, 99-1710, & 99-1725).

<sup>347</sup> See *Bryant*, 222 F.3d at 159–62.

<sup>348</sup> See *id.*

<sup>349</sup> Letter from Clarke D. Forsythe, President, Ams. United for Life, to Mildred F. Jefferson 1 (Oct. 13, 2000) (on file at Papers of Mildred Jefferson, Box 13, Folder 6, Schlesinger Library, Harvard University).

or attempting to do so,<sup>350</sup> pro-lifers continued emphasizing woman-protective arguments.<sup>351</sup> Recent prosecutions exposed a longstanding fault line in the pro-life position; while many movement members believed that abortion hurt women and saw the strategic benefits of saying so, pro-lifers did not oppose efforts to punish women.<sup>352</sup> The movement's goals—maximizing protection for fetal life and protecting women—could easily come into conflict with one another when women themselves went to prison.

*B. Gonzales, Whole Woman's Health, and the New Jurisprudence of Punishment*

The Supreme Court's 2007 decision in *Gonzales v. Carhart* emboldened pro-life lawmakers to push the boundaries of what the Court would tolerate. *Gonzales* addressed the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003, a law outlawing dilation-and-evacuation abortion, a procedure by which a fetus was removed in one piece.<sup>353</sup> The Court not only upheld the law but also cited woman-protective arguments with approval.<sup>354</sup> *Gonzales* also offered lawmakers more latitude to restrict abortion, even when doubt remained that a law would negatively impact women's health.<sup>355</sup> After *Gonzales*, pro-lifers had new interest in woman-protective arguments.<sup>356</sup> At the same time, the decision inspired much further-reaching restrictions.<sup>357</sup> Movement leaders began to believe it was possible to overrule *Roe*, in practice if not in theory.<sup>358</sup>

The statute and the litigation defending it showed how well the movement could weave fetal-protective arguments into a campaign nominally centered on women. When hearing testimony on the statute, Congress considered evidence on the physical risks of late-term abortions.<sup>359</sup> The litigation of *Gonzales* put arguments about post-abortion syndrome at the top of the agenda.<sup>360</sup> These arguments figured centrally in

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<sup>350</sup> See Clarke D. Forsythe, *The Road Map to Overturning Roe v. Wade: What Can the States Do Now?*, AMS. UNITED FOR LIFE (2012), <http://www.aul.org/wp-content/uploads/2012/04/road-map-overturning-roe.pdf> [<https://perma.cc/TC5Y-72MP>] (discussing, in part, state laws meant to curb abortion); Rowan, *supra* note 4.

<sup>351</sup> See Forsythe, *supra* note 350.

<sup>352</sup> See *id.* Cf. generally Rowan, *supra* note 4.

<sup>353</sup> See 550 U.S. 124, 132, 135–38 (2007).

<sup>354</sup> See, e.g., *id.* at 156–64.

<sup>355</sup> See *id.* at 141–43, 162–63.

<sup>356</sup> See generally Clarke D. Forsythe & Bradley N. Kehr, *A Road Map Through the Supreme Court's Back Alley*, 57 VILL. L. REV. 45 (2012).

<sup>357</sup> See generally Forsythe, *supra* note 350; Goldberg, *supra* note 258.

<sup>358</sup> Forsythe, *supra* note 350; Forsythe & Kehr, *supra* note 356.

<sup>359</sup> See H.R. REP. NO. 108-58, at 5, 14–18 (2003) (discussing, in part, risks associated with late-term, partial-birth abortion) [hereinafter Partial-Birth Abortion Ban Act].

<sup>360</sup> Brief of Sandra Cano, the Former “Mary Doe” of *Doe v. Bolton*, and 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner at 22–24, *Gonzales*, 550 U.S.

an amicus curiae brief by the conservative Justice Foundation, which in turn drew on affidavits from Operation Outcry, a group of women who claimed to have been hurt by abortion and coerced into choosing it.<sup>361</sup> The affidavits had already been making the rounds in pro-life circles for several years, serving as the foundation for an effort to relitigate *Roe v. Wade*, and forming the factual basis for a 2006 attempt in South Dakota to ban abortion outright.<sup>362</sup>

*Gonzales* drew heavily on these arguments in upholding the federal statute, all the while describing fetal life in terms that far more closely matched pro-lifers' assertions.<sup>363</sup> The Court applied *Casey*'s undue-burden test to the law, identifying several purposes that supported it, including "express[ing] respect for the dignity of human life," preserving the reputation of the medical profession, and protecting women from post-abortion regret.<sup>364</sup> "It is self-evident," the majority wrote, "that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form."<sup>365</sup>

*Gonzales* further concluded that the ban did not have an impermissible effect.<sup>366</sup> Those challenging the law had stressed that it made no exception for situations in which intact dilation-and-evacuation (D&E) abortions were necessary to protect women's health.<sup>367</sup> Emphasizing conflicting views about whether D&E was ever needed to protect women, the Court held that Congress had the freedom to act, and a facial challenge to the statute had to fail.<sup>368</sup>

*Gonzales* opened new opportunities for the pro-life movement; some saw greater potential in arguments involving women's health: "After adopting the mantra that 'abortion is safer than childbirth,' the Justices have operated since *Roe* with the assumption that . . . there are only risks from delaying an abortion," wrote Clarke Forsythe.<sup>369</sup> He concluded that *Gonzales* had ushered in "a more even-handed examination of health considerations and health data."<sup>370</sup> Forsythe and his colleagues also saw value in TRAP regulations that could be used to build on pro-life arguments

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124 (No. 05-380) [hereinafter Brief of Sandra Cano]; Siegel, *The Right's Reasons*, *supra* note 262, at 1642.

<sup>361</sup> For the brief, see Brief of Sandra Cano, *supra* note 360, at 22–24. On the Court's reliance on the brief, see Siegel, *The Right's Reasons*, *supra* note 262, at 1641–46.

<sup>362</sup> See, e.g., Siegel, *The Right's Reasons*, *supra* note 262, at 1641–46, 1642 n.8.

<sup>363</sup> See *Gonzales*, 550 U.S. at 157–66.

<sup>364</sup> *Id.* at 157–59.

<sup>365</sup> *Id.* at 159–60.

<sup>366</sup> See *id.* at 161–68.

<sup>367</sup> See *id.* at 147, 161.

<sup>368</sup> See *id.* at 161–67.

<sup>369</sup> Clarke Forsythe, *The Medical Assumption at the Foundation of Roe v. Wade & Its Implications for Women's Health*, 29 ISSUES L. & MED. 183, 199 (2014).

<sup>370</sup> *Id.* at 200.

about women's health.<sup>371</sup> Forsythe and Kehr described these statutes as a means of ensuring "effective protection for women's physical and psychological health, not merely the bargain-basement goal of stopping the worst practitioners."<sup>372</sup>

Although *Gonzales* increased the draw of woman-protective arguments, the Court's decision also encouraged pro-lifers who wanted to pass more all-encompassing and punitive laws.<sup>373</sup> This push brought renewed attention to the issue of punishing women.<sup>374</sup> In some instances, feticide laws were applied far more broadly.<sup>375</sup> Thirty-eight states already had in place laws authorizing homicide charges in the unlawful death of an unborn child, though some did explicitly rule out the prosecution of a pregnant woman.<sup>376</sup> Others left open whether women could be prosecuted for a range of offenses, including homicide, assault, and child abuse.<sup>377</sup>

In 2009, the first test of the principle that women would not be prosecuted came when a teenage girl in Utah asked a man to beat her to end her pregnancy.<sup>378</sup> Her boyfriend had apparently not wanted the pregnancy, and the girl was uncertain that she could get a legal abortion.<sup>379</sup> Prosecutors charged the girl with solicitation to commit murder, but the charges were reduced when a judge concluded that murder charges could not apply to a woman seeking to terminate her own pregnancy.<sup>380</sup> The Utah State Legislature responded by passing legislation explicitly authorizing homicide charges in the cases of women who intentionally or knowingly caused the death of an unborn child.<sup>381</sup> Unless an abortion was performed by or under the supervision of a physician, the law categorized most other procedures as a form of murder.<sup>382</sup>

Lawmakers took on the issue of punishing women partly because it had become much easier for women to terminate their own pregnancies using abortion drugs.<sup>383</sup>

<sup>371</sup> See generally Forsythe, *supra* note 350; Forsythe & Kehr, *supra* note 356.

<sup>372</sup> Forsythe & Kehr, *supra* note 356, at 46.

<sup>373</sup> See *id.*; Forsythe, *supra* note 350.

<sup>374</sup> See Goldberg, *supra* note 258; see also Rowan, *supra* note 4, at 70–74.

<sup>375</sup> See, e.g., H.B. 442, 61st Leg., 2016 Gen. Sess. (Utah 2016); see also Forsythe, *supra* note 350, at 109; Rowan, *supra* note 4.

<sup>376</sup> See *Fetal Homicide State Laws*, NAT'L CONF. ST. LEGISLATURES (Nov. 16, 2017), <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx> [<https://perma.cc/3ZB6-KATM>].

<sup>377</sup> See *id.*

<sup>378</sup> See Rowan, *supra* note 4, at 71; Goldberg, *supra* note 258.

<sup>379</sup> See Goldberg, *supra* note 258; Edecio Martinez, *Abortion Beating: Aaron Harrison Sentenced for Trying to Cause Miscarriage with Fists*, CBS NEWS (Oct. 28, 2009, 11:02 AM), <https://www.cbsnews.com/news/abortion-beating-aaron-harrison-sentenced-for-trying-to-cause-miscarriage-with-fists/> [<https://perma.cc/V5UR-8QJZ>].

<sup>380</sup> See Rowan, *supra* note 4, at 71; Goldberg, *supra* note 258.

<sup>381</sup> See H.B. 442, 61st Leg., 2016 Gen. Sess. (Utah 2016); see also Rowan, *supra* note 4, at 71.

<sup>382</sup> See Utah H.B. 442; see also Rowan, *supra* note 4, at 71; Nina Liss-Schultz, *She Was Desperate. She Tried to End Her Own Pregnancy. She Was Thrown in Jail*, MOTHER JONES (May/June 2017), <http://www.motherjones.com/politics/2017/05/fetal-homicide-abortion-rights-restrictions/> [<https://perma.cc/584R-MKRM>].

<sup>383</sup> See Rowan, *supra* note 4, at 71.

Mifeprex, or RU 486, first appeared in the late 1980s as an abortion drug.<sup>384</sup> After 2000, physicians most often used RU 486 together with misoprostol, a drug that could also terminate pregnancies when used on its own.<sup>385</sup> Neither drug was available over-the-counter in the United States, but women seeking it out often managed to purchase it either online or abroad.<sup>386</sup>

As more women got their hands on abortion medication, lawmakers and prosecutors cracked down on those who terminated their own pregnancies.<sup>387</sup> In 2011, Jennie Linn McCormack faced criminal charges under a 1972 law that made it illegal for a woman to perform abortion on herself after McCormack terminated a pregnancy using RU 486.<sup>388</sup> McCormack might also have run afoul of a recently passed state law barring any abortion after twenty weeks of pregnancy.<sup>389</sup> A judge ultimately dismissed the case against her, citing a lack of evidence, and the Ninth Circuit ultimately struck down the disputed Idaho law.<sup>390</sup>

Just the same, McCormack was far from the last to face criminal charges for inducing an abortion; in 2013, Jennifer Whalen faced criminal charges after purchasing abortion pills for her daughter online.<sup>391</sup> When she took her daughter to the hospital for treatment for complications, hospital officials reported her.<sup>392</sup> Whalen eventually faced a nine- to eighteen-month sentence for providing an abortion without

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<sup>384</sup> See, e.g., CRITCHLOW, *supra* note 52, at 221; Lawrence D. Brown, *The More Things Stay the Same the More They Change: The Odd Interplay Between Government and Ideology in the Recent Political History of the U.S. Health-Care System*, in HISTORY AND HEALTH POLICY IN THE UNITED STATES: PUTTING THE PAST BACK IN 38 (Rosemary A. Stevens et al. eds., 2006); Rowan, *supra* note 4, at 71.

<sup>385</sup> See Rowan, *supra* note 4, at 71.

<sup>386</sup> See *id.*; Becky Little, *The Science Behind the "Abortion Pill,"* SMITHSONIAN.COM (June 23, 2017), <https://www.smithsonianmag.com/health-medicine/science-behind-abortion-pill-180963762/> [<https://perma.cc/WT97-ZY26>].

<sup>387</sup> See Rowan, *supra* note 4, at 71–72.

<sup>388</sup> See Kim Murphy, *Idaho Woman's Case Marks a Key Abortion Challenge*, L.A. TIMES (June 16, 2012), <http://articles.latimes.com/2012/jun/16/nation/la-na-idaho-abortion-20120617> [<https://perma.cc/5Y5M-CKXN>]; Jessica Robinson, *Idaho Woman Arrested for Abortion Is Uneasy Case for Both Sides*, NPR (Apr. 9, 2012, 1:46 PM), <https://www.npr.org/templates/story/story.php?storyId=150312812> [<https://perma.cc/9LLY-K5T2>]; Mark Joseph Stern, *A Quiet Victory*, SLATE (June 5, 2015, 1:19 PM), [http://www.slate.com/articles/double\\_x/doublex/2015/06/jennie\\_linn\\_mccormack\\_case\\_court\\_strikes\\_down\\_idaho\\_s\\_abortion\\_laws.html](http://www.slate.com/articles/double_x/doublex/2015/06/jennie_linn_mccormack_case_court_strikes_down_idaho_s_abortion_laws.html) [<https://perma.cc/F32J-A5TH>].

<sup>389</sup> See Stern, *supra* note 388.

<sup>390</sup> See *id.* For the Ninth Circuit's decision, see *McCormack v. Herzog*, 788 F.3d 1017 (9th Cir. 2015).

<sup>391</sup> See Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. TIMES MAG. (Sept. 22, 2014), <https://nyti.ms/2kUit3u>; David DeKok, *Pennsylvania Mother Who Gave Daughter Abortion Pill Gets Prison*, REUTERS (Sept. 6, 2014, 12:25 PM), <http://www.reuters.com/article/us-usa-crime-pennsylvania-abortion-idUSKBN0H10IR20140906> [<https://perma.cc/X38P-E3XV>].

<sup>392</sup> See, e.g., Bazelon, *supra* note 391.



a license, dispensing drugs without a license, assault, and endangering the welfare of a child.<sup>393</sup>

Two years later, Anna Yocca, a 31-year-old woman, was indicted for first-degree attempted murder after she attempted to perform an abortion on herself using a coat hanger in the bathtub.<sup>394</sup> Yocca was twenty-four weeks pregnant, and she seriously injured her child, who was born premature with lifelong damage to his lungs, eyes, and heart.<sup>395</sup> Authorities ultimately agreed to reduce the charges against Yocca to aggravated assault.<sup>396</sup>

In the best known case, Purvi Patel was sentenced to twenty years in prison for feticide and child neglect after attempting an abortion with drugs she purchased online.<sup>397</sup> Patel had arrived at the hospital claiming to have had a miscarriage and placed the fetus in a dumpster.<sup>398</sup> Attorneys later disputed the age and viability of the fetus, with defense witnesses claiming the child could not breathe on its own and prosecution witnesses claiming that the child had been born alive.<sup>399</sup> Although doctors found no trace of abortifacient drugs in Patel's body, hospital employees suspected that she had self-induced, and prosecutors later found text messages indicating that she had purchased abortion-inducing drugs online after getting pregnant during an affair with a co-worker.<sup>400</sup> Not wanting to disclose the affair to her conservative family, Patel allegedly decided to terminate the pregnancy.<sup>401</sup> Prosecutors charged her

<sup>393</sup> See, e.g., *id.*

<sup>394</sup> See, e.g., Becca Andrews, *Woman Charged with Attempted Murder for Coat-Hanger Abortion Faces Reduced Charges*, MOTHER JONES (Dec. 22, 2015, 7:39 PM), <http://www.motherjones.com/politics/2015/12/tenn-woman-charged-coat-hanger-abortion-case-reduced-charge/> [<https://perma.cc/3EYZ-EMXN>]; Sarah Kaplan, *Tenn. Woman Charged with Attempted Murder for Failed Coat Hanger Abortion*, WASH. POST (Dec. 14, 2015), [https://www.washingtonpost.com/news/morning-mix/wp/2015/12/14/tenn-woman-charged-with-attempted-murder-for-failed-coat-hanger-abortion/?utm\\_term=.7be57fad11f0](https://www.washingtonpost.com/news/morning-mix/wp/2015/12/14/tenn-woman-charged-with-attempted-murder-for-failed-coat-hanger-abortion/?utm_term=.7be57fad11f0) [<https://perma.cc/BP77-T2V2>]; Ed Pilkington, *Woman Charged with Attempted Murder for Failed Self-Induced Abortion*, GUARDIAN (Dec. 15, 2015, 12:39 EST), <https://www.theguardian.com/us-news/2015/dec/15/tennessee-woman-charged-attempted-murder-failed-self-induced-abortion> [<https://perma.cc/9LSD-EQ5N>].

<sup>395</sup> See Kaplan, *supra* note 394.

<sup>396</sup> See Andrews, *supra* note 394.

<sup>397</sup> See Mehta, *supra* note 5; Paltrow, *supra* note 5; Redden, *supra* note 5.

<sup>398</sup> See Mehta, *supra* note 5; Redden, *supra* note 5.

<sup>399</sup> See Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES MAG. (Apr. 1, 2015), <https://nyti.ms/2k42jDC>; Redden, *supra* note 5.

<sup>400</sup> See Amanda Marcotte, *Somehow, Indiana Managed to Convict a Woman of Both "Feticide" and Child Neglect*, SLATE (Apr. 2, 2015, 12:55 PM), [http://www.slate.com/blogs/xx\\_factor/2015/04/02/purvi\\_patel\\_sentenced\\_to\\_30\\_years\\_for\\_child\\_neglect\\_and\\_feticide\\_there\\_s.html](http://www.slate.com/blogs/xx_factor/2015/04/02/purvi_patel_sentenced_to_30_years_for_child_neglect_and_feticide_there_s.html) [<https://perma.cc/MS76-NKPQ>]; see also Jennifer Chowdhury, *Indiana Sentences Purvi Patel to 20 Years for Feticide*, NBC NEWS (Mar. 31, 2015, 9:39 AM), <https://www.nbcnews.com/news/asian-america/indiana-has-now-charged-two-asian-american-women-feticide-n332761> [<https://perma.cc/X8TJ-Y6GZ>].

<sup>401</sup> See Chowdhury, *supra* note 400; Redden, *supra* note 5.

with feticide for having an illegal abortion, as well as child neglect for effectively killing the child after it had been born alive.<sup>402</sup> Although a court overturned Patel's conviction on appeal, she originally had faced a twenty-year prison sentence.<sup>403</sup>

Although relatively few women faced prosecution for illegal abortion, pro-lifers spoke out against some of the criminal charges that were filed.<sup>404</sup> For example, Marjorie Dannenfelser of the Susan B. Anthony List stressed that criminal prosecutions for women were never acceptable: "Criminal sanctions . . . are appropriate for abortionists, and not for women," she concluded.<sup>405</sup> For the most part, however, the common ground that should be available to those on either side of the debate about ending the punishment of women has yet to become visible. While sometimes denouncing the prosecution of pregnant women, pro-lifers have not spoken out against all attempts to criminalize women's behavior during pregnancy or offered less punitive solutions.<sup>406</sup>

Given the Court's recent decision in *Whole Woman's Health v. Hellerstedt* and the election of Donald Trump, the future of efforts to prosecute women for abortion seems less clear than ever.<sup>407</sup> *Whole Woman's Health* struck down two key pieces of woman-protective legislation.<sup>408</sup> Based on a model law circulated by AUL, one provision required any physicians performing an abortion to have admitting privileges at a hospital within thirty miles.<sup>409</sup> A second mandated that abortion clinics comply with the regulations governing ambulatory surgical centers.<sup>410</sup>

AUL and its allies defended the law as a necessary protection of women's health: "The [vast majority] of all abortions in this State are performed in clinics devoted primarily to providing abortions and family planning services," stated the legislative findings that AUL proposed for each law.<sup>411</sup> "In most instances, the woman's only

<sup>402</sup> See Mehta, *supra* note 5; Redden, *supra* note 5.

<sup>403</sup> See *Judge Says Purvi Patel Should Be Freed Immediately After Feticide Conviction Overturned*, GUARDIAN (Aug. 31, 2016, 22:19 EDT), <https://www.theguardian.com/us-news/2016/sep/01/purvi-patel-freed-immediately-feticide-conviction-overturned> [<https://perma.cc/5Z7R-QBQ6>]. On the decision overturning Patel's conviction, see *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016).

<sup>404</sup> Robinson, *supra* note 388.

<sup>405</sup> *Id.*

<sup>406</sup> *Cf. id.*; Rowan, *supra* note 4.

<sup>407</sup> See Berenson, *supra* note 1; Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), <https://nyti.ms/2k4ISJa>.

<sup>408</sup> See Domonoske, *supra* note 26.

<sup>409</sup> See Dawn Porter, *Abortion Providers in Places Like Texas Are Heroically Courageous*, WASH. POST (June 29, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/06/29/abortion-providers-in-places-like-texas-are-heroically-courageous/?utm\\_term=.7e9509fcd92c](https://www.washingtonpost.com/posteverything/wp/2016/06/29/abortion-providers-in-places-like-texas-are-heroically-courageous/?utm_term=.7e9509fcd92c) [<https://perma.cc/UJ5P-VZJ6>].

<sup>410</sup> *See id.*

<sup>411</sup> AMS. UNITED FOR LIFE, ABORTION PROVIDERS' ADMITTING PRIVILEGES ACT: MODEL LEGISLATION & POLICY GUIDE FOR THE 2015 LEGISLATIVE YEAR 5 (2014), <http://www>

actual contact with the abortion provider occurs simultaneously with the abortion procedure, with little opportunity to ask questions about the procedure, potential complications, and proper follow-up care.”<sup>412</sup> Before quoting several Supreme Court opinions on the importance of protecting women’s health, the findings further explained:

Abortion is an invasive, surgical procedure that can lead to numerous and serious (both short- and long-term) medical complications. Potential complications for abortion include, among others, bleeding, hemorrhage, infection, uterine perforation, uterine scarring, blood clots, cervical tears, incomplete abortion (retained tissue), failure to actually terminate the pregnancy, free fluid in the abdomen, acute abdomen, organ damage, missed ectopic pregnancies, cardiac arrest, sepsis, respiratory arrest, reactions to anesthesia, fertility problems, emotional problems, and even death.<sup>413</sup>

After abortion providers challenged the law, Texas emphasized at trial the ways that both provisions supposedly helped women.<sup>414</sup> When the Supreme Court later agreed to hear the case, pro-life groups celebrated.<sup>415</sup> AUL called the case “the most significant . . . before the Supreme Court in decades.”<sup>416</sup> Charmaine Yoest, the former president of AUL, presented *Whole Woman’s Health* as a potential vindication of the woman-protective strategy that the movement had refined for decades: “After more than four decades of the abortion industry’s recalcitrant opposition to meaningful oversight,” she stated, “the Supreme Court must unequivocally affirm that it meant what it has said as far back as *Roe*: states may regulate abortion to protect a mother’s health.”<sup>417</sup>

But the Court struck down both parts of the challenged Texas law and showed fresh skepticism about the woman-protective arguments on which the movement had

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.aul.org/downloads/2015-Legislative-Guides/Abortion/Abortion\_Providers\_Admitting\_Privileges\_Act\_-\_2015\_LG.pdf[https://perma.cc/K6R2-573T]; AMS. UNITED FOR LIFE, WOMEN’S HEALTH PROTECTION ACT (ABORTION CLINIC REGULATIONS): MODEL LEGISLATION & POLICY GUIDE FOR THE 2013 LEGISLATIVE YEAR 6 (2012), <http://www.aul.org/wp-content/uploads/2012/11/Womens-Health-Protection-Act-Abortion-Clinic-Regulations-2013-LG.pdf> [https://perma.cc/4Q8X-U5AE] [hereinafter WOMEN’S HEALTH PROTECTION ACT].

<sup>412</sup> WOMEN’S HEALTH PROTECTION ACT, *supra* note 411, at 6.

<sup>413</sup> *Id.*

<sup>414</sup> See *Whole Woman’s Health v. Lakey*, 46 F. Supp. 3d 673, 679–87 (W.D. Tex. 2014).

<sup>415</sup> See *Whole Woman’s Health v. Cole*, 136 S. Ct. 499 (2015) (granting certiorari to the Fifth Circuit in *Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015) (per curiam)); *AUL Represents State Legislators in Historic Supreme Court Case, Fights to Protect Health and Safety Standards for Women Vulnerable to Abortion Industry Abuses*, AMS. UNITED FOR LIFE (Feb. 3, 2016), <http://www.aul.org/2016/02/aul-represents-state-legislators-in-historic-supreme-court-case-fights-to-protect-health-and-safety-standards-for-women-vulnerable-to-abortion-industry-abuses/> [https://perma.cc/C98C-YSKV] [hereinafter *AUL Represents State Legislators*].

<sup>416</sup> *AUL Represents State Legislators*, *supra* note 415.

<sup>417</sup> *Id.*

long relied.<sup>418</sup> After concluding that the petitioners' claim was not barred by *res judicata*, the Court took up the proper application of the undue-burden test:

The first part of the Court of Appeals' test may be read to imply that a district court should not consider the existence or nonexistence of medical benefits when considering whether a regulation of abortion constitutes an undue burden. The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.<sup>419</sup>

The Court made clear that courts retain the final decision as to when a law creates an undue burden and should weigh evidence on the subject independently rather than accepting legislative judgments without question.<sup>420</sup> The Court easily reconciled this holding with *Gonzales*.<sup>421</sup> Recognizing the weight *Gonzales* gave to Congress's findings on partial-birth abortion, the Court emphasized that the Texas legislature that passed HB2 had made no findings at all.<sup>422</sup> Moreover, as *Whole Woman's Health* framed it, *Gonzales* did not reach a conclusion solely on the basis of legislative findings.<sup>423</sup> Indeed, the ultimate decision about whether a law constituted an undue burden should remain with a court focused on "the evidence in the record."<sup>424</sup>

In applying the undue-burden standard, the Court found no evidence that either provision of HB2 actually served its stated purpose of protecting women's health.<sup>425</sup> Citing peer-reviewed studies, proof in amicus briefs from medical organizations, and expert testimony at trial, the Court also concluded that nothing in the record indicated that women would be safer after HB2 than before.<sup>426</sup>

Woman-protective arguments appealed to abortion opponents convinced that women suffered when they terminated their pregnancies, and since the 1990s, such claims have taken on real strategic significance.<sup>427</sup> As long as pro-lifers view these claims as tactically crucial, efforts to punish women seem unlikely to take off. However, *Whole Woman's Health* seems likely to make woman-protective arguments less compelling to abortion opponents. The Court did not spell out whether courts should scrutinize fetal-protective laws as closely as they should laws like

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<sup>418</sup> *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–18 (2016).

<sup>419</sup> *Id.* at 2309.

<sup>420</sup> *See id.* at 2309–10.

<sup>421</sup> *See id.*

<sup>422</sup> *See id.* at 2310; *see also* *Gonzales v. Carhart*, 550 U.S. 124, 156–67 (2007) (giving deference to Congressional findings on The Partial-Birth Abortion Ban Act of 2003).

<sup>423</sup> *See Whole Woman's Health*, 136 S. Ct. at 2310.

<sup>424</sup> *Id.*

<sup>425</sup> *See id.* at 2309–18.

<sup>426</sup> *See id.*

<sup>427</sup> *See supra* Sections III.A–B.

Texas's HB2.<sup>428</sup> Indeed, *Casey* emphasized that *Roe* had underestimated the state's interest in protecting fetal life throughout pregnancy.<sup>429</sup> *Whole Woman's Health* did nothing to disrupt this conclusion.<sup>430</sup>

*Gonzales* later suggested that states had an important interest in protecting fetal dignity by prohibiting procedures that would diminish respect for human life and undermine the reputation of the medical profession.<sup>431</sup> The *Whole Woman's Health* Court stressed that *Gonzales* had correctly carried out the balancing required by the undue-burden standard.<sup>432</sup> It is reasonable to believe that lawmakers will have more latitude passing laws designed to protect fetal life than they would in introducing more woman-protective measures. In the aftermath of the Court's decision, abortion opponents have much less reason to emphasize the woman-protective arguments that make calls to punish women so costly.

The anti-abortion laws introduced since Donald Trump's election confirm that movement members have taken new interest in fetal-protective laws; Texas became the second state to introduce regulations governing the disposal of fetal remains, requiring the cremation or burial of all remains unless a woman miscarried at home.<sup>433</sup> Before a federal court enjoined it, Indiana's burial law applied even to women who miscarried at home.<sup>434</sup> On the campaign trail, Trump pledged to back a federal ban on abortion at twenty weeks that movement members framed as a fetal-pain prevention measure.<sup>435</sup>

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<sup>428</sup> Cf. *Whole Woman's Health*, 136 S. Ct. at 2326 (Thomas, J., dissenting).

<sup>429</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 871–73 (1992).

<sup>430</sup> See generally *Whole Woman's Health*, 136 S. Ct. 2292.

<sup>431</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 157–58 (2007).

<sup>432</sup> *Whole Woman's Health*, 136 S. Ct. at 2309–10.

<sup>433</sup> On Texas's fetal-remains regulations, see, for example, Molly Redden, *Texas Measure Requiring Burial of Fetal Remains May Herald Wave of Similar Laws*, *GUARDIAN* (Dec. 19, 2016, 9:00 EST), <https://www.theguardian.com/us-news/2016/dec/19/texas-fetal-remains-burial-cremation-law> [<https://perma.cc/4BAX-Q4GW>]; Samantha Schmidt, *After Months of Controversy, Texas Will Require Aborted Fetuses to Be Cremated or Buried*, *WASH. POST* (Nov. 29, 2016), [https://www.washingtonpost.com/news/morning-mix/wp/2016/11/29/dep-spite-months-of-outcry-texas-will-require-aborted-fetuses-to-be-cremated-or-buried/?utm\\_term=.cbd81f72ec99](https://www.washingtonpost.com/news/morning-mix/wp/2016/11/29/dep-spite-months-of-outcry-texas-will-require-aborted-fetuses-to-be-cremated-or-buried/?utm_term=.cbd81f72ec99) [<https://perma.cc/S9PW-YZKN>]; Liam Stack, *Texas Will Require Burial of Aborted Fetuses*, *N.Y. TIMES* (Nov. 30, 2016), <https://nyti.ms/2jOA0t6>.

<sup>434</sup> See Emma Green, *State-Mandated Mourning for Aborted Fetuses*, *ATLANTIC* (May 14, 2016), <https://www.theatlantic.com/politics/archive/2016/05/state-mandated-mourning-for-aborted-fetuses/482688/> [<https://perma.cc/VUR3-L8DY>]; see also Stephanie Wang, *Judge Halts Indiana's New Abortion Law*, *INDYSTAR* (June 30, 2016, 1:09 PM), <http://www.indystar.com/story/news/politics/2016/06/30/judge-grants-preliminary-injunction-indiana-abortion-law/86556662> [<https://perma.cc/XM4H-ZBMF>].

<sup>435</sup> For the promises that Trump made during the election, see Letter from Donald J. Trump to Pro-Life Leader (Sept. 2016), <https://www.sba-list.org/wp-content/uploads/2016/09/Trump-Letter-on-ProLife-Coalition.pdf> [<https://perma.cc/NK7W-9PPR>]. For the law potentially banning abortions after twenty weeks, see, for example, Pain-Capable Unborn Child Protection Act, H.R. 36, 115th Cong. (2017).

Since December 2016, Ohio and Kentucky became the most recent of more than a dozen states to introduce such laws.<sup>436</sup>

To be sure, most fetal-protective laws do not authorize punishments for women.<sup>437</sup> However, many on the books do not rule out such penalties, and the same may be true of the new laws that legislators are introducing.<sup>438</sup> Now that the anti-abortion movement no longer relies so heavily on a woman-protective strategy, new safeguards are needed to ensure that both sides' stated commitment to preventing the punishment of women is more than empty words.

Part IV suggests several shared legal solutions that appeal to those committed to not punishing women for abortion. First, even if a law criminalizes abortion under certain circumstances, any such statute should explicitly exempt any woman seeking to terminate her own pregnancy, even when a procedure is illegal. Second, those on opposing sides should find common ground on laws intended to eliminate the reasons women use drugs or have dangerous, illegal abortions.

#### IV. MAKING GOOD ON THE COMMITMENT NOT TO PUNISH WOMEN

In theory, the commitment not to punish women is one of the few things on which those contesting the abortion wars agree.<sup>439</sup> Nevertheless, in practice, a meaningful number of women face punishment for actions taken during pregnancy.<sup>440</sup> Recently, states have punished more women for abortion itself.<sup>441</sup> This Part begins by exploring the rationale for laws punishing women for child abuse or feticide. Next, this Part shows why it is unnecessary—and should be politically unappealing—for lawmakers to single out women in this way. Finally, this Part lays out several alternatives that should appeal to those with varying views on abortion.

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<sup>436</sup> On the Ohio law, see, for example, Jessie Balmert, *Ohio Governor Vetoes 'Heartbeat' Abortion Bill, but Passes 20-Week Ban*, USA TODAY (Dec. 13, 2016, 4:20 PM), <http://www.usatoday.com/story/news/nation-now/2016/12/13/ohio-governor-vetoes-heartbeat-abortion-bill-but-passes-20-week-ban/95389734/> [<https://perma.cc/JS7B-3PP8>]; Jason Slotkin, *Ohio Gov. Kasich Signs 20-Week Abortion Limit, Rejects 'Heartbeat Bill,'* NPR (Dec. 13, 2016, 7:25 PM), <http://www.npr.org/sections/thetwo-way/2016/12/13/505457437/ohio-gov-kasich-signs-20-week-abortion-limit-rejects-heartbeat-bill> [<https://perma.cc/YY4N-MTQA>]. On the Kentucky law, see, for example, Max Greenwood, *Kentucky Lawmakers Pass 20-Week Abortion Ban*, THE HILL (Jan. 7, 2017, 5:09 PM), <http://thehill.com/blogs/blog-briefing-room/news/313193-kentucky-lawmakers-pass-20-week-abortion-ban> [<https://perma.cc/S73M-K2RK>]; Bradford Richardson, *Kentucky Becomes 19th State to Ban Abortions After 20 Weeks Into Pregnancy*, WASH. TIMES (Jan. 11, 2017), <http://www.washingtontimes.com/news/2017/jan/11/kentucky-becomes-19th-state-ban-abortion-after-20/> [<https://perma.cc/Y4QN-J8ZC>].

<sup>437</sup> Cf. *Fetal Homicide State Laws*, *supra* note 376 (listing fetal homicide laws by state).

<sup>438</sup> See *id.*

<sup>439</sup> See, e.g., Mehta, *supra* note 5; Rich, *supra* note 20 (quoting Clarke Forsythe as saying, “[P]unishing women is not the answer.”).

<sup>440</sup> See *supra* Section III.B.

<sup>441</sup> See, e.g., Atima Omara, *Punishing Women for Abortion*, AM. PROSPECT (June 16, 2016), <http://prospect.org/article/punishing-women-abortion> [<https://perma.cc/26RS-X76V>].

*A. The Justifications for Punishing Pregnant Women*

In recent years, more pregnant women have faced criminal charges for conduct during pregnancy.<sup>442</sup> The first wave of prosecutions for drug use during pregnancy came in the 1980s and 1990s, but since 2003, a wide variety of states have considered whether to extend criminal penalties.<sup>443</sup> In some instances, courts have interpreted homicide, neglect, or abuse laws to cover drug use.<sup>444</sup> For example, in 2003, Arizona signed off on the manslaughter conviction of a woman whose newborn tested positive for crack cocaine and subsequently died.<sup>445</sup> In Oklahoma, a woman was convicted of second-degree murder following the stillbirth of a child exposed to methamphetamine.<sup>446</sup> While the state considered and failed to pass a law treating drug use during pregnancy as assault, prosecutors continue charging drug users with neglect.<sup>447</sup>

As early as 1997, the South Carolina Supreme Court held that “maternal acts endangering or likely to endanger [a fetus]” counted as child abuse.<sup>448</sup> More recently, in 2003, the court upheld the conviction and twenty-year prison sentence of Regina McKnight for murder by child abuse.<sup>449</sup> In 2013 and 2014, the Alabama Supreme

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<sup>442</sup> See CTR. FOR REPROD. RIGHTS, PUNISHING WOMEN FOR THEIR BEHAVIOR DURING PREGNANCY: AN APPROACH THAT UNDERMINES WOMEN’S HEALTH AND CHILDREN’S INTERESTS (2000), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub\\_bp\\_punishingwomen.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/pub_bp_punishingwomen.pdf) [<https://perma.cc/4HB8-ZGUC>]. For further examples of women who faced criminal liability for conduct during pregnancy, see Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawyers*, 64 IND. L.J. 357 (1989); *Coercive and Punitive Governmental Responses to Women’s Conduct During Pregnancy*, ACLU, <https://www.aclu.org/other/coercive-and-punitive-governmental-responses-womens-conduct-during-pregnancy> [<https://perma.cc/B9XP-JY8L>] (last visited Feb. 21, 2018); see also *supra* Section III.B.

<sup>443</sup> See Georgatos, *supra* note 203; see also Christine Vestal & Elizabeth Wilkerson, *States Expand Fetal Homicide Laws*, ALTERNET (Aug. 28, 2006, 7:00 PM), [https://www.alternet.org/story/40676/states\\_expand\\_fetal\\_homicide\\_laws](https://www.alternet.org/story/40676/states_expand_fetal_homicide_laws) [<https://perma.cc/LG3E-X5W7>] (describing trends in fetal homicide laws since the 1970s, and recent developments); *Personhood*, REWIRE (Jan. 6, 2017), <https://rewire.news/legislative-tracker/law-topic/personhood/> [<https://perma.cc/ZKV7-6HMY>] (listing recently introduced “personhood” legislation); *supra* Section III.B.

<sup>444</sup> See, e.g., Leticia Miranda et al., *How States Handle Drug Use During Pregnancy*, PROPUBLICA (Sept. 30, 2015), <https://projects.propublica.org/graphics/maternity-drug-policies-by-state> [<https://perma.cc/D7AV-943Z>] (listing explicit or implied judicial approval of such punishments in Alabama, Arizona, Florida, Massachusetts, Mississippi, Oklahoma, South Carolina, Tennessee, and Texas).

<sup>445</sup> See, e.g., *id.*

<sup>446</sup> See, e.g., *id.*

<sup>447</sup> See *id.*; see also *Oklahoma Bill Regarding Pregnant Women and Substance Abuse (SB 559)*, REWIRE, <https://rewire.news/legislative-tracker/law/oklahoma-bill-regarding-pregnant-women-and-substance-abuse-sb-559/> [<https://perma.cc/NR3E-29AR>] (last updated Apr. 24, 2015).

<sup>448</sup> *Whitner v. State*, 492 S.E.2d 777, 779 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998).

<sup>449</sup> See *State v. McKnight*, 576 S.E.2d 168, 171–73 (S.C. 2003) (upholding conviction

Court concluded that prosecutors can charge pregnant drug users with a form of child endangerment, and in 2014, Tennessee passed a statute openly allowing prosecutions for fetal assault if a child is born addicted to or harmed by drugs.<sup>450</sup>

More women also seem likely to face prosecution for terminating their own pregnancies. Although only a handful of women have thus far faced charges,<sup>451</sup> many state laws hold open the possibility of similar prosecutions.<sup>452</sup> Thirty-eight states make feticide a crime, and twenty-three reach the death of an unborn child from conception onward.<sup>453</sup> While excusing anyone performing a legal abortion, several state laws say nothing about women who self-induce abortion or do so at times or in ways that run afoul of state law.<sup>454</sup> With the spread of abortion drugs and the rising number of restrictions on access to abortions performed by doctors, it seems likely that more women will face prison time for having illegal abortions.<sup>455</sup>

Recent fetal abuse and feticide laws share several justifications that deserve examination. First, in both cases, supporters of criminal charges emphasize that prosecutors target only women who intentionally harm their unborn children.<sup>456</sup> For example, after the state charged her with homicide by child abuse, Regina McKnight argued on appeal that she lacked the requisite intent for the crime.<sup>457</sup> She argued that she had not known that her drug use would lead to a stillbirth.<sup>458</sup>

The South Carolina Supreme Court rejected this argument, reasoning that any illegal drug user demonstrated extreme indifference toward her unborn children.<sup>459</sup> “Given the fact that it is public knowledge that usage of cocaine is potentially fatal,” the court reasoned, “we find the fact that McKnight took cocaine knowing she was

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where defendant’s stillborn 34–37-week gestational age fetus tested positive for metabolites of cocaine), *cert. denied*, 540 U.S. 819 (2003).

<sup>450</sup> See Laura Bassett, *Tennessee Enacts Law to Incarcerate Pregnant Women Who Use Drugs*, HUFFINGTON POST (Apr. 30, 2014, 3:21 PM), [http://www.huffingtonpost.com/2014/04/30/tennessee-to-incarcerate-\\_n\\_5241770.html](http://www.huffingtonpost.com/2014/04/30/tennessee-to-incarcerate-_n_5241770.html) [<https://perma.cc/F3H5-VR3A>]; Nina Martin, *This Law Is Supposed to Protect Babies, but It’s Putting Their Moms Behind Bars*, MOTHERJONES (Sept. 23, 2015, 10:00 AM), <http://www.motherjones.com/politics/2015/09/alabama-chemical-endangerment-drug-war/> [<https://perma.cc/6AZ8-64J4>].

<sup>451</sup> See generally Rowan, *supra* note 4; discussion *supra* Section III.B.

<sup>452</sup> See *Fetal Homicide State Laws*, *supra* note 376.

<sup>453</sup> See *id.*

<sup>454</sup> See, e.g., *id.*

<sup>455</sup> See, e.g., ALASKA STAT. §§ 11.41.150, 11.81.250, 12.55.035–125 (2017); ARK. CODE ANN. §§ 5-61-101, 5-61-102 (2017); OKLA. STAT. tit. 21, § 691 (2017); see also *Fetal Homicide State Laws*, *supra* note 376.

<sup>456</sup> See, e.g., Sarah Netter, *Utah Abortion Bill: Punishing Miscarriages or Preventing Crime?*, ABC NEWS (Mar. 1, 2010), <http://www.abcnews.go.com/health/utah-abortion-bill-punishing-miscarriages-preventing-crime/story?id=9955517> [<https://perma.cc/Q28D-72G2>] (bill’s sponsor arguing bill only targets reckless behavior constituting an unjustifiable risk).

<sup>457</sup> See *State v. McKnight*, 576 S.E.2d 168, 172–73 (S.C. 2003).

<sup>458</sup> See *id.* at 173.

<sup>459</sup> See *id.*



pregnant was sufficient evidence to submit to the jury on whether she acted with extreme indifference to her child's life."<sup>460</sup>

The court's conclusion tracked arguments made by pro-lifers in the 1980s and 1990s about the distinction between pregnant drug users and other women who may inadvertently miscarry.<sup>461</sup> Pregnant drug users were on notice about the risks posed by their conduct both because of criminal laws on the subject and because of public knowledge about the impact of certain narcotics on the fetus.<sup>462</sup> Lawmakers claim to punish women in only extreme cases, when women do something unsafe, illegal, and deliberately wrong.<sup>463</sup> For example, Utah zeroes in on intentional or knowing acts leading to fetal harm and exempts abortions only when "carried out by a physician or . . . under the direction of a physician."<sup>464</sup>

The justification for these laws lies partly in the relative infrequency with which women are punished, at least up to this point; lawmakers and activists claim to punish only those whose acts are intentional, dangerous, and illegal.<sup>465</sup> As this Part shows next, however, these justifications do not stand up to close examination.

### *B. The Futility of Punishing Pregnant Women*

As the chief sponsor of the Utah law admitted, efforts to punish pregnant women serve to restrict access to abortion.<sup>466</sup> Movement members promote these laws partly to limit access to abortion.<sup>467</sup> At the same time, these laws theoretically make sense because they single out "the worst of the worst," those who act with the most awareness of their conduct and violate more than one criminal statute. Targeting these women could deter others from having unsafe, illegal abortions or abusing drugs.

In practice, however, criminal laws are likely to encourage riskier conduct. Emphasizing intentional or reckless conduct makes little sense when women have few real alternatives, particularly, the poor, non-white women who disproportionately face penalties for conduct during pregnancy.<sup>468</sup> An ever-expanding array of abortion restrictions has put legal abortions out of reach for some women.<sup>469</sup> Drug treatment

<sup>460</sup> *Id.*

<sup>461</sup> See discussion *supra* Section II.B.

<sup>462</sup> See, e.g., *McKnight*, 576 S.E.2d at 173, 175–76.

<sup>463</sup> See Netter, *supra* note 456.

<sup>464</sup> H.B. 442, 61st Leg., 2016 Gen. Sess. (Utah 2016).

<sup>465</sup> See Netter, *supra* note 456.

<sup>466</sup> See *id.*

<sup>467</sup> See *id.*

<sup>468</sup> On poor women of color facing more prosecutions for conduct during pregnancy, see, for example, Deborah L. Rhode, *The Terrible War on Pregnant Drug Users*, NEW REPUBLIC (July 17, 2014), <https://newrepublic.com/article/118681/law-protect-fetuses-actually-punishes-minority-women> [<https://perma.cc/2DLL-AC6M>].

<sup>469</sup> On the impact of restrictions on abortion access, see, e.g., MATTHEW E. WETSTEIN, ABORTION RATES IN THE UNITED STATES: THE INFLUENCE OF OPINION AND POLICY 106–29

programs tailored for the needs of pregnant or parenting women are underfunded, overburdened, and inaccessible.<sup>470</sup> Women who fail to avail themselves of better options often do so because those choices are practically, if not formally, unavailable.<sup>471</sup>

Nor will such laws be effective in deterring women from harming their children or themselves. Women aware of criminal penalties might not seek out drug addiction treatment or necessary medical care after self-inducing abortion for fear of getting caught, leading to negative outcomes for women and their children.<sup>472</sup> Pregnant or parenting women in prison rarely have access to effective treatment, but they can often get drugs that fuel an addiction.<sup>473</sup> Furthermore, by not addressing the underlying causes of fetal harms—a lack of access to safe, legal abortion or effective drug treatment programs for pregnant women—these laws simply stigmatize women’s decisions without likely changing their behavior.

Such prosecutions also seem politically risky, even for activists and politicians seeking to restrict abortion as much as possible. As activists realized in the early 1990s, their movement lost ground when voters viewed abortion opponents as moral absolutists, indifferent to the well-being of women.<sup>474</sup> To address this image problem, pro-lifers began highlighting women coerced or manipulated into choosing abortion.<sup>475</sup>

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(1996); Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 374 NEW ENG. J. MED. 843, 843–52 (2016); Joseph Neiman et al., *The Effect of Restrictions in Abortion Access on Overall Abortion Rate*, U. NEV. SCH. MED., <http://www2.medicine.nevada.edu/medlib/posters/2015-student-posters/neiman.pdf> [https://perma.cc/WD6D-P3SS] (last visited Feb. 21, 2018); see also Rhode, *supra* note 468.

<sup>470</sup> See, e.g., AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, COMMITTEE OPINION NO. 473, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST (2011), <http://www.acog.org/Resources-And-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Substance-Abuse-Reporting-and-Pregnancy-The-Role-of-the-Obstetrician-Gynecologist> [https://perma.cc/PNE9-DRFM].

<sup>471</sup> See *id.*; Neiman et al., *supra* note 469.

<sup>472</sup> See AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMM. ON ETHICS, COMMITTEE OPINION NO. 664, REFUSAL OF MEDICALLY RECOMMENDED TREATMENT DURING PREGNANCY (2016), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/Refusal-of-Medically-Recommended-Treatment-During-Pregnancy> [https://perma.cc/25VH-74VK]; Board of Trustees, *Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663, 2667 (1990) (“Pregnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians’ knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment.”).

<sup>473</sup> See, e.g., CTR. FOR REPROD. RIGHTS, *supra* note 442, at 8.

<sup>474</sup> See discussion *supra* Section III.A. See generally Jensen, *supra* note 12.

<sup>475</sup> See Siegel, *The Right’s Reasons*, *supra* note 262, at 1687 (“Women who seek abortions must have been confused, misled, or coerced into the decision to abort a pregnancy—because the choice to abort a pregnancy cannot reflect a normal woman’s true desires or interests.”).

These arguments angered supporters of legal abortion, many of whom saw woman-protective arguments as sexist generalizations that might, under some circumstances, violate the Equal Protection Clause.<sup>476</sup> At the same time, anti-abortion, woman-protective arguments resonate politically because they soften the image of pro-lifers and shift blame for difficult pregnancies from women to their partners, families, or society as a whole.<sup>477</sup> For these arguments to carry any political weight, however, they need to match the legal reality in most states. Signing off on or promoting prosecutions of any pregnant woman undermines woman-protective arguments and makes them seem hollow.

Next, this Part turns to some alternatives that should attract support from those with clashing views on abortion. First, at a minimum, states should amend feticide laws to exempt women who have terminated their pregnancies, regardless of whether they have done so legally. If those on both sides agree that women should not be punished for abortion, then activists should ensure that the law does not allow punishment, regardless of when or how they terminate their pregnancies. Second, in dealing with fetal mistreatment, states should introduce laws reducing the risk of fetal harm rather than penalizing women when it is too late to make a difference. By introducing laws of this kind, lawmakers can show that the pro-life commitment not to punish pregnant women for fetal harm is more than an empty promise.

### C. Alternatives to Punishment

Like statutes on assault, neglect, or abuse of an unborn child, feticide laws generally applied to third parties who harmed pregnant women and their children.<sup>478</sup> Only recently have statutes been applied to women terminating their own pregnancies.<sup>479</sup> States should clarify that these laws never authorize the prosecution of pregnant women. Many states exempt all pre-viability procedures to which a pregnant woman has consented, thereby reaching all non-coerced abortions (whether legal or illegal).<sup>480</sup> Such a reform would avoid the potential constitutional problems with laws that are less clear. Ambiguous laws applied to pregnant women raise procedural and

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<sup>476</sup> See, e.g., Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 225–28 (2009); Siegel, *The New Politics*, *supra* note 257, at 991–94; Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1196 (2010); *see also* Jensen, *supra* note 12.

<sup>477</sup> Cf. Siegel, *The New Politics*, *supra* note 257, at 992–93; *see also* Jensen, *supra* note 12, at 1–7.

<sup>478</sup> See, e.g., Paltrow, *supra* note 5; *see also* *Fetal Homicide State Laws*, *supra* note 376 (listing some states where acts committed to the mother are included, but acts say the mother are excluded).

<sup>479</sup> See, e.g., Paltrow, *supra* note 5; *see also* discussion *supra* Section IV.A.

<sup>480</sup> See *Fetal Homicide State Laws*, *supra* note 376.

substantive due process concerns.<sup>481</sup> If a statute does not spell out that women can be prosecuted for terminating a pregnancy, they may not have constitutionally adequate notice that their conduct could be criminal.<sup>482</sup> Moreover, by putting more obstacles in the path of a pregnant woman, such laws could constitute an undue burden under *Casey*.<sup>483</sup>

Constitutional questions aside, those with varying views on abortion should see the wisdom of clearly exempting women from criminal prosecution. As an initial matter, by explicitly protecting women from prosecution, the law would encourage women who seek out dangerous, illegal, or self-induced abortions to seek attention if they suffer complications. Pro-life and pro-choice activists claim to care about women's health, and ensuring that abortion laws advance that interest should appeal to those with different opinions on abortion. At the same time, if criminal penalties are not in place, drug-addicted women are more likely to seek out prenatal care.<sup>484</sup> Research establishes that the children of addicted women who receive treatment during pregnancy have far better outcomes after birth.<sup>485</sup>

Those on opposing sides of the abortion question should also endorse laws that eliminate some of the conditions that push women to endanger themselves or inadvertently harm unborn children. Most obviously, lawmakers should fund more effective drug-treatment programs designed to serve the needs of pregnant and parenting women. The need for this alternative has become especially apparent. The Department of Health and Human Services has warned that the nation is suffering from an opioid epidemic.<sup>486</sup> Deaths from abuse of prescription drugs is on the rise, and forty-four Americans die daily as the result of an overdose.<sup>487</sup> Heroin deaths have also increased sharply, quadrupling between 1999 and 2013.<sup>488</sup> The Department has also suggested that an addiction to prescription drugs represents a great risk factor for a subsequent heroin problem.<sup>489</sup>

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<sup>481</sup> See *What's Wrong with Fetal Rights*, ACLU, <https://www.aclu.org/other/whats-wrong-fetal-rights> [<https://perma.cc/E7YF-Z3DA>] (last visited Feb. 21, 2018).

<sup>482</sup> See CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 442, at 3 (discussing the concern of some courts that prosecutions violate due process rights).

<sup>483</sup> See discussion *supra* Section III.B (explaining the undue-burden analysis in recent case law).

<sup>484</sup> See, e.g., CTR. FOR REPRODUCTIVE RIGHTS, *supra* note 442, at 4.

<sup>485</sup> See, e.g., *id.* at 7.

<sup>486</sup> See, e.g., *About the Epidemic: The U.S. Opioid Epidemic*, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.hhs.gov/opioids/about-the-epidemic/index.html> [<https://perma.cc/TFR9-UYLR>] (last visited Feb. 21, 2018) [hereinafter *About the Epidemic*]; AM. SOC'Y OF ADDICTION MED., OPIOID ADDICTION: 2016 FACTS AND FIGURES, <http://www.asam.org/docs/default-source/advocacy/opioid-addiction-disease-facts-figures.pdf> [<https://perma.cc/QC5B-Y5AJ>] (last visited Feb. 21, 2018).

<sup>487</sup> See, e.g., *About the Epidemic*, *supra* note 486.

<sup>488</sup> See, e.g., *id.*

<sup>489</sup> See, e.g., *id.*

To address the risk of drug use by pregnant women, states should adopt programs that have proven effective in addition to those targeted for growing opioid use. In-patient treatment programs have a track record of helping pregnant and parenting women addicted to drugs, and more state laws should create and fund them.<sup>490</sup> When it comes to opioid addiction, state laws should mandate training for physicians prescribing drugs likely to create a high risk of addiction.<sup>491</sup> A federal executive order signed in October 2015 should serve as a model for programs in the states.<sup>492</sup> State laws should also expand access to medication-assisted treatment, a protocol involving access to certain prescriptions, counseling, and behavior modification therapy that has proven especially useful for those addicted to opioids.<sup>493</sup>

Pro-life and pro-choice activists should also support laws eliminating some of the underlying reasons women resort to illegal abortions or drug use. Some studies have found that nearly 40% of women seeking an abortion report that they do so because of domestic violence,<sup>494</sup> and research has also suggested a strong connection exists between drug abuse and the violence experienced by women, both as children and adults.<sup>495</sup> Poverty also contributes to poor outcomes for children at least as much as drug use.<sup>496</sup> Almost 18% of pregnant women drink alcohol during early pregnancy, and 10% of women admitted to smoking in the last three months of pregnancy.<sup>497</sup>

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<sup>490</sup> See, e.g., CTR. FOR REPROD. RIGHTS, *supra* note 442.

<sup>491</sup> On recommendations for mandatory opioid training, see Thomas M. Burton, *FDA Panel Urges Mandatory Opioid Training for Doctors*, WALL ST. J. (May 4, 2016, 7:39 PM), <http://www.wsj.com/articles/fda-panel-urges-mandatory-opioid-training-for-doctors-1462405146> [<https://perma.cc/T6NV-2EAF>]; see also Opinion, *Should Opioid Training for Doctors Be Mandatory?*, N.Y. TIMES (May 5, 2016), <http://www.nytimes.com/roomfordebate/2016/05/05/should-opioid-training-for-doctors-be-mandatory>.

<sup>492</sup> See Memorandum on Addressing Prescription Drug Abuse and Heroin Use, 2015 DAILY COMP. PRES. DOC. 1 (Oct. 21, 2015), <https://www.obamawhitehouse.archives.gov/the-press-office/2015/10/21/presidential-memorandum-addressing-prescription-drug-abuse-and-heroin> [<https://perma.cc/JY79-R7EJ>].

<sup>493</sup> See, e.g., *id.*; see also NAT'L INST. ON DRUG ABUSE, MISUSE OF PRESCRIPTION DRUGS 26–29, <https://d14rmgtrwzf5a.cloudfront.net/sites/default/files/2609-misuse-of-prescription-drugs.pdf> [<https://perma.cc/X9GU-TLRB>] (last updated Jan. 2018) (explaining there are multiple options for treatment of prescription opioid addiction).

<sup>494</sup> On the prevalence of domestic violence among women seeking abortion in the United States, see, for example, Susan S. Glander et al., *The Prevalence of Domestic Violence Among Women Seeking Abortion*, 91 OBSTETRICS & GYNECOLOGY 1002, 1002–05 (1998).

<sup>495</sup> See Hortensia Amaro et al., *Violence During Pregnancy and Substance Use*, 80 AM. J. PUB. HEALTH 575, 578 (1990); Teri Randall, *Domestic Violence Begets Other Problems of Which Physicians Must Be Aware to Be Effective*, 264 JAMA 940, 943 (1990).

<sup>496</sup> See Neiman et al., *supra* note 469.

<sup>497</sup> On the percentage of women who smoke in the last three months of pregnancy, see, e.g., *Tobacco Use and Pregnancy*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/maternalinfanthealth/tobaccousepregnancy/> [<https://perma.cc/8RSZ-EG76>] (last visited Feb. 21, 2018). On alcohol use among pregnant women, see SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., 18 PERCENT OF PREGNANT WOMEN DRINK

Like nutritional deficiencies, drug and alcohol use can stunt fetal development, and yet punitive laws do not cover them.<sup>498</sup> A logical solution for pregnant women would not single out women who violate the law while ignoring the concrete effect of that behavior on a child. Preventing, rather penalizing, misconduct best promises to improve outcomes for women and children.

Those genuinely interested in achieving good outcomes for pregnant women and children should support strong state and federal domestic violence laws, including enhanced criminal penalties and robust injunctive relief. Those who disagree on abortion should also see the need for targeted programs for poor women, including those improving the diagnosis of drug addiction in pregnant women and ensuring access to education and prenatal care.

Even states with severe budget constraints can do more to enforce existing laws and fill slots in programs already created by law. States should introduce legislation barring discrimination against pregnant women in the administration of existing, publicly funded drug treatment programs or follow the lead of legislators who have mandated that pregnant women be given priority access to already-funded programs.

These alternatives should attract the support of activists sincerely interested in protecting women and their children. As a practical matter, addressing the root causes of drug addiction and self-induced abortion promises to do much more to eliminate fetal harm than laws discouraging women from seeking help. As importantly, laws actually recognizing that women can be victims—of domestic violence, of poverty, and of other conditions beyond their control—lends credibility to arguments about the importance of protecting women. Those authentically interested in helping women should do more than restrict abortion.

#### CONCLUSION

Would women be punished if abortion were once again criminalized? Recent events have made this question far more than a matter of speculation. Between the backlash that greeted Donald Trump's comments on punishing women and a visible increase in prosecutions of pregnant women, scholars, lawyers, and politicians have debated the aims of the pro-life movement and the potential that women would face punishment if abortion were once again a crime.

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ALCOHOL DURING EARLY PREGNANCY (2013), <http://www.samhsa.gov/data/sites/default/files/spot123-pregnancy-alcohol-2013/spot123-pregnancy-alcohol-2013.pdf> [<https://perma.cc/FFX4-L8XU>].

<sup>498</sup> See, e.g., CTR. FOR REPROD. RIGHTS, *supra* note 442. For studies showing the severe impact of malnutrition on fetal development, see Caroline HD Fall, *Fetal Malnutrition and Long-Term Outcomes*, 74 NESTLE NUTRITION INST. WORKSHOP SERIES 11 (2013); Peter J. Morgane et al., *Prenatal Malnutrition and Development of the Brain*, 17 NEUROSCIENCE & BIOBEHAVIORAL REVS. 91 (1993); see also, e.g., *Fetal Homicide State Laws*, *supra* note 376; Miranda et al., *supra* note 444.

In spite of interest in the question, there is a gap in the historical scholarship: while researchers have studied the law and politics of illegal abortion before 1973, we lack an understanding of the goals and strategies of pro-life legal reformers after *Roe* involving the punishment of women. This Article begins to bridge this gap.

In the years immediately after *Roe*, pro-lifers did not officially endorse the punishment of women.<sup>499</sup> However, the movement did not foreclose the possibility of penalizing women if doing so would provide the unborn with more protection.<sup>500</sup> Over the course of the 1980s, the idea of punishing women came to the forefront of the debate.<sup>501</sup> Pro-lifers gradually developed a new focus on protecting women from the harms associated with abortion.<sup>502</sup> Tied to the rise of crisis pregnancy centers, these arguments helped the movement dispel rumors that it harbored only lawbreakers indifferent to women's plight.<sup>503</sup> Woman-protective arguments also appealed to movement members seeking to undermine what they saw as the best argument for the other side.<sup>504</sup>

At the same time, as activists sought to strengthen restrictions of abortion, they looked to introduce laws that recognized fetal personhood in other contexts.<sup>505</sup> Movement members pushed for feticide and child abuse laws, some of which applied to pregnant drug users.<sup>506</sup> Over time, movement leaders even signed off on laws permitting prosecutions of women for terminating their pregnancies.<sup>507</sup>

Over the course of several decades, a contradiction appeared in the movement's position on punishing (or protecting) women. While pro-lifers invested more and more in the protection of women, movement members did not consistently treat them as victims rather than perpetrators.<sup>508</sup> Indeed, movement members justified certain prosecutions of pregnant women whose conduct qualified as selfish, malicious, intentional, or illegal.<sup>509</sup>

To resolve this contradiction, those on either side of the abortion debate should seek out legal solutions that reduce the risk that women will have dangerous illegal abortions or use drugs. Protecting women is more than a catchphrase. Those who have purported to care about the well-being of women can do better than punishing women for abortion.

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<sup>499</sup> See Ziegler, *supra* note 8.

<sup>500</sup> See *id.*

<sup>501</sup> See *id.*

<sup>502</sup> See *id.*; see also discussion *supra* Sections II.B–III.A.

<sup>503</sup> See Willke, *Never the Mother*, *supra* note 13; Ziegler, *supra* note 8.

<sup>504</sup> See Ziegler, *supra* note 8. See generally Jensen, *supra* note 12.

<sup>505</sup> See discussion *supra* Sections II.A–IV.A.

<sup>506</sup> See, e.g., Netter, *supra* note 456; Paltrow, *supra* note 5.

<sup>507</sup> See, e.g., Netter, *supra* note 456.

<sup>508</sup> Compare Georgatos, *supra* note 203, with Jensen, *supra* note 12, and Willke, *Never the Mother*, *supra* note 13.

<sup>509</sup> See Rich, *supra* note 20.