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Glossary of Acronyms

ALI- American Legal Institute

AMA- American Medical Association

APHA- American Public Health Association

CDC- Center for Disease Control

D&C- Dilation and curettage

JCAH- Joint Commission on Accreditation of Hospitals

MPC- Model Penal Code

NAACP- National Association for the Advancement of Colored People

NARAL- National Association for the Repeal of Abortion Laws/National Abortion Rights Action League

NOW- National Organization for Women

ZPG- Zero Population Growth

Chapter I: Introduction

The 1973 decision of *Roe v. Wade* has been one of the most controversial of in recent memory, its 7-2 decision summarily granted women, without interference by men, the right to terminate their pregnancies on demand, during the first trimester, based on a constitutional right to privacy. This right to privacy is not contained within the text of the Constitution, but according to Justice Harry Blackmun who delivered the opinion for the court, "personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras."[1] While women's groups, in particular the National Organization for Women (NOW), and other abortion rights advocacy groups, notably the National Association for the Repeal of Abortion Laws (later to become the National Abortion Rights Action League, NARAL) have widely celebrated this decision, legal scholars hotly debated its merits. Constitutional scholars have derided this decision as "bad constitutional law" or in some cases, "not constitutional law and giv[ing] almost no sense of an obligation to try to be" constitutional law.[2]

The Court enshrined the right to privacy not in *Roe*, but eight years earlier in *Griswold v. Connecticut*, wherein Justice William Douglas, writing for the four-person plurality, declared that several of the Bill of Rights contained penumbras, or rights implied by the Constitution not explicated in its text, which encompassed the right of marital privacy. According to Douglas, the First, Fourth, Fifth, Ninth, and Fourteenth Amendments contained these penumbras.[3] It was only within an eight year span that the protection of these penumbras extended from the sexual privacy

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[1] *Roe v. Wade,* 410 U.S. 113, 129 (1973).
[2] Michael J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court*, 151.
[3] *Griswold v. Connecticut* 381 U.S. 479, 483 (1965).

within a marriage, to sexual privacy generally in 1972,[4] to the right of a woman to have the freedom to terminate her pregnancy in 1973. These eight years marked a period of domestic upheaval: large portions of the feminist second wave fought for legal equality by appealing to both legislatures and the courts, along with a host of other collectives including African-Americans, homosexuals, the elderly, etc. There was considerable upheaval in Supreme Court as well: five seats on the Court changed hands between *Griswold* and *Roe*, including the Chief Justice-ship which shifted from the notoriously activist Earl Warren to the decidedly more conservative Warren Earl Burger.

Abortion law reform made considerable progress in the states between the *Griswold* and *Roe* without the help of the Supreme Court. Before 1960, nearly every state enforced laws virtually outlawing access to abortion. However, by 1973, nineteen states had reformed their respective laws to allow abortions under certain circumstances, such as for the life or health of the mother or in cases of rape. Four states, New York, Washington, Alaska, and Hawaii, permitted abortions under all circumstances (See Table 1). Federal and state courts also advanced the laws of a few states. These lower courts found highly restrictive laws in Connecticut, Florida, Georgia, Michigan, New Jersey, Pennsylvania, and Wisconsin unconstitutional. However these rulings often encouraged the legislatures to reconsider their restrictive policy and did not have a sweeping effect as the Supreme Court's decision in *Roe* and *Doe*.[5]

[4] See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
[5] See Appendix

State	Legal in cases of rape or incest	Legal if endangers mother's health	Legal if fetus is damaged	Legal on demand
Alabama		✓		
Alaska	✓	✓	✓	✓
Arkansas	✓	✓	✓	
California	✓	✓	✓	
Colorado	✓	✓	✓	
Delaware	✓	✓	✓	
Florida	✓	✓	✓	
Georgia	✓	✓	✓	
Hawaii	✓	✓	✓	✓
Kansas	✓	✓	✓	
Maryland	✓	✓	✓	
Massachusetts		✓		
Mississippi	✓			
New Mexico	✓	✓	✓	
New York	✓	✓	✓	✓
North Carolina	✓	✓	✓	
Oregon	✓	✓	✓	
South Carolina	✓	✓	✓	
Virginia	✓	✓	✓	
Washington	✓	✓	✓	✓

Table 1: Detail on the states which had reformed abortion laws before 1973[6]

Legal scholars, including former Supreme Court Justice Thomas Clark, have argued that the *Roe* decision effectively undermined the state legislatures' capacity to decide for themselves what their laws on abortion should be. Whether or not the Court actually had the legal jurisdiction to make such a sweeping ruling on a questionable constitutional basis has been one of the many big questions surrounding this decision. This paper addresses the constitutional foundations of the *Roe* decision by tracing the legal and social underpinnings of the right to privacy

[6] Data derived from Lawrence Lader, *Abortion II*, 170-173.

as a matter of substantive due process. I will start, in the next chapter, by examining the roots of privacy as a matter of law. I do this by juxtaposing two ideas that surfaced in law and politics in the 1890s, one articulated by Louis Brandeis, the other by Elizabeth Cady Stanton. I will also analyze how the law begins to regulate reproduction in the mid-to-late nineteenth century, because the specific state anti-abortion and anti-contraception laws are those at issue in *Griswold* and *Roe*. In the third chapter, I will critically examine how the right to privacy was first formulated in *Griswold* by looking at the arguments, briefs, and decisions for both sides.

The fourth chapter looks at the social and legal pressures surrounding abortion and searches for ways in which the Court might have been pressured to decide *Roe* the way it did. The analysis of *Roe* in the fifth chapter mimics the analysis of *Griswold* in the third, but also considers how the Court knew of viable alternatives. I will note here that all of this essay's references to *Roe v. Wade* should be understood as pertaining to *Roe*, as well as its companion case, *Doe v. Bolton*, these cases were argued together and decided together in the Supreme Court. It is ultimately my contention that the *Roe* decision was made completely outside the scope the legal privacy as it had been established up until *Eisenstadt v. Baird*, which was the final Supreme Court case concerning privacy rights before *Roe*. The Court ruled in *Roe* in such a way as to allow the effect of the decision to become startlingly compromised by subsequent court decisions and legislative acts, including the 1976 Hyde Amendment and even the Stupak-Pitts Amendment to the national health care law passed in March of 2010. Moreover, the Court summarily decided on this highly controversial issue at a legally inopportune time. As I will explore, numerous other

legal and Constitutional avenues existed for the redress of this issue, none of which were particularly ripe in 1973.

Chapter II: The Roots of Privacy; The Roots of the Problem

Trying to discern where and when a "right to privacy" first originated in law, is in itself a great undertaking not necessary to the object of this paper. I could go back to the discussions of the founding fathers on the Constitution itself, or to Blackstone who wrote in his seminal work, *Commentaries on the Laws of England*, that marriage was a private relationship between a man and a woman, subject only to the laws of contract by the King,[7] or even back to Hippocrates, whom Blackmun discussed specifically in the *Roe* decision. Any starting point is arbitrary, at best. For my purposes, however, the most instructive starting point is an article written by a famously articulate thirty four year-old civil litigator from Kentucky, Louis Brandeis. I focus on Brandeis specifically because he authored the first meaningful description of a constitutional right to privacy in this 1890 article. In this article, entitled "The Right to Privacy," he outlined how legal rights entailed more than their text most immediately dictates. "The right to life," he wrote, "has come to mean the right to enjoy life—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges… intangible as well as tangible."[8] Brandeis's right to privacy was concerned primarily with a person's "possession of self," or, more explicitly, the ability of a private individual to protect his or her reputation from "unseemly gossip" or being made into "an object of journalistic enterprise."

[7] William Blackstone, *Commentaries on the Laws of England*, I.xv: Of Husband and Wife, http://avalon.law.yale.edu/18th_century/blackstone_bk1ch15.asp.
[8] Louis Brandeis, "The Right to Privacy" *Harvard Law Review* 4 (1890): 193.

Brandeis' privacy more directly antecedes libel law than privacy rights as we know them in the twentieth century. The "right to be let alone" involved more than simply the protection of private individuals from the media, because he connected privacy to a notion of an ability to enjoy life. Invasion by the media was but one way to impede the enjoyment of private life. Brandeis acutely perceived this, as he dedicated the thirty-eight years as a practicing attorney to the cause of protecting the individual, which earned him epithets such as "the People's Lawyer." Thirty-eight years after writing this article, he wrote in his famous dissent in *Olmstead v. United States*, that the founding fathers "conferred, as against the Government, the right to be let alone -- the most comprehensive of rights, and the right most valued by civilized men." Additionally, "to protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual… must be deemed a violation of the Fourth Amendment." This comprehensive reading of the Bill of Rights encompassed more than their mere textual guarantees, allowing the Court in *Griwold* to later employ penumbras.

Elizabeth Cady Stanton articulated an entirely separate, though substantively related right to privacy in an address she gave to Senate Committee on Woman Suffrage in 1892 entitled "The Solitude of Self." Stanton, by this time a stately seventy-seven year old woman with white hair and steely, light eyes, was no stranger to the intricacies of law. Her father served one term in Congress and later became a New York Supreme Court justice.[9] While best known for her work to gain the right to vote for women, though unsuccessful in her lifetime, she just as fervently advocated for the right of the individual to control his or her own sphere of privacy.

[9] Elisabeth Griffith, *Eighty Years and More Reminiscences 1815-1897* (Boston: Northeastern University Press, 1993), 5.

While Brandeis used his dedication to the right to be left alone as a vehicle for shaping constitutional law, Stanton used hers as an argument for allowing women to develop as individuals in the same way that men were able, and in that regard to give women a voice in the government. In her address to the Senate Committee, Stanton called for "a complete emancipation from all forms of bondage, of custom, dependence, superstition; from all the crippling influences of fear, [which] is the solitude and personal responsibility of her own individual life"[10]

Stanton's speech more easily preceded what would become the legal right to privacy in that she demanded that women should gain freedom from legal their subordination to men. To say that Stanton would have actually advocated for the outcome of the *Roe* case would be to take this analysis too far, and even controvert Stanton's actual political position on abortion. Stanton, during her forty seven year-long marriage, gave birth to seven children. Stanton was, however, very keen on the notion of choice: she described her experience raising children as "voluntary motherhood," or as an expression of a mother's free will, regardless of her husband's interests. This implied that there was a such thing as "involuntary motherhood," and that it was somehow wrong.[11] Indeed the idea that men could force women into motherhood would inhibit those women's capacity to achieve what Stanton asks for in her speech to the Senate Committee: the ability to enjoy "her birthright to self-sovereignty; because, as an individual, she must rely on

[10] Elizabeth Cady Stanton, "The Solitude of Self," http://www.sscnet.ucla.edu/history/dubois/classes/995/98F/doc43.html.
[11] Jean H. Baker, *Sisters: The Lives of America's Suffragists* (New York: Hill and Wang, 2005), 109.

herself."[12] Marriage and motherhood determined the course of a woman's life more than any events. To force her to do either would be to diminish human status.

But what of the legislative and legal roots of *Griswold* and *Roe*? Unlike privacy generally, we can more easily pinpoint the genesis of the legal problem at issue in the cases I will later discuss. It is important here to start with the fact that the American legal attitude toward abortion, before the mid-nineteenth century, mimicked the older English common law tradition. Abortion before "quickening," or anywhere between fourteen and twenty-one weeks into the pregnancy, was a widely accepted practice, or at the very least lacked any sort of legal condemnation at any level.[13] A confluence of three highly connected social developments changed the legal attitudes toward abortion and contraception dramatically. These included the growing concern over birth rates of certain portions of the American population, the desire of the newly-formed American Medical Association to consolidate and control the medical practice, and the vigorous efforts of Anthony Comstock, a political activist, who held for years held a privileged position in New York city and state, and later federal, politics.

The mere fact that during America's first hundred years as an independent country, the birth rate among Protestant women of northern European origin dropped from an average of seven children in 1787 per woman to five children in 1877 demonstrates this first social trend. By the turn of the twentieth century, the

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[12] Stanton, "The Solitude of Self."
[13] Brief of 281 American Historians as *Amici Curiae* Supporting Appellees in *Webster v. Reproductive Services*, 1988, II.

birth rate dropped again to about three and a half children per woman on average.[14] This falling birth rate, compared by waves of immigrants coming from Southern and Eastern Europe, caused a rise in Nativist sentiments among the dominant group of white Anglo-Saxon protestants. Professor James Mohr believes this became a key factor in not only the passage of abortion laws, but in their enforcement as well by doctors, as they "both used and were influenced by blatant Nativism."[15]

The Nineteenth-Century conception of race informed Nativist politics. Matthew Jacobsen remarked that "an earlier generation of Americans *saw* Celtic, Hebrew, Anglo-Saxon, or Mediterranean physiognomies where today we see only subtly varying shades of mostly undifferentiated whiteness"[16] Using this conception of race, Anglo-Saxons could assert their "racial" superiority to the substantial Jewish, Italian, and, in particular, Irish immigrant groups of this time. With the slow, almost purely theoretical, integration of African-Americans into American political culture, by way of gaining citizenship through the Fourteenth Amendment and voting rights through the Fifteenth Amendment, "white," as a racial concept started blending together previously distinct physiognomies of Irish and Anglo-Saxon. Physicians, who had the closest proximity to the science of demography by personal observations of fertility and mortality, largely controlled the Nativist and sensationalist rhetoric in an effort to control increases in "undesirable" populations.

Here, it becomes important to note that many of the physicians that first formed the American Medical Association (AMA) had primary interests in

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[14] Carl Degler, *At Odds : Women and the Family in America from the Revolution to the Present* (New York: Oxford University Press, 1980), 116.
[15] James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (New York: Oxford University Press, 1979), 43.
[16] Matthew Jacobsen, *Whiteness of a Different Color* (Cambridge: Harvard University Press1 998), 10.

monopolizing the medical practice as well as Anglo-Saxon race survival. Many laypeople thought of abortion as a medical procedure, but not one that necessitated a licensed physician. Indeed, the most common methods of abortion at this time involved herbs and devices that women could purchase from a pharmacy and use themselves. Furthermore, career abortionists, who performed the actual extraction surgery, were most often not trained as doctors. The amicus brief of the 281 American historians for *Webster v. Reproductive Services* cites, for example, that in 1871 New York City "supported two hundred full-time abortionists, not including doctors who sometimes performed abortions."[17]

Twelve years after the AMA's founding in 1847, AMA representatives began lobbying state legislatures to pass laws outlawing abortions in an effort to prevent midwives, pharmacists and other non-medically licensed practitioners from performing what they framed as being highly dangerous procedures. This same effort also discouraged women from obtaining them. After lobbying the Connecticut legislature in 1855, the judiciary committee of the Connecticut legislature asked a committee of AMA doctors to shape Connecticut's newest anti-abortion law, which they did successfully in 1860.[18] By this time, twenty other states had followed suit. The AMA aided in outlawing all forms abortion except in cases where a licensed physician, more often in the opinion of two or more physicians, deemed it medically necessary to preserve the life of the mother.[19]

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[17] Brief of 281 American Historians as *Amici Curiae* Supporting Appellees in *Webster v. Reproductive Services*, 1988, III.

[18] Morris Fishbein, *History of the American Medical Association 1847-1947* (Philadelphia: W. B. Saunders Company, 1947), 1012.

[19] See 1857 Texas Abortion Statute, 1858 North Carolina Statutes Pertaining to Abortion, e.g.

In addition to portraying an abortion as dangerous, AMA physicians also spoke of abortion as being barbaric because abortions of their proximity to infanticide. Dr. Augustus Gardner wrote "Abortions and destruction of children at and subsequent to birth have been practiced among all barbarous nations of antiquity… the savages of past ages were no better than the women who commit such infamous murders to-day…"[20] Horatio Storer, a professor of obstetrics, observed that increases in population in the state of Massachusetts had been "*wholly* of those of those of *recent foreign origin*" such that the absolute numbers of natives were in fact decreasing. He additionally cited that while marriage rates in Massachusetts steadily increased, more married couples failed to produce offspring. Using his own statistical data, he concluded that more abortions in Anglo-Saxon women caused the lack of offspring.[21] It is difficult to confirm the actual numbers, as aggregate census data aggregates Irish Catholics and Anglo-Saxons alike under the broader category of "white." Pope Pius IX's 1869 declaration eliminating the distinction between "fetus animatus" and "fetus inanimatus," thus enshrining the idea that life begins at conception into Catholic dogma, also helps to explain at least a decline in the number of Protestant, Anglo-Saxon births relative to Irish and Italian Catholic births. This last point highlights a peculiarity in the Nativist-medical abortion scheme: physicians denounced abortion as barbaric, similarly Irish Catholics became associated with barbarism, even though at this point Irish

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[20] Augustus K. Gardner, *Conjugal Sins Conjugal Sins Against The Laws Of Life And Health And Their Effects Upon The Father, Mother And Child* (Whitefish MT: Kessinger Publishing, 1870), 112-113.

[21] Horatio Robinson Storer, "On the Decrease of the Rate of Increase of Population now obtaining in Europe and America," *American Journal of Science and Arts* 43, no. 128 (March, 1867): 147.

Catholics can no longer, assuming at least moderate devoutness, practice this particularly insidious act of barbarism.

The third crucial factor was the influence of Anthony Comstock. By the time he came to sponsor the infamous 1873 Comstock Act, he had made a name for himself by consistently supplying New York police with information on sex trade merchants throughout New York City and by later founding the New York Society for the Suppression of Vice whose mission was to "supervise the morality of the public.[22] Unlike the physicians, Nativists, and feminists who supported anti-abortion and anti-contraception laws, Comstock was firmly motivated by religious considerations as well as the inherent inferiority of women. Congress passed the Comstock Act within four days of its being introduced; President Grant signed it into law on March 3rd, 1873.[23] The text of the Act concerned "obscene and lewd" literature, as well as "any article or thing designed or intended for the prevention of contraception or procuring of abortion…"[24] The Act did not concern itself with the legality of actually obtaining contraception or abortions, merely the dissemination of information concerning them. Nevertheless, the Comstock Act was highly problematic in two ways: first it gave Comstock personally virtually unlimited access to open any letter or package in order to investigate whether its contents were obscene. The second problem with this particular piece of legislation arose forty years later. In 1917 the Seventh Circuit Court of Appeals, interpreted the Comstock Act as pertaining to the act of abortion itself, and thus its enforcement was not limited to communications about abortion in *Bours v. United States*. The

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[22] Public Broadcasting Corporation, "People and Events: Anthony Comstock's 'Chastity' Laws" in *The Pill*, http://www.pbs.org/wgbh/amex/pill/peopleevents/e_comstock.html
[23] Lawrence Lader, *Abortion*, 91.
[24] The Comstock Act, 1873.

Court reasoned that the inclusion of the word "abortion" in the text of the Comstock Act "indicated a national policy of discountenancing abortion as inimical to the national life."[25] The Supreme Court subsequently denied certiorari to the appellant, Bours. Therefore this interpretation of the Comstock Act remained viable with respect to both contraception and abortion until the *Griswold* decision. However, this effective federal ban on contraception and abortion remained innocuous as the corresponding state laws became the target of constitutional attack.

In the last quarter of the nineteenth century, the legal development of the right to privacy entailed two disparate, perhaps mutually exclusive, notions and absolutely no indication that it has anything to do with contraception or abortion. It seems as though abortion was anything *but* an issue of privacy when considering the steps taken by the AMA and state legislatures to govern the behaviors of women and men alike. We can see from the prior discussion that abortion was a matter of "race survival" for some, a mechanism for controlling the medical practice for others, and still for others a blight on the moral character of the nation. Nowhere in this early discussion of abortion are the voices of wives and mothers apparent anywhere, which seems to be Stanton's point exactly in her address to the Senate Committee. I turn then to my analysis of *Griswold*, which acted as the first crucial step in defining the what a constitutional right to privacy involved.

III: Constitutional Invention: An Analysis of *Griswold v. Connecticut*

[25] 229 F.7d 960.

June 7th, 1965 was dry, pleasantly balmy day for Washington D.C. as the Supreme Court announced its plurality opinion in *Griswold.* Three and a half years earlier, the New Haven city police arrested the cases' two appellants, Estelle Griswold and Dr. Lee Buxton, under Connecticut's anti-contraception statute nine days after the opening of their birth control clinic in New Haven in November of 1961. Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Buxton, the League's medical director and a professor at Yale Medical School, set out to test the Connecticut statute in as much as they tried to operate a Planned Parenthood clinic. Griswold opened the clinic only four months after the rather disappointing Supreme Court decision in *Poe v. Ullman*, in which Dr. Buxton was also involved as a plaintiff. In *Poe*, the Court side-stepped the issue of actually ruling on the substance of Connecticut's anti-contraception statute as Ullman, the state's attorney, had not and did not intend to prosecute the plaintiffs as neither Buxton nor Poe yet violated the Connecticut anti-contraception statute.[26]

Griswold and Buxton were tried together on the January 2nd, 1962. The trial attorney for Griswold and Buxton, Catherine Roraback, attempted to argued in the invalidity of the Connecticut statute as it violated Ms. Griswold and Dr. Buxton's First Amendment right to Freedom of Speech. The trial court convicted Griswold and Buxton under the Connecticut statute, indicating clearly that the courts did not constitute not an appropriate forum for reviewing the merits of the legislature. The Appellate Division of the Sixth Connecticut Circuit Court affirmed their convictions in turn, as did the State Supreme Court of Errors.[27] By March of 1965, when oral arguments for the case's appeals to the Supreme Court took place, Griswold's

[26] *Poe v. Ullman*, 367 U.S. 497, 500.
[27] *Griswold v. Connecticut* 381 U.S. 479, 480.

counsel had been twice replaced. Griswold and Buxton intended for Fowler Harper, a tenured professor at Yale Law School and nationally recognized authority on torts, to deliver oral argument in front of Supreme Court, just as he had done for Dr. Buxton four years prior in *Poe*. However, Harper died of cancer three months before oral argument commenced, and so Thomas Emerson, Fowler's Yale faculty colleague, delivered the oral address.

It is important to note here that the Connecticut statute as formulated became most immediately problematic due to the introduction of the birth control pill in 1960, only a year before Dr. Buxton first tested the anti-conception statute in *Poe v. Ullman*. The legislature tailored the law prohibiting the possession and sale of contraceptives insofar as they prevented the conception of a child. Pharmacies readily marketed contraceptives, but only to prevent the spread of venereal disease, because of the law's mandate. Practically speaking, the law only proscribed those contraceptive devices which could not be shown to prevent of the spread of venereal disease, namely the birth control pill. Furthermore, it became apparent in the oral arguments of *Griswold* that the state's interest in suppressing the possession and sale of devices exclusively used to prevent pregnancy had nothing to do with the use of the device itself, but rather aimed to discourage adultery and pre-marital intercourse, for which the state of Connecticut already had separate laws in place.[28] The way which Joseph Clark, counsel for the state of Connecticut, argued the defense rendered the Connecticut legal scheme incoherent at best: if the state of Connecticut had an interest in preventing adultery and pre-marital sex, it should follow that anti-contraceptive law would only be applied in cases where men and

[28] Joseph Clark, counsel for the state of Connecticut, *Griswold* Oral Argument, March 29, 1965.

women used contraceptives specifically to limit the spread of venereal disease. After all, and as Mr. Emerson pointed out, completely faithful spouses who never engaged in pre-marital intercourse, and had been tested prior to marriage for venereal disease, also required by Connecticut law, should have no concern about spreading venereal disease.

Emerson successfully shifted the constitutional issue in *Griswold* from one of First Amendment free speech, as Roraback had argued, to one of Fourteenth Amendment due process. In Emerson's words, this case involved two due process issues: first that the Connecticut statute violated Due Process "in the basic sense, that [the law] is arbitrary and unreasonable" and second that the law violated due process in "the special sense that it constitutes a deprivation of life against invasion of privacy."[29] The Court offered Emerson two alternate plausible constitutional arguments as well which Emerson ultimately refused to argue. The first argument relied on the equal protection clause of the Fourteenth Amendment. Neither the Court nor Emerson expanded on how the equal protection doctrine would fit this case, though presumably it involved the idea that the anti-contraception laws were discriminatory in effect against the economically disadvantaged. This argument would have likely failed in view of the fact that economic disadvantage did not (and still does not) create a suspect class (like race) within the 1965 meaning of equal protection. Equal protection doctrine would not serve as a plausible alternative in the privacy cases until more than ten years later in a series of law review articles. No member of the Supreme Court acknowledged equal protection as an alternative

[29] Thomas Emerson, *Griswold* Oral Argument, March 29, 1965.

until Ruth Bader Ginsburg's dissent in *Gonzales v. Carhart* in 2007.[30] Ginsburg's equal protection argument, that forcing a woman to carry an unwanted pregnancy to term unfairly favors men by virtue of the fact that they cannot get pregnant,[31] would have failed in 1965. The Court did not apply equal protection doctrine to issues of gender discrimination until *Reed v. Reed* in 1971.[32] The Court tended to view equal protection as only a final constitutional recourse until *Brown v. Board of Education* in 1954. The Court also offered Mr. Emerson the Ninth Amendment as an alternative grounds for a privacy argument, a point to which Emerson superficially agreed in oral argument in saying "we felt we couldn't pitch [the argument] squarely on the Ninth Amendment… but we offer that [Ninth Amendment] as one basis for the right of privacy."[33]

Emerson's case rested first and foremost on a substantive due process argument, a potentially dangerous legal territory as the Court had refused to openly validate arguments of substantive due process for over thirty years. However, Emerson painstakingly contended that this use of substantive due process could be distinguished from antiquated economic substantive due process doctrine of *Lochner v. New York*.[34] Emerson's formulation of a right to privacy based in Fourteenth Amendment due process was based in fairly quiet history of a use of due process to uphold certain individual liberties. Justice McReynold's dictum in the 1923 case of *Meyer v. Nebraska* controlled this line of analysis; stating that:

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[30] 550 U.S. 124, 133.
[31] Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," North Carolina Law Review 63: no 1 (1984-1985), 382-383.
[32] 404 U.S. 71.
[33] Emerson, *Griswold* Oral Argument.
[34] 198 U.S. 45.

> Without doubt, [due process of law] denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[35]

The tradition established in *Meyer* and consistently upheld throughout the decades leading up to the *Griswold* decision[36] seemed nowhere as odious as the substantive due process used at the turn of the century to impose an unrestricted freedom of contract, even though the *Meyer* dictum lists "the right of the individual to contract" as one of those rights protected as a matter of due process jurisprudence. The important part of the dictum, however, and the part that Emerson rightly focused on, noted that there existed a right to an "essential to the orderly pursuit of happiness by free men" that entailed a person's ability "to establish a home and bring up children." This implied that there is just as fundamental a right *not* to have children if one so chooses.

Emerson repeatedly stressed that his position only applied to married couples. This presented a very important limiting factor in Emerson's arguments, which by all means should have precluded in the inevitable decision from later applying to *Eisenstadt* and *Roe*. He noted at the beginning of his argument, and multiple times in his brief, that the Planned Parenthood Center opened by Griswold "functioned only for the purpose of helping married women." This obviated the state's primary concern of preventing adultery and pre-marital sex if the Center only

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[35] 262 U.S. 390, 399.

[36] See *Pierce v. Society of Sisters*, 268 U.S. 510 (upholding the right of parents and guardians to provide private education to their children); *Schware v. Board of Examiners*, 353 U.S. 232 (upholding the right of a qualified individual to practice a chosen profession); and *Aptheker v. Secretary of State*, 378 U.S. 500 (upholding the right of an individual to obtain a passport regardless of political affiliation).

catered to married women. Furthermore, the Court specifically asked Emerson whether or not his privacy argument could be used to invalidate laws criminalizing abortion. Emerson flatly responded that it would not, as abortion is not a privacy issue: "The conduct that is being prohibited in the abortion cases rakes place outside of the home, normally. There is no violation of the sanctity of the home." Another important limiting factor of Emerson's argumentation was he was only arguing against the formulation of the Connecticut statute, and readily admitted that "if we prevail on the privacy ground; that would probably end only the Connecticut statute, because the Connecticut statute is the only use statute."[37] This simply means that Emerson objects to the Connecticut statute insofar as it prohibits the use of contraceptive devices inside the home, and which was, as far as he knew, the only statute of its kind. Most of the other state and federal anti-contraception statutes involved prohibitions on distribution, not use inside the home.

The Court had to weigh Emerson's arguments on the fundamental rights protected by due process against the what the state argued as being a legitimate use of police power, although Clark explicitly stated that the state's argument was not without its extra-legal motivations. In the state's brief and oral argument, the state provided and periodically referenced an article by Richard Scammon, then head of the Census Bureau, entitled "Our Population: The Statistics Explosion," which detailed that the national birth rate had been declining steadily from a relative high point of 25.3 live births per thousand people in 1957 to 19.4 live births per

[37] Emerson, *Griswold* Oral Argument.

thousand people in 1965.[38] Clark continually referenced in oral arguments how Connecticut's birth rates remained even lower than the national birth rate, although did not cite where he obtained this information. In fact, Clark's assertion is only partially true. Between 1950 and 1960, Connecticut had the largest population growth due to in-state births of any state, and in that time experienced the largest growth in fertility rate of any state. After 1960, Connecticut's birth and fertility rate did decline, but less than the national average.[39]

The majority of the Court ultimately rejected the state's arguments surrounding the issue of contraceptive usage as a substantive function of the state's interest in declining birth rates or even its constitutionally permissible ability to legislate in the interest of societal morality. The seven justice majority agreed to some measure that the Connecticut anti-contraceptive statute contravened some form of fundamental personal liberty, but gave four separate, mutually-exclusive constitutional justifications for striking down the statute. Justice William Douglas wrote the majority opinion, which would be heavily cited in the next few years to constitutionally justify abortion on demand. In addition to his famous articulation of the Bill of Rights create a zone of privacy not exclusively limited to the text of the amendments themselves, he examined the Fourth Amendment at length, teasing out its penumbras by citing the 1886 case of *Boyd v. United States*.[40] The *Boyd* decision held a law allowing the compulsory publication of private books, journals, etc. in criminal proceedings unconstitutional as a violation of Fourth and Fifth Amendment

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[38] Department of Health and Human Services, National Center for Health Statistics. Additionally, the birth rate would continue to decline annually until 1976 when it hit its lowest point in over fifty years at 14.8 live births per thousand.

[39] Stanley Smith and Bashir Ahmed, "A Demographic Analysis of the Population Growth of States, 1950-1980," *Journal of Regional Science* 30, no. 2 (1990): 212, 216, 218.

[40] 116 U.S. 616.

guarantees. The *Boyd* analysis of privacy as constitutional doctrine closely relates to Brandeis' analysis of privacy:

> [The Fourth and Fifth Amendments] apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property[41]

Douglas paid close attention to the sphere of the home as a grounding for a constitutional guarantee of privacy. Indeed Douglas cited a laundry list of cases which lent credence to the Fourth Amendment as not just a guarantee against government invasion of a physical residence, but against invasion of "personal liberty" as well, suggesting that they all have previously established constitutional guarantees of "privacy and repose."[42]

By relying heavily on these precedents, which recognized privacy in some capacity as a Fifth Amendment due process claim, Douglas avoided becoming the creator of new constitutional guarantee. There are, however, important limiting features of these cases: *Breard v. Alexandria*, *Public Utilities Commission v. Pollak*, *Lanza v. New York*, and *Frank v. Maryland* all delineated what a "right of privacy" does *not* entail. *Breard* recognized the right of individuals to canvass private homes on behalf of businesses without invitation from the owner as a due process claim. *Public Utilities Commission* noted that to preclude radio broadcasting on public transportation would be a due process violation. *Lanza* rejected the recording and transcription of conversions between prisoners and their visitors as a valid due

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[41] 116 U.S. 616, 630.

[42] See *Breard v. Alexandria*, 341 U. S. 622, 626, 644; *Public Utilities Commission v. Pollak*, 343 U. S. 451; *Monroe v. Pape*, 365 U. S. 167; *Lanza v. New York*, 370 U. S. 139; *Frank v. Maryland*, 359 U. S. 360; *Skinner v. Oklahoma*, 316 U. S. 535, 541.

process claim. Finally, *Frank* permitted searches of the home by public health officials without a warrant. These cases all weighed due process entitlements *against* Fourth Amendment would-be rights of privacy, rather than incorporating those rights as due process claims under either the Fifth or Fourteenth amendment.

Commentators have often argued that *Skinner* is one of the strongest precedents to support Douglas' incorporation of privacy as a matter of due process as those cases are substantively related. The unanimous vote in *Skinner* struck down an Oklahoma statute which mandated sterilization of "habitual criminals," i.e. persons convicted at least three times of "felonies involving moral turpitude." Justice Douglas, only forty-three years-old and three years into what would turn into the longest career of any Supreme Court justice to date, penned this opinion in 1942. *Skinner* directly called into question the ruling in *Buck v. Bell*[43] fifteen years earlier, which categorically permitted the sterilization of "feeble-minded individuals" in the custody of state institutions in the interest of the popular theory of eugenics. The Court in *Buck v. Bell* curiously rejected the appellants substantive due process claims in the tradition of *Meyer* and *Pierce*, even though the eight of the nine justices that decided the *Meyer* and *Pierce* cases also decided *Buck.* Disappointingly, the *Skinner* decision only amounted to an exception to *Buck* rather than a challenge to compulsory sterilization altogether. Despite Douglas's numerous references to procreation as "one of the basic civil rights of man," the Court merely struck down the act based on practical inconsistencies over what constituted a "felony involving moral turpitude" deserving of sterilization. *Buck v. Bell* remained (and as a matter of law still remains) intact, meaning that while the state could not arbitrarily sterilize

[43] 274 U.S. 200.

criminals, the greater right of an individual to safeguard his or her fertility was never legally enshrined against the state's interest in weeding out the "feeble-minded" from the population. Thus, the Court never made a ruling on the substance of reproductive law.

The final important limitation of Douglas's opinion, and in fact holds true for the three concurring opinions, is that the fact that the clinic opened up by Dr. Buxton and Ms. Griswold dispensed contraceptives *only to married individuals* seemed to be of important substance to the court's ruling. Douglas referred to the right of privacy numerous times as one of the "freedoms of married persons." He also concluded his opinion with a short dictum:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[44]

Undoubtedly, he intended for his opinion to apply to those people who already formed their "enduring," "intimate," and "sacred" bond with one another. Douglas solidified the rights of married individuals, so that, as of 1965, unmarried people would remain subject to the state's interest in discouraging sexual activity.

Justice Goldberg relied on the Ninth Amendment in his concurring opinion. He rejected Douglas's use of Fourteenth Amendment due process because he disagreed that the first eight amendments, which apply specifically to Congress, could be "incorporated" in the Fourteenth Amendment guarantee of due process, and thereby bind the actions of state legislatures as well. Goldberg's view

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[44] 381 U.S. 479, 486.

highlighted an on-going controversy over the Fourteenth amendment which has divided jurists since its ratification in July of 1868. Since the decision in *Gitlow v. New York*,[45] the Court steadily increased which provisions of the Bill of Rights it deemed as applying to state governments, and in doing so created the doctrine of "selective incorporation," as in some of the first eight amendments would apply to states, but not all. In this specific case, precedent on incorporation supported Goldberg's position more than Douglas's. By 1965, the Court had yet to specifically visit the issue of whether or not the relevant portions of the Third, Fourth, and Fifth amendments could be incorporated into the Fourteenth Amendment. In fact, the Court did not decide on that issue until twenty years later.[46] The Ninth Amendment does not require the use of incorporation doctrine because it is not written in a way that specifically applies to Congress.

Goldberg capitalized on the fact that the right to privacy in marriage is not written in the text of the Constitution, and thus requires the use of the Ninth Amendment. He supplemented the use of the Ninth Amendment with references to the original intent of the framers of the Constitution as well as the character of the "totality of the constitutional scheme," which he borrowed from his own dissenting opinion in *Poe v. Ullman*. With respect to the Ninth Amendment, Goldberg opined that "the Ninth Amendment, in indicating that not all liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights." To say that the right of privacy in marriage is

[45] 268 U.S 652: The majority in *Gitlow* acknowledged that the First Amendment guarantees of freedom of speech can bind the legislation of state governments as well as Congress.
[46] See *New Jersey v. T.L.O.*, 469 U.S. 325.

not protected because the framers did not specifically include it would be ignore the very purpose of the Ninth Amendment.

The important leap in jurisprudential logic that Goldberg made in this opinion was the establishment of the right to privacy as a "fundamental personal right," which he did without referencing specific precedent. Of course, this is not to say that Goldberg was incorrect in doing so, rather that, by framing the right to privacy in this way, Goldberg's opinion had the potential to shape subsequent decisions on privacy rights in a manner entirely separate from Douglas's use of due process. Goldberg's opinion could have also introduced a trend in jurisprudence that would strengthen the use of Ninth Amendment in cases involving other personal liberties. Previous cases on personal liberties, such as *Meyer* and *Pierce*, made no reference to the Ninth Amendment at all.

Justice John Marshall Harlan also disagreed with Douglas's use of incorporation doctrine, but accepted Douglas's Fourteenth Amendment premise. Harlan's opinion largely mirrored his vehement dissent in *Poe v. Ullman* four years earlier, where he opposed the Court's decision to dismiss the case on a technicality and considered the merits of the case at length. The facts of *Poe* closely resembled the facts of *Griswold*, except that in *Poe*, an anonymous married woman, along with *Griswold* appellant Lee Buxton, directly challenged the constitutionality of Connecticut's anti-contraception statute without the provocation of prosecution from the state.

In *Poe,* he characterized the Connecticut anti-contraception statute as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate

concerns of an individual's personal life."[47] This sets the stage for Harlan to consider a constitutional protection of the decisions of married couples within the home at length as a matter of privacy. His opinion in *Poe* slightly differs from his opinion in *Griswold* in this one particular way: in *Griswold*, Harlan added a slightly expanded analysis of the applicability of *Palko v. Connecticut.*[48] The Court in *Palko* declined to incorporate the Fifth Amendment guarantee against double jeopardy into the Fourteenth Amendment's due process clause, but found that a protection against double jeopardy established a guarantee "implicit in the concept of ordered liberty" and thus could bind state governments' actions through the Fourteenth Amendment. Harlan uses the *Palko* rationale to side-step the question of incorporation, because Fourteenth Amendment due process flatly protects marital privacy on its own, that is, not relying at all on the Bill of Rights.

In *Poe*, Harlan considers privacy as a right to be protected in and of itself, without expressly referencing the criterion in *Palko* of "implicit in the concept of ordered liberty." In this way, Harlan is actually more the creator of the right to privacy in the sense of regulating sexual activity than Douglas, and in fact Douglas references Harlan's analysis on the issue a few times in great depth in his *Griswold* opinion. In one of Harlan's more stirring pages of his *Poe* opinion, he writes and Douglas quotes:

> The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm

[47] 367 U.S. 497, 538.
[48] 302 U.S. 319.

> of family life,' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations.[49]

This consideration of marital privacy within the home as an entitlement worth constitutional protection in and of itself through the Fourteenth Amendment necessitates substantial judicial activism. The *Griswold* finding prompted many legal commentators to reconsider his *Poe* opinion, particularly because it entails a marked departure from his generally more reserved judicial philosophy.[50]

The prevailing theory among these commentators attributed Harlan's *Poe* opinion to his social, political and economic predispositions. The mere fact that he analyzed the constitutional question at length despite the Court's unwillingness to consider the merits in this case indicates that Harlan had strong personal feelings on the matter. Tinsley Yarbrough, Justice Harlan's biographer, noted that Harlan's overall tolerant and cosmopolitan attitude, "reflecting the Oxford upper-class experience," could explain his willingness to embrace the privacy issues in *Poe* and *Griswold*. Yarbrough further opined that "given [his] interests [in art, music, and theatre as well as a socially diverse group of friends]… the justice was probably very uncomfortable with government-imposed censorship or intrusions into personal privacy."[51] Harvard Law professor Mark Tushnet presented a slightly different opinion, that Harlan "was particularly alert to intrusions on privacy, which he could have associated with the private property that was the foundation of his class."[52] Harlan was most likely not the only justice with strong personal feelings on privacy rights, but discussing his background here provides a useful insight in the judicial

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[49] 367 U.S. 497, 551-552.
[50] Lengthy footnote referencing Schroeder, 1046-1049.
[51] Tinsley Yarbrough, "Reflections of a Biographer," *New York Law School Law Review* 36, no. 1 (1991): 239-240.
[52] Mark Tushnet, "Themes in Warren Court Biographies," *New York University Law Review* 70, no. 1 (1995): 760.

decision-making process, particularly when a justice's decision seems incongruous with the law. Harlan's *Poe* opinion embodied an attitude completely inconsistent with his judicial philosophy, which merited special consideration here. I plan to discuss personal motivation in the *Roe* case at length in Section V.

Justice Byron White authored the final and, perhaps most cryptic, concurrence. White agreed with Douglas and Harlan that the Connecticut statute invaded the marital relationship in an constitutionally impermissible way. Like Douglas and Harlan, White invoked the due process clause of the Fourteenth Amendment, but did not comment on incorporation, "the concept of ordered liberty," or even the foundations of privacy as a constitutional right. White reached the conclusion, much more simply, that "there is a 'realm of family life which the state cannot enter' without substantial justification."[53]

"Substantial justification" requires some consideration. In judicial parlance, "substantial justification" invokes a particular mode of judicial scrutiny. Most commonly used in First and Fourteenth Amendment jurisprudence, this kind of judicial scrutiny requires the justices to consider the goal of a given law, then consider how well that law serves that goal. The Court developed this fashion of scrutiny to weigh the legitimacy of laws challenged under the equal protection clause of the Fourteenth Amendment. Here, as White did not invoke the equal protection clause, he appropriated this type of scrutiny to apply to the due process clause, without relying on any precedent to do so. To justify this method of constitutional review, White relies on *Yick Wo v. Hopkins*, *Skinner v. Oklahoma*, and *McLaughlin v. Florida*, all of which invoked the equal protection clause specifically,

[53] 381 U.S. 502. See also *Prince v. Massachusetts*, 321 U.S. 158.

and *Schware v. Board of Bar Examiners*, which the Court decided based on the due process clause, but did not use equal protection scrutiny.[54] The modes of scrutiny available as of 1965 were limited to "rational basis review" and "strict scrutiny" (levels of "intermediate" or "heightened" scrutiny have since developed). White applied rational basis review in this case, which determines whether a legislative goal is "legitimate" and if the law in question is "related" to the goal it is supposed to serve. The term "substantial justification" specifically invokes a strict scrutiny standard, which determines whether a legislative goal is "compelling" and if the law in question is "the most narrowly-tailored means" of achieving that goal. Additionally, when applying strict scrutiny, that state has the burden of providing a "substantial justification" for enacting the law. However, Even though White used the term "substantial justification," he failed to apply a standard of strict scrutiny. Therefore, White concurred with the majority in *Griswold* because he saw no rational relationship between the anti-contraception statute and Mr. Clark's stated justification of "discouraging promiscuous or illicit sexual relationships."[55]

While White's reasoning may appear attractively simple, it is actually by far the most dangerous for two reasons. First, standards of scrutiny give justices very broad authority: the Supreme Court majority becomes the ultimate decider of what qualifies as a legitimate government goal and whether or not the laws in place serve those goals. Different justices apply these standards in very different ways. Some have even refused to apply them at all.[56] Second, as Loyola Marymount Law

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[54] 118 U.S. 356, 316 U.S. 535, 379 U.S. 184, and 353 U.S. 232, respectively.
[55] 381 U.S. 479, 504.
[56] In *Nguyen v. I.N.S.*, 533 U.S. 53, Justice Stevens cast the deciding vote in a gender discrimination case, voting to uphold a discriminatory law because he refused to apply any the established Fourteenth Amendment scrutiny standards.

professor Allan Ides explained, "in *Griswold* had the state rationally explained its complete ban on the use of contraceptives… a state could be free to regulate private conduct based upon nothing more than a standard of rationality."[57] If a state can reasonably explain its intrusion into private life, then it has the constitutional sanction to do so. No other justice considered White's application of rational basis review in the subsequent abortion cases. As I will explore further in Chapter V, White's concurrence in *Griswold* very clearly laid a foundation for his visceral dissent in *Roe*.

Hugo Black and Potter Stewart both dissented, but personally disagreed with the Connecticut statute. They both made a point of ruling against their personal predilections. Black refused to acknowledge any sort of constitutional right of privacy: "Privacy is a broad, abstract, and ambiguous concept which can easily be shrunken in meaning," because, he had a tendency to read the language of the constitution very plainly. As much as the privacy laws upset his libertarian sensibilities, he was perhaps the only justice willing to admit: "I like my privacy as well as the next, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some *specific constitutional provision*" (emphasis mine). As to the argument that White, Harlan, and Goldberg presented, Black viewed their rationales as different ways of saying that the Court can invalidate laws that it does not like. The evaluations of which laws are wise or necessary belong to the legislative body.[58] Stewart started his opinion with the

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[57] Allan Ides, "The Jurisprudence of Justice Byron White," *The Yale Law Journal* 103, no. 2 (November, 1993), 450.
[58] Justice Black, Dissenting Opinion in *Griswold v. Connecticut*, 381 U.S. 508-510, 515; Wallace Mendelson, "Hugo Black and Judicial Discretion," *Political Science Quaterly* 85, no. 1 (March, 1970): 34.

disclaimer that "as a matter of social policy, I think professional counsel about methods of birth control should be made available to all, so that each individual's choice can be meaningfully made." In a short attempt at respecting *stare decisis* (respecting the wisdom of previous court rulings), Stewart rejects using the Fourteenth amendment substantive due process in the way that Douglas, Harlan, and White do, because only two years earlier, the court had, in Stewart's mind, confirmed substantive due process's permanent death in *Ferguson v. Skrupa*[59] As Stewart could not find any textual basis in the Constitution for upholding a right to privacy, it did not exist.[60]

It is abundantly clear that the differing opinions in *Griswold* carried a highly divisive quality to them. No justice dared invoke the doctrine of substantive due process by name, particularly given its ruling *Ferguson*. Instead, as Paul Kauper explained, "In extending the specific [right to privacy] to the periphery of the Bill of Rights, the Court is essentially engaging in substantive due process, but dignifying it with a different name and thereby creating the illusion of greater objectivity."[61] The majority of the Court in *Griswold* will never be able to escape the criticism that they found a creative way to invalidate a "wrong" law. Perhaps the fault of the law lied not within its substantive constitutional difficulties, but in its sheer impracticality and unenforceability. Afterall, the law not only prohibited the manufacture and sale of contraceptives, but specifically their use within the home. Stone et al. presented a fascinatingly simple alternative to the *Griswold* problem:

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[59] 372 U.S. 730 (1963).
[60] Justice Stewart, Dissenting Opinion in *Griswold v. Connecticut*, 381 U.S. 528, 529.
[61] Paul Kauper, "Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The *Griswold* Case," *Michigan Law Review*, 64: no. 1 (1965), 253.

> The law at issue could not be enforced directly against married couples because the Connecticut citizenry would be aghast at any such enforcement action… The law was out of step with democratic convictions. A law should not be usable at all if the public would not permit it to be enforced in the way it reads... If laws cannot be enforced directly—through prohibiting certain criminal activities—they cannot be enforced through indirect, sporadic, discriminatory routes that escape the same degree of public accountability.[62]

This claim introduces two attractive possibilities that would have resulted in either its repeal or its invalidation on other grounds. The first is obvious in Stone's claim. To the second, a plaintiff could have come forward under legitimate procedural due process grounds because of the inherent desuetude of a law that would require the state to enter homes to search for people using contraceptives.

This first formulation of privacy doctrine more closely cohered with Stanton's theory of inviolable personhood than Brandeis's right to let alone. However, the inviolability of the marital relationship and the inviolable of individual personhood have far different implications. Even so, *Griswold* advanced *Griswold* provides a connecting point between the two theories of privacy. The comprehensive Bill of Rights interpretation in *Griswold* armed the court with precedent to rule that Fourth Amendment search and seizure applied to wiretaps as well as physical structures in *Katz v. United States*.[63] *Katz* explicitly overturned *Olmstead*, the case where Brandeis dissented and first wrote of the right to be let alone. Essentially, the Court validated Brandeis's original point in 1928, but only had the means to do so using *Griswold*. Furthermore, in gaining reproductive control, not only women, but couples, could determine their own reproductive destinies. While Stanton deeply was deeply committed to family, she just as much "sought to

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[62] Geoffrey R. Stone et al., "Implied Fundamental Rights," in *Constitutional Law*, 5th ed. (New York: Aspen Publishers, 2005).

[63] 389 U.S. 347, 350.

strengthen the social order secured by stable marriages and diminish the need for divorce."[64] Undoubtedly, control in the realm of family planning, as the Court noted, would serve to affirm the both the stability as well as the inherent privacy of the marital relationship.

Chapter IV: Crisis and the Road to *Roe*

A: Social Trends

Even before *Roe*, it was fairly common for a woman to procure abortions, and because of the rigidity of the laws in place, women procured the vast majority of these abortions illegally. As early as 1957, medical professionals and government officials attempted to track exactly how many abortions women successfully obtained in any given year. Different sources came up with figures with vastly varying results, which speaks to the inherent problem of studying illegal activity. Dr. Christopher Tietze conducted a study among a representative group of white women on the rates of fetal deaths, to rebut some of Dr. Alfred Kinsey's research in *Sexual Behavior in the Human Female* (1953). Dr. Tietze interviewed 1,329 who had a total 2,723 pregnancies. The women he interviewed admitted to having a total of 708 abortions, only forty-seven of which were performed legally under the guidance of a licensed physician. Tietze concluded from his representative sample that

[64] Martha Minow, "We, the Family: Constitutional Rights and American Families," *The Journal of American History* 74, no. 3 (December, 1987), 973.

roughly one in four pregnancies in white women ended with an abortion.[65] From small scale studies such as these, medical professionals attempted to extrapolate how many abortions may have been performed nationwide. Tietze estimated, based on his own research, that 1,200,000 were performed each year. In 1959, Dr. Harold Rosen of Johns Hopkins University cited an figure of 1,500,000 as being more accurate.[66] Professor Richard Krannich estimated a comparatively conservative 1,000,000 per year.[67]

Whatever the actual figure, the problem of illegal abortion gained steam as a public issue on the national scene throughout the 1960s, culminating in the *Roe* decision in 1973. Illegal abortions were not solely problematic in that they involved hundreds of thousands women disrespecting the law every year, but the procedures were dangerous, sometimes deadly. If a woman decided to pursue an abortion by extra-legal means, she had three general options: 1) see a licensed physician willing to take the risk of performing an illegal procedure, 2) see an unskilled abortionist, 3) do it herself. By and large, only women of some means could afford to pay a licensed physician in areas where such physicians were available. The latter two options often presented grave danger to the woman. The Boston Women's Health Book Collective outlined four methods unskilled abortionists often used. Among these included "Dirty D&C," a dilation and curettage procedure that physicians also performed, involving opening up the vagina and surgically extracting the fetus, usually after twelve to sixteen weeks of gestation. However, unskilled abortionists

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[65] Christopher Tietze and Clyde Martin, "Foetal Deaths, Spontaneous and Induced, in the Urban White Population of United States," *Population Studies* 11, no. 2 (November, 1957): 175-176.
[66] Isadore Rubin, "Illegal Abortion… Disease of Society," *Sexology* (January, 1959), 352.
[67] Richard Krannich, "Abortion in the United States: Past, Present, and Future Trends," *Family Relations* 29, no. 3 (July, 1980): 368.

often performed these procedures with no anesthesia, no antiseptics, or dirty tools which could result in traumatic pain or infection. Unskilled abortionists might also use a catheter, which directly caused an infection to the uterus. Another method involved the use of a douche to insert chemicals like vinegar, turpentine, or lye into the uterus. Finally, the Collective mentioned the method of pumping air to the uterus. This last method was particularly dangerous because of the probability of causing an air embolism, the introduction of air into the vascular system, which could result in a sudden and violent death if untreated.[68]

Women who performed the procedure on themselves were equally at risk. *Our Bodies, Ourselves* identified two main ways women would self-induce abortions, the first involved a variety of external means including taking a very hot bath, prolonged exercise, or sticking long sharp tools into the vagina. These methods rarely ever worked and were more likely to endanger the mother than the fetus. Women also tried using cocktails of drugstore abortificants.[69] A 1959 article in Sexology Magazine detailed many concerns of physicians about illegal abortion: Dr. Warren Nelson commented on drugs for self-induced abortions in particular, "First, great danger exists in [the drugs used for self-induced abortions] uncontrolled use because… they may have disastrous effects on the bone marrow (of the mother). Second, if the embryo is no killed, the subsequent incidence of developmental anomalies is high."[70]

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[68] Boston Women's Health Book Collective, *Our Bodies, Ourselves* (New York: Simon and Schuster, 1973), 145-147.
[69] Ibid, 148.
[70] Rubin, 350.

Various media outlets made the danger and humiliation of illegal abortions very clear, and in response to this problem, many different groups began to mobilize. The first groups I will look at who applied pressure on the legislatures to reform the states' position on abortion are rights advocacy groups, including NOW and NARAL. In 1966, following the third national conference of the Commissions on the Status of Women, author Betty Friedan, Dr. Pauli Murray, and fifteen other women held NOW's first meeting in Friedan's Washington D.C. hotel room. NOW's membership grew rapidly over the next several months, reaching 300 members in October. Reproductive freedom became one of NOW's first unifying issues: In 1967, NOW adopted the following article to their Bill of Rights: "WE DEMAND… the right of women to control their own reproductive freedom by removing from the penal code laws limiting access to contraceptive information and devices, and by repealing penal laws governing abortion."[71] As their statement suggests, NOW's advocacy strategy involved appealing to state legislatures to repeal laws entirely.

NOW framed the issue of legal abortion in a narrower way than other rights advocacy groups. They concerned themselves primarily with abortion as a women's issue, ignoring some of the grander implications on the medical practice, family planning, and population concerns, all of which comprised substantive policy issues to the legislative abortion debates. From its inception NOW's strategy prioritized mass media outlets as way to disseminate what Deana Rohlinger refers to as "framing packages," that is, short, key talking points to sway public opinion on the abortion issue. In their early days, and before they had legal precedent on their side,

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[71] Judith Hole and Ellen Levine, *Rebirth of Feminism* (New York: Quadrangle Books, 1971), 439.

their two framing packages concerned safety (describing the dangers of back-alley abortions), and the priority of the mother over the fetus.[72]

NARAL supported a similar goal, but used a wider variety of means than NOW and implicated the role of the physician more. Notably, some NARAL leaders used direct confrontation with the law as a means of directing the public's attention to the illegal abortion issue. Patricia Maginnis, founder of the Society for Humane Abortion, and co-founder of NARAL, started with her direct confrontation method in 1966 by handing out pamphlets on the streets of San Francisco containing practical advice on abortion, as well as a list of referrals to clinics in Mexico, but eventually only had to pay a fine for littering. Later that year, she began teaching classes in self-abortion techniques. The *New York Times* described her as "a 38 year-old spinster… a slender, intense woman with the eyes of a zealot."[73] She made a point to operate outside the confines of law and social norms. She desired to face the law head-on, and eventually she won. She boasted to the Sacramento *Bee* that "Law enforcement… realizes that once the law stands trial in court, it will collapse." Eventually the San Mateo Country District Attorney answered her challenge and arrested her for illegally distributing do-it-yourself abortion kits in her classes. The trial court convicted her, but on appeal, the court found that the California state code barring her form disseminating information on abortion unconstitutionally violated her First Amendment rights.[74]

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[72] Deana Rohlinger, "Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Countermovement Dynamics," *The Sociological Quaterly* 43, no. 2 (Autumn, 2002): 487-488.
[73] Wallace Turner, "Abortion Classes Offered on Coast," *New York Times*, December 4, 1966, 81.
[74] Lawrence Lader, Abortion II, 32-33.

Lawrence Lader, a journalist, and also a NARAL co-founder, attempted to call public attention to the abortion issue fairly early on after the *Griswold* decision as well, though in a far more legal way. In 1966, Lader published his first book on abortion, aptly titled, "Abortion," discussing at length the social, moral, and legal issues surrounding abortion reform, which he viewed as a necessary measure. Lader radically suggested in this book that the recent holding in *Griswold* could be extended to protect a woman's right to terminate pregnancy, although Lader's reading of the decision was overly broad. He prophetically suggested that the most effective way to eradicate abortion law would not be by legislative repeal, which seemed like a dismal prospect in 1966, but to challenge the laws in "court cases aimed at a broader definition of our constitutional liberties and guarantees." [75]

The essence of NOW and NARAL's tactics had nothing to do with privacy, but in fact attempted to enlist medical and legal professionals in drawing attention to the issue. In Patricia Maginnis's instance, she made a point of publicizing the fact that she had endured three illegal abortions, two of which she performed on herself. Patricia Maginnis was by far not the only one who publicly harangued about her personal and private abortion experiences. In February 1969, a group of guerilla feminists known as the Redstockings, stormed a New York assembly hearing to examine expert testimony in favor of repealing New York's abortion laws, demanding to be heard as "experts" on abortion. The next month, they held their own "speak out" at the Washington Square Methodist Church, where nine women told stories to an audience of over three-hundred of their personal, private abortion

[75] Lawrence Lader, *Abortion* (New York: The Bobbs-Merrill Company, 1966), 172, 175: Lader read the *Griswold* decision as "upholding basic liberties that seem integral to all methods of family limitation."

stories. These women literally lived the prevailing feminist mantra that "the personal is political" Of course the more radical techniques like these did not garner favor with the more established groups of feminists in NOW, and in fact NOW leaders viewed these efforts as largely counter-productive.[76] Though legally, the court ultimately determined abortion to be a private matter, after the efforts of rights-advocacy groups, abortion was never a private issue. If women activists, and doctors, exercised Brandeis's "right to be let alone," illegal abortion might have remained a silent danger in the legal system.

Their efforts at lobbying legislatures either directly or indirectly via public opinion were met with, at best, mixed results. The vast majority of states failed to liberalize their laws at all, and most of those that did still implemented substantial restrictions. As summarized in Table 1, all but four states that liberalized their abortion laws added one or more additional exceptions in which abortion would be permitted, including danger to the mother's health, cases of rape or incest, or in case of a damaged fetus. The states that enacted all three additional exceptions adhered their laws to the American Law Institute's (ALI) Model Penal Code (MPC), which a committee of jurists released in 1967. When considering NOW's goals, this was a rather modest gain. President Johnson's Task Force on Family Law and Policy estimated that if all states enacted the MPC abortion law, that "only 15% of the illegal abortions would fall within the permitted classes of abortions and the

[76] Susan Brownmiller, *In Our Time* (New York: Dell Publishing, 1999), 106-109.

remaining 85% of abortions (as many as 875,000 per year) would continue to be subject to criminal sanctions."[77]

Of course, rights advocacy groups never established sole control over the way the abortion was framed in public policy and media. As I briefly discussed in section III, the fear of over-population reached crisis levels among policy makers. Between 1950 and 1980, the United States population grew 1.875 times the amount it grew between 1910 and 1940.[78] Theories resurrecting Thomas Malthus's early 19th-Century theory of exponential population growth abounded in the press. In 1957, Dr. Murray Luck, a professor of biochemistry at Stanford University, foretold of a world where natural resources could not possibly support of an estimated population of 9,000,000,000 by 2050. He proposed, as his primary solution, that "abortion, at the request of the prospective mother should not only be permitted, but in some instances encouraged."[79] Dr. John Rock of Harvard Medical School proposed a similar solution a year later, in conjunction with the wide-spread and humane practice of birth control.[80]

Because of a Malthusian fear of a growing population outstripping the country's (and the world's) carrying capacity, some suggested working toward equalizing fertility and mortality rates, i.e. the theory of zero population growth (ZPG). Census Bureau officials Ellen Jamison and Peter Gardiner suggested in 1971 that the United States could attain ZPG within a century using a uniform

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[77] Task Force on Family Law and Policy, *Personal Rights Relating to Privacy* (Washington DC, 1968).
[78] *Resident Population of States in the United States, 1900-2000* (San Antonio: University of Texas Press, 2003).
[79] Lawrence Davies, "9 Billion Humans Seen in 100 Years," *New York Times*, August 29th, 1957, 29.
[80] "Birth-Rate Brake Called Necessity," *New York Times*, November 6th, 1958, 39.

combination of direct and indirect controls. Population control theorists and policy makers framed access to legal abortions as one potential method of indirect population control.[81] Imposing direct population control, such as two-child families or compulsory sterilization after the birth of a third child, in a rights-based society seemed legally dubious at best. Well-established legal precedent favored the rights of couples to have or not have children as they pleased.[82] Meeker and Silliman proposed "The Population Control Act," wherein they commented that fully legal abortions constituted "an essential tool" for the purpose of population control. However, this framing technique was highly problematic in that abortion became a sanction for those that gave birth to more than three children, rather than an individual and civil liberty.[83]

Policy makers also attempted to introduce more realistic, less subjugating measures to curtail population growth. Republican Senator Robert Packwood, an ironic hero for the pro-choice movement, attempted to introduce the only federal legislation to fully legalize abortion in the District of Columbia in 1970. Packwood perceptively recognized the problems in the courts with abortion law, given the recent onslaught of challenges to the various state abortion laws to be discussed in section B. In a speech to Congress introducing this legislation, Packwood reminded Congress that they were "left in a situation where no doctor know whether or not he can legally perform certain types of abortions." He implored Congress to act on this matter for the good of the District of Columbia as well as to set an example for the

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[81] Thomas H. Meeker and N. Reed Silliman, "Population: The Problem, the Constitution, and a Proposal," Journal of Family Law 11, no. 1 (1971-1972): 325-330.

[82] *Meyer v. Nebraska* 262 U.S. 290, *Griswold v. Connecticut*. *Buck v. Bell* notwithstanding as compulsory eugenic sterilization, though still technically legal, fell out of favor after World War II.

[83] Meeker and Silliman, 340-341.

states. Concurrently, Packwood introduced Senate Bill 2018, which provided that "any woman… shall have access to all information concerning birth control, contraception, and all other information that she needs to make a wise choice in the matter of child bearing."[84] 1970 was a critical year for the birth control issue in addition to the abortion issue, as dissemination of birth control to non-married persons became a critical issue in the courts. Packwood believed these two pieces of legislation served the needs of population control as well as women's and physician's rights, but both failed to pass in Congress.

The AMA and the American Public Health Association (APHA) became as concerned with abortion as women's rights groups. The equally imperative, though somewhat less obvious, reality of the situation of legal abortion reform was doctors could not perform their duties using their best judgments if state laws governing medical procedures remained so restrictive. These laws certainly inhibited women from controlling their own bodies, but the legislatures aimed the punitive effect of them at those who performed the operation. One of the more important, though less conspicuous, portions of the *Griswold* ruling found that medical professionals had the legal standing "to raise the constitutional rights of the married people with whom they had a professional relationship."[85] Despite the particularly precarious position doctors faced amidst this controversy, the medical community's overall attitude progressed slowly and steadily, generally following public opinion. Although some medical professionals started taking firm, public stances on abortion law reform as early as 1959.

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[84] *Speech by Senator Bob Packwood, Introducing Bills to Provide Tax Incentives for Family Limitation, and to Liberalize Abortion Laws in the District of Columbia*, 93d Cong., 1st sess. (February 24, 1970), 54538-54539.

[85] *Griswold v. Connecticut*, 381 U.S. 479, 481; *Tileston v. Ullman*, 318 U.S. 44.

Dr. Mary Calderone, an influential physician and reproductive freedom advocate, was one of the first to speak out to the medical and public health communities about the peril illegal abortions posed. Among Calderone's grievances about the American abortion law scheme, she noted that the American Law Institute had already discussed, as of 1959, that "present laws and mores have not served to control the practice of illegal abortion:" in effect, the laws retained no use to the present society. The hundreds of thousands, if not millions, of illegal abortions that medical professionals have estimated occur every year easily serve to prove this point. Calderone also grieves over the inconsistency with which women can obtain abortions from qualified medical professionals and the stifling inability for doctors to practice medicine using their best judgment. Calderone suggested, despite the secretive and embarrassing nature of the practice at the time, that the problem would be best solved by wide-scale studies from the public health community. She wrote to this effect:

> "We will never find out how many illegal abortions have been performed but how about trying to find out how many are being asked for? Suppose requests for abortion were made reportable? Why not? Suppose that every time a woman come to a doctor asking for an abortion, he make a note of it along with some easily obtained information and sends this not to his health officer."[86]

While this solution would solve illegal abortion as a public health problem, it would achieve the opposite sort of effect from the NOW and NARAL advocacy strategies. Abortion would not become a matter of *privacy* inherently, even if the privacy of patients in such a wide-scale study were respected. Nevertheless, such a wide-scale

[86] Mary Steichen Calderone, "Illegal Abortion as a Public Health Problem," *American Journal of Public Health* 50: no. 7, (July, 1960), 951-953.

medical study never actually happened, let alone in 1960, when physicians who supported abortion reform comprised a small minority.

More medical practitioners rethought their positions with the emergence of two catalytic events in the early 1960s. First, Grünenthal, a German pharmaceutical company, began to market Thalidomide, a popular sedative, in 1957. In addition to relieving other ailments, studies showed that Thalidomide acted as a particular good inhibitor of morning sickness, and thus physicians widely prescribed it to their pregnant patients in the United States. However, American mothers quickly discovered that Thalidomide posed a significant risk to embryonic development, such that many children were born with phocomelia, a disease which caused a fetus's limbs to develop into flippers. This particular birth problem became a media frenzy in the summer of 1962 when Sherri Finkbine, the hostess of a local television show in Phoenix, Arizona, the risk of congenital defects in her child when she took Thalidomide for her morning sickness. Finkbine and her husband sued the Maricopa County Hospital in Phoenix to obtain an abortion, but the court continually delayed the proceedings. Eventually Finkbine travelled to Sweden to obtain a legal abortion. The whole fiasco drew the public's attention to the problem of restrictive abortion laws, as the media portrayed Finkbine as an innocent victim in this case.[87]

Second, an epidemic of rubella, spread throughout the United States starting in 1963-1964. Medical researchers only just discovered during the onset of this outbreak that mothers exposed to rubella during pregnancy risked birthing children

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[87] Bill Becker, "Abortion to Bar Defective Birth is Facing Legal Snag in Arizona," *New York Times*, July 25, 1962, 22; "Judge Balks at Legal Abortion for Victim of Deforming Drug," *Washington Post*, July 31, 1962, A3; "Finkbine Baby Found Deformed," *Los Angeles Times*, August 19th, 1962, A.

with severe congenital defects at a rate of 50%-60% of cases studied.[88] In two cases, women who had given birth to babies with severe congenital defects attempted to sue their attending physicians for "wrongful birth," either because the physician in question did not adequately warn the parents about the defects associated with rubella, or refused to provide an abortion after finding out the potentially of giving birth to a deformed fetus.[89]

By 1965, more substantial portions of the medical community publicly defended legal reform, particularly in light of the *Griswold* decision. Dr. Carl Goldmark, during his inaugural speech as president of the New York Medical Society, envisioned "an enlightened society," where a woman could obtain an abortion for any unwanted pregnancy, to be obtained through repealing the anti-abortion laws on the books. Though radical for the time in his address, he modestly proposed that such a society could only exist in the "utopian world of 2065 A.D."[90] Less drastically, the AMA's Committee on Human Reproduction recommended that the their House of Delegates adopt a resolution to lobby for legal reform pursuant to the 1965 ALI model. However, The House of Delegates voted against making any recommendations, largely due to the votes of practicing Roman Catholic Doctors and psychiatrists. The New York Times quoted one psychiatrist as saying that "psychiatrically, a woman is worst off after an abortion because of her remorse."[91]

In the Spring of 1967, the AMA finally adopted the resolution to fully support MPC-structured reform, because, as one article in the *Journal of the American*

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[88] Mary Sheridan, "Final Report of a Prospective Study," *British Medical Journal* 2: no. 5408 (August 29, 1964), 536.
[89] Gleitman v. Cosgrove, 49 N.J. 22; Stewart v. Long Island College Hospital, 296 N.Y.S.2d 41. Neither complaint succeeded in court.
[90] "Leading Physician Calls for Changes," *New York Times*, October 26, 1965, 37.
[91] Thomas O'Toole, "A.M.A. Puts Off Abortion Stand," *New York Times* 2 December 1965, 24.

Medical Association noted, the topic of abortion "can no longer be brushed aside as unmentionable. While abortion is still a controversial subject… the emphasis on individual human dignity… has served to identify the dilemma and to bring about a dialogue aimed at seeking solutions."[92] By 1970, the AMA actively encouraged legislatures to repeal existing abortion laws, even those which had conformed to the ALI's proposed code. Finally, the next year, the AMA approached Margie Pitts Hames, Mary Doe's attorney in *Doe v. Bolton*, asking her to help draft an amicus brief in support of challenging the constitutionality of Georgia's abortion laws.[93]

Fairly obviously, The Catholic Church publicly spoke out against all forms of abortion liberalization, even though individual Catholics had more varied opinions. However, some organized religious sects, particularly Protestants, actively favored abortion law liberalization. The Unitarian Universalist Church encouraged, very early on in 1963, that abortion should be legal "if there exists some compelling reason, physical, psychological, mental, spiritual, or economic."[94] The New York Episcopal Diocese strongly backed the New York Beilenson Bill in 1966 and 1967, which would have liberalized abortion laws in New York according to the MPC.[95] The Lutheran Church took a considerably more conservative stance, but by 1968, most synods fully supported MPC-style reform.[96] That same year, the American Baptist convention adopted the official position that "recognized abortion should be a matter of responsible, personal decision."[97]

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[92] "Abortion and the Law," *The Journal of the American Medical Association* 199, no. 3: 212.
[93] David Garrow, *Liberty and Sexuality*, 455, 491.
[94] "Unitarians Urge Legal Abortions," *New York Times*, May 19, 1963, 81.
[95] Ronald Mairoana, "Churches Debate Abortion Reform," *New York Times*, January 31, 1967, 25.
[96] "Resolution on Abortion Voted by Lutherans," *Washington Post*, May 22, 1968, A3.
[97] "Baptists Ask Abortion Change," *Chicago Tribune*, June 1, 1968, S A7.

B: Legal Trends

For many jurists, legislative repeal seemed like the ideal solution to this highly controversial, highly publicized problem. Because the law did not threaten these jurists, who were largely neither women, nor doctors, viewed the slow pace of repeal and liberalization as progress, not problematic. Then recently-retired Supreme Court justice Thomas Clark, who had agreed with Arthur Goldberg's interpretation of the law in *Griswold*, wrote in 1969 of how the eradication of abortion laws, vis-à-vis repeal, would allow "that the right of childbirth should be left to each woman acting on the advice of her doctor. This would have the effect of removing the issue from the hands of the legislatures and the courts."[98] Nonetheless, The Supreme Court's decisions in *Griswold* gave women, rights advocates, physicians, and legal professionals constitutional weaponry to use in the struggle to legalize abortion in the United States. Due to the discouraging results in state legislatures, advocates ran out of options to affect change in abortion laws.

Legal scholars and rights advocates alike found numerous ways to attack state abortion laws on constitutional grounds. In the period between 1965 and 1972, Federal District courts around the country heard twenty-three cases where physicians, women, and rights advocates constitutionally challenged various state abortion laws. State courts considered an additional thirty-five cases. These cases largely fell into two broad categories: the first consisted of interested parties suing the state attorney general and calling for a three-judge panel to determine the constitutionality of the laws in question without necessarily contravening the laws

[98] Thomas Clark, "Religion, Morality, and Abortion: A Constitutional Appraisal," *Loyola of Los Angeles Law Review* 2, no. 1 (1969): 3-4.

beforehand. The plaintiffs in these cases usually requested that the courts enjoin the state attorney general from enforcing the law. The second category of case consisted of physicians and non-medical practitioners as plaintiff/appellants, who had already been convicted under the state anti-abortion statute in question, requesting the courts invalidate the law or portions of the law, in the hopes that the courts would then hold their convictions void.

Rights advocates and medical practitioners fallen victim to unclear, restrictive abortion laws waged the vast majority of their constitutional challenges between 1969 and 1972, including *Roe v. Wade*, *Doe v. Bolton,* and *United States v. Vuitch,* those cases which the Supreme Court eventually granted certiorari. By the time these waves of suits occurred, asserting rights through the courts seemed like the only way to accomplish social change. Harriet Pilpel, a feminist lawyer and one of the plaintiff's counsel in *Poe v. Ullman*, insisted that "Our abortion laws today, like birth control laws in the past, must be interpreted by the courts." Lawrence Lader envisioned such a test case in 1966 where "a group of eminent physicians [would] testify in court that the abortion sought or denied was essential to the good practice of medicine."[99] Test cases of nearly every conceivable constitution permutation involved such testimony, but it would still take three years until such arguments were accepted in the state and federal district courts.[100]

Most arguments the various plaintiffs advanced either challenged the laws on grounds which would apply the right to privacy in *Griswold* to abortion as well as contraception, or challenged the wording of the laws based on vagueness or

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[99] Lader, *Abortion*, 154.
[100] In *People v. Belous*, the California State Supreme Court determined that the California abortion statutes unduly deprived physicians of their right to practice medicine

overbreadth, or both. For example the appellants in *Crossen v. Breckenridge*,[101] *Rosen v. Louisiana State Board of Medical Examiners*,[102] *Commonwealth v. Page*,[103] and *Cheaney v. State*[104] all argued that the marital right to privacy which permitted couples to freely use contraceptives as a function of First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments should extend to a woman's right to terminate her pregnancy. The appellants in *Vuitch v. United States*,[105] *People v. Fulton*,[106] and *State v. Guerrieri*[107] argued their respective state statutes were so unconstitutionally vague or overbroad that they violated the appellant's Fourteenth Amendment due process. These arguments required the courts to either determine whether *Griswold* could be expanded or parse the particular semantics of their respective state statutes such that they could be reasonably construed as "too vague."

Naturally, the diverse state courts ruled inconsistently with one another, as before 1973, they could only rely on each other's precedent. After only a single challenge, the Centre Country common pleas court invalidated Pennsylvania's anti-abortion statute as contravening the right to privacy, a ruling which the state superior and supreme courts upheld over the course of separate hearings. Judge Campbell's opinion in this case noted:

> Both the Pennsylvania [anti-abortion] and Connecticut [anti-contraception] statutes are at odds with current medical practice, both invade the intimate realm of marital privacy, both interfere with a married couple's freedom to control the number and spacing of

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[101] 446 F.2d 833.
[102] 318 F. Supp. 1217.
[103] 54 Pa. D & C. 2d 12.
[104] 259 Ind. 138.
[105] 305 F. Supp. 1032.
[106] 84 Ill. App. 2d 280.
[107] 20 Ohio App. 2d 132.

> offspring, and both are in conflict with a solution to one of the world's critical problems, the population explosion.[108]

The Louisiana Supreme Court, on the other hand, considered three separate challenges to Louisiana's anti-abortion statute and upheld the law each time, because even though "similar attacks are going on in several states… the mentioned causes would not be binding on this court. And the argument is even less impressive when, as here, we cannot determine whether the statutes are sufficiently similar so as to be persuasive."[109] While Pennsylvania Court determined that the social implications of the abortion problem were substantive to the constitutional question, the Louisiana Court actively refused to take the same position.[110]

Some appellants offered more creative constitutional arguments outside the scope of the *Griswold* finding, which the courts never found persuasive. The plaintiffs in *Steinberg v. Brown*, argued that to deny a woman the right to obtain an abortion amounted to state-sponsored cruelty, thus encroaching on her Eighth Amendment rights. Judge Don Young of the court retorted in his opinion that "It may seem cruel to a hedonist society that 'those who dance must pay the piper,' but [unwanted pregnancy] is hardly unusual."[111] A few appellants reasoned that the abortion statutes operated discriminatorily in effect against the economically disadvantaged, who did not have the means to pay physician's fees or travel to other states with more liberal laws. The courts in response either found the contention immaterial[112] or did not fall within the intended use of the equal protection

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[108] *Commonwealth v. Page*, 54 Pa. D & C. 2d 12, 15.
[109] *State v. Shirley*, 256 La. 665, 669.
[110] A complete list of the state and district federal court decisions can be found in Appendix.
[111] 321 F. Supp. 741, 748.
[112] *Cheaney v. State*, 259 Ind. 138, 148.

clause.[113] As to the equal protection clause, it is not surprising for the time that the courts would tend to reject the argument: before 1973, the equal protection clause only carried weight insofar as litigants could demonstrate discrimination on the basis of race or national origin.

While the Supreme Court only had seven sitting judges in 1971, it granted certiorari to two significant district court cases, besides *Roe v. Wade* and *Doe v. Bolton*, both of which played an integral part in the Court's ability to rule in *Roe*. The former was *Vuitch v. United States*.[114] Dr. Milan Vuitch, a licensed physician in the District of Columbia had indictments pending against him for providing illegal abortions. Vuitch contended that the D.C. law violated his Fourteenth Amendment rights due to the law's vagueness, because it outlawed all abortions not "necessary for the preservation of the mother's life or health."[115] The district court sided with Vuitch and found that the word "health" presented confusion and struck down the statute. Nevertheless, the Supreme Court decided the word "health" was not unconstitutionally vague in that "in accord with general usage and modern understanding, and a recent interpretation… by the federal courts, includes psychological as well as physical wellbeing," thus reversing the district court's ruling[116] If anything, the Court's ruling should have secured abortion regulation in D.C. Afterall, the Court allowed the law to remain intact, and they refused to entertain Vuitch's substantive First and Ninth Amendment arguments. But, under the Vuitch decision, doctors could practice more freely than ever. Lawrence Lader explains:

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[113] *Crossen v. Attorney General of Kentucky*, 344 F. Supp. 587, 592.
[114] 402 U.S. 62 (1971).
[115] D.C. Code Ann. § 22-201.
[116] 402 U.S. 62, 71-72.

> [The *Vuitch* decision] broadened two existing rights… The Court enlarged the definition [of health] to include psychological well-being… Even more important to a medical profession terrorized by the possibility of proving an abortion necessary, the Court emphatically placed the burden of proof on the prosecution.[117]

Previously, as the burden to prove the necessity of an abortion fell doctors, they had no interest in interpreting the D.C. statute liberally. When *Vuitch* reversed that standard, it became exceedingly difficult for the state to prove that a doctor did not perform an abortion to *preserve the psychological health* of the mother.

Eleven months later, the Court rendered a second critical opinion in *Eisenstadt v. Baird*. The defendant, William Baird, already made a name for himself by directly confronting contraception regulations in New Jersey and Massachusetts. Here, a trial court in Massachusetts convicted Baird for exhibiting contraceptives while delivering a lecture at Boston University, then giving a young woman a package of vaginal foam. On appeal, the Massachusetts Supreme Court reversed his conviction as to exhibiting the contraceptive as violative of his First Amendment rights, but sustained his conviction as to giving out vaginal foam. He subsequently appealed again to a the federal district court that dismissed his case. He appealed yet a third time to Court of Appeals for the First Circuit, which reversed the lower court's dismissal before finally receiving the opportunity to appear in front of the Supreme Court.

In a curious 6-1 decision, the Supreme Court overturned his conviction, using *Griswold* as its primary grounds. The state contended in oral argument that the purpose of the anti-contraception regulation was "to limit contraception in and of itself." The Court also saw no merit in the state's claim that the statute deterred

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[117] Lader, *Abortion II*, 115.

premarital sex or illicit sexual relationships. Brennan had no problem extending the Court's ruling in *Griswold* to apply to single people, even though every constitutional justification in *Griswold* stressed the substance of the marital relationship to that particular case. The majority could not ascertain any rationale as to why married people could obtain and use contraceptives, but single could not. Thus William Brennan, writing for the Court, determined that the Massachusetts law excluded a particular class of people which could not withstand rational basis review under the Fourteenth Amendment equal protection clause.

Of privacy, Brennan famously wrote, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[118] William Douglas concurred with Brennan, but decided the case on simpler grounds: both of Baird's convictions violated his right to First Amendment free speech. Douglas viewed Baird's distribution of contraceptive in a lecture setting as symbolic speech, rather than conduct, and thus could not be punished. Douglas compared Baird's situation with any other classroom setting: "Handing an article under discussion to a member of the audience is a technique known to all teachers, and is commonly used… Passing one article to an audience is merely a projection of the visual aid, and should be a permissible adjunct of free speech."[119]

Douglas's application of the First Amendment seems the most logical, especially considering the Court had just announced in 1968 and 1969 a clear and

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[118] 405 U.S. 438, 453.
[119] 405 U.S. 438, 460.

comprehensive theory of symbolic speech. The Court established in *United States v. O'Brien* that "When speech and non-speech elements are combined in the same course of conduct, a *sufficiently important government interest* in regulating the non-speech element can justify *incidental limitations* on free speech" (emphasis mine).[120] Here, the Court established that giving out non-hazardous contraceptives did not serve an important government interest. Moreover, the limitation on the non-speech element of symbolic speech directly related to the content of that speech, which violated the *O'Brien* standard. Nevertheless, *Roe* depended on the Brennan's oblique equal protection analysis, as Douglas's interpretation failed to extend *Griswold*'s privacy right in any way.

The conglomeration of social and legal trends after *Griswold* disengaged reproduction from privacy. Reproduction controlled the overall health of society according to population theorists. It served as a way for women to take control of their own lives in opposition to men for feminists. It defined the effectiveness of the medical profession for doctors. While *Griswold* solidified the right to privacy as one grounded in marriage, immediately thereafter interested parties tried every which way to extend privacy more generally. Moreover, as Justice Black feared in his *Griswold* dissent, "privacy" became ill-defined and ambiguous. Neither Brandeis's nor Stanton's original interpretation of what privacy involved became clear or applicable as many started testing abortion statutes.

[120] 391 U.S. 367, 376.

Chapter V: "Convenience, whim, caprice:" An Analysis of *Roe v. Wade*

On average, The Supreme Court renders decisions on non-emergency cases eighty-one days, or eleven-and-a-half weeks, after the presentation of oral arguments. The Court announced its decision in *Roe*, and its companion case *Doe v. Bolton*, fifty-seven weeks and five days after oral arguments, which is only one indicator of the incredible complexity and unprecedented nature of this case. The genesis of this case traces back to 1969 in Houston, Texas, when twenty-year old Norma McCorvey discovered she has become pregnant with her second illegitimate child. According to McCorvey, she travelled to Dallas to seek an abortion on the basis that she had been raped, which did not constitute an exception under Texas law at the time, but her friends knew of some physicians who would perform one in that circumstance nonetheless. The physician in Dallas refused to perform the abortion because McCorvey could not produce a police report. In fact she later admitted, after the *Roe* decision, that she had not been raped. McCorvey then sought the help of an abortionist without a medical license, but his clinic had been shut down by the police before she could actually obtain an abortion. Finally, McCorvey's friends referred to Sarah Weddington and Linda Coffee, two recent University of Texas Law graduates interested in overturning the Texas anti-abortion statutes.[121]

The Texas statute in question was one of the most restrictive in the country: it remained unchanged from the time the legislature passed it in 1854 and only allowed a physician to perform an abortion to save the mother's life. Weddington and Coffee filed suit against Henry Wade, the Dallas County District Attorney, in

[121] Norma McCorvey and Andy Meisler, *I Am Roe: My Life, Roe V. Wade, and Freedom of Choice* (New York: Harper Collins Publishers, 1994), 34-37.

Federal Court on behalf of Ms. McCorvey, who assumed the pseudonym Jane Roe, as well as on behalf of John and Mary Doe, a married couple whom doctors advised should not conceive because of Mary Doe's neuro-chemical imbalance.

An equally important player in this case was Sandra Cano, then known as Sandra Bensing, a twenty-two year mother of three from Atlanta who found herself pregnant a fourth time in April of 1970. At the time she became pregnant, her husband had been incarcerated for multiple charges of kidnapping and molestation, and she had to leave job as a Krystal waitress after suffering a psychological breakdown. She then approached the Atlanta Legal Aid Society for help. Cano claimed in 2003 that she needed a lawyer to divorce her husband, however, the Atlanta Legal Aid Society claimed, and her affidavits also supported, that she sought their help because Grady Memorial Hospital denied her request for an abortion. The laws in Georgia at the time were considerably more lenient than the Texas laws, as the Georgia state legislature had liberalized its anti-abortion statute in 1968, based on Model Penal Code. In Georgia, a woman could legally obtain an abortion if her life, health, or the health of her fetus were in danger, or in the event of rape or incest. However she would need the opinion of three physicians and the approval of a special hospital committee, licensed by the state Joint Commission on Accreditation of Hospitals. A few days after the hospital denied Cano's request, the Margie Pitt Hames, of the Legal Aid Society, filed suit against Arthur Bolton, the attorney general of Georgia in a Federal District Court.[122]

[122] Gayle White, "Roe v. Wade Role Just a Page in Rocky Life Story," *The Atlanta Journal and Constitution*, January 28, 2003.

On June 17th, 1970, The Federal District Court in Texas invalidated Texas's anti-abortion statute on the basis that it infringed upon the "fundamental right to choose whether to have children" protected by the Ninth Amendment, the First amendment guarantees of freedom of speech, and against state establishment of religion, as well as unconstitutional vagueness and overbreadth. The District Court granted the plaintiffs declaratory relief, but denied to issue an injunction preventing the district attorney from further prosecuting doctors under the law because, under the state's controlling precedent, Porter v. Kimsey, the law did not "abridge free expression on its face."[123, 124] Six weeks later the Federal District Court in Georgia invalidated parts of the Georgia statute based solely on the right of privacy guaranteed by the Fourteenth Amendment due process. Like in *Roe*, the court granted declaratory relief, but denied injunctive relief.[125] The Supreme Court received both cases on direct appeal from the plaintiffs and consolidated them: plaintiffs argued the cases on the same day and the Court announced both decisions on the same day.

Weddington, one of the youngest lawyers to have ever argued in front of the Supreme Court at the age of twenty-six, delivered her oral argument on the morning of December 13th, 1971. Her nerve became apparent in her frequent stuttering, pausing, and distraction to the point where she knocked over her microphone twice during her initial argument. Nevertheless, she opened with several eloquent point about the deleterious effects of the Texas's anti-abortion statute on the class of women she represented. "Pregnancy to a woman," she boldly argued, "is perhaps

[123] *Roe v. Wade*, 314 F. Supp. 1217, 1224
[124] 309 F. Supp. 993, 995.
[125] 319 F. Supp. 1048, 1056.

one of the most determinative aspects of her life. It disrupts her body. It disrupts her education. It disrupts her employment. And it often disrupts her entire family life."[126]

For the first seven minutes of her thirty-minute argument, she spoke more as if she were testifying in front of a legislative committee, as she only addressed the Constitutional issue after Justice Stewart asked her three times to get to the point. Weddington briefly argued that she believed the right to not continue a pregnancy lied in the Ninth Amendment. This seemed like a bold, but strategic move on her part: she argued in the District Court that a right to terminate a pregnancy consisted in the right to privacy, as in *Griswold*, however, as noted above, the Court invalidated the statute almost solely on Ninth Amendment grounds. In arguing for the Supreme Court, Weddington avoided relying on *Griswold*:

> "Certainly, under the Griswold decision, it appears that the members of the Court in that case were obviously divided as to the specific constitutional framework of the right which they held to exist in the Griswold decision. I'm a little reluctant to... aspire to a wisdom that the Court did not... was not in agreement on."[127]

After that allusion, Weddington did not refer to *Griswold* in the rest of her oral argument, which, from the outset, indicated that she had little desire to argue privacy rights established up until this point with regard to abortion.

Weddington's argument instead relied more on Justice Goldberg's interpretation of *Griswold*, that access to abortion, was an "implied fundamental right" such that it merited strict protections despite its lack of basis in the Bill of Rights. Unlike Thomas Emerson's argument in *Griswold*, Weddington repeatedly

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[126] Sarah Weddington, Supreme Court Oral Argument, December 13th, 1971.
[127] Ibid.

spoke of the difficult position of women. The manner of Texas's legal construction left the Federal Courts as "the only forum available to these women." This is specifically the case because the Texas anti-abortion statute places no culpability on women, despite the fact that they solicit the doctor to perform the abortion. Doctors were liable under the law; women were not, meaning doctors could seek redress in the state Courts if they felt the laws violated some Constitutional right, but women could not. Thus, as Weddington repeated several times "the Texas courts have referred to the woman as being the victim, and they have never referred to anyone else as being the victim."

Much of the discussion among Weddington and the nine justices also did not concern constitutional matters. Justice White pressed her on whether or not she made, or the law should make, any distinction during the progression of the pregnancy. Justice Stewart asked how Texas law viewed the fetus. Of course, in context, probing into the nature of fetal rights and when or how a fetus should be granted rights as if it were a person, would seem critical to the ultimate Constitutional question. However, when considering the opinions that the court eventually rendered, all of this inquiry went to waste as the Court specifically declined to address the question of whether or not a fetus counted as a person within the meaning of the Constitution.

Jay Floyd, a Dallas County assistant attorney general, argued on behalf of Mr. Wade for the first round of arguments. Curiously, Mr. Wade did not decide to argue in, or even attend, the proceedings against him, even though he gained notoriety in Dallas County for winning every case he personally argued. The fact of the matter, which Wade himself revealed years later, was he was not personally interested in

Roe case or in legal arguments over abortion. In 1989, the Dallas Morning News quoted him as saying, "in some cases abortion is justified."[128] Justice Thurgood Marshall, who remained silent during Weddington's argument, quickly injected his voice into the conversation at the beginning of Floyd's argument by asking what Texas's interest in its own statute was. Floyd critically erred in stating that the Texas "had a compelling interest because of the protection of fetal life." This point ultimately destroyed Floyd's case because, as the justices would point out, first the Texas statute did not originally intend specifically to protect fetal life, and second, this argument assumed fetal life had rights tantamount to that of a pregnant woman. Floyd essentially prayed for the Court to defer to the wisdom of the legislature in making such laws, because the legislature alone had the power to determine whether or not a fetus could be considered a person with rights under the law. However, when the Court inquired as to how Texas law viewed fetal life, it effectively obviated the thrust of Floyd's argument. As to whether or not Texas viewed a fetus as a person within the meaning of the law, all Floyd could only say, "I don't think the courts have come to the conclusion that the unborn has full juristic rights—not yet. Maybe they well. I don't know."[129]

The Court entertained re-arguments from Weddington and Floyd's co-counsel, Robert Flowers, ten months later, in October of 1972. They took this unusual step because only seven justices heard the original arguments in December, 1971. By September, 1971 both Hugo Black and John Marshall Harlan retired, and their respective replacements, Lewis Powell and William Rehnquist had not both been confirmed by the Senate until January, 1972. This change left both sides

[128] *Dallas Morning News*, 15 May 1989.
[129] Jay Floyd, *Roe v. Wade* Oral Argument, December 13th, 1971.

completely unsure as to how the new Court composition could affect the decision. Weddington counted on Douglas and Brennan to vote in her favor, while Flowers could reasonably rely on the new stalwart conservatives, Burger and Rehnquist. Thurgood Marshall, having been a well-known civil rights advocated associated with National Association for the Advancement of Colored People (NAACP), also seemed likely to sympathize with Weddington. Stewart, White, Blackmun, and Powell comprised the key swing portion of the Court. Stewart had dissented in *Griswold*, but sided with the majority in *Eisenstadt*. White sided with the majority in both *Griswold* and *Eisenstadt*, but disagreed with the majority's reasoning in both. Blackmun was a well-known life-long friend of Warren Burger, and in his early years as a Supreme Court justice, voted on the same side as Burger 87.5% of the time.[130] Powell had made a name for himself both in his close relationships with civil rights leaders, as well as his staunch advocacy for big business influence.

In re-argument, Weddington revised her position on the Constitutional issues: this time, she relied much more on the Fourteenth Amendment right to privacy and *Griswold*. The recent Second Circuit Court of Appeals decision in *Abele v. Markle* also helped Weddington's case substantially. The plaintiffs in *Abele* challenged the Connecticut anti-abortion statute, which posed similar restrictions on abortion to the Texas statute. There, the court found the a fetus could not be considered a person within the meaning of the Fourteenth Amendment and that the state interest of protecting fetal life "could not be advanced by means of such a drastic abridgement of pregnant women's rights."[131] Because *Abele* had the same

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[130] Linda Greenhouse, *Becoming Justice Blackmun* (New York: Times Books), 180-186. The 87.5% figure refers to Greenhouse's review of Blackmun's voting record from 1970 to 1975.
[131] 324 F.Supp. 224, 232.

basic premise as *Roe*, *Abele* could easily dictate *Roe*'s outcome, and relieve the justices from having to invent law. Moreover, the Supreme Court of New York and the Federal District Court of Pennsylvania had decided on two cases by this time where plaintiffs, claiming they were as guardians ad-litem of unborn fetuses, sued hospitals to enjoin them from performing abortions. In both of these cases, the courts found that the fetuses possessed no rights within the meaning of the Constitution, and found in favor of the hospitals.[132]

In addition to these new arguments, Weddington, as before, stressed the plight of women in this situation, continuously referring to "women as the victim" in this situation. Justice White once again inquired as to whether or not the fetus should be considered a person, so much so that it appeared as if the case hinged on personhood. Weddington did her best to evade this argument, as she intended to represent women's interests. However, Blackmun, White, and Burger all repeatedly brought up the issue of whether a fetus could be considered a person. When asked if she would lose her case if the Court determined that a fetus was entitled to protection under the Constitution, she laughed nervously and said "Well, I would have a very difficult case," because, in that case, "you would have [the requisite] State compelling interest which, in some instances, can outweigh a fundamental right." This is to say, all parties agree that if the state could show a compelling interest in formulating anti-abortion laws, the Court can rule in the state's favor.

Fortunately for Ms. Weddington, Mr. Flowers's argument displayed that he did not have the law to back the state up. First, Justice Stewart asked Flowers if he

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[132] Byrn v. New York City Health & Hospitals Corporation, 31 N.Y.2d 194 (1972); McGarvey v. Magee-Women's Hospital, 340 F. Supp. 751 (1972).

could point to any precedent that acknowledged that a fetus carries the same rights as a person. Flowers could not. Flowers made the mistake of trying to make an argument surrounding the original intent of the Constitution. Mr. Flowers was wrong to contend this on three grounds, two of which the Court pointed out. First, that the states did not adopt the relevant amendment, the Fourteenth Amendment, to the Constitution until 1868. Second, the Fourteenth Amendment specifically refers to "persons" as "*born* or naturalized in the United States." The text alone excludes the *unborn* from coverage. Finally, even if Flowers intended to refer to the Ninth Amendment, a grounds which Weddington continued to argue, the "original intent" completely undermines Flowers's point. According to legal historian, Russell Caplan, "The Ninth Amendment was drafted in order to allay concern that the Constitution might abolish rights traditionally guaranteed by state law. These "other" rights were understood to refer to the common law…"[133] The common law, at the adoption of the Constitution, permitted abortion before quickening, as I noted above in Chapter II.

The Court did not point out this last problem to Flowers, either because the written history of the Ninth Amendment is of relatively recent vintage, or because Flowers specifically intended to refer to the Fourteenth Amendment. Even though the Court did not mention this specific problem, Flowers addressed it by citing legal scholar Joseph Witherspoon, who theorized that the framers of the Constitution specifically thought that "[The right to] life… is inherent by nature in every

[133] Russell Caplan, "The History and Meaning of the Ninth Amendment," *Virginia Law Review* 69, no. 1: 227-228.

individual, and exists even before the child is born."[134] Flowers's contention still does not address the fact that in the new republic, abortions were perfectly legal, and Flowers did not cite any evidence to suggest that the framers did anything to change that particular feature of the common law.

The Court additionally forced Flowers to admit that should the statute stand on the grounds that fetal life was protected to a right to life, then all of the abortion reforms of the past six years in the United State would be wildly unconstitutional. Thus a woman could not, under any circumstance, seek an abortion for the sake of her physical health, in the event of rape, or even to save her own life. Finally, Flowers urged the Court to look deeply into the extent of current medical research to make a determination as to whether or not a fetus deserved protection. This amounted to another unfortunate mistake in that it was precisely by looking into the extent of medical research, and specifically taking into account the positions of the American Medical Association and the American Public Health Association, both of which had taken strong pro-liberalization stances by the late 1960s, that the Court ultimately ruled against the state of Texas.

What is so striking about Blackmun's opinion is that it hardly even touches on the complicated Constitutional issues at play. Blackmun opens his opinion with a lengthy recapitulation of the history of abortion and the medical research surrounding it, beginning from the ancient Greeks. He readily acknowledged the drastic shift in American legislative attitudes toward abortion starting in the early to mid 19th century. However, he does revise the history somewhat to the benefit of the

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[134] Joseph Witherspoon, *Basic Problems in Civil and Political Rights: the Jurisprudence of Social Change*, (Austin: University of Texas Press), 93.

state: he particularly insisted that states enacted the anti-abortion statutes of this time primarily for the benefit of the mother's health as well as state interest in fetal life. He then noted how the AMA changed its view, starting in 1967. The AMA's opinion, as Blackmun recognized, shifted due to "the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available," and a feeling "that this trend will continue"[135]

Similarly, he recognized the APHA's position that abortions would be best performed in fully-equipped hospitals during the first trimester of pregnancy. Reference to medical opinions clearly set up the structure under which Blackmun ruled. He found it important that before the states started enacting anti-abortion statutes that the common law distinguished between aborting a fetus before and after quickening. The extent of medical research by 1973 had firmly established pregnancy in a framework of trimesters. Finally, before giving his own opinion, he wrote of the American Bar Association (ABA)'s opinion. The ABA proposed a "Uniform Abortion Act" in 1972, which recommended that all states adopt laws similar to the MPC, adding that the doctor may only perform the abortion up to twenty weeks after conception.

Blackmun cited three reasons why he viewed the state abortion laws, particularly those enacted in the 19th Century, were archaic: first, that they "were the product of a Victorian social concern to discourage illicit sexual conduct." Second, "when most criminal abortion laws were first enacted, the procedure was a hazardous one for women." Finally, that the State had an interest in protecting fetal life. As I previously outlined in Chapter II, these reason were all only partially true,

[135] Justice Harry Blackmun, Opinion for *Roe v. Wade*, 410 U.S. 113, 143; citing…

and were explainable by a larger racist conception of growth trends in certain segments of the population. Blackmun's failure to recognize this imperative trend may well be the fault of Sarah Weddington, as she introduced no evidence to that effect in either her brief or her oral argument.

To establish that such a right as "right to privacy" existed in the Constitution was a much easier task for Blackmun than for Douglas before him in *Griswold*, because Douglas had already created it. However, Blackmun used a slightly different line of precedent. Rather than relying primarily on *Meyer* and *Pierce*, Blackmun traced the right of privacy to *Union Pacific Railroad v. Botsford*. The Court in this case determined that the law could not compel someone to submit to a medical examination *without his or her consent,* because "No right is held more sacred or is more carefully guarded by the common law than the right of every individual to the possession and control of his own person."[136] While this case was clearly different from *Roe* because consent for the procedure was clearly not at issue, *Union Pacific* established control of one's own person as a fundamental right. Blackmun more thoroughly relied on very recent precedent, including *Katz v. United States* (1967) and *Terry v. Ohio* (1968), both of which had to do with the literal "search and seizure" interpretation of the Fourth Amendment, rather than its penumbras.

Griswold seemed to be the controlling precedent, although Blackmun did not present any coherent theory of which interpretation of the decision he intended to use. On pages 129 and 152 of his opinion, Blackmun cited that personal and sexual privacy relied on the mutually exclusive interpretations of penumbras surrounding the Bill of Rights incorporated the Fourteenth Amendment as well as among a right

[136] 141 U.S. 250, 251 (1891).

reserved by the people in Ninth Amendment. Recall that Justice Goldberg invoked the Ninth Amendment specifically because he disagreed with Douglas's incorporation method. He additionally invoked the *Palko* rationale, dealing with rights "implicit in the concept of ordered liberty" on page 152, as well as Justice White's opinion involving a use of rational basis review to determine how well a law serves "legitimate state interests." To this end, Blackmun opined that Texas had failed to provide the Court with a state interest compelling enough to justify its law, as written.

At best, Blackmun's constitutional basis for the opinion was inconsistent, as he repeatedly switched his Constitutional position. The syllabus for the opinion dictated that the Court overturned the Texas statute because it stood in violation of Fourteenth Amendment due process. The Fourteenth Amendment, the Court said, "protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy."[137] The express opinion, though, did not confer unto women the right to terminate a pregnancy, but rather gave physicians the right to act in accordance with his or her "best medical judgment."[138] The Court then explicitly limited the legitimate practice of abortions to doctors. While consistent in theory with the idea that having an abortion performed by a licensed doctor is in the best interests of the pregnant woman's health, leaving the ultimate right to decide up to the doctor presented problems for later abortion cases, which I will discuss in the final chapter.

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[137] Blackmun, *Roe v. Wade*, 114, 129, 147, 152-153.
[138] Blackmun, *Roe v. Wade*, 164.

The nature of when and how a woman can obtain an abortion created another defining facet of this opinion. "The privacy right involved… cannot be said to be absolute," Blackmun wrote. The Court refused to rule on whether or not life begins at conception, which rendered this opinion all the more confusing considering that the opinion only granted doctors to perform abortions on demand in every state during the first trimester of pregnancy. To make this determination, Blackmun, once again heavily relying on the extent of medical research by this time, placed great weight on the fact "up until the twelfth week of pregnancy, abortion had a lower mortality rate than childbirth," thus protecting women's general health interests.[139] The Court decided that as a woman's pregnancy progressed, the state's interest "in protecting the potentiality of life" grew, such that, at some undetermined point during the pregnancy, though after the first trimester, the state interest became "compelling." The Court described one possible point of where a state interest could become compelling as the point of "viability." In 1973, medical convention placed viability, the point at which a fetus can survive outside of the womb, at around twenty-eight weeks after conception. The *Roe* framework, therefore, depends on medical determinations, which obviously change with time.

In defense of this extension of privacy, Blackmun brought the wealth of state and district court cases that have held various state laws unconstitutional. The more problematic feature of this opinion is not that Blackmun's interpretation of the was particularly inventive. It was not. But, this opinion usurped the legislature's ability to make a determination about legal privacy entailed. Some legislatures determined that the fetus had rights and thus should be protected under the law; some district

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[139] Nancy Rhoden, "Trimesters and Technology: Revamping *Roe v. Wade*," *The Yale Law Journal* 95: no. 4 (March, 1986), 639.

courts agreed. Some legislatures determined exactly the opposite, and some district courts agreed. This opinion had a sweeping effect because Blackmun did not limit this opinion to apply only to the Texas statute, which he easily could have done.[140]

Legal commentators as well as the courts typically conflate the findings in *Doe* with *Roe.* Here, I have not specifically analyzed the arguments presented by Margie Pitts Hames and Dorothy Beasley, who argued on behalf of Arthur Bolton, specifically because the arguments on both sides were nearly identical to those presented by Sarah Weddington, Jay Floyd, and Robert Flowers. In fact, Weddington and Hames met with each other on several occasions before the *Roe* and *Doe* hearings to compare arguments. However, the ruling in *Doe* actually had substantially different implications. "Had the *Roe* case gone to the Supreme Court without *Doe*," Emory University professor David Garrow opined, "the Supreme Court's ruling might have been much narrower."[141]

Doe in and of itself coheres substantially more as a proper Constitutional opinion than *Roe*. Rather than invalidating the Georgia statute on its face because the statute violated the Fourteenth Amendment findings of *Roe*, the Court, again through Justice Blackmun, addressed each specific procedural requirement of the statute. *Doe* first reiterates that the decision of whether or not to perform an abortion belongs to the attending physician. In the interest of preserving a physician's right to exercise his or her own best judgment, *Doe* invalidates three important procedural requirements of the Georgia statute. First that a physician must perform an abortion in a hospital accredited by the Joint Commission on

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[140] Michael J. Perry, *We the People: The Fourteenth Amendment and the Supreme Court*, 164.
[141] David Garrow, *Liberty and Sexuality*, (New York: Macmillan Publishing Company, 1994), 446, 499.

Accreditation of Hospital (JCAH), because JCAH-accredited hospital possess no unique capability to perform abortions better than other formal medical settings. Second, the interposition of a hospital committee on abortion for the sake violates patient rights because of the assumption that a physician's judgment needs approval. Third, that a physician has not rational need to search for the concurrence of two of his or her colleagues to perform the procedure, because this would not be required in the instance of any other medical procedure. *Doe* additionally invalidated Georgia's residency requirement as violative of the privileges and immunities clause of the Fourteenth Amendment. Constitutional precedent expressly "protects persons who enter other States to ply their trade" under the privileges and immunities clause, so thus must protect those who travel to another state to seek medical services.[142]

Chief Justice Burger delivered a short, ineffectual concurrence. He explained his apprehension with "the Court [taking] notice of various scientific and medical data in reaching its conclusion," though did not offer any alternative analysis, or really express why Blackmun's approach troubled him. He agreed with the overall conclusion regarding statutory violation of the Fourteenth Amendment. Burger added briefly that he would allow the certification of two physician for the abortion procedure, contrary to the Court's finding in *Doe*. Finally, he doubted that the ruling would have sweeping consequences because the Court "rejected any claim that the Constitution requires abortions on demand." Speaking of this last point, Burger was

[142] Justice Blackmun, *Doe v. Bolton*, 410 U.S. 179, 193, 195, 198, 200; *Toomer v. Witsell*, 334 U.S. 385, 396-397.

flatly incorrect because, as a matter of course, this decision overturned forty-six state abortion laws, including all of those which complied with the MPC.[143]

Justice Douglas wrote a more substantial opinion which seemed to deviate from Blackmun's in his resistance to depend on the Ninth Amendment. Douglas preferred, instead, to outline and extend the definition of "liberty" contained within the Fourteenth Amendment. Douglas did not make this particularly clear, but his opinion seemed as though a privacy right such as this could be supported through the privileges and immunities clause of the Fourteenth Amendment. Douglas listed three types of rights he found to be contained within this Fourteenth Amendment definition of liberty. First, "autonomous control over the development and expression of one's intellect," protected by First Amendment penumbras without exception. Second, he named "freedom of choice in the basic decisions of life respecting marriage, divorce, procreation, contraception, etc." Douglas thought of this second set of rights, as "fundamental" and only subject to regulation in the face of a narrowly and precisely-tailored law serving a "compelling state interest." Douglas specifically references Brandeis's "right to be let alone," citing *Olmstead v. United States*, which, in Brandeis's as well as Douglas's conception included the "right of an individual to plan his own affairs." Finally, Douglas listed the third set of freedoms, "to care for one's health and person [and] from bodily restraint or compulsion." These rights were similarly subject to regulation in light of a "compelling state interest."[144]

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[143] Chief Justice Burger, Concurring opinion in *Doe v. Bolton*, 410 U.S. 179, 207-208.
[144] Justice Douglas, Concurring opinion in *Doe v. Bolton*, 410 U.S. 179, 210-214

Any impediment to the right to seek or perform an abortion flouted all three of these basic, fundamental liberties to Justice Douglas. Restrictions in the way that Georgia and Texas enacted denied a doctor the ability to give medical advice, interfered with a woman or family's ability to make decisions in their own family planning process, and further deprived a woman of the free use of her body. Douglas further objected that the statutes did not differentiate among the different stages of pregnancy. While this seemed as if it might validate Blackmun's overly-medicalized opinion, in fact Douglas expressed a different concern altogether. *Griswold*, he wrote, "held that the States may not preclude spouses from attempting to avoid the joinder of sperm and egg. If this is true, it is difficult to perceive any overriding public necessity which might attach precisely at the moment of conception." Some district courts, as I explained before and further outline in Appendix I, precisely made the distinction between a person's ability to prevent egg fertilization and to disrupt the process already in action. Douglas did not agree or disagree, however, with Blackmun's trimester framework to this effect.[145]

Surprisingly, Justice Stewart, who had dissented in *Griswold*, voted with the majority in *Roe*. His relatively short concurrence, especially in light of the dissent he wrote in *Griswold* was puzzling. Stewart wrote of the *Griswold* decision in his *Roe* concurrence that it "stands as one in a long line of… cases decided under the doctrine of substantive due process, and I now accept it as such." Stewart, who thought the Connecticut statute at issue in *Griswold* was "uncommonly silly," still refused to strike down the statute because he did not see the nexus between the law's inherent desuetude and its constitutional impermissibility. Only eight years

[145] Ibid, 216.

later, he changed his mind, and decided that in light of *Eisenstadt*, which recognized ""the right of the *individual,* married or single, to be free from unwarranted governmental intrusion" necessarily extended to a woman's right to terminate her pregnancy. Stewart's two completely contradictory opinions could only really be explained by his lack of any consistent constitutional theory.[146] He dissented in *Griswold* on the grounds that he thought of substantive due process as a completely out-dated doctrine. When substantive due process reappeared in *Griswold*, and later *Stanley v. Georgia*, and *Eisenstadt*, he felt it appropriate to simply agree with the present trend of jurisprudential theory among his colleagues.[147]

Justice Rehnquist's dissent in *Roe v. Wade* was one of his first opinions of his thirty-three year career on the bench. Here, as in many of his future opinions, he gave the precise language of the Constitution the strictest attention. Rehnquist's presented a discerning critique, where he objected to the decision's broad scope (a scope which Blackmun denied employing). He also had "difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case." In many ways, but especially in a manner pertaining to then-established constitutional precedent Rehnquist made a correct objection. "Texas, by the statute here challenged," Rehnquist argued, "bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word."[148] However, Rehnquist did not specifically highlight the problem with the Court's reliance on privacy. *Griswold* created a inviolable zone of privacy surrounding the home and the marital

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[146] Garrow, 597.
[147] Justice Stewart, Concurring Opinion in *Roe v. Wade*, 410 U.S. 113, 167-170.
[148] Justice Rehnquist, Dissenting Opinion in *Roe v. Wade*, 410 U.S. 171-172.

relationship. *Stanley v. Georgia* enshrined that zone of privacy around the home with respect to First Amendment protections. Not withstanding Justice Brennan's famous pronouncement on privacy in *Eisenstadt*, the constitutional posture in *Eisenstadt* had little, if anything, to do with privacy. Thus, because no one presented any constitutional justification to suggest that privacy within the home should extend outside the home, Rehnquist correctly observed that privacy should not apply here.

Rehnquist believed Stewart and Douglas's assessment of abortion restrictions constituting a deprivation of liberty to be more technically correct, although he personally failed to see how abortion restrictions deprived anyone of liberty *without due process of law*, as textually required by the Fourteenth Amendment. Finally, he derided the Court for adding "a new wrinkle the [the due process] test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment." Rehnquist considered the Court's insistence upon finding a "compelling state interest," as an invocation of strict scrutiny that a law must survive in order to remain constitutional.

Justice White, who voted with the majority in *Griswold* and *Eisenstadt*, switched sides and authored a second dissent to *Roe*. White's terse and biting dissent disparaged the majority as exercising its clear power and "interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it." In White's view, the Court manipulated the Constitution to value "the convenience, whim, or caprice of the putative mother more than the life or potential life of the fetus." While Rehnquist's opinion adopted more the tone of an inexperienced justice unsure of the

Court's ruling, White seemed genuinely angry with the decision. White's attitude is somewhat unexpected, as the Court adopted his method of jurisprudential review in theory, if not in practice.[149] Allan Ides suggested that "for Justice White, the sweeping decision in *Roe*… present[ed] a stark and injudicious confrontation with his belief in the integral importance of careful, reasoned judgment."[150] White offered no additional analysis when mocking the majority.[151]

Aside from the inherent deficiencies with *Roe* as discussed by Rehnquist and White, many further cases and social changes expose further problems with the decision. The first of which I would like to address is the trimester framework. The problem with making a Constitutional ruling in a medically-determined framework is that, invariably, medicine advances in a way this particular interpretation of a specific set of facts cannot. In 1973, abortion surpassed childbirth in statistical safety as long as the abortion took place in the first twelve weeks of gestation. By 1983, the abortion became statistically safer up to twenty-one weeks. Jack Smith et al., of the Center for Disease Control (CDC) reached this conclusion by comparing relative morality rates: an estimated 8.5 in every 100,000 mothers died in labor per year. An estimated 7.8 per 100,000 women died in the process of a safe, legal abortion from the sixteen to twenty weeks.[152] This advancement in abortive technology and safety rendered one of Blackmun's two medical observations obsolete. In that same year the Court had the opportunity to update *Roe* by adjusting

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[149] Justice White saw the Connecticut statute as needed to survive "a substantial burden of justification," a strict scrutiny standard. Even tough his analysis of the contraception did not quite measure up to that standard; see pages 28-30.
[150] Ides, 450.
[151] Justice White, Dissenting opinion in *Doe v. Bolton*, 410 U.S. 179, 221-222.
[152] Jack Smith et al., "An Assessment of Incidence of Maternal Morality in the United States," *Journal of American Public Health* 74, no. 1 (1984): 783.

the time when states could regulate abortion from twelve weeks to sixteen weeks in light of recent research, but the Court declined to do so.[153] Later, in *Planned Parenthood v. Casey*, the Court altogether eradicated Blackmun's trimester framework, and essentially made viability temporal point of legal distinction.[154] While the lack of a trimester framework may be less rigid, the Court then permitted states to regulate abortion in the first twelve weeks where they could not before.

Hypocritically, the Court has upheld the temporal mobility of any possible legal distinction along with the threshold of viability, which, in a period of ten years, moved from twenty-eight weeks to twenty-five weeks. Additionally, the Court redefined viability to include a fetus's ability to live either by natural means *or through artificial life support systems*.[155] This latter finding pushed the point of viability back to twenty-two or twenty-three weeks. This finding became particularly problematic in 2003, when the Court upheld the federal Partial-Birth Abortion Ban Act, which proscribed dilation and curettage eighteen weeks after conception except to save the mother's life or physical health.[156]

A second problem I will address here is the strict scrutiny standard Blackmun invoked. A standard such as this would not be troublesome in and of itself, but the fact remains that the Court has selectively applied the strict scrutiny standard since *Roe*. Moreover, when the Court does apply strict scrutiny, most the restrictions to abortion tend to survive. In *Planned Parenthood v. Ashcroft*, the Court sustained the constitutionality of state statutes requiring the presence of a second

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[153] *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 429 (1983).
[154] 505 U.S. 833, 847-850, 876.
[155] *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976).
[156] *Gonzales v. Carhart*, 550 U.S. 147 (2007) upholds 18 U.S.C. § 1531.

physician during post-viability abortion procedures and requiring minors to obtain parental consent before undergoing an abortion. While the Court invoked the necessity for the state to provide a compelling interest for the second physician requirement, it did not specify that the law had to be "narrowly-tailored" to serve that interest. The Court also found no reason why the parental consent requirement for minors should need to be justified by a compelling state interest.[157] In 1992, he Court in *Planned Parenthood v. Casey* changed the standard of review completely to a newly-created "undue burden" standard, which Sandra Day O'Connor defined as having "the effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Using the new standard, the Court upheld state requirements on parental consent and a twenty-four hour waiting period.[158]

The larger problem with *Roe* was not necessarily that the Court decided it based on extending the right of privacy in a confusing and inconsistent fashion, but that the structure of *Roe*, in terms of its legal position of strict scrutiny and its medical position using the trimester framework rendered privacy useless. Subsequent Courts overturned most of *Roe*'s core holdings in fewer than twenty years. Of course, deciding that the right to choose to have an abortion based on privacy rights posed problems in and of itself. Consistent with district court findings, the Supreme Court never accepted poverty as a suspect class deserving of scrutiny under the equal protection clause of the Fourteenth Amendment. As such, the Court repeatedly upheld the right of the state *not* to subsidize the costs of an abortion to indigent women.[159] At the heart of this controversy, the Court has found,

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[157] 462 U.S. 476, 477, 482, 486.
[158] 505 U.S. 833, 887, 893-895, 899.
[159] Maher v. Roe, 432 U.S. 464; Harris v. McRae, 448 U.S. 297.

correctly, the state does not have to pay for the costs of an abortion in order to cohere with the findings in *Roe.* More unfortunately, *Roe*'s negotiations and regressions have weakened women's positions relative to both the state and their physicians. While *Roe* granted the right of physicians to make a medical determinations, all of the subsequent impediments to choice--including waiting periods, lack of subsidies to the indigent, parental involvement, mandatory counseling--affected the woman's right to choose, not the doctor's right to practice.

Chapter VI: Conclusion: This is the World that We Live in

The fact that the Court made such a broad, definitive ruling on such a sensitive topic practically guaranteed many of *Roe*'s shortcomings. Naturally, Blackmun's opinion drew criticisms from both liberals and conservatives alike. Blackmun, for his part, told one of his former law clerks in an interview that he did not regret his decision, and while he did not realize its implications in 1973, "It's a step that had to be taken as we go down the road toward the full emancipation of women."[160] But was it?

Legislative repeal might have left the law neutral to the issue of abortion, but the right to have or medically perform an abortion would have subsequently been subject to an even more precarious position. Even though *Roe v. Wade* left the door open for subsequent challenges to a woman's right to choose, Courts still respect the law and have avoided overturning the decision, regardless of political climate. *Roe*

[160] Former Justice Harry Blackmun, Interview with Harold Koh, March 4, 2004. http://www.pbs.org/newshour/bb/law/jan-june04/blackmun_3-04.html (accessed April 12, 2010).

put a legal check in place, which is, despite the best efforts of abortion opponent, still present, to prevent states from enacting pre-1973 laws. Legislative repeal would not necessarily have had that same effect. In 1969 Thomas Clark noted,

> The present change in attitude toward abortion has developed while the need for abortion has diminished as a technique to save the life or health of the mother or to prevent fetal deformities. Despite the medical developments, the demand for abortions has increased astronomically. This indicates a change in social mores, which is undoubtedly the result of increased knowledge and use of abortion[161]

Legislative repeal would have allowed states legislatures to react to their constituencies' changing social mores on their own terms, instead of having a blanket prohibition thrust upon them by the federal government. Then again, as is the case with most nation-wide social reforms, some states greatly lag behind others in terms of progress. The *Doe* holding would have been more critical on its own to advancing legislative reforms than the *Roe* holding on its own, as *Doe* invalidated residency requirements for women seeking abortions.

A second option, reproductive freedom as one in a line of discrimination cases, rather than privacy cases, also might have better protected both rights to abortion and privacy, though separately. In this respect, *Roe* is an unfortunate product of its time. By 1973, the abortion issue garnered so much attention that it would have been nearly impossible for the Courts *not* to have dealt with it, especially in light of their findings in *Vuitch* and *Eisenstadt*. It remains a truism that the Court had the ultimate decision to even entertain these cases: no exterior force could compel the court to grant the plaintiffs in *Roe* and *Doe* certiorari. They did it of

[161] Clark, 6.

their own volition and as such forced themselves into deciding in a particular way because of the precedent available at that time.

Five months after announcing the *Roe* decision, the Court decided in the seminal case of *Frontiero v. Richardson*, that gender could be considered a suspect class under equal protection jurisprudence such that laws which discriminated against gender were subject to a strict scrutiny standard. Deciding *Roe* at that point would not have helped terribly much because only three years later, the court changed its mind about what kind of suspect class women constituted. In 1976, *Craig v. Boren* established women as a suspect class, but that laws discriminating on the basis of gender were subject to "intermediate scrutiny." The new invention of intermediate scrutiny had yet in that case to define itself completely. By 1984, intermediate scrutiny firmly established that in order for law which differentiate on the basis of gender to remain constitutionally sound, the state must show that the law or policy in question furthers "an important government objective" that is "substantially related" to the interest or objective it serves.[162]

Ruth Bader Ginsburg, one of the foremost advocates for connecting gender discrimination with reproductive autonomy argued in 1985: "Inevitably, the shape of the law on gender-based classification and reproductive autonomy indicates and influences the opportunity women will have to participate as men's full partners in the nation's social, political, and economic life."[163] However, this doctrine would not completely ripen until Ruth Bader Ginsburg's 1996 decision in *United States v. Virginia*, where the Court majority enshrined intermediate scrutiny as it pertained

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[162] *Mississippi University for Women v. Hogan,* 458 U.S. 718 (1982).
[163] Ruth Bader Ginsburg, "Some Thoughts on Autonomy and Equality in Relation to *Roe v. Wade*," North Carolina Law Review 63: no 1 (1984-1985), 375.

to equal protection gender discrimination and added an additional requirement to the original formulation, that the state must provide a "substantial justification" for enacting the law.[164] If the Court had waited on the abortion issue for over twenty years, the political, medical, and Malthusian hype around it might have passed. The Court might have been free to make a more objective opinion outside the virulent social pressures that surrounded it in the 1970s. Perhaps also, that would have been enough time for the states to enact their own acceptable legislation on the matter.

While this may be relatively ineffectual speculation, the basic point remains that the *Roe* decision was necessarily influenced by its times. As such, *Roe* had to be a privacy issue, as no alternative method of constitutional review to privacy existed in 1973. Privacy as a constitutional right became inextricably linked with sexual rights and particularly reproductive freedom because there was no other way to address the issue of the sexuality in the law. The consequence is that privacy, as Stanton and Brandeis envisioned it no longer existed. Or if it did, it was not in any form recognizable to their original formulations. When reproductive freedom became a greater right for the doctor than for the woman, Stanton's "inviolability of self" and Brandeis's "right to be let alone" faded away as a right to privacy as we know it today. The inviolability of self and the right to be let alone do not exist when reproductive freedoms become subject to the kind of restrictions that *Roe* and subsequent abortion cases allow it to. Privacy, then, just a Justice Black predicted is " a broad, abstract, and ambiguous concept which [has] easily be shrunken in meaning."

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[164] 518 U.S. 515.

Appendix: Outcomes of State and Federal Abortion Cases Decided Before *Roe*

A: State Court Cases

Date	*Case*	*Citation*	*State*	*Asserted Constitutional Grounds*	*Outcome*
Oct, 1965	Oregon v. Buck	239 Ore. 557	OR	14th Amendment equal protection and due process	Abortion statute upheld
Mar, 1967	Gleitman v. Cosgrove	49 N.J. 22	NJ	14th Amendment due process	Infants cannot sue for wrongful birth
June, 1967	People v. Fulton	84 Ill. App. 2d 280	IL	Vagueness; 1st Amendment Establishment of Religion	Abortion statutes upheld
Nov, 1967	State v. Barnett	248 Ore. 614	OR	5th Amendment procedural due process	Abortion statute upheld
Sept, 1968	State v. Barnett	251 Ore. 234	OR	5th Amendment procedural due process	Trial court erred in refusing to allow defendant to inquire jurors on religious beliefs
Nov, 1968	Stewart v. Long Island College Hospital	296 N.Y.S. 2d 41	NY	14th Amendment due process	Infants cannot sue for wrongful birth; parents cannot sue for failure to provide a therapeutic abortion
Jun, 1969	Kudish v. Board of Medicine	356 Mass. 98	MA	Vagueness	Abortion statute found not vague
Sep, 1969	People v. Belous	71 Cal. 2d 954	CA	Vagueness; 14th Amendment due process	Abortion statute unconstitutionally restricted right to practice medicine; statute invalidated
Oct, 1969	State v. Guerrieri	20 Ohio App. 2d 132	OH	Vagueness	Abortion statute upheld
Jan, 1970	State v. Mucie	448 S.W.2d 879	MS	Vagueness; discriminatory in effort; Right to privacy	Abortion statute upheld
Jun, 1970	State v. Shirley	256 La. 655	LA	Vagueness; Right to privacy	Abortion statute upheld
Jul, 1970	Commonwealth v. Page	54 Pa. D & C.2d 12	PA	Right to privacy	Abortion statute invalidated
Aug, 1970	Lashley v. State	10 Md. App. 136	MD	Vagueness	Abortion statute upheld
Sept, 1970	State v. Abodeely	179 N.W.2d 347	IA	Vagueness; 14th Amendment equal protection	Abortion statute upheld
Oct, 1970	State v. Bartlett	128 Vt. 618	VT	Vagueness; 14th Amendment right to life; right to choose to bear children	Abortion statute upheld
Feb, 1971	State v. Raymond	113 N.J Super. 222	NJ	Vagueness	Defendant waived his right to challenge constitutionality of laws; statute upheld
Jun, 1971	State v. Schulman	6 Ore. App. 81	OR	Vagueness; 5th Amendment shifting burden of proof	Abortion statute upheld
Nov, 1971	Thompson v. State	493 S.W.2d 913	TX	Vagueness; Overbreadth; Right to Privacy	Abortion statute upheld

Dec, 1971	State v. Scott	260 La. 90	LA	Vagueness; Overbreadth; 14th Amendment due process; Right to privacy	Abortion statute upheld
Jan, 1972	Commonwealth v. Brunelle	361 Mass. 6	MA	Right to privacy	Defendant could not assert unconstitutionality because he was not a licensed physician; statute upheld
Jan, 1972	Beecham v. Leahy	130 Vt. 164	VT	14th Amendment equal protection	Abortion statute upheld
Jan, 1972	Martinez v. Board of Medical Examiners	476 S.W.2d 400	TX	Vagueness; 5th Amendment due process property rights	Revocation of Plaintiff's medical license for performing an unlawful abortion upheld
Jan, 1972	Spears v. State	257 So. 2d 867	MS	None	Abortion statute upheld
Feb, 1972	State v. Barquet	262 So. 2d 431	FL	Vagueness	Abortion statute invalidated; Court stressed that abortions still not legalized
Mar, 1972	People v. Hanrahan	52 Ill. 2d. 70	IL	Vagueness	Court denied hospital on performing an abortion on a suicidal patient
May, 1972	Gironda v. State	263 So. 2d 193	FL	None	Pursuant to State v. Barquet, court released prisoner because abortion statute had been declared unconstitutional
Jul, 1972	Cheaney v. State	259 Ind. 138	IN	9th Amendment right to privacy; Vagueness	Abortion statute upheld
Jul, 1972	Byrn v. New York City Health and Hospitals Co.	31 N.Y.2d 194	NY	5th and 14th Amendment right to life	Only legislature can determine whether or not a fetus has rights
Aug, 1972	People v. Nixon	42 Mich. App. 332	MI	Vagueness; Right to freely practice medicine	Licensed physicians who perform an abortion in the first trimester are not subject to prosecution
Aug, 1972	People v. Bricker	42 Mich. App. 352	MI	Vagueness; Right to privacy	Statute is not unconstitutional as applied to Bricker because he was not a licensed physician
Sept, 1972	State v. Munson	86 S.D. 663	SD	1st, 3rd, 4th, 5th, 9th, 14th Amendment right to privacy	The finding in *Griswold* cannot be applied to a right to abortion; statute upheld
Oct, 1972	Rodgers v. Danforth	486 S.W.2d 258	MS	14th Amendment right to privacy, due process, equal protection; 1st Amendment establishment of religion	Abortion statute upheld
Oct, 1972	Sasaki v. Commonwealth	485 S.W.2d 897	KY	Vagueness; 14th Amendment equal protection, due process	Abortion statute upheld

Nov, 1972	People v. Barksdale	8 Cal. 3d 320	CA	Vagueness; Right to freely practice medicine	Parts of the statute which limit abortions to only when the health of woman is "gravely impaired" invalidated.
Nov, 1972	State v. Campbell	263 La. 1058	LA	1st, 4th, 5th, 9th, 14th Amendment right to privacy	Defendant did not allege vagueness, so even though the law is unconstitutionally vague, statute still upheld

B: Federal Court Cases

Date	*Case*	*Citation*	*State*	*Asserted Constitutional Grounds*	*Outcome*
Nov, 1969	Hall v. Lefkowitz	305 F. Supp. 1030	NY	Vagueness; 14th Amendment equal protection, due process, right to privacy	Court declined to rule
Nov, 1969	United States v. Vuitch*	305 F. Supp. 1032	DC	Vagueness; 14th Amendment equal protection, right to bear or not bear children	D.C. Statute invalidated, but only as it pertained to defendant, Dr. Vuitch
Mar, 1970	Doe v. General Hospital of District of Columbia	140 U.S.App.D.C. 149	DC	14th Amendment equal protection	D.C. General Hospital cannot prevent indigent class of women from obtaining abortions if it is found to be medically necessary for her life or health.
Mar, 1970	Babbitz v. McCann	310 F. Supp. 293	WI	1st, 14th Amendment right to privacy	Preventing doctors from performing abortions in the first trimester is unconstitutional
Mar, 1970	Danforth v. Scott	310 F. Supp. 688	IL	Right to terminate a pregnancy	Statute upheld, doctors may be prosecuted if they terminate a pregnancy except to save life of the mother
May, 1970	Doe v. Randall	314 F. Supp. 32	MN	1st Amendment right to free speech and association	Abortion statute upheld
Jun, 1970	Roe v. Wade*	314 F. Supp. 1217	TX	Vagueness; 9th and 14th Amendment	Abortion statute invalidated
Jul, 1970	Doe v. Bolton*	319 F. Supp. 1048	GA	Right to terminate a pregnancy	Parts of statute that limited grounds under which a woman could get an abortion invalidated
Aug, 1970	Rosen v. State Board of Medical Examiners	318 F. Supp. 1217	LA	Vagueness; 1st, 4th, 5th, 9th, 14th Amendment; Right to privacy	Abortion statute upheld as protection of fetal life is an important state policy
Dec, 1970	Doe v. Dunbar	320 F. Supp. 1297	CO	Right to terminate a pregnancy	Abortion statute had been recently revised by the legislature, thus court upheld it.

Dec, 1970	Steinberg v. Brown	321 F. Supp. 741	OH	Vagueness; 1st, 4th, 5th, 8th, 9th, 14th Amendment due process, cruel and unusual punishment, equal protection	Abortion statute upheld
Jan, 1971	Ryan v. Specter	321 F. Supp. 1109	PA	1st, 3rd, 4th, 5th, 6th, 8th, 9th, 14th Amendments	Part of the statute invalidate subject to *Commonwealth v. Page*; District Court abstained from ruling on the other parts of the statute
Feb, 1971	Corkey v. Edwards	322 F. Supp. 1248	NC	Right to privacy; state lacks a compelling interest in enforcing the statute	State can assign constitutional protections to a fetus; statute upheld
Feb, 1971	Major v. Ferdon	325 F. Supp. 1141	CA	Vagueness, Overbreadth	Abortion statute upheld
Jun, 1971	Planned Parenthood v. Nelson	327 F. Supp. 1290	AZ	14th Amendment Due Process	Court declined to rule
Jul, 1971	United States ex. rel. Williams v. Zekler	445 F.2d 451	NY	4th, 9th, 14th Amendment right to privacy; Vagueness; Equal protection	Physician has the right to assert rights on behalf of his patients
Sep, 1971	Landreth v. Hopkins	331 F. Supp. 920	FL	1st, 6th Amendment; 14th Amendment due process and equal protection	Abortion statute upheld
Feb, 1972	YMCA v. Kugler	342 F. Supp. 1048	NJ	1st, 4th, 5th, 6th, 8th, 9th, 14th Amendment right to privacy in a doctor-patient relationship	Statute invalidated for violating 1st and 14th Amendment rights to practice medicine
Mar, 1972	Poe v. Menghini	339 F. Supp. 986	KS	14th Amendment due process and equal protection	Statute invalidated for violating 1st, 9th, and 14th Amendment rights to practice medicine as well as equal protection
Mar, 1972	McGarvey v. Magee-Women's Hospital	340 F. Supp. 751	PA	Right to life under 14th Amendment due process	Court refused to enjoin hospital from performing abortions
May, 1972	Planned Parenthood v. Marks	497 P.2d 534	AZ	Right to privacy	Court declined to rule
May, 1972	Crossen v. Commonwealth	344 F. Supp. 587	KY	9th Amendment right to privacy, 14th Amendment equal protection and due process	Court cannot declare when a statute is archaic; statute upheld
Sept, 1972	Abele v. Markle	351 F. Supp. 224	CT	1st, 4th, 5th, 8th, 9th, 13th, 14th Amendments; Right to practice profession freely, Right to privacy	Court invalidated statute; A Fetus is not a person within the meaning of the Constitution
Nov, 1972	Larkin v. Bruce	352 F. Supp. 1076	WI	14th Amendment right to pursue a profession	Court further affirmed Wisconsin abortion statutes invalid per *Babbitz v. McCann*

*Denotes cases eventually decided in the Supreme Court

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