4

Abortion Law

"I will do anything and everything to stop the unmitigated murders of fetuses. I will do anything to stop the atrocities committed by your clinic every minute of every day at your clinic. You are all pieces of shit and I will kill to stop these atrocities. I will blow you up if I have to, burn the clinic down. I will do whatever is necessary. I swear to God I will. After that you are in God's hands and He will do His thing."

Luke Daniel Wiersma (sentenced to eighteen months in federal prison)

In the late fall of 2015, three people were tragically gunned down at a Planned Parenthood clinic in Colorado Springs. The shootings were followed by hours of standstill. Businesses were evacuated. I thought of a colleague who performs abortions. She works in a conservative county and many of her patients are women who tell her that they want her care, but they do not want to call it an abortion. They tussle with words as she explains that she cannot provide the service if they do not understand what it means. They say they understand, but want to make sure that the doctor knows they are not like the other women. She wonders, who are the other women? Most of these women are white, regularly attend church, and would identify as conservative. After the doctor and her patients come to terms with the language – it is an abortion – the women have the procedure and go home.

Sometimes, the women my colleague sees have been raped. Sometimes, they are domestic violence victims, not yet survivors, trying to figure a way out. One time, a patient came with her boyfriend, but did not want the doctor to give any hint of what was happening. The boyfriend was possessive and abusive, and simply would not let the girlfriend out of his sight and reach. Sometimes I receive a call from my colleague as she is curious about a certain question of law. The thing that stays with me is that she never posts her photo at the university where she teaches. When she is the plenary or keynote speaker at an event, she refuses to have her image in the program. She reminds me that she has two children. Two little girls. She does not want anyone to find her daughters, show up at her doorstep, and gun them down.

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Are the doctor's fears irrational? Should she just ease up? I think about Michael Griffin, James Kopp, Paul Jennings Hill, Peter Knight, and John Salvi – killers who stalked doctors who perform abortions. They showed up at homes, churches, and the workplace with bombs and guns. The National Abortion Federation estimates that there have been almost 400 credible death threats against medical providers or clinics that help women with their abortions. The doctors are afraid not only for themselves but also their families.

The fatal shooting in Colorado could be counted alongside a deadly history of violent attacks on abortion providers. The victims are doctors, guards, friends of patients seeking medical care at clinics. In Colorado, it was Robert L. Dear, Jr. who opened fire with a semiautomatic weapon. He told authorities that he was concerned about the "body parts." The shooting occurred after undercover, surreptitious, illegal videos were made and spliced together, seeming to suggest that abortion providers at Planned Parenthood were selling fetal remains. Planned Parenthood was investigated and cleared of allegations, but even so, that would not bring back the lives of those who were stalked and killed.

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The battle over women's autonomy, especially their reproductive healthcare and decision-making, has always been about much more than simply women's health and safety. Rather, male power, control, and dominion over women's reproduction historically served political purposes and entrenched social and cultural norms that framed women's capacities almost exclusively as service to a husband,[1] mothering,[2] reproducing,[3] and sexual chattel.[4] For example, tort law carved out specific remedies for husbands who suffered the loss of their wives' servitude and sex under the "loss of consortium" cause of action. Historically, loss of consortium litigation provided economic remedies only for husbands. This law derives from the legal premise that the husband is the master of the wife. She is his servant. Thus, when wives suffered a physical injury, husbands could file suit against third parties for the "loss" of their wives' servitude, companionship, and sex.

Due to the widespread practice of chattel slavery in the seventeenth, eighteenth, and nineteenth centuries in the United States, most Black women, their mothers, and daughters encountered or directly suffered the physical norms and conditions of that cruel enterprise, including physical bondage, food deprivation, and physical torture (whippings, brining, and amputations of fingers and toes). They also endured reproductive coercion and terror, including sexual assaults, rapes, forced reproduction, and stripping away of offspring. Not every state tolerated the physical and sexual barbarism common to states like Mississippi, South Carolina, and Louisiana. However, even states like New York, Vermont, and Maine practiced slavery with fervor. In New York, it is estimated that 20 percent of its colonial population were slaves (over 40 percent of New York households owned slaves), meaning that Black

women were no more protected from the abuses of chattel slavery there than in Alabama, Georgia, or Virginia.

Coverture laws extended an aspect of bondage and repression to white women. Coverture laws adopted by U.S. courts were unmistakably distinct in form and practice from chattel slavery, especially as white women retained many other freedoms, including the ability to own slaves. Nonetheless, coverture rendered white women the property of their husbands, and one key aspect of their servitude was obedience to their husbands. Courts legitimized coverture by upholding laws that sanctioned or imposed no punishments against husbands beating and sexually assaulting their wives.

Even after the ratification of the Fourteenth Amendment, while legislatures recognized women's citizenship, they insisted upon denying them suffrage based on the fiction that women lacked the sophistication of mind and judgment to cast a vote.[5] Legislatures debated whether a woman's vote would essentially accrue to her husband. The Supreme Court deferred to state legislatures on this sophistry and solidified women's political subordination by ruling in *Minor v. Happersett* that although the Constitution granted women citizenship, it did not confer upon them a right to vote.

These were not the norms foisted on men. White men in particular were spared the indignities of legal marginalization as legislatures and courts reserved and promoted special status for them. As the Supreme Court declared in *Ozawa v. United States* in 1922, "The provision is not that Negroes and Indians shall be *excluded* but it is, in effect, that only free white persons shall be *included*. The intention was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified."[6]

In that case, the Supreme Court unanimously ruled that a Japanese-American man was ineligible for citizenship because the legislature intended naturalization in the United States only for "free white persons." One year later, in *United States v. Bhagat Singh Thind*, the Justices unanimously affirmed that a person of Indian Sikh ethnicity did not fit the "common sense" definition of "free white person," despite being anthropologically Aryan and a former World War I army veteran. The Supreme Court left no room for doubt that the Naturalization Act of 1906 intended to confer citizenship and whiteness only on people who looked white. Justice Sutherland wrote the Court's opinion, stating, "it may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them today; and it is not impossible, if that common ancestor could be materialized in the flesh, we should discover that he was himself sufficiently differentiated from both of his descendants to preclude his racial classification with either."

Instead, in the United States, common law granted white men not only citizenship but also recovery for the losses associated with their wives' sexual unavailability

and even for the debauchery of their daughters.[7] Women's sex and sexuality were not only the legal domains of husbands but also the preoccupations of fathers, because the law deemed wives, daughters, slaves, and field animals the property or chattel of men.[8] In other words, law serves a profound role in the making and unmaking of persons, particularly women, and especially women of color.[9]

In turn, such social norms – often enforced by statutes and court rulings – were rooted in rhetoric rather than the realities of women's autonomy, humanity, experiences, capacities, and lived lives. Courts played a profound role in conscribing women to second-class citizenship that denied them broad civic participation, including voting, participating on juries,[10] and professional employment. In *Bradwell v. Illinois*, the U.S. Supreme Court upheld a law barring women law graduates from practicing law.[11] Justice Joseph Bradley found that nature and law deemed it "repugnant" for a woman to adopt "a distinct and independent" civic life from her husband because by law she lacked fundamental capacities. A subsequent ruling by the Wisconsin State Supreme Court in *In re Goodell* further illustrates the rhetoric strategically deployed by legislatures and courts to deny women personhood and autonomy over their lives:

> We cannot but think the common law wise in excluding women from the profession of the law. . . . The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. . . . There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife.[12]

Of course, such rhetoric constrained women's abilities to use their bodies in professional labor. Most importantly, by declaring that so-called laws of nature dictate that women bear children, the court served to trap women into lives of subordination and servitude to husbands, children, and ultimately the state, which commanded women to serve those roles. Ironically, promoting women's safety, virtue, and protection was the legal lark that normalized this type of misogyny. It justified the subordination of women through harsh regulations and practices. Notably, however, neither legislatures nor courts were concerned about the validity of their claims on women's capacities. That is, facts and empirical truths regarding women's lives were meaningless or irrelevant.

Justice Harry Blackmun's majority opinion in *Roe v. Wade* significantly interrupted the Supreme Court's prior jurisprudence and therefore its rhetoric related to women, their autonomy, and capacities. In that case, roughly one hundred years after the Supreme Court upheld state laws barring women from voting and entering the practice of law, the Court acknowledged the chilling impacts associated with

social stereotyping and stigmatization of women. In *Roe*, which decriminalized abortion in the United States, the Court finally acknowledged the "detriment" that the state had imposed on women by denying them choices about their reproductive destinies. Justice Blackmun candidly acknowledged the "[s]pecific and direct harm medically diagnosable even in early pregnancy" that some women may endure by being forced by the state to bear children.

Roe's reliance on social science represented a sea change; Justice Blackmun consulted science, history, and sociology to dispel the notion that abortion had always been illegal in the United States.[13] For the first time, the Court clearly articulated that motherhood and childbearing could be harmful to women. Further, forcing women into those destinies violated their constitutional right to privacy. Justice Blackmun wrote:

> Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[14]

The Court explained, "we are also told … that abortion was practiced in Greek times as well as in the Roman Era, and that 'it was resorted to without scruple.'"[15]

Indeed, abortion was practiced legally in the United States for centuries prior to brutal nineteenth-century antiabortion campaigns launched by male physicians who sought to monopolize women's healthcare by driving out and criminalizing midwives and stigmatizing abortion.[16] Dr. Horatio Storer, a chief architect of the nineteenth-century antiabortion/antimidwife movement, wrote that "[midwives] frequently cause abortion openly and without disguise."[17] Even more unsettling to him, "[t]hey claim a right to use instruments, and to decide on the necessity and consequent justifiability of any operation they may perform."[18] Undoubtedly, that level of expertise, autonomy, and independence among midwives, who were predominantly Black, proved too threatening for an organized group of powerful men seeking to create the new profession called gynecology.

Referencing aspects of this history, the Court wrote: "It is undisputed that at common law, abortion performed *before* 'quickening' – the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy – was not an indictable offense."[19] Justice Blackmun canvassed Christian theology and canon law, finding that "[t]here was agreement … that prior to [quickening] the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide." The Court noted that prior to "the anti-abortion mood" that became prevalent in the late nineteenth century, abortions were not criminalized. In other words, "a woman enjoyed a substantially broader right to

terminate a pregnancy" until the antiabortion campaigns that coincided with the abolitionist and suffrage movements in the United States.

Today, however, *Roe*'s legacy remains uncertain. In 2018, the Trump administration announced that it would enact new rules barring U.S. medical providers that receive Title X funding from counseling their patients on abortion or making referrals for the medical treatment. The new rule, if successfully implemented, will impact four million poor Americans who receive reproductive health services under the Title X program.[20] In essence, the administration is proposing a gag rule on American doctors, much like that imposed on foreign providers.

Campaigns to undo the hard-fought rights gained by women to govern their bodies and reproductive health now result in the closing of clinics that perform not only abortion but also a plethora of women's reproductive health services. Millions of poor women are trapped, living in states where only one abortion clinic remains – such as Missouri, Mississippi, North Dakota, South Dakota, and Wyoming – forced to drive hours, even in life-threatening pregnancies, to arrive at the nearest clinic. Despite the promise of *Whole Woman's Health v. Hellerstedt*,[21] states continue to erect serious barriers to women's reproductive autonomy by enacting Targeted Regulation of Abortion Providers (TRAP) laws, which claim to protect and promote women's health. Empirically, however, such laws do not promote women's health. As described earlier in this book, in the United States a woman is fourteen times more likely to die in pregnancy or childbirth than during an abortion. This simple and important fact – that abortion is safer than childbirth – is obscured in the antiabortion legislating.

For example, in 2017, only months after the Supreme Court struck down ambulatory surgical center requirements as a condition for a clinic's licensure to provide abortions, Minnesota state legislators sponsored an almost identical bill before that state's legislature.[22] Notwithstanding the fact that the bill lacked constitutional muster, because statutes requiring ambulatory surgical center standards for abortion clinics are unconstitutional as a matter of law, litigating TRAP legislation exacts an enormous financial toll on women's health organizations. However, these laws are not about promoting women's health.

In Minnesota, according to data I obtained from the Minnesota Department of Health, complications associated with an abortion are less than 0.01 percent. In my written and public testimony before the Minnesota State Legislature Committee on Judiciary and Public Safety Finance and Policy, I emphasized this. My testimony informed the legislators that a woman in Minnesota is more likely to die from gun death, domestic violence, drug poisoning, homicide, and childbirth than from an abortion. Predictable deaths in Minnesota will not be from an abortion, but rather domestic violence and traumatic injuries from firearms. Firearms are the second leading cause of brain injury in Minnesota. A woman is more likely to die from a urinary tract infection during pregnancy than an abortion.

Finally, I told the nearly all-male committee that ambulatory surgical center requirements run afoul of constitutional law and Supreme Court precedent because they are medically unnecessary, create undue burdens, and offer no added health benefit to women seeking care. Increasingly, legislators opposed to abortion ignore these facts.

Those most disenfranchised by recent legislative policies that criminally target abortion providers are poor women, especially women of color nationally and internationally. Internationally, the United States now aggressively invests in depriving and divesting women and girls of reproductive privacy, autonomy, and equality.[23] Not surprisingly, the rhetoric used to justify the enactment of far-reaching antiabortion (and increasingly anticontraception) laws domestically and abroad ignores science, history, sociology, and women's lived lives. When and if the Supreme Court undertakes an abortion law challenge, will the Justices heed the path of Blackmun or ignore empirical evidence altogether?

Much of the scholarly discussion unpacking antiabortion campaigns features Anthony Comstock, an antivice crusader and U.S. postal inspector, as the main force behind the outlawing of abortion. Yet, such important accounts overlook the explicit and direct role of doctors as fellow crusaders, whose interest in elevating their professional status came at the expense of female reproductive healthcare providers and patients. By law then, women were not only the property of their husbands at home, but ruled also by men in medicine. As Dr. Storer wrote, "medical men are the physical guardians of women and their offspring," because "their position and peculiar knowledge necessitated in all obstetric matters to regulate public sentiment and to govern the tribunals of justice."[24]

Ironically, antiabortion laws root not in claims of protecting the sanctity of life but, strangely, in the blocking of women from the practice of medicine and midwifery. Historically, abortion was legal and not criminalized in the United States. Women Colonial women had practiced both the delivery of pregnancies and the termination of the same since the earliest European settlements in this nation. Indigenous women governed the same with their bodies. These matters were the domains of pregnant women and the midwives who largely and quite successfully administered their care. In southern states many of these midwives or women trained in pregnancy delivery and termination were African American.[25] It is estimated that 50 percent of births in the United States were attended by Black midwives.[26]

Historically, the ban on abortion coincided with the monopolization of women's medical care by male physicians, supported and largely directed by the American Medical Association (AMA) and the efforts of its leadership. This largely disregarded or unknown history deserves greater attention within legal literature as it helps to contextualize abortion rights, debunk the notion that antiabortion sentiment is rooted historically in care for the fetus, and illuminates the entanglement of social status, political power, and the fight over control of women's bodies.

Today, abortion is a constitutionally protected right in the United States. Nevertheless, the law governing this right could be described as a mishmash –due, in part, to its history in the United States but also, in significant part, to the subordinate status of women, which spills out in the implicit and explicit paternalistic language of the U.S. Supreme Court. Currently, abortion law is governed by constitutional and state laws, federal statutes, and executive orders. Most importantly, no Supreme Court jurisprudence provides a basis for denying a woman access to an abortion, although state laws have been enacted in Alabama and Georgia to facilitate and justify this.

4.1 ABORTION AND MEDICAL CARE GOVERNING WOMEN'S BODIES

Medicinal as well as surgical abortions were legal in the seventeenth and eighteenth centuries in the United States. In fact, not until the late nineteenth century, during the post-antebellum period, did abortions come under attack and ultimately were banned in the United States – significantly because of shifts in the *politics* of medicine – with the consolidation of medical care taking a decidedly male turn, forcefully and legally shutting out midwives of all ethnic backgrounds from the practice of gynecological care.[27] According to Sharon Robinson, author of *A Historical Development of Midwifery in the Black Community*, "by the early 19th century, the male physician had succeeded in replacing midwives among upper- and middle-class white urban American women."

The origins of gynecology – a male dominated profession at its inception – is troubling. Physicians such as Dr. Marion Simms, known for conducting brutal experiments on the Black female slaves he rented, were associated with the birth of gynecology in the United States. Simms, who notoriously tortured Black women by lacerating, suturing, cutting, and experimenting on them (often without anesthesia) became hailed as the "grandfather" of gynecology in the United States. He practiced and perfected the cesarean section on nonconsenting, enslaved Black women. His innovations earned him a statue in New York's famed Central Park. Only recently has it been removed.

The rise of gynecology replaced midwifery and also contributed to the backlash against abortion. Abortion served as a powerful political tool to justify displacing midwives. The disdain for not only midwives but women generally comes through in the writings of early male gynecologists like Storer. He claimed that no one should doubt the criminality of abortion, "least of all . . . mothers, however ignorant or degraded." He wrote with umbrage about male gynecologists not being consulted for abortions. Passages in his writings seethe with contempt, despisement, and scorn against women and midwives. For Storer, it was a problem that women are not "deterred by [gynecologists'] refusal [to perform abortion] from going elsewhere for aid, or from inducing abortion upon themselves."[28]

Someone reading Storer's writings could be forgiven for mistakenly concluding that women were the legal subjects not only of their husbands, but also of their gynecologists. Or that the uterus was the exclusive domain of men from sexual pleasure to medical science. In essence, women were incidental to their own bodies, and their opinions and interests simply did not matter that much.

The AMA, then an exclusionary, segregated organization that banned African Americans from membership, spearheaded this shift toward the monopolization of gynecological care, abortion, and ultimately women's bodies. Its membership lobbied Congress and state legislatures to require licensure for midwifery and also to criminalize abortion.[29] The AMA incited racist fears, contributing to nativism and anti-immigrant sentiment. Dr. Horatio Robinson Storer played a pivotal role in this regard. He warned that too few whites inhabited "the great territories of the far West, just opening to civilization, and the fertile savannas of the South, now disenthralled" due to the abolition of slavery; he asked whether those regions of the country would "be filled by our own children or by those of aliens? This is a question our women must answer; upon their loins depends the future destiny of the nation."[30]

Not until the wake of such actions, in 1869, did the Catholic Church condemn abortion. Prior to this time, the Catholic Church espoused the view that human life did not begin before quickening. However, a newly established AMA Committee on Criminal Abortion, spearheaded by Dr. Storer, urged that quickening had "its commencement at the very beginning, at conception itself" and, as such, the doctors stated, "we are compelled to believe unjustifiable abortion always a crime."[31] Importantly, the impetus for legislative bans on abortion or designations of who should be able to deliver babies did not relate to health or safety.

Naturally, it was in the self-interest of gynecologists to claim that "the deliberate prevention of pregnancy . . . [is] detrimental to the health" and that "occasional childbearing is an important means of healthful self-preservation."[32] Empirically, we know the latter statement lacked scientific merit then and now, as pregnancy presents a far greater risk to a pregnant woman's health than an abortion.

Laws such as the following in Massachusetts came to represent the new movement toward criminalization of abortion:

> Every person who shall knowingly advertise, print, publish, distribute, or circulate, or knowingly cause to be advertised, printed, published, distributed, or circulated, any pamphlet, printed paper, book, newspaper, notice, advertisement, or reference, containing words, or language, giving or conveying any notice, hint, or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop, or office where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, or any advice, directions, information, or knowledge, may be obtained for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be punished . . .[33]

Thus, antiabortion laws reflected the consolidation of power and economic opportunity under the guise of professionalism and safety. Seemingly, these laws rooted in anti-immigrant sentiment as much as, if not more than, any concern for women's health. Tellingly, although women's bodies became a contested political site for the control of a vibrant industry where pecuniary gains were to be made, medical schools barred women from entry and elite medical organizations did the same. At a time in which transplants were not performed, enhancement surgeries did not exist, and other medical technologies were yet to burgeon, pregnancies represented a dynamic and profitable space in which to practice medicine.

However, reproductive healthcare did not claim the prestige associated with other areas of medicine. At least one significant reason for this was that female midwives – many of whom were formally uneducated (although nonetheless successful) – dominated that space. A close reading of books and pamphlets published at the time shows that male gynecologists sought to transform the stature of reproductive healthcare, but they believed they could not achieve this if such healthcare was also provided by midwives. Criminalizing abortion and urging the prosecution of women who sought abortions advanced their goal, smothering the practice of midwifery in the United States.

At the Sixth Annual Meeting of the American Association for Study and Prevention of Infant Mortality, in 1915, Dr. Joseph DeLee, a preeminent twentieth-century obstetrician, leading casebook author, and fervent opponent to midwifery, launched his remarks with the words: "I desire to state that I am fundamentally opposed to any movement designed to perpetuate the midwife."[34] He claimed that "the midwife destroys obstetric ideals." He told the audience that midwives were "not absolutely necessary at the time," and, even if they were, the "[midwife] is a drag on our progress as a science and art."[35]

The legal history of abortion and its regulation root in the quagmire created out of the racialization and sex-exclusivity of reproductive medicine in the United States. In the wake of slavery's end, skilled midwives represented both real competition for male doctors who sought to enter the practice of child delivery and also a threat to how obstetricians viewed themselves. According to Joseph DeLee, "[i]f an uneducated woman of the lowest classes may practice obstetrics, is instructed by the doctors, and licensed by the State, it certainly must require very little knowledge and skill – surely it cannot belong to the science and art of medicine."

DeLee, Storer, and others were successful in stigmatizing midwifery as a "backward" reproductive healthcare practice. Obstetricians lauded obstetrics as a *trained* profession at the cusp of innovation with tools such as forceps[36] and other technologies that offered the modern convenience of hospitals. At the time, even if midwives wanted to practice in hospitals, those institutions effectively excluded them, because hospitals barred women from practice within their institutions. As researchers note, these changes in replacing midwives with doctors and homes with hospital-based medical care were not rooted in evidence.[37]

Rather, male gynecologists explicitly revealed their motivations in undermining midwifery: they desired pecuniary gain, recognition, and a monopoly. As one leading obstetrician explained, "there is high art in obstetrics and [the public] must pay as well for *it* as for surgery. I will not admit that this is a sordid impulse. It is only common justice to labor, self-sacrifice, and skill."[38] Moreover, these shifts were also deeply racialized. American hospitals zealously and faithfully practiced segregation, barring the admission of African Americans both to practice and as patients.

Even legislation said to support women's healthcare, such as the Sheppard-Towner Maternity and Infancy Act of 1921 – also known as the "better baby" bill – curiously shut midwives out of the process of reproductive healthcare and undergirded the shift toward hospital-based care. Interestingly, the only female member of Congress at the time, Alice Mary Robertson, opposed the bill, famously stating that it would prove "harmful." Strict regulation of midwifery and licensure requirements, along with states racializing the hiring of healthcare workers who traveled to rural communities, further burdened the practice of midwifery and excluded Black women from the profession. Despite the growing numbers of African American doctors and nurses in the United States during the early twentieth century, they were rarely included in states' efforts to educate poor women about reproductive healthcare.[39]

This churning of racism and sexism in the provision of reproductive healthcare created a new class of nurses and female public health workers to provide *assistance* to doctors. Overwhelmingly, those selected for these roles (traveling healthcare nurses) were white women. And, despite the fact that historically white colleges and universities with nursing schools admitted only white women, African Americans were being educated in medicine and nursing at the new crop of schools like Tuskegee University, Spellman College, Morehouse University, Hampton University, and others. Nonetheless, the professionalization of reproductive medicine was decidedly white and exclusive.[40]

Successful smear campaigns cleverly designed for political persuasion and to achieve legal reform described midwives as unhygienic, barbarous, nonefficacious, nonscientific, dangerous, and unprofessional. At the root of these actions were the deliberate efforts to elevate men who wanted to monopolize gynecology and obstetrics. Accord to Dr. DeLee:

> The midwife is a relic of barbarism. In civilized countries the midwife is wrong, has always been wrong. . . .
>
> . . . The midwife has been a drag on the progress of the science and art of obstetrics. Her existence stunts the one and degrades the other. For many centuries she perverted obstetrics from obtaining any standing at all among the science of medicine.
>
> Even after midwifery was practiced by some of the most brilliant men in the profession such practice was held opprobrious and degraded. Less than 100 years

> ago, in 1825, the great English accoucheur Ramsbotham complained of the low esteem in which he was held by his brother surgeons. He was denied admittance to the Royal College and his colleagues would not dare to be seen talking to him on the street![41]

The power of such potent rhetoric manifested itself in laws and practices that ultimately outlawed midwifery or imposed such onerous and expensive licensing requirements that many who practiced midwifery could not afford them. The ultimate result was the male monopolization of women's reproductive healthcare. Today about 1 percent of reproductive healthcare is performed by midwives.

Yet, even under deeply constrained conditions while helping poor women complete their pregnancies, midwives achieved better birth outcomes than male doctors did. Contemporary studies dispel the myths and stereotypes that for decades demeaned and stigmatized midwife care.[42] Robust empirical evidence points to the efficacy of midwife-based care.[43]

The professionalization of reproductive medicine represented a new era in the treatment of women, promising better outcomes and minimized risks. However, it also promised to be almost exclusively male and white. By shutting out midwifery altogether, male gynecologists solidified male domination and control of reproductive health in medical school obstetrics and gynecology training, systems of practice and licensure, and membership of professional medical organizations.

4.2 THE SUPREME COURT AND ABORTION CASES

> I mean, I was on one of those crappy ass yellow tiled dining room tables, with my legs up in the air, and blood in the kitchen sink right there next to me.
>
> Cathy, 69, Ormond Beach, Florida (1962 abortion)[44]

In her landmark work, *When Abortion Was a Crime*, author Leslie J. Reagan copiously details the deaths and infections that overwhelmed hospitals in New York and Chicago in the years before *Roe*. Reagan writes that by the "early 1960s, [illegal] abortion-related deaths accounted for nearly half, or 42.1 percent, of the total maternal mortality in New York City."[45] She explains that in Chicago, "[p]hysicians and nurses at Cook County Hospital," one of the busiest hospitals in the nation, "saw nearly one hundred women come in every week for emergency treatment following their abortions."[46] Sadly, "[s]ome barely survived the bleeding, injuries, and burns; others did not."[47]

In the years before *Roe*, hospital emergency wards in major cities across the nation were so completely overwhelmed by girls and women who sought care for "abortion related complications" that they created special secret wards in which to treat them for the burns, infections, uterine tears, poisonings, and the myriad near-death conditions resulting from trying to end a pregnancy. These abortion-related complications, including deaths, were not isolated. Rather, they affected "[t]ens of

thousands of women every year."[48] Deaths were particularly acute among women of color.[49] Sadly, all the deaths, infections, and complications were preventable, because legal abortions are far safer than even childbirth.

Exact numbers are unclear, but reports from hospitals and other sources estimate that nearly one million illegal abortions occurred each year in the United States prior to *Roe v. Wade*, which decriminalized the procedure. Rachel Benson Gold, Vice President for Public Policy at the Guttmacher Institute, explained that "[t]he toll the nation's abortion laws took on women's lives and health in the years before *Roe* was substantial."[50] She was right. In 1967, Dr. Alan Guttmacher founded the organization that bears his name out of concern for women dying in the most horrific, but preventable, ways due to so-called back-alley abortions that annually resulted in the deaths of women and teenage girls throughout the United States, and even more staggering infections, infertility, and emergency hospital interventions.[51]

Over the years, researchers and women's health organizations collected the harrowing narratives of women who sought and survived illegal abortions during that devastating pre-*Roe* era. Sometimes their friends, sisters, and mothers provided the stories, because the women themselves – like Geraldine "Gerri" Santoro – died during the procedure or shortly thereafter. In Gerri's case, a photo captured in black and white memorializes her death as the twenty-eight-year-old mother of two died alone, hemorrhaging on a motel floor at the Norwich Motel in Connecticut. Her boyfriend fled in a panic. The next day, the motel's maid discovered Gerri's naked body, collapsed on her knees, blood saturating the once white sheet and the carpet beneath her. Years later, *Ms.* magazine would publish the photo with the headline "Never Again."

Gerri's death and similar stories provide a narrative backdrop to the haunting images of women, bloodied and dead in bathtubs, with coat hangers or some other common household appliance refashioned into an instrument to gut the uterus nearby. They provide context for the terms kitchen-table and back-alley abortions and serve as a potent reminder that the demand for abortion is not a new manifestation and that the risks associated with criminalized abortions are predictable.

The National Association for the Repeal of Abortion Laws (also known as NARAL Pro-Choice America) published *Choices: Women Speak Out About Abortion* to encourage women to tell their abortion stories to remove the stigma and shaming.[52] Their stories illume the indignities and humiliation pregnant women experienced, as well as traumas and health risks. Polly Bergen shared this account of her experiences:

> A greasy looking man came to the door and asked for the money as soon as I walked in. He told me to take off all my clothes except my blouse; there was a towel to wrap around myself. I got up on a cold metal kitchen table. He performed a procedure, using something sharp. He didn't give me anything for pain – he just did it. He said

that he had packed me with gauze, that I should expect some cramping, and that I would be fine. I left.[53]

Her experience was typical of the many chilling experiences encountered by girls and women who wanted to end their pregnancies pre-*Roe*. Simply put, Polly's experience was not unusual. Barbara S. told *Vice News* that in her case, at eighteen years old, she did not know if the man to perform her abortion "was a fry cook, a doctor, a plumber . . . or what he did."[54] He was simply the guy who opened the door for the desperate girl. Sometimes the pregnancies resulted from rape, as in the case of Judi M., who was molested by her parents' friend in 1968, when she was sixteen years old, and became pregnant. She was desperate, so she did not turn away when a man wearing an apron opened the door to the apartment where she was to have her abortion. She wrote that "this was my only choice."[55] She did not flee when he demanded, "Give me the money." Perhaps she might have been spared what followed, including being punched in the face, blacking out, waking up where she "was lying in a pool of blood, and the guy wasn't there anymore."[56]

Sometimes the abortionists were sexual predators. Cathy, from Ormond Beach, Florida, recalls that she was sixteen years old when her abortion took place and the "doctor" told her, "You have a tight pussy."[57] At other times, abortionists chastised their clients, telling them they deserved punishment for their sins.

However, the verbal cruelty did not compare to the risks associated with incompetently performed abortions. As one woman wrote to *Ms.* magazine:

"My submission is very short. It is about my Mother, b. 1924, d. 1971.

She was found in a pool of blood on her cold white tile bathroom floor. Her mother found her. She was discovered, [she] did not die. Later, she had my sister and me. After her suicide at age 46, her mother told [me] about finding her daughter unconscious in a pool of blood." – Carol F.[58]

Frequently, the most devastating accounts came from girls and teenagers who sought to end their pregnancies. Evelyn H. recounted the memory of her friend who died after a botched abortion:

"In 9th grade a good friend became pregnant by our AAU coach. He threatened to kill her if she told how she became pregnant. Her parents were divorced and her mother had committed suicide a few weeks prior. She borrowed money from everyone and wrote a check on [her] dad's account to go to [the] local abortionist. She died in [the] girls bathroom a week later. . . . She was a very talented artist and composed music. I had known her since third grade and even now, at 62, can hear her laughter and have a caricature of myself she drew. She had to be buried in a different cementary [sic] as [she] was Catholic raised, as did her mom. After her death a group told the coach to quit or we would tell. We were 14-year-old kids doing the best we could for our friend. . . . She was just a baby herself." – Evelyn H.[59]

In another testimony, William P. tells the story of his mother, who "had an illegal abortion in her teens" before he was born. He discloses that the procedure nearly killed her. His mother simply could not stop bleeding. Bleeding to death following botched abortions was not unusual. In his mother's case, she could not risk seeking medical care "without facing criminal charges." So she bled on the newspapers her boyfriend collected. As William shares, "All she could do was wait it out in her hotel room," sitting on the stack of newspapers "to collect the blood."[60]

The best chance that a woman had in obtaining an abortion was to be in danger of death if she carried the pregnancy to term or if deemed suicidal, schizophrenic, or so psychologically fragile that the abortion was necessary to spare her mental health. With the aid of sympathetic doctors, some women feigned these conditions in order to spare themselves an unwanted pregnancy or an unsafe abortion. Others might have been fortunate enough to find an underground member of the Jane Collective or the Abortion Counseling Service of Women's Liberation, an underground railroad of sorts for women and girls who sought to safely end their pregnancies. The Jane Collective operated out of Chicago, mostly helping poor women who could not afford to travel to states where abortion services were legal. However, they took enormous risks in carrying out their efforts. In 1972, Chicago police raided the Jane Collective and seven members of the organization were arrested and each charged with eleven counts of committing abortion and conspiracy to commit abortion. The maximum prison sentence was 110 years per woman. The Court's ruling in *Roe* effectively ended their prosecution, and the group disbanded shortly thereafter.

Inaccessibility to contraception exacerbated these problems. Even access to contraception for single women was illegal in many states until *Eisenstadt v. Baird*, the 1972 Supreme Court decision that held that denying single persons the right to contraception, while allowing it for married couples, violated the Fourteenth Amendment's Equal Protection Clause. Justice Brennan 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." In that case, the state of Massachusetts made it a felony for any unmarried person to receive birth control – and even married couples had to receive their contraceptives from a registered doctor or pharmacist.

The Massachusetts law was not unusual; other states enacted similar laws, making it a felony to obtain birth control. Such laws served as enduring legacies of Comstock's nefarious antivice movement. These laws ultimately conferred state control over the most intimate aspects and acts in a woman's life. However, the groundwork for a constitutional challenge to abortion criminalization was being laid in states like New York, where the sobering volume of deaths and injuries resulting from kitchen-table and back-alley abortions left hospitals without sufficient space to treat the affected women.

Aryeh Neier, who was the national executive director of the American Civil Liberties Union during that period, said to me there was "no question that . . . back-alley abortions" played a pivotal role in the legislative decriminalization of abortion.[61] But even then, as Neier explained, decriminalizing abortion "was not originally portrayed as a women's rights issue." Instead, it was about sparing male doctors criminal punishment for performing abortions.

Although Neier disagreed with the approach adopted to end the criminalization of abortion, because it situates reproductive rights "from the physician's standpoint," the strategy was successful. Women's deaths remained secondary to the criminal punishment of doctors who helped women safely terminate their pregnancies. The basic concept of a "woman's right" had yet to take shape, at least in the reproductive health context. That would soon change.

Neier hired a young lawyer, Ruth Bader Ginsburg, in 1971 to direct a women's rights program after he became national director of the organization. Neier told me, "to some extent I share [Ruth Bader Ginsburg's] perspective." That is, "she always wanted to deal with abortion from a women's rights standpoint, whereas *Roe* deals with it from a physician's standpoint." When asked about the ACLU's pivotal leadership on women's reproductive rights, he responded, "I was fortunate to get [Ruth Bader Ginsburg] to direct the women's rights project. She wanted to push a litigation campaign on women's equality in a step-by-step way. It was remarkably well planned."

4.2.1 *Roe v. Wade*: Strict Scrutiny and the Trimester Framework

In 1973, the U.S. Supreme Court overturned Texas criminal laws that prohibited abortion except in cases where the pregnancy endangered the woman's life.[62] In a resounding 7–2 decision, the Court held that, "as a unit," all of the Texas abortion statutes "must fall." The Court advised that its "task [wa]s to resolve the issue by constitutional measurement, free of emotion and of predilection."

That opinion, *Roe v. Wade*, established that the constitutional right to privacy included a woman's decision to terminate her pregnancy. Justice Blackmun opined that the right of personal privacy is "fundamental . . . in the concept of ordered liberty." The Court reasoned that "where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake."

The Court held that criminal abortion statutes such as those in Texas (and throughout the nation), which criminalized pregnancy terminations without consideration of the pregnant woman's interests, the stage of pregnancy, or recognition of other considerations involved, "violate the Due Process Clause of the Fourteenth Amendment." Blackmun summarized:

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

The Court established a trimester framework, which foregrounded and later gave way to the undue burden standard found in *Casey*.

According to the Court, Roe sought to terminate her pregnancy and desired that the abortion be "performed by a competent, licensed physician, under safe clinical conditions."[63] Yet, section 2A of the Texas Penal Code (1961) permitted the criminal punishment and incarceration of physicians who administered abortions.[64] The law sanctioned punishment "in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled."[65] A doctor who violated the law could be fined "not less than one hundred nor more than one thousand dollars" if she attempted but did not complete the abortion.[66] If the pregnant woman died as a result of the abortion, or any attempt at it, the law treated that as murder.

Norma Leah Nelson, a single pregnant woman, challenged the Texas prohibitions, describing to the Court how severe economic hardships and social stigma unduly injured her and "all other women similarly situated."[67] Nelson, later known by the pseudonym Jane Roe, and her lawyers claimed that the Texas statutes amounted to "unconstitutionally vague" abridgments of personal privacy rights "protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments."[68] The Court referenced the brief, which describes Nelson as having attained a tenth-grade education but no matriculation beyond that point. A string of low-paying jobs, including bartending and carnival barking, barely allowed Nelson to support herself.[69]

The Court ruled that a state's imposition of motherhood onto women who would not otherwise choose that for themselves is a severe injury.[70] Blackmun wrote, that "[m]aternity, or additional offspring, may force upon the woman a distressful life and future," burdened by potentially imminent psychological trauma. The Court stated that "there is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically, and otherwise to care for it."[71]

Justice Blackmun observed that the movement to criminalize abortion was of a "relatively recent vintage." For example, "[t]hose laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin," he wrote. Rather, as he described, the laws derived from "statutory changes effected, for the most part, in the latter half of the 19th century," when Anthony Comstock launched his notorious antivice campaigns against contraception, abortion, naked images – even in medical books – and vice generally, which ultimately

resulted in federal bans on contraception and twenty-four states enacting similar prohibitions on contraception and abortion.[72]

In *Roe*, the Court ruled that a right to terminate a pregnancy is rooted in the right to privacy, "whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people." This privacy right, according to the Court, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The Court concluded that the state has a dual interest and that it includes protecting fetal life and ensuring the health of the pregnant woman. To capture these competing interests of a woman's right to privacy and state protection of life, the Court created a trimester framework to govern the constitutionality of abortion regulations: During the first trimester of a woman's pregnancy, when the fetus was not medically viable, the woman's right to privacy outweighed state interests. In the second trimester, however, a state could, "if it chooses," regulate abortion where such regulations were "reasonably related to maternal health." In the third trimester, according to the Court, the state could, "if it chooses," regulate abortion "and even proscribe" it, "except where it is necessary in appropriate medical judgment, for the preservation of the life or health of the mother."

Today, advocates for women's rights, health, and equality and reproductive justice struggle with the meaning of *Roe*. On the one hand, it decriminalized abortion and recognized women's lived lives – how early and out-of-wedlock motherhood stigmatized women and destined them to lives of hardship and "additional difficulties." Previously, the Supreme Court had been complicit in regulating women's reproduction (upholding forced sterilization laws) and decisive in relegating women to destinies of motherhood and subordination. *Roe* did not overturn prior Supreme Court precedents in this regard, but it did begin to chip away at that dark mark on the Court's record by recognizing a woman's fundamental right to privacy. And "this right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action ... or ... in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

On the other hand, as Aryeh Neier, who was at the forefront of New York's decriminalization of abortion told me, *Roe* and the decriminalization movement was ultimately framed around doctors and women's relationships *or consultations* with their doctors. Women's control over their reproduction may have been freed from the grasps of husbands and the clutches of the state, but *Roe* situated a woman's right to privacy alongside her doctor's evaluation of her decision. As then Judge Ruth Bader Ginsburg explained to Senator Metzenbaum in her nomination hearing to become a Supreme Court justice, "[t]he *Roe* decision is a highly medically oriented decision, not just in the three-trimester division," because it "features, along with the

right of the woman, the right of the doctor to freely exercise his profession." Reflecting on this, Ginsburg noted that "[t]he woman appears together with her consulting physician, and that pairing comes up two or three times in the opinion, the woman, together with her consulting physician."[73] Ginsburg's criticism was that, ironically, although *Roe* liberalized abortion and recognized a woman's right to privacy and bodily autonomy, women were not the sole focal point of the decision.

The Court and its decisions that followed in the 1970s further complicated *Roe*'s legacy, including whether abortion would be accessible to the poor women that Justice Blackmun evoked in the decision.

4.2.2 *Poverty and Abortion: Maher, Beal, and Harris*

Mary Poe and Susan Roe, like Jane Doe, were poor. At age sixteen, Mary sought and received an elective abortion at a Bridgeport, Connecticut hospital. The state of Connecticut refused to reimburse the hospital because Mary had not obtained the required physician certification of medical necessity under Connecticut law. Susan Roe was a twenty-six-year-old unmarried mother of three young children. Both Mary and Susan sought abortions in their first trimesters of pregnancy. The problem was that they could not afford the costs of their abortions. In each case, the state would have paid for the more costly prenatal and postnatal expenses if Mary and Susan had maintained their pregnancies. Connecticut would also have underwritten the costs of a "therapeutic" abortion – to save the life of a pregnant woman.

If you are poor and cannot pay for an abortion, *Roe v. Wade* may provide little solace. That was the case in 1977 (and continues to be for many poor women), when the Supreme Court issued an opinion in *Maher v. Roe*. Funding restrictions tethered poor women to the fraught conditions that characterized the pre-*Roe* era. That is, if a woman sought to exercise her constitutional right to terminate a pregnancy, as granted by *Roe*, because she did not wish to remain pregnant or because it would result in further economic hardship, interfere with her education, cause imminent psychological distress, or any of the conditions described in *Roe*, Connecticut required that she pay the costs. By this time, Justice Blackmun was in the minority – the losing side, joining with Justices Brennan and Marshall, dissenting in a case where the Supreme Court disingenuously held that Connecticut did not interfere with an indigent woman's right to *seek* an abortion. Whether a poor woman could actually obtain an abortion was not a question the Court considered.

Rather, the Court ruled that indigent girls and women were free to find other, private means to pay for the procedure. Justice Powell wrote that "[a]n indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires."[74] An indigent woman who desired an abortion simply did "not come within" the category of disadvantage that the Court had ever recognized – and the Court was not inclined to consider poor women's

poverty in relation to their reproductive rights. The Court condescendingly noted that the state of Connecticut was not responsible for the indigency of Poe and Roe and, as such, not required to remedy it. In reality, for most poor pregnant women, not just some "indigency makes access to a competent licensed physician not merely 'difficult' but 'impossible.'"[75]

Even though the Court expressly stated that its decision was not a "retreat from *Roe*," in effect it was. By refusing to fund abortion services – a procedure less expensive and safer than childbirth – the state served to coerce women into continuing pregnancies. Justice Brennan wrote in his dissent that "many indigent women will feel they have no choice but to carry their pregnancies to term because the State will pay for the associated medical services, even though they would have chosen to have abortions."[76] Most importantly, this coercion worked only on poor women, "who are uniquely the victims of this form of financial pressure."[77]

The Court's distressing insensitivity and hostility toward the lives of poor women revealed itself soon after. Like Gerri Santoro pre-*Roe*, Rosaura "Rosie" Jimenez's post-*Roe* death epitomized the hardship borne by women who wanted to end their pregnancies. Jimenez was a single mother attending college to provide better opportunities for her daughter than she had as a child with nearly a dozen siblings. She was already receiving welfare benefits and knew that she could not afford to have another child. She cleaned houses on weekends to supplement her income and worked part-time jobs. When she discovered that she was pregnant, she learned that Medicaid would not pay for her abortion, even though it would pay for a pregnancy, which costed thousands more. Much like the women before *Roe*, Rosie received her unsafe, trailer-park abortion from someone unskilled. Within a day she was hospitalized and dead a week later after all the organs in her body shut down. She was twenty-seven years old.

The lives of these pregnant women and their stories are important to recognize, because they inform us about the pragmatic realities of abortion rights after *Roe*. On the one hand, *Roe* spared middle-class white women from the horrific conditions and indignities of abortions obtained in back alleys, on kitchen tables, in seedy motel rooms, inside filthy buildings, and in bathtubs. On the other hand, poor women struggled to access abortion care. By 1977, the sex disparities in pay, education, work opportunities, and social mobility persisted, and states along with private industries ardently resisted women's efforts to demand equality.[78] In fact, companies devised coercive strategies and adopted fetal protection policies as strategic means to use women's pregnancies as a reason to discriminate against them.[79]

Meanwhile, states enacted laws prohibiting government funding for abortion services. *Maher v. Roe*,[80] *Beal v. Doe*,[81] and *Harris v. McRae*[82] – a spate of alarming Supreme Court decisions affecting abortion access and rights for indigent women – mark the Court's substantive departure from a commitment to allowing all women to participate in the broader reproductive privacy right articulated in *Roe*. Reviewed as companion cases, *Maher* and *Beal* established that states are not required to fund

abortions.[83] Moreover, states may economically prioritize childbirth over abortion, even if doing so undermines the state fisc and denies poor women their medical choices. In *Harris*, the Court upheld the Hyde Amendment's denial of public funds even in the case of medically necessary pregnancy terminations, such as when an abortion is "necessary to avert severe and permanent damage to the health of the mother."[84]

Of the three cases, all of which upheld laws that placed abortion out of reach for poor women, *Harris v. McRae*, decided 5–4, broached a level of high immorality toward the lives of poor pregnant women hitherto not present in the Court's highly contentious, punitive post-*Roe* jurisprudence. Congress adopted a rider known as the Hyde Amendment, which effectively bans federal funds in abortion care by blocking federal Medicaid funding for pregnancy termination except in cases of rape, incest, and "where the life of the mother would be endangered if the fetus were carried to term."[85] The Hyde Amendment is particularly distressing constitutionally, because it not only excludes indigent pregnant women in dangerous pregnancies from Medicaid benefits, even when recommended by a doctor, but also demands the expenditure of millions of federal dollars in order to impede the exercise of a constitutional right. As Justice Stevens expressed in his dissent, this inflicts serious, enduring harm on indigent pregnant women who need to end their pregnancies for urgent medical reasons. In upholding the Hyde Amendment, the Court sanctioned "a blatant violation" of the government's "duty to govern impartially."[86]

Representative Hyde, sponsor of the rider that bears his name, sought to ban abortion access altogether, but could not curry sufficient legislative support for a constitutional amendment to do so. However, limiting poor women's access was within reach. Notably, he said, "I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle available is the . . . Medicaid bill."[87] The results continue to be devastating. Rosie Jimenez was the Hyde Amendment's first known victim.

Specifically, in *Harris*, the Court found that "Title XIX does not obligate a participating State to pay for those medically necessary abortions for which Congress has withheld federal funding."[88] Carving out an exception for those that require an abortion to pay privately for it, while the state pays for other pregnancy-related medical treatments, disserves the social welfare goals on which Medicaid is founded. The Court stated:

> [R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.[89]

When authorizing Medicaid, Congress decided to fund *all* medically necessary procedures, however. In part, this is why singling out poor pregnant women who

choose not to remain pregnant as disqualified from this government benefit amounts to an illogical and economically irresponsible government scheme. Notice that in such instance the government does not deny coverage because treatment is medically unsound, too costly, experimental, or dangerous to the woman. The government denies poor pregnant women this treatment because it chooses her to remain pregnant and wields its resources to achieve that affect. Congress could very well have decided that it would not fund any pregnancy-related care, whether prenatal care, labor and delivery, postnatal care, or abortion. Congress acted not only irrationally but also unconstitutionally when it decided to fund one outcome of a pregnancy and not another, because doing so is impermissibly coercive, nonneutral, and a strong-arm tactic to discourage indigent women from exercising a constitutionally protected right. The Hyde Amendment effectively conditions indigent pregnant women's care on them remaining pregnant.

Unlike *Maher*, which involved nontherapeutic abortions, *Harris* established that even if the life of the mother were at risk, the government does not place an "obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest."[90] Yet, how could the significant suffering or injury to a pregnant woman be in the public's interest, or serve a defensible legislative interest? How could it be a rational, important, or compelling state interest for pregnant women to suffer grave injury during pregnancy? Justice Stevens concluded that the Court's tolerance of the Hyde Amendment's exclusion of abortion in the case of life endangerment was tantamount to severe, unconstitutional "punishment." Wasn't this what *Roe* was intended to prevent?

Again, the Court reasoned that "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."[91] According to the Court, "indigency falls in the latter category."[92] Still, had not states, their judiciaries, and even the Supreme Court cultivated and nurtured the types of conditions that subordinated, oppressed, and limited the rights of women – including basic freedoms and rights to an equal and unsegregated education and employment – and were particularly and aggressively maintained during Jim Crow, immediately preceding the civil rights advancements of the 1960s and 1970s?

In his dissenting opinion Justice Brennan wrote that "[t]he Hyde Amendment's denial of public funds for medically necessary abortions plainly intrudes upon [the] constitutionally protected decision" in *Roe*. He was right. The Court "studiously avoid[ed] recognizing the undeniable fact that for women eligible for Medicaid . . . denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether," especially for poor women of color.[93] Given this, Justice Marshall predicted that poor women would resort to "back-alley butchers" or attempt to "induce an abortion themselves by crude and dangerous methods, or suffer the

serious medical consequences of attempting to carry the fetus to term." The incredibly high maternal mortality rates in states where only one abortion clinic remains highlights the prescience of Justice Marshall's dissent.

The majority's opinion in *Harris* manifested the Court's profound, lingering failure to recognize the intersectional nature of sex, race, and economic oppression.[94] In 1980, the year in which *Harris* was decided, state legislatures sanctioned and courts upheld sexual assault, rape, and domestic violence in marital relationships, reinforcing the antiquated ideals of women as sexual property of their husbands. One could read *Harris* as reifying the notion that pregnant, indigent women were not deserving of basic human rights and fundamental constitutional protections of privacy, autonomy, or a right to life.[95] Sadly, the Court's blind spot to its own distressing record on women's rights and sex equality has yet to be fully acknowledged and remedied, particularly in relation to reproductive health.[96]

In a line of cases stretching from more than a century ago up to today,[97] the Supreme Court and lower courts failed, at important times, to protect women and their interests. In this, the Court has not only failed women per se. In upholding sexist legislation historically and now, the Court has failed to protect fundamental values of liberty and justice embedded in the Constitution – as related to women.

That is, the Court has spoken with suspect and hostile authority about the limits of women's capacities in matters of work, contracting, voting, and more. The Court's derisive framing of women and their capacities, which ultimately creates the very double standards it is charged with dismantling, manifests itself across cases that involve women seeking the better fruits of full citizenship and economic independence. Lurking in plain sight is the Court's jurisprudence that anchored women to marginalized status, leaving little wonder why and how states seek strategically to slide legislation within the gaps of constitutional jurisprudence to further stymie women's equality. In its 1948 opinion in *Goesaert v. Cleary*, the Court upheld a draconian Michigan law that stated that "no female may be . . . licensed [to bar tend] unless she be 'the wife or daughter of the male owner' of a licensed liquor establishment."[98] The Court held that "[t]he Fourteenth Amendment did not tear history up by the roots," and venerated the regulation of liquor as "one of the oldest and most untrammeled of legislative powers," before concluding that "Michigan could, beyond question, forbid all women from working behind a bar."[99] The Court seemed unfazed by what it described as "the vast changes in the social and legal position of women."[100]

Thus, in 1961, when the Court upheld a Florida law distinguishing women from men in the jury selection (women had to opt in, whereas men were simply drawn from the local pool of citizens), it reasoned that "woman is still regarded as the center of home and family life."[101] Arguably, this signaled that women still remained in service to their husbands. Neither the state of Florida nor the Supreme Court would grant women freedom from the status the former created by law and that the latter upheld. In reality, opting into such service, which is fundamental to United States'

democracy, might not have been easy for many women who desired to serve on juries, because of social forces that further entrenched women's compromised status in home and society. In that light, signing up for jury duty was made an act of social rebellion with all the stigma attached, rather than a normal civic obligation for women. Once again, the Court failed not only women, but the very purpose and cause of a democracy: "We cannot say that it is constitutionally impermissible for a State, acting in pursuit of the general welfare, to conclude that a woman should be relieved from the civic duty of jury service . . .."[102] Then and more recently, the Court has upheld legislation that implicitly and explicitly reinforces the exclusion of women from opportunity.[103]

When the Court reasons that poor women are responsible for or the cause of their poverty, it not only assumes innocence on the part of the state in shaping the status of women, but absolves states' odious records of discrimination against women across decades and centuries. First, in such instances the Court misreads its weak, inconsistent, and sometimes appalling record, too, such as in *Buck v. Bell* upholding forced sterilization of indigent women. Second, contraceptive and abortion access matter to women's economic equality and independence. Thus, when states curtail women's access to economic opportunity and family planning, and courts sanction this, these institutions ultimately contribute to women's second-class citizenship.

4.2.3 *Planned Parenthood of Southeastern Pennsylvania v. Casey*

In reality, reproductive healthcare rights hinge not on *Roe v. Wade* but on a later case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the Supreme Court abandoned the trimester approach.[104] In that case, the Court upheld the central holding of *Roe v. Wade*, which it defined as "the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State."[105] However, *Casey* also represented a new era in antiabortion legislating, which found expression in TRAP laws. This new strategy sought to undermine the abortion right by creating myriad hurdles for medical providers, clinics, and patients – effectively chipping away at the abortion right by making it burdensome for providers to offer medical treatments and difficult for patients to access that care.

At issue in this case were five provisions of the Pennsylvania Abortion Control Act of 1982 section 3205 of which "require[d] that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifie[d] that she be provided with certain information at least 24 hours before the abortion is performed," and section 3209 of which "require[d] that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband."[106] Prior to any of the provisions taking effect, petitioners challenged the law.

The Court ruled that the state's power to restrict abortions is limited, both temporally and by the mode of restriction. That is, states may not restrict abortion during the period of nonviability. Further, the Court made it clear that any regulations burdening abortion rights after fetal viability must create exceptions to preserve women's health. *Casey* established that the state may regulate abortion prior to viability only so long as the regulations do not establish an "undue burden" on a woman's ability to have an abortion. And while the Court did not define the contours of what would amount to an undue burden, it upheld several provisions of the Pennsylvania law, including the twenty-four-hour waiting period, its so-called informed consent requirements, and regulations imposed on minors seeking abortions. The Court struck down the provisions requiring that married women notify their husbands.

The antiabortion movement interpreted *Casey* as a victory and reproductive rights advocates recognized it as a lifeline protecting the fundamental principle in *Roe*. In the former case, *Casey* legitimized the TRAP law strategy, perversely grounding it in preserving and furthering the health interests of pregnant women. It wedged a boot in the door. Prior to *Casey*, the Court did not permit a state to second-guess a woman's readiness to schedule and receive a medical procedure that would relieve her of stigma, shame, pain, and physical threats to her health and safety. After *Casey*, that changed. A state could force a pregnant woman seeking treatment to end her pregnancy, to wait twenty-four, forty-eight, or even seventy-two hours (not including weekends and holidays) before she receives an abortion, under the guise of promoting informed consent. A state could claim – as some do now – that its waiting period policy furthers a woman's right to be informed, and as such is not deployed as a measure to interfere with a woman's right to end a pregnancy. *Casey* also legitimized infringements on physicians' free speech by ruling that states could require doctors to be conduits for its messaging, even if the messages are inaccurate and not based on evidence. Again, this too was justified as protecting a woman's health. *Casey* tolerated these intrusions.

Some reproductive health proponents view *Casey* as more than life support for abortion rights. In her nomination hearing to the Supreme Court, Justice Ginsburg remarked that the "*Casey* decision, at least the opinion of three of the Justices in that case, makes it very clear that the woman is central to this." In other words, the woman stands independently, not reliant on a doctor's consultation and not needing permission from a doctor. Justice Ginsburg stated that "this is her right," in contrast to *Roe*, where her decision had to be "in consultation with her physician."[107]

Nevertheless, TRAP legislation highlights and underscores the weaknesses in current Supreme Court jurisprudence, particularly the framework articulated in *Casey*. Sadly, the Court revived paternalistic ideologies associated with women's capacity to reason, consent, and make autonomous reproductive healthcare decisions, because historically the state and courts have been complicit in undermining women's economic capacities and liberty interests. That is, while functionally,

TRAP laws impose onerous constraints on abortion providers, substantively the laws challenge the underlying principles of women's reproductive rights, such as autonomy, privacy, and equality. In many states, legislatures have been quite successful in using this tactic, even though Supreme Court precedent does not provide a right for legislatures to unduly burden or interfere with women's reproductive healthcare rights. Yet, this is exactly what some states are doing.

4.2.4 *Gonzales v. Carhart*

In one of the most disturbing opinions addressing abortion, the Supreme Court ruled 5–4 that the Partial-Birth Abortion Ban Act of 2003 did not unconstitutionally violate personal liberty protected by the Fifth Amendment, despite the fact that the law lacked an exception for the procedures when necessary to protect the health of a pregnant woman.[108] Writing for the majority, which included Justices Roberts, Scalia, Thomas, and Alito, Justice Kennedy concluded that imposing a medical exception for whenever "medical uncertainty" existed would impose "too exacting a standard . . . on the legislative power [. . .] to regulate the medical profession."[109]

In that case, doctors sued to bar the law from going into effect, given that it was not only misleading by its title and inference but would apply to common abortion procedures such as dilation and evacuation ("D&E"), as well as intact dilation and extraction (referred to as "intact D&E" or "D&X").[110] Abortion providers argued that the law was unconstitutional and that it would violate the spirit of *Casey* by imposing an undue burden on abortion access rights, especially as the law would essentially ban most late-term abortions. Such procedures rarely take place, and when they do, in most instances it is to protect the health of the pregnant woman or for other medical reasons.

In fact, abortion providers made a profoundly strong case, because the federal law provided no safeguards for the protection of the pregnant woman's health, thus making it unconstitutional under the Court's precedent in *Stenberg v. Carhart.* Abortion providers argued that even if Congress believed that late-term abortions are never medically necessary, such findings would be immaterial given that abortion regulations that could impose harms on women's health establish an undue burden on the right to terminate a pregnancy. Government lawyers argued that a health exception is not required when Congress decides that a banned procedure is never necessary to promote the health of the pregnant woman.

Not only did the Court uphold the law, but Justice Kennedy introduced into the Court's abortion jurisprudence the erroneous notion that abortion taxes a pregnant woman's mental health. He wrote, "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort . . .. Severe depression and loss of esteem can follow."[111]

To the contrary, research demonstrates that "there is no increased risk of low self-esteem or life dissatisfaction following an abortion relative to being denied one."[112]

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Justice Kennedy made no mention of women who experience severe depression and emotional anxiety in pregnancy, childbirth, and parenting – though empirical evidence on these matters is readily available. As researchers and medical providers in the U.S. Department of Health and Human Services and National Institute of Mental Health explain, "with postpartum depression, feelings of sadness and anxiety can be extreme and might interfere with a woman's ability to care for herself or her family."[113]

The U.S. Department of Health and Human Services further explains that "without treatment, postpartum depression can last for months or years . . . affecting the mother's health, it can interfere with her ability to connect with and care for her baby and may cause the baby to have problems with sleeping, eating, and behavior as he or she grows."[114] A multidisciplinary group of Canadian researchers, composed of women's health experts in psychiatry, psychology, sociology, public health, and nursing, recently reported as follows:

> Postpartum depression (PPD) is a significant public health problem which affects approximately 13% of women within a year of childbirth. Although rates of depression do not appear to be higher in women in the period after childbirth compared to age matched control women (10–15%), the rates of first onset and severe depression are elevated by at least three-fold.[115]

My point here is not to stigmatize women for the mental health stress that may attend pregnancy, but rather to point out the Court's coercive use of rhetoric in cases addressing abortion. For example, Justice Kennedy avoids acknowledging the enormous physical and psychological relief experienced by some women who terminate their pregnancies.[116] A research team led by gynecologists at the University of California San Francisco reported that "the overwhelming majority of women felt that termination was the right decision for them over three years."[117] They explained, "In particular, research has found that the positive sentiments women report over time post-abortion included maturity, deeper self-knowledge, and strengthened self-esteem."[118] In other words, a woman's life satisfaction trajectory after abortion did not receive acknowledgment or mention from the Court.

In a study of 35,000 adult identical twins, findings "showed that more children make mothers less happy." Furthermore, it does not seem that "additional children beyond the first child" have a positive effect for females in relation to happiness.[119] Professor Hans-Peter Kohler's research sheds greater light on the problematic assumption built into Justice Kennedy's opinion. Kohler explains, "in contrast to the large positive effect of the first child on well-being, additional children beyond the first child are not associated with higher levels of happiness; instead, the within-[monozygotic] results reveal that additional children beyond the first tend to be associated with *lower* levels of happiness for females."[120] In fact, "[e]ach child beyond the first decreases the happiness indicator by 13% of one standard deviation

for females, and three additional children almost completely compensate for the positive effect resulting from the first child."[121]

There are significant costs to women when the Court perpetuates stereotypic attitudes toward their sex, particularly in abortion cases, because, problematically, "the notion that abortion lowers women's self-esteem has been the basis, in part, for legislation to restrict abortion access."[122] Perhaps no other institution has been more steadfast than the Court in anchoring women's identity to home, pregnancy and child-rearing. The Court's jurisprudence on abortion reflects this. In addition to this, the *Carhart* decision also problematically contributed to a moral panic about the rarely performed abortions in the third trimester of pregnancy.

There are many reasons to criticize the Court's decision. Here, I will point out three problematic features of the Court's decision. First, it violates the spirit of *Roe* and *Casey*, and shows disregard and even contempt for pregnant women's health. Second, Kennedy grants medical authority to Congress to fulfill an unconstitutional agenda. In the wake of the Court's decision, "legislatures in thirty-one states exploited the loopholes by enacting misnamed, but carefully worded, 'partial-birth' abortion laws precisely to create doubt as to whether they 'outlaw standard methods of terminating a pregnancy before fetal viability.'"[123] Third, the Court stereotypes and patronizes women who seek abortion.

4.2.5 *Whole Woman's Health v. Hellerstedt*

The battle over reproductive healthcare rights has moved significantly to states, where strategic TRAP legislation functions to circumvent and undermine women's fundamental constitutional rights at the state level. As a result, recent encroachments on women's reproductive healthcare rights raise important questions about reproductive rights and federalism or states' rights.

In 2013, after heated debate and an ambitious, but unsuccessful, filibuster by Wendy Davis, the Texas legislature enacted House Bill 2 (H.B. 2). The law contained two provisions at issue in the 2016 U.S. Supreme Court case *Whole Woman's Health v. Hellerstedt*.[124] The legislation represented another tool in the antiabortion arsenal built and primarily cultivated by male lawmakers. Ironically, Texas lawmakers claimed H.B. 2 and similar laws protected women, preserved their health, and enhanced patient safety. Governor Rick Perry signed the legislation, heralding it as part of the "culture of Texas" and destined to make abortion "a thing of the past."[125] Indeed, Perry and Texas legislators cleverly erected so many barriers in the paths of women seeking abortions in Texas that the right to terminate a pregnancy became more illusory than real. Their goal – to hobble abortion access (while not actually banning the procedure) – proved successful in the short term. Lawmakers celebrated the deceptively framed law as a hopeful strike against *Roe v. Wade*.

Problematically, Governor Perry's legislative victory in the name of women's health and safety also perpetuated a profoundly misleading medical narrative.

Despite unambiguous scientific research[126] and empirical outcomes from abortion clinics[127] proving that legal abortions are as safe as penicillin shots,[128] antiabortion legislators and activists steadfastly campaigned that TRAP laws constitute "sensible women's health legislation." Antiabortionists have proven successful, shaping the narrative about abortion to such a chilling degree that only one abortion clinic remains in each of these states: Kentucky, Mississippi, Missouri, North Dakota, South Dakota, West Virginia, and Wyoming. In reality, pregnant women in Texas were no safer after the enactment of H.B. 2 than before, because women are fourteen times more likely to die during pregnancy and childbirth than by terminating a pregnancy.[129] Moreover, the United States ranks behind all other elite (and many developing) nations on maternal and infant mortality matrixes, including England, France, and Germany, but also Belarus, Cuba, Guam, Hungary, Poland, and Taiwan.

The two provisions at issue in *Whole Woman's Health* concerned the constitutionality of two Texas Health and Safety Codes. Section 171.0031, or the "admitting privileges" requirement, mandated that "[a] physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced."[130] The second provision, related to Texas Health and Safety Code section 245.010, required that "an abortion facility must be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers."[131]

According to the Texas Policy Evaluation Project, within months of the law's enactment the number of abortion clinics in Texas dramatically declined by 56 percent from forty-one licensed clinics to eighteen.[132] After the bill's passage, researchers recorded a dramatic uptick in the number of women who sought to self-induce abortions. They estimated that between 100,000 and as many as 250,000 women in Texas attempted self-induced abortions. On the one hand, the number of legal abortions in Texas immediately declined, due to the reduced number of clinics in the state. On the other hand, waiting periods for an abortion increased by nearly three weeks.[133] Longer waiting periods produced serious barriers and harsh consequences, particularly for poor women, because Texas also enacted a ban on abortions after twenty weeks. Many women reported that the Texas restrictions placed an undue burden on their constitutionally protected right to an abortion by constructing barriers to access. One such example could be found in the Rio Grande of Texas, where only one abortion clinic operated. With its closure, the nearest clinic to perform abortion services would have been 230 miles away, a twelve-hour round-trip car ride.[134]

The weeks leading up to the Supreme Court's announcement of the ruling were intense. A defeat in this case would mean clinics that perform abortions could effectively be regulated out of business. The Supreme Court's 5–3 decision struck down both provisions.[135] The Court overturned the Fifth Circuit Court of Appeals'

decision, finding that both the admitting privileges requirement and the surgical center requirement were undue burdens on a woman's right to terminate a pregnancy.[136] The Court found that the legislature's rationale for enacting H.B. 2 was inconsistent with the effects produced by the law.

Writing for the majority, Justice Breyer pointed out the dubiousness of the law, because abortion was "extremely" safe prior to the law's enactment.[137] In fact, an abortion is one of the safest medical procedures that a woman could receive. It is safer than childbirth and carrying a pregnancy to term and safer than common outpatient procedures such as colonoscopies.

Citing an amicus brief from the Society of Hospital Medicine, the Court noted the "undisputed" fact that "hospitals often condition admitting privileges on reaching a certain number of admissions per year."[138] As such:

> [I]t would be difficult for doctors regularly performing abortions at the El Paso clinic to obtain admitting privileges at nearby hospitals because "[d]uring the past 10 years, over 17,000 abortion procedures were performed at the El Paso clinic [and n]ot a single one of those patients had to be transferred to a hospital for emergency treatment, much less admitted to the hospital."[139]

Justice Breyer explained that "[i]n a word, doctors would be unable to maintain admitting privileges or obtain those privileges for the future, because the fact that abortions are so safe" means abortion providers were unlikely to treat patients whom they could admit.[140] Moreover, amicus briefs filed by Medical Staff Professionals and the American College of Obstetricians and Gynecologists (ACOG), clarifying that "admitting privileges . . . have nothing to do with the ability to perform medical procedures,"[141] provided a persuasive factual foundation for the Court. In the latter brief, ACOG specifically related that "some academic hospitals will only allow medical staff membership for clinicians who also accept faculty appointments."[142]

Justice Breyer took special note of a particular gynecologist with nearly forty years of practice experience, who, despite experience in delivering over 15,000 babies, was yet unable to obtain hospital admitting privileges at the seven hospitals within a thirty-mile radius of his office. The Court cited a letter from one of the nearby hospitals, which explained that the refusal to provide the doctor admitting privileges was "not based on clinical competence considerations."[143] To that end, the Court concluded that "[t]he admitting privileges requirement does not serve any relevant credentialing function." Instead, the law resulted in numerous clinic closures throughout the state of Texas and inordinate, unjustifiable burdens placed on pregnant women.

The second issue the Court turned to was whether H.B. 2's surgical center requirement violated the constitutional standards set forth in *Casey*. Prior to the enactment of H.B. 2 and the surgical center requirements, "Texas . . . required abortion facilities to meet a host of health and safety requirements."[144] Specifically, Justice Breyer stated that Texas law already required clinics that

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perform abortions to develop, complete, and maintain: environmental and physical requirements; annual reporting; infection control; record keeping; patients' rights standards; quality assurance mechanisms; disclosure requirements; and anesthesia standards, among others. Moreover, clinics performing abortions in Texas were subject to random and unannounced inspections as a means of monitoring compliance with nearly a dozen separate standards. The Court struck down this provision.

4.3 CONCLUSION

As this book goes to press, the United States Supreme Court has decided to take up *June Medical Services v. Gee*, a case that challenges its authority and prior ruling in *Whole Woman's Health*, which was decided barely three years before. The case involves a Louisiana admitting privileges law virtually identical to the Texas law the Supreme Court struck down as unconstitutional in 2016. This type of challenge to the Court's authority and precedent is virtually unheard-of and thus highlights the unique and brazen disregard for Supreme Court precedent as related to women's reproductive rights.

Clearly, antiabortion laws are not about protecting the health or safety of women and girls or people who can become pregnant. Safety serves as an expedient, duplicitous proxy in these instances. For the most part, male legislators control women's reproductive healthcare access in the United States, and in the context of abortion some cling to their power over women's bodies with an ironclad grip. Overwhelmingly, these policymakers have no history of providing medical care and no experience in the sciences. Yet, they legislate against reproductive health with an outsized authority relative to their knowledge and in ways that are both condescending to women and dangerous. Some in this cohort champion legislation that denies abortion even in cases of rape and incest. Even saving or preserving the life of the pregnant woman does not matter. Women's health and safety are only incidental to what really matters: preserving power.

Brie Shea spells out how their power was strategically executed in 2019 to hollow out abortion rights.[145] Nearly four hundred antiabortion laws were proposed in the first half of 2019 and more than a dozen states debated legislation that would give constitutional rights to fetuses. Those same laws would prioritize the "rights" of fetuses over pregnant women. State legislatures introduced a spree of laws criminalizing abortion during the first and second trimesters, claiming to protect fetuses after a heartbeat is detected, notwithstanding the fact that those early pulsations they legislate about have nothing to do with a developed, beating heart.

Nevertheless, sixteen states introduced legislation seeking to ban abortion after the so-called detection of a fetal "heartbeat." Mississippi's governor signed a law banning abortion after six weeks. The Arkansas legislature enacted the "Cherish Act," which makes it a felony to perform an abortion after eighteen weeks of fetal gestation. Violating this law could result in six years imprisonment. Lawmakers in Utah enacted a similar

law. Ohio's governor signed antiabortion legislation that provides no exception for rape or incest. Beyond a doubt, the ability to terminate a pregnancy is under serious threat and the future of abortion rights secured under *Roe*, *Planned Parenthood v. Casey*, and *Whole Woman's Health* rests with a deeply divided, partisan, and politicized Supreme Court.

Yet, also contributing to the mishmash of state statutes, federal law, and cases are little-known executive orders and amendments that restrict the use of federal funds for abortion, domestically and abroad. For example, even former President Obama added to the list of antiabortion executive orders. In 2010, he signed one into law. Executive Order 13535 – Patient Protection and Affordable Care Act's Consistency with Longstanding Restrictions on the Use of Federal Funds for Abortion – ensures the enforcement and implementation of abortion restrictions in the Affordable Care Act (ACA).[146] The executive order emerged from negotiations and a compromise struck with Democratic congressman Bart Stupak, who refused to support the passage of the ACA unless the legislation included strong language prohibiting the use of federal funds for abortion.[147]

The compromise allowed the ACA to move forward in Congress with the support of Stupak and others.[148] In the process, it further entrenched a problematic notion, however – namely, that Congress may unconstitutionally impose reproductive preferences on women, violating their privacy rights. The executive order "maintains current Hyde Amendment restrictions governing abortion policy and extends those restrictions to the newly created health insurance exchanges."[149] The executive order also extends to other federal laws. For example, it seeks to "protect conscience" by upholding the Church Amendment[150] as well as the Weldon Amendment.[151] President Obama's executive order also shields entities that discriminate against women based on conscience, by allowing preexisting federal laws to apply.[152]

President Obama's executive order not only applies Hyde to the ACA, it also expands protections by "prohibit[ing] discrimination against healthcare facilities and healthcare providers because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions."[153] Ironically, entities that discriminate against and harm women based on religious views are now permitted to do so under an executive order without repercussion. Further, the executive order includes strict guidelines prohibiting the "use of tax credits and cost-sharing reduction payments to pay for abortion services (except in cases of rape or incest, or when the life of the woman would be endangered)."[154] Ironically, the Act forces upon state health insurance commissioners the responsibility of ensuring that exchange plan funds, which were intended to provide greater access to healthcare, comply with the expanded restrictions meant to deny women reproductive healthcare.

However, President Obama's little-known executive order stands alongside other executive orders and amendments, such as the Mexico City Policy, otherwise known as the "global gag rule," which is discussed in Chapter 9.