UNIVERSITÀ
DI PAVIA

UNIVERSITÀ DEGLI STUDI DI PAVIA

DIPARTIMENTO DI STUDI UMANISTICI
DIPARTIMENTO DI SCIENZE POLITICHE E SOCIALI
DIPARTIMENTO DI GIURISPRUDENZA
CORSO DI LAUREA MAGISTRALE IN STORIA GLOBALE DELLE CIVILTÀ E DEI TERRITORI

THE LEGALIZATION OF ABORTION IN THE UNITED STATES: A HISTORICAL ANALYSIS (1968-1973)

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Anno Accademico 2025-2026

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Introduction

In 1963, Betty Friedan, then an unknown journalist, published *The Feminine Mystique*, a survey on the widespread unhappiness and unfulfillment of white suburban housewives in the 1950s and early 60s. The book was an overnight success and –to this day– is considered to have almost single-handedly spurred second-wave feminism.[1] 1963 was also the year of the March on Washington. Barely three months before JFK's assassination, 200,000 people peacefully walked to the Lincoln Memorial in Washington, D.C. to advocate for African American rights. Nine years after the historic Supreme Court ruling that had rendered racial segregation in public schools unconstitutional (Brown v. Board of Education, 1954), Black people in America were still fighting for their civil rights.[2] Two years later, the escalation of the Vietnam War would put American soldiers on the front lines, spurring another surge of mass protests that would often merge the two causes.[3] Such a combative and animated political climate would serve as a breeding ground for the birth of a new feminist movement. Discontented with the male-centered narrative of civil rights groups such as the Student Nonviolent Coordinating Committee (SNCC) or, after 1966, the vigorously radical Black Panther Party, women –especially Black women– involved in the struggle for African American rights began to distance themselves from the Movement to carve a space of their own.[4]

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[1] For further reading, see Chafe, William H.. *The Road to Equality: American Women Since 1962*, Oxford University Press, 1994; Coontz, Stephanie. *A Strange Stirring:* The Feminine Mystique *and American Women at the Dawn of the 1960s*, Basic Books, 2010; Davis, Flora. *Moving the Mountain: The Women's Movement in America Since 1960*, University of Illinois Press, 1999; Hennessee, Judith. *Betty Friedan: Her Life*, Random House, 1999; Horowitz, Daniel. *Betty Friedan and the Making of "The Feminine Mystique": The American Left, the Cold War, and Modern Feminism*, University of Massachusetts Press, 1998;

[2] For further reading, see Clotfelter, Charles T.. *After* Brown*: The Rise and Retreat of School Desegregation*, Princeton University Press, 2006; Rothstein, Richard. *The Color of Law: A Forgotten History of How Our Government Segregated America*, Liveright Publishing Corporation, 2017;

[3] For further reading, see Hall, Simon. *Peace and Freedom: The Civil Rights and Antiwar Movements in the 1960s*, University of Pennsylvania Press, 2004; Lucks, Daniel S.. *Selma to Saigon: The Civil Rights Movement and the Vietnam War*, University Press of Kentucky, 2014;

[4] For further reading, see Bell, Janet Dewart. *Lighting the Fires of Freedom: African American Women in the Civil Rights Movement*, New Press, 2018; Brines, Winifred. *The Trouble Between Us: An Uneasy History of White and Black Women in the Feminist Movement*, Oxford University Press, 2007; Evans, Sara. *Personal Politics: The Roots of Women's Liberations in the Civil Rights Movement and*

As Black lawyer and activist Florynce Kennedy said:

> «I could understand feminism better because of the discrimination against Black people, and the patterns were very similar, almost parallel, so it was easy for me to understand the psychology and the techniques to fight them, you see, because all I had to do is transfer the thinking from the Black community over to the women's community, and you get the same thing: less good jobs and stuck with the kids, and cheaper pay for the same work.»[5]

The very first victory for Second-wave feminists would come in 1964, and it would be built right on the shoulders of the Civil Rights Movement: in July, Title VII of the Civil Rights Act was amended to add unfair treatment on the basis of sex to the categories of prohibited forms of discrimination, which already included those based on race, religion, ethnicity and nationality. This major step forward was the result of a governmental campaign that had guaranteed special attention to gender inequality since the beginning of the decade. In 1961, President Kennedy had established the President's Commission on the Status of Women (PCSW), a specifically appointed panel to keep him updated on sex discrimination in the workplace, on educational imbalance between the sexes, and on any structural injustice within the law. The commission was the very first federal initiative to recognize and validate women's struggle for equal rights.[6]

In the meantime, following her unexpected success, Betty Friedan had become a prominent leader of the rising feminist cause. In 1966, along with Black lawyer Pauli Murray, she co-founded the National Organization for Women (NOW),[7] serving as its first president. Known for her iron-fisted leadership and her controversial stance on queer women's place in the movement, Friedan pushed for equal rights in the

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the New Left, Vintage Books, 1980; Holsaert, Faith S. et al.. *Hands on the Freedom Plow: Personal Accounts by Women in SNCC*, University of Illinois Press, 2010;

[5] Florynce Kennedy's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, Simon & Schuster, LLC, New York, 2024, p. 73

[6] For further reading, see Critchlow, Donald T.. *Intended Consequences: Birth Control, Abortion, and the Federal Government in Modern America*, Oxford University Press, 2001;

[7] For further reading, see Turk, Katherine. *The Women of NOW: How Feminists Built an Organization That Transformed America*, Farrar, Straus and Group, 2023;

workplace and, together with her collaborators at NOW, became a tireless advocate for the repeal of all abortion bans.

But problematic, often white-centric Betty Friedan was not alone in her battles. After *The Feminine Mystique*'s success, many different, more nuanced perspectives on feminist theory began to emerge. With her 1969 pamphlet titled *Double Jeopardy: To Be Black and Female*, black feminist Frances Beal anticipated the concept of intersectionality by understanding that black women's struggle was "doubled" by their experience of both systemic gender inequality and racial discrimination.[8] That same year, *Our Bodies, Ourselves*, a groundbreaking manual on women's health written by the Boston Women's Health Book Collective, began circulating, effectively paving the way for the destigmatization of women's anatomy, sexuality, and reproductive rights.[9] In 1970, Kate Miller's *Sexual Politics* incorporated a new perspective into feminist theory by understanding that women's oppression stemmed from a power imbalance between the sexes, one that shared similarities with systemic issues such as classism and racism. And these are but a few examples. Following this unprecedented feminist impetus, a number of new journals and magazines were founded to encourage discussion within the movement and spread ideas on a large scale. These publications spanned from the radical, pioneering efforts of *Off Our Backs*, established in Washington at the dawn of the new decade with the purpose of not shying away from overlooked or controversial issues such as domestic violence and homosexuality, to Gloria Steinem's own *Ms. Magazine*, the periodical that pushed feminist discourse into the mainstream.[10]

Meanwhile, the abortion rights movement took on a life of its own. In 1969 Chicago, while a female-run underground abortion network called Jane was beginning to illegally operate, the newborn National Association for the Repeal of Abortion Laws (NARAL) held its first ever conference on the pressing matter of abortion

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[8] For further reading, see Davis, Angela Y.. *Women, Race, and Class*, Vintage Books, 1983; Springer, Kimberly. *Living for the Revolution: Black Feminist Organizations, 1968-1980*, Duke University Press, 2005;

[9] For further reading, see Davis, Kathy. *The Making of "Our Bodies, Ourselves": How Feminism Travels Across Borders*, Duke University Press, 2007;

[10] For further reading, see Beins, Agatha. *Liberation in Print: Feminist Periodicals and Social Movement Identity*, University of Georgia Press, 2017; Farrell, Amy Erdman. *Yours in Sisterhood:* Ms. *Magazine and the Promise of Popular Feminism*, University of North Carolina Press, 1998;

liberalization, a conference that was attended –among others– by the indomitable Betty Friedan.

But abortion legalization could not happen in public rallies or conferences. Abortion legalization had to happen in courts, and its rise (Roe) and fall (Dobbs) could not have been possible without a number of other cases relating not only to abortion as a criminal procedure, but also to sterilization as a widespread practice, to the decriminalization of birth control and premarital heterosexual sex, and to pregnancy discrimination as a blatant form of gender inequality. This is what this work is about.

After learning about the colossal movement that was second-wave feminism in the United States, I became more and more interested in the people and the cases that backed feminists' efforts from the courtroom. I was immediately fascinated with Ruth Bader Ginsburg and her tireless work as a collaborator of the American Civil Rights Union (ACLU) in the early 1970s.[11] Her judicial approach to sex discrimination and to women's rights was essential in opening new doors for what Clara Bingham defines as "feminist jurisprudence". Her interest in gender equality sparked Ginsburg to deal with a number of cases that encouraged her to take action against discriminatory laws: Reed v. Reed (1971), Moritz v. Commissioner (1972), Frontiero v. Richardson (1973) all tried to dismantle the body of laws that established a difference in treatment between the sexes. It was of course Struck v. Secretary (1972), the case of a military nurse who had been discharged solely for being with child and wanting to carry the pregnancy to term, that allowed Ginsburg to deal with the pressing matter of women's reproductive rights. This case sparked my interest for its unusual approach to the issue of abortion. As of early 1970, when Captain Susan Struck became pregnant, military policy on voluntary pregnancy termination was the most progressive abortion "law" in the country: all servicewomen and female relatives of servicepersons were entitled to elective abortions, no questions asked. However, this surprisingly liberal policy presented a downside: if a pregnant servicewoman wanted to deliver her child, she would automatically be discharged. Ginsburg believed that this peculiar case of

[11] For further reading, see De Hart, Jane Sherron. *Ruth Bader Ginsburg: A Life*, Scribe Publications, 2020; Ginsburg, Ruth Bader, Tyler, Amanda L. *Justice, Justice Thou Shalt Pursue: A Life's Work Fighting for a More Perfect Union*, University of California Press, 2021; Ginsburg, Ruth Bader, Hartnett, Mary and Williams, Wendy W.. *My Own Words*, Simon & Schuster, 2016;

pregnancy discrimination could be the key to abortion legalization. Upon learning of this extraordinary lawsuit, I wondered: how did they get there? How –and when– was abortion criminalized in the United States? Why? And most importantly, how was it legalized? These are the questions I tried to answer in this work.

The road to the legalization of abortion, its almost fifty-years-long run, and its ultimate demise are the focus of this thesis. More specifically, I adopted a historical perspective in tracing the outlines of the 1960s criminal abortion scene, choosing the Jane collective as a prime example of the way women dealt with reproductive injustice, and a judicial point of view in examining the cases that shaped abortion discourse from the pre-Roe era to the decades following the Supreme Court's historic decision. This analysis was made possible by a significant number of historical, medical, legal and scientific journals, and by direct access to the digitalized versions of both federal and state courts opinions. Coming into contact with the language that legal professionals employed to deal with abortion, and with the "clinical" way with which they handled such a delicate matter, provided me with an entirely new perspective: while outside the courtroom both the anti-abortion movement and the groups advocating for liberalized laws used a highly emphatic, political and often aggressive language to promote their causes, most judicial opinions read as extremely detached—save for the occasional outraged dissenting judge. It is a distinctively singular point of view, one whose existence had not occurred to me before.

As for the research section of this thesis, I decided to use The New York Times as my primary source. What better way to complete my analysis than to turn to yet another type of language –the journalistic one– and see what kind of perspective it had to offer? I found the point of view of the media to be a highly relevant puzzle piece to add to this work. After all, in the 1960s and 70s, the media –in this case print media– was people's main source of information on the matter of abortion. While activists, feminists, legal professionals and politicians had other means to educate themselves on women's reproductive health and rights, ordinary, indifferent or uninvolved people mainly used newspapers as their source. But why The New York Times? In 1970, New York State became home to the most advanced and progressive abortion law in the country. As one of the four states that largely liberalized abortion that year, New

York was unique in its lack of a residency requirement, which allowed women from all over the country to seek safe and legal procedures within its borders. Its exclusive position among the nation's most progressive states made New York the ideal case study, and The New York Times its ideal spokesperson. As for the timeframe, I choose to begin my analysis with the year 1968, when the push for abortion liberalization became a central effort in the New York's legislature, and to conclude it with December 1973, approximately one year after Roe v. Wade. As expected, this five-year period proved to be rich in content: over 400 articles on the matter of abortion were published by the New York Times, of which I selected and examined a total of 387.

To organize such a vast pool of information, I divided this work into three chapters. The first one will paint a picture of "the road to Roe", starting with the 19th century impetus that led all 50 states and the District of Columbia to criminalize abortion in the surprisingly short 29-year period between 1840 and 1869. From then on, I will discuss the everpresent issue of class disparity in matters of healthcare, and its close relation to therapeutic abortion. The chapter will then touch on the heavy subject of sterilization abuse and its racial undertones and implications, and only then it will move on to the harsh reality of 1960s criminal abortion, specifically to the extraordinary experience of the Jane collective, a feminist abortion network based in Chicago that devoted itself to providing illegal but safe procedures to desperate pregnant women. Then, my analysis will focus on two different cases of pre-Roe abortion liberalization: California's People v. Belous (1969), and its relevance to the discourse around a physician's right to practice medicine, and New York's unprecedented 1970 law. I will then examine two legal cases that shaped judicial discourse around reproductive rights: Eisenstadt v. Baird (1972), which legalized the use of contraception for unmarried people, and Relf v. Weinberger (1974), which brought to light the horrors of sterilization abuse at the expense of Black people. The last paragraph will explore pre-Roe case law on the matter of pregnancy termination, focusing on another two cases: United States v. Vuitch (1971), the first ever abortion lawsuit to reach the United States Supreme Court, and Struck v. Secretary of Defense (1972), RBG's unique approach to abortion legalization.

The second chapter, titled “Abortion after Roe”, opens with an in-depth analysis of the opinions in Roe v. Wade and its companion case, Doe v. Bolton. As abortion becoming a woman’s constitutional right did little to solve systemic issues such as class and racial disparity in matters of healthcare, in the second paragraph I will discuss the (un)availability of abortion to poor and non-white people in the years following Roe’s sentence. Relating closely to the healthcare gap is the topic of the third paragraph, which will examine the issue of federal funding for abortion. Moving on, the chapter will then analyze three significant abortion cases of the post-Roe era: Planned Parenthood v. Danforth (1976) and Bellotti v. Baird (1979), which dealt with the problematic requirement of spousal or parental consent that compromised married and underage women’s freedom to seek abortions, and Planned Parenthood v. Casey (1992), which subtly restricted the framework for legal abortion established by Roe. My analysis will then discuss the rise of a widespread anti-abortion sentiment within American society, one that consistently escalated after 1973 and culminated in the 2022 sentence in Dobbs v. Jackson Women’s Health Organization, the case that overturned Roe and Casey and effectively put an end to legal abortion in the United States.

Ultimately, the third and final chapter will make use of the 387 New York Times articles I selected to put together a year-by-year account of the events that led New York State to liberalize abortion in 1970, and of the ways in which state politicians and legislators dealt with the new law. This chapter will go back to the 1960s and 70s, when discourse around abortion legalization was at its peak: while the first two chapters delineate the history of abortion in the United States specifically through the lens of the law, this final section delves into the inner workings of New York’s state government through the eyes of print media. Due to its peculiarity, and given the thematic consistency of the first two chapters, this section comes last, offering a unique and standalone point of view. Of the 387 NYT pieces I examined, I referenced a total of 98. The chapter will explore then Governor Nelson Rockefeller’s role in bringing about abortion reform and legislative change, President Nixon’s firm opposition to voluntary pregnancy termination as a population control practice, the Catholic hierarchy’s outrage regarding the law’s dismissal of a fetus’s “right to life”,

and the part that New York women and physicians played in making sure that the incessant attacks on the most progressive abortion bill in the country would not render their hard-fought battle for reproductive rights futile.

Chapter I
The Road to Roe

1. *Abortion criminalization in the 19th century: A change in attitude*

There was a time when abortion wasn't a legal matter, or even a political one; nor was it a religious or moral dilemma, but simply a female issue mostly handled by women, be it midwives or "healers". A medical problem no different than any other. That time wasn't as long ago as we might expect.

All throughout history, women have always seeked abortions.

> «From the earliest nomadic societies that could only sustain as many children as adults could physically carry to modern capitalism, women have used whatever means available to them to separate sex from procreation. [...] The evidence shows that whatever the economic system, state of scientific knowledge or law, and however dangerous or limited their options, women have tried to end unwanted pregnancies.»[12]

When the Industrial Revolution came about in the late 18th century, women (as well as children) were forced to join men in factories to help sustain their often numerous families. The horrific working conditions, the endless shifts and the unsanitary work environment caused many women to miscarry or give birth to stillborn infants. Forced to live in such difficult circumstances to make ends meet, and given the general ignorance surrounding contraception, women often turned to abortion as a way out. But the radical shift produced by the Industrial Revolution had reached the doors of healers too, forever changing the practice of medicine.

> «The huge changes brought by the Industrial Revolution meant the world of the midwife's kitchen garden, with its medicinal plants and herbs, was left in

[12] Orr, Judith. "Abortion: As Old as Humanity." In *Abortion Wars: The Fight for Reproductive Rights*, 1st ed., Bristol University Press, 2017, p. 41

> the past. The new pills, poisons and chemicals that became accessible were what women reached for as abortifacients.»[13]

So how did such a normalized and widespread practice become a crime? As with most things, the Church had a role in condemning abortion, making it a moral issue in 1869, when Pope Pius IX declared that the fetus is inhabited by the soul since the moment of conception[14]—thus asserting that abortion essentially equals homicide both in nature and gravity. But this catholic stance, however paradoxical it may sound, was bound to have more influence in the decades to come, especially in the battle for the legalization of abortion of the mid 20th century, than it did at first.

As for the 1800s, while England had already criminalized abortion before quickening (the noticeable movements of the fetus) with the so-called Ellenborough Act of 1803,[15] abortion in the early weeks of pregnancy was a widely accepted –if not welcome– solution to the overwhelming issue of overpopulation; that is, until 1837, when the Offenses Against The Person Act «abandoned the differentiation between pre- and post-quickening.»[16] The United States naturally followed, as they'd always heavily relied on English common law to forge their own legal system. As it had been for early English law, abortion before quickening wasn't even frowned upon in America until the early-to-mid 19th century. In fact,

> «[...] abortions were overtly advertised and performed at least until the Civil War [...] It was not until the middle of the 19th century that anti-abortion laws [...] were passed and enforced.»[17]

Many reasons could be behind this change in attitude: the severe morality of the era, the potential harm to the ideal growth of the American population, and –most importantly– the innate risks of a medical procedure as delicate and dangerous as 19th

[13] Orr, Judith. "Abortion: As Old as Humanity." p. 49
[14] Milman, Kathryn G.. *Abortion Reform: History, Status, and Prognosis*, 21 Case Western Reserve Law Review 521, 1970, p. 526
[15] Orr, Judith. "Abortion: As Old as Humanity." p. 49
[16] Milman, Kathryn G.. *Abortion Reform: History, Status, and Prognosis*, p. 527
[17] Milman, Kathryn G.. *Abortion Reform: History, Status, and Prognosis*, p. 528

century abortion was. Surprisingly (and ironically) enough, it was the potential harm to the life of the mother that led to the criminalization of abortion. Another reason for imposing reproductive control on women was the growing fear of their liberation: if a woman could control her reproductive system, hence choosing whether or not to bear children, she could virtually question –and subvert– her role in society, which in the 1800s was essentially that of a breeder. Women refusing motherhood, in the eyes of the men of the time, equaled women refusing their innate role, their nature even.

> «Physicians addressed men's fears of women changing social roles, in particular, of suffragists' demand for women's right to a place in the public sphere. Thus the current historiography concludes that nineteenth century abortion politics concerned control of women's bodies and the meaning of motherhood in defining women's social place.»[18]

Another critical factor is, of course, race. If white American women were aborting their children, then white hegemony was inherently at stake. The racial factor in 19th century anti-abortion discourse is vastly reliant on the sky-high immigration rates registered at the time.

> «Between 1851 and 1880 almost five million immigrants arrived in the United States [...] The 1860 census counted 31.4 million Americans, slightly more than 4 million of whom were foreign-born. [...] The 1890 census, the first to count second-generation immigrants, found that 80 percent of New York City's white population consisted of immigrants and their children.»[19]

Of these immigrants, Irish Catholics were a particularly thorny group. While our contemporary perception of race almost never takes religious beliefs into consideration, in the 19th century race and religion were overlapping categories,[20]

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[18] Beisel, Nicola, and Kay, Tamara. *Abortion, Race, and Gender in Nineteenth-Century America*, American Sociological Review 69, no. 4, 2004, American Sociological Association, p. 498

[19] Beisel, Nicola, and Kay, Tamara. *Abortion, Race, and Gender in Nineteenth-Century America*, p. 501

[20] Ibidem

which is clearly demonstrated by the ostracization of Irish immigrants first and Italian immigrants later, both of whom are "white", but also mainly Catholic.

Finally, the medical professionals certainly played a crucial role in the criminalization of abortion. This turn of events is rooted in the "centralization" of the medical practice that fittingly began in the 1800s. The American Medical Association was founded in 1847[21] in an attempt to standardize medical practice and education by making health professionals a specialized category. Professionalizing medicine also meant de-professionalizing, and banishing, any other less orthodox practitioners of medicine and pharmacy, including midwives.

> «The argument of these physicians, in brief, was that abortion was both an "immoral" act and a medically dangerous one, given the incompetence of many of those practitioners then providing abortion.»[22]

But physicians' involvement in the criminalization of abortion also spawned from demographic concerns, namely the fear that, if left unsupervised, abortion could cause damage to natural population growth and to the equally natural purpose of women's sexuality—that of procreation.[23]

All these converging factors led to a very efficient anti-abortion campaign, promoted by the AMA itself in 1858.[24] In their endeavor, physicians unsurprisingly didn't shy away from racist rhetoric, arguing that «abortion threatened the political power and social influence of the native-born,»[25] namely white, Protestant Americans, and thus «was a crime against the state and a violation of women's duty to the republic.»[26] This effort to effectively and definitively criminalize abortion resulted in a very rapid

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[21] American Medical Association (AMA), *AMA history*, https://www.ama-assn.org/about/ama-history/ama-history

[22] Joffe, Carole. *Portraits of Three "Physicians of Conscience": Abortion before Legalization in the United States*, Journal of the History of Sexuality, Vol. 2, No. 1, University of Texas Press, 1991, p. 48

[23] Beisel, Nicola, and Kay, Tamara. *Abortion, Race, and Gender in Nineteenth-Century America*, p. 506

[24] Beisel, Nicola, and Kay, Tamara. *Abortion, Race, and Gender in Nineteenth-Century America*, p. 498

[25] Beisel, Nicola, and Kay, Tamara. *Abortion, Race, and Gender in Nineteenth-Century America*, p. 507

[26] Ibidem

enactment of anti-abortion laws all throughout the United States. Starting with Alabama in 1840 and ending with Wyoming in 1869, all 50 States (including the District of Columbia) had regulated abortion by the start of the 1870s.[27] Hereafter is a complete tab of 19th century abortion criminalization state by state.

Table 1 Year of passage of first anti-abortion law

Name	Year	Name	Year
Alabama	1840	Montana	1864
Alaska	1884	Nebraska	1866
Arizona	1864	Nevada	1861
Arkansas	1838	New Hampshire	1848
California	1849	New Jersey	1849
Colorado	1861	New Mexico	1854
Connecticut	1821	New York	1829
Delaware	1883	North Carolina	1881
District of Columbia	1857	North Dakota	1877
Florida	1868	Ohio	1834
Georgia	1876	Oklahoma	1875[a]
Hawaii	1850	Oregon	1854
Idaho	1864	Pennsylvania	1846[a]
Illinois	1827	Rhode Island	1861
Indiana	1835	South Carolina	1883
Iowa	1838	South Dakota	1899[a]
Kansas	1855	Tennessee	1883
Kentucky	1879[a]	Texas	1854
Louisiana	1856	Utah	1876
Maine	1840	Vermont	1846
Maryland	1868	Virginia	1847
Massachusetts	1812[a]	Washington	1854
Michigan	1846	West Virginia	1847
Minnesota	1851	Wisconsin	1849
Mississippi	1839	Wyoming	1869
Missouri	1825		

Note: Laws collected from original and secondary sources.

[a] Kentucky lists an 1879 ruling prior to an 1880 law. Massachusetts has an 1812 ruling prior to an 1845 law. Although the Dakota Territory's law is 1877, South Dakota lists 1899, whereas North Dakota books use 1877. Oklahoma uses the 1875 Indian territories' date. Pennsylvania has a ruling in 1846 and a law in 1860. Neither the Dakotas nor Oklahoma are included in the data set. Results are robust to coding the ruling versus the law.

Lahey, Joanna N. "Year of passage of first anti-abortion laws" in *The Effect of Anti-Abortion Legislation on Nineteenth Century Fertility*, Demography 51, no. 3, 2014, p. 942

[27] Photo courtesy of Lahey, Joanna N.. *The Effect of Anti-Abortion Legislation on Nineteenth Century Fertility*

These new abortion laws had an immediate and tangible effect on population growth and fertility. In particular, data shows that «having a law increases the child-to-woman ratio by 111 per 1,000 women,»[28] which is an increment of roughly 11%. Furthermore,

> «Fertility would have been 5.2% to 10.9% lower without anti-abortion laws in 1900 and 5.7% to 11.9% lower in 1910. These estimates are consistent with modern results from the twentieth century, which find that greater access to birth control, abortions and family planning during the 1960s and 1970s led to fertility increases of 2% to 6% overall, and up to 15% among groups with greater need and less flexibility (e.g., teenagers and minorities).»[29]

This data demonstrates how reproduction (and abortion) control consistently influences population growth, even if not always in the way that we might expect.

2. *Therapeutic abortion and class disparity*

In a time period when practicing abortions goes against the law, voluntary termination of pregnancy can be roughly divided into two categories: criminal abortion and therapeutic abortion. While defining the former comes very easily, in that it concerns those practices that are not performed by licensed physicians in licensed hospitals, the latter is a label mainly used to define an area of legality in which some forms of abortion are deemed acceptable. In other words, «a therapeutic abortion is defined as one which comes within the exception stated or implied in the provisions of criminal law condemning abortion.»[30] Intuitively enough, laws criminalizing abortion varied from state to state, the strictest allowing induced termination of pregnancy only when the life of the mother was in danger—or not allowing it at all. Other common stipulations permitted abortion when the fetus was deformed or when the pregnancy

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[28] Lahey, Joanna N.. *The Effect of Anti-Abortion Legislation on Nineteenth Century Fertility*, p. 943
[29] Lahey, Joanna N.. *The Effect of Anti-Abortion Legislation on Nineteenth Century Fertility*, p. 945
[30] Packer, Herbert L., and Gampell, Ralph J.. *Therapeutic Abortion: A Problem in Law and Medicine*, Stanford Law Review 11, no. 3, Stanford Law Review, 1959, p. 418

originated from rape or incest.[31] These conditions left room for a limited practice of abortion, which fell into the category of "therapeutic".

Up until the late 1960s, most states permitted abortions only when necessary to "save" or "preserve" the life of the mother. To obtain this "life-saving" procedure, women had to be recommended by their physician, and their case had to be heard and approved by «a standing hospital committee established specifically to review abortion requests. Either as a matter of state law or hospital policy, these committees frequently required that additional physicians examine the woman to corroborate her own physician's finding that an abortion was necessary to protect her life or physical health.»[32] Notably, the California Act of 1967, famously the most progressive out of all the 1960s laws on therapeutic abortion, requires that the committee consist of two physicians in the first 13 weeks of pregnancy, and of three physicians starting from the 14th. What makes this statute relatively liberal is the clause which states that a therapeutic abortion may be performed if the mental health of the patient, and not her physical health exclusively, is endangered by the continuation of the pregnancy (as well as if said pregnancy is the result of incest or rape).[33] The extremely tedious procedure of appearing before a committee is not only humiliating for the pregnant patient, but also most likely unobtainable to all those women that may not afford to go through such a lengthy and expensive process. As a matter of fact, private hospitals presented the quickest, most efficient way to obtain a therapeutic abortion.

> «Since the poor lack sufficient funds for private treatment and rely so heavily on public hospitals, denials or delays of treatment by those institutions are tantamount to a denial of adequate medical care. [...] In a survey of 65 randomly selected major American hospitals, Dr. Robert Hall discovered that

[31] Charles, Alan and Alexander, Susan. *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection*, 23 Hastings UC Law Journal 147, 1971, pp. 147-48

[32] Benson Gold, Rachel. *Lessons from Before Roe: Will Past be Prologue?*, Guttmacher Policy Review, Volume 6, Issue 1, 2003 https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue#:~:text=Although%20legal%20abortions%20were%20largely,her%20life%20or%20physical%20health

[33] Milman, Kathryn G.. *Abortion Reform: History, Status, and Prognosis*, p. 534

> the rate of therapeutic abortions was 3.6 times higher on the private services of these hospitals than on their ward services.»[34]

This, accompanied with the physicians' bias to be more indulgent, and consequently more accommodating, towards richer private patients than towards their poorer, often colored counterparts, makes it very easy to imagine how such a policy could create a discrepancy in treatment between wealthy and indigent patients.

> «Under the abortion laws in effect before 1970, at least 80 percent of all therapeutic abortions were performed on private hospital patients, who were predominantly white and affluent. In New York City during the early 1960s, 93 percent of the therapeutic abortions were performed on white private patients.»[35]

As it has already transpired, this class disparity very obviously translates to racial disparity. In a 1970 study conducted at hospitals participating in the Professional Activities Survey, Dr. Christopher Tietze found that between 1966 and 1968 the therapeutic abortions per 1000 births ratio amounted to 3.5 for white patients and to 2.4 for non-white ones.[36] Another interesting data shows that non-white women were less likely to obtain a therapeutic abortion on psychiatric grounds, mainly because the clause stating that therapeutic abortion may be performed to preserve the mental health of the mother was mostly cited in cases regarding private patients.[37]

Furthermore, not only were indigent non-white women less likely to access therapeutic abortion, their circumstances made it all the more difficult (if not impossible) for them to travel to foreign countries where abortion was partially or completely legal. While wealthy women could fly to Puerto Rico, Japan, Sweden and

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[34] Charles, Alan and Alexander, Susan. *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection*, p. 152

[35] Hayler, Barbara. *Abortion*, Signs, Vol. 5, No. 2, Winter 1979, The University of Chicago Press, p. 319

[36] Tietze, Christopher. *United States: Therapeutic Abortions, 1963 to 1968*, Studies in Family Planning, Vol. 1, No. 59, Wiley on behalf of Population Council, 1970, p. 6

[37] Charles, Alan and Alexander, Susan. *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection*, pp. 153-154

even England, after the country legalized abortion in 1968,[38] poor women often had to turn to the cheaper and immensely dangerous alternative: criminal abortions. As colored women were more likely to seek back-alley abortions, they were also more likely to die from them.

> «A clear racial disparity is evident in the data of mortality because of illegal abortion: In New York City in the early 1960s, one in four childbirth-related deaths among white women was due to abortion; in comparison, abortion accounted for one in two childbirth-related deaths among nonwhite and Puerto Rican women. [...] Furthermore, from 1972 to 1974 [when abortion became legal], the mortality rate due to illegal abortion for nonwhite women was 12 times that for white women.»[39]

This disparity was made even more evident when four states, Hawaii, Alaska, New York, and Washington, repealed their abortion bans in 1970 –«the first three by legislative action and Washington by popular ballot»–[40] making it legal to safely obtain the procedure within their borders. Unable to afford even domestic flights, poor non-white women often faced risks of permanent sterilization, sepsis and even death in trying to illegally terminate their unwanted pregnancies.

> «The poor and nonwhite suffer disproportionately from the "back-alley" abortionists, whose services they seek out in lieu of the medically safe hospital abortions generally denied them. [...] For example, during the first full year of operation of California's 1967 Reform law, approximately 7 percent of the state's nonwhite female population subjected themselves to criminal abortion, as opposed to only 1½ percent of the state's white female population.»[41]

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[38] Reagan, Leslie J. *Abortion Travels: An International History*, Journal of Modern European History, 17, no. 3, Sage Publications, Inc., 2019, pp. 341-343

[39] Benson Gold, Rachel. *Lessons from Before Roe: Will Past be Prologue?* https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue#:~:text=Although%20legal%20abortions%20were%20largely,her%20life%20or%20physical%20health

[40] Guttmacher, Alan F.. *Abortion on Request: The Physician's View*, The American Biology Teacher, Vol. 34, No. 9, University of California Press, 1972, p. 515

[41] Charles, Alan and Alexander, Susan. *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection*, p. 155

While therapeutic abortion certainly paved the way for the de-criminalization of induced pregnancy termination, it also served only a marginal slice of the population, namely the rich and the white. Class and racial disparity permeating such a delicate medical practice left poor and colored women to be butchered at the hand of unlicensed abortionists, directly contributing to the widening of the systemic medical inequalities faced by indigent minorities.

3. The innate racism of sterilization abuse

As Barbara Hayler wrote, «forced motherhood and forced sterilization are two sides of the same coin.»[42] Forced sterilization is as much an invasion of a person's bodily autonomy and liberty to choose as denying them access to a safe abortion. Both are a threat to the most basic of human rights: freedom. And when these two forms of invasion of privacy intersect with racism and white-supremacist ideologies, the problem becomes much bigger and much more nuanced. But what is forced sterilization?

> «Surgical sterilization is a procedure that renders a person permanently unable to bear children. While the ethics of a biomedical procedure are never determined by technology alone, the virtually irreversible nature of surgical sterilization makes the choice a more drastic one than it might be otherwise. The question of "voluntariness" becomes more problematic and the conditions under which the decision is made –including the social, economic, institutional, and sexual conditions– require critical scrutiny.»[43]

Voluntary and informed sterilization may be performed to preserve the health –or even the life– of the patient if conceiving and giving birth to a child are considered a high medical risk to them (therapeutic sterilization), or to prevent said patient from getting

[42] Hayler, Barbara. *Abortion*, p. 320
[43] Pollack Petchesky, Rosalind. *Reproduction, Ethics, and Public Policy: The Federal Sterilization Regulations*, The Hastings Center Report, Vol. 9, No. 5, The Hastings Center, 1979, p. 29

pregnant, as a permanent and irreversible form of birth control (contraceptive sterilization).[44] Both of these terms are used when the patient has autonomously and voluntarily consented to the procedure after having been informed by health professionals of its benefits and potential risks. Any other form of sterilization is to be considered involuntary, thus forced, and falls into the category of abuse—or more accurately, sterilization abuse.

One form of sterilization abuse is eugenic sterilization, which is forced on an individual who's seen as lacking mental or physical capabilities that can be deemed hereditary, and consequently "debilitate" their potential offspring.[45] As the term suggests, this type of sterilization falls into the problematic territory of eugenics. Similarly, when sterilization is forced upon a non-white individual, the white-supremacist implications of such an act also dangerously reek of eugenics. And when the majority of colored women and mothers are also poor and dependent on state welfare funds, it's very easy for the abusers to justify their crimes on economic grounds. Unsurprisingly, this racial bias is endorsed by medical professionals: «several studies have shown that most physicians –well over 90 percent in some surveys– favor compulsory sterilization for a welfare mother with three or more illegitimate children.»[46] What is even more disturbing is that indigent women –as it's been proven in court–[47] have been pressured or forced to accept involuntary sterilization, lest they be cut off completely from their welfare benefits.[48] In other cases, doctors have been known to «refuse to provide abortions to indigent women unless they also agree to be sterilized in what is commonly referred to as "the package deal."»[49] It is, in all respects, a form of legal coercion.

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[44] Tessler, Suzanne. *Compulsory Sterilization Practices*, Frontiers: A Journal of Women Studies, Spring, Vol. 1, No. 2, University of Nebraska Press, 1976, p. 52

[45] Ibidem

[46] Hayler, Barbara. *Abortion*, p. 320

[47] The case referenced here is Relf v. Weinberger (1974), a landmark lawsuit that denounced the horrors of sterilization abuse and helped making the issue a subject of public scrutiny

[48] Ibidem

[49] Hayler, Barbara. *Abortion*, p. 321

A 1993 report reveals «that since 1964, approximately 65% of the women sterilized in North Carolina were Black and approximately 35% were white.»[50] The same article reports:

> «Carl Shultz, director of HEW's Population Affairs Office, estimated that between 100,000 and 200,000 sterilizations had actually been funded that year by the federal government.»[51]

Circling back to eugenics, according to Davis, «during Hitler's Germany, incidentally, 250,000 sterilizations were carried out under the Nazis' Hereditary Health Law,»[52] making the American data dangerously –and alarmingly– close to that of Nazi Germany, one of the most extreme perpetrators of eugenics-related crimes in history. In 1979, statutes permitting the practice of forced sterilization on certain groups, such as mentally disabled people, still existed in 25 states,[53] shining a horrifying light on a highly disregarded reality, that of perfectly legal eugenic grounds in the matter of reproductive autonomy—or lack thereof. And what's even more appalling is this:

> «Those at whom the proposals are aimed (the "beneficiaries") are still primarily low-income, black or other minorities, and female; and their alleged "unfitness" is associated with mental disability and/or poverty. Those enunciating the proposals are still primarily white and upper-middle-class and often wear the hats of helping professionals, moralists, or fiscal reformers.»[54]

The difference in treatment between wealthy white women and indigent non-white ones is made even more disheartening by the way they perceive and endure inequality in the matter of sterilization:

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[50] Davis, Angela. *The Historical Context: Racism, Birth Control and Reproductive Rights*, Race, Poverty & the Environment, Vol. 4, No. 2, Special Issue: POPULATION & IMMIGRATION, Reimagine!, 1993, p. 22
[51] Ibidem
[52] Ibidem
[53] Pollack Petchesky, Rosalind. *Reproduction, Ethics, and Public Policy: The Federal Sterilization Regulations*, p. 31
[54] Ibidem

> «For middle-class white women, the primary issue connected with sterilization has been the refusal of hospitals to permit voluntary sterilizations; for poor and minority women the primary issue has been the genocidal implications of involuntary, compulsory sterilization.»[55]

Essentially, while one group of women is denied sterilization even when they voluntarily seek it, the other group is forced to undergo the procedure against their will. And although neither of these treatments is fair, one seems to aim at "protecting" or "preserving" a specific group of people (the white and wealthy), while the other very clearly pushes towards the opposite outcome, that of the control and possible regulation of another specific group of people, this time poorer and, as it happens, mainly colored.

4. *Abortion denied: Psychological consequences on the mother and on the unwanted child*

> «I got pregnant right out of high school. This was 1960 in Aberdeen, South Dakota. There was no birth control available. When I went in to get a pregnancy test, my mother asked our family doctor if he would consider giving me an abortion. The doctor was horrified. My mother took a risk asking, and in retrospect I recognized that. I had to get married, out of town [...] I was a fallen woman. I walked down the aisle and I couldn't stop crying. [...] I was literally transferred from my father to my husband. [...] I wept because all my possibilities were gone.»[56]

In the 1960s, being denied an abortion could be life-destroying: unfortunately, it was also the norm. Only a few physicians were willing to risk their license and their

[55] Hayler, Barbara. *Abortion*, p. 320
[56] Sally Roesch Wagner's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 15

freedom (the punishment for performing illegal abortions was often incarceration) to help women who needed to terminate their pregnancy and could not, for whatever reason, obtain a therapeutic abortion. One of them was Dr. Robert M. Livingston, a New Jersey OBGYN who performed illegal abortions in the late 1960s and early 1970s, consistently defying NJ's anti-abortion laws despite being tried multiple times.[57]

But not every woman was so lucky as to meet an accommodating doctor. Most women had to either have the child, or turn to the high-risk alternative: backstreet abortions.

> «When my mother described her own abortions, I never forgot what she told me. She said: "You went downtown to the basement of a nightclub in Greenwich Village, and there, for $10, you had an abortion on a table. And if you were lucky, when you woke up you weren't holding the doctor's penis in your hand.»[58]

By seeking criminal abortions, not only were women risking permanent damage, sterilization, sepsis and ultimately death, they were also constantly being harassed and sexually abused at the hands of their usually unlicensed abortionists. Besides, criminal abortions were not merely dangerous, they could also be highly expensive, spanning from a few dollars to $1000. Of course, a cheaper price usually meant a riskier procedure.

> «I had no other options, I wanted it over with. And I didn't care how it was done, I was *that* desperate. An acquaintance said: "Here's a phone number"— and it was the Mob. They had to talk in code. They said: "Do you want a Cadillac, a Chevrolet or a Rolls-Royce?" The Chevy was the cheapest, $500. A Cadillac was something like $750. And if you wanted the

[57] Kaplan, Morris. "Doctor Who Defied Antiabortion Laws Indicted in Bergen", *The New York Times*, August 25, 1972, p. 67

[58] Vivian Gornick's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, pp. 16-17

> Rolls-Royce, and we're talking about the '60s here, it was a thousand dollars.»[59]

Consequently, women who did not have enough money to abort straight away were bound to keep the child and likely struggle economically for the rest of their lives. And since most indigent women seeking criminal abortions were also non-white, the problem of course becomes inherently racial.[60] What makes the issue that much more serious is the fact that criminal abortion wasn't the last resort of no more than a few desperate souls either. As of 1972, registered data on illegal abortion was as follows:

> «It has been estimated that between 200,000 and 1,200,000 illegal abortions were performed annually in recent years in this country (Calderone, 1958). The round number of one million is a commonly accepted "guesstimate." At all events, illegal abortion has been described as the third largest U.S. racket, being surpassed only by gambling and narcotics.»[61]

As if resorting to breaking the law and being destined to have financial problems weren't enough, abortions seeked on mere socioeconomic grounds have always been more unpopular than, say, abortions that are carried out after rape or incest, or even after the discovery of fetal deformity. A 1962 Gallup Poll found that out of 1391 white male and female respondents, an exorbitant total of 74% disapproved abortion if the mother had no means to sustain a child, while only 29% disapproved voluntary termination of pregnancy if the fetus was found to be deformed, and a mere 16% if the mother's health was endangered by the pregnancy.[62] Facing social isolation as well as serious economic issues, women who were denied access to abortion were bound to suffer psychological consequences. Among them, those experiencing a so-called "turnaway abortion," which occurs when the patient is denied the procedure because

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[59] Dorie Barron's testimony in *The Janes*, directed by Tia Lessin and Emma Pildes, HBO Documentary Films, Pentimento Productions, 2022

[60] Charles, Alan and Alexander, Susan. *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection*, p. 155

[61] Guttmacher, Alan F.. *Abortion on Request: The Physician's View,* p. 515

[62] Blake, Judith. *Abortion and Public Opinion: The 1960-1970 Decade*, Science, New Series, Vol. 171, No. 3971, American Association for the Advancement of Science, 1971, p. 541

her pregnancy exceeds the gestational age limit of a specific clinic or legal system, have proven to be more likely to suffer financial consequences and develop health problems.[63] A 2013 study on 843 women found that:

> «In the first-trimester and near-limit groups, the emotion most reported by women about the abortion was relief (96% and 90%, respectively); the difference between groups was significant. [...] Sadness was the emotion most reported by women in the turnaway group (60%). Women denied an abortion differed from those who received a near-limit procedure in terms of nearly every emotion felt about their experience: Women in the turnaway group were more likely to have felt regret (50% vs. 41%) and anger (42% vs. 29%), whereas they were less likely to have felt relief, happiness and guilt (30-49% vs. 56-90%). [...] Sixty-two percent of women in the turnaway group still wished that they had been able to obtain an abortion.»[64]

Therefore, women who had been denied abortion were more prone to feel sadness, anger, and even regret, whereas more than 90% of their first-trimester and near-limit counterparts mainly felt relief. Intuitively enough, turnaway women were also less likely to experience feelings of guilt: as their road to obtaining an abortion had been more difficult, one can assume that they were that much more determined and unwavering in their choice to terminate their pregnancy, a data that is confirmed by the 62% of women who "still wished that they had been able to obtain an abortion."
And what about the unwanted children?

> «A study made of Swedish children born when their mothers were refused the abortions they had requested showed that unwanted children, as compared with their controls, as they grew up were more often picked up for drunkenness, or antisocial or criminal behavior; they received less education; they received more psychiatric care; and they were more often exempted

[63] Advancing New Standards in Reproductive Health (ANSIRH), *The Turnaway Study*, University of California San Francisco, https://www.ansirh.org/research/ongoing/turnaway-study
[64] Rocca, Corinne H.; Kimport, Katrina; Gould, Heather and Foster, Diana G.. *Women's Emotions One Week After Receiving or Being Denied an Abortion in the United States*, Perspectives on Sexual and Reproductive Health, Vol. 45, No. 3, Wiley, 2013, p. 126

> from military service by reason of defect. Moreover, the females in the group married earlier and had children earlier, thus no doubt tending to create a vicious circle of poorly tended children who in their turn would produce more poorly tended children.»[65]

Another interesting study was conducted in Czechoslovakia in 1971. The Prague Study –as it's been called– was based on unprecedented access to the records of the Appellate Commission of Prague, which registered abortion requests.[66] In 1957, the Czechoslovakia government had «liberalized its abortion statutes, permitting district abortion commissions [such as the Appellate Commission] to grant requests to terminate unwanted pregnancies on medical and social grounds during the first three months of pregnancy.»[67] In the ten years that followed, abortion applications were accepted in most cases (up to 92%), and another 6% of those requests were granted after a plea had been made. The remaining 2%* was ultimately denied for different reasons, mainly the fact that the pregnancy did not fit within the parameters defined by the law.[68] Between 1961 and 1963, out of 24,989 abortion requests, a total of 638 women were denied the procedure; they make up about 2.55% of the total, thus demonstrating the accuracy of the previously mentioned data*. Of these 638 women, only 555 were citizens of Prague, and 57% of them (316) had ended up having the child. What's compelling is that of the 293 women left, 80 allegedly suffered a miscarriage, or "spontaneous abortion." The remaining 79 were never found to have given birth in Prague, or turned out to be untraceable.[69] Understandably, none of the respondents admitted to having resorted to a criminal abortion, but one can assume that at least a percentage of those "spontaneous abortions" had indeed been voluntary, and illegally performed; it is also likely that of the missing respondents, some would have turned to illegal abortions after having been denied the procedure twice.

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[65] Hardin, Garrett. *Abortion. Or Compulsory Pregnancy?*, Journal of Marriage and Family, Vol. 30, No. 2, Family Planning and Fertility Control, National Council on Family Relations, 1968, p. 249
[66] Dytrych, Zdenek; Matejcek, Zdenek; Schuller, Vratislav; David, Henry P.; and Friedman, Herbert L.. *Children Born to Women Denied Abortion*, Family Planning Perspectives, Vol. 7, No. 4, Guttamacher Institute, 1975, p. 165
[67] Ibidem
[68] Ibidem
[69] Ibidem

But what's really of interest to us are the 317 children that were indeed born to those 316 pregnant women. 70 of these children either died, were given up for adoption, moved away from Prague, or were institutionalized in childcare facilities. In four cases, the mother even denied the existence of the child. Of the remaining 233 children, 220 (110 girls and 110 boys) were selected as the study group to eventually be compared to just as many children born to women who had not requested an abortion.[70] When the study was carried out, the children were about nine years old. The researchers assumed that at least part of these children, who were presumably born out of a compulsory pregnancy, would've ended up being as accepted and loved as a wanted child; part of them, however, would've suffered from their unwantedness, and would've been at least partially neglected, either through disregard or through some form of overcompensation. The negligence of these children's parents manifested in their offspring through a somewhat surprising higher incidence of health issues, as well as through different behavioral abnormalities: during the children's preschool years, their "naughtiness" proved to be 15.9% above average, their stubbornness 35.5% more marked and their bad temper 30% more prominent than the average wanted child.[71] Interestingly, the marital status of the "unwanted" children's parents tended to be less stable and more prone to go through multiple changes than that of the parents that had wanted their child.[72] In light of this, it is to be concluded that an unstable family dynamic and precarious parental figures consistently add to a child's stress, thus making them more prone to develop behavioral issues.
Finally, the research team concludes:

> «The higher incidence of illness and hospitalization despite the same biological start in life, slightly poorer school marks and performance despite the same level of intelligence, somewhat worse integration in the peer group—all these point to a higher-risk situation for the child and the family,

[70] Dytrych, Zdenek; Matejcek, Zdenek; Schuller, Vratislav; David, Henry P.; and Friedman, Herbert L.. *Children Born to Women Denied Abortion*, p. 165-166
[71] Dytrych, Zdenek; Matejcek, Zdenek; Schuller, Vratislav; David, Henry P.; and Friedman, Herbert L.. *Children Born to Women Denied Abortion*, p. 167
[72] Dytrych, Zdenek; Matejcek, Zdenek; Schuller, Vratislav; David, Henry P.; and Friedman, Herbert L.. *Children Born to Women Denied Abortion*, p. 170

> as well as for society. These higher risks concern, above all, the emotional and social development of the children [...]»[73]

This data makes the problem of restricted access to abortion that much more compelling. While some might argue that preventing an abortion might "save a life" –that of the fetus– it is a proven fact that the life of the mother is bound to be forever changed, and often for the worse, as she will likely face economic difficulties and social stigma. It is also a demonstrated fact that the children of women who have been denied an abortion will also suffer the consequences, showing their distress through dangerous and potentially vicious (as in reoccurring and generational) behavioral issues. Preventing all this by liberalizing abortion access should be in the best interest of society as well as that of all the individuals involved.

5. *Ask for Jane*

> «In the state of Illinois –and most of the rest of the nation– abortion was illegal. It was not medical practice, it was simply a crime. We were very aware of the fact that women were suffering in a variety of ways because of abortion being against the law. Women did awful things out of fear and desperation. We knew that some would be injured, some would die [...] So we thought: "We can be of use. You need an abortion, we'll help you. Call this number and ask for Jane."»[74]

It all started at the University of Chicago. In the late 1960s, Heather Booth was a student and civil rights activist.[75] Despite her involvement in the Civil Rights Movement and her interest in women's issues, by her own admission, Booth was not educated on the topic of abortion:

[73] Dytrych, Zdenek; Matejcek, Zdenek; Schuller, Vratislav; David, Henry P.; and Friedman, Herbert L.. *Children Born to Women Denied Abortion*, p. 171

[74] Judith Arcana's testimony in *The Janes*, directed by Tia Lessin and Emma Pildes, HBO Documentary Films, Pentimento Productions, 2022

[75] O'Donnell, Kelly Suzanne. *Reproducing Jane: Abortion Stories and Women's Political Histories*, Signs, Vol. 43, No. 1, The University of Chicago Press, 2017, p. 77

> «I don't remember any real discussion about abortion, until a friend told me that his sister was pregnant, and was nearly suicidal; that she wasn't ready to have a child, and was looking for a doctor to perform an abortion, and could I help out? I started to ask around. I went to doctors who were in the medical arm of the Civil Rights Movement, and they directed me to a doctor T. R. M. Howard. [...] I contacted him by phone. He was very responsive, he said he would take care of it and…he was good to his word. Word spread and someone else called. I put that person in touch with Dr. Howard, and then word spread again.»[76]

The state of Illinois had made abortion illegal in 1867.[77] As in all other states, women were seeking clandestine abortions: they could resort to back-alley abortions, placing themselves at the mercy of butcher abortionists, or they could turn to the Mob, as future Jane "counselee" Dorie Barron had done for her first abortion. Unknowingly and almost accidentally, Heather Booth had started offering a third safer option, at a time when women were so desperate that all major Chicago hospitals required a special unit: the septic abortion ward. As OBGYN Dr. Allan Weiland recalls:

> «What was seared into my brain is what desperate people will do when they think they have no other choice. Women would come in with some type of complication, often a horrendous injury, as a result of an illegal abortion. Women would use objects to try to disrupt the pregnancy which perforated the uterus, perforated the bladder, perforated the intestines. There were chemical means—I recall one woman who tried carbolic acid. She had horrific burns. We would see 15 to 20 people a day [...] The septic abortion ward was full everyday.»[78]

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[76] Heather Booth's testimony in *The Janes* (2022)

[77] Reagan, Leslie J.. *"About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion*, Chicago, 1867-1940, The Journal of American History, Vol. 77, No. 4, Oxford University Press, 1991, p. 1242

[78] Dr. Allan Weiland's testimony in *The Janes* (2022)

Fortunately, Heather Booth's abortion network was bound to become much bigger. Following her first few successful operations as a middlewoman, students kept coming to her; after a while, people outside of campus were seeking her help, making the operation a citywide phenomenon. By 1968, Booth was married, pregnant and teaching full-time, but her network only kept expanding. In the meantime, Dr. Howard had been arrested, and Booth had come into contact with someone named "Mike"[79], her new trusted abortionist. Unable to manage it all by herself, Booth started advertising her clandestine abortion service after political meetings; she would say: «If you want to work on abortion, come see me.»[80] After recruiting about fifteen women, she passed all the information onto them, and then left.[81] That's when Jane, a service that would provide over 11,000 safe abortions in the span of a few years,[82] effectively started.

From the very beginning, the group ran ads on underground papers; there were also flyers and all kinds of posters placed on lampposts and bulletin boards all over Chicago. All they read was: "Pregnant? Call Jane."[83]

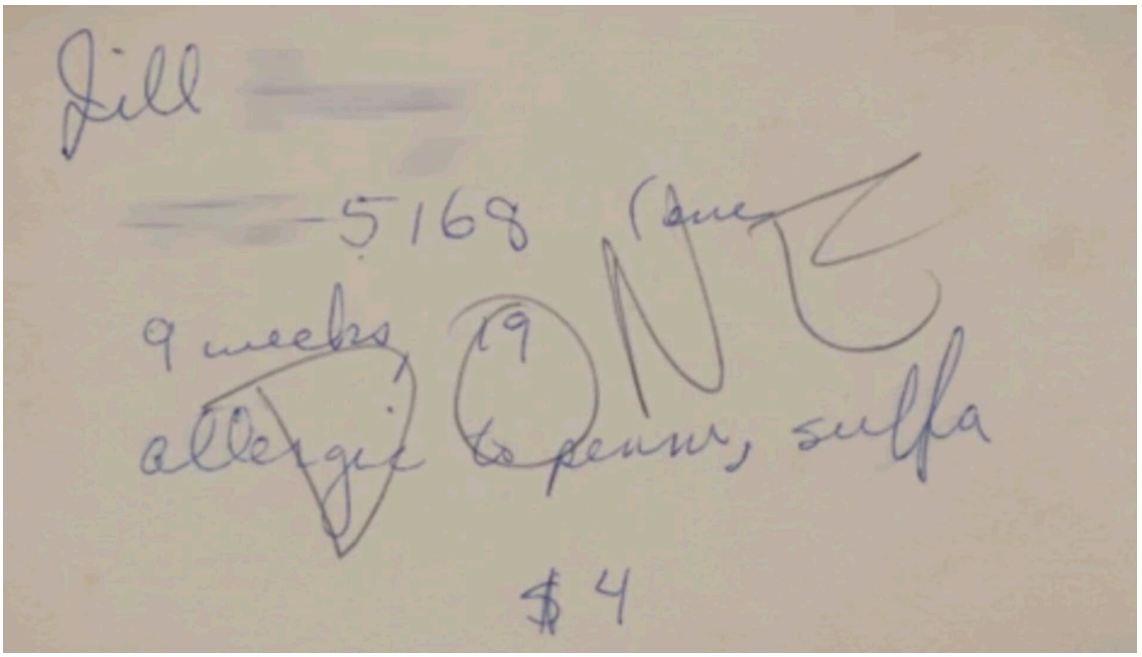
> «We needed a telephone number for people to call. I said: "Well, we could use my phone, but let's change it so they don't ask for Eleanor. How about Jane? Nobody's called Jane anymore, and it's a nice, simple name." And that's where Jane came from.»[84]

Each new counselor had to go through a training session, after which she effectively became a "Jane". The longer a Jane had been working for the service, the more she knew about its inner workings: «The women who did the administrative job of organizing information were called Big Jane. The people who answered the phone were Little Jane.»[85] The women who came to the Janes for an abortion were never

[79] Heather Booth's testimony in *The Janes* (2022)
[80] Heather Booth's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 177
[81] Ibidem
[82] *The Janes* (2022)
[83] Ibidem
[84] Eleanor Oliver's testimony in *The Janes* (2022)
[85] Martha Scott's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 179

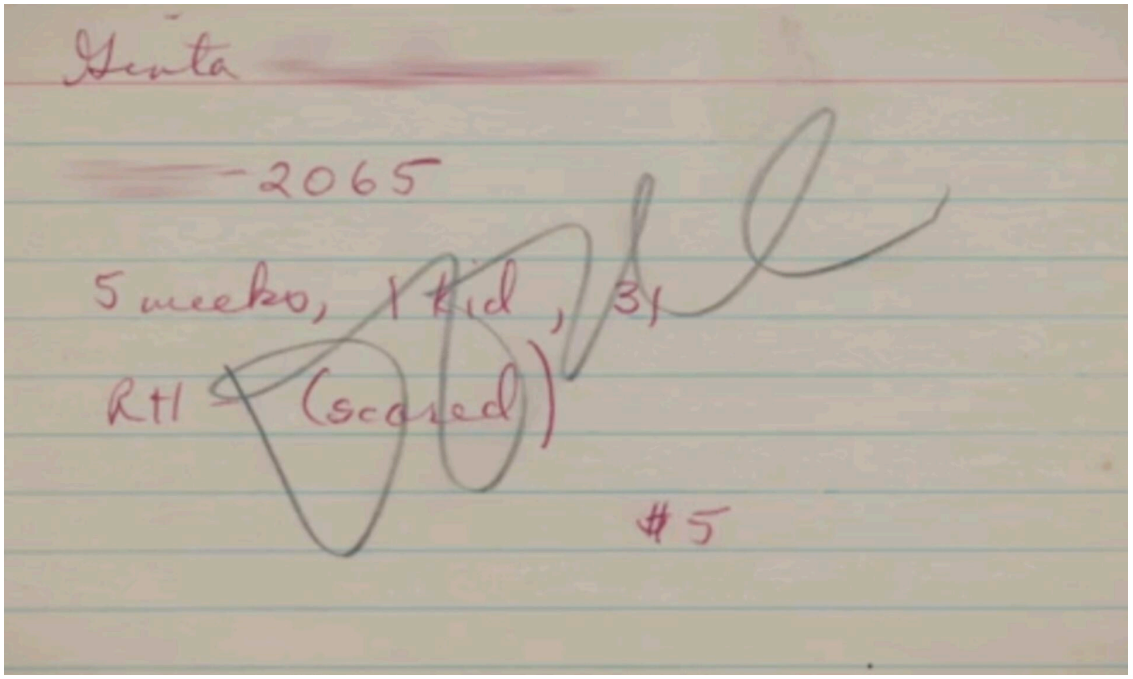
patients, they were “counselees”. As Jane member Laura Kaplan put it: «We never called anybody patients because that’s a medical term. We were creating a much more equalizing experience.»[86]

Each woman who called Jane gave out her main personal information, which was annotated on a 3-by-5 index card. She would put down her name, age, address, family situation, medical and pregnancy details, and how much money she could afford to spend on the abortion. Some women could barely spend a handful of dollars, some a few dozens, maybe even a hundred dollars, some wrote “$0” on their index cards. Some counselees also annotated their fears: “Terrified”, “Afraid of pain”. One even says: “Cautious father is a cop”.[87]



[88] Example 1, a Jane index card reading: “Jill … ; … 5168 [address]; [intelligible] 9 weeks, 19 [age]; allergic to [intelligible; maybe “pen”—short for penicillin], sulfa [drugs], $4

[86] Laura Kaplan’s testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 178
[87] *The Janes* (2022)
[88] Photo courtesy of *The Janes* (2022)



[89] Example 2, a Jane index card reading: "[name, intelligible] … ; … 2065 [address]; 5 weeks, 1 kid, 31 [age]; [intelligible]; (scared); $5

There were two main spaces in which the Janes operated: The Front and The Place. The Front was the facade, and it served as a sort of waiting room for whomever wanted to accompany and support the woman seeking the abortion. Many women brought their children, some brought their husbands or other loved ones. In The Front, the atmosphere was kept as relaxing and as comfortable as possible for everyone involved. Sometimes the Janes offered refreshments, something to give the illusion of tranquillity, whereas everything that was going on was very much illegal.[90] The actual abortion was performed at The Place. A designated driver –always one of the Janes– would drive groups of women from The Front, where their chaperones would wait, to The Place. The money was paid forward, just before going up to The Place.[91]

> «We would say to women: "Pay as much as you can, because that's gonna help pay for the next person, who has less than you." We had to charge

[89] Ibidem
[90] Laura Kaplan's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 178
[91] *The Janes* (2022)

> because it cost money to do abortions. And certainly in the days when the guy was doing the abortions, he was only doing 'em for the money.»[92]

The Place was ever-changing. The Janes had to find people who were willing to lend or rent their apartment to use as a temporary clinic. Sometimes they used their own homes. Once they'd secured a place, they could set up a functioning clinic in 15 minutes. If necessary, they were also able to dismantle the improvised, make-do ward and make a run for it in 5 minutes.[93]

The Janes' custom was to stay in contact with their "counselees" for two weeks after the procedure to make sure that everything had gone smoothly. Many women, however, disappeared completely from the Janes' radar.[94]

> «A number of women said they'd gotten our name and phone number from their doctor. So one of us would call the doctor and say: "Hi, this is Jane. We've noticed you've been referring and we wanna know if there's a way you can be of assistance to us." And for the most part they would say: "Don't ever call me again."»[95]

The Janes had compiled a list of physicians who were willing and able to perform abortions illegally. Unsurprisingly, some of them were unreliable or even potentially abusive and dangerous to women. Of one chiropractor on the list it is said: "Heard a story about his holding girls at point of a knife in his office when he was drunk. Drinks a lot and unreliable. Don't send girls to him."[96] Of course, the Janes wouldn't send women to suspicious doctors before having investigated further. Many of them were ruled out; most of them asked for a lot of money in exchange for their services: «At first, Jane members would only comfort the women prior to the procedure and negotiate prices with doctors,»[97] but in the early 1970s they made a discovery that

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[92] Laura Kaplan's testimony in *The Janes* (2022)
[93] *The Janes* (2022)
[94] Ibidem
[95] Ibidem
[96] Ibidem
[97] O'Donnell, Kelly Suzanne. *Reproducing Jane: Abortion Stories and Women's Political Histories*, p. 78

changed everything. One of their most trusted abortionists was not and had never been a licensed physician. “Mike”, who had come into contact with Heather Booth at the dawn of the service, had never practiced medicine: he just so happened to be very skilled at doing abortions. He had never harmed anyone, which was a relief to the Janes; still, the discovery certainly came as a surprise, one that caused a number of women to leave the service altogether, feeling that they had betrayed their counselees’ trust or feeling betrayed themselves. But to Judith Arcana, this shocking revelation meant something else: «I said: “Wait a minute. This means if he can do it, *we* can do it.”»[98]

“Mike” was willing to teach the Janes how to perform abortions: he wanted out, for fear of being arrested, and the Janes wanted full independence. It was a quid pro quo. For the Janes, it was also a bold challenge to a medical profession that had always been blatantly male and a way to treat women’s problems autonomously.[99]

> «The deal we cut with Mike was, “You come down in your price and let us in so we can learn more about how to do the procedure.” The first thing that I did was observe. Then I sat by the side of the bed and held the woman’s hand and kibitzed with him and her during the abortion itself. I did that a couple of times. Then I learned how to give shots. Of course, I already knew how to put in a speculum. I remember very clearly when Mike taught me how to dilate a cervix. He was a good teacher. [...] Soon, several of us had enough experience assisting him that we started doing it ourselves.»[100]

After New York’s liberal abortion law went into effect in 1970, part of Jane’s clientele –the part that could afford booking a flight to New York City– did not need its services anymore. Only Jane’s burden wasn’t lightened—it merely changed its complexion. And Sheila Smith put it, «it was really the lower middle-class and the

[98] Judith Arcana’s testimony in *The Janes* (2022)
[99] Jane member Jody’s testimony in *The Janes* (2022)
[100] Judith Arcana’s testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 180

poor women who were stuck.»[101] And once again, the class issue easily translated into a racial issue.

> «Women of color were just kinda on the outs ‘cause they couldn’t afford it. And to me that was just outrageous.»[102]

The Janes themselves were primarily white and middle-class, and by their own admission not necessarily educated on social and racial matters. Very few women of color involved themselves in the service, one of them being Marie Leaner. They did, however, largely benefit from it, especially after 1970. After all, it is not a secret that the vast majority of maternal septic shocks and abortion-related deaths at the time were registered among Black and Puerto Rican women.[103] Jane member Peaches has since wondered how “offensive” white Janes «may have unintentionally been.»[104]
So the service continued to provide for the poorest, most desperate and often colored. Somehow, the illicitness of their practice never much bothered the Janes. As Judith Arcana’s husband Michael recalls, «they put posters up in the neighborhood, they put things on billboards, they advertized.»[105] And they got away with it until May 3, 1972.

> «Abortion was illegal in the state of Illinois, and mostly illegal in every state in the United States in 1972. But it wasn’t in our radar, even in the Homicide Unit. We handled murders, rapes, serious assaults. [...] We had a murder every other day, and that’s what we dealt with. These two women walked into our office to tell us that an abortion was gonna happen. They said: “Our sister-in-law is going to have an abortion and we think that’s a sin, and we want you to stop it.” Abortion didn’t exist in my world. It was never spoken about in my family or in my social circle. Never. [...] All of us [detectives, all Irish Catholics] were like: “What?” We didn’t wanna get involved in this, but we were told: “You’re the Homicide Unit, you’re gonna have to do it.”»[106]

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[101] Sheila Smith’s testimony in *The Janes* (2022)
[102] Marie Leaner’s testimony in *The Janes* (2022)
[103] Dr. Alan Guttmacher’s testimony in *The Janes* (2022)
[104] Jane member Peaches’ testimony in *The Janes* (2022)
[105] Judith Arcana’s husband Michael Pildes’ testimony in *The Janes* (2022)
[106] Chicago Homicide Detective Sgt. Ted O’Connor’s testimony in *The Janes* (2022)

That day, Martha Scott, Abby Pariser and Diane Stevens were at The Place. Scott was performing the abortions. It was a normal, busy day. O'Connor and his colleagues decided to follow the sister-in-law from The Front to The Place. Arcana, who was the designated driver for the day, always drove as if she was being followed, just in case. That day, she actually was. The Homicide detectives took the elevator up to the 11th floor, where the Janes were operating. When they kicked the door open, the Janes threw their medical equipment out of the window. The detectives then began looking for the male doctor—only there was no doctor. When they realized, they arrested all the seven Jane members present: Susan Gallatzer, Abby Gallon, Judith Arcana, Madeline Schwenk, Martha Scott, Sheila Smith and Diane Stevens; the youngest, Gallatzer, was 21 years old and the oldest, Stevens, was 32. They would later be remembered as "the Abortion Seven".[107]

> «I was not really upset until they fingerprinted us. And then it felt like the men now had some control that they didn't have before. That's what made it so much realer than anything else.»[108]

The Abortion Seven were held at 1121 South State, along with a few prostitutes and other convicted women. After they were bailed, the service became busier than ever. As Jane member Peaches put it: «You'd think that all of that publicity would scare people.»[109] In reality, it only got them more and more counselees.

Still, the Janes «were each charged with three counts of performing abortions and three counts of conspiracy to perform abortions»[110], meaning that they were all risking up to 110 years of prison. To make matters worse, the Chicago Court System was saturated with Catholics and anti-abortionists.

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[107] Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 393

[108] Martha Scott's testimony in *The Janes* (2022)

[109] Jane member Peaches' testimony in *The Janes* (2022)

[110] Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 393

> «During the time between the Bust and the Grand Jury, we were interviewing lawyers. All but one men, of course. The men were [...] so condescending that it was impossible—how could we possibly hire these guys to represent us when they couldn't even *see* us?»[111]

In the end, defense attorney Jo-Ann Wolfson –who had previously represented the Black Panther Party– took the case. She didn't want the Janes to make any big political statement, she just wanted the charges to be dropped. Wolfson was also conscious that Roe v. Wade was in the radar of the Supreme Court, so her strategy was to delay the proceedings for as long as possible, buy the Janes some time, and see what would happen. Then January 22, 1973 came, and the Janes, along with all American women, were finally free.

> «We decided that that would be it. And then we went on to the rest of our lives, you know? We came together to do something at a time that it was most needed, we did it, and then it was time to do something else. We were done. So, goodbye Jane.»[112]

6. *California liberalizes abortion: People v. Belous*

Between 1959 and 1962, the American Law Institute (ALI), a non-profit organization that assembles the efforts of attorneys, judges and scholars to influence and improve American laws,[113] drafted and approved a Model Code that would be known as the ALI Model Penal Code. The model statute, which «played an important part in the widespread revision and codification of the substantive criminal law of the United States,»[114] also touched on the subject of abortion (Section 230.3, "Abortion")[115]. The

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[111] Judith Arcana's testimony in *The Janes* (2022)
[112] Laura Kaplan's testimony in *The Janes* (2022)
[113] American Law Institute (ALI), *About ALI*, https://www.ali.org/about
[114] American Law Institute (ALI), *Model Penal Code*, https://www.ali.org/publications/model-penal-code
[115] American Law Institute (ALI), *Model Penal Code, Official Draft and Explanatory Notes*, The American Law Institute, Philadelphia, 1985, p. 165, retrieved from https://www.legal-tools.org/doc/08d77d/

entry "Justifiable Abortion" –in stark contrast to the "Unjustified Abortion" section condemning whomever "purposely and unjustifiably" aborts a woman– reads:

> «A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable.»[116]

In other words, a licensed physician may perform an abortion in case of rape, incest, fetal deformity, and when the mental health and/or physical health of the mother is endangered by the pregnancy. What makes this statute groundbreaking is the unprecedented regard for the mental health of the pregnant woman. This new approach would make it undoubtedly easier for women with no particular physical impairments to seek a legal and safe abortion. If a woman exhibits one or more of these conditions, the diagnosis must be approved and «certified in writing by two physicians [...] and be filed [...] in the place where the abortion will be performed. [...] Such ascribed justification is considered an affirmative defence to any subsequent prosecution.»[117] Furthermore, in states where rape, incest and congenital fetal defects are not justified grounds for an abortion, the mental health clause would allow doctors to make up false psychiatric reasons so that the woman could still obtain an abortion. Indeed, the drafting of the ALI Model Penal Code effectively made the passing of therapeutic abortion statutes in several states possible.

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[116] Ibidem
[117] Milman, Kathryn G.. *Abortion Reform: History, Status, and Prognosis*, p. 530

> «The State of Colorado in 1967 became the first state to adopt the ALI proposed abortion law. By 1973 thirteen additional states had adopted it in one form or another.»[118]

One of such states was California. The California Act of 1967 clearly has the ALI model law in mind; still, there are a few substantial differences. As for abortions seeked on grounds of the pregnant woman's mental or physical health, the request must be approved by a panel of two physicians between the first and 12th week of pregnancy, and by a panel of at least three if the procedure is to be performed between the 13th and the 20th week. The termination of pregnancy also has to take place in an accredited hospital, which is a clause explicitly stated by the ALI model. As for abortions on grounds of rape or incest, the same set of rules persists, with an additional clause: the district attorney is to «determine that there is sufficient cause to believe the alleged cried occured.»[119] But the California statute proves to be deficient in its mental health clause by demanding that the psychiatric impairments be so grave as to require institutionalization; thus the law fails to protect pregnant women whose mental health struggles are not so obvious or so physically debilitating that they legally require admission to a mental institution. And while the physical health clause turns out to be much more flexible than its counterpart, as it does not entirely rule out non-emergency procedures, another serious flaw is to be found in the stipulation that does not permit abortion on grounds of rape or incest in women under the age of 15, effectively leaving them unguarded even in light of blatant acts of pedophilia.[120]

Such was the state of things in late 1960s California. Before therapeutic abortion was legalized in the state in 1967,[121] Section 274 of the California Penal Code stated that abortion was to be permitted «only when necessary to preserve the life of the pregnant woman.»[122] Predictably, this did not stop Californian women from seeking illegal abortions. Before Jane was even formed, a women's rights activist based in San

[118] Pilpel, Harriet F.. *Abortion: U.S.A. Style*, The Journals of Sex Research, Vol. 11, No. 2, Taylor & Francis, Ltd., 1975, p. 114
[119] Milman, Kathryn G.. *Abortion Reform: History, Status, and Prognosis*, p. 534
[120] Milman, Kathryn G.. *Abortion Reform: History, Status, and Prognosis*, p. 535
[121] Justia Law, *People v. Belous*, California Case Law, Volume 71, Cal. 2d 954, 1969, https://law.justia.com/cases/california/supreme-court/2d/71/954.html
[122] Milman, Kathryn G.. *Abortion Reform: History, Status, and Prognosis*, p. 538

Francisco, Patricia Maginnis, began distributing pamphlets containing a list of available abortionists from Mexico and Japan, effectively launching «the first open (and illegal) abortion referral service in the United States.»[123] To make sure that their illegal abortion network was in fact safe, Maginnis and her collaborators founded the Association to Repeal Abortion Laws (ARAL). In an attempt to further provoke Californian authorities, Maginnis started teaching classes on how to perform self-induced abortions and distributing do-it-yourself kits.

> «By November, Maginnis and [Rowena] Gurner [a close collaborator of Maginnis] had taught twenty-five classes in the San Francisco Bay Area and soon offered classes elsewhere in California and in Ohio, New Mexico, and Washington, D.C. Class size ranged from "15 women of various ages and race" in Berkeley to 150 in Washington D.C.»[124]

The "List of Abortion Specialists" contained the abortionists' names, their prices, and directions to their "clinics". Although the list named practitioners from other countries, such as Japan, Sweden and Canada, most women went to Mexico, which had been a "safe" haven for American women seeking abortion since the early 1950s.[125]

> «The border became more visible in American abortion legislation after the case of the People of the State of California v. Buffum in 1953. The development of this "surreptitious" abortion market would not have been possible without it; the case accelerated the abortion-tourism industry at the border and allowed providers of illegal abortions to profit immensely.»[126]

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[123] Reagan, Leslie J.. *Crossing the Border for Abortions: California Activists, Mexican Clinics, and the Creation of a Feminist Health Agency in the 1960s*, Feminist Studies, Summer, Vol. 26, No. 2, Feminist Studies, Inc., 2000, p. 323

[124] Reagan, Leslie J.. *Crossing the Border for Abortions: California Activists, Mexican Clinics, and the Creation of a Feminist Health Agency in the 1960s*, p. 327

[125] Reagan, Leslie J.. *Crossing the Border for Abortions: California Activists, Mexican Clinics, and the Creation of a Feminist Health Agency in the 1960s*, p. 330

[126] Gutierrez-Romine, Alicia. "To the Border: 'Tijuana Abortions' and Legal Vagueness" in *From Back Alley to the Border*, University of Nebraska Press, 2020, p. 166

Physician Roy L. Buffum and Reginald L. Rankin were both charged with conspiracy to perform abortion when they arranged (Buffum) for four women to be driven (Rankin) from Long Beach, California, to Tijuana, Mexico, to obtain clandestine abortions. Upon their appeal to the state Supreme Court, the charges were dropped on what some would consider a technicality: the ruling of People v. Buffum implies the limited outreach of California's (and by extent America's) jurisdiction, and states that the charge of conspiracy to perform abortions –or any other conspiracy charge– cannot be prosecuted if the alleged crime has been or is planned to be committed outside of the state border, namely in Tijuana, Mexico.[127]

By 1969, the clandestine Mexican abortion network was well-established, partially on account of People v. Buffum and partially thanks to the efforts of Maginnis and her collaborators at ARAL. It was in this political and social climate that the case of People v. Belous reached the California Supreme Court. In 1966, Dr. Leon Belous, an OBGYN based in Beverly Hills, California, was accused (and subsequently convicted in January 1967) of abortion (Section 274 of the California Penal Code) and conspiracy to commit abortion (Section 182). These two felonies were going to cost him a fine of $5000 and a two-year-long probation.[128] The facts that brought Dr. Belous to court were as follows: in 1966, a young unmarried couple came to see Dr. Belous in his office to seek a confirmation of pregnancy. Upon examination, the woman, Cheryl, turned out to be pregnant, and she and her partner Clifton tried to persuade Dr. Belous to abort her, threatening to seek the illegal and dangerous procedure in Tijuana if the doctor refused. Conscious of the riskiness of the Tijuana abortion network, Dr. Belous, at the couple's pressing insistence, gave them the number of one Dr. Karl Lairtus, a Mexican practitioner whom he'd met in Tijuana and whom he knew was now performing abortions in Chula Vista, California, as he waited to obtain an American license. After the abortion, which had cost the couple $500, the police raided Dr. Lairtus' clinic, arresting him and finding two notebooks containing women's information and the contacts of other physicians who had been referring

[127] Justia Law, *People v. Buffum*, California Case Law, Volume 40, Cal. 2d 709, 1953, https://law.justia.com/cases/california/supreme-court/2d/40/709.html
[128] Justia Law, *People v. Belous*, https://law.justia.com/cases/california/supreme-court/2d/71/954.html

their pregnant patients to him. Among those names was Dr. Belous', who was later arrested at his office. At the time, Section 274 of the Penal Code read:

> «Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years.»[129]

Upon appeal, the state Supreme Court established in a 4-3 decision that the the clause which held that an abortion may be performed only when it is necessary to preserve the life of the pregnant woman, implying that the absence of the procedure would certainly result in the death of the patient, was in fact unconstitutionally vague and a ground too uncertain to base any decision on. As the majority opinion recalls, U.S. courts had previously rejected such a strict interpretation of the "necessary to preserve life" clause.[130] Consequently, the California Supreme Court held that the phrase did not satisfy due process requisites, as is required by the Fourteenth Amendment to the United States Constitution, whose first Section states:

> «[...] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; [...]»[131]

Since the Due Process clause, along with the Equal Protection clause (also found in the Fourteenth Amendment), implicitly protect a person's right to privacy, this argument has often been used in cases regarding sex and marriage (e.g. Loving v. Virginia, 1967), as established for the first time in the 7-2 ruling that legalized the use

[129] Justia Law, *People v. Belous*, https://law.justia.com/cases/california/supreme-court/2d/71/954.html
[130] Ibidem
[131] Library of Congress, *The Constitution Annotated,* Fourteenth Amendment, Section 1, https://constitution.congress.gov/constitution/amendment-14/

of contraception by married couples in Griswold v. Connecticut (1965). The majority in Griswold held that «specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.»[132] In other words, the Bill of Rights delineates a "penumbra" that creates a zone of privacy regarding marriage and –by extention– other equally intimate matters. In his concurring opinion for Griswold v. Connecticut, Justice Arthur Goldberg writes:

> «Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family –a relation as old and as fundamental as our entire civilization– surely does not show that the Government was meant to have the power to do so.»[133]

The 1969 People v. Belous ruling, by finding the California Penal Code section regarding abortion to be unconstitutional, successfully set a precedent for Roe v. Wade to follow. Although California did not "repeal" its anti-abortion laws by passing a new, liberal statute (as New York would go on to do in 1970), the striking down of Section 274 certainly allowed physicians to operate more freely, without fear of being prosecuted over a technicality such as the "necessary to preserve life" clause.

7. *Abramowicz v. Lefkowitz and New York's landmark abortion law*

By 1969, a total of six states had adopted the ALI Model Code: Colorado, California, Georgia, Maryland, Mississippi and North Carolina.[134] New York was not among them. In the state, illegal abortion was a common practice that fed a widespread network, especially in New York City. New York did allow therapeutic abortions, but they were mostly performed on psychiatric grounds in private hospitals, and only the

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[132] Justia Law, *Griswold v. Connecticut*, U.S. Supreme Court, Volume 381, U.S. 479, 1965, https://supreme.justia.com/cases/federal/us/381/479/

[133] Ibidem

[134] Wasmuth, Carl E. and Chareau, Kenet E.. *Abortion Laws: The Perplexing Problem*, Cleveland State Law Review, Issue 3, Vol. 18, 1969, p. 506

wealthy could afford private health care services. It has been documented that the incidence of therapeutic abortions was 3.6 times higher in private facilities than it was in public ones.[135] In New York City specifically, an early 1960s statistic registers that up to 93% of therapeutic abortions were performed on private patients who were also white.[136]

> «In New York City in 1960-1962 [...] municipal hospitals, in which the poor were concentrated, showed the miniscule abortion rate of 0.1 per 1000 live births. There was also a marked ethnic differential: the rate of legal abortions in New York City per 1000 deliveries was 2.6 for whites, 0.5 for blacks, and 0.1 for Puerto Ricans.»[137]

Even in the six states where abortion laws had been liberalized by taking the ALI Model Code approach, therapeutic abortion rates, when compared to the incidence of illegal abortion and maternal mortality, were infinitesimal.[138]

Back in 1966, New York State Assemblyman Albert H. Blumenthal, a Democrat from Manhattan, had launched a campaign to repeal New York's 136-years-old law which permitted abortion only when necessary to preserve the pregnant woman's life.[139] After four years of tribulations, an updated version of the controversial bill would pass with a 76 to 73 vote in the New York State Assembly,[140] and finally be signed by then New York Governor Nelson Rockefeller on April 12, 1970. The new law allowed abortion to be a private matter in the hands of the pregnant woman and her doctor up until the 24th week of pregnancy.[141] Unlike the other three states that would also repeal their abortion laws in 1970 (Hawaii, Washington and Alaska) New York did not

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[135] Charles, Alan and Alexander, Susan. *Abortions for Poor and Nonwhite Women: A Denial of Equal Protection*, p. 152
[136] Hayler, Barbara. *Abortion*, p. 319
[137] Guttmacher, Alan F.. *Abortion on Request: The Physician's View*, p. 515
[138] Ibidem
[139] Kovach, Bill. "Final approval of abortion bill voted in Albany", *The New York Times*, April 11, 1970, p. 1
[140] Kovach, Bill. "Abortion reform is voted by the Assembly, 76 to 73; Final approval expected", *The New York Times*, April 10, 1970, p. 1
[141] Kovach, Bill. "Final approval of abortion bill voted in Albany"

request that the patient seeking an abortion be a resident of the state;[142] the lack of a residency requirement, along with the fact that abortions could be performed virtually for any reason up to the second trimester, effectively made New York's abortion law the most progressive in the country.

The bill went into effect on July 1, 1970. In the 18 months following abortion liberalization (from July 1, 1970 to December 31, 1971), 278 122 pregnancies were legally and safely terminated in New York City; 64.5% of the patients who sought these abortions were not residents of NYC.[143] While in 1969 the maternal mortality rate per 10 000 live births had been 5.3, in 1971, a full year after the bill had passed, the mortality rate had dropped to 2.9, «the lowest figure recorded in the history of the New York City Health Department.»[144] Racial disparity in obtaining legal abortions also drastically plummeted, almost disappearing completely as 45.3% of legal abortions were obtained by white patients and a striking 43.9% were safely performed on Black ones; the remaining 10.8% occurred among Puerto Rican women.[145]

But before all this, the women of New York had mobilized to personally take action against the scourge of back-alley abortions.

> «On January 14, 15, and 23, 1970, dozens of women packed the thirteenth floor of the federal courthouse in Manhattan to testify about traumatic personal experiences with illegal abortion. During these daylong depositions, women became the expert witnesses in a case seeking to repeal restrictive abortion laws in the state of New York. The women detailed incidents of rape at the hands of sham abortionists, botched procedures that left them infertile or physically damaged, and unwanted pregnancies that rendered them destitute as they struggled to care for children they could not afford to raise.»[146]

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[142] Pilpel, Harriet F.. *Abortion: U.S.A. Style*, p. 114
[143] Guttmacher, Alan F.. *Abortion on Request: The Physician's View*, p. 516
[144] Ibidem
[145] Ibidem
[146] Randolph, Sherie M.. *Florynce "Flo" Kennedy: The Life of a Black Feminist Radical*, University of North Carolina Press, 2015, p. 168

Their argument was simple: no woman deserved to go through these shocking and exploiting experiences simply for wanting to terminate her pregnancy. Most clandestine abortionists were abusers and profited off of women's trauma and desperation: women, they argued, should be entitled to access safe abortions legally, without risking life-threatening physical and psychological damages. This New York Federal Court suit would be known as Abramowicz v. Lefkowitz and would set a historic example for being «the first case to use women who suffered from illegal abortions instead of physicians as expert witnesses.»[147] As expected, prior to this case, abortion case law usually involved a physician or abortionist, and would be based upon an infringement of the law, such as charges of abortion or conspiracy to commit abortion (e.g. People v. Belous). Famously, these cases centered around a physician's right to perform medicine, in all its nuanced and controversial ramifications; instead, the legal arguments used in Abramowicz v. Lefkowitz focused entirely on women's testimonies, pushing for a recognition of abortion as a constitutional right through the submission of individual and intimate experiences. The plaintiffs in this suit were «married pregnant women, unmarried pregnant women, social workers and psychologists, physicians and nurses»[148] of different socioeconomic and ethnic backgrounds.

In the late 1960s, the Women's Health Collective had begun collecting testimonies on illegal abortion experiences, with the intent of filing a suit on behalf of all the women of New York who had been let down by the government and its flawed legal and medical systems. Center for Constitutional Rights lawyer Nancy Sterns was contacted by the collective to pursue this possibility; soon, she realized that the effort that the suit required would be much too intense for a single attorney, and she gathered an all-women legal team –which included black feminist leader Flo Kennedy– to help her make the case.[149]

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[147] Ibidem

[148] Justia Law, *Hall v. Lefkowitz*, Southern District of New York, 69 Civ. 4284, 4285, 4469, 4423, Volume 304, F. Supp. 1030, 1969, https://law.justia.com/cases/federal/district-courts/FSupp/305/1030/2244909/

[149] Randolph, Sherie M.. *Florynce "Flo" Kennedy: The Life of a Black Feminist Radical*, pp. 171-172

> «Throughout the proceedings, Kennedy emphasized that women's voices should be privileged and chastised the state's lawyers for not caring about women's viewpoints. Her audience was neither the judge in this case nor the established legal system but rather the countless women who shared the experiences of the plaintiffs and could therefore understand why restrictive abortion laws should be repealed.»[150]

Abramowicz was also the first case to argue that the right to obtain an abortion was rooted in the constitutional rights to liberty and equal protection of the laws,[151] as stated in the Fourteenth Amendment. Although the case was rendered moot when New York repealed its obsolete abortion law in April of 1970, it effectively set a landmark precedent for future cases –including Roe v. Wade– by centering women as witnesses in legal matters regarding their bodily autonomy.

8. Reproductive health case law: Eisenstadt v. Baird; Relf v. Weinberger

On April 4, 1967, reproductive rights pioneer William "Bill" Baird stood up in front of a crowd of over 2,000 people at Boston University to give a speech about the importance of having access to abortion and birth control.[152] At the time, Chapter 272 of the Massachusetts Penal Code, entitled "Crimes Against Chastity, Morality, Decency, and Good Order,"[153] prohibited the sharing of information regarding contraception, and of course the distribution of any means of birth control to unmarried persons. Married couples had obtained the right to be prescribed birth control in 1965, following the landmark Supreme Court decision in Griswold v. Connecticut. Baird's speech was a planned rebellious act that voluntarily infringed upon Massachusetts puritan laws. The public lecture had been planned after he'd

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[150] Randolph, Sherie M.. *Florynce "Flo" Kennedy: The Life of a Black Feminist Radical*, p. 174
[151] Bazelon, Emily, "America Almost Took a Different Path Toward Abortion Rights", *The New York Times*, May 26, 2022, www.nytimes.com/2022/05/20/magazine/roe-v-wade-abortion-rights.html
[152] Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, pp. 63-64
[153] Justia Law, *Crimes Against Chastity, Morality, Decency, and Good Order*, Massachusetts General Laws, Part IV, Title I, Chapter 272, https://law.justia.com/codes/massachusetts/part-iv/title-i/chapter-272/

received a call from the Boston University student paper editor, Roy Mungo. Mungo, who'd heard about Baird's activism, wanted him to come to BU and "challenge their laws." At first, Baird refused, prioritizing his family's security, but upon further reflection he realized something:

> «I said, If I could be heard by the US Supreme Court, here's what I can accomplish: I could knock out the law on birth control, knock out the law on abortion, all based on the same principle of the right of privacy. But I also can maybe knock out the laws on fornication, because if you make birth control legal, you have to fornicate to use it. It said that if you have intercourse, but you're not married, that's illegal. The law clearly said fornication was a one-year jail term in almost all states. So I thought about it and I said, You know what? I'll come.»[154]

As a married man and father of four children, Baird had seemingly no interest in reproductive rights. After all, obtaining contraception had been legal for married couples since 1965, and abortion was and always had been a women's issue. What drove Bill Baird to political activism was his own experience as a salesperson for a pharmaceutical company. The firm produced a drug, Methergine, which induced uterine contractions and was thus prescribed to new mothers to control post-childbirth bleeding. This same characteristic could also cause a pregnant person to miscarry. Women (often prostitutes) would offer Baird their sexual favors in exchange for the drug, so that they could procure themselves an abortion.[155] As an unwanted child himself, Baird had always believed that «every baby should be born loved and wanted.»[156] He later started working for Emko to sell their contraceptive foam.[157] In November 1963, Baird was on the job at Harlem Hospital, «a well-known place for

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[154] Bill Baird's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, pp. 63-64
[155] Bill Baird's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, pp. 39-40
[156] Ibidem
[157] National Museum of American History, *Emko Contraceptive Foam Kit*, americanhistory.si.edu/collections/object/nmah_719945

poor people to get abortions,»[158] when a screaming woman walked through the hospital doors.

> «I ran into the hallway, and I literally saw someone staggering, covered with blood from the waist down, with an eight inch piece of coat hanger sticking out of her. I caught her as she slumped to the ground. She said, "My baby. It's my baby." Then all of a sudden, out of nowhere, came some of the orderlies with a gurney, and they just took her right out of my arms and put her onto the gurney. That was the last I saw of her. I found out a little bit later that she had died.»[159]

This shocking experience drew Bill Baird to provocative activism, making him a pioneer of the reproductive rights movement.

After his Boston University speech, which the police were attending, Baird began distributing condoms and contraceptive foam to some students in a prearranged act of disobedience, which spurred the police to arrest him. In May of the same year, he was charged for illegally handing out means of birth control to an unmarried person and for spreading information about contraception. He was sentenced to three months in the notoriously brutal Charles Street Jail in Boston.[160]

> «According to historical accounts, Baird ignored the strategy mapped out by Planned Parenthood and other proponents of reproductive freedom who sought to press for legislative change. Instead, he set out to defy the statute so that he could challenge its constitutionality in court.»[161]

And so he did. After his conviction, Baird submitted a petition for "the federal writ of *habeas corpus*" ("you have the body"), which «is a judicial order forcing law

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[158] Bill Baird's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 41

[159] Ibidem

[160] Bill Baird's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, pp. 65-66

[161] Appleton, Susan Frelich. *The Forgotten Family Law of Eisenstadt v. Baird*, The Yale Journal of Law and Feminism, Vol. 28, No. 1, 2016, p. 5

enforcement authorities to produce a prisoner they are holding, and to justify the prisoner's continued confinement,»[162] meaning that a court may reevaluate the detention of an individual if such measure proves to be unlawful. His plea was at first denied by the district court, then appealed to the Court of Appeals for the First Circuit, which established that Baird had the grounds for the writ. This decision was then appealed to the U.S. Supreme Court by then Sheriff of Suffolk County, Massachusetts, Thomas Eisenstadt. The case was argued in November 1971 and resulted in a 6-1 ruling on March 22, 1972.[163]

> «The majority opinion resolved the standing issue and addressed the substantive matter on equal protection grounds without considering the due process argument. Brennan found that the law had no rational basis, since it could not be justified as furthering public health if contraception was fully available to married couples. This opinion simply extended the logic of Griswold v. Connecticut to all heterosexual intercourse, regardless of the marital status of the individuals involved.»[164]

The historic ruling of Eisenstadt v. Baird not only allowed anyone to access contraceptive methods legally, but successfully decriminalized premarital heterosexual sex all throughout the nation.

On May 2, 1927, the U.S. Supreme Court ruled in favor of upholding Chapter 46B of the Code of Virginia, titled "Sexual Sterilization of Inmates of State Institutions".[165] This statute permitted the forced sterilization of "feeble-minded" persons through «the operation of vasectomy if upon a male and of salpingectomy [the surgical removal of one or both fallopian tubes] if upon a female.»[166] The 8-1 ruling decided the case of

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[162] United States Courts, *Habeas Corpus*, Glossary of Legal Terms, www.uscourts.gov/glossary-legal-terms/habeas-corpus
[163] Justia Law, *Eisenstadt v. Baird*, U.S. Supreme Court, Volume 405, U.S. 438, 1972 supreme.justia.com/cases/federal/us/405/438/
[164] Ibidem
[165] Encyclopedia Virginia, *Chapter 46B of the Code of Virginia § 1095h–m (1924)*, encyclopediavirginia.org/primary-documents/chapter-46b-of-the-code-of-virginia-%C2%A7-1095h-m-1924/
[166] Ibidem

18-year-old mother Carrie Buck, a "feeble-minded" white woman who was committed to the Virginia State Colony for Epileptics and Feeble Minded after being raped by her foster parents' nephew in Albemarle County, Virginia, where she lived. After the attack, the foster family decided to commit her to the State Colony institution on grounds of "promiscuity", which was then widely considered a marker of mental disability. Buck's biological mother had also been institutionalized for immoral behavior and prostitution.[167] The institution's board had voted for Buck to be «sterilized without detriment to her general health,»[168] establishing that the well-being of both Buck and society would "be promoted" by her sterilization; this decision was consistent with the Virginia Sterilization Act, which can be considered a milestone in the white-supremacist eugenics movement of the 1920s. In his majority opinion for Buck v. Bell, Justice Oliver Wendell Holmes famously compared forced and non-consensual sterilization to the widespread practice of compulsory vaccination, writing:

> «It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.»[169]

Appallingly, the Buck v. Bell ruling has never been overturned. It has, however, been challenged by another significant case: Relf v. Weinberger. In 1973, two Black teenage sisters from Montgomery, Alabama, Mary Alice and Minnie Relf (who were respectively fourteen and twelve years old), were supposed to receive birth control through the federally funded facility responsible for their medical care. Instead, they were taken to a hospital and forcibly sterilized through tubal ligation, an irreversible

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[167] Ordover, Nancy. "Buck v. Bell and Before" in *American Eugenics: Race, Queer Anatomy, and the Science of Nationalism*, University of Minnesota Press, 2003, p. 135
[168] Justia Law, *Buck v. Bell*, U.S. Supreme Court, Volume 274, U.S. 200, 1927 supreme.justia.com/cases/federal/us/274/200/#207
[169] Ibidem

procedure. Their illiterate mother had signed an "X" on the authorization paper, mistakenly believing to be consenting to birth control shots.[170]

The Southern Poverty Law Center helped the Relfs file a lawsuit against then Secretary of Health, Education, and Welfare Caspar Weinberger. Back in 1927, the case of Carrie Buck had brought to light the widespread practice of sterilization; however, by upholding the statute which made sterilization abuse legal, the case had done nothing to change the state of things. By the early 1970s, more than 65% of non-consensual sterilizations were carried out at the expense of Black women.[171] Furthermore:

> «The total number of these sterilizations [as of 1974] is clearly of national significance. Few realize that over 16 percent of the married couples in this country between the ages of 20 and 39 have had a sterilization operation. Over the last few years, an estimated 100,000 to 150,000 low-income persons have been sterilized annually under federally funded programs. Virtually all of these people have been adults: only about 2,000 to 3,000 per year have been under 21 years of age and fewer than 300 have been under 18. There are no statistics in the record indicating what percentage of these patients were mentally incompetent.»[172]

The Relfs' lawsuit was also based on evidence exposing that an indefinite number of minors and mentally impaired people had in fact been sterilized –either against their will or without receiving proper information on the procedure– under federal programs or using federal funds. Further evidence demonstrated that many indigent people had been coerced into agreeing to be sterilized under the threat of being stripped of their welfare benefits.[173] The memorandum opinion for Relf v. Weinberger, which was decided on March, 15, 1974, reads:

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[170] National Archives Foundation, "Signed with an X" in *The New Face of Justice*, archivesfoundation.org/newsletter/new-face-of-justice/#:~:text=When%20Mr.,the%20case%20to%20be%20moot

[171] Ibidem

[172] Justia Law, *Relf v. Weinberger*, District of Columbia, Volume 372, F. Supp. 1196, 1974 law.justia.com/cases/federal/district-courts/FSupp/372/1196/1421341/

[173] Ibidem

> «The Court finds that the Secretary has no statutory authority under the family planning sections of the Social Security or Public Health Services Acts to fund the sterilization of any person incompetent under state law to consent to such an operation, whether because of minority or of mental deficiency. It also finds that the challenged regulations are arbitrary and unreasonable in that they fail to implement the congressional command that federal family planning funds not be used to coerce indigent patients into submitting to sterilization. In short, federally assisted family planning sterilizations are permissible only with the voluntary, knowing and uncoerced consent of individuals competent to give such consent.»[174]

After the district court sentence, the case was appealed to the U.S. Court of Appeals for the D.C. Circuit; during the pending period, the Department of Health, Education and Welfare enacted new regulations to control sterilization practices in response to the outrage that had spawned from the Relf sisters' case. These guidelines were meant to insure that a person could give their informed consent to voluntarily undergo sterilization only after having been educated on the risks and benefits of the procedure, and on the permanence of its effects. The patient was also to be informed, both orally and in written form, that their welfare benefits would remain intact whether they refused or accepted to undergo the procedure. Finally, after consenting, the patient had to wait for 72 hours before proceeding with the operation.[175] By replacing the old provisions which the lawsuit had been based upon, these new regulations effectively rendered the case moot in the eyes of the court of appeals. Nevertheless, Relf v. Weinberger remains a major legal victory against the racism- and classism-driven sterilization abuse of non-white and indigent people.

[174] Ibidem
[175] Donovan, Patricia. *Sterilizing the Poor and Incompetent*, The Hastings Center Report, Vol. 6, No. 5, The Hastings Center, 1976, p. 7

9. *Abortion case law: United States v. Vuitch; Struck v. Secretary of Defense*

Milan Vuitch, a licensed physician of Serbian origin based in Washington, D.C., was arrested in 1968 for openly infringing upon the city's statutes that deemed abortion acceptable only when necessary to preserve the life or health of the pregnant woman.[176] At the time, Title 22, Section 201 of the D.C. Code read:

> «Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces an abortion or miscarriage on any woman unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years…»[177]

When he «allowed advocates to openly disseminate his name to women who wanted abortions,»[178] Dr. Vuitch knew he was risking up to ten years of prison; still, he wanted to challenge District of Columbia's law with the goal of bringing mental health into the equation,[179] as suggested by the ALI Model Penal Code. The district court found the statute to be unconstitutionally vague, as the word "health" was much too broad a term to define a precise condition, rendering physicians unable to securely perform medicine. More precisely, for the District Judge:

> «The statute was vague for two principal reasons:
> 1. The fact that, once an abortion was proved a physician "is presumed guilty and remains so unless a jury can be persuaded that his acts were necessary for the preservation of the woman's life or health."
> 2. The presence of the "ambivalent and uncertain word health."»[180]

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[176] Valk, Anne M.. "Organizing for Reproductive Control" in *Women's Activist Organizing in US History*, University of Illinois Press, 2022, p. 211
[177] Wagner, John. *Constitutional Law—Due Process and Abortion: United States v. Vuitch, 402 U.S. 62 (1971)*, Nebraska Law Review, Volume 51, No. 2, 1971, p. 340
[178] Valk, Anne M.. *Women's Activist Organizing in US History*, p. 211
[179] Ibidem
[180] Justia Law, *United States v. Vuitch*, U.S. Supreme Court, Volume 402, U.S. 62, 1971, supreme.justia.com/cases/federal/us/402/62/

The District Court for the District of Columbia thus withdrew the accusations of abortion against Dr. Vuitch and rejected his indictment, at which point the Government decided to appeal to the U.S. Supreme Court.[181] In the majority opinion for United States v. Vuitch, Justice Hugo Black wrote that the Court disagreed with the district judge's opinion that a physician should be required to prove their innocence after allegedly committing a crime; in fact, Justice Black believed that «it would be highly anomalous for a legislature [...] to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell within that category.»[182] The majority was of the opinion that it is part of a physician's job to make decisions in matters of life and death, and that «whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered,»[183] as it is intrinsic to the medical profession.

As for the supposed vagueness of the statute, if the word "health" was in fact too unclear and ambiguous, it would violate the Due Process clause of the Fourteenth Amendment by obliging physicians to consistently prove their innocence in court. The Supreme Court, however, found that "health" was a widely accepted term in the medical profession, commonly used to define the mental and physical well-being of an individual. Despite the lack of definitions of "health" that explicitly include both mental physical wellness in the history of the statute, the Court upheld District Judge Waddy's verdict in Doe v. General Hospital of District of Columbia (1970)[184], which found that D.C. law permitted abortion for physical as well as "for mental health reasons whether or not the patient had a previous history of mental defects."[185] In this regard, Justice Black's opinion reads:

> «We see no reason why this interpretation of the statute should not be followed. Certainly this construction accords with the general usage and

[181] Ibidem
[182] Ibidem
[183] Ibidem
[184] Justia Law, *Doe v. General Hospital of District of Columbia*, District of Columbia, Volume 313, F. Supp. 1170, 1970, law.justia.com/cases/federal/district-courts/FSupp/313/1170/1969235/
[185] Justia Law, *United States v. Vuitch*, supreme.justia.com/cases/federal/us/402/62/

> modern understanding of the word "health," which includes psychological as well as physical wellbeing. Indeed, Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness.»[186]

In striking contrast, the Supreme Court of California had struck down a similar law only a year prior (People v. Belous, 1969), also on grounds of vagueness; however, as People v. Vuitch challenged a federal D.C. statute instead of state legislation, Belous was not significant to the case.

Although the 5-4 decision in United States v. Vuitch negated the alleged vagueness of the D.C. statute, it also placed the burden of proof on the prosecution, meaning that the Government was to prove that the abortion performed by Dr. Vuitch had not been carried out to safeguard the woman's physical or mental health in the face of severe threats.[187] Therefore, as the Government deemed it unrealistic to succeed in further prosecuting Dr. Vuitch, he remained free and kept on practicing medicine.

As for the case, despite its somewhat unsatisfactory ruling, United States v. Vuitch has gone down in history as one of the first Supreme Court cases to consider the constitutionality of abortion.

In 1970, Air Force nurse Susan Struck was stationed in Phù Cát, Vietnam, when she learned that she had become pregnant.[188] At the time, military law permitted abortions for medical and even psychological reasons to all its personnel and their dependents (e.g. military wives and daughters). Abortions were to be performed at any military facility, with no regard to individual state laws. For most of the 1970s, military personnel and their dependents could virtually obtain an abortion in states where it was prohibited even when the pregnant woman's life was threatened (e.g. Louisiana,

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[186] Ibidem
[187] Ibidem
[188] Dixon Vuic, Kara. *The Better Roe: The Case of Struck v. Secretary of Defense*, Perspective on History, American Historical Association, 2022, www.historians.org/perspectives-article/the-better-roe-the-case-of-struck-v-secretary-of-defense-september-2022/

Pennsylvania and New Hampshire).[189] The policy had no viability clause, «but it did require the approval of two physicians and specified that no medical staff had to participate against their wishes.»[190] For servicewomen, on the other hand, deciding to carry a pregnancy to term meant immediate discharge. To put it simply, once a member of the military became pregnant, they only had two options: abortion or immediate release from active duty. At first, Captain Struck decided for the abortion and asked to be temporarily moved to Japan to obtain it, since Vietnam, as an active warzone, did not offer the procedure in all its military facilities. However, soon after her decision, Captain Struck turned to her Catholic roots and abandoned her initial resolution, instead planning to carry her pregnancy to term and placing the child for adoption. To avoid being discharged, she hid her pregnancy up to the eighth month, when she was eventually confronted about her condition.[191] On October 16, 1970, she appeared in front of a Board of Officers which endorsed her discharge from the Air Force; on October 26, the Secretary of the Air Force authorized that Captain Struck be honorably discharged at the earliest opportunity.[192]

> «On December 17, 1970, Mr. Justice Douglas of the Supreme Court of the United States, upon application, entered an order that her discharge be stayed pending final decision on the merits in the United States District Court for the Western District of Washington. The District Court on February 1, 1970, filed its Conclusions of Law, which are to the effect that the Air Force Regulation concerning discharge of pregnant officers is reasonable and constitutional; that Captain Struck might therefore be lawfully discharged; [...] There are no disputed questions of fact. There is no problem about the meaning of the text, Air Force Regulation 36-12. It is clear and free from ambiguity.»[193]

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[189] Boonstra Heather D.. *Off Base: The U.S. Military's Ban on Privately Funded Abortions*, Guttmacher Policy Review, Volume 13, Issue 3, 2010 www.guttmacher.org/gpr/2010/08/base-us-militarys-ban-privately-funded-abortions#:~:text=Public%20Funding%20Ban,a%20statement%20overruling%20the%20DOD

[190] Dixon Vuic, Kara. *The Better Roe: The Case of Struck v. Secretary of Defense*, www.historians.org/perspectives-article/the-better-roe-the-case-of-struck-v-secretary-of-defense-september-2022/

[191] Ibidem

[192] Justia Law, *Struck v. Secretary of Defense*, Courts of Appeals, Ninth Circuit, Volume 460, F.2d 1372, 1972, law.justia.com/cases/federal/appellate-courts/F2/460/1372/190838/

[193] Ibidem

Any further objection to the court's ruling would consequently challenge the constitutionality of this regulation: Captain Struck's last resource was to appeal to the United States Supreme Court. Her attorney, Robert Czeisler, was then working for the American Civil Liberties Union's affiliate in Washington; coincidentally, future Supreme Court Justice Ruth Bader Ginsburg was also directly involved with the ACLU at the time, having just written the legal brief for Reed v. Reed (1971), famously the first Supreme Court case to consider sex discrimination a violation of the Equal Protection Clause established by the Fourteenth Amendment.[194] Logically, Czeisler decided to involve Ginsburg in Captain Struck's case.

> «The problem, she believed, had little to do with the obvious psychological differences between the sexes, though these could hardly be ignored. Rather, it lay in the vulnerability to various forms of pressure that sexual relations often create for women in their childbearing years—pressures to give up needed jobs when pregnant, to have a pregnancy terminated involuntarily, or to carry an unwanted pregnancy to term against one's best judgement. When such pressures take the form of statutes or regulations, the law becomes by its very nature sexy based, penalizing women.»[195]

By 1971, termination of pregnancy had been a hot topic in American courts of all levels for a few years. That same year, the Supreme Court had decided to hear two cases that would later become historic milestones: Texas' Roe v. Wade and Georgia's Doe v. Bolton. In such an animated legal climate, Struck v. Secretary offered a new perspective on the matter of abortion: while most cases (Roe and Doe included) challenged restrictive abortion legislation, Struck dealt with one of the most liberal abortion regulations of the country, that of the military. In Struck's case, discrimination did not rest in a limited access to abortion, but rather in the coercive manner in which military policy forced a woman to either *have* an abortion or resign.

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[194] Justia Law, Reed v. Reed, U.S. Supreme Court, Volume 404, U.S. 71, 1971, supreme.justia.com/cases/federal/us/404/71/

[195] De Hart, Jane Sherron. *Ruth Bader Ginsburg: A Life*, Scribe Publications, London, 2020, p. 180

This unique perspective offered a breeding ground for a different challenge to the constitutionality of abortion: instead of relying on the right to privacy established by Griswold v. Connecticut (1965), as Roe v. Wade would go on to do, Struck would've rested its arguments on equal protection and sex discrimination, creating a much steadier (and less vulnerable) legal foundation. Or so Ginsburg believed.[196]

> «As applied, the [Air Force pregnancy] regulations denied Captain Struck equal protection of the law and substantially infringed upon her right to autonomy in deciding whether to bear a child. [...] Ginsburg acknowledged that in the event of any temporary medical disability, removal from a combat zone was entirely appropriate. Yet for every other temporary medical disability, including drug addiction and alcoholism, the air force encouraged reporting, rehabilitation, and reassignment. That pregnancy was the only temporary disability warranting mandatory discharge, she contended, constituted a flagrant example of sex discrimination.»[197]

Furthermore, Ginsburg argued, regulations that push women towards pregnancy termination in a coercive manner violate their freedom to exercise religion and to put their religious values into practice, as it had been for Captain Struck. In her brief for Struck v. Secretary, Ginsburg claims that «restrictive rules, and particularly discharge for pregnancy rules, operate as "built-in headwinds" that drastically curtail women's opportunities.»[198]

Despite Ginsburg's efforts, and despite the Supreme Court's agreement to hear the case, then Solicitor General Erwin Griswold, the federal government's representative before the Supreme Court, urged the Air Force to revoke Captain Struck's discharge and repeal its pregnancy regulations, effectively rendering the case moot.[199]

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[196] Dixon Vuic, Kara. *The Better Roe: The Case of Struck v. Secretary of Defense*, www.historians.org/perspectives-article/the-better-roe-the-case-of-struck-v-secretary-of-defense-september-2022/

[197] De Hart, Jane Sherron. *Ruth Bader Ginsburg: A Life*, p. 186

[198] Siegel, Neil S. and Siegel Reva B.. *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, Duke Law Journal, Vol. 59, No. 4, Duke University School of Law, 2010, p. 773

[199] Siegel, Neil S. and Siegel Reva B.. *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, pp. 777-778

Chapter II
Abortion after Roe

1. Roe v. Wade

In October, 1969, a Gallup poll surveyed a group of 1448 white women and men on the subject of abortion. Less than four years before the landmark Supreme Court ruling in Roe v. Wade, the poll registered the following data: 13% of all male and female respondents disapproved abortion when necessary to preserve the health of the pregnant woman; 25% disapproved abortion in cases of fetal defects; 68% disapproved it when the mother had no economic means to sustain a pregnancy and raise a child; 79% when the woman simply did not want any more children.[200] While public opinion surrounding the topic of abortion had gotten slightly more liberal in the course of the 1960s,[201] by the end of the decade white American attitudes towards abortion were still not fully open to a truly progressive law. This is why, when January 22, 1973 came about, it generated immediate backlash and an unexpected, radical political polarization.

> «Not only is it commonly assumed that Roe started the conflict over abortion but the common assumption, both outside and within the legal academy, is that Roe has driven the realignment of Republican and Democratic voters around abortion. [...] As Cass Sunstein put it, "[T]he decision may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women's movement by spurring opposition and demobilizing potential adherents."»[202]

Many claim that the Court's decision has in fact been the root of the conflict over abortion for three main reasons: it tried (and –to some extent– succeeded) to solve the abortion problem nationally, instead of dealing with it individually in state-level

[200] Blake, Judith. *Abortion and Public Opinion: The 1960-1970 Decade*, p. 541
[201] Ibidem
[202] Greenhouse, Linda and Siegel, Reva B.. *Before (and After) Roe v. Wade: New Questions About Backlash*, The Yale Law Journal, Vol. 120, No. 8, The Yale Law Journal Company, Inc, 2011, p. 2072

courts; its liberalism did not align with popular opinion, as proved (among others) by the aforementioned Gallup poll; and finally, it did not leave space to any form of compromise,[203] making the restrictive abortion laws of 46 states unconstitutional effective immediately.[204]

The facts that led to such a divisive decision are as follows: in 1969, Norma McCorvey (a.k.a. Jane Roe) became pregnant with her third child. Her first daughter lived with her parents, while her second born had been given up for adoption.[205]

> «She had never finished tenth grade, was working as a waitress, and knew she would lose her job if her pregnancy continued. She could barely support herself, much less a child. I sympathized with her plight, and we agreed that it was unfair that many women [...] lost their jobs if they became pregnant.»[206]

As she was then living in Dallas, Texas, her doctor refused to abort her, seeing that Articles 1991 to 1994 and Article 1196 of the Texas Penal Code only allowed abortion when necessary to preserve the life of the pregnant woman.[207] McCorvey was contacted by lawyers Linda Coffee and Sarah Weddington, who were willing to make her a plaintiff with the legal pseudonym of Jane Roe and bring her case to court. Joining McCorvey in her legal efforts, John and Mary Doe, a childless married couple, had the repeal of the Texas anti-abortion laws in their best interest: Mary, while not pregnant at the time, had been medically advised not to have children and not to take oral birth control. Had she become pregnant, Texas law would have left her with no way out; by making abortion legal, the state would have guaranteed her the protection that she felt she deserved as a citizen. Finally, «James Hubert Hallford, a licensed

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[203] Greenhouse, Linda and Siegel, Reva B.. *Before (and After) Roe v. Wade: New Questions About Backlash*, pp. 2073-2074

[204] Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 425

[205] Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 233

[206] Sarah Weddington's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 233

[207] Justia Law, *Roe v. Wade*, U.S, Supreme Court, Volume 410, U.S. 113, 1973, supreme.justia.com/cases/federal/us/410/113/

physician, sought and was granted leave to intervene in Roe's action»[208] as a third petitioner, lamenting the state of distress and uncertainty in which he was forced to practice medicine, and declaring that he himself had previously been prosecuted –two trials were still pending– for performing abortions.

> «He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendment.»[209]

Thus the case offered three different perspectives on the problem of abortion: that of the pregnant single woman; that of the couple who could not have children, lest the woman's health be severely endangered; that of the physician who risked prosecution for practicing medicine.

Roe v. Wade was first argued on May 22, 1970 «in front of a three judge panel, which included one female judge whom Coffee had clerked for, Sarah T. Hughes.»[210] The District Court for the Northern District of Texas found the state's abortion law to be unconstitutional based on the Ninth Amendment, which states that «the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.»[211] It was the opinion of the district court that one of such retained rights was the right to choose whether or not to bear children, and, accordingly, whether to terminate a pregnancy via abortion. Furthermore, the court found the Texas statutes to be vague and dismissive of the right to privacy established by the Fourteenth Amendment (Griswold v. Connecticut, 1965). The district court

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[208] Ibidem
[209] Ibidem
[210] Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 234
[211] Library of Congress, *The Constitution Annotated,* Ninth Amendment, constitution.congress.gov/constitution/amendment-9/

then dismissed the Does' petition, and granted declaratory relief solely to Hallford and Roe.[212] Despite the somewhat promising ruling, the court would not put a stop to the prosecution of physicians on grounds of abortion, meaning that the law, while unconstitutional, could still be enforced. The lack of a satisfying relief (in this case, an injunction forbidding Dallas County District Attorney Henry Wade to sue practitioners) spurred Coffee and Weddington to appeal the case to the U.S. Supreme Court.[213]

Firstly, the Court addressed the Does' case, declaring them unfit to show as plaintiffs in the litigation, as their claims leaned on purely speculative grounds.

> «Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place, and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy.»[214]

Therefore, the Supreme Court agreed with the lower court's decision to dismiss the Does' complaint. After thoroughly examining the history of abortion and of the laws regulating it, the majority opinion lists the three main reasons that led to the 19th century criminalization of such practice: the Victorian concern with "illicit sexual conduct"; the dangerous nature of abortion techniques at the time, which of course had since then changed significantly—so much so that the procedure no longer posed a threat to the women seeking it; the state's interest in preserving fetal life,[215] an

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[212] Justia Law, *Roe v. Wade*, supreme.justia.com/cases/federal/us/410/113/
[213] Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, p. 234
[214] Justia Law, *Roe v. Wade*, supreme.justia.com/cases/federal/us/410/113/
[215] Ibidem

argument that rested on the Catholic conviction that life starts at the moment of conception.[216]

> «Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs. In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth, or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.»[217]

In light of this, the Supreme Court found it unjust to base criminal prosecution on a single –albeit widely accepted– "theory of life". It did however endorse the existence of a significant state interest in preserving the life and health of pregnant women and the "potentiality of human life".[218] These individual and separate interests become "compelling" at different times during the pregnancy. The compelling point for the health of the woman was considered to be at the end of the first twelve weeks of pregnancy, as it is a «now-established medical fact [...] that, until the end of the first trimester, mortality in abortion may be less than mortality in normal childbirth.»[219] Thus, up until this point in the pregnancy, the decision to terminate it should rest solely on the woman and her doctor.

The compelling point for the state interest in prenatal life was of course fetal viability, which is determined by the fetus' ability to survive outside the uterus with or without medical assistance. This generally occurs after 24 weeks of pregnancy, between the second and the third trimester. After that point, the state would be free to choose

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[216] In his *Apostolicae Sedis moderationi* bull (1869), Pope Pius IX had declared that the soul inhabits the fetus instantly the moment it's conceived. This belief led him to enforce the immediate and automatic excommunication (*Latae sentientiae*) of any person (woman, doctor, health professional) involved in the execution of an abortion.

[217] Justia Law, *Roe v. Wade*, supreme.justia.com/cases/federal/us/410/113/

[218] Ibidem

[219] Ibidem

whether to regulate or prohibit abortion, except when it was deemed necessary to preserve the woman's life. In light of these considerations, the Texas Penal Code proves to be far too restrictive, as it exclusively regards abortion as a life-saving procedure, with no consideration for gestational age: «the statute, therefore, cannot survive the constitutional attack made upon it here.»[220]

Roe v. Wade 7-2 ruling thus famously established a trimester framework which offered a compromise between the state's interest in the health of pregnant people and its interest in the potentiality of human life. By doing so, it established: that within the first trimester termination of pregnancy was to be considered a private matter between the pregnant woman and her physician, completely free of state interference; that during the second trimester, the state had an interest in regulating abortion by prioritizing the safety of pregnant people; that during the third trimester, states could promote abortion bans at their discretion, except when the procedure was considered necessary to preserve the life and health of pregnant people.

Regarding the right to privacy, Justice Harry Blackmun, author of the majority opinion, notoriously wrote:

> «This right of 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, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.»[221]

2. *Roe's companion: Doe v. Bolton*

In 1970, Sandra Cano, a mother of three based in Georgia, found herself pregnant again. Her husband was a convicted felon, two of her children were in foster care, and the third, born only a year prior, had been given up for adoption. Not knowing what to

[220] Ibidem
[221] Ibidem

do, she seeked the help of the Atlanta Legal Aid to file for a divorce. She later declared that she had never been aware of being involved in an abortion case.[222] Nevertheless, that's how Doe v. Bolton's journey to the United States Supreme Court started.

At the time, Chapter 26, Sections 1201 to 1203 of Georgia's 1968 Criminal Code –which had been patterned after the ALI Model Code– allowed abortion only when a licensed physician deemed it necessary "in his best clinical judgement" to preserve the wellbeing of the mother—namely if the pregnancy posed a life-threatening hazard or could potentially cause her severe injuries; a pregnant woman could also abort when there was substantial proof of grave fetal defects or when the pregnancy resulted from rape.[223] Furthermore, Georgia's statute imposed three necessary conditions for the performance of an abortion:

> «(1) that the abortion be performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals (JCAH); (2) that the procedure be approved by the hospital staff abortion committee; and (3) that the performing physician's judgment be confirmed by independent examinations of the patient by two other licensed physicians.»[224]

Cano, who was named the case's plaintiff under the legal pseudonym of Mary Doe, allegedly[225] seeked a therapeutic abortion during her 8th week of pregnancy, and was denied the procedure for not meeting any of the Georgia statute conditions. Doe was joined in her protest by licensed physicians, nurses, social workers and even men of the cloth—all of whom felt that they had been directly or indirectly scorned by the state's restrictive abortion law. The District Court for the Northern District of Georgia

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[222] Ziegler, Mary. "The Making of Roe" in *Roe: The History of a National Obsession*, Yale University Press, 2023, pp. 10-11

[223] Justia Law, *Doe v. Bolton*, U.S. Supreme Court, Volume 410, U.S. 179, 1973, supreme.justia.com/cases/federal/us/410/179/

[224] Ibidem

[225] The alleged request for a termination of pregnancy, cited in the official Supreme Court records for the case, is in conflict with Cano's subsequent statements declaring that she had never sought an abortion in the first place—only a divorce. Later in life, much like Norma McCorvey, she became vocal about her support for a fetus' "right to life".

ruled that, out of all the petitioners, «only Doe presented a justiciable controversy.»[226] As it had been for the lower court's decision in Roe v. Wade, Georgia's district court granted merely declaratory (not injunctive) relief, holding some of the indicted provisions unconstitutional, as they violated the citizen's rights to privacy and liberty. The lack of an injunction, however, resulted from the court's recognition of the state's interest in preserving potential human life—somehow foreshadowing the Supreme Court's combined ruling in Roe and Doe. The decision was then appealed to the Supreme Court in hopes of obtaining a more extensive relief.[227]

Firstly, the Court found that, unlike Roe's own Dr. Hallford –who had been prosecuted for criminal abortion– the physicians supporting Doe on grounds of uncertainty regarding the statute's scope presented standing to sue. As the Court's majority opinion states:

> «The physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions. The physician appellants, therefore, assert a sufficiently direct threat of personal detriment. They should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.»[228]

As for the appellants' opinion that Georgia's statute was far too subjective for a physician to make a decision without fearing prosecution, and could be thus considered unconstitutionally vague, the Court conformed to the ruling in United States v. Vuitch (1971), which found that such "vagueness" does not in fact exist—or at least apply to these cases.

The appellants then questioned the constitutionality of the conditions stating that an abortion necessarily be performed in a JCAH accredited facility, and that only after the decision is reviewed and approved by a hospital committee the pregnant woman be examined by two other physicians to confirm her suitability for the procedure. The

[226] Justia Law, *Doe v. Bolton*, supreme.justia.com/cases/federal/us/410/179/
[227] Ibidem
[228] Ibidem

appellants felt that these provisions unjustly infringed upon a woman's right to privacy, and did not guarantee her due process and equal protection. As the JCAH is not a governmental organization, the Supreme Court found that the provision did «not withstand constitutional scrutiny in the present context.»[229] Calling the requirement for a committee's review "basically redundant", as it happens only after the abortion has already been approved and recommended by the pregnant woman's physician, the Court deemed it unnecessary; the majority opinion also noted that no other surgical procedure required a committee review, creating an unfair double standard specifically around abortion. Similarly, imposing an additional examination by two other physicians was considered superfluous, as the judgement of the woman's personal doctor should not need further assessment. The Supreme Court then dismissed the statute's residency requirement, claiming that «a contrary holding would mean that a State could limit to its own residents the general medical care available within its borders.»[230] Finally, the Court denied an injunctive relief as it had done for Roe, relying on the assumption that deeming the statutes unconstitutional, thus rendering them void, would make a formal injunction against state officials redundant.

As Roe's companion case, Doe v. Bolton was decided in a 7-2 ruling on January 22, 1973 and argued by the same majority. While destined to be overshadowed by its titanic companion from Texas, Doe was just as decisive in bringing about the first nationwide abortion rights victory.

> «Supreme Court decisions set the supreme law of the land; the decisions in Roe and Doe affected the laws of every state that had provisions similar to those of Texas and Georgia. Abortion was no longer illegal.»[231]

[229] Ibidem
[230] Ibidem
[231] Sarah Weddington's testimony in Bingham, Clara. *The Movement. How Women's Liberation Transformed America, 1963-1973*, Simon & Schuster, LLC, New York, 2024, p. 424

3. *Class and racial disparity post-Roe: Abortion access for poor and non-white people*

When examined from the perspective of class and racial disparity, the decision in Roe v. Wade appears instantly flawed. As the Supreme Court recognized the right to obtain an abortion to be rooted in a woman's constitutional right to privacy, it also guaranteed no state interference in the decision to undergo the procedure, which from then on was to be considered a confidential matter between a woman and her doctor. But since no pregnancy termination could be granted without first consulting with a licensed physician, there exists an undeniable and necessary correlation between the right to an abortion and access to healthcare.

> «In announcing a woman's right to choose an abortion in consultation with her physician, Roe rested on a series of assumptions. First, it assumed a certain degree of affluence and access—women choosing an abortion ostensibly had access to medical care, and as such, made their decisions in consultation with medical professionals. Relatedly, Roe framed abortion as the "choice" of whether or not to have a child, irrespective of the background conditions that might inform or shape such choices. It offered no quarter to those women whose reproductive "choices" were shadowed by economic insecurity, the absence of safe and affordable childcare, and racial and gender injustice.»[232]

In 1974, more or less one year after Roe, the Alan Guttmacher Institute registered an existing disparity in access to legal and safe abortion, mainly rooted in a woman's socioeconomic background (poorer women had less chances to access the procedure) and in the region in which she lived, with urban areas intuitively offering more frequent and diverse solutions.[233] The unavailability of safe procedures predictably feeded into the systemic issue of criminal abortions. It would be naive to assume that

[232] Murray, Melissa. "Race and Abortion After Roe v. Wade" in *Race-ing Roe: Reproductive Justice, racial Justice, and the Battle for Roe v. Wade,* Harvard Law Review, Vol. 134, No. 6, The Harvard Law Review Association, 2021, pp. 2049-2050

[233] Cates, Willard, Jr. and Rochat, Roger. *Illegal Abortions in the United States: 1972-1974*, Family Planning Perspectives, Vol. 8, No. 2, Guttmacher Institute, 1976, p. 88

the 1973 nationwide legalization of abortion put a stop to the practice of illegal procedures altogether; on the contrary, it once again highlighted the class disparity that had been at the core of the abortion question since its 19th century criminalization. As the Janes had registered after New York's abortion legalization in 1970, the clientele of illegal abortion networks (Jane included) did not disappear, it merely changed its socioeconomic backgrounds, and –more often than not– its skin color as well. The same thing happened barely three years later, when abortion legalization was no longer restricted to a single state (or, more accurately, to four of the fifty states), instead becoming a nationwide phenomenon. Once again, socioeconomic imbalance translated to racial inequality. Between 1972 and 1974, the Guttmacher Institute reported 19 illegal abortion deaths among white women, and 44 among non-whites,[234] meaning that roughly 70% of the people who had died of abortion-related complications were part of colored minorities. Of course, as criminal abortion was (and still is) an illegal practice, only partial data can be collected, mainly through hospital records reporting abortion-related deaths or episodes of maternal septic shocks. Even so, the blatant racial disparity cannot be considered accidental.
To make matters worse, on June 17, 1977, the House of Representative passed a restrictive version of the so-called Hyde Amendment, which had been initially presented in 1976.

> «That amendment prohibits the use of federal funds after October 1 "to pay for abortions or to promote or encourage abortions." Three days later, the U.S. Supreme Court, in 6-3 decisions, ruled that states need not pay for "nontherapeutic" abortions even though they pay for childbirth, and that public hospitals need not perform such abortions, although they provide other pregnancy-related services. [Beal v. Doe, 1977]. On June 29, the Senate voted 56-39 to bar the use of federal funds for abortion except to save the life of the pregnant woman if the fetus were carried to term "or where medically necessary, or for the treatment of rape or incest."»[235]

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[234] Ibidem
[235] Lincoln, Richard; Dŏring-Bradley, Brigitte; Lindheim Barbara L. and Cotterill Maureen A.. *The Court, the Congress and the President: Turning Back the Clock on the Pregnant Poor*, Family Planning Perspectives, Vol. 9, No. 5, Guttmacher Institute, 1977, p. 207

This decision directly affected the already indigent recipients of Medicaid, a public insurance plan founded in 1965 to cover the health expenses of poor Americans.[236] As the amendment made these funds non-spendable on legal and safe "elective" abortions, poor women were left with two choices: keep a child they did not have the resources to raise, or resort to either cheaper back-alley abortions or permanent sterilization. And the people affected by these restrictions do not make up a small number either, as «more than three million Medicaid-eligible women are at risk of unwanted pregnancy at any given time.»[237]

In 1977, the average cost of a legal abortion was $280, with the lowest price being found in North and South Dakota ($160) and the highest in Delaware, Mississippi, West Virginia and Wyoming ($460). In contrast, the average AFDC[238] monthly payment amounted to $238, with peaks of $363 in Hawaii and New York –interestingly two of the four states that had made abortion completely legal back in 1970– and lows of a mere $48 per month in Mississippi,[239] one of the four states that offered the most expensive abortions in the country. To add insult to injury, Mississippi, as a Southern state, still held a high percentage of Black residents in the 1970s, once again making race and class interlocked issues: in 1970, the state counted a population of 2,216,912 people, 823,629 of which were Black[240] (roughly 37% of the entire state's population). Although there is no ethnicity-based distinction in the eighth Annual Report of the Mississippi Medicaid Commission (which covers the 12 months between July 1, 1976, barely a few days after the Hyde Amendment's approval, to June 30, 1977), it is worth noting that, in the fiscal year of 1977, a total of

[236] Center on Budget and Policy Priorities, *Policy Basics: Introduction to Medicaid*, www.cbpp.org/research/policy-basics-introduction-to-medicaid

[237] Lincoln, Richard; Dŏring-Bradley, Brigitte; Lindheim Barbara L. and Cotterill Maureen A.. *The Court, the Congress and the President: Turning Back the Clock on the Pregnant Poor*, p. 209

[238] Aid to Families with Dependent Children, another federal welfare program for low-income families and children; see ASPE (Office of the Assistance Secretary for Planning and Evaluation), *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) - Overview*, aspe.hhs.gov/aid-families-dependent-children-afdc-temporary-assistance-needy-families-tanf-overview

[239] Lincoln, Richard; Dŏring-Bradley, Brigitte; Lindheim Barbara L. and Cotterill Maureen A.. *The Court, the Congress and the President: Turning Back the Clock on the Pregnant Poor*, p. 211

[240] U.S. Department of Commerce/Bureau of Census, "Population by Race 1970, and Negro Population 1960, by State" in *1970 Census of Population*, Series PC(S1)-1, June 1971, p. 17

360,700 Mississippi residents were eligible to receive Medicaid funds, and 289,729 effectively became Medicaid recipients. Of these 289,729, 42,989 were AFDC adults and 128,087 were AFDC children,[241] both of which can be considered categories comprising girls and women of childbearing age (which approximately goes from 12 to 45 years of age). Therefore, it is safe to assume that the Supreme Court's decision not to federally fund non-therapeutic abortions, along with the Hyde Amendment's provision preventing Medicaid funds from being used for abortions, potentially affected thousands of indigent Mississippi Medicaid recipients. And this is only one state's data.

As Lincoln et al. point out, the average abortion price of $280 «is $42 higher than the average monthly welfare payment for an entire family for food, clothing, shelter and all other necessities,»[242] making it an unobtainable expanse for a pregnant welfare recipient whose main concern was presumably to feed and clothe her existing children. Yet again, the poor –and often non-white– were forced to sacrifice theirs and their families' wellbeing on account of a flawed system that consistently failed to protect them and instead systemically rewarded the white and wealthy.

> «In its June 20 decisions, the Supreme Court declared that the refusal of a state to finance abortions for poor people did not interfere with their right to seek and, if they could pay for them, obtain legal abortions (a logic which dissenting Justice Blackmun [significantly the same Supreme Court Justice behind Roe and Doe's majority opinions] likened to Marie Antoinette's injunction to France's starving peasantry: "Let them eat cake"). How reasonable is it to expect poor people to be able to pay for their own abortions?»[243]

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[241] Mississippi Medicaid Commission, *Eighth Annual Report*, Mississippi Division of Medicaid, December 1977, pp. 7-10, medicaid.ms.gov/resources/

[242] Lincoln, Richard; Dŏring-Bradley, Brigitte; Lindheim Barbara L. and Cotterill Maureen A.. *The Court, the Congress and the President: Turning Back the Clock on the Pregnant Poor*, p. 211

[243] Ibidem

4. *The Hyde Amendment and its three crown jewels: Beal v. Doe, Maher v. Roe, Poelker v. Doe*

Within the Labor-HEW Appropriations Act for Fiscal Year of 1977 there exists a Section (number 209) commonly known as the "Hyde Amendment". This section states:

> «None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term.»[244]

After six months, the amendment's text was expanded to include rape, incest, and potential severe long-term injuries to the health of the mother as conditions that would make an abortion eligible to be federally funded. As of 1981, 36 states had «adopted the amendment's standards.»[245] Medicaid, on the other hand, had been established in 1965 by Title XIX of the Social Security Act, entitled "Grants to States for Medical Assistance Programs".[246] When the Hyde Amendment first passed in 1976, Medicaid had been an active federal insurance program for little more than a decade, and abortion had been legal nationwide for three and a half years. The Guttmacher Institute reports that between 1977 and 1978, publicly funded abortions had dropped by 34%.[247] In response to all this, in 1977, three different lawsuits from Pennsylvania, Missouri and Connecticut brought the issue of the constitutionality of federal abortion funds restrictions to the United States Supreme Court.

On May 3, 1974, Doe v. Wohlgemuth was decided in the U.S. District Court for the Western District of Pennsylvania. The suit had been brought by a group of pregnant welfare recipients ("Doe") who had sought elective abortions at Magee-Womens Hospital in Pittsburgh, Pennsylvania. The women challenged the constitutionality of

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[244] Gunty, Susan. *The Hyde Amendment and Medicaid Abortions*, The Forum (American Bar Association. Section of Insurance, Negligence and Compensation Law), Vol. 16, No. 4, American Bar Association, 1981, p. 826

[245] Ibidem

[246] Social Security Administration, *Title XIX—Grants to States for Medical Assistance Programs*, Compilation of the Social Security Laws, www.ssa.gov/OP_Home/ssact/title19/1900.htm

[247] Benson Gold, Rachel. *After the Hyde Amendment: Public Funding for Abortion in FY 1978*, Family Planning Perspectives, Vol. 12, No. 3, Guttmache Institute, 1980, p. 133

the state's refusal to reimburse their abortion expenses[248]. As federally fundable abortions in Pennsylvania had to be deemed "medically necessary" by a licensed physician, the plaintiffs felt that such requirement violated both Title XIX and their constitutional right to due process. While the three-judge district court found their claim relating to Title XIX to be unfounded, it partially recognized the validity of the constitutional issue. Upon appeal, the Court of Appeals for the Third circuit, «not reaching the constitutional question, reversed on the statutory issue, holding that Title XIX prohibits participating States from requiring a medical necessity certificate as a funding condition during the first two trimesters of pregnancy.»[249] Then Secretary of Public Welfare of Pennsylvania Frank S. Beal appealed this decision to the U.S. Supreme Court. The majority opinion for Beal v. Doe states:

> «[...] we have held merely that (I) the provisions of the Social Security Act do not require a State, as a condition of participation, to include the funding of elective abortions in its Medicaid program; and (II) the Equal Protection Clause does not require a State that elects to fund expenses incident to childbirth also to provide funding for elective abortions. But we leave entirely free both the Federal Government and the States, through the normal processes of democracy, to provide the desired funding. The issues present policy decisions of the widest concern. They should be resolved by the representatives of the people, not by this Court.»[250]

That day, the same majority also decided two other cases, Poelker v. Doe and Maher v. Roe. In Poelker, an indigent pregnant woman from St. Louis, Missouri ("Doe") was denied a non-therapeutic abortion at a St. Louis public hospital; she then filed a suit against then city mayor John Poelker on constitutional grounds. Although the district court ruled in favor of Poelker, the Court of Appeals for the Eighth Circuit overturned the lower court's decision, finding that the provision which prohibited the

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[248] Justia Law, *Doe v. Wohlgemuth*, Western District Court of Pennsylvania, Volume 376, F. Supp. 173, 1974, law.justia.com/cases/federal/district-courts/FSupp/376/173/1468392/
[249] Justia Law, *Beal v. Doe*, U.S. Supreme Court, Volume 432, U.S. 438, 1977, supreme.justia.com/cases/federal/us/432/438/
[250] Ibidem

performance of an abortion unless there existed grave risks of injury or death had denied the plaintiff equal protection of the laws. As the city publicly funded childbirth-related services, but refused to fund pregnancy termination procedures, the court of appeals found evidence of "invidious discrimination". This inequity, the court observed, also fed into the systemic issue of class disparity in matters of reproductive health, as the city's provision clearly favored wealthy women, who could afford to seek elective abortion in private clinics, and failed their poor counterparts.[251]

The third case, Maher v. Roe, was initially filed by two indigent pregnant women from Connecticut ("Roe") who could not obtain a certificate of "medical necessity" for their abortions, as the Connecticut Welfare Department limited «state Medicaid benefits for first trimester abortions to those [...] "medically necessary."»[252] Relying on Roe v. Wade and Doe v. Bolton, the three-judge district court found that the provision denied equal protection, as it was implicit in the landmark 1973 abortion cases that, in the eyes of the law, abortion and childbirth presented no substantial differences, and were simply two alternative approaches to pregnancy. In contrast, the Supreme Court held that its decision in Roe and Doe did not apply to this case, as «there is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.»[253] Since Texas and Georgia's laws interfered with a doctor's right to perform medicine and with a woman's right to privacy, they were deemed unconstitutional; conversely, the state of Connecticut did not interfere with an indigent woman's right to obtain a safe, non-therapeutic abortion, as she was free to seek the procedure using private resources. The Court also determined that the state's decision to publicly fund childbirth did not pose a threat to her personal liberty or have any real consequence on her life, concluding that «the indigency that may make it difficult –and in some cases, perhaps, impossible– for some women to have abortions is neither created nor in any way affected by the Connecticut regulation.»[254]

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[251] Justia Law, *Poelker v. Doe*, U.S. Supreme Court, Volume 432, U.S. 519, 1977 supreme.justia.com/cases/federal/us/432/519/

[252] Justia Law, *Maher v. Roe*, U.S. Supreme Court, Volume 432, U.S. 464, 1977, supreme.justia.com/cases/federal/us/432/464/

[253] Ibidem

[254] Ibidem

On June 20, 1977 the Supreme Court ruled 6-3 that the laws from Pennsylvania, Missouri and Connecticut did not infringe upon any constitutional right, and that individual states were free to direct their public healthcare funds to any medical procedures, including elective abortion, but they could not be obliged to do so. Thus, if a state decided to publicly fund childbirth or other pregnancy-related treatments and not, say, non-therapeutic abortion, it had the right to do so. But the issues brought to light by Beal v. Doe and its two companion cases were much bigger than mere state policy. By letting states decide for themselves on this matter, the Court indirectly contributed to the widening of the nation's already vast health gap. In his farsighted dissenting opinion, Justice Thurgood Marshall, the first ever –and at the time only– African-American member of the Supreme Court, wrote:

> «The impact of the regulations here falls tragically upon those among us least able to help or defend themselves. As the Court well knows, these regulations inevitably will have the practical effect of preventing nearly all poor women from obtaining safe and legal abortions. The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives. Many thousands of unwanted minority and mixed-race children now spend blighted lives in foster homes, orphanages, and "reform" schools; Many children of the poor, sadly, will attend second-rate segregated schools. And opposition remains strong against increasing Aid to Families With Dependent Children benefits for impoverished mothers and children, so that there is little chance for the children to grow up in a decent environment. I am appalled at the ethical bankruptcy of those who preach a "right to life" that means, under present social policies, a bare existence in utter misery for so many poor women and their children.»[255]

The matter becomes rather thornier if we consider that, as of the first quarter of 1976, ten states did not provide public abortion services altogether, and only 18% of all

[255] Justia Law, *Beal v. Doe*, supreme.justia.com/cases/federal/us/432/438/

American public hospitals were equipped for the procedure.[256] This data suggests that 82% of public hospitals could not offer legal and safe abortions, and that after 1977 –of the 18% that could– some likely enforced or upheld policies to ban federal funds from being used for elective abortions, largely because of the Supreme Court decision in Beal, Poelker and Maher. By 1980, about four years after the Hyde Amendment's enactment, only 17 states and the District of Columbia funded elective abortions; in the remaining 33 states, federal policy dictated that public funds were to be used for abortion only when the practice was deemed necessary, as it endangered the pregnant woman's life, or at best when the pregnancy had been a result of rape or incest.[257] Perhaps surprisingly, the most direct consequence of these cuts on public funds for elective abortion was not the increase of criminal procedures, but rather an equally alarming push towards sterilization as a last resort.[258] Although somewhat unfit to be labelled as "forced", this particular kind of contraceptive sterilization is hardly an autonomous decision, much less a personal preference; in fact, it can be argued that such a desperate measure might be suitably called a "forced choice".

> «This "option" is being made readily available, and almost unavoidable, by government agencies anxious to slow or halt the birth rate among poor and Third World women. The legally sanctioned cut-back in abortion services appears to be directly connected to an increasingly powerful movement for the compulsory sterilization of women of specific race and class groups. Thus, the struggle for freely available abortion is inextricably linked to, and must be seen as part of, the struggle against sterilization abuse.»[259]

Once again, we find ourselves back to square one: if the legalization of abortion had seemingly come as a victory for all women, and as a long-term solution to the class

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[256] Alan Guttmacher Institute, *Supreme Court: States Need Not Pay for 'Nontherapeutic' Abortions via Medicaid; Public Hospitals Can Deny Service*, Family Planning Perspectives, Vol. 9, No. 4, Guttmacher Institute, 1977, p. 179

[257] Mendelson, June E. and Domolky, Serena. *The Courts and Elective Abortions under Medicaid*, Social Service Review, Vol. 54, No. 1, The University of Chicago Press, 1980, pp. 124-125

[258] Booth Glen, Kristin. *Abortion in the Courts: A Laywoman's Historical Guide to the New Disaster Area*, Feminist Studies , Feb., 1978, Vol. 4, No. 1, Feminist Studies, Inc., 1978, pp. 14-15

[259] Ibidem

and racial disparity surrounding the issue of reproductive health, reality immediately proved to be harsher than expected. By 1973, forced sterilization of non-white people had been a social plague for decades, an appalling reality that ran parallel to the horrors of criminal abortion. As it turns out, this eugenics-driven practice did not cease to exist after Roe v. Wade, it merely stopped being so "on the nose". By becoming hostile and virtually unobtainable to indigent people, reproductive healthcare proved to be a prerogative of the wealthy, and mostly white, upper class. Abortion, while technically legal, was costly, and apparently unfit to be federally funded. As it happens, instead of forcing indigent non-white people to undergo sterilization, the system carefully laid out an obstacle course to indirectly give them a push in the "right" direction, namely the one leading to an irreversible procedure that would render them unable to reproduce.

Merely four years after Roe and Doe, the American legal and medical systems were already taking disturbingly decisive steps back. But the Hyde Amendment and its three crown jewels, Beal, Poelker and Maher, were only the first warning signs of Roe's alarming vulnerability.

5. *Post-Roe case law: Planned Parenthood v. Danforth, Bellotti v. Baird, Planned Parenthood v. Casey*

In 1976, a year before the Supreme Court considered Poelker v. Doe, Missouri's abortion policies found themselves at the center of yet another landmark Supreme Court decision: Planned Parenthood of Central Missouri v. Danforth.

The suit was brought by two Missouri licensed physicians: Dr. Michael Freiman performed hospital and clinic abortions in St. Louis, while Dr. David Hall supervised the procedure at the local Planned Parenthood facility in Columbia, Missouri. The two physicians, along with Planned Parenthood, challenged the constitutionality of a series of Missouri provisions, most famously Section 3 of the state's abortion statutes. Section 3(2) established that, to obtain a first trimester abortion, a pregnant woman must submit a written form stating that she has been thoroughly informed on the procedure and that she is consenting to it freely; if she happened to be married, the

provision forced her to obtain the written consent of her spouse, unless a doctor deemed the abortion necessary to preserve her life (Section 3(3)). Similarly, Section 3(4) required that an unmarried pregnant woman under the age of 18 obtain the written consent of one parent or legal guardian before requesting the procedure. These two stipulations effectively rendered minors and married women who sought abortions fully dependent on external approval, depriving them of their right to make an autonomous, informed choice. The District Court for the Eastern District of Missouri upheld all the challenged provisions except Section 6(1), which required that a physician always try to keep a fetus alive and healthy—lest they be tried for manslaughter. As Section 6 seemingly considered nonviable fetuses to be on par with viable infants, it was overturned as "unconstitutionally overboard" by the district court.[260] The case was then appealed to the U.S. Supreme Court on various constitutional grounds, namely a physician's right to perform medicine and a woman's right to decide whether to bear children. The appellants also claimed that the Missouri statutes infringed upon «the right to privacy in the physician-patient relationship.»[261]
As for Section 3(2), requiring that a woman give her written consent to terminate the pregnancy, the Court found it to be acceptable, as it is common to similarly request a patient's signed consent before they can undergo other surgical procedures. On the other hand, the spousal consent clause was deemed unconstitutional and an illegitimate violation of a woman's right to privacy. The majority opinion, delivered by Justice Blackmun, reads:

> «Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period. [...] We recognize that the decision whether to undergo or to forgo an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. Notwithstanding these factors, we cannot hold that the State has

[260] Justia Law, *Planned Parenthood v. Danforth*, U.S. Supreme Court, Volume 428, U.S. 52, 1976, supreme.justia.com/cases/federal/us/428/52/
[261] Ibidem

> the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy when the State itself lacks that right.»[262]

Virtually, the Court argued, terminating a pregnancy should be a mutual decision between husband and wife, whether he be the father of the fetus or not. Realistically, this cannot always be the case, and the Court could not be persuaded to believe that giving the man the power to veto his wife's abortion would strengthen the couple's marital relationship. The majority considered it a fact that, «when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail.»[263]

The necessity for parental consent was challenged by the appellants based on the following arguments: that no other medical or surgical procedures requested similar consent in order to be performed on a minor; that a minor could «consent to medical services for pregnancy (excluding abortion), venereal disease, and drug abuse»[264] in the state of Missouri; that a married pregnant woman under the age of 18 was not required to obtain her parents or guardian's consent to seek a termination of pregnancy, despite still being a minor. Based on its previous decision in regards to spousal consent, the Court similarly ruled that the state could not give a third party –be it her husband or her parents– the power to veto a woman's decision to abort, and that such decision, as unequivocally established by Roe v. Wade and Doe v. Bolton, was to be considered a private matter between a patient and her doctor.

> «No compelling state interest toward unmarried minors, such as preservation of the family unit, was found sufficient to enable the state to interfere with that fundamental right. Still, the Court upheld the Missouri statutory requirement that a woman herself must give informed consent in writing. The Court stressed that striking the parental consent provision "does not suggest that every minor, regardless of age or maturity, may give effective consent for

[262] Ibidem
[263] Ibidem
[264] Ibidem

termination of her pregnancy". Rather, the Court appears to be moving toward a sort of "mature-minors" rule [...]»[265]

Planned Parenthood v. Danforth was ruled 5-4 on July 1, 1976, securing a significant victory for the autonomy and privacy of minors and married women.

Bellotti v. Baird marks another success for reproductive rights pioneer William "Bill" Baird, the activist behind the landmark Supreme Court case that rendered the use of contraceptives accessible to unmarried persons, de facto legalizing premarital heterosexual sex in the United States (Eisenstadt v. Baird, 1972).
Similarly to Section 4 of the Missouri abortion provisions, Massachusetts' own Section 12S –as part of a group of 1974 restrictive abortion statutes challenging Roe– required that an unmarried pregnant minor obtain the consent of both her parents before being granted a legal abortion; although not completely restrictive, as it allowed the woman to seek the opinion of a superior court judge upon her parents' refusal and technically obtain the abortion "for good cause shown", the law still infringed upon her Fourteenth Amendment right to privacy—or so Baird thought.[266] As a then abortion clinic director and a tireless advocate for women's reproductive health and safety, Baird found the Massachusetts provision to be unconstitutional on due process and equal protection grounds, an opinion shared by the three-judge panel that first heard the case on a district court level in 1976.[267] Following an intricate legal process,[268] Bellotti v. Baird (II) once again reached the Supreme Court in 1979. After

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[265] Long, Sharon L. and Ravenscraft, Patricia. *Abortion, Parental and Spousal Consent, Requirements; Right to Privacy; Planned Parenthood of Central Missouri v. Danforth*, Akron Law Review, Vol. 10, No. 2, 2015, p. 374
[266] Justia Law, *Bellotti v. Baird II*, U.S. Supreme Court, Volume 443, U.S. 622, 1979, supreme.justia.com/cases/federal/us/443/622/
[267] Justia Law, *Bellotti v. Baird I*, U.S. Supreme Court, Volume 428, U.S. 132, 1976, supreme.justia.com/cases/federal/us/428/132/
[268] Bellotti v. Baird was first appealed to the U.S. Supreme Court in 1976. On July 1, 1976, the same day as the decision in Danforth, the Court vacated the lower court's ruling, contesting that the district court should have asked the Massachusetts Supreme Judicial Court (the highest court of the state) to clarify the abortion statute before appealing to the U.S. Supreme Court. «On remand, the District Court certified several questions to the Supreme Judicial Court. Among the questions certified was whether the statute permits any minors –mature or immature– to obtain judicial consent to an abortion without any parental consultation whatsoever. The Supreme Judicial Court answered that, in general, it does not; that consent must be obtained for every nonemergency abortion unless no parent is

the Massachusetts Supreme Judicial Court clarified the Supreme Court's concerns regarding parental notice and consent, the district court affirmed its initial ruling which held the Massachusetts statute unconstitutional; appellants Attorney General of Massachusetts Francis Bellotti et al. asked the Court to review this decision a second time.

As «a child, merely on account of his minority, is not beyond the protection of the Constitution,»[269] their rights also exist within the Fourteenth Amendment and the Bill of Rights; that is not to say that a minor should be treated as an adult by the law. First, the Supreme Court brought the existence of juvenile courts as an example of beneficial and constructive distinction in treatment between minors and adults.

> «Second, the Court has held that the States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences. These rulings have been grounded in the recognition that, during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.»[270]

The third point the Supreme Court made upon considering the case was that "the guiding role of parents" creates reasonable grounds for restrictions to a minor's decision breadth. There is also a limit, the Court found, to the scope of state interference with a parent's involvement in a minor's choice, as «[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.»[271] Moral, political and religious education is not in actuality a state's duty. In fact, the Massachusetts statute intended to encourage a pregnant woman under the age of 18 to consult with her parents or guardians before seeking an abortion. Virtually, the discussion should be civil and constructive; however, by giving parents

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available; and that an available parent must be given notice of any judicial proceedings brought by a minor to obtain consent for an abortion.» (Bellotti v. Baird, 443 U.S. 622)

[269] Justia Law, *Bellotti v. Baird II*, supreme.justia.com/cases/federal/us/443/622/

[270] Ibidem

[271] Ibidem

the power to forcefully condition –if not veto, since the law allowed an alternative path– their daughter's choice, the statute made room for an unjust hindrance to a person's liberty and right to privacy, which is to be considered equally unacceptable whether the individual involved is an adult or a minor. Moreover, as the district court had recognized, some parents may «obstruct, and perhaps altogether prevent, the minor's right to go to court.»[272] In Massachusetts' case, the Court had to establish whether the parental consent clause placed an undue burden on pregnant minors.

> «[...] The potentially severe detriment facing a pregnant woman, is not mitigated by her minority. Indeed, considering her probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible. Yet an abortion may not be the best choice for the minor. [...] In a given case, alternatives to abortion [...] may be feasible and relevant to the minor's best interests. Nonetheless, the abortion decision is one that simply cannot be postponed, or it will be made by default, with far-reaching consequences.»[273]

Although the Court was not persuaded that Section 12S effectively posed an undue burden on a pregnant minor trying to obtain a pregnancy termination, it ruled that said minor be permitted to bypass consultation with her parents and directly seek the opinion of a superior court, which must determine her maturity before authorizing the abortion. If a minor proves to be immature, the court may still grant her an abortion if she demonstrates that obtaining the procedure is in her best interest, juvenility and legal incompetence notwithstanding. In concluding its analysis, the Supreme Court states:

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[272] Ibidem
[273] Ibidem

> «Although it satisfies constitutional standards in large part, § 12S falls short of them in two respects: first, it permits judicial authorization for an abortion to be withheld from a minor who is found by the superior court to be mature and fully competent to make this decision independently. Second, it requires parental consultation or notification in every instance, without affording the pregnant minor an opportunity to receive an independent judicial determination that she is mature enough to consent or that an abortion would be in her best interests.»[274]

For these reasons, the Court upheld the lower court's judgement, effectively voiding the Massachusetts statute. Despite the success of cases such as Danforth and Bellotti II, as of 1990, 38 states had enacted abortion statutes that requested either the notification or the consent of at least one parent or guardian in order to grant an elective abortion to a pregnant minor. Out of these 38 states, 15 actually enforced said provisions, with 9 of them requiring the explicit consent of at least one parent, rather than merely giving them notice of the procedure,[275] making the combined issue of abortion and minority an unresolved matter.

As the most significant abortion case after Roe and Doe, Planned Parenthood of Southeastern Pennsylvania v. Casey played a major role in establishing the framework for legal abortion in the United States until 2022, when the Supreme Court overturned both its ruling and that of Roe v. Wade (Dobbs v. Jackson Women's Health Organization). The questions brought to the Supreme Court concern five "controversial provision" of the Pennsylvania Abortion Control Act of 1982, which established: that a pregnant married woman give notice to her husband before undergoing an abortion; that a pregnant minor request her parents' consent in order to obtain an abortion; that a physician necessarily inform their patients of the procedure's possible risks; that a woman wait a mandatory 24-hour period between her decision to

[274] Ibidem
[275] Haas-Wilson, Deborah. *The Impact of State Abortion Restrictions on Minors' Demand for Abortions*, The Journal of Human Resources, Vol. 31, No. 1, University of Wisconsin Press, 1996, p. 145

terminate her pregnancy and the procedure; that hospitals and clinics offering pregnancy termination report their abortion-related activities. The class suit was filed on constitutional grounds by five Pennsylvania abortion clinics and a group of physicians seeking an injunction to prevent the provisions' enforcement. Their claim was deemed legitimate by the district court, whose ruling was then overturned by the Court of Appeals for the Third Circuit, which upheld all the provisions challenged but the one requiring a pregnant woman to notify her husband of her abortion. This decision was then appealed to the U.S. Supreme Court.[276]

In opening its majority opinion, the Court takes time to reaffirm three principles established by Roe v. Wade: the constitutional right of a woman to freely abort a fetus prior viability without state interference; the state's prerogative to restrict abortions after viability, with the exception of those deemed necessary in cases of life-threatening pregnancies; the state's compelling interest in both the life and health of pregnant people and the preservation of potential human life.[277]

In the initial sections of its reasoning, the Court highlights the necessary moral neutrality of its stand:

> «Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest.»[278]

[276] Justia Law, *Planned Parenthood of Southeastern Pa. v. Casey*, U.S. Supreme Court, Volume 505, U.S. 833, 1992, supreme.justia.com/cases/federal/us/505/833/
[277] Ibidem
[278] Ibidem

The Court then affirms that since 1973 no case subsequent to Roe has ever threatened its constitutional validity, as Roe heavily relies on Griswold v. Connecticut (1965) and its finding of a right to privacy within the Fourteenth Amendment. Roe's holding is also reasserted by a group of following cases regarding "personal autonomy and bodily integrity" in matters of medical treatment, and their rejection of any state interference in such matters.[279] To maintain the validity of Roe's "essential holding", the Court relied on the judicial doctrine of *stare decisis* ("to stand by things decided"), a fundamental common law principle which establishes that courts at all levels must rely on precedent to formulate a judgement.[280] The Court's conclusion was that, based on the principle of *stare decisis*, viability was the most reasonable point of the pregnancy at which to "draw a line": before that point, every woman was free to abort a fetus; after, the state would have a compelling interest in preserving the potentiality of that fetus' life. The trimester framework created by Roe, which allowed only minimal state regulations up until the third trimester of pregnancy, was then rejected by the Court as too "rigid" and biased towards the pregnant woman's right to choose, rather than equal in its approach to both the interest of the woman and that of the state. The majority found the viability clause to be tidier and more flexible in light of potential medical advancements; as it is a generally accepted fact that medicine tends to progress, this change of framework can be interpreted as potentially restrictive.[281] It is worth noting that Casey is largely viewed as the first Supreme-Court-level challenge to the constitutional right to an abortion established by Roe.

> «The political challenge accomplished a great deal in limiting the breadth of the right to choose abortion, but it was not as successful as its organizers had hoped. When Casey was decided, the Court, for the first time, had a clear majority of Justices who had either written an opinion challenging Roe or had been appointed by a President committed to reversing the decision.»[282]

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[279] Ibidem
[280] American Bar Association, *Understanding Stare Decisis*, www.americanbar.org/groups/public_education/publications/preview_home/understand-stare-decisis/
[281] Justia Law, *Planned Parenthood of Southeastern Pa. v. Casey*, supreme.justia.com/cases/federal/us/505/833/
[282] Whitman, Chris. *Looking Back on Planned Parenthood v. Casey*, Michigan Law Review, Vol. 100, No. 7, Centennial Issue, The Michigan Law Review Association, 2002, p. 1982

Furthermore, the Court replaced Roe's strict scrutiny with an undue burden standard, which permits state regulations that «further the health or safety of a woman seeking an abortion»[283] as long as they don't place an "undue burden" on said woman; in other words, such regulations are only permissible if they don't pose a substantial threat to a woman's right to abort a fetus prior viability. By abandoning the strict scrutiny standard established by Roe, Casey rendered the matter of abortion more vulnerable to future challenges to its constitutionality. Based on the newly appointed principle of "undue burden", the Court deemed that only the spousal notification provisions placed «a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.»[284] As for the other challenged provisions, since they did not prevent a woman from obtaining an abortion, but merely made the process more difficult, they were all upheld by the Court.

«Despite its willingness to reaffirm Roe,»[285] the decision in Planned Parenthood v. Casey proves to be defective in its attempt to protect the well-established constitutionality of abortion, instead exposing women to unnecessary hardships and Roe to the kind of attacks that had been eagerly coveted by its opponents for almost twenty years.

6. An imperfect solution: Anti-abortion attitudes and the threat of trigger laws

Ever since Roe's ruling in 1973, opponents to the legalization of abortion have tried to turn back the clock on women's reproductive rights, challenging Roe's standing both in courts and public rallies. The main concern of anti-abortion activists was the threat that they felt abortion posed to human life and, more specifically, to children. Young people born after Roe were not only "survivors", having managed to escape by chance the scourge of liberalized abortion, but could also virtually become the next "pro-choice" generation. It was a risk that pro-lifers were not willing to take.

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[283] Justia Law, *Planned Parenthood of Southeastern Pa. v. Casey*, supreme.justia.com/cases/federal/us/505/833

[284] Whitman, Chris. *Looking Back on Planned Parenthood v. Casey*, p. 1986

[285] Whitman, Chris. *Looking Back on Planned Parenthood v. Casey*, p. 1990

> «The anti-abortion narrative of childhood vulnerability offered the restoration of social hierarchies as a solution to the problem of abortion. It was "women's liberal abortion speakers" and feminist "witches" who were the sources of societal indoctrination. Pro-choice women separated sex and reproduction, thus undermining women's role in society and changing their relationships with men. More subtly, anti-abortion activists –who were almost always white– mourned the loss of past racial hierarchies while also envisioning theirs as a civil rights movement. [...] They also cast themselves as white saviors of black victims; they would save black infants from their supposed risk of abortion. [...] For many white people –and young white people in particular– this was a powerful combination. They could be a part of a modern "civil rights movement" that nonetheless championed racist and sexist nostalgia.»[286]

Religious moral codes and values, especially Catholicism, were of course one of the roots of anti-abortion attitudes. It is a common belief among christians, and among many atheists and agnostics too, that human life begins at the moment of conception. This idea was rendered an integral part of the Catholic Church's doctrine with Pope Pius IX 1869 bull *Apostolicae Sedis moderationi*. It is from this concept that the association of abortion with murder stems. Of course, many Catholics and christians recognize that the secular nature of the State and of democracy must prevent religious beliefs from infiltrating public policy: in 1984, the candidate for vice president Geraldine Ferraro, a Catholic lawyer, declared that –as opposition to abortion was a private and individual matter rooted in one's morality and ethics– she had "no right" to "impose" her personal views on other people, thus identifying herself as pro-choice.[287] On the other hand, there were those who believed that matters of Church and State should be allowed to overlap in public matters (a sort of "political"

[286] Holland, Jennifer L.. *"Survivors of the Abortion Holocaust": Children and Young Adults in the Anti-Abortion Movement*, Feminist Studies, Vol. 46, No. 1, Feminist Studies, Inc., 2020, pp. 75-76
[287] Hofman, Brenda D.. *Political Theology: The Role of Organized Religion in the Anti-Abortion Movement*, Journal of Church and State, Vol. 28, No. 2, Oxford University Press, 1986, p. 225

or “public” theology, as Hofman calls it), and that this convergence finds justification within the Constitution itself.

> «Not only is this view of an active “public theology” not viewed as inconsistent with the First Amendment, but as Cardinal Joseph Bernardin, chairman of the bishops' Pro-Life Committee, argues, it is mandated by the First Amendment: “The purpose of the First Amendment was not to silence the religious voice, but to free religion from state control so that moral/religious values and principles could be taught and cultivated in the wider society. This left religious institutions with the kind of influence they should have in civil society—moral influence.”»[288]

If the foundation of a person’s attitudes towards abortion is so deeply rooted in their religious beliefs that they don’t support a firm separation of Church and State affairs, but rather a stronger entanglement between them, the obstacle in the path of pro-choice activists becomes quite formidable. It is the innate determination and tirelessness of religious pro-lifers that has put them at an advantage ever since Roe’s sentence. While the landmark Supreme Court ruling came as a shocking surprise to most, and especially to pro-lifers, who during the Sixties and early Seventies were firm in their conviction that nationwide abortion liberalization was not in the cards, the surprise element was not impactful enough to postpone their reaction; on the contrary, it made it all the more radical. Under the meticulous guidance of the Catholic Church, the anti-abortion movement grew from an unorganized, sporadic coalition into a well-established nationwide force. Its biggest advantage immediately proved to be the vast array of resources that the Catholic Church could offer both financially and from an institutional viewpoint «(space, organizational capacity, leadership, communication networks, ideology, and experience in activism).»[289] Back in 1967, when abortion legalization had been a public sphere debate for a few years, a group of

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[288] Hofman, Brenda D.. *Political Theology: The Role of Organized Religion in the Anti-Abortion Movement*, p. 227

[289] Doan, Alesha E.. “The Rise of the Pro-Life Movement Post Roe v. Wade” in *Opposition and Intimidation: The Abortion Wars and Strategies of Political Harassment*, University of Michigan Press, 2007, p. 74

Catholic bishops met in Chicago and decided to fund «a new program that would monitor abortion legislation and "alert constituents".»[290] This initiative effectively established what would go on to become the oldest and largest pro-life organization in the United States: the National Right to Life Committee (NRLC). The NRLC then reached out to local pro-life groups in New York, Minnesota, Virginia, California, Pennsylvania, Arizona, Massachusetts, Ohio, Colorado, Washington and Florida,[291] creating a vast network that would enable the organization to expand and ultimately put down roots in the entire country.

As the pro-life movement organized itself institutionally, its fervent members took it upon themselves to bring their anti-abortion stance into public spaces.

> «Public demonstrations or rallies became part of the movement's persona. Less than a week after Roe, about 18,000 people marched to the cadence of drums in downtown Chicago to protest the Supreme Court's ruling. Thirty thousand people assembled in the shadow of St. Louis's Gateway Arch on October 21, 1973 [...] The importance of numbers has always been a component for both pro-life and pro-choice activists for four basic reasons: to energize the faithful; to prove legitimacy and superiority; to discourage the opposition; and to employ the media to advertise and chronicle events.»[292]

On January 22, 1974, Roe's first anniversary, anti-abortion activists Nellie Gray launched the March for Life in Washington, D.C., which was attended by thousands of people (reports' numbers vary from five to fifty thousand)[293] and would go on to become an annual occurrence as well as one of the movement's most prominent mass actions.

Anti-abortion activism also infiltrated public and private schools long before Roe and Doe reached the Supreme Court. In the late 1960s, pro-lifers understood that molding new generations could be a good way to stop the "abortion epidemic" at its root; after

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[290] Karrer, Robert N.. *The Pro-Life Movement and Its First Years under "Roe"*, American Catholic Studies, Vol. 122, No. 4, American Catholic Historical Society, 2011, p. 51
[291] Ibidem
[292] Karrer, Robert N.. *The Pro-Life Movement and Its First Years under "Roe"*, p. 57
[293] Karrer, Robert N.. *The Pro-Life Movement and Its First Years under "Roe"*, p. 58

all, it was young women who were potentially going to seek abortions, and by trying to influence them in their tender years, activists hoped to sway them away from the dreaded procedure altogether. In public schools, pro-life ideals were promoted both by teachers and by outside speakers via specific lectures, «which often centered on a slideshow of pictures from John and Barbara Willke's famous *Handbook on Abortion*, which many have called the "bible of the anti-abortion movement.»[294] In public classrooms, the activists' objection to abortion was mainly built on biological arguments, since, while pro-lifers were usually religious and derived their anti-abortion attitudes from the Church's ethics and moral codes, they would not have been able to enter public schools as easily –or at all– if they had based their propaganda on religious grounds. In private religious schools, on the other hand, pro-lifers were freer to employ whatever language they saw fit: in fact, «educators at private schools, unlike those at public schools, could mandate anti-abortion activism as a part of their lessons.»[295]

From a strictly legal point of view, the ardent anti-abortion attitudes sparked by Roe resulted in the mass employment of a highly strategic legal weapon: trigger laws. Along with enabling provisions such as spousal and parental consent and notification clauses, which come as close to abortion restrictions as constitutionally allowed under Roe, Doe and Casey, states found a way to ensure that abortion would be immediately banned or restricted the moment Roe was overturned; and considering Roe had been under attack ever since its ruling, pro-lifers understood that this strategy could very well be their most powerful weapon yet. While some states had never officially struck down their pre-Roe abortion bans, making them still effective if Roe were to be overturned, states that had explicitly repealed such bans had to think of a way to bypass this "technical issue": trigger laws, as statutes that are by definition "triggered" into effect by a specific occurrence (namely the passing or overturning of a law), presented the easiest way for this second category of states to virtually find themselves in the same position as the ones that had never enjoined their pre-existing

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[294] Holland, Jennifer L.. *"Survivors of the Abortion Holocaust": Children and Young Adults in the Anti-Abortion Movement*, p. 80

[295] Holland, Jennifer L.. *"Survivors of the Abortion Holocaust": Children and Young Adults in the Anti-Abortion Movement*, p. 81

abortion bans in the first place. One way of blocking these trigger laws from going into effect is the doctrine of desuetude, which could virtually invalidate them for being obsolete.

> «The doctrine of desuetude suggests "that judges should take judicial notice of the fact that a statute has fallen into desuetude" or disuse. "The chief virtue of the doctrine is its ability to remove archaic and unrepresentative laws from the statute books." The doctrine seeks to protect individuals from law enforcement officials selectively enforcing "long dormant statutes...as pretexts for harassing individuals." When a statute lies dormant for a period of time and is not enforced, there is a failure to provide citizens with fair notice of its implications, which may constitute a violation of due process.»[296]

This doctrine is, however, rarely employed in modern legal proceedings, leaving trigger laws' path largely undisturbed. According to the Guttmacher Institute, as of 2022, 13 states had drafted trigger laws that would have gone into effect the moment Roe was overturned; these states were «Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming.»[297] Moreover, an additional 9 states had kept their pre-Roe bans, making the women of 22 states (almost half the country) liable to being stripped of their rights the moment abortion was deprived of its constitutional validity. Thus legal abortion's vulnerability was not only intrinsic to Roe and Casey's rulings, it also existed in the reactionary statutory threats that quite literally lied dormant for decades, waiting for the right moment to strike.

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[296] Alexander, Heidi S.. *The Theoretic and Democratic Implications of Anti-Abortion Trigger Laws*, The Rutgers Law Review, Volume 61, No. 2, Rutgers Law School, 2009, p. 396

[297] Nash, Elizabeth and Guarnieri, Isabel. *13 States Have Abortion Trigger Bans—Here's What Happens When Roe Is Overturned*, The Guttmacher Institute, June 2022, www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned

7. *Legal abortion is no more: Dobbs v. Jackson Women's Health Organization*

That moment came in 2022, when Dobbs v. Jackson Women's Health Organization reached the United States Supreme Court. The case challenged the Mississippi Gestational Age Act of 2018, which forbade the performance of abortive procedures after 15 weeks of pregnancy, unless the life of the mother was in danger or there was substantial proof of grave fetal defects. While the trimester framework defined by Roe left almost no doubts regarding the regulation of abortion, effectively preventing state interference for the entire first trimester of pregnancy and state bans up until the third, Casey's ruling established that, after the fetus had reached viability, states were free to restrict abortion, allowing bans such as the one challenged in Mississippi to go into effect. The suit was initially filed by Jackson Women's Health Organization, an abortion clinic in Jackson, Mississippi, against State Health Officer of Mississippi Thomas Dobbs et al.; the district court ruled in the clinic's favor, prohibiting the enforcement of the Act. The sentence was appealed to the Court of Appeals for the Fifth Circuit, which ruled that states may not ban abortions prior viability, as decided in Casey; since the gestational age for fetal viability is generally considered to be around the 24th week of pregnancy, prohibiting abortion after a mere 15 weeks was to be considered unconstitutional. This decision was then appealed to the U.S. Supreme Court.[298]

The opinion of the Court, authored by Justice Samuel Alito, begins with the following statement:

> «Abortion presents a profound moral issue on which Americans hold sharply conflicting views. Some believe fervently that a human person comes into being at conception and that abortion ends an innocent life. Others feel just as strongly that any regulation of abortion invades a woman's right to control her own body and prevents women from achieving full equality. Still others in a third group think that abortion should be allowed under some but not all

[298] Justia Law, *Dobbs v. Jackson Women's Health Organization*, U.S. Supreme Court, Volume 597, U.S. 215, 2022, supreme.justia.com/cases/federal/us/597/19-1392/

> circumstances, and those within this group hold a variety of views about the particular restrictions that should be imposed.»[299]

Justice Alito then recognizes the "paradoxical" nature of Casey, which claimed to preserve Roe's central holding, while simultaneously paving the way for its partial overruling and the enactment of abortion restrictions all throughout the nation. The opinion then acknowledges that, in order to uphold the Mississippi statute, the Court must overrule both Roe and Casey: and so it does, holding that «the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision.»[300] In Justice Alito's eyes, the right to an abortion could not be found within the concepts of privacy and liberty established by the Fourteenth Amendment; in fact, he argued that the decision in Roe was nothing short of an "abuse of judicial authority", which was not at all grounded in –nor guaranteed by– the United States Constitution. Relying on precedent, the Court found that, in order to grant a right that is not explicitly stated within the Constitution, such right must be «objectively, deeply rooted in this Nation's history and tradition.»[301] This conclusion may be reached only after extensive historical research, which allows ample margin for justification to be ingrained in the country's heritage. As liberty is a "capacious term", the Court must be careful in interpreting its ties with the Due Process Clause.
Since the Court felt that Roe had failed to provide the necessary historical context to justify its reliance on a constitutional right to liberty, Dobbs' majority opinion fills in the blanks; only, in doing so, it once again finds Roe's ruling faulty and unfounded, as English common law generally criminalized abortion after quickening, and –later on– American states independently banned abortion in a 19th century collective impetus.

> «The inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions. On the contrary, an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973. The Court in Roe could have

[299] Ibidem
[300] Ibidem
[301] Ibidem

> said of abortion exactly what *Glucksberg*[302] said of assisted suicide: "Attitudes toward [abortion] have changed since Bracton, but our laws have consistently condemned, and continue to prohibit, [that practice]."»[303]

The Court recognized that people of different states may value a woman's right to choose to terminate her pregnancy more than they value the potentiality of human life—and vice versa. As both interests were acknowledged in Roe and Casey, Alito argued that the decision to favor one over the other should fall to individual states, and by definition to the people who live and vote in those states.

In considering the doctrine of *stare decisis* invoked by Casey, the Court recognized its importance in the American legal system, but also emphasized how it is not an "inexorable command", citing three landmark cases in which precedents were overruled (one of them being Brown v. Board of Education). The opinion goes on to say that, while overruling precedents is a practice that should be intently pondered and never downplayed, five elements make the overturning of Roe and Casey a favorable decision: «the nature of their error, the quality of their reasoning, the "workability" of the rules they imposed on the country, their disruptive effect on other areas of the law, and the absence of concrete reliance.»[304] After working through each of these factors, the Court reaches a verdict:

> «We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.
>
> The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

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[302] Washington v. Glucksberg is a historic 1997 Supreme Court decision which ruled that no right to assisted suicide can be found in the Constitution, neither explicitly nor implicitly, as such act is not in fact protected by the Due Process Clause.

[303] Justia Law, *Dobbs v. Jackson Women's Health Organization*, supreme.justia.com/cases/federal/us/597/19-1392/

[304] Ibidem

It is so ordered.»[305]

But what does all this entail? Virtually, the ruling in Dobbs makes individual states autonomous in deciding whether to ban or restrict abortion, and to what extent. The overturning of Casey, however, annulled the undue burden standard, which offered women at least some modicum of protection by banning statutes that placed a substantial obstacle in their path to obtaining an abortion. With the undue burden principle gone, nothing bars states from prohibiting abortion at any given gestational age. As abortion is no longer a constitutional right, it has forcibly renounced its prerogative to be examined under strict scrutiny. Carol Sanger argues that, based on Dobbs' newly established framework, even a provision prohibiting abortion after only three weeks of pregnancy (at which point it is almost impossible for the woman to be aware of her condition) may very well be perfectly lawful.

> «[...] The challenged [abortion] regulation "must be sustained if there is a rational basis under which the legislature could have thought that it would serve legitimate state interests." Because these "legitimate interests include respect for and preservation of prenatal life at all stages of development," a three-week chronological ban would seem within constitutional bounds.»[306]

The Guttmacher Institute reported in 2024 that «within 30 days of the Dobbs decision, 43 clinics in 11 states had stopped providing abortion care. By 100 days after the decision, this had increased to 66 clinics in 15 states.»[307] Furthermore, a total of 14 states had no operating abortion clinics whatsoever, as they'd either enacted trigger laws or gone back to their pre-Roe bans. Predictably, since June 24, 2022, the day Dobbs v. Jackson Women's Health Organization was decided, America has witnessed the comeback of abortion travels, and the consequent growth of class and racial

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[305] Ibidem
[306] Sanger, Carol. The Rise and Fall of a Reproductive Right, Family Law Quarterly, Vol. 56, No. 2/3, Family Law and the Supreme Court, American Bar Association, 2022-2023, p. 155
[307] Baden, Kelly; Dreweke Joerg and Gibson, Candace. *Clear and Growing Evidence That Dobbs Is Harming Reproductive Health and Freedom*, The Guttmache Institute, May 2024, www.guttmacher.org/2024/05/clear-and-growing-evidence-dobbs-harming-reproductive-health-and-freedom

disparity in matters of reproductive health.[308] Indeed, the issue of abortion in the United States appears to have come full circle.

[308] Ibidem

Chapter III

The Abortion Debate: As Told by The New York Times (1968-1973)

1. 1968. New York at work: Towards a new abortion law

In 1968, future vice president Nelson Rockefeller had been governor of New York for a decade;[309] first appointed in 1958, Rockefeller had already been re-elected twice, first in 1962 and then in 1966, both times after the established four-year terms. He would later go on to be re-elected once more in 1970, before finally resigning in 1973.[310] Thus, in the years when New York was at the center of the most fervent abortion debate of the decade, the state's politics were consistently dominated by a single person, grandson of one of the wealthiest and most influential businessmen in American history. As Robert Connery points out:

> «Rockefeller had certain advantages not usually possessed by a governor. He added long tenure, abundant energy, great wealth, and an exceptionally wide acquaintance in industry and the arts to the prerogatives and strong party leadership role that go with the governorship in New York. Rockefeller also brought to the governorship a conviction that major social and economic problems could be solved by state government and that aggressive executive leadership from the governor's mansion could help find these solutions.»[311]

At the very beginning of 1968, Rockefeller's involvement in the abortion issue was already well-established. On January 10, the New York Times published an article titled "Rockefeller asks abortion reform"; the piece reports the governor's push for a liberalization of New York's 85-year-old restrictive abortion law, describing his stance

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[309] For further reading, see Connery, Robert H.. *Rockefeller of New York: Executive Power in the Statehouse*, Cornell University Press, 1979; Norton Smith, Richard. *On His Own Terms: A Life of Nelson Rockefeller*, Random House, 2014;

[310] Connery, Robert H.. *Nelson A. Rockefeller as Governor*, Proceedings of the Academy of Political Science, Vol. 31, No. 3, Governing New York State: The Rockefeller Years, The Academy of Political Science, 1974, p. 4

[311] Connery, Robert H.. *Nelson A. Rockefeller as Governor*, p. 1

as «the strongest position the Governor has yet taken on the sensitive question.»[312] Abortion had already been one of the "dominant issues" of the 1967 legislature, but any hope for reform had been killed along with the proposed bill; nevertheless, in January 1968, Rockefeller seemed ready to bring the matter of abortion liberalization back to the legislature's attention. In a televised interview, the governor declared that he wished for «a modification of the present law [...] to the maximum extent that is compatible with the best interests of the community as a whole.»[313]

The very first of the 37 most significant New York Times articles on the topic of abortion that I found for the year 1968 was published two days prior with the title "Abortion: Once a Whispered Problem, Now a Public Debate"; the piece is a lengthy report on how abortion had been consistently entering public spaces, becoming a topic to debate openly, and no longer something to be talked about in secret. This change in attitude had pushed people to embrace more liberal views on the matter, even spurring clergymen to actively counsel women and help them illegally obtain the procedure.[314] As the article puts it, «publicity caused a change.»[315]

On January 21, the Times published a piece reporting «the formation of a committee to recommend changes in the state's 85-year-old abortion law "in time for action by the current session of the Legislature."»[316] The committee was made up of a total of ten members, six of them being known for their support for the liberalization of the 19th century New York abortion law that only permitted abortions to save the life of the pregnant woman: in the article, Schanberg writes that the new, liberalized statute would also allow abortion in cases of danger to the woman's mental or physical health, rape, incest and fetal deformity. Among the committee members that supported

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[312] Schanberg, Sydney H.. "Rockefeller asks abortion reform", *The New York Times*, January 10, 1968, p.1

[313] Ibidem

[314] The Clergy Consultation Service (CCS) was an underground abortion network founded in 1967 in New York City by protestant clergymen and rabbis. The service's goal was to assist pregnant women in their search for a safe abortion, offering practical solutions as well as psychological support. For further reading on the CCS, see Dirks, Doris Andrea and Relf, Patricia A.. *To Offer Compassion: A History of the Clergy Consultation Service*, University of Wisconsin Press, 2017;

[315] Brody, Jane E.. "Abortion: Once a Whispered Problem, Now a Public Debate", *The New York Times*, January 8, 1968, p. 28

[316] Schanberg Sydney H.. "Governor Orders Study of Abortion", *The New York Times*, January 21, 1968, p. 1

abortion reform were illustrious physicians and pro-abortion advocates Alan Guttmacher and Christopher Tietze.

By February 7, the New York State Assembly Standing Committee on Codes «by a vote of 12 to 4, with 3 absentees, advanced the measure for consideration by the full Assembly without recommending its passage.»[317] While the measure counted 43 supporters in both the Senate and Assembly, it still had to face the fervent opposition of the Catholics. An example of the Catholic hierarchy's open hostility towards the Blumenthal bill was registered on March 17, when the Times reported that the Queens Catholic Lawyer Guild had published a highly detailed 27-pages-long document opposing abortion liberalization; the guild argued that, were the bill to pass, «the law would no longer declare a value on life as it is manifested and present in the unborn.»[318] It wouldn't be long until the bill's opponents were granted their wishes: on April 3, the proposed abortion reform was once again turned down by the Assembly.

> «The Assembly rejected today, after five hours of emotional debate, an attempt to reform the state's 85-year-old abortion law. It was the second straight year that an attempt to liberalize the controversial abortion law had failed. [...] Supporters of the abortion bill had been saying privately in the last few days that they had three or four votes more than the 76 needed for passage. But when Speaker Anthony J. Travia asked for a show of hands of those opposed to the bill, there was a gasp in the chamber as a forest of hands shot up on both sides of the aisle. [...] "It's dead for this year," Mr. Blumenthal said. "We'll absolutely try again next year." "I guess you could say we aborted the bill," he added wryly. "The pressures were just too great in an election year. We had four votes we needed and they backed out."»[319]

Meanwhile, in Colorado, abortion had been liberalized on April 25, 1967; the procedure was permitted in cases of rape, incest, and –most notably– when the mental and physical health of either the pregnant woman or the fetus was threatened: in 1968,

[317] Clarity, James F.. "Abortion Reforms Gain in Assembly", *The New York Times*, February 7, 1968, p. 1
[318] Dugan, George. "Queens Catholic Lawyer Guild Votes to Oppose Abortion Bill", *The New York Times*, March 17, 1968, p. 25
[319] Kifner, John. "Abortion Reforms Dies in Assembly", *The New York Times*, April 4, 1968, p. 1

this rendered Colorado's law the most progressive in the country. On June 9, 1968, the Times reported that in the year since the law's enactment, 289 therapeutic abortions had been notified to the Colorado State Department of Public Health, and there was good reason to believe that an unknown number of procedures had been performed but not reported. The article notes that «whatever the actual number is, it has become clear that the law has not made Colorado the "abortion mecca" of the nation as opponents originally feared. The number is small compared with live births in the state—37,273 last year.»[320] By June 30, the number of therapeutic abortions in Colorado had reached 338, most of which –195 to be exact– had been performed on psychological grounds. Of the remaining 143 procedures, 32 were performed on medical grounds, 33 on victims of rape, and 20 on women whose fetuses could have been defective as a result of early pregnancy German measles.[321] This data is in accord with the pre-Roe tendency to grant therapeutic abortions for mental health reasons, as they presented the least objective standard of judgement, thus the easier to possibly fabricate.

Colorado's precedent certainly served as an example for New York. While the Assembly's rejection of the Blumenthal bill undoubtedly marked a step back for the state, support for an abortion reform gained more and more traction. On November 13, Planned Parenthood, a voluntary birth control organization with nationwide scope, unanimously voted to recognize abortion and voluntary sterilization as valid medical procedures, urging for a repeal of all abortion bans.

> «Delegates voted yesterday to accept recommendations of their 100-member board of directors, which had confirmed overwhelmingly the policy of the organization's national medical advisory committee. The latter held that it was the right and responsibility of every woman to decide whether and when to have a child.
>
> It reaffirmed that abortion is a medical procedure and a decision that must rest with the woman and her physician. The committee added that this

[320] "Colorado Assays Its Abortion Law", *The New York Times*, June 9, 1968, p. 33

[321] "Mental Health Given as Reason For Most Abortions in Colorado, *The New York Times*, August 19, 1968, p. 20

> decision should be made with full knowledge of the woman's personal situation, with consideration of her social, economic and cultural environment.»[322]

Dr. Alan Guttmacher, Planned Parenthood president of five years and member of Rockefeller's abortion committee, declared himself satisfied with the organization's stance: the group believed that both voluntary sterilization and abortion, if chosen consciously and under the guidance of professionals, should be recognized means of dealing with potential or actual unwanted pregnancies. New York state physicians generally supported the liberalization of the state's abortion law: a 1965 poll found that 85.3% of 1350 New York OBGYNs were in favor of a new law patterned after the ALI model code.[323] All New York had to do was push again for legislative action.

2. *1969. New York tries again*

In January 1969, New York was already preparing to give reform another shot. On January 15, the Times read:

> «Prospects for reform of the state's 86-year-old abortion law by the Legislature appeared better today than at any time since the movement for reform accelerated two years ago. The most significant indicator has come from the Senate, where revision bills have not even been brought to the floor for a vote in recent years. Since 1967, reform legislation has been virtually ignored in the Senate, while being bitterly debated and eventually killed in the Assembly. A change in the Senate attitude was reflected today by its majority leader, Earl W. Brydges, who has opposed reform legislation in the past. Mr. Brydges said that if a Senate committee proposed a "reasonable" reform bill, "I would be disposed to let it out on the floor."»[324]

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[322] Kaplan, Morris. "Abortion and Sterilization Win Support of Planned Parenthood", *The New York Times*, November 14, 1968

[323] Schur, Edwin M.. *Abortion*, The Annals of the American Academy of Political and Social Science, Vol. 376, Sex and the Contemporary American Scene, Sage Publications, Inc., 1968, p. 144

[324] Clarity, James F.. "Abortion Reformers Confident Albany Session Will Pass a Bill", *The New York Times*, January 15, 1969, p. 35

Although this new open-mindedness was still nothing more than a mere promise, it was seen as a hopeful sign by supporters of the long-awaited abortion reform. Promoters of the bill, like Brooklyn Democrat Stanley Steingut, were feeling optimistic, having registered a growing support both in fellow legislators and in public opinion. Rockefeller himself felt that change was "possible", especially given the strong push coming from the public. His specifically appointed abortion committee had drafted a new proposal, in some ways more liberal than the Blumenthal bill, as it only required the approval of a three-phyrician panel, instead of that of a hospital board (as established by the bill). On the other hand, while the Blumenthal bill would grant the procedure to patients as young as 14 years old, the committee felt that 16 was a more appropriate age limit. The governor declared himself ready to endorse the committee's proposal and draft a proposition based on that model.[325] The same optimism was reflected in a later article, published on January 30, in which it was said that legislators were «amenable to passage of a moderate abortion-reform bill»[326] that would allow potential impairment to both the physical and mental health of the pregnant woman to figure as a reason to legally permit abortion in New York State. The premises looked even more promising after February 6, when «the Council of Churches, the state's largest interdenominational Protestant organization»[327] officially called for a repeal of the state's abortion ban.

> «Up to now, the council, whose member groups represent more than a million and a half parishioners, has supported the enlarging of the grounds for abortion but never the total repeal of the 86-year-old law, which permits an abortion only to save the mother's life. [...] But in its latest memorandum, the Protestant group threw its support to a repeal bill that would leave abortion to "the individual's conscience and the right of a woman to reach her own personal and moral decision as to continuance of pregnancy."»[328]

[325] Ibidem
[326] Schanberg, Sydney H.. "Albany Action on Abortion Reform Seen as Likely", *The New York Times*, January 30, 1969, p. 22
[327] "State Protestants Now Back Repeal Of Abortion Statute", *The New York Times*, February 7, 1969, p. 39
[328] Ibidem

Although it had always been the Catholic hierarchy, and not Christian groups as a whole, who had openly opposed and effectively stood in the way of abortion reform, the support of such an influential religious group seemed like another push in the right direction. It is therefore not surprising at all that the number of relevant New York Times articles on the matter of abortion –and of its complicated relationship with New York's legislative and religious hierarchies– increased from 1968's 37 to a more substantial 60 in 1969—almost twice as many. Even public sentiment around the subject was growing stronger, so much so that seven days after the Council of Churches' unexpected endorsement of abortion reform, a group of women disrupted a legislative hearing on the matter in an open act of protest. While the council was discussing possible abortion reform, the women were asking for a total repeal of the obsolete 19th century law, lamenting the overwhelmingly male composition of the gathered assembly, which counted 14 men and one nun.[329]

> «Senator Seymour Thaler, a Queens Democrat, called out from the platform: "I am entirely in sympathy with these women, the law should be repealed, in my opinion. We have had enough hearings. You are quite right to be impatient." Loud applause broke the pattern of the noise briefly, but the angry female voices continued to ring out. Senator Thaler left his seat on the platform and went down into the audience, pleading: "I am on your side. This is the legislative procedure: We have to get on. Anarchy is no substitute for the orderly procedure of law."
>
> About a half hour after the noisy outbreak began, Senator Lent announced that the hearing would move to another room and continue as an executive session closed to the public except for the news media.»[330]

By March 5, the abortion committee working in Albany, where the headquarters of the New York State Legislature are located, had added one more clause to its abortion reform proposition: that an unmarried pregnant minor of 15 years of age or younger be

[329] Evans Asbury, Edith. "Women Break Up Abortion Hearing", *The New York Times*, February 14, 1969, p. 42
[330] Ibidem

permitted to obtain the procedure.[331] In a matter of days, however, the reform's chances of success began to thin. On March 12, New York's republican leaders began to entertain the possibility of raising the matter of reform «in the Senate first—where its chances of passage are considered poorer than in the Assembly.»[332] Despite these rumors, the Senate decided to leave the first vote to the lower house, and the bill reached the Assembly on March 20. The Times reports:

> «Should it [the bill] pass the Assembly, where the vote could be taken early next week, the consensus among legislators is that added pressure will then be placed on the Senate leadership to let it pass there, too.»[333]

The vote was expected for the following week. Nevertheless, the optimistic sentiment surrounding an Assembly vote unaffected by the Senate's influence would not last much longer. The bill was put to vote on April 17, and shockingly rejected in a 78 to 69 decision. The unexpected blow came from the 14 legislators who had promised support only to suddenly back out, allegedly after being moved by republican Assemblyman Martin Ginsberg, whose polio-induced deformity rendered him sympathetic towards the fetuses who would be aborted for being defective if the law were reformed: if people truly believed that «[...] "a life should not come into this world malformed or abnormal," then it was his opinion that the next step would be to legislate that people like himself, who became disabled after birth, also "should not be permitted to live."»[334] After a five hour-long debate, the New York State Assembly killed the Blumenthal bill for the third consecutive year.[335] Following his proposal's defeat, Albert H. Blumenthal briefly considered revising it to exclude the fetal

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[331] Schanberg, Sydney H.. "State Senate Unit to Offer Wide Abortion Reform", *The New York Times*, March 5, 1969, p. 33
[332] Schanberg, Sydney H.. "Abortion Reformers Fear Pressures", *The New York Times*, March 13, 1969, p. 32
[333] Schanberg, Sydney H.. "Abortion Reform Gains as Bill Goes to Assembly", *The New York Times*, March 21, 1969, p. 50
[334] Schanberg, Sydney H.. "Sponsor of Abortion Reform Abandons Plan to Revive Bill", *The New York Times*, April 19, 1969, p. 26
[335] Schanberg, Sydney H.. "Assembly Blocks Abortion Reform in Sudden Switch", *The New York Times*, April 18, 1969, p. 1

deformity clause that had apparently caused legislators to withdraw their support, but was assured that the bill would be rejected again.[336]

A month later, two women and two men were arrested in a luxury Bronx apartment on grounds of abortion. The women were a housewife and a teacher, the men a physical therapist and a Dominican physician. They ran an underground abortion network that procured the procedure to an average of 20 women a day for a price of $400 each; some of the women were referred to the group by the CCS. In light of the events, even District Attorney Burton Roberts, who handled the case, urged for a more progressive abortion law: «"the fact is that the law needs modification and liberalization so we can face the problem realistically and allow the medical profession to perform abortions in appropriate circumstances."»[337]

By September, word was coming in from California that a new abortion case might mark a step forward for physicians' rights: the resonance of People v. Belous (1969)[338] reached New York in a decisive moment in the state's fight for liberalized abortion. The ACLU's general counsel, New York attorney and professor Norman Dorsen, noted:

> «"The persuasive reasoning of the California court particularly applies to similar statutes in about 40 states that also prohibit abortions unless "necessary" to preserve the life of the mother. The case could be a major step in alleviating the tragic health and social problems caused by restrictive and unrealistic abortion laws."»[339]

Meanwhile, in New York City, People v. Belous prompted women and physicians to go after the state's restrictive law by; this class action was brought on constitutional grounds –as the plaintiffs felt the state's abortion law violated both the patient's right

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[336] Schanberg, Sydney H.. "Sponsor of Abortion Reform Abandons Plan to Revive Bill"

[337] Evans Asbury, Edith. "Four Seized Here In Abortion Raid", *The New York Times*, May 25, 1969, p. 34

[338] For further reading on California's journey to abortion legalization, see Gutierrez-Romine, Alicia. *From Back Alley to the Border: Criminal Abortion in California, 1920-1969*, University of Nebraska Press, 2020;

[339] "California Court Decision May Curb Abortion Prosecutions", *The New York Times*, September 14, 1969, p. 66

to privacy and the doctors rights to practice medicine– and went down in history as Abramowicz v. Lefkowitz.[340] Brooklyn DA Eugene Gold, who was named as one of the suit's defendants, commented that California's case justified «serious consideration of any lawsuit attacking [...]"»[341] New York's law, calling for urgent changes and deeming them "essential". Abortion reform supporters in New York State were further encouraged by the development of United States v. Vuitch in the District of Columbia. On November 11, the Times published the news that D.C.'s law permitting abortion only as a life-saving procedure was struck down by Federal Judge Gerhard Gesell for being unconstitutionally vague.[342]

> «[...] Judge Gesell seemed confident, not only that the U. S. District Attorney would appeal his decision but that the Supreme Court would be sympathetic to his decision. There had, he observed, been "an increasing indication in decisions of the Supreme Court of the United States that, as a secular matter, a woman's liberty and right of privacy extends to family, marriage and sex matters, and may well include the right to remove an unwanted child, at least in the early stages of pregnancy."»[343]

By November 23, New York legislators were once again feeling hopeful and planning on reintroducing a reform bill in January of the following year, a maneuver that would mark the legislature's fourth attempt at liberalizing abortion in the state. The bill's sponsors felt that the advancements in Washington and California had caused a change in climate so significant that people thought «a race might develop on whether the court or the Legislature will act first.»[344] The optimistic sentiment was also encouraged by a pro-abortion shift in public opinion: according to a Gallup poll, in

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[340] "State Abortion Curb Challenged In Suit as a Violation of Rights", *The New York Times*, October 1, 1969, p. 55
[341] Ibidem
[342] Reston, James. "Washington: Gesell on the Unwanted Child", *The New York Times*, November 12, 1969, p. 46
[343] Ibidem
[344] Knowles, Clayton. "Sponsors in Albany Optimistic On Reform of Abortion Laws", *The New York Times*, November 23, 1969, p. 78

November 1969 40% of American adults were in favor of abortion in the first trimester of pregnancy, with a peak of 58% among college students.[345]

Despite the major setback that the Blumenthal bill's third consecutive rejection caused in New York State, in 1969 two major cases –California's People v. Belous and D.C.'s United States v. Vuitch– kept pro-abortion discourse alive throughout the nation. Their momentous impact was bound to contribute to the major legislative shift that would make New York home to the most liberal abortion law in the United States. As Fred P. Graham wrote in November 1969:

> «As recently as two years ago, the idea that American women have a constitutional right to have abor- tions was heard only from the radical fringes of the feminist movement. Today, a growing number of lawyers and judges are predicting that this right will eventually be recognized by the Supreme Court. Others believe that the courts will declare the nation's anti-abortion laws unconstitutional on less sweeping grounds, but with the same results to leave abortion as a private matter between women and their physicians.»[346]

3. *1970. Third time's the charm: New York legalizes abortion*

1970 was the most significant year for New York's abortion trials, even more so than 1973. It is no coincidence that from January to December 1970, the New York Times published over a hundred articles on the matter; of these articles, I found 101 to be particularly significant. If we take into consideration that the same topic was discussed in a mere 37 NYT pieces in 1968 –when the Blumenthal bill was brought to the legislature's attention for the second time– and a more considerable, yet not exorbitant, 60 articles in 1969, it becomes clear that the significance of 1970 for abortion discourse was reflected in printed media, as is to be expected.

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[345] "Legal Abortion in Early Months Supported by 40% in Gallup Poll", *The New York Times*, November 30, 1969, p. 60

[346] Graham, Fred P.. "Abortions: Moves to Abolish All Legal Restraints", *The New York Times*, November 16, 1969, p. 9

At the very beginning of the year, a January 25 article poses a controversial question: "Is there a right to abortion"? The question of the constitutionality of abortion was subject to a particularly thorny debate in the years before Roe—and perhaps even more so *after* the 1973 Supreme Court sentence. While New York had tried (and by 1970 failed three times) to liberalize its 1881 codified abortion statute via legislative change, states like California had successfully resorted to another juridical tool: state lower and supreme courts. Along with this change of means, the new decade promised a change in attitude. As Linda Greenhouse points out:

> «More important than the change of tactics is the change of philosophy that underlies the new abortion‑reform movement. The reformers no longer claim that the states, basically correct in regulating abortion, are simply too rigid in the way they apply this power. Now, they are seeking to establish abortion as a positive legal right, like the right to free speech or the right to be secure against unlawful search and seizure, protected by the United States Constitution against interference by the state on any but the most pressing grounds. If they succeed, it is just possible that there will not be an abortion law left standing in any state by the end of this year.»[347]

While undoubtedly optimistic, this interpretation was in fact not too far-fetched, as Roe's recognition of a constitutional right to abortion within a broader right to privacy would demonstrate. In sheer contrast, the very next day the Times published a piece that registered a certain reluctance regarding abortion reform among New York legislators, which was partially due to «the academic question of whether the courts or the Legislature [would] act first.»[348] On the other hand, supporters of reform –while in no way larger in number than their opponents– were seemingly more resolute than ever, as the article's title suggests.[349]

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[347] Greenhouse, Linda J.. "Constitutional Question: Is There a Right to Abortion?", *The New York Times*, January 25, 1970, p. 30

[348] Farrell, William E.. "Opponents of the Abortion Law Gather Strength in Legislature", *The New York Times*, January 26, 1970, p. 19

[349] Ibidem

Meanwhile, Abramowicz v. Lefkowitz,[350] the unprecedented abortion case that employed women's testimonies to construct its legal narrative, was still being heard in New York's courtrooms: Abramowicz was one of four lawsuits challenging the constitutionality of New York's 89-year-old abortion sections of the state's penal code. These four suits were expected to be heard on April 15, 1970 by a three-judge federal panel, which is the established norm for all constitutional challenges. It was the intention of attorneys Nancy Stearns and Florynce Kennedy «to present evidence of the emotional impact of illegal abortion on women's lives, including the inability to acquire information about it.»[351]

By February, there was once again talk of abortion reform in Albany. In its decisive year, the Blumenthal bill and its journey in the New York State Capitol were discussed in 20 New York Times articles between February and mid-April, when the new liberal law finally passed in an unprecedented legislative accomplishment that had been four years in the making. On February 4, the Times registered Assemblyman Blumenthal's newest attempt at reforming the state's abortion law. While the previous year's rejection of the bill had been an unexpected heavy blow, legislators still felt optimistic, especially because by 1970 many were in favor of a total repeal of the law, which could certainly be considered a much more radical change. Blumenthal himself had endorsed «the Patterson-Cook repeal bill, which would [have] remove[ed] all restrictions on abortions by duly licensed physicians,»[352] effectively making voluntary pregnancy termination a private matter between a woman and her personal doctor. Even notorious abortion adversary Earl Brydges, the Republican leader of the state Senate majority, was beginning to consider change, going so far as to make his staff draft a new proposal—which would undoubtedly be far from progressive, but still a push toward reform. Somewhat anticipating Roe's ruling, the senator's bill was going to establish a threshold for legal abortion at an appointed time during the pregnancy; after the designated gestational age, the procedure would have been permitted only in

[350] For further reading on the case, see Schulder, Diane and Kennedy, Florynce. *Abortion Rap*, McGraw Hill, 1971;
[351] "Women Testify in Abortion Law Test", *The New York Times*, January 27, 1970, p. 29
[352] "Abortion Reform Opportunity", *The New York Times*, February 4, 1970, p. 42

the face of life-threatening complications.[353] However, not everyone believed Brydges' own bill to be well-intentioned: on the contrary, many thought it a "hoax" to stall broader reform measures. Democrat Senator Seymour Thaler went so far as to say that Brydges' real intentions were «"to lead a funeral march for reform with this [bill]."»[354] Notwithstanding the polemics, the state Senate decided to discuss abortion reform for the first time on March 10. In the previous years, it had always been the Assembly which had considered –and killed– the Blumenthal bill; as a consequence, the measure had never reached the Senate floor before. A first-hand consideration in the Senate was unheard of, and could prove to be a double-edged sword: if the Upper House rejected the newest bill, «that would close the case.»[355] It is certainly curious that the first ever abortion-reform bill to be discussed in the New York State Senate had been actively promoted by a conservative opponent of abortion. The measure, which was (some would say suspiciously) greenlit by Senator Brydges, was to be debated on March 17. The day before the Times reported:

> «Unofficial surveys today showed the sentiment on the bill to be extremely close. These surveys, conducted by newsmen, indicate 28 members are in favor of or lean toward the bill while 25 oppose the measure. Four members are reported undecided.
> Twenty-nine votes are required for passage.»[356]

The long-awaited results were printed in the March 19 issue.

[353] "Brydges Easing Opposition to New Abortion Law", *The New York Times*, February 19, 1970, p. 51
[354] Clines, Francis X.. "State Senate to Act On Abortion Reform", *The New York Times*, March 11, 1970, p. 73
[355] Ibidem
[356] Kovach, Bill. "Albany to Open Abortion Debate", *The New York Times*, March 17, 1970, p. 31

Vote on Abortion

Special to The New York Times

ALBANY, March 18—Following is the roll-call vote by which the Senate passed the abortion reform bill today.

FOR THE BILL—31

Democrats—18

Bernstein (Bronx)	Meyerson (Brooklyn)
Bloom (Brooklyn)	Ohrenstein (Manh.)
Bookson (Manhattan)	Paterson (Manh.)
Bronston (Queens)	Powers (Monroe)
Galleber (Bronx)	Rosenblatt (Bklyn.)
Garcia (Bronx)	Schwartz (Queens)
Goldin (Bronx)	Stewart (Brooklyn)
Greenberg (Brooklyn)	Thaler (Queens)
Lewis (Brooklyn)	Zaretzki (Manh.)

Republicans—13

Anderson (Bingh.)	Lent (Nassau)
Barclay (Pulaski)	Marino (Nassau)
Day (Interlaken)	Niles (Johnstown)
Dominick (Newburgh)	Present (Jamestown)
Goodman (Manh.)	Smith, W. T. (Elmira)
Gordon (Peekskill)	Speno (Nassau)
Laverne (P chester)	

AGAINST THE BILL

Republicans—20

Adams (Buffalo)	Hudson (Albany)
Brydges (Niagara F.)	Hughes (Syracuse)
Caemmerer (Nassau)	Knorr (Queens)
Calandra (Bronx)	Langley (Albany)
Conklin (Brooklyn)	Lombardi (Syracuse)
Donovan (Wash. Mills)	Marchi (Staten Is.)
Dunne (Nassau)	McGowan (Buffalo)
Flynn (Yonkers)	Rolison (Pough.)
Gioffre (West.)	Smith, B.C. (Suffolk)
Giuffreda (Suffolk)	Stafford (Peru)

Democrats—6

Ferrall (Brooklyn)	Griffin (Buffalo)
Ferraro (Queens)	Lentol (Brooklyn)
Glinski (Buffalo)	Santucci (Queens)

[357] The March 18, 1970 vote on the reform abortion bill in the New York State Senate, "Vote on Abortion", *The New York Times*, March 19, 1970, p. 39

Perhaps surprisingly, the measure passed in a 31 to 26 decision. As one of the most progressive in the country, the bill presented no gestational age (in contrast to what Brydges had initially planned) and no residency restriction; were the proposal to pass in the Assembly, where it was due to be debated the following week, the choice to abort a fetus in New York State would be placed entirely in the hands of a pregnant woman and her doctor, and the state would have no right to interfere with the process in any way. The Senate's approval was considered to be a very promising sign, seeing as the Upper House was «normally the more conservative house.»[358] And since Governor Rockefeller's liberal views on abortion had been made a part of his yearly

[357] Photo courtesy of The New York Times, March 19, 1970, p. 39

[358] Kovach, Bill. "Abortion Reform Approved, 31-26, by State Senate", *The New York Times*, March 19, 1970, p. 39

legislative campaigns since 1967, were the proposal to pass in Assembly, his signature would almost definitely be a sure thing.

> «Immediately after passage of the bill in the Senate, the twin lobbies in opposition—the Catholic Church and the Medical Society of the State of New York, which had been relatively quiet up to this point—took up the issue. The doctors registered "strong opposition" while the bishops of New York State denounced the bill as a destruction of "the right to life."»[359]

While the Church's disapproval of abortion had deep religious and moral roots, physicians feared that by making New York State home to the most progressive abortion statute of the nation –and by not requiring that women undergoing the procedure be residents of the state– the results would be to indirectly promote "abortion mills".[360] This seemed to be the case for the UK, which had made abortion legal in 1968 and had since then been harboring desperate women from all over the world, even going so far as to establish travel agencies specifically for "abortion tourism".[361]

On March 23, an Assembly committee amended the bill in a 13 to 7 decision, setting a gestational limit for abortion at 24 weeks.[362] Seven days later, the Assembly once again rejected the bill «by a vote of 73 to 71, three votes short of the 76 required for passage,»[363] as the proposal needed to secure an absolute majority. However, controversies regarding Speaker Perry Duryea's choice not to count two favorable votes because the assemblymen who cast them had left before roll call –and his subsequent refusal to add his own vote to reach the required 76 total– allowed Republican Assemblywoman Constance Cook to save «the bill by placing it on the

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[359] Kovach, Bill. "Abortion Reform Has Only a Fighting Chance", *The New York Times*, March 22, 1970, p. 8

[360] Ibidem

[361] Greenhouse, Linda. "New Abortion Agency Here Arranges Travel, Housing and Care in Clinics in London", *The New York Times*, March 22, 1970, p. 30; For further reading on the topic of abortion travels, see Sethna, Christabelle and Davis, Gayle. *Abortion Across Borders*, John Hopkins University Press, 2019;

[362] Kovach, Bill. "Assembly Committee Restricts Senate's Abortion Reform Bill", *The New York Times*, March 24, 1970, p. 37

[363] Kovach, Bill. "Abortion Reform Beaten In the Assembly by 3 Votes", *The New York Times*, March 31, 1970, p. 82

table—parliamentary jargon for a move that, in effect, erased the unfavorable vote and placed the bill in limbo.»[364] When the motion to review the decision was put to vote, it won 92 to 52.[365] On April 9, the measure was finally approved by the Assembly in a 76 to 73 decision: the bill was then sent to the Senate, who had already approved a more liberal version of it, which made supporters of reform optimistic.[366] As expected, the Senate's approval came on April 10, once again counting 31 senators in favor, 26 against.[367] Next, the proposal was headed to Rockefeller's desk; at that point, a veto from the Governor seemed highly unlikely, given his history of support for a more progressive abortion law. Meeting everyone's expectations, on April 11 Rockefeller signed the bill, making abortion in New York State legal with no restrictions up to the gestational age limit of 24 weeks. The Times reported the news on April 12:

> «The Governor signed the bill –which had dominated this session of the Legislature– without comment. Earlier, however, the Governor gave credit to women's groups who had lobbied intensively for the bill.
>
> "Women's liberation played an important part in the passage of this bill," the Governor told newsmen in New York City before traveling here to sign the measure. He also said that "the wives of the Senate and the Assembly put this bill through."
>
> The Governor also credited the Republican party for passage of the measure. Politics, in fact, played an important role in passage, even though the majority of the opposition to the bill came from Republicans in both houses.
>
> In a key political decision that made passage possible, Assemblyman Albert H. Blumenthal, Democrat of Manhattan, who has pioneered the reform effort in the state, was removed as sponsor of the bill this year. Legislative leadership, in Republican hands in both houses, would agree to passing a bill this year only if it had Republican sponsorship.»[368]

[364] Kovach, Bill. "New Vote Due Next Week", *The New York Times*, April 1, 1970, p. 48
[365] Kovach, Bill. "Assembly Revives Bill On Abortion For 2d Time Today", *The New York Times*, April 9, 1970, p. 46
[366] Kovach, Bill. "Abortion Reform is Voted by the Assembly, 76-73; Final Approval Expected", *The New York Times*, April 10, 1970, p. 42
[367] Kovach, Bill. "Final Approval of Abortion Bill Voted in Albany", *The New York Times*, April 11, 1970, p. 17
[368] Kovach, Bill. "Rockefeller, Signing Abortion Bill, Credits Women's Groups, *The New York Times,* April 12, 1970, p. 47

The fact that abortion was subject to political maneuvering should not be surprising; however, the importance of republican influence in the passage of the New York abortion bill might seem counterintuitive. In the 1970s, the Republican Party was not a monolithic entity. After all, Rockefeller himself was a Republican, yet he had been vocal about his support for abortion reform, and had been actively promoting change, for four years. The Republican Party's relationship with women's rights would shift remarkably in the 1980s, with what some have described as a "realignment".[369]

> «At its 1980 convention, the Republican Party removed the Equal Rights Amendment (ERA)[370] from its platform, reversing a pattern of nearly 40 years of official party support. Democrats, on the other hand, not only retained a pro-ERA plank but pledged to provide financial support only to candidates who backed the amendment. Yet the Democratic Party had traditionally been ambivalent, if not hostile, to the ERA. The parties' platform choices on the ERA, the central feminist issue of the time, signaled significant interparty dissension on women's rights more generally, in sharp contrast to earlier consensus. Since 1980, polarization over a spectrum of women's rights issues has been a central characteristic of party competition in the United States.»[371]

In fact, in the 1950s and 1960s, it had been the Republican Party's prerogative to align itself with women's struggle for equal rights. By 1976, both parties recognized abortion discourse as legitimate in their political platforms, although Democrats were more inclined to support Roe v. Wade as a means to achieve the goal of abortion

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[369] For further reading, see Wolbrecht, Christina. *The Politics of Women's Rights: Parties, Positions, and Change*, Princeton University Press, 2000;

[370] The Equal Rights Amendment is a proposed revision of the United States Constitution that would prohibit any form of sex discrimination. The ERA was approved by Congress in 1972, and consequently ratified by 38 states; however, its definitive approval is still pending. For further reading on the ERA, see DeWolf, Rebecca. *Gendered Citizenship: The Original Conflict over the Equal Rights Amendment, 1920-1963*, University of Nebraska Press, 2021; Suk, Julie C.. *We the Women: The Unstoppable Mothers of the Equal Rights Amendment*, Skyhorse, 2020;

[371] Wolbrecht, Christina. *Explaining Women's Rights Realignment: Convention Delegates, 1972-1992*, Political Behavior, Vol. 24, No. 3, Special Issue: Parties andPartisanship, Part Two, Springer, 2002, p. 237

legalization.[372] In the Seventies, the parties' realignment in the matter of women's rights was starting to take shape, but was not yet so definitive as to be a defining characteristic that would gain (or lose) them votes. In fact, a 1976 study found that, excluding Catholics, Democrats "were slightly more opposed to abortion" than Republicans.[373]

Political influences notwithstanding, New York's historic legislative action would mark a major advancement for women's reproductive rights. Such a broad liberalization of abortion would not only serve the women of New York State, but also all American women with the means to travel within its borders to get a safe and legal procedure. Of course, as is to be expected after every major change, there would be downsides, namely the all-pervasive issue of healthcare-related class disparity. As a matter of fact, the battle for legal abortion would not be over until the procedure became accessible to virtually everyone, all over the country. As previously demonstrated, this goal would also turn out to be somewhat illusory, but in 1970 people were not yet worrying about that.

New York's progressive abortion bill came into effect on July 1. That day, the New York Times voiced many people's worries regarding the new abortion policy and its effects on the state's healthcare system.

> «The nation's most liberal abortion law goes into effect in New York State today amid controversy and confusion over how many women will seek abortions, how an abortion can be obtained, how much it will cost and whether the hospitals will be able and willing to meet the demand.
>
> Adding to the confusion a threatened walkout by nor medical hospital workers voluntary hospitals. This could severely curtail the number abortions hospitals in the city will be able to do.»[374]

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[372] Wolbrecht, Christina. *Explaining Women's Rights Realignment: Convention Delegates, 1972-1992*, p. 240

[373] Petersen, Larry R. and Mauss, Armand L.. *Religion and the "Right to Life": Correlates of Opposition to Abortion*, Sociological Analysis, Vol. 37, No. 3, Oxford University Press, 1976, p. 249

[374] Brody, Jane E.. "State's Liberal Abortion Law Takes Effect Today Amid Prospects for Initial Delays, *The New York Times*, July 1, 1970, p. 36

Statistics from the very next day, July 2, showed that a total of 147 abortions were performed in the bill's first 24 hours. Moreover, the Times reported that «in the 15 municipal hospitals equipped to terminate pregnancies 208 more patients [had] registered for future abortions [...], bringing the applications in those hospitals to 1,263.»[375] By July 14, 509 termination of pregnancies were reported to have been performed in public New York City hospitals in the first two weeks since the new law's implementation.[376] In order to moderate the high demand's toll on public health facilities, the city's Board of Health proposed an amendment to the bill that would allow pregnancy termination procedures to be performed in hospitals and "highly equipped clinics" only; however, the cost of abortion in such places was between $400 and $1000, while procedures performed in an OBGYN's personal office were as cheap as $50, and mostly just as safe. Were the amendment to be approved, physicians providing office abortions would risk a thousand dollar fine, if not a year in prison; moreover –and most importantly– indigent patients would suffer the consequences of not being able to afford safe and legal procedures.[377] On September 17, the Board ruled in favor of the amendment, establishing that New York City physicians were to «stop performing abortions in their private offices by Oct. 19.»[378] A month later, the restrictive rules went into effect.

> «A three-week survey By The New York Times that included interviews with dozens of doctors, administrators and patients disclosed that the road to a hospital abortion often included seeming endless delays, clerical errors, complicated procedures, high costs and gratuitous psychological trauma.
> Faced with such difficulties, many women –especially the poor, poorly educated, timid, embarrassed, frightened and unaggressive– are finding hospital abortions impossible to obtain.

[375] Rims, Peter. "Abortions Begun in State Under Liberal New Law", *The New York Times*, July 2, 1970, p. 43
[376] "Abortions in City Hospitals Total 64 Over Weekend", *The New York Times*, July 14, 1970, p. 13
[377] Fosburg, Lacey. "Abortion Measure Stirs Alarm", *The New York Times*, July 16, 1970, p. 24
[378] Sibley, John. "Rules Tightened On Abortion Here", *The New York Times*, September 18, 1970, p. 47

> The ban on operations in offices is expected to further reduce the availability of abortions here.»[379]

While off to a promising start, 1970 ended on a sour note for the abortion question in New York City. Very soon after the long-awaited passage of a highly progressive abortion bill, it became clear that the fight for abortion rights was far from being won. New York State –along with the rest of the country– still had a long way to go, though advancements towards abortion legalization undoubtedly made the beginning of the new decade a decisive turning point. In fact, 1970 was a significant year for the abortion debate in other states as well, three of which also legalized the procedure within their borders. Hawaii had been dealing with its 100-year-old anti-abortion law since February 10, when the state Senate had voted 17 to 7 in favor of a total repeal. Were the House of Representatives to also pass the bill, abortion in Hawaii would be permitted to any woman whose personal physician agreed to the performance of the procedure.[380] This leap forward would come at the end of the month, making Hawaii the first state to liberalize abortion to an unprecedented degree.

> «Hawaii's Senate approved today [February 24] and sent to Gov. John A. Burns a bill that would make this state's abortion law the most liberal of any in the nation.
> Mr. Burns, a Roman Catholic, has indicated that he will let the bill become law without signing it.»[381]

In April, almost at the same time as New York, Alaska unexpectedly repealed its archaic law following a major setback on April 18, when Governor Keith Miller vetoed the proposed bill, which had passed the previous week in both houses and would have made abortion before viability a private matter between doctor and patient. The Governor's choice aligned with his personal belief in a "right to life". To

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[379] Brody, Jane E.. "New Abortion Rules Take Effect, Complicating Confused Picture", *The New York Times*, October 20, 1970, p. 29
[380] "Anti‐Abortion Law Gains in Hawaii", *The New York Times*, February 11, 1970, p. 23
[381] "Bill to Legalize Abortions Clears Hawaii Legislature", *The New York Times*, February 25, 1970, p. 28

override MIller's veto, the legislature would have needed 40 votes, three more than the 37 which had made the passage of the bill possible.[382] However, contrary to all expectations, on April 30 Governor Miller's veto was overridden, making Alaska the third state in the country to adopt a progressive abortion law. The needed 40 votes, which were to be made up of the combination of both houses' numbers, came from a 13 to 6 Senate decision and a 28 to 11 one by the House of Representatives.[383]

Lastly, Washington State would secure its spot among the most progressive states in terms of abortion access in November, only with a major difference: while New York, Hawaii and Alaska had liberalized their obsolete abortion statutes via legislative action, Washington would give its citizens the faculty to vote on the matter firsthand. Referendum 20, albeit not as radical a measure as its legislative predecessors, promised to allow abortions up until the 16 weeks of pregnancy with a few clauses, including spousal and parental consent.[384] On November 3, the measure was approved by Washington citizens in a widely attended ballot poll.

By the end of 1970, abortion had been heavily reformed in four states: New York, Washington, Hawaii and Alaska; of these four states, only New York did not require a pregnant woman seeking abortion to be its resident, making its urban areas, especially New York City, a safe haven for (wealthy) women all over the country.

4. 1971. The highs and lows of New York's progressive abortion law

The first article on abortion to appear in the New York Times in 1971 was about its possible demise: as Lawrence Lader puts it, «no recent law has been so mutilated in its first six months as New York State's abortion statute.»[385] Starting with the 1970 amendment that from October 19 on prohibited the performance of abortions in smaller clinics and physicians' offices, the country's most progressive law yet had been under attack since the very beginning.

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[382] "Liberalized Abortion Vetoed in Alaska", *The New York Times*, April 19, 1970, p. 42
[383] "Abortion Reform Veto Overridden in Alaska", *The New York Times*, May 1, 1970, p. 10
[384] "Heated Campaign Fought in Washington State Over Abortions", *The New York Times*, October 25, 1970, p. 79
[385] Lader, Lawrence. "Undoing the Abortion Law", *The New York Times*, January 4, 1971, p. 31

> «As a result of the board's restrictions, abortion care in city hospitals has become a bureaucratic jungle whose main victims are the poor. Re buffed and degraded by hospital after hospital, they must wait an average of three to four weeks for an abortion (while anyone with $600 or $700 can enter a proprietary hospital immediately).
> These delays are not only psychologically injurious to the patient but force her into the increased risks of late abortion—the saline injection technique, instead of the simple, five minute suction method commonly used in pre-twelve-week pregnancies.»[386]

During the 1971 legislature, the Republican Party intended to «cripple the law with amendments.»[387] Despite the threat of more restrictions, the number of abortions performed in New York City in the first six months of the bill had reached 69,000 in December 1970, an estimated figure which did not include pregnancy terminations carried out in doctor's offices prior to October 19. According to Health Services Administrator Gordon Chase, 49% of the approximate 69,000 procedures were performed on non-residents.[388] In April, while President Nixon threatened to restrict abortion services in the military, which were available to all servicewomen and female relatives of servicemen (as seen in Struck v. Secretary of Defense),[389] in New York Rockefeller released a statement saying that he would block Medicaid funds from being used for abortions. If the Governor was to be true to his word, an immediate consequence would be the cancellation of 4,000 procedures that had already been scheduled for the following weeks. As the Times reports:

> «"A sure result will be that several thousand children will be added to the welfare rolls, poor women who choose to limit their families will be deprived of the right to make that choice, and the traditional division between the right

[386] Ibidem
[387] Ibidem
[388] Sibley, John. "69 000 Abortions in Six Months Here", *The New York Times*, February 7, 1971, p. 70
[389] "Nixon Orders End To Eased Abortions In Armed Services", *The New York Times*, April 3, 1971, p. 30

> of the rich and the poor to good health will be maintained," said Mr. Sugarman, who also is the city's Commissioner of Social Services.»[390]

Chase estimated that every dollar cut on Medicaid would cost New York two dollars in federal funds, effectively making cuts on abortion more expensive than maintaining federal funding for pregnancy termination services. And while on April 6 Rockefeller assured that he would veto any restrictive amendment to New York's hard-fought abortion bill,[391] merely two days later his order to ban Medicaid resources from funding pregnancy terminations was issued by New York's Commissioner of Social Services George K. Wyman.[392]

Further jeopardizing liberalized abortion proposals and laws all over the country, in the same statement in which he –in his own words– «directed that the policy on abortions at American military bases in the United States be made to correspond with the laws of the states where those bases are located,»[393] President Nixon made clear his personal view on abortion for the very first time:

> «From personal and religious beliefs I consider abortion an unacceptable form of population control. Further, unrestricted abortion policies, or abortion on demand, I can not square with my personal belief in the sanctity of human life—including the life of the yet unborn. For, surely, the unborn have rights also, recognized in law, recognized even in principles expounded by the United Nations.
>
> Ours is a nation with a Judeo‑Christian heritage. It is also a nation with serious social problems—problems of malnutrition, of broken homes, of poverty and of delinquency. But none of these problems justifies such a solution.
>
> A good and generous people will not opt, in my view, for this kind of alternative to its social dilemmas. Rather, it will open its hearts and homes to

[390] Evans Asbury, Edith. "Plan to Ban Abortion Medicaid Expected to Increase City's Cost", *The New York Times*, April 3, 1971, p. 26
[391] Lynn, Frank. "Governor Is Firm On Abortion Lawn", *The New York Times*, April 7, 1971, p. 54
[392] "Medicaid's Role In Abortions Cut", *The New York Times*, April 9, 1971, p. 28
[393] "Nixon Abortion Statement", *The New York Times*, April 4, 1971, p. 28

the unwanted children of its own, as it has done for the unwanted mil lions of other lands.»[394]

Coming from the President itself,[395] these words surely left a significant mark, and are but one example of just how deeply rooted the belief in a "right to life" was in early-Seventies American society. Legal or not, abortion would always be under attack if a large –and in this case extremely influential– part of American citizens opposed it on religious principles. The religion-based opposition to abortion was in fact growing stronger by the minute. On April 12, the Times reported that the Catholic Archdiocese of New York was to open a counseling service providing "an alternative to abortion"—the alternative being giving birth and being offered pre- and post-natal care, along with «access to homes for unwed mothers and adoption agencies.»[396] The service was to be called "Birthright", as its Catholic promoters believed that it was «the right of every pregnant woman to give birth and the right of every child to be born.»[397]

Meanwhile, New York was still registering a significant number of successful abortions every week, with an estimate of 15,000 procedures per month. The total of all pregnancy terminations carried out in the first nine months after the bill went into effect amounted to about 100,000, a sum which in itself made New York City the "abortion capital of the country", as the Times put it. According to the registered data (as not every facility equipped to perform abortions disclosed such information), of the patients who'd undergone the procedure, «white women accounted for 73.5 per cent of the total; 22.2 per cent were black, and 4.3 per cent Puerto Rican.»[398] Despite the new law's success among its main beneficiaries –pregnant women– the New York legislators who had opposed the bill tried to debate and pass a repeal on June 6, 1971. The repeal bill would bring New York back to its 1881 abortion statute which only

[394] Ibidem

[395] For further reading, see McMahon, Kevin J.. *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences*, University of Chicago Press, 2011; Perlstein, Rick. *Nixonland: The Rise of a President and the Fracturing of America*, Scribner, 2008;

[396] Carmody, Demdre. "Catholics To Give Antiabortion Aid", *The New York Times*, April 12, 1971, p. 34

[397] Ibidem

[398] Edmiston, Susan. "A Report On the Abortion Capital Of the Country", *The New York Times*, April 11, 1971, p. 10

permitted abortion as a life-saving procedure. After bringing the topic up for debate, Senator Earl Brydges, the promoter of the repeal measure, acknowledged that «neither the Senate nor the Assembly could muster the necessary votes to repeal»[399] yet, and that Rockefeller had promised to veto any repeal bill that came to his desk. Hence, for the time being, legal abortion in New York was safe, but its opponents were likely to come at it again in the 1972 legislature.

Regardless of its exposure to constant attacks, New York's law approached the one-year mark triumphantly, with the state's Health Services registering 165,000 procedures in New York City alone.

> «Despite a host of institutional difficulties, public confusion and professional footdragging when the law took effect last July 1, today there are almost as many abortions being done as there are babies born in the city—950 abortions, for every 1,000 births. And the number of abortions continues to grow rapidly.
>
> At the same time, the rate of medical complications has been lower than expected and compares favorably with that in other countries with liberal abortion laws.
>
> [...] Abortion capabilities outside of the city have evolved much more slowly. The abortions performed in other parts of the state will account for only about 20 per cent of the projected total of 207,000 abortions in the first year, and most of those were done in only five counties—Nassau, Suffolk, Westchester, Erie and Monroe.»[400]

In October the number of abortions performed in the city had grown to 181,821, and statistics showed a significant decline in maternal deaths, with the rate of two deaths per 10,000 live births being the lowest ever registered in New York City. As the main

[399] "Abortion Law Repeal Is Killed by Brydges", *The New York Times*, June 6, 1971, p. 64

[400] Brody, Jane E.. "City's Year‑Old Abortion Record Hailed", *The New York Times*, June 30, 1971, p. 43

cause for maternal mortality in the previous decades had been illegal abortion, the state's progressive law was believed to be the reason for this historic improvement.[401]

On December 14, 1971, the Times reported that two lawsuits from Texas and Georgia were to challenge the constitutionality of abortion bans, making the argument that the state had no right to interfere in matters of women's bodily autonomy. The suits would be known as Roe v. Wade and Doe v. Bolton, and were bound to change women's rights history in the United States. However, in 1971, their relevance could not be foreseen, which is clear by the article's skepticism: as "Jane Roe"'s lawyer Sarah Weddington approached the matter of abortion's constitutionality by claiming that the «Ninth Amendment, which bars the Government from disparaging unspecified rights "retained by the people," was violated by laws that denied a woman the right to decide whether to have an abortion,»[402] the author notes that «no Supreme Court majority has ever struck down a law under the Ninth Amendment.»[403]

While New York City was about to enter the new legislative year as the "abortion capital of the country", by the end of 1971 new challenges to abortion bans were beginning to shape a nationwide revolution, one that would become a beacon of hope as New York's progressive bill faced the threat of repeal.

5. 1972. New York's abortion law under attack—yet there is hope

The new year immediately presented New York with a challenge: on January 5, State Supreme Court Justice Francis X. Smith «issued a temporary injunction to block abortions in the city hospitals.»[404] The measure would have delayed an estimate of one thousand scheduled procedures, and had the potential to threaten abortion's legality in the city. The next day, the Health and Hospitals Corporation assured New York's citizens that abortion services in the city would not be suspended for the time being; however, the measure still posed a threat to public reproductive healthcare. This direct

[401] Brody, Jane E.. "Decline in Maternal Death Rate Linked to Liberalized Abortion", *The New York Times*, October 13, 1971, p. 15
[402] "2 Suits Contest Bans On Abortion", *The New York Times*, December 14, 1971, p. 21
[403] Ibidem
[404] Brody, Jane E.. "City Will Move to Prevent a Ban on Abortions", *The New York Times*, January 7, 1972, p. 26

attack came from law professor Robert Byrn, who had filed a lawsuit against NYC Health and Hospitals Corporation at the end of 1971, claiming legal personhood for unborn fetuses. The suit was "temporarily blocked" on January 11, when a panel of five justices of the Appellate Division of the State Supreme Court «reserved decision on a motion by city and state officials to dismiss the suit [...] and refused to halt the continuance of abortions.»[405]

During the following weeks, the attacks on liberalized abortion kept coming: in February, the State Supreme Court prohibited the funding of abortion via Medicaid in a 4 to 3 decision. From then on, federal Medicaid funds could be used only for medically necessary abortions, making it virtually impossible for indigent people to access "on demand" procedures. In the words of NYC health Services Administrator Gordon Chase:

> «The effect of the ruling [...] is "not to deny abortions to everyone but just to deny them to women who cannot pay for them" and to force some of them "to risk their lives at the hands of backalley abortionists or by dangerous attempts at self‑induced abortions."»[406]

On February 26, the State Supreme Court ruling in Byrn v. New York City Health & Hospitals Corporation was overturned upon appeal,[407] marking a significant victory for New York's 1970 abortion bill, which was proving to be quite resilient.

Meanwhile, a commission appointed by President Nixon to study population growth (The Commission of Population Growth and the American Future) presented a study which found that promoting progressive abortion laws like New York State's own all throughout the country would be highly beneficial, and should thus be encouraged; moreover, the Commission «called for government to fund abortion services and urged that abortion costs be covered by health insurance.»[408] Given Nixon's own anti-abortion attitudes, which prompted him to consider the procedure an unacceptable

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[405] Kaplan, Morris. "Court Lets Abortions Continue", *The New York Times*, January 12, 1972, p. 45
[406] "Appeals Court Upholds Medicaid Abortions Curb", *The New York Times*, February 11, 1972, p. 35
[407] Kaplan, Morris. "State Abortion Law Upheld on Appeal", *The New York Times*, February 26, 1972, p. 9
[408] "A Presidential Panel Supports Abortion on Request", *The New York Times*, March 17, 1972, p. 18

means of population control, and given the firm opposition to liberalized abortion of both Catholic and Jewish hierarchies, the study was bound to spur intense public discourse. Pro-life sentiment was growing stronger in New York as well. On April 16, an estimate of 10,000 people gathered in Central Park protesting the state's liberal statute and asking for a total repeal.[409] The rally was promoted by the Knights of Columbus, a men-only Catholic organization, and took place on the day that New York Archbishop and Cardinal Terence Cooke named the "Right to Life Sunday". During the event, Rabbinical Alliance of America President Abraham Gross compared abortion to murder in his speech, representing Jewish leaders in opposing voluntary pregnancy termination as a liberalized practice. On the same day, reproductive rights activist Bill Baird held a counter-demonstration, and was joined by 12 men who were chained to each other to represent the 12 apostles, in open defiance of Catholic dogma.[410] The very next day, about 600 protesters marched to the state's Capitol in Albany to demand the repeal of the 1970 abortion bill.[411] Likely giving in to the pressure, on April 25 Rockefeller declared himself open to the possibility of restricting the statute's gestational age limit to 16 weeks in place of the established 24, describing the possible amendment as "desirable" after the bill's two-years trial and claiming to have discussed the matter with both the State Public Health Council and the State Health Department.[412] Following the Governor's statement, the Times reported:

> «The Rockefeller amendment to the abortion law [...] was considered to have a better chance of passage in the Senate than the Assembly. But because the abortion issue is a politically delicate one, and most of the 207 legislators are seeking reelection in the fall, there is likely to be maneuvering over which house considers the bill first.

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[409] For further reading, see Holland, Jennifer L. *Tiny You: A Western History of the Anti-Abortion Movement*, University of California Press, 2020; Williams, Daniel K.. *Defenders of the Unborn: The Pro-Life Movement Before Roe v. Wade*, Oxford University Press, 2015;

[410] "Thousands Here Urge Repeal of Abortion Statute", *The New York Times*, April 17, 1972, p. 27

[411] Narvaez, Alfonso A.. "Abortion Repeal Urged in Albany", *The New York Times*, April 18, 1972, p. 43

[412] Clarity, James F.. "Governor Urges Change To 16‐Week Abortions", *The New York Times*, April 26, 1972, p. 31

> Neither house wants to be the first to pass a controversial bill, and risk the political consequences, only to have the other house kill the measure and effectively escape liability.»[413]

Once again, the matter of abortion's legality proved to be subject to political maneuvering. Things escalated when a total repeal bill was introduced by Republican Assemblyman Edward Crawford on May 2; although Rockefeller had promised to veto any repeal measure, as 1972 was an election year, the political pressure of anti-abortion groups was prompting New York legislators to appease them in order to gain their favor.[414] The result was that two abortion bills were simultaneously pending in the New York State legislature.

In the meantime, President Nixon declared himself in favor of the proposed repeal in a non-confidential letter, later released by the archdiocese, to Cardinal Cooke.[415] The President's statement served to magnify the heated debate on whether abortion "on demand" should stay legal in New York State. A Times article published on May 8 noted:

> «Eventual repeal is still considered unlikely, for Governor Rockefeller repeatedly has vowed to veto any measure repealing the two-year-old liberalized law that might pass the two houses. An override of a veto is considered even less likely because of a shortage of votes and of remaining time in the legislative session.
>
> [...] Despite this outlook, the two sides expect the same hard fought, close and even teary- eyed climax as occurred in the 1970 debate because of a variety of factors including heavy grassroots and church pressures, the coming elections, and, now, the President's unusual entry into the debate.»[416]

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[413] Clarity, James F.. "Albany Awaits an Abortion Bill", *The New York Times*, April 27, 1972, p. 35
[414] Farrell, William E.. "Abortion Repeal Gains in Albany", *The New York Times*, May 3, 1972, p. 18
[415] McFadden, Robert D.. "President Supports Repeal Of State Law on Abortion", *The New York Times*, May 7, 1972, p. 29
[416] Clines Francis X.. "Abortion Dispute in State Accented by Nixon's Letter", *The New York Times*, May 8, 1972, p. 43

Nixon's direct and public involvement was unprecedented for «openly working through a particular church to influence the action of a state government.»[417] Rockefeller, who was to serve as the President's chairman for New York State in his re-election campaign, remained firm in his intent to veto any total repeal proposals, and was reported to be "upset" by Nixon's stance.[418] In the end, the Governor stayed true to his word. On May 10, the Assembly voted in favor of total repeal.

Assembly Vote on Abortion Law

Special to The New York Times

ALBANY, May 9—Following is the roll-call vote in which the Assembly tonight voted to abolish the state's liberalized abortion law and restore the law permitting abortions only when a mother's life was jeopardized:

FOR THE BILL—79

Democrats—24

T. W. Brown (Albany)
Calabretta (Queens)
Cincotta (Brooklyn)
De Salvio (Manh.)
Greco (Buffalo)
Griero (Brooklyn)
Griffin (West Seneca)
Haley (Waddington)
Jack (Manhattan)
Lill (Rochester)
Lis (Buffalo)
Lisa (Queens)
Martuscello (Bklyn)
M. L. McCarthy (Buff)
McInerney (Westchr.)
Mirto (Brooklyn)
Mondello (Bronx)
Montano (Bronx)
Nine (Bronx)
Schmidt (Queens)
Straub (Brooklyn)
Thorn (Nassau)
Verderame (Bklyn)
Walsh (Manhattan)

Republicans—55

Amann (Richmond)
Battista (Brooklyn)
Bell (Woodstock)
Bersani (Syracuse)
Betros (P'keepsie)
Biondo (Westchester)
Buckley (Utica)
Burns (Suffolk)
Burrows (West)
F. A. Carroll (Roch.)
V.S. Carroll (N. Falls)
Corbett (Ft. Edward)
Costigan (Suffolk)
Crawford (Oswego)
Delli Vacl (Queens)
Di Carlo (Brooklyn)
Drome (Rexford)
Emery (Geneseo)
Esposito (Queens)
Farrell (Nassau)
Field (Albany)
Flack (Queens)
Gallagher (Queens)
Gunning (Queens)
Hardt (Buffalo)
Harris (Canada Lake)
Hausbeck (Buffalo)
Healey (Nassau)
Hogan (Niagara Falls)
Jerabek (Suffolk)
Kelleher (Troy)
Kelly (Brooklyn)
Kingston (Nassau)
Stephens (Brewster)
Tills (Hamburg)
Van Colt (W'stchstr)
Warder (Geneva)
Wertz (Suffolk)

AGAINST THE BILL—68

Democrats—45

Beatty (Brooklyn)
Berle (Manhattan)
Blumenthal (M'nhtn)
Brewer (Queens)
Chananau (Bronx)
Copperman (Queens)
Di Falco (Manh'tn)
Eve (Buffalo)
Fink (Brooklyn)
Fortune (Brooklyn)
Gottfried (Manhattan)
Gottlieb (Manhattan)
Harwood (Nassau)
Hecht (Bronx)
Hevesi (Queens)
Hochberg (Bronx)
Kunsel (Bronx)
Kraf (Bronx)
Kramer (Nassau)
Krupsak (Amst'rdm)
Landes (Nassau)
Leichter (Manhattan)
Mercorella (Bronx)
G.W.Miller (M'nhtn)
H. I. Miller (Queens)
M.H.Miller (Bklyn)
Olivieri (Manhattan)
Passannante (Manh.)
H. Posner (Queens)
S. Posner (Bronx)
Ramos (Bronx)
Rossetti (Manhattan)
Sharoff (Brooklyn)
Silverman (Brooklyn)
Simon (Brooklyn)
Solarz (Brooklyn)
Southall (Manhattan)
Stavisky (Queens)
Stein (Manhattan)
Steingut (Brooklyn)
Streizin (Brooklyn)
Wager (Nassau)
Weprin (Queens)
Williams (Brooklyn)
Wright (Brooklyn)

Republicans—23

Beckman (Westfield)
Boland (Binghamton)
R. A. Brown (Bridgeport)
C. Cook (Ithaca)
D. Cook (Henrietta)
Finley (Walworth)
Gilman (Middletown)
Ginsberg (Nassau)
Henderson (Hornell)
Herbst (Newburgh)
Jones (Nassau)
Lane (Windham)
Leasure (Endicott)
Levy (Sufferen)
Marshall (Elmira)
H. Miller (Fayetteville)
Rosenberg (Rochester)
Shoemaker (Webster)
Steinfeldt (Rochester)
Suchin (Westchester)
Taylor (Watertown)
Walkley (Castile)
Wemple (Schenectady)

ABSENT—2

Democrats—2

Lama (Brooklyn)
Stella (Bronx)

[419] The May 10, 1972 vote on the total repeal of the 1970 abortion bill in the New York State Assembly, "Assembly Vote on Abortion Law", *The New York Times*, May 10, 1972, p. 51

In a 79-68 decision, the Assembly passed the bill and sent it to the Senate. Of the assemblymen who voted in favor of repeal, the vast majority (55 out of 79) were

[417] "Mr. Nixon's Intervention", *The New York Times*, May 8, 1972, p. 36
[418] Clarity, James F.. "Governor Reported Irked By Nixon's Abortion Views", *The New York Times*, May 9, 1972, p. 26
[419] Photo courtesy of The New York Times, May 10, 1972, p. 51

members of the Republican Party; on the other hand, only 23 Republicans opposed the bill, along with 45 Democrats—almost twice as many. On the very next day, when the Senate voted 30-27 in favor of the bill after a seven-hour-long debate,[420] the matter was left to rest entirely in the hands of the Governor. As promised, Rockefeller vetoed the proposal on May 13. In his statement, the Governor said:

> «The same strong reasons that led‑line to recommend abortion‑law reform in my annual message … for 1968–69 and 1970 and to sign into law the reform that was ultimately adopted in 1970, now compel me to disapprove the bill just passed that would repeal that reform.
> The abortion‑law reform of 1970 grew out of the recommendations of an outstanding select citizens committee, representative of all affected parties, that I appointed in 1968.
> Under the distinguished leadership of retired Court of Appeals Judge Charles W. Froessel, the select committee found that the then‑existing, '19th‑century, near‑total prohibition against abortion was fostering hundreds of thousands of illegal and dangerous abortions. It was discriminating against women of modest means who could not afford an abortion haven and the often frightened, unwed, confused young woman. It was promoting hypocrisy and, ultimately, human tragedy. [...]
> I fully respect the moral convictions of both sides in this painfully sensitive controversy. But the extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reform has represented the will of a majority of the people of New York State.»[421]

By claiming that the Assembly and Senate votes had been the result of political coercion rather than the legislators' genuine beliefs, Rockefeller considered his own veto to be representative of the people's will—anti-abortion rallies notwithstanding.

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[420] Narvaez, Alfonso A.. "Abortion Repeal Passed by Senate, Sent to Governor", *The New York Times*, May 11, 1972, p. 40
[421] "Text of Abortion‑Bill Veto", *The New York Times*, May 14, 1972, p. 62

Despite being constantly under attack and having just overcome a major legislative threat at the last minute, New York's abortion law had hit record highs in 1971—and it was showing no signs of slowing down. According to Health Commissioner Hollis S. Ingraham, the number of abortions that were carried out in New York State between January and December of 1971 amounted to 262,807, 60.9% of which were performed on non-resident patients coming from all states except New Mexico (presumably due to its close proximity to Mexico, a country well-known for its illegal abortion networks) and Hawaii (where abortion had been legal since 1970). Unsurprisingly, 206,673 procedures –roughly 78.6% of the total– were sought in New York City, still the undisputed abortion capital of the nation.[422]

Meanwhile, in October 1972 Roe v. Wade and Doe v. Bolton were scheduled to be reheard by the Supreme Court. Preparing for the occasion, iconic second-wave feminist leader Gloria Steinem, along with a group called The Women's National Abortion Action Coalition, organized protests against «the "fanaticism" of groups committed to restrictive abortion laws in New York State and elsewhere.»[423] Steinem herself declared that pro-choice women and feminists would not repeat their previous mistakes by underestimating the "lobbying power" of the Right To Life movement, which she called a «small, very vocal, virulent and well‑financed group.»[424] The WONAAC's plan was to picket outside the Archdiocese's offices in New York City on October 2, the second day of the national Respect for Life Week indicted by the Church, and to demonstrate in front of the Supreme Court on October 11, when the re-hearing of Roe and Doe was to take place.[425] On October 7, Health Services Administrator Gordon Chase called liberalized abortion in New York State "an enormous success" which had «"conclusively" demonstrated the safety of abortion on a mass scale»[426] by almost completely eliminating maternal and infant mortality and consistently reducing the number of illegitimate children.

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[422] "262,808 Abortions in State in 1971", *The New York Times*, September 1, 1972, p. 23

[423] Johnston, Laurie. "Abortion Forces Prepare for Foes", *The New York Times*, September 27, 1972, p. 27

[424] Ibidem

[425] Ibidem

[426] McFadden, Robert D.. "City Liberalized Abortions Held 'Enormous Success'", *The New York Times*, October 8, 1972, p. 1

Despite the relevance of the anti-abortion movement, by the end of 1972 New York's 1970 abortion statute was still standing, Roe was on its way to the Supreme Court, and pro-choice advocates were keeping their voices loud.

6. 1973. Abortion is legal in the United States

On January 22, 1973, Roe v. Wade and Doe v. Bolton were decided by the United States Supreme Court. The next day, the New York Times published five articles on the matter. One contained "excerpts" from Roe's majority opinion, another one reported the Catholic hierarchy's reaction to the news:

> «In the forefront of Catholic reaction were Cardinal Cooke of New York and Cardinal Krol of Philadelphia, who is also the president of the National Conference of Catholic Bishops.
> Cardinal Cooke issued a statement calling the Court's action yesterday "shocking" and "horrifying." Cardinal Krol called the decision "an unspeakable tragedy for this nation."»[427]

On the other hand, Planned Parenthood president Dr. Alan Guttmacher «called the decision "a wise and courageous stroke for the right to privacy, and for the protection of a woman's physical and emotional health."»[428] Another article explained the set of rules that were to be followed for legal abortion throughout the nation; these established: that during the first three months of pregnancy any woman could freely decide to abort; that during the second trimester states could regulate abortions in order to safeguard a pregnant woman's health, but not prohibit them altogether; that for the last ten weeks of pregnancy states could ban abortion, except when the procedure was deemed life-saving. The same piece assured readers that the ruling would not significantly affect the laws of the four states that had legalized abortion

[427] Van Gelder, Lawrence. "Cardinals Shocked—Reaction Mixed", *The New York Times*, January 23, 1973, p. 1
[428] Ibidem

back in 1970, including New York.[429] A different article focused on each individual state, explaining the "effect" that the Supreme Court decision would have on their current abortion laws. A total of 31 states still followed obsolete anti-abortion statues, which were effectively rendered void by Roe. Of these states, 11 were located in the Midwest, 7 in the West, 6 in the Northeast and 7 in the South of the country, suggesting that the geographical distribution of antiquated abortion laws did not adhere to any regional bias or stereotype. Excluding Hawaii, Washington, Alaska and New York, the remaining 15 states presented abortion regulations that –while "relatively modern"– would still «require considerable rewriting to conform.»[430] Lastly, the remaining Times article focused specifically on New York's case, noting that the ruling in Roe and Doe would stall, if not block altogether, any attempt to reinstate New York's 1881 restrictive abortion statute. The piece reported:

> «The United States Supreme Court's abortion decision today appeared to quash the hopes of Right to Life and other antiabortion groups for a full-scale debate in the Legislature again, this year on repealing the state's liberalized abortion law.
> "No way," replied Assemblyman Constance E. Cook, a Republican of Ithaca and a sponsor of the liberalized abortion law, when asked if the issue of restoring the old state statute would be seriously discussed again. [...]
> The Supreme Court's 7-to-2 ruling, Mrs. Cook said, rendered efforts by antiabortion lobbyists to force it to the floors of the Senate and Assembly "a useless show of strength."
> Similarly, Assembly Speaker Perry B. Duryea, Republican of Montauk, said he felt it would be "futile" to bring repeal legislation up for debate again.»[431]

After years of struggling, New York's 1970 law appeared to be finally safe. Still, the Supreme Court ruling spurred doubts concerning «the immediate impact on existing state laws, the role of the local health authorities in setting standards of safety for early

[429] Weaver, Warren, Jr.. "National Guidelines Set by 7-to 2 Vote", *The New York Times*, January 23, 1973, p. 1
[430] "Effect of Ruling On States' Laws", *The New York Times*, January 23, 1973, p. 20
[431] Farrell, William E.. "Ruling Seems to Forestall Abortion Debate in Albany", The New York Times, January 23, 1973, p. 1

abortions and the fate of most of the abortion clinics that now exist in and around New York City.»[432] Were states to follow the most literal interpretation of the decision in Roe, which, among other things, struck down all residency requirements, even Washington, Hawaii and Alaska, whose laws presented such clauses, would be required to slightly modify them to conform. According to this interpretation, only the law of New York State, whose metropolis had become the "abortion capital of the country" precisely because it permitted out-of-state patients to seek abortions within its borders, would not need to be altered in any way. As for the remaining 46 states and the District of Columbia, they would, «in effect, have no abortion laws until their legislatures pass[ed] laws that conform[ed] to the Supreme Court's ruling.»[433] Given the general uncertainty surrounding the ruling's breadth, it was deemed likely that most wealthy or middle-class women would still turn to New York as a safe compromise, at least for the first few months of the year. As the Court had prohibited any state interference during the first trimester of pregnancy, The NYC Health Services Administration invalidated «the city's health code regulations governing how and where abortions might be performed,»[434] making way for the possibility of abortions being once again carried out in smaller clinics and physician's offices.

Following Roe, medical facilities all over the country had to make ready to perform an unprecedented number of procedures, which were expected to amount to around 1.6 million a year.[435] Two and a half years after New York State fully legalized abortion, the entire country was bound to rely on its experience to adjust to the Supreme Court's sentence. The statistics were hopeful: an overall drop in both maternal and infant mortality rates, a decrease of illegitimate births, and –as a consequence– of teenage marriages contracted as a cover-up. Moreover, having control over their unwanted pregnancies would enable more young women to pursue higher education. This is not to say that the transition would be easy; in fact, the American healthcare system was

[432] Brody, Jane E.. "Questions Left Unanswered by Ruling on Abortion", *The New York Times*, January 24, 1973, p. 14
[433] Ibidem
[434] Ibidem
[435] Brody, Jane E.. "Hospitals Prepare for 1.6 Million Abortions Annually", *The New York Times*, January 28, 1973, p. 45

entirely unprepared to face such a massive change. Roe's sentence, however, could turn out to be highly beneficial for the country in the long run.

> «Politically, the decision flew in the face of President Nixon's publicly expressed opposition to liberalized abortion laws. Yet three of the four Justices he had named to the High Court –Warren E. Burger, Lewis F. Powell Jr. and Mr. Blackmun– voted with the majority, which based its decision on the constitutional right to privacy, a concept that has evolved out of the Fourteenth Amendment's guarantee of due process of law. The seven Justices rejected the "right to life" theory that the fetus is a person with enforceable legal rights—recognizing only a "potentiality of human life" during the last 10 weeks of pregnancy. Only William H. Rehnquist among the Nixon judges joined Byron R. White in the two‐man dissent.»[436]

In the first few weeks after the sentence, individual states tried to deal with their voided abortion statutes; the matter, however, proved to be rather thorny. The one state that succeeded in promoting a legislative bill that would conform with Roe's rules, Virginia, then proceeded to reject said bill. According to the New York Times, by mid-February at least eight other states had similarly introduced legislative measures to adhere to Roe, and "an equal number" were working on it. But between legal and medical professionals, no one seemed willing to take action, which spurred the women who could afford it to keep resorting to New York State as a sort of "abortion safe haven".[437] On February 26, the Supreme Court invalidated the laws of nine states which had upheld their restrictive abortions statutes in local courts, instructing them to conform to its January 22 ruling. Furthermore, the Court struck down an attempt to overturn New York's 1970 law on grounds of being unconstitutional, as it permitted abortions without restrictions within the first 24 weeks of pregnancy, well past the first-trimester limit established by Roe. Dismissing the claim without a hearing, the

[436] Brody, Jane E.. "The Court Landmark Ruling on Abortion", *The New York Times*, January 28, 1973, p. 3
[437] Brody, Jane E.. "States and Doctors Wary On Eased Abortion Ruling", *The New York Times*, February 16, 1973, p. 77

High Court declared «that there was no "substantial Federal question" involved in the New York case.»[438]

As state-level legal change was at a stalemate, indigent and lower-class women could still not access legal and safe abortion, which had become their constitutional right. On March 14, the issue was brought to the attention of government and healthcare officials by Rockefeller Foundation president Dr. John H. Knowles at a Planned Parenthood meeting in New York.

> «"Laissez-faire may be in for soap and cars, but not for health services," said Dr Knowles, who is the former director of Massachusetts General Hospital. "The free market has not provided accessible services to the poor."
> He predicted that without swift action on the part of government and the health system, women who are poor, very young or from rural areas would be without access to safe abortion services "for years to come."»[439]

And while the poor still struggled to obtain what was rightfully theirs, the U.S. federal government took a small step forward on April 10, when the IRS ruled that abortions –along with expanses for birth control pills and vasectomies– would become tax-deductible, regardless of the "moral questions" that such means and procedures may have raised.[440]

Meanwhile, in New York City, the Board of Health established a few guidelines to better adhere to Roe's ruling. As New York State already permitted first trimester abortions, the only regulations that had been voided by the high Court's decision were those prohibiting that they be performed in doctor's offices or in clinics which did not conform to a strict set of safety policies. The surviving guidelines regarding abortion within the first 12 weeks of pregnancy established that the procedure be performed only by a licensed OBGYN or under their guidance, that the clinic or office be

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[438] Weaver, Warren, Jr.. "Supreme Court Bars a Review of Abortion Decision", *The New York Times*, February 27, 1973, p. 22

[439] Brody, Jane E.. "Plan to Speed Abortion Services Urged", *The New York Times*, March 15, 1973, p. 31

[440] "Cost of Abortions, Vasectomies And Pills Ruled Tax Deductible", *The New York Times*, April 11, 1973, p. 53

equipped for emergencies, and that an agreement be stipulated with a hospital to act as a backup facility. The hospital-only restriction remained intact for all abortions carried out after the first trimester.[441]

On May 20, the New York Times published an article on how states had been adjusting to the January 22 sentence.

> «Nearly four months after the Supreme Court struck down restrictive abortion laws, women In many areas of the country still find that terminating a pregnancy means leaving their home state, paying high prices or running the risk of exploitation by commercial referral services.
>
> At the same time, greatly eased restrictions in many urban areas have meant that fewer women travel elsewhere for an abortion. Clinics in New York are cutting back their operations and some reportedly may close down.»[442]

In states like Utah, where the Mormon Church held significant political influence and owned most public hospitals, legal abortion was being firmly resisted. In other regions, abortions could virtually be sought by any woman, but hospital-only requirements and other such clauses made their cost prohibitive.[443] This, of course, had been a problem long before Roe, when abortion travels highlighted the healthcare gap between wealthy and lower-class patients. Unsurprisingly, the problem had not been solved by nation-wide abortion legalization.

By July, lawsuits «to compel public hospitals to perform abortions»[444] had been filed in nine different states by the ACLU and the National Association for Repeal of Abortion Laws (NARAL). Since January, a number of public hospitals throughout the country had failed to conform to Roe's ruling, refusing to perform any abortion that was not deemed necessary for the preservation of the pregnant woman's life or health. Two such suits had already been won in New Jersey and Massachusetts, and another seven were being prepared in Texas, Minnesota, Missouri, Wisconsin, Ohio, Florida

[441] Brody, Jane E.. "Abortion Rules Revised by City", *The New York Times*, May 16, 1973, p. 31
[442] King, Wayne. "Despite Court Ruling, Problems Persist in Gaining Abortions", *The New York Times*, May 20, 1973, p. 35
[443] Ibidem
[444] Sibley, John. "2 Groups to Challenge Hospitals That Resist Ruling on Abortion", *The New York Times*, July 2, 1973, p. 11

and Indiana.[445] Slowly but surely, the country was starting to (sometimes forcefully) adjust to its new law.

On December 31, 1973, a New York Times article entitled "Abortions, Legal for Year, Performed for Thousands" read:

> «The sweeping change that has resulted from the Court decision has removed much of the social stigma associated with the operation and has taken abortions out of the backrooms of the illegal abortionist and brought them into the mainstream of modern medical care. [...]
> Tens of thousands of abortions are being performed in cities where a year ago it was impossible to obtain the operation.»[446]

Whereas abortion had once been a "whispered problem", an illegal procedure most women were scared to both seek and talk about, by the end of 1973 obtaining a safe pregnancy termination in any part of the country had become their constitutional right. And while adjusting to such a major change was bound to be challenging for the American legal and sanitary systems, and social injustice in matters of healthcare was destined to be an ever-present issue, Roe's sentence would go down in history as a monumental milestone for women's reproductive rights in the United States.

7. Epilogue

Between January 1, 1968 and December 31, 1973, over 400 articles on the topic of abortion were published by The New York Times. Of those few hundreds, I initially selected 387 to serve me as references in narrating the abortion debate through the lenses of the journalistic pillar that is the New York City-based newspaper. The 387 pieces were unsurprisingly unevenly distributed over the examined five-year period. That in itself is an interesting data. The year 1968 counts the lowest number of articles discussing abortion, a mere 37. If we look at the historical and political context of

[445] Ibidem
[446] "Abortions, Legal for Year, Performed for Thousands", *The New York Times*, December 31, 1973, p. 39

1968 New York, it is easy to find the reason behind this somewhat underwhelming figure. While the Blumenthal bill had already been introduced –and rejected– during the 1967 legislative session, the abortion debate in the state, and especially its political relevance, was just beginning to emerge. In 1969, 60 New York Times articles discussed the topic of abortion, a topic that would once again be a central subject of debate in Albany. The growing number reflected the growing significance of the issue. 1969 figured as the third consecutive year during which New York State tried to repeal its obsolete 1881 abortion law. Governor Rockefeller was resolute in his pursuit of reform, and the Catholic hierarchy was equally resolute in opposing it. By the start of 1970, the issue had become a statewide phenomenon. 1970 was also the year that would finally settle the matter for New York State, which would go on to liberalize abortion to an unprecedented degree. For this reason, 1970 predictably holds the record for the highest number of selected articles discussing abortion, a total of 101. The numbers for the three following years are decisively more balanced: 53 for 1971, and 68 for both 1972 and 1973. As for 1973 specifically, what's particularly interesting –although entirely predictable– is the national-level focus on the issue, an issue no longer relegated to the borders of New York State. That is not to say that for the four years prior 1973 the Times did not report on the abortion debate in other states; the matter, however, undeniably gained unprecedented national significance after January 22, 1973.

Of the 387 articles examined, I used a total of 98 to paint a picture of the abortion debate in New York State, and in New York City, during those decisive years. By using a newspaper as a primary source, the state's politics, its leaders and the events that defined an era feel extremely approachable. With this analysis, I tried to examine the long and hard-fought battle for abortion rights in New York State through the lenses of print media, an information medium whose intent is to report landmark events as they're still happening, demonstrating its relevance as a means to access, examine and understand history.

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