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The Rise and Fall of a Reproductive Right: *Dobbs v. Jackson Women's Health Organization*

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Introduction

Although the phrase "Post-*Roe* Era" is still used by those who want to underscore the loss wrought last June by *Dobbs v. Jackson Women's Health Organization*, it is only a matter of time before the present state of reproductive constitutionalism solidifies into the more authoritarian "*Dobbs* Era."[1] In these early days of transition, states are still figuring out what they want the legal status of abortion to be, ever since *Dobbs* overruled both *Roe v. Wade*[2] and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] thus tossing the issue of abortion's legality back to the states for resolution.[4] In Justice Alito's words, "It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."[5]

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1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
2. 410 U.S. 113 (1973).
3. 505 U.S. 833 (1992).
4. *Dobbs*, 142 S. Ct. at 2243.
5. *Id.* Note that within three months of the *Dobbs* decision, Republican Senator Lindsay Graham of South Carolina introduced a bill to make abortion a federal crime across the entire country, boldly contradicting Justice Alito's commitment toward states' rights. *See* David Morgan, *Republican Graham Proposes National Ban on Abortion After 15 Weeks of Pregnancy*, REUTERS (Sept. 13, 2022), https://www.reuters.com/legal/us-senate-republican-lindsey-graham-unveils-abortion-bill-ahead-midterms-2022-09-13/.

So, should what was formerly regarded as a legal medical procedure remain so? Should it be legal and funded? Or should legal abortion migrate from a state's health regulations to the criminal code and be illegal? Or illegal with exceptions? Or illegal with extraterritorial reach? And who should bear the burden of the illegality? Pregnant women, their physicians, and anyone who aids or assists them?

There are also questions about the mechanism by which abortion's status is to be determined in each state—by extant trigger laws,[6] new legislative enactments[7] or referenda,[8] constitutional amendments, or judicial determinations when a state (Florida, for example) has conflicting provisions?[9] Still other decisions arise at the local level: For example, what priority should abortion investigations and prosecutions be assigned and by whose authority?[10] Whose discretion should prevail, if discretion is called for? Resolving these questions is the pressing task of citizens and lawmakers, and answers are now owed to women of child-bearing age—typically 15 to 44 years old—so that all 64.5 million[11] of them can know just where

6. Jesus Jimenez & Nicholas Bogel-Burroughs, *What Are Abortion Trigger Laws and Which States Have Them?*, N.Y. Times (June 24, 2022), https://www.nytimes.com/2022/06/25/us/trigger-laws-abortion-states-roe.html.

7. Amy Cheng, *Indiana Passes Near-Total Abortion Ban, the First State to Do So Post-*Roe, Wash. Post (Aug. 6, 2022), https://www.washingtonpost.com/nation/2022/08/06/indiana-abortion-ban-roe-holcomb/.

8. Dylan Lysen, Laura Zeigler & Blaise Mesa, *Voters in Kansas Decide to Keep Abortion Legal in the State, Rejecting an Amendment*, N.P.R. (Aug. 3, 2022), https://www.npr.org/sections/2022-live-primary-election-race-results/2022/08/02/1115317596/kansas-voters-abortion-legal-reject-constitutional-amendment; Jonathan Weisman & Nick Corasaniti, *First Kansas, Next Michigan and Beyond as Abortion Ballot Measures Spread*, N.Y. Times (Sept. 9, 2022), https://www.nytimes.com/2022/09/09/us/politics/michigan-abortion-referendum.html.

9. State v. Planned Parenthood of Sw. & Cent. Fla., 342 So. 3d 863 (Fla. Dist. Ct. App. July 21, 2022); *see also* Erik Larson, *ACLU Asks Florida Supreme Court to Review 15-Week Abortion Ban*, Bloomberg (Aug. 11, 2022), https://www.bloomberg.com/news/articles/2022-08-11/aclu-asks-florida-supreme-court-to-review-15-week-abortion-ban.

10. Everton Bailey Jr., *Dallas Council Committee Backs Plan to Limit City Resources Used to Investigate Abortions*, Dallas Morning News (Aug. 2, 2022), https://www.dallasnews.com/news/politics/2022/08/02/dallas-council-committee-backs-plan-to-limit-city-resources-used-to-investigate-abortions/; *see also* Patricia Mazzei, *DeSantis Suspends Tampa Prosecutor Who Vowed Not to Criminalize Abortion*, N.Y. Times (Aug. 4, 2022), https://www.nytimes.com/2022/08/04/us/desantis-tampa-prosecutor-abortion.html.

11. *Population Data for United States,* March of Dimes Peristats, https://www.marchofdimes.org/peristats/data?reg=99&top=14&stop=125&lev=1&slev=1&obj=3 (last updated Jan. 2022).

they stand under state law should they confront a pregnancy that is or has become unwanted or that endangers the woman's health.[12]

As well as provoking questions of "What next?" the *Dobbs* case also raises the backwards-looking question of "How did this happen?" Although we were forewarned of the decision's content through a mysterious and as-yet-unsolved leak in early May 2022,[13] there was a palpable sense of shock for many when the official decision actually came down in late June. How could one live (blithely, it now seems) into one's adulthood secure in the highest level of legal protection around reproduction—the constitutional *right* established in *Roe* and affirmed in *Casey*—only to have it felled with a few determined strokes from Justice Alito's pen in the *Dobbs* case?

To be sure, for pro-life advocates and supporters, the decision was not so much a shock as a long-awaited accomplishment.[14] The *Roe* decision had been a stunning shock to pro-life advocates who felt that "the Court erred in leaving the unborn without the protection they deserved."[15] Overturning *Roe* had been actively sought since the day it was decided in 1973. Over the next 50 years, opponents tried all sorts of approaches to undo *Roe*—tactical trial and error such as unsuccessful fetal personhood amendments,[16] mountains of restrictive legislation in the states,[17] regular appearances before the Supreme Court,[18] and political and spiritual consolidation (conservative

12. The fluidity of the categories is worth keeping in mind, as pregnancies can move from wanted to unwanted in the space of one telephone call: A boyfriend calls to say that he didn't sign up for this; an employer calls to say they are downsizing and come get your pink slip; a doctor's office calls with unhappy news regarding certain prenatal testing. *See* Denise V. D'Angelo et al., *Differences Between Mistimed and Unwanted Pregnancies Among Women Who Have Live Births*, 36 Persp. on Sexual & Reproductive Health 192, 193–96 (2004) (clarifying the difference between mistimed and unwanted pregnancies).

13. Adam Liptak, *A Supreme Court in Disarray After an Extraordinary Breach*, N.Y. Times (updated June 24, 2022), https://www.nytimes.com/2022/05/03/us/politics/supreme-court-leak-roe-v-wade-abortion.html.

14. *See* Ruth Graham, *"The Pro-Life Generation": Young Women Fight Against Abortion Rights*, N.Y. Times (July 3, 2022), https://www.nytimes.com/2022/07/03/us/pro-life-young-women-roe-abortion.html.

15. Mary Ziegler, After *Roe*: The Lost History of the Abortion Debate 29 (2015).

16. Kate Zernike*, Is a Fetus a Person? An Anti-abortion Strategy Says Yes*, N.Y. Times (Aug. 30, 2022), https://www.nytimes.com/2022/08/21/us/abortion-anti-fetus-person.html.

17. *See An Overview of Abortion Laws*, Guttmacher Inst. (as of Nov. 1, 2022), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws.

18. *See* Roe v. Wade *and Supreme Court Abortion Cases*, Brennan Ctr. for Just. (Sept. 28, 2022), https://www.brennancenter.org/our-work/research-reports/roe-v-wade-and-supreme-court-abortion-cases.

Catholics, Evangelicals, and Republicans).[19] The "jewel in the crown"—scuttling *Roe*—was finally secured by President Trump's appointment of Justices Gorsuch (2017), Kavanaugh (2018), and Barrett (2020).[20] For this constituency, pure jubilation marked the 5–4 majority opinion in *Dobbs*, striking down not only *Roe* and *Casey*, but also the doctrines of privacy and much of *stare decisis* as well.[21]

But for those who experienced the *Dobbs* decision with something closer to "shock and awe," it is perhaps worth rewinding the reproductive script to look back and see how over the course of the 20th century, American law had developed the concept of constitutionally protected reproductive rights. Consideration of such rights began in the 1920s and progressed in roughly 20- to 30-year increments, ending (certainly for the present) almost 100 years later in 2022 with *Dobbs*, which shredded the right to abortion by denouncing the underlying doctrine of privacy, a move that also seems to leave open the possibility of taking down other privacy-derived rights in the future.[22]

In this article, I will trace the way in which this series of constitutional cases reflects both social attitudes and legal constraints on reproductive behavior during the 20th century. How do the decisions acknowledge or reject legal protections for such behaviors and desires? As we shall see, reproductive policies of the state and individual preferences of citizens may take a pronatalist slant, as women and men seek—sometimes demand—to be permitted to create children. Other policies and preferences are anti-natal, favoring decisions *not* to reproduce through such practices as abstinence, contraceptive use, or sterilization. Yet each additional decision, whether pro- or anti-natal, thickens our understanding of how, over time, different reproductive rights became defined and protected.

This article argues first that plotting the various legal constraints placed on reproductive behavior reveals the social and historical contexts in which different preferences arise. That is, depending on the applicable

19. *See* Daniel K. Williams, *This Really Is a Different Pro-Life Movement*, Atlantic (May 9, 2022), https://www.theatlantic.com/ideas/archive/2022/05/south-abortion-pro-life-protestants-catholics/629779/; Elizabeth Dias, *For Conservative Christians, the End of* Roe *Was a Spiritual Victory*, N.Y. Times (June 25, 2022), https://www.nytimes.com/2022/06/25/us/conservative-christians-roe-wade-abortion.html.

20. For the appointment dates of the justices, see *Current Members*, Supreme Ct. of the U.S., https://www.supremecourt.gov/about/biographies.aspx (last visited Oct. 20, 2022).

21. Adam Liptak, *In 6-to-3 Ruling, Supreme Court Ends Nearly 50 Years of Abortion Rights*, N.Y. Times (June 24, 2022), https://www.nytimes.com/2022/06/24/us/roe-wade-overturned-supreme-court.html.

22. *See generally* Mary Ziegler, Beyond Abortion: *Roe v. Wade* and the Battle for Privacy (2018).

legal doctrine and jurisprudence at any given time, reproductive behavior may be protected from state intrusion as a constitutional right, or it may be found subsidiary to positive law and subject to its regulation. The cases will be familiar to those who teach or practice family law and its offshoots, and certainly to those who deal with reproductive rights. The idea here is to follow their trajectory, beginning with the brutal decision in *Buck v. Bell*—upholding the coerced sterilization of "imbeciles" in 1927[23]—and then developing in *Skinner v. Oklahoma* (reversing compulsory vasectomy of a prisoner in 1942)[24] to *Griswold v. Connecticut* (striking down a ban on contraceptive access for married couples).[25] These cases contributed to the recognition of reproductive rights, which by the end of the 20th century culminated in recognizing the right to abortion.[26] *Roe v. Wade* established the abortion *right* as against state criminal prohibitions (1973),[27] and was followed by *Planned Parenthood v. Casey* (1992), which upheld abortion's status as a fundamental right while at the same time expanding the grounds for restricting it.[28] We see *Casey* at work in additional cases, including *Gonzales v. Carhart* (2007), where the Supreme Court upheld a federal ban on a particular abortion procedure,[29] and *Whole Woman's Health v. Hellerstedt* (2016), which struck down tighter Texas restrictions on access to abortion.[30]

These cases take us to the present,[31] where the rise of reproductive rights has been overtaken by *Dobbs*, marking an abrupt and decided plunge southward.[32]

This plunge leads to a second insight of this article. In contrast to nearly all the earlier cases, the integrity of the analysis in *Dobbs* regarding the social facts that underlie the holding appears unreliable; indeed, the center of its arguments does not hold. The decision lacks the integrity one would expect from a pre-leaked blockbuster that overturned the vested expectations of citizens of the last 50 years. And what truly stings here is that what the Court gets so wrong with its overconfident tone and its selection of facts is an appreciation of how women and girls (and often their partners) have

23. 274 U.S. 200 (1927).
24. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).
25. 381 U.S. 479 (1965).
26. *See infra* Part I.
27. 410 U.S. 113 (1973).
28. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
29. 550 U.S. 124 (2007).
30. 579 U.S. 582 (2016).
31. *See infra* Part II.
32. *See infra* Part III.

relied upon the holdings in *Roe* and *Casey*. Because *Dobbs* disregards most women's views on abortion, I want wherever possible to capture something of the voices of the women facing reproductive decisions under one or another of the regulatory regimes.

To conclude, there are many ways to critique *Dobbs*—its theocratic underpinnings, its peculiar historical choices, its doctrinal disregard of precedent, and so on. I focus here on these: first, its disquieting location as the endpoint in the trajectory of reproductive law cases from the 20th century forward; second, *Dobbs*' disregard of women as reproductive agents in the constitutional scheme; and third, its disregard of the developed doctrines of privacy and liberty regarding reproductive practices, an aspect of life that at one time or another envelops most of us.

I. The Road to *Roe*: 1927–1973

A. Buck v. Bell (1927)

I start with the bleak but scientifically confident and patriotically swelling case of *Buck v. Bell*, which held in 1927 that Virginia's Eugenical Sterilization Act was constitutional.[33] In that case, the compulsory sterilization of institutionalized residents of state asylums at the superintendent's say so was held to violate neither the Constitution's Due Process Clause nor the Equal Protection Clause.[34] According to its preamble, the 1924 Act had been passed to advance "the health of the individual patient and the welfare of society" by preventing the sexual reproduction of "mental defectives."[35] The legislation would prevent society from being "swamped with incompetence."[36] The Act reflected the popularity of what was then accepted as the science of eugenics in Virginia and beyond.[37] It was considered a simple exercise of police power in a matter of public health for the public benefit.[38]

Passage of the Act also represented Superintendent Albert Priddy's concern regarding litigation: He had earlier been sued after he sterilized a mother and daughter, whose husband and father also wrote Dr. Priddy

33. 274 U.S. 200 (1927).

34. *Id.* at 208.

35. An Act to Provide for the Sexual Sterilization of Inmates of State Institutions in Certain Cases, ch. 394, 1924 Va. Acts 569 (repealed 1974).

36. *Buck*, 274 U.S. at 207.

37. Nathalie Antonios, *Sterilization Act of 1924*, Embryo Project Encyclopedia (Apr. 14, 2011), https://embryo.asu.edu/pages/sterilization-act-1924.

38. *Id.*; Buck v. Bell, 130 S.E. 516, 519 (Va. 1925), *aff'd*, 274 U.S. 200 (1927).

to prevent the sterilization of yet another daughter.[39] Superintendent Priddy wanted a law and a validating judicial decision to protect him from liability in the future.[40] Thus, the case was carefully prepared as test case litigation: The personal and family history of Carrie Buck, with her low mental assessment score and assumed sexual promiscuity, became the ideal candidate for both the operation and the lawsuit.[41] Buck, a teenage resident of the Virginia "Colony for Epileptics and Feeble Minded," had been determined to have a mental age of nine and therefore to be a "Middle-grade Moron" based on the prevailing aptitude test and scale.[42] She became pregnant out of wedlock,[43] delivering a baby girl who herself was described as "abnormal," taken from Buck, and placed for adoption.[44] Because Buck's mother Emma had already been committed to the Colony on grounds of mental deficiency, her "feeble-minded" daughter Carrie became the perfect candidate to demonstrate the hereditary dangers of genetically transmitted deficiencies signaling moral and social decay.[45] As legal historian Victoria Nourse explains, "the scientific glue" holding these connections together was "the idea of feeblemindedness as fixed and permanent, an inherited trait of great danger."[46] The dangers were understood to go far beyond the costs of state support for one "defective" family. "Feeble-minded" immigrants produced waves of crime; newly tested army recruits were scoring just above "moron"; and the economy could not be sustained if the country were awash in mental mediocrity.[47]

Buck was appointed counsel to challenge the sterilization law (this legal challenge was also part of the preplanned test case).[48] According to the record, Buck uttered but one sentence in the entire sterilization proceeding.[49] At the end of her sterilization hearing, a single question was put to her by the superintendent's lawyer: "Do you care to say anything about having this

39. Nathalie Antonios & Christina Raup, *Buck v. Bell (1927)*, Embryo Project Encyclopedia (July 3, 2018), https://embryo.asu.edu/pages/buck-v-bell-1927; Adam Cohen, Imbeciles 82–83 (2016).

40. *See* Antonios & Raup, *supra* note 39.

41. *Id.*

42. *Id*.; Cohen, *supra* note 39, at 30. For more on the test used and scale and their deficiencies, see *id.* at 30–33.

43. Indeed, it later was known that Buck had been raped by her foster family's visiting nephew. *See* Antonios & Raup, *supra* note 39.

44. *Id*.

45. *Id*.

46. Victoria F. Nourse, In Reckless Hands: *Skinner v. Oklahoma* and the Near Triumph of American Eugenics 26 (2008).

47. *Id*. at 25–26.

48. Cohen, *supra* note 39, at 96.

49. *Id.*

operation performed on you?"[50] (He did not clarify what "this operation" was.) "'No, sir,' Carrie responded. 'I have not, it is up to my people.'"[51] Although she may have been relying on her counsel (my "people") to speak for her (her family was absent), neither her lawyer nor opposing counsel nor anyone else followed up to clarify her understanding.[52]

There is, however, other testimony that informs how we might think about the plight of others who were sterilized at the Colony. The first is from Carrie Buck's sister Doris, who in 1928 was also sterilized by Virginia officials; she was told that the operation was to remove her appendix.[53] In 1979, some 50 years after the surgery, Doris Buck was finally told why she had never been able to have a child: "I broke down and cried," she said.[54] "My husband and me wanted children desperately. We were crazy about them. I never knew what they'd done to me."[55]

The second speaker is Willie Mallory, whom Dr. Priddy had unconsensually sterilized in 1916, and whose suit against Priddy occasioned the plan to litigate the constitutionality of the Act for protection. Mrs. Mallory's testimony takes the form of the complaint she filed against Dr. Priddy. Willie Mallory's complaint stated that:

> [From Oct. 14, 1916] defendant [Dr. Priddy] . . . illegally and wrongfully deprived her of her liberty, and kept her wrongfully and illegally in his custody, and under his control for several months, by force, threats and personal violence, and by fear of bodily harm, and while so in his custody, and under his personal control, the said defendant by force, and violence, placed her under ether, or other anesthetic, and while she was then, and there, unconscious, performed an operation upon her by removing her genital organs, or sterilizing her, and unsexing her, and destroying her power to bear children, and caused her great mental and physical suffering by keeping her in dread of said operation. . . . And also thereby inflicted upon her great pain and discomfort of body, and worry of mind, and deprived her of the comfort & association of her family, and so deprived her, by said

50. *Id.*
51. *Id*.
52. *Id*. at 96–97.
53. Sara G. Boodman & Glenn Frankel, *Over 7,500 Sterilized by Virginia*, Wash. Post (Feb. 23, 1980), https://www.washingtonpost.com/archive/politics/1980/02/23/over-7500-sterilized-by-virginia/8002199e-709c-4e18-8b54-3b44c130828f/.
54. *Id.*
55. *Id.*

> illegal imprisonment, of her daily wages, to wit, $1.25 per day, from that time until, to wit, July 1st, 1917. . . .[56]

The language here is powerful. The plaintiff described herself as "unsex[ed]," her power to bear children "destroy[ed]."[57] These are mighty things to suffer, and we ought to keep them in mind.

By 1927, Buck's case found its way to the U.S. Supreme Court.[58] In a short and chilly opinion (five paragraphs including Justice Oliver Wendell Holmes's huzzah that "Three generations of imbeciles are enough."), the Supreme Court held that Buck's consent was not necessary.[59] Neither the Due Process Clause nor the Equal Protection Clause of the Constitution had been offended by the Virginia statute.[60] As Justice Holmes explained, Buck had received a hearing at the Colony supported by evidence, testimony, affidavits, and a transcript, and had had notice and the opportunity to appear and to appeal: "[I]n that respect [Buck] has had due process of law."[61] The equal protection claim—that the Act provided for the "sexual sterilization" only of institutionalized persons while similarly disabled people in the general population could not be so accosted—was also dismissed out of hand.[62] Holmes patiently explained that "the law does all that is needed when it does all that it can" ("you can't reasonably expect the state to take on everyone").[63] That ended the matter, after a quick jab by the Court at Buck's lawyer to the effect that everyone knows that equal protection arguments are raised only when counsel has nothing better to offer.[64] If anything, the justice added, sterilization might actually increase the equal treatment of the "feeble-minded": Once society was protected from the economic consequences of their sexual liaisons, the operation might in fact enable some of the "feeble-minded" "to be returned to the world, and thus open the asylum to others" so that the desired "equality aimed at will be more nearly reached."[65]

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56. Willie Mallory Complaint (1917), *in* Buck v Bell *Documents*, Paper 80, Ga. State Univ. Coll. of Law: Reading Room (Jan. 2009), https://readingroom.law.gsu.edu/buckvbell/80/.

57. *Id*.

58. Buck v. Bell, 274 U.S. 200 (1927).

59. *Id.* at 207.

60. *Id.*

61. *Id.*

62. *Id.* at 208.

63. *Id.*

64. *Id.* ("It is the usual last resort of constitutional arguments to point out shortcomings of this sort.").

65. *Id.*

But in addition to this tidy parsing of the 14th Amendment, it was the logic of eugenics, then accepted as a solid, necessary, and invigorated branch of science, that drove the decision in *Buck v. Bell*. What was at issue was the treatment owed to lesser citizens like Carrie Buck regarding their reproductive preferences. Although there was no language in the case regarding what we might now consider a "right to procreate," one sentence refers obliquely to Buck's claim that the loss of reproductive capacity was the harm: "It seems to be contended that in no circumstances could such an order [an order to sterilize the patient against her will] be justified."[66] But, scoffed Justice Holmes, that could not be right as a matter of patriotism, morality, or, indeed, equality between peoples so differently situated.[67] A Civil War veteran himself, Holmes wrote that:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence.[68]

Under this analysis, the deprivation suffered by Buck took on nobler meaning as a sacrifice, admittedly not as noble as risking death in military service, but on a par with her sacrificial role as a mother. Women's duty during the post-Revolutionary period was defined as that of "Republican Motherhood": the charge to bear and raise the upstanding male citizens of the future.[69] This was how gender played out for those held to be "feeble-minded." The duty of such a woman was not to produce children but explicitly not to do so.[70] Here, traits in addition to gender enter the mix: Her hereditary trait of "feeble-mindedness"[71] reduced her traditional status as a woman even further. The state was well within its police power to do this.[72] As we shall see, gender assumptions—tailored to present prejudices—usually play a role in legal dictates involving reproduction (or its antecedent

66. *Id.* at 207.
67. *Id*.
68. *Id*.
69. "Focusing attention on their sons and encouraging industry, frugality, temperance, and self-control, republican mothers would nurture virtuous citizens who served their communities; by educating their daughters, mothers would insure the virtue of future generations." Marilyn S. Blackwell, *The Republican Vision of Mary Palmer Tyler*, 12 J. Early Republic 11, 12 (1992).
70. *Buck*, 274 U.S. at 207.
71. *Id.*
72. *Id.*

of sexual activity). At the same time, contemporary views about categories of womanhood influence how laws are drawn and applied.

The point here is not to accept the eugenics-based holding in *Buck v. Bell*, but rather to highlight how the Supreme Court's opinion mirrored "beliefs of the times."[73] This is a thread I shall pull through this article at different points in time: the social context of the Court's views toward reproductive behavior and its regulation at different points on the trajectory of women's abortion right.

B. Skinner v. Oklahoma (1942)

Some 20 years after the decision in *Buck v. Bell*, a second forced-sterilization case made its way to the Supreme Court.[74] In this case, the operation was not imposed upon an institutionalized person as a purported public health measure, but as a statutory punishment for committing a crime.[75]

McAlester State Penitentiary inmate Jack Skinner had been sentenced under the Oklahoma Habitual Criminal Sterilization Act to sterilization by vasectomy on the statutory grounds he was a "habitual criminal" (convicted of three instances of a felony crime "involving moral turpitude").[76] Under the statute, vasectomy could be imposed for a "habitual criminal" who committed any such crimes in any state, but certain offenses were excluded from consideration (violation of revenue acts, embezzlement, and political offenses).[77] Skinner had been convicted three times of "felonies involving moral turpitude": once for stealing chickens and twice for armed robbery.[78]

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73. *The Right to Self-Determination: Freedom from Involuntary Sterilization*, DISABILITY JUST., https://disabilityjustice.org/right-to-self-determination-freedom-from-involuntary-sterilization/ (last visited Oct. 22, 2022).

74. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

75. *Id.* at 538.

76. *Id.* at 536. Vasectomies were introduced around the turn of the century by Dr. Albert Ochsner of Chicago, who in 1899 published a paper called *Surgical Treatment of Habitual Criminals* in the *Journal of the American Medical Association*. COHEN, *supra* note 39, at 65. Ochsner defended the vasectomy (in contrast to castration) because a vasectomy did not upset a man's hormonal balance, was not disfiguring, was not imposed as a punishment to the criminal himself, and did not "interfere with his enjoyment of life should he reform and become a useful member of society." ("Enjoyment of life" refers to sexual intercourse.) A.J. Ochsner, *Surgical Treatment of Habitual Criminals*, 16 JAMA 867, 867 (1899). Indeed, the only charge before the jury in Skinner's case was for them to determine whether the procedure would be harmful to Skinner's health. *Skinner*, 316 U.S. at 537.

77. *Skinner*, 316 U.S. at 536–37 (discussing Oklahoma Habitual Criminal Sterilization Act, OKLA. STAT. ANN. tit. 57, §§ 171–95).

78. *Id.* at 537.

In the 1930s, eugenics was still a social and a legislative force.[79] In the context of "a growing sense of lawlessness," even President Roosevelt was concerned, "chid[ing] the public for its fascination with the public enemy. . . ."[80] U.S. Attorney General Homer Cummings began a "campaign against crime." [81] The "paradigmatic image [was] the public enemy, the habitual criminal, the repeater."[82] The latter categories were readily seized by criminologists as perfect targets for sterilization as a means of preventing crime itself (a product of a weak mentality) being passed from generation to generation.[83] Sterilization had never fallen out of vogue, but it now had a new and timely target: recidivists, or the "habitual felon."[84] Thus, in 1943, Oklahoma passed its Habitual Criminal Sterilization Act.[85] To be sure, there was some opposition to sterilization laws, including from the Catholic Church (on pronatalist grounds), and from some individuals and organizations (opposing cruelty).[86]

Our interest is in the vocal opposition from Skinner's fellow prisoners at McAlester State Prison in McAlester, Oklahoma.[87] They left no question about the grounds of their opposition: the de-gendering of men that was understood to result from the procedure.[88] As Professor Victoria Nourse observes, "[s]terilization laws had always been written not only with heredity, but also with sex in mind."[89]

At his trial, Skinner testified to the social and personal harm of sterilization. Being rendered unable to reproduce would induce in him "resentment":[90]

> [Skinner's attorney, Claud Briggs:] [Y]ou stated . . . that you might be able to . . . overcome this trouble of yours [criminal activity] by living an up right [sic] clean life and rearing a family?

79. Nourse, *supra* note 46, at 22.

80. *Id.* at 46.

81. Hon. Homer Cummings, Att'y Gen. of the U.S., *The Campaign Against Crime*, Justice.Gov (Nov. 22, 1933), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/16/11-22-1933.pdf.

82. Nourse, *supra* note 46, at 46.

83. Nancy J. King*, Sentencing and Prior Convictions: The Past, the Future, and the End of the Prior-Conviction Exception to* Apprendi, 97 Marq. L. Rev. 523, 532–33 (2014).

84. *Id.* at 533–34.

85. Oklahoma Habitual Criminal Sterilization Act, Okla. Stat. Ann. tit. 57, §§ 171–95.

86. Cohen, *supra* note 39, at 67–68; Nourse, *supra* note 46, at 74.

87. Nourse, *supra* note 46, at 55–63.

88. *Id.* at 61.

89. *Id.* at 60. "Eugenics preoccupied itself with sex, sliding between the sex that makes babies (procreation), the sex that makes populations (race), and the sex that brands one a cultural degenerate and social inferior." *Id*. at 61.

90. *Id.* at 107.

> [Skinner:] That is my hope.
>
> [Briggs:] Is it that [hope] that . . . makes you intensely dread and resent the forceful performance of this operation?
>
> [Skinner:] Yes, sir. . . . I would be out and alone and could not marry and rear a family and would not have any inspiration, I would be by myself without inspiration.[91]

In his testimony we hear Skinner's own voice expressing the magnitude of the proposed sterilization for him. It would leave him nothing and deny him the ability to have a sense of community and family.[92] (Consider the similar dread and shame expressed in Willie Mallory's complaint.)[93]

In his appeal from the Oklahoma Supreme Court's upholding the Act's constitutionality, Skinner's lawyer Briggs added more familiar legal arguments.[94] These included a lack of procedural due process compared to that provided to Carrie Buck, the inapplicability of the police power when the state of scientific knowledge about the inheritability of marginal traits was uncertain, and the proposition that vasectomy should fail as a cruel and unusual punishment.[95] Yet the U.S. Supreme Court bypassed these grounds because there was one overriding feature of the Act that "clearly condemns it": the Act's "failure to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment."[96] The flaw was the Habitual Criminal Sterilization Act's division of criminals into two classes—those subject to sterilization and those not—based on an unconvincing, indeed, unexplained difference between thieving and one of the exceptions, embezzling.[97] (It may have been that embezzling was more often engaged in by white defendants in positions of control over another's funds.)[98] But neither crime was more violent, more premeditated, more anything than the other; and yet, what

91. *Id*. (testimony excerpted and reformatted).
92. *Id.*
93. *See supra* note 56 & accompanying text.
94. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 538 (1942).
95. *Id.*
96. *Id.*
97. *Id.* at 541–42.
98. *See* Ernest Poortinga et al., *A Case Control Study: White Collar Defendants Compared with Defendants Charged with Other Nonviolent Theft*, 34 J. Am. Acad. Psychiatry & L. 82 (2006) (finding that over a 12-year period, defendants charged with embezzlement were more likely to be white than defendants charged with other forms of nonviolent theft).

hinged on the difference was depriving the thief (but not the embezzler) of "a basic liberty": "the right to have offspring."[99]

That right, Justice William O. Douglas continued, "involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race."[100] This language did not mean that the Court found there was for Skinner a "right to procreate"—a right to choose—in today's terms.[101] But it refigured procreation from the back-handed dismissiveness it had received in *Buck v. Bell*. Harms to procreation were to be taken seriously, and that change prompted reconsideration of what was necessary to overcome the straightforward exercise of the police power.

Honing in on the precise harm of the deprivation, not only to Skinner but to society itself, the justice stated:

> The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury.[102]

Here we are presented with an entirely different social understanding of Skinner's plight as compared to that of the sterilized Carrie Buck. The very point of sterilizing Buck was to make her group of persons—the "feeble-minded"—wither and disappear. Indeed, redemption of a kind was bestowed on her through the (unwilling) sacrifice of her procreative function, which might prove economically useful: Without administrative concerns about her producing more imbeciles, she might be able to leave the Colony through the revolving door of sterilization and self-sufficiency envisioned by eugenicists. In contrast, the Court in *Skinner* acknowledged the profound social, familial, and rights-based loss to Skinner of the vasectomy. Indeed, the relation between his loss and the state's exercise of authority for the public good (again, the police power) was so deeply and specially entwined as to occasion a new phrase to describe the appropriate constitutional review: strict scrutiny. In explaining why the Court goes on at some length describing the harms of sterilization, Justice Douglas states:

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99. *Skinner*, 316 U.S. at 536, 541.

100. *Id*. at 541.

101. *See* Gerber v. Hickman, 291 F.3d 617, 622 (9th Cir. 2002) (no constitutional right for inmate to provide his sperm to his wife for purposes of artificial insemination; "By no stretch of the imagination . . . did *Skinner* hold that inmates have the right to exercise their ability to procreate while still in prison.").

102. *Skinner*, 316 U.S. at 541.

> We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.[103]

Our interest here is less where *Skinner* led in terms of constitutional doctrine than its recognition of the cruelty of sterilization to the individual and to groups. As the 1930s gave way to the Second World War, the techniques of Nazi Germany to rid itself of "non-Aryan" people became known and the Court's 1942 warning about "evil or reckless hands" was a clear reference to Germany's use of sterilization.[104] Thus, Justice Douglas began his opinion with the declaration that

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.[105]

To be sure, despite its use of the language of rights as regards procreation, *Skinner* did not overrule *Buck v. Bell*, and involuntary sterilizations in federally funded programs, largely of poor women who were disproportionately Black, continued into the 1970s.[106] Yet despite

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103. *Id*. Some have described *Skinner* as originating the constitutional doctrine of strict scrutiny, but as legal historian Stephen Siegel explains, although "Justice Douglas subjected a sterilization statute to heightened review . . . he did so through a non-deferential inquiry into whether the statute's classifications actually had a rational basis, employing the form of review that today would be called 'minimal scrutiny with bite.'" Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 Am. J. Legal Hist. 355, 359 (2006). *See also* Ben Horowitz, *A Shot in the Arm: What a Modern Approach to* Jacobson v. Massachusetts *Means for Mandatory Vaccinations During a Public Health Emergency*, 60 Am. U. L. Rev. 1715, 1723 n.72 (2011) (arguing that although the Court used the phrase "strict scrutiny" in *Skinner*, they "did not really apply . . . the non-deferential approach that is currently employed").

104. *Skinner*, 316 U.S. at 541. The matter is historically complex as historians have shown how Germany in the 1920s and 30s began studying state laws regarding the sterilization of the mentally ill and bans on interracial marriage as models for their own subsequent laws. *See* James Q. Whitman, Hitler's American Model: The United States and the Making of Nazi Race Law (2017) (discussing how American race law provided a blueprint for Nazi Germany).

105. *Skinner*, 316 U.S. at 536.

106. *See* Marlene H. Prendergast, Comment, *Sterilization Regulation: Government Efforts to Guarantee Informed Consent*, 18 Santa Clara L. Rev. 971, 977 (1978) (discussing the case *Relf v. Weinberger*, 372 F. Supp. 1196 (D.D.C. 1974), *vacated*, 565 F.2d 722 (D.C. Cir. 1977), where three sisters were coerced into sterilization in California); Linda Villarosa, *The Long Shadow of Eugenics in America*, N.Y. Times Mag. (June 8, 2022), https://www.nytimes.com/2022/06/08/magazine/eugenics-movement-america.html.

ongoing misuse of the procedure for women—most recently for women in federal immigration detention centers[107]—we see a shift from a general acceptance of eugenic sterilization practices in the first decades of the century to a sobered realization of their consequences when unfettered and endorsed by the state.

Skinner was paroled from McAlester in 1939, remarried, and moved to Visalia, California, where he opened a dry cleaning business. His obituary noted that he was survived by six grandchildren and 10 great-grandchildren.[108]

C. Griswold v. Connecticut (1965)[109]

The 1960s were indeed a swinging time. This was due not only to the British influence—Mary Quant, Vidal Sassoon, the Beatles—but also due to the U.S. Food and Drug Administration (FDA). In 1960 the FDA authorized the first use of an oral contraceptive, Enovid.[110] "Within [two] years . . . 1.2 million American women were using . . . the '[P]ill.' . . ."[111] "By the end of the decade, married couples had made [the Pill their] contraceptive of preference, a trend that was especially pronounced among wives in their twenties."[112] However, although medical technology had produced this shiny, new, easy-to-use, and relatively inexpensive form of contraception (compared to abstinence, condoms, the diaphragm, and sterilization), the sale or use of oral contraceptives for women across the United States seeking to control their fertility was restricted or prohibited outright in a number of states.[113]

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107. Brigitte Amiri, *Reproductive Abuse Is Rampant in the Immigration Detention System*, ACLU (Sept. 23, 2020), https://www.aclu.org/news/immigrants-rights/reproductive-abuse-is-rampant-in-the-immigration-detention-system.

108. David J. Krajicek, *Oklahoma Convict Went to Supreme Court to Fight Forced Sterilization*, N.Y. Daily News (June 4, 2016), https://www.nydailynews.com/news/national/okla-convict-supreme-court-fight-forced-sterilization-article-1.2661391.

109. 381 U.S. 479 (1965).

110. *A Brief History of Birth Control in the U.S.*, Our Bodies, Ourselves Today at Suffolk Univ., https://www.ourbodiesourselves.org/health-info/a-brief-history-of-birth-control/ (last visited Oct. 22, 2022).

111. Audiey Kao, *History of Oral Contraception*, AMA J. Ethics (June 2000), https://journalofethics.ama-assn.org/article/history-oral-contraception/2000-06#:~:text=The%20Food%20and%20Drug%20Administration,as%20it%20is%20popularly%20known.

112. Dolores Flamiano, *Covering Contraception: Discourses of Gender, Motherhood and Sexuality in Women's Magazines, 1938–1969*, Am. Journalism, Summer 2000, at 59, 74 (2000) (quoting John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 251 (1989)).

113. Martha J. Bailey et al., *Early Legal Access: Laws and Policies Governing Contraceptive Access, 1960–1980* (Aug. 2011), http://www-personal.umich.edu/~baileymj/ELA_laws.pdf; *see also* Carol Flora Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 Am. Q. 3 (1966).

It was not until 1965 that the Supreme Court announced its decision in *Griswold v. Connecticut* that the use of contraception by married persons was protected by a constitutional right of privacy.[114] Indeed, it was *Griswold*, and not *Roe*, that first introduced the mysterious language of "penumbras" and "emanations" that became better known in the 1973 *Roe* decision.[115] The impact of the Pill in American society was, from the beginning, huge. One author lists the social magnitude as including "women's careers, health, fertility trends, laws and policies, religion, interpersonal relationships and family roles, feminist issues, and gender relations, as well as sexual practices among both adults and adolescents."[116] At the technical and the personal level, its revolutionary feature was that "[t]he spontaneity of sexual passion no longer had to be interrupted by inserting a diaphragm or putting on a condom";[117] it "separated intercourse from precautionary measures to prevent pregnancy."[118] For some, this made sex more natural and joyous; for others, the meaning of such spontaneity remained complicated and guilt-inducing. One unhappily pregnant young woman explained why she had never used birth control: "When we had sex, we couldn't use condoms, because having them around would have been admitting an intent to sin or an expectation of fallibility. For the same reasons, I couldn't take birth control pills. . . . To prepare to sin would be worse than to break in a moment of irresistible desire."[119] The point to underscore here is the link, whether moral or religious, between attitudes toward sex and the attitudes toward birth control.[120]

In this section, I want to focus on two aspects of *Griswold*. The first is the privacy doctrine that it sets out and the application of privacy to the use of contraception in 1965.[121] The second focus is to look at the treatment of the *Griswold* case at the state level. *Griswold* and a few earlier cases again surface the authority of the police power, first observed in *Buck*

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114. *Griswold*, 381 U.S. at 486.

115. *Id.* at 484.

116. Louise Tyrer, *Introduction of the Pill and Its Impact*, 59 Contraception 11S, 15S (1999), https://reader.elsevier.com/reader/sd/pii/S0010782498001310?token=2B3B58EE6611B0D422471C3AD7FCB1BFB0E228AA750C8D33928B8EE124C8B482301F3B56D5DDB830F65050E30970664B&originRegion=us-east-1&originCreation=20220814210826.

117. John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 250–51 (2d ed. 1997).

118. *Id.* at 250.

119. Merrill Tierce, *The Abortion I Didn't Have*, N.Y. Times Mag. (Dec. 5, 2021), https://www.nytimes.com/2021/12/02/magazine/abortion-parent-mother-child.html. The author explained the curious logic between faith and sin: "Our faith trapped us. . . . As long as I didn't take the birth-control pill, I could believe I wouldn't sin again." *Id.*

120. *Id.*

121. Griswold v. Connecticut, 381 U.S. 479, 479 (1965).

v. Bell.[122] *Griswold* also shows the role of religion, particularly religious views about sex in the politics of contraception, before *Griswold* recognized the constitutional right to privacy.[123] This foreshadows the treatment of contraception for the Post-*Roe* Era. As we shall see in the *Dobbs* section, there is no more constitutional privacy, there is to be greater deference to legislature opinions, and there is a newfound protection of religious beliefs with regard to legislative enactments.[124] Thus, at the conclusion of this article we can assess whether post-*Roe* state law treatment of contraceptive decision-making returns the law in a number of states to its 20th century pre-*Griswold* status and rationale.

And so the 1965 case of *Griswold v. Connecticut*. The statutes at issue were two Connecticut laws: the first criminalized the use of "any drug, medicinal article or instrument for the purpose of preventing conception;" the second authorized the prosecution of anyone who "assists, abets, counsels, causes, hires or commands another to commit" the offense of using contraception.[125] The appellants were employees of the Planned Parenthood League of Connecticut: the executive director (Estelle Griswold) and the medical director (Dr. C. Lee Buxton).[126] Having found that the defendants had standing to raise the rights of the married persons they counseled at the clinic, the Court turned to the issue of whether the use of contraception was constitutionally protected.[127]

The Court began with "the association of people," a right previously found to be protected by the First Amendment.[128] Marriage created such an association, as did membership in a political party.[129] Protected as well was the right to absorb "the spectrum of available knowledge," or at least not to have the spectrum contracted by the state.[130] The First, Third, Fourth, and Fifth Amendments create "zones of privacy"; for example, the Fifth Amendment "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment."[131]

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122. *Id.* at 485–86; Buck v. Bell, 274 U.S. 200, 207 (1927).

123. *Griswold*, 381 U.S. at 483–86.

124. *See infra* Part III.

125. *Griswold*, 381 U.S. at 480.

126. *Id.*; Lori Ann Brass, *An Arrest in New Haven, Contraception and the Right to Privacy*, Yale Med., Spring 2007, at 16, https://medicine.yale.edu/news/yale-medicine-magazine/ymspring07_348432_43933_v1.pdf.

127. *Griswold*, 381 U.S. at 481–82.

128. *Id.* at 482.

129. *Id.* at 483, 486.

130. *Id.* at 482.

131. *Id.* at 484.

Here the Court through Justice William O. Douglas—who also wrote for the Court in *Skinner*—explained the concept that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[132] They don't just grudgingly apply to the scope of their literal text: "Various guarantees create zones of privacy."[133] Moreover, the right to use contraceptives by married couples falls into a privacy zone

> created by several fundamental constitutional guarantees. And [*Griswold*] concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.[134]

Douglas then pronounces the question that I think sends chills through many a family law professor each time one teaches the case: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[135] The image takes one directly to the facts of the Court's subsequent decision in *Loving v. Virginia*,[136] where the local police burst into the Lovings' bedroom in the early morning hours, after they, a biracial couple married in the District of Columbia, had returned to Virginia to be near Mildred Loving's family. The police shone flashlights on the awakening couple, searching their walls for their illegal-in-Virginia District of Columbia marriage certificate.[137] Justice Douglas ends the *Griswold* case with perhaps flowery phrases—I prefer to think of them as fervent—including: "[Marriage] is an association for as noble a purpose as any involved in our prior decisions."[138]

One can see how *Griswold* leads to other forms of protected privacy. The next step was to include single persons on a theory of equal protection.[139] The next was to extend the nature of *forms* of privacy decisions to include abortion, same-sex sexual activity, and ultimately same-sex marriage.[140] We

132. *Id*. The "emanations" language and analysis first appeared in Justice Douglas's dissent in *Poe v. Ulman*, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting).

133. *Griswold*, 381 U.S. at 484.

134. *Id*. at 485.

135. *Id.*

136. 388 U.S. 1 (1967).

137. Robert A. Pratt, *The Case of Mr. and Mrs. Loving: Reflections on the Fortieth Anniversary of* Loving v. Virginia, *in* FAMILY LAW STORIES 7, 14 (Carol Sanger ed., Foundation Press 2007).

138. *Griswold*, 381 U.S. at 486.

139. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

140. *See* ZIEGLER, *supra* note 22 .

will pick up there with *Roe* after looking back once again to see what factors were at play in Connecticut when contraception was a matter of state court jurisprudence. Through the machinations of state politics, we get a sense of what women faced locally in the 20th century, and—importantly—what they may face again in the 21st.

Connecticut's first contraceptive prohibition was enacted in 1879 and remained in place until 1965.[141] In 1940, the Connecticut Supreme Court quoted approvingly from a Massachusetts case regarding the "plain purpose" behind the prohibition: "to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender. . . a virile and virtuous race of men and women."[142] That is worth reading twice to see how much social control and perhaps social solidarity rests on depriving women of control over their fertility and family composition. It is also worth rereading for its resonance with the apotheosis of the Republican Family and reproductive patriotism in *Buck v. Bell*.

There was no wiggle room for any measure of reform. For example, as historian Mary Dudziak informs us, year after year, the legislature had the opportunity to accept a compromise measure.[143] It might, for example, have accepted a partial exception when a woman's life was at risk if she became pregnant.[144] But in an interesting form of reverse bootstrapping, because the legislature had never amended the statute, the Connecticut Supreme Court concluded that it was "[t]he manifest intention of the legislature" to have an "all-out prohibition" on contraceptives.[145]

The repeated inability of the Connecticut legislature to reform its unwaveringly strict birth control statutes was due to the role of religion—specifically the Catholic Church—in state politics.[146] Dudziak explains that the Church was so powerful that it didn't need to "openly enter" the periodic fights; without its active participation, "the legislators were fully aware of its position."[147] Later in the century, priests became more directly

141. *Connecticut and the Comstock Law*, CT HUMANITIES (Mar. 28, 2021), https://connecticuthistory.org/connecticut-and-the-comstock-law/.

142. State v. Nelson, 11 A.2d 856, 862 (Conn. 1940) (quoting Commonwealth v. Allison, 116 N.E. 265, 266 (Mass. 1917)); *see* Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before* Griswold v. Connecticut, 75 IOWA L. REV. 915, 926 (1990). Indeed, the Connecticut ban on contraceptives was "more restrictive" than that on abortion, "which allowed abortion when it was necessary to preserve a woman's life." *Id.* at 926.

143. Dudziak, *supra* note 142, at 925.

144. *Id.*

145. Tileston v. Ullman, 26 A.2d 582, 585 (Conn. 1942), *appeal dismissed*, 318 U.S. 44 (1943) (per curiam).

146. Dudziak, *supra* note 142, at 928.

147. *Id.* (citation omitted).

involved in defeating legislative attempts to ease birth control restrictions.[148] Not only were there anti–birth control sermons on Sundays, but the clergy participated in voter registration drives and supported anti–birth control candidates for the legislature.[149] After the Second World War, the Catholic War Veterans also prominently opposed reform legislation.[150] In 1948, "[t]he Reverend Austin B. Digman of Saint Mary's Church in Bethel told his parishioners that support for a candidate who favored reform of birth control laws 'would be a violation of the natural moral law which Catholics and the Catholic Church are duty bound to uphold and would be a direct violation of God's Sixth Commandment.'"[151] Indeed, religion permeated the Connecticut Legislature depending on the chamber.[152] The House, elected primarily by Protestants, often supported reform; but the Senate, with its "more heavily Catholic constituency,"[153] would defeat whatever came up.

In 1957 and 1958, Dr. Buxton, Fowler Harper (a Yale Law School professor), Estelle Griswold, and Catherine Roraback (a Connecticut attorney) began to plan a legal challenge to the birth control statutes.[154] The attorneys had to work from scratch, much like the inexperienced junior lawyers who, as we shall see, put together the complaint in *Roe v. Wade*.[155] As civil rights attorney Catherine Roraback recalled, "[a]t that time, in 1957 and 1958, public interest law as we now know it had not yet become an established part of our legal landscape; resort to the federal courts for civil relief from the impact of state criminal laws was not the usual practice."[156] Because the claims raised were basically the same as those raised in previous state cases, the Connecticut Supreme Court of Errors reaffirmed its ruling in an earlier case that, although contraceptives were "the best and safest preventive measure" for the plaintiffs, the legislature did not have to allow it when there was "another alternative, abstinence from sexual intercourse."[157]

148. *Id.* at 928–29.

149. *Id.* at 929 & n.96.

150. *Id.* at 928.

151. *Id.* at 929 (citation omitted).

152. *Id.* at 928–30.

153. *Id.* at 930.

154. *See* Catherine G. Roraback, Griswold v. Connecticut*: A Brief Case History*, 16 OHIO N.U. L. REV. 395, 396–97 (1989). Roraback notes, "Even for those of us who were there, it is hard to remember the attitudes toward birth control in the 1950's. The statutory prohibition . . . even [for] married persons was accepted by many as a legitimate exercise of the police powers of the state." *Id.* at 396.

155. *See* DAVID GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 605–31 (1998) (ebook).

156. Roraback*, supra* note 154, at 398.

157. Buxton v. Ullman, 156 A.2d 508, 514 (Conn. 1959), *appeal dismissed sub nom.* Poe v. Ullman, 367 U.S. 497 (1961).

In the court's view, the cases raised "an issue of public policy" reserved for the legislature.[158] Despite the occasional resulting hardship, the greater good would be served by leaving the statutes as they were. And it was clear where the hardship fell: Wealthier women could obtain a private prescription to be filled across state lines, but the absence of any public clinics left poorer women without the means to control their fertility or to protect their health.[159]

The U.S. Supreme Court's decision in *Griswold v. Connecticut* follows neatly upon *Skinner v. Oklahoma* in the trajectory of a developing reproductive right. The history of birth control legislation in Connecticut and local efforts to reform it seem largely a political story where no rights doctrine could draw the attention of the state's supreme court. As Dr. Buxton reported, women died as a result,[160] and it took the U.S. Supreme Court to save the day and the lives of women in the state. Now, however, *Griswold*'s more local Connecticut story reads less like an historical state/federal comparison than a premonition of what may become a broader post-*Dobbs* story across states.

II. The *Roe* Era: 1973–2022

A. Roe v. Wade (1973)

Right below the lead headline of the *New York Times* on January 23, 1973, announcing President Lyndon Johnson's death, a second headline also stretched across the front page. It read: *High Court Rules Abortions Legal the First 3 Months*.[161] And so began the public life of *Roe v. Wade*. That January date was the apex in the trajectory of the rise of the reproductive right to abortion, celebrated by pro-choice women who gathered in Washington, D.C., and decried by anti-abortion folks in their annual March for Life.[162]

In this section I want to draw attention to three aspects of the case. The first is simply its rationale, or the doctrine of privacy as articulated in *Griswold*. The second aspect is the holding, or the specific rules laid down by the case of how it would work in practice. Here the Court devised a

158. *Id.*

159. *See* Roraback, *supra* note 154, at 396–97; *see also* Harriet F. Pilpel, *Birth Control and a New Birth of Freedom*, 27 Ohio St. L.J. 679 (1966).

160. Dudziak, *supra* note 142, at 932.

161. Warren Weaver Jr., *High Court Rules Abortions Legal the First 3 Months*, N.Y. Times, Jan. 23, 1973, at A1. Other papers treated the decision with livelier copy: see Jeffrey Antevil, *Top Court Throws Out Abortion Bans*, N.Y. Daily News, Jan. 23, 1973, at 2; and the somewhat perplexing *Abortion Ruling: Mother Knows Best*, L.A. Times, Jan. 23, 1973, at 1.

162. *Compare* March for Life, https://marchforlife.org (last visited Oct. 20, 2022) *with History of Marches and Mass Actions*, Nat'l Org. for Women, https://now.org/about/history/history-of-marches-and-mass-actions/.

regulatory scheme that slotted pregnancy into a constitutional framework that was in effect for nearly 20 years. To foreshadow: We know that in 1992, *Roe* received permanent body blows from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[163] But one has to understand what *Roe* originally posited in order to understand how seriously the decision was compromised by *Casey* in 1992, and how in 2022 *Roe* and *Casey* were obliterated by the coup de grace from *Dobbs*. The third aspect, one I have been trying to trace in each phase of this trajectory, is the Court's characterization of the position of women with unwanted pregnancies and what it would mean, by the Court's light, not to have the right to choose.

So, to the beginning: Just prior to *Roe*, four states—New York, Hawaii, Washington, and Alaska—had enacted legal abortion statutes.[164] Then, in 1970, Jane Roe, described by the Supreme Court as "a single woman . . . residing in Dallas County, Texas," filed suit in federal court against Henry Wade, the elected district attorney of Dallas County and the man responsible for enforcing Texas's criminal abortion statute.[165] In her complaint, Roe stated simply that she was "pregnant; that she wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions'; that she was unable to get a 'legal' abortion in Texas" because her pregnancy did not appear to be life-threatening; and that she "could not afford to travel to another jurisdiction to secure a legal abortion. . . ."[166] Her legal claim was that "the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy. . . ."[167]

The Supreme Court, by Justice Harry Blackmun, ruled for Roe on the basis of a right to privacy. Acknowledging that "[t]he Constitution does not explicitly mention any right of privacy," it observed nonetheless that, in a line of cases going back to the late 19th century, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[168] The "roots of that right" were found by "the Court or individual Justices . . . in the First Amendment; in

163. 505 U.S. 833 (1992).

164. Julia Jacobs, *Remembering an Era Before* Roe *When New York Had the "Most Liberal" Abortion Law*, N.Y. Times (July 19, 2018), https://www.nytimes.com/2018/07/19/us/politics/new-york-abortion-roe-wade-nyt.html.

165. Roe v. Wade, 410 U.S. 113, 120 (1973). For more on how Norma McCorvey became Jane Doe, see Garrow, *supra* note 155; Norma McCorvey & Andy Meisler, I Am Roe: My Life, *Roe v. Wade*, and Freedom of Choice (1994); and Joshua Praeger, The Family Roe: An American Story (2021).

166. *Roe*, 410 U.S. at 120.

167. *Id.*

168. *Id.* at 152.

the Fourth and Fifth Amendments; in the penumbras of the Bill of Rights; in the Ninth Amendment; or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment."[169] These sources of privacy were, of course, drawn from the opinion in *Griswold*. The *Roe* Court further stressed that these earlier cases had their foundations in private realms of domestic intimacy, such as marriage, contraception, family relationships, and procreation.[170] Deciding to terminate a pregnancy fit into these deeply personal decisions that went to the core of family composition and individual autonomy.[171]

The second concern was how *Roe* was to work in the real world. In his analysis, Justice Blackmun correlated the stages of pregnancy to the growing interest of the state in the pregnancy as it develops.[172] He noted that the state has two interests in the pregnancy: the health of the mother and a form of respect owed to the developing fetus.[173] In the first stage (basically, the first trimester), the state has almost no interest in the mother's health due to the medically accepted safety of an early abortion.[174] Thus, in this initial period, the state has very little stake in the woman's decision: She may make the decision to terminate her pregnancy herself in consultation with her doctor.[175] In the second trimester, as the fetus grows and develops, the abortion procedure becomes more complicated and states may regulate in the interests of the mother's health.[176] Finally, at the point of fetal "viability" or potential to live outside the womb—considered at that time to be during the third trimester—the state's interest in the prenatal life becomes compelling in the constitutional sense and states may, if they choose, ban abortion all together, except where necessary to save the life or health of the woman.[177] (It is not too much of a spoiler alert to say that the trimester system with its constitutionally weighted state interests was wiped out in *Casey*, and we shall soon see what took its place.)

Anticipating a very different story in *Dobbs*, I want lastly to look at the *Roe* Court's description of what women may confront in the absence of the abortion right. The Court states in brief that:

169. *Id*. (internal citations omitted).
170. *Id.* at 152–53.
171. *Id.* at 153–56.
172. *Id.* at 114.
173. *Id*. at 159.
174. *Id.* at 163.
175. *Id.*
176. *Id.* at 163–64.
177. *Id.* at 160 ("Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."), 163–65.

> Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[178]

We have a picture then of the physical, social, financial, and familial factors that a woman or girl may well take into consideration in making her decision. These are hardly trivial concerns but engage the woman's entire family, including her existing children, her health, her present well-being, and her future aspirations. And although the list was composed in 1972, it seems apt 50 years later, no matter how many contrary assurances the *Dobbs* Court tosses our way.

B. Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

The final significant abortion case of the 20th century is *Casey*, though other cases between *Roe* and *Casey* were contenders for overturning *Roe*. The favorite for that achievement may have been *Webster v. Reproductive Health Services* in 1989.[179] Advocates on both sides anticipated that the case could ring the death knell for *Roe*.[180] But although in *Webster* the Supreme Court upheld the state's restrictions on government employees or facilities providing nontherapeutic abortions, and avoided ruling on a statutory preamble stating that "life . . . begins at conception," it declined the larger invitation by the appellants and the United States to overturn *Roe*.[181]

It took the case of *Casey*, decided three years later, to inch the law closer to that. Now, for those who have followed the abortion cases through the decades, it was possible to be confused in deciding where *Casey* should be plotted on the graph of the abortion right's rise and fall. This is because

178. *Id*. at 153.

179. 492 U.S. 490 (1989); *see* Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119 (1989). The arguments and analysis of the Estrich and Sullivan article bear surprising resemblance to the argumentation in *Dobbs* and the article is worth a 30-year retro look.

180. Estrich & Sullivan, *supra* note 179, at 121.

181. *Webster*, 492 U.S. at 504–07, 511, 521.

when *Casey* was decided in 1992, both camps of abortion advocates claimed a victory. Pro-choice advocates were elated that *Casey* had not overturned *Roe*, as parties, amici, and the U.S Solicitor General had urged.[182] The decision was therefore rightly celebrated: not only had *Roe* been upheld, but it was upheld on the basis of *stare decisis*, and by three center right members of the Court.[183]

On the other hand, *Casey* shook *Roe* to its roots. To begin, *Casey* endorsed a particular factual relationship between women and the fetus, one in which the Court had no doubt that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision."[184] Recall that in the first trimester of *Roe*, the Court was agnostic as to how the fetus might impact a woman's decision; indeed, the decision was between the woman and her doctor and the state itself could not intervene.[185] *Casey* concluded that in *Roe*, the Court had undervalued the importance of the state's interest in fetal life, a problem that it remedied by authorizing states to regulate abortion from the moment of conception.[186] As we shall see, *Dobbs* makes the fetus's impact dispositive, not relative; indeed, the decision is no longer the woman's to make in a state where abortion is illegal.[187]

A second and momentous change from *Roe* to *Casey* concerns the legal test that was to be used by courts to decide if a particular regulation on abortion was constitutional or not. *Casey* abolished the trimester analysis, which meant, among other things, that the state could now potentially regulate abortion from the moment of conception: The protected first trimester, which gave the state little or no interest in regulations, was gone.[188] To be sure, there had been nothing legally sacrosanct about trimesters; they served as a clunky but workable way to align constitutional doctrine within the schema of a developing pregnancy. Yet abandoning trimesters meant that some other marker for measuring the strength of the state's interest in prenatal life had to be found, for gone were the standard tiers of constitutional scrutiny used to assess governmental intrusion into other fundamental rights. In *Casey*, the Court rolled out a new test: measures that sought to "express profound respect for the life of the unborn" by persuading

182. Linda J. Wharton & Kathryn Kolbert, *Preserving* Roe v. Wade . . . *When You Win Only Half the Loaf*, 24 Stan. L. & Pol'y Rev. 143, 143–44, 148 n.32 (2013).

183. *Id.* at 143–44, 150–51; *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46, 854–69 (1992) (opinion of the Court).

184. *Casey*, 505 U.S. at 882 (opinion of O'Connor, Kennedy, & Souter, JJ.).

185. Roe v. Wade, 410 U.S. 113, 163 (1973).

186. *Casey*, 505 U.S. at 875–76 (opinion of O'Connor, Kennedy, & Souter, JJ.).

187. *See infra* Part III.

188. *Casey*, 505 U.S. at 875–78 (opinion of O'Connor, Kennedy, & Souter, JJ.).

women not to abort through a variety of state interventions were all right—were constitutional—so long as they did not create an "undue burden" on the right to choose to have an abortion before the fetus was viable.[189] To repeat: *Casey* wrought the end of the trimester analysis of *Roe*, replacing the test for the constitutionality of a contested abortion regulation with the new "undue burden test."[190]

Casey further defined "undue burden" to give the new test some substance. A regulation created an undue burden (and was therefore unconstitutional) if it "ha[d] the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[191] Consider similar state regulations decided first under *Roe* and then under *Casey*, such as disclosures to the pregnant woman about fetal appearance. In a 1986 case called *Thornburgh v. American College of Obstetricians & Gynecologists*, the Supreme Court struck down required disclosures of the likely gestational age of the fetus. Printed disclosure materials describing the fetus were also struck down on the ground that they were not medical in nature and were simply presented "[u]nder the guise of informed consent" to encourage women to think of their fetuses as infants.[192] However, in the *Casey* case, reviewing a disclosure quite similar to that in *Thornburgh*, the Supreme Court just six years later decided that the fetal appearance disclosures were perfectly fine. Stated the Court, to the extent that *Thornburgh* had found constitutional violations in such disclosures, it had gone "too far" and was overruled.[193] Indeed, the *Casey* Court upheld all the restrictions challenged in the case but one, requiring that wives generally had to notify their husbands about their intent to get an abortion.[194] The Court decided that in light of social science evidence about domestic violence, the spousal consent requirement might really place a substantial obstacle in a woman's path.[195]

But if *Casey* so dramatically *changed*—cut back on—the analysis a court was to apply from that in *Roe*, how did *Roe* and *Casey* become besties in the run-up to *Dobbs*? The two were constantly mentioned as a pair, in one breath, particularly in the discussion of *stare decisis*. The

189. *Id.* at 877.

190. *Id.* at 877–79.

191. *Id.* at 877.

192. 476 U.S. 747, 760–63 (1986). The materials included the "probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from fertilization to full term. . . ." *Id.* at 761 (citation omitted).

193. *Casey*, 505 U.S. at 882 (opinion of O'Connor, Kennedy, & Souter, JJ.).

194. *Id*. at 893–94 (opinion of the Court).

195. *Id.* at 887–94.

answer is that even with all its revisionist treatment of *Roe*, by upholding the "central holding of *Roe*," *Casey* stood for the proposition that as with *Roe*, abortion was still legal; at least before fetal viability, it could still not be criminalized.[196] Therein lay the truly devastating risk inherent in the *Dobbs* decision for pro-life advocates: that the decision might whittle back *Roe* even further than *Casey* had done—perhaps by approving a pre-viability cutoff for abortion, at say 15 or even six weeks—without allowing states to reassign abortion generally to the realm of crime. (Indeed, this was exactly what Chief Justice Roberts would have done in his concurrence of one.[197] He would have upheld the Mississippi law generally banning abortions after 15 weeks, thereby overturning the viability requirement of *Roe*, but without reversing *Roe* itself.[198])

Yet for our purposes here, *Casey* remains extremely important. That is because it fills in even more details at the Supreme Court level of analysis of the relation between women's lives and reproductive regulation, specifically the right first laid out in *Roe* of the right to choose abortion. The facts that the Supreme Court highlights in *Casey* are not some measly dicta that can be ignored, but, rather, they are a part of the core discussion on *stare decisis*, as the Court examines the extent to which women have come to rely on the holding in *Roe.* Indeed, the Court supports the importance of reliance not merely for individual cases of relying on abortion but in a larger societal sense of behavior:

> To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.[199]

196. *Id.* at 853, 879; Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2241 (2022).

197. *Dobbs*, 142 S. Ct. at 2310–17 (Roberts, C.J., concurring in the judgment). *Compare Casey*, 505 U.S. at 871 ("The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.") (opinion of O'Connor, Kennedy, & Souter, JJ.), *with Dobbs*, 142 S. Ct. at 2312 (Roberts, C.J., concurring in the judgment) ("The viability line is a relic of a time when we recognized only two state interests warranting regulation of abortion: maternal health and protection of 'potential life.'").

198. *Dobbs*, 142 S. Ct. at 2313–14.

199. *Casey*, 505 U.S. at 856 (opinion of the Court).

Put simply, the ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.[200] This differs hugely from *Dobbs*, where we shall see the Court suggests a kind of reliance by pregnant women on federal and state welfare provisions that help them get by with their unwanted pregnancies.[201] In contrast, *Casey* describes the relation between women's market participation and women's ability—their right—to control their own fertility.[202] Justice Alito has little time for sex equality as being of interest in a future analysis of an abortion right.[203] But the link between reproductive rights and human equality is not at all beside the point. It *is* the very point that leads to—if not produces—equality.

C. Whole Woman's Health v. Hellerstedt (2016)

One sees that *Casey* made it much harder to overturn an abortion regulation intended to make abortion harder to get. The case had broadened the scope of what counted as a justifiable interest of the state in protecting fetal life, or maternal health (to include a woman's mental as well as physical health, thus opening the door to such justifications as unproven concerns about suicide).[204] Thus, the last case I want to introduce before our trajectory of a reproductive right collapses is called *Whole Woman's Health v. Hellerstedt*.[205] I am particularly fond of the case because it regards women not as weak-minded ninnies who do not understand what an abortion is or what is in their own best reproductive interest. Instead, the case treats women as patients deserving of good treatment.

The case involves two provisions of Texas legislation. The first provision required all abortion providers to have their facilities operate on par with ambulatory surgical centers, so as to include a post-surgical suite, corridors wide enough to accommodate passing gurneys, and an increased nurse-to-patient ratio, among other things.[206] Such renovations and revisions were costly and would have forced some licensed clinics to close.[207] The second

200. Rosalind Pollack Petchesky, Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom 109, 133 (rev. ed. 1990).

201. *Dobbs*, 142 S. Ct. at 2258–59.

202. *Casey*, 505 U.S. at 894–97 (opinion of the Court).

203. *Dobbs*, 142 S. Ct. at 2245–46.

204. *Casey*, 505 U.S. at 883 (opinion of O'Connor, Kennedy, & Souter, JJ.).

205. 136 S. Ct. 2292 (2016).

206. *Id.* at 2300, 2314–15.

207. *Id.* at 2301–03, 2316*; see also* Alexa Ura, *State Officials Note Significant Drop in Texas Abortions*, Tex. Trib. (Mar. 17, 2016), https://www.texastribune.org/2016/03/17/number-abortions-performed-texas-continues-drop/. The ambulatory surgical center requirement was enjoined before it took effect. *Whole Woman's Health*, 136 S. Ct. at 2301–03; *see* Ura, *supra*.

provision required all abortion providers to have admitting privileges at a hospital within 30 miles of their clinic.[208] The district court determined that "as of the time the admitting-privileges requirement began to be enforced, the number of facilities providing abortions dropped in half, from about 40 to about 20."[209] Among other challenges to meeting this requirement, hospitals didn't like to grant privileges to physicians unlikely to use them, and "the fact that abortions are so safe meant that providers were unlikely to have any patients to admit."[210] (It was also the case that a fair number of Texas hospitals and community members opposed both the procedure and the providers of abortion, which also impacted the ability of clinics to meet the admitting privileges requirement.)[211] The inability of clinics to meet these new regulations meant that more clinics closed and women seeking abortion had to travel substantially greater distances for medical care.[212]

Did this kind of burden—increased travel distance, time, and cost—rise to the level of an "undue burden" so that the obstacle placed on women seeking an abortion should be considered substantial and be struck down as a violation of the U.S. Constitution?[213] In his decision for the Court, Justice Breyer answered the question with a confident "Yes."[214] What was important about *Whole Woman's Health* was that Breyer interrogated the state's argument carefully. The two provisions were advertised as improving health care for pregnant women, and on face value, they may seem to do so. How can one dispute the health value of more equipment or a doctor with admitting privileges at a nearby hospital in contrast to one without? The answer was to examine how these provisions worked on the ground, and careful fact finding by the district court showed the *pretextual* nature

208. *Whole Woman's Health*, 136 S. Ct. at 2300, 2310.

209. *Id.* at 2312*; see also* Ura, *supra* note 207.

210. *Whole Woman's Health*, 136 S. Ct. at 2312.

211. *See id.* (citing amicus brief by Planned Parenthood Federation of America et al. "noting that abortion facilities in Waco, San Angelo, and Midland no longer operate because Planned Parenthood is 'unable to find local physicians in those communities with privileges who are willing to provide abortions due to the size of those communities and the hostility that abortion providers face'") (quoting Brief of *Amici Curiae* Planned Parenthood Fed. of Am. et al. at 14, *Whole Woman's Health* (No. 15-274)); *cf. id*. (noting that a clinic doctor "who estimates that he has delivered over 15,000 babies in his 38 years in practice was unable to get admitting privileges at any of the seven hospitals within 30 miles of his clinic").

212. *Whole Woman's Health*, 136 S. Ct. at 2313.

213. *See* Madeline M. Gomez, *More Than Mileage: The Preconditions of Travel and the Real Burdens of H.B.2*, 33 COLUM. J. GENDER & L. 49 (2016); Madeline M. Gomez, Note, *InterSections at the Border: Immigration Enforcement, Reproductive Oppression, and the Policing of Latina Bodies in the Rio Grande Valley*, 30 COLUM. J. GENDER & L. 84 (2015).

214. *Whole Woman's Health*, 136 S. Ct. at 2300.

of the law.[215] The actual impact of the provisions was to cause clinics to be shuttered since they could not comply.[216] But compliance would not have improved health care for abortion patients. That is because abortion is such a simple procedure that it does not require the high-tech machinery of an ambulatory surgical center.[217] Nor does a doctor need privileges to a local hospital to treat a patient in distress. That is because *any* patient can seek emergency room care even without special privileges for their physician.[218] In short, as the opinion made clear:

> [I]n the face of no threat to women's health, Texas seeks to force women to travel long distances to get abortions in crammed-to-capacity superfacilities. Patients seeking these services are less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered.[219]

What is so encouraging about this excerpt is that it treats pregnant women as deserving of high-quality health care and shows that the supposed advantages of the Texas law were but sleights of hand—that they sounded medically advanced but in fact were not. It is that aspect of integrity in examining the facts of the case that made *Casey* less threatening for future cases. The Supreme Court was insisting that *Casey* was not a rubber stamp but required that rules be measured against their own claims of achievement, and should they fail in that regard, the rules would not be waived through for courtesy's sake.[220]

Of course, the victory of *Whole Woman's Health* was short-lived, soon to be wiped away with the decision in *Dobbs*. But without getting too romantic about *Whole Woman's Health*, it was at least a decision where the Supreme Court took reproducing women seriously and insisted that with

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215. Michael Dorf, *The Wages of Guerrilla Warfare Against Abortion*, SCOTUSBLOG (June 27, 2016), https://www.scotusblog.com/2016/06/symposium-the-wages-of- guerrilla-warfare-against-abortion/.

216. *See* Ura, *supra* note 207.

217. As Justice Breyer notes, "Requiring scrub facilities; maintaining a one-way traffic pattern through the facility; having ceiling, wall, and floor finishes; separating soiled utility and sterilization rooms; and regulating air pressure, filtration, and humidity control can help reduce infection where doctors conduct procedures that penetrate the skin. App. 304. But abortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile." *Whole Woman's Health*, 136 S. Ct. at 2315–16.

218. *Id.* at 2311.

219. *Id.* at 2318.

220. *Id.* at 2309 ("The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.").

sufficient reliable proof as to the actual effect of anti-abortion legislation, such legislation could and would be struck down. *Casey* was no longer a master stamp. The value of *Whole Woman's Health* was rather short-lived, receiving the final kibosh from *Dobbs*. And while not quite a "Camelot moment,"[221] I do remember that June 27, 2016, was a splendid day.

III. The *Dobbs* Era: 2022–[Unknown]

And so we arrive at last at *Dobbs v. Jackson Women's Health Organization.* Having sketched the rise of the abortion right, it is time now to consider its fall. Mississippi was one of the many states vying for the honor of toppling *Roe*; legislatures competing for the prize sought it by enacting legislation that was clearly—defiantly—unconstitutional.[222] Of the many options—restrictions on types of abortion procedures, legislatively disfavored reasons for an abortion, and so on, unconstitutional pre-viability bans won the day. *Roe*, as affirmed by *Casey*, had set the chronological marker for banning abortion at viability, now medically considered at around 24 weeks,[223] approximating the time when a fetus can survive outside the womb, even with assistance.[224] The pro-life strategy was that when a pre-viability (or other) unconstitutional enactment came under review by the right Supreme Court—one with a clear conservative majority—the Court would nod at whatever legislation was on appeal before it, but would also do the real and serious work of reassessing *Roe* and *Casey*, and overrule them both.[225]

The strategy required patience regarding waiting out the Court's changing composition. During the first two years of the Trump administration, Justice Gorsuch was appointed to replace Justice Scalia, who had died nine months before the 2016 election; and Justice Kavanaugh replaced Justice Kennedy, who retired. But it took the death of Justice Ginsburg in September 2020

221. "Don't let it be forgot/ that once there was a spot/ for one brief shining moment/ that was known as Camelot." Alan Jay Lerner, *Camelot Reprise*, *in* Camelot (1960).

222. Zernike, *supra* note 16; Kate Zernike, *How Did Roe Fall?*, N.Y. Times (June 25, 2022), https://www.nytimes.com/interactive/2022/06/25/us/how-roe-ended.html.

223. Sumesh Thomas & Elizabeth Asztalos*, Gestation-Based Viability—Difficult Decisions with Far-Reaching Consequences*, 8 Children 593 (2021), https://doi.org/10.3390/children8070593 ("In the 1960s, delivery before 28 weeks completed gestation was considered 'previable'; however, by the 1990s, about 50% of babies born at 24 weeks survived with neonatal intensive care. Over the last two decades, further improvements in survival and functional outcomes of babies born at 24 weeks gestation has led to parents and care providers to offer active interventions for babies born at 23 and 22 weeks of gestational maturity.").

224. At the time of the *Roe* decision, viability was generally put at 28 weeks. Roe v. Wade, 410 U.S. 113, 160 (1973).

225. Zernike, *How Did Roe Fall?*, *supra* note 222.

to provide the tipping seat.[226] In a trice, President Trump nominated Judge Amy Coney Barrett, who, following a Rose Garden announcement, scooted through her Senate confirmation hearing and was sworn in on October 26, 2020.[227] Even with a discount for Chief Justice Roberts, an unreliable vote, a fixed majority of 5–3 was assured, with only Breyer, Sotomayor, and Kagan left to hold up their side.

With the newly composed Court coming into view, state legislators enjoyed newfound confidence in their strategy of the last few years and began enacting unconstitutional legislation by the ream. Perhaps the simplest were pre-viability bans—including the Mississippi ban on abortions after 15 weeks that was challenged in *Dobbs*.[228] (It is worth remembering that while the legal challenges were wending their way through state and federal courts, statutes that were not enjoined continued to reduce the number of abortions performed in any particular state.[229] This was always part of the goal of having an abortion-free country: not just legally but in fact.)

With Mississippi having won the race to the Court, I want now to approach the opinion in *Dobbs* from two intertwining perspectives. The first is the legal holding and rationale. The second is the Court's use of facts in its discussion of reliance on *Roe* as a possible ground for sustaining *Roe* and *Casey* under the doctrine of *stare decisis*. The argument I lay out is that there is a disturbing dissonance between the Supreme Court's use of social facts and its holding in *Dobbs*. Justice Alito's description of women and their use of law, particularly, does not easily map onto actual data about pregnant women today. Thus, the decision that brings the downfall of *Roe*—with a solid warning shot over the bow of contraception—aligns more with moral or religious or even fanciful beliefs about how women's

226. *See Current Members*, *supra* note 20; *Justices 1789 to Present*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx.

227. *Oath Ceremony: The Honorable Amy Coney Barrett*, SUPREME CT. OF THE U.S., https://www.supremecourt.gov/publicinfo/press/oath/oath_barrett.aspx (last visited Oct. 23, 2022).

228. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (noting that Mississippi's statute "generally prohibits an abortion after the 15th week of pregnancy—several weeks before the point at which a fetus is now regarded as 'viable' outside the womb"); *see State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (as of Aug. 17, 2022), https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions. Bans were also enacted on specific abortion procedures. *Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INST. (Aug. 1, 2022), https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester.

229. *See* Isaac Maddow-Zimet & Kathryn Kost, *Even Before* Roe *Was Overturned, Nearly One in 10 People Traveled Across State Lines for Care*, GUTTMACHER INST. (July 21, 2022), https://www.guttmacher.org/article/2022/07/even-roe-was-overturned-nearly-one-10-people-obtaining-abortion-traveled-across.

reproductive behavior and life choices ought to be rather than how they are in the real world of American life.

To take the law first, Justice Alito began by assuring readers that there was no judicial wiggle room in this case to consider the other side.[230] He and four other conservative judges could not have ruled otherwise; their hands were tied: "*Roe* and *Casey* must be overruled. . . ."[231] (Note that Chief Justice Roberts's concurrence in the judgment belies Alito's imperative; Roberts would have upheld Mississippi's 15-week ban and would *not* have overruled the two fundamental cases.)[232] Alito gave two reasons for his absolutism. First, *Roe* was "egregiously wrong."[233] Second, *Casey* "does not compel unending adherence" to *Roe*,[234] never mind that such adherence, also known in law as "following precedent," is generally thought to be a good thing, an inherent aspect of the rule of law.

Justice Alito's egregiousness point focuses on the fact that the word "privacy," from which the abortion right is derived, is not itself in the text of the Constitution.[235] Alito quotes Professor John Hart Ely's early criticism of *Roe* that the decision "[wasn't] constitutional law and g[ave] almost no sense of an obligation to try to be."[236] This lack does not distress these jurists, scholars, and advocates well satisfied that while the word "privacy" may be absent, the *principle* of privacy is found throughout the Constitution in an array of explicit protections, set out in both *Griswold* and *Roe* as including the First, Fourth, Fifth, Ninth, and 14th Amendments.[237] Of course, abolishing a right to privacy as the means of overturning *Roe* sets the stage for the dispiriting doctrinal work *Dobbs* has already been teed up to do in the post-*Roe* world with regard to any doctrine or right based in the now-vanquished right to privacy. Despite Justice Alito's assurance that *Dobbs* has no application beyond abortion,[238] Justice Thomas already announced in his *Dobbs* concurrence that "we should reconsider all of this Court's substantive due process [privacy] precedents. . . ."[239]

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230. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2279 (2022).

231. *Id.*

232. *Id.* at 2314 (Roberts, C.J., concurring in the judgment); *see supra* note 197 & accompanying text.

233. *Dobbs*, 142 S. Ct. at 2265 (majority op.).

234. *Id.* at 2243.

235. *Id.* at 2245.

236. *Id.* at 2270.

237. Consider Ronald Dworkin on principles: Ronald Dworkin, *The Model of Rules*, 35 U. Chi. L. Rev. 14 (1967).

238. *Dobbs*, 142 S. Ct. at 2258.

239. *Id.* at 2301 (Thomas, J., concurring).

The absence of specific words in the Constitution does much to sustain Justice Alito's conviction that *Roe* is rotten and ill-fated. Indeed, the justice goes beyond the standard criticism that the word "privacy" is missing to highlight that the word "abortion" has also gone AWOL.[240] But *of course* the word "abortion" is missing from our founding document. The Constitution is not an index listing every human activity that a state might address. Many topics or categories go unmentioned, but this has not deterred the Court from adjudicating where such things or activities—television, vaccinations, political parties, or vasectomies—fit into our constitutional order and the protection of rights.

But importantly for the analysis here, there is another word that is not in the Constitution, and it is "women" (not even in the 19th Amendment).[241] I argue here that "women" are also missing from the decision in *Dobbs* and that where they might appear, we get instead a fanciful account by Justice Alito of how the legal system protects the subcategory of unhappily pregnant women. The argument is introduced in a section explaining the pro-choice argument. It is that "[w]ithout the availability of [legal] abortion . . . people will be inhibited from exercising their freedom to choose the types of relationships they desire, and women will be unable to compete with men in the workplace and in other endeavors."[242] To this, Justice Alito responds with a legalistic form of Balderdash! He notes that pro-life Americans ("Americans who believe that abortion should be restricted") have observed a drastic change in attitudes to the pregnancies of unmarried women.[243] Consider that pregnancy discrimination is now banned by federal law;[244] that pregnancy leave is now guaranteed in many circumstances;[245] that medical care is covered by insurance (for some);[246] and that "safe haven" laws provide unwed mothers with a wholesome place to drop off

240. *Id*. at 2245.

241. *See* U.S. Const. amend. XIX. As the *Dobbs* dissenting justices wrote, "'[P]eople' did not ratify the Fourteenth Amendment. Men did." *Dobbs*, 142 S. Ct. at 2324 (Breyer, Sotomayor, & Kagan, JJ., dissenting).

242. *Dobbs*, 142 S. Ct. at 2258.

243. *Id.*

244. *Id.*

245. *Id.* at 2258–59. *But see* Kristin M. Malone, Note, *Using Financial Incentives to Achieve the Normative Goals of the FMLA*, 90 Tex. L. Rev. 1307, 1308 (2012) ("Of primary significance, women still take [Family and Medical Leave Act] caretaking leave much more frequently than men do, and as a result, women continue to face stereotypes that hinder their professional advancement and keep men in superior and more stable positions in the workforce. The FMLA may in some cases even function to entrench these differences by recreating and validating social and market incentives for women to shoulder the burden of family responsibilities.").

246. *Dobbs*, 142 S. Ct. at 2259.

their newborns.[247] Indeed, the justice reminds us that there are plenty of couples who want to adopt newborn babies today.[248] This paints a picture of a sort of *Mister Rogers' Neighborhood*, or Justice Alito's, for unwed mothers where there isn't much to worry about during pregnancy or after, for that matter, and where everyone just wants to be your friend, especially the state and federal governments.

While this picture focuses primarily on economic security for pregnant women and new mothers, Justice Alito's citations lead us to the appropriate statutes but are not an accurate picture of economic life for these overstressed women and girls. Seventy-five percent of U.S. abortion patients are poor or of low income.[249] Restrictions on public and private insurance coverage for abortion services at both the federal and state levels prevent many from obtaining the coverage they need.[250] While the United States in general ranks poorly on standard measures related to maternal support and child outcomes, a state-by-state post-*Dobbs* survey shows that in the states most likely to ban abortion, the rates of uninsured women and maternal deaths are among the highest in the country and that no state with a ban has guaranteed paid maternity leave.[251] The researchers had posed the question, "What it's like to have a baby in the states that will ban abortion?" The empirical answers suggest "Not good," "Not easy", "Not *Dobbs*ian."

And finally, here are a few words on the introduction of Safe Haven laws in *Dobbs* as a panacea for a woman who might choose to abort rather than gestate, deliver, and give up her baby.[252] The issue of Safe Havens—a crisis form of adoption where in order to resist the impulse of smothering or disposing a newborn in a dumpster, the just-delivered mother is urged to bring the infant to a fire station or other officially designated location—first emerged in the oral argument in *Dobbs*. Justice Barrett asked the attorney for Jackson Women's Health whether, "insofar as you . . . focus on the ways in which forced parenting, forced motherhood, would hinder women's access

247. *Id.*

248. *Id.*

249. Jenna Jerman et al., Guttmacher Inst., Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008, at 7 (May 2016), https://www.guttmacher.org/sites/default/files/report_pdf/characteristics-us-abortion-patients-2014.pdf.

250. Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 Guttmacher Pol'y Rev. 46 (2016), https://www.guttmacher.org/sites/default/files/article_files/gpr1904616_0.pdf.

251. Amy Joyce & Lauren Tierney, *What It's Like to Have a Baby in the States That Will Ban Abortion*, Wash. Post (May 6, 2022; updated July 1, 2022, 5:22 PM EDT), https://www.washingtonpost.com/parenting/2022/05/06/support-in-states-banning-abortion/.

252. *See* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 Colum. L. Rev. 753 (2006).

to the workplace and to equal opportunities . . . [w]hy don't the safe haven laws take care of that problem?"[253] The thrust of the justice's question is this: If the mother can avoid the obligations of childrearing by legally disposing of the infant anonymously and with impunity, then abortion should not be necessary to avoid "forced motherhood."[254] But in fact, the Safe Haven procedure is filled with uncertainty for mother and babe especially when compared with the orderly and regulated process of adoption to which some pregnant women turn. In contrast, women may choose the Safe Haven option after they have gone into labor.[255] Throughout her pregnancy, the woman has forgone prenatal care because she didn't want anyone to know she was pregnant.[256] She delivers the baby by herself in whatever circumstances

253. Justice Barrett's question in full was:

So Petitioner points out that in all 50 states, you can terminate parental rights by relinquishing a child after [birth], and I think the shortest period might have been 48 hours if I'm remembering the data correctly.

So it seems to me, seen in that light, both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women's access to the workplace and to equal opportunities, it's also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy.

Why don't the safe haven laws take care of that problem?

Transcript of Oral Argument at 56, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392); *see also* Tayler Simone Mitchell, *Justice Amy Coney Barrett Questions Whether Adoption Laws Could Eliminate the "Burden" of Parenthood for Abortion Seekers*, Insider (Dec. 6, 2021), https://www.businessinsider.com/amy-coney-barrett-asks-safe-haven-laws-solutions-unwanted-motherhood-2021-12 (explaining Barrett's question).

254. Under the "safe haven option," the woman's obligation is arguably limited to gestation and labor and delivery. In response, the lawyer for Jackson Women's Health explained that pregnancy itself carries its own risks and burdens outside of parenting, a consideration that was available to the Court at the time of *Roe* and *Casey* (even though Safe Haven laws may not have existed when *Casey* was decided). Transcript of Oral Argument, *supra* note 253, at 57–58. See also Solicitor General Elizabeth Prelogar's response to similar questions from Justice Barrett:

I think where the analysis goes wrong in reliance on those safe haven laws is overlooking the consequences of forcing a woman upon her the choice of having to decide whether to give a child up for adoption. That itself is its own monumental decision for her.

And so I think that there's nothing new about the safe haven laws, the—or—or at least nothing new about the availability of adoption as an alternative. *Roe* and *Casey* already took account of that fact. And I think that there are certainly, of course, all of the—the bodily integrity interests that we've referred to, but, also, the autonomy interests retain in force as well. . . .

And I think, for many women, that is an incredibly difficult choice, but it's one that this Court for 50 years has recognized must be left up to them based on their beliefs and their conscience and their determination about what is best for the course of their lives.

Id. at 109–10 (internal question omitted).

255. *See* Sanger, *supra* note 252, at 800.

256. *See id.* at 789–90; Laury Oaks, Giving up Baby: Safe Haven Laws, Motherhood, and Reproductive Justice 120 (2015).

provide her with privacy, often without hygiene or assistance.[257] (Unassisted labor is one factor in maternal mortality or injury.)[258] Police sometimes track down the surrendering mother, thus violating the statute's pledge of anonymity.[259] In most cases, no information is taken about the parents' medical history, so the child or its adopted family has no information on the child's medical history or ethnicity or the identity of the parents.[260] Indeed, because the infant is supposed to be turned in secretly, there is also no way to show that it was even the mother herself who brought the baby in, thus casting doubt on the voluntariness of the surrender. The opinion in *Dobbs* takes no account of these serious factors so key to a proper adoption. As we can imagine, it may well be hard to decide what to do when one is unhappily pregnant. But the removal of lawful abortion as one of the options is a troubling, indeed tragic loss.

During the 50 years since *Roe*, and particularly after *Casey* became part of the canon, abortion has become harder to get—harder physically, financially, legally, and perhaps emotionally—in many states. Nonetheless, its basic legality and therefore its safety were secure everywhere. That is now otherwise. Pregnant girls and women in "illegal" states who determine that terminating their pregnancy is the best course for them at this moment will now follow in the steps of their post-war grandmothers and others who sought abortions before 1973. Women with "contacts" and resources will be able to obtain abortions from licensed doctors in the United States who perform them surreptitiously, some as a matter of conscience and some for pay or profit.[261] Assuming there are no applicable exceptions in their otherwise "illegal" state, still other women will have to travel, plan, and borrow to arrange for an abortion in a "safe" state, perhaps risking arrest upon return to their home state, although state law hasn't quite worked out the problem of extraterritoriality yet.[262] Still other pregnant women, unable

257. *See* Oaks, *supra* note 256, at 120; Sanger, *supra* note 252, at 795.

258. *Maternal Mortality*, World Health Org. (Sept. 19, 2019), https://www.who.int/news-room/fact-sheets/detail/maternal-mortality.

259. *See* Oaks, *supra* note 256, at 137–38, 140; Annette Baran, Evan B. Donaldson Adoption Inst., Unintended Consequences: "Safe Haven" Laws Are Causing Problems, Not Solving Them (2003).

260. *See* Sanger, *supra* note 252, at 771; Oaks, *supra* note 256, at 23, 25.

261. *Compare* Carole E. Joffe, Doctors of Conscience: The Struggle to Provide Abortion Before and After *Roe v. Wade* (1995), *with* Leslie Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867–1973 (1997).

262. While Justice Kavanaugh wrote in his concurrence that a state could not "bar a resident of that State from traveling to another State to obtain an abortion" because of "the constitutional right to interstate travel," the majority did not address this issue. *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring).

or unwilling to arrange an abortion, will continue their pregnancies, deliver their babies, and keep them or place the infant for adoption, hopefully in the latter case having organized this option ahead of time with a licensed adoption service in order to receive the benefits of prenatal care for their baby and increased agency over their decision for themselves.

Finally, to get the full picture of the constitutional scheme *Dobbs* leaves in place, we must return to the matter of what test is to be used by courts to decide the constitutionality of abortion regulations in states where abortion remains legal but is heavily regulated, as was the case in many states under *Roe*. Let us say that a state enacts a three-week chronological time limit from the moment of conception during which abortion can be performed. Assume now that a pregnant woman challenges that regulation because three weeks doesn't give a woman enough time to know if she even is pregnant. Under the now-defunct *Casey* undue burden test, one can see the argument that three weeks might indeed place a substantial obstacle in a woman's path to obtain an abortion. But *Casey*, and with it the undue burden test, is now defunct courtesy of *Dobbs*.

What to do? Have we come full circle? Certainly not, for as Justice Alito states, procuring an abortion is no longer "a fundamental constitutional right because such a right has no basis in the Constitution's text or in our Nation's history."[263] Therefore, the rational relationship test applies, not strict scrutiny. This means that the challenged regulation "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests."[264] Because these "legitimate interests include respect for and preservation of prenatal life at all stages of development,"[265] a three-week chronological ban would seem within constitutional bounds. Thus, while there is a test to apply, its application has been neatly jiggered so that it is hard to think of a regulation that falls outside a legislator's notion of a reasonable state interest.

While we cannot now know the numbers of babies that will be born in consequence of *Dobbs*, it seems likely that as abortion becomes criminalized in many or most circumstances in, say, half the American states,[266] more women will keep and raise their children themselves. Is it possible to know how these women and girls will think about their decisions? Some may be unable to negotiate or to afford the process of obtaining an out-of-state

263. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283 (2022).

264. *Id.* at 2284.

265. *Id.*

266. *See Tracking the States Where Abortion Is Now Banned*, N.Y. TIMES (updated Dec. 12, 2022), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html.

abortion.[267] Others may be able to obtain the oral abortion pill through the U.S. mails.[268] Such "self-managed abortions" may distance unhappily pregnant women today from their sisters of 50 years ago who faced more isolated and often dangerous paths to a safe abortion, what one historian called "lonely, tragic, but . . . necessary pilgrimages."[269]

There are, however, some data—a few voices—from the *Roe* period. For this information, we can turn to an important 2020 study of two categories of women who sought abortions during the *Roe* years: The first were those who missed the chronological cutoff under their states' regulatory schemes and were "turned away" from abortion clinics; the second, those during that same period who fell within the legal chronological guidelines and received the legal abortions they sought.[270] Over the course of three years, from 2008 to 2010, Turnaway Study researchers recruited over 1,000 pregnant women from 30 abortion clinics in 21 states.[271] The Turnaway Study gives us some sense of how women and their infants fare and how women feel when they are unable to get the abortion they seek, thus proceeding into their futures as mothers.

The study found that "[f]or every outcome we analyzed, women who received an abortion were either the same or, more frequently, better off than women who were denied an abortion."[272] Their financial and employment situations were better, as well as their physical health.[273] They had more aspirations and a greater chance of subsequently "having a wanted pregnancy and being in a good romantic relationship. . . ."[274] Moreover, their existing children were better off, too.[275] In contrast, women who carried an unwanted pregnancy to term were more often hurt in a number of ways when compared

267. The Ezra Klein Show, *We're on the Precipice of a Post-*Roe *World*, N.Y. Times (Sept. 21, 2021) (interview with Leslie Reagan) ("The people who will be most hurt are the ones who don't have much information, don't have access to it, don't have money, and we will see struggles to raise the money to go out of state or go to Mexico.").

268. Pam Belluck, *F.D.A Will Permanently Allow Abortion Pills by Mail*, N.Y. Times (Dec. 16, 2021), https://www.nytimes.com/2021/12/16/health/abortion-pills-fda.html.

269. Beth Palmer, *Lonely, Tragic, but Legally Necessary Pilgrimages: Transnational Abortion Travel in the 1970s*, 92 Canadian Hist. Rev. 638 (2011) (discussing travel from Canada to the United States).

270. Diana Greene Foster, The Turnaway Study: Ten Years, a Thousand Women, and the Consequences of Having—or Being Denied—an Abortion (2020).

271. *Id.* at 16. "At each site, for every woman denied the abortion, [the Study] recruited two women who received an abortion just under the gestational limit and one who received an abortion in the first trimester." *Id.*

272. *Id.* at 21.

273. *Id.*

274. *Id.*

275. *Id.*

with the "women who received their wanted abortions"[276]: larger physical health risks, complications from delivery, increased anxiety, and economic hardship.

In time, of course, more economists, sociologists, and child development specialists will be armed with more data as more pregnant women will be "turned away" in likely response to shorter periods of legal abortions in states that so choose to enact them. We will then have access to the "empirical question" that Justice Alito emphatically told us was so particularly hard for judges to assess: that is, "the effect of the abortion right on society and in particular on the lives of women."[277]

At present, researchers have recorded sustained narratives from women who fell in both categories: those who turned down motherhood, at least for the present, and terminated their pregnancies, and those whose unwanted pregnancies continued to term as the law required. One finding was that all of these women seem keenly aware of the effect or absence of legal abortion on their lives. Turnaway Study Director Diana Greene Foster put it this way: "The Turnaway Study brings powerful evidence about the ability of women to foresee consequences and make decisions that are best for their lives and families."[278] In contrast, Justice Alito badly underestimates—or perhaps is simply not interested in—women's abilities to assess the meaning of motherhood for their lives and for their families. But that is only part of the explanation.

To honor the difficulties and the fortitude of those who will now live and reproduce under *Dobbs* rules, I would like to end this article by presenting a December 2021 article called "The Abortion I Didn't Have," by author Merritt Tierce.[279] Tierce presents a viewpoint rarely floated in discussions of abortion: the impact on the life of someone who chose not to abort an unwanted pregnancy, even though it was legal at the time to do so. Those circumstances make the story richer since she had the law on her side and yet chose against it. Tierce is a writer, scriptwriter, novelist, and mother of two.[280] Twenty years ago, Tierce, who was devoutly religious, had just graduated from a Christian liberal arts college in Texas, was heading to Yale Divinity School for a Master's degree in religion and literature, and was

276. *Id.* at 21–22.

277. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277 (2022) ("That form of reliance depends on an empirical question that is hard for anyone—and in particular, for a court—to assess, namely, the effect of the abortion right on society and in particular on the lives of women.").

278. FOSTER, *supra* note 270, at 22.

279. Tierce, *supra* note 119.

280. *Id.*

unexpectedly pregnant.[281] Under great pressure from her parents (abortion was not discussed), she married her nice boyfriend, knowing that

> I knew so clearly this wasn't how I should feel on my wedding day. I felt as if I were carrying my son . . . for everyone else. . . . I did not feel the attachment a person can feel with a longed-for, wanted pregnancy . . . and I felt an unbearable load of guilt for being the mother my son had to have. He didn't get to choose, either.[282]

Yale, the master's degree, and eventually the marriage went out the window. And that wasn't quite all:

> I didn't abort the pregnancy I didn't plan, but I did have to abort the life I imagined for myself. It cost me a lot, to carry an unintended pregnancy to term, to have the baby, to live the different life. All I've been able to do is try to make sure I paid more of the cost than my son did, but he deserved better than that.[283]

"[W]hat I want to say," Tierce writes, "is, 'Yes, I do love [my son] so much that I wish he could have been born to someone who was ready and excited to be a mother.'"[284] Also: "I would never give my son back, for anything, but I would certainly give him a different mother."[285] She wasn't ready for motherhood, accepted it nonetheless, and both she and her son paid a price. According to Tierce, his was not having a mother who could have cared for him as fully as she might have had she wanted a child at that time. As Tierce says, he deserved better; he was innocent in the whole arrangement.[286]

These are feelings we almost never hear about, perhaps because women and girls are trained to identify good motherhood from around age five and dreading your baby isn't part of it. Of course, neither is aborting it, or so it might seem, but this is in fact the short view. Studies across time consistently

281. *Id.*; *see supra* note 119 and accompanying text. Tierce wrote: "[N]o, I don't know why I was able to have premarital sex, though I believed it was wrong, and yet I couldn't believe abortion was wrong and do it anyway; such are the vagaries of human action." *Id.*

282. *Id.*

283. *Id.*

284. *Id.* (emphasis omitted).

285. *Id.*

286. *Id.* ("The sadness was not only for me or only for my baby. The sadness was exactly for both of us. I didn't want to be sad about being pregnant, and I didn't want him to be growing inside a sad person, because it wasn't his fault.").

show that one of the main reasons women choose abortion is so they can be a better mother to the children they already have.[287] Many want to be the kind of mother who could "Give my child, like, everything in the world."[288] Fifty-nine percent of women who abort are mothers already.[289] They do know what is at stake for them. And that is the choice that *Dobbs v. Jackson Women's Health Organization* denies and that Merritt Tierce insists upon.

Conclusion

We have come a long way from *Buck v. Bell* and *Skinner v Oklahoma*, the 20th century cases that first addressed whether women and men of reproductive age were protected from the power of the state to deny them the right to act upon their "begetting" preferences. Only in *Skinner* did the Supreme Court include procreation within the bundle of rights that are part of a person's marital status. By 1972, that particular right had been extended to unmarried persons in the case of *Eisenstadt v. Baird*.[290] The right to beget, so called, had come to include the right *not* to reproduce through such practices as contraception and abortion, subject to restrictions on timing: Women could choose abortion only prior to fetal viability. Following the summer 2022 decision in *Dobbs v. Jackson Women's Health Organization*, the states may reclaim authority over women's reproductive agency by banning abortion at any time following conception, without even the safety net of the historically popular exceptions of rape, incest, and fetal anomaly.

This article is written around "a" reproductive right—the singular right of abortion. Yet there is enough in Justice Alito's decision, Justice Thomas's concurrence, and the dismayed dissents to alert us as lawyers, as citizens, and as women to the possibility of extending the *Dobbs* rationale to "reproductive practices" in the plural. The proponents of *Dobbs* already know their next move. Some forms of contraception and in vitro technologies seem ripe for the chopping.

I'm 74 years old and have a hard time envisioning the next trajectory count-down to whatever case will overrule *Dobbs*. But envision we must.

287. Rachel K. Jones et al., *"I Would Want to Give My Child, Like, Everything in the World": How Issues of Motherhood Influence Women Who Have Abortions*, 29 J. FAM. ISSUES 79 (2007).

288. *Id.*

289. JERMAN ET AL., *supra* note 249, at 7.

290. 405 U.S. 438, 453 (1972).