APPENDIX

TO THE

TESTIMONY

OF

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The authors present the 1990 Gallup Organization Abortion and Moral Beliefs Survey from which they conclude that Americans are woefully ignorant about the state of law on abortion. Basically, U.S. Americans know that a woman has a legal right to an abortion because of the landmark decision *Roe v. Wade*. However, there is great confusion as to when during a pregnancy a woman may exercise her legal right. Additionally, the authors look at such issues as abortion and free choice, the impact of abortion on women's health and the relationship of the equality of women to *Roe v. Wade*. In conclusion they find that "the abortion privacy doctrine has spawned a great host of ills for women, without remedying any of the real historical injustices against them."

"Is Abortion the 'First Right' for Women?" by Paige Cunningham and Clarke Forsythe, excerpted from Abortion, Medicine and the Law, 4th Edition.

4 • Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion

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I. Introduction

Freely available, legal abortion in the United States is of relatively recent vintage. Prior to 1960, abortion in virtually all circumstances was a crime in every state.[3] In the

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[3]Colorado (in 1968) and New Mexico (in 1919) permitted abortion only for "serious and permanent bodily injury." Maryland (in 1867) permitted abortion for the mother's "safety." Alabama (in 1951) and the District of Columbia (in 1901) allowed abortion when necessary for the mother's "life or health." By judicial interpretation, Massachusetts allowed abortion for the mother's life and physical or mental health. Kudish v. Board of Registration on Medicine, 356 Mass. 98, 99–100, 248 N.E. 2d. 264, 266 (1969) and cases cited therein. Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Detroit L. Rev. 157 (1990); Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's Law Journal 29, 45–49 (1985).

The notion that legal abortion was available before the 19th century and at common law has been exploded by recent scholarship. J. Keown, *Abortion, Doctors & the Law* (1988); Dellapenna, *The Historical Case Against Abortion*, No. 13 Continuity 59 (1989); Dellapenna, *The History of Abortion: Technology, Morality & Law*, 40 U. Pitt. L. Rev. 359 (1979); Dellapenna, Brief of the American Academy of Medical Ethics as *Amicus Curiae*, in Hope v. Perales, No. 21073/90 (N.Y. Sup. Ct. App. Div. Jan. 1992).

1960s, a movement that sought to abolish abortion laws had some success: By the time of the Supreme Court's decision in *Roe v. Wade*[4] in 1973, 19 states had "liberalized" their abortion laws to various degrees.[5] Numerous rhetorical arguments were raised in justification of legalized abortion "as a humane solution to a critical social problem."[6] Legalized abortion was needed for population control,[7] to promote maternal health,[8] to reduce child abuse,[9] to alleviate poverty[10] and to eliminate unsafe "back-alley abortions."[11] Many of these arguments were implicitly relied upon in the Supreme Court's opinion in *Roe v. Wade*,[12] in which the Court legalized abortion on demand through all nine months of pregnancy.[13] In less than a decade, the status of abortion changed from being a crime in all 50 states to being widely perceived as a "constitutional right," a "fundamental freedom." As Lawrence Lader wrote, "[T]he Court went far beyond any of the 18 new state laws the movement had won since 1967, with only New York's law approaching its scope. It climaxed a social revolution whose magnitude and speed were probably unequaled in United States history."[14]

Yet the public rhetoric has shifted dramatically in the 20 years since *Roe:*

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[4]410 U.S. 113 (1973).

[5]Linton, *supra* note 3; *See generally*, L. Lader, *Abortion II: Making the Revolution* (1973); F. Ginsburg, *Contested Lives: The Abortion Debate in an American Community* 35–37, 64–71 (1989). However, shortly before the Supreme Court's decision in *Roe v. Wade*, Michigan rejected a state referendum by a 61% majority that would have introduced elective abortion up to five months. J. Noonan, *A Private Choice: Abortion in America in the Seventies* 34 (1979); Destro, *Abortion and the Constitution*, 53 Cal. L. Rev. 1250, 1337–38 (1975). North Dakota rejected a similar referendum by a 77% majority. *Id.*

[6]L. Lader, *supra* note 5, at 43. *See generally*, Tietze & Lewit, *Abortion*, 220 Scientific Amer. 21 (Jan. 1969); A. Neier, *Only Judgment: The Limits of Litigation in Social Change* 116 (1982); Callahan, *An Ethical Challenge to Prochoice Advocates: Abortion & the Pluralistic Proposition*, Commonweal, Nov. 23, 1990, at 681, 682–83.

[7]L. Lader, *supra* note 5, at 14, 54; Hardin, *Abortion and Human Dignity*, in A. Guttmacher, ed., *The Case for Legalized Abortion Now* 83 (1967). For a more recent statement, *see* "Population size can't be overlooked as an environmental danger," New York Times, October 31, 1988, at A18.

[8]*Cf.* the statement of Mary Calderone, medical director of Planned Parenthood Federation of America, in 1960: ". . . medically speaking, that is, from the point of view of diseases of the various systems, cardiac, genitourinary, and so on, it is hardly ever necessary today to consider the life of the mother as threatened by a pregnancy." Calderone, *Illegal Abortion as a Public Health Problem*, 50 Am. J. Pub. Health 948 (July 1960). Ten years later, Christopher Tietze acknowledged: "Abortion is much more widely approved as an emergency measure than as an elective method of birth regulation." Tietze & Lewit, *Abortion*, 220 Scientific Amer. 21, 23 (Jan. 1969) (chart).

[9]L. Lader, *supra* note 5, at 23–24; Hardin, *supra* note 7, at 82. A more recent argument of this kind is made in H. P. David, et al., *Born Unwanted: Developmental Effects of Denied Abortion* (1988).

[10]Hardin, *supra* note 7, at 84–85. *Cf.* Beal v. Doe, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting) ("And so the cancer of poverty will continue to grow").

[11]Maginnis, *Elective Abortion as a Woman's Right*, in A. Guttmacher, *supra* note 7, at 132. For a recent version of this argument, *see* E. Messer & K. May, *Back Rooms: An Oral History of the Illegal Abortion Era* (Torchstone paperback ed. 1989).

[12]410 U.S. 113, 116, 153 (1973) ("In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.").

[13]*See infra* note 21. The phrase "abortion on demand" appears first coined by abortion advocates, not opponents. B. Nathanson, *Aborting America* 176–77 (Life Cycle Books paperback 1979); Guttmacher, *Abortion—Yesterday, Today & Tomorrow*, in A. Guttmacher, *supra* note 7, at 13 ("Today, complete abortion license would do great violence to the beliefs and sentiments of most Americans. Therefore I doubt that the U.S. is as yet ready to legalize abortion on demand, and I am therefore reluctant to advocate it in the face of all the bitter dissension such a proposal would create.")

[14]L. Lader, *supra* note 5, at iii.

> *The most striking ideological development has been the emergence into leadership positions in the prochoice movement of some feminists who have scanted many of the original arguments for abortion reform. They have shifted the emphasis almost entirely to a woman's right to an abortion, whatever her reasons and whatever the consequences.*[15]

Today, the argument, almost exclusively, is that abortion—for any reason, at any time of pregnancy—is the "first right" for women; that is, women's unlimited access to abortion is essential for sexual equality and is the nonnegotiable prerequisite for all other social, economic or legal rights.[16] As one abortion-rights activist has put it, "[w]e can get all the rights in the world . . . and none of them means a doggone thing if we don't own the flesh we stand in . . ."[17] Nevertheless, a sober assessment of this new justification for elective abortion suggests that it was not founded on a genuine consideration of women and their needs or on an accurate understanding of elective abortion in practice.

The Supreme Court will have an opportunity to conform the legal reality more closely to the philosophical and political reality of abortion's tragic impact on women and society by upholding all provisions of the law challenged in *Planned Parenthood v. Casey*.[18] The Pennsylvania law sets forth minimal protections for women's physical and psychological well-being. For example, it requires fully informed consent, with a 24-

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[15] Callahan, *supra* note 6, at 681, 683. *Cf.* A. Neier, *Only Judgment: The Limits of Litigation in Social Change* 116 (1982).

[16] *See, e.g.*, R. Petchesky, *Abortion and Woman's Choice* 5 (Rev. ed. 1990) ("A woman's right to decide on abortion when her health and her sexual self-determination are at stake is 'nearly allied to her right to be' "); Wattleton, *Reproductive Rights Are Fundamental Rights*, The Humanist, Jan/Feb. 1991, at 21, 22 ("Without reproductive autonomy, our other rights are meaningless"); Paul & Schaap, *Abortion and the Law in 1980*, 25 N.Y.L. School L. Rev. 497, 498 (1980) ("without which other legal rights have little significance"). *See generally*, B. Harrison, *Our Right to Choose* (1983).

Lawrence Lader said much the same thing in 1973. L. Lader, *supra* note 5, at 18. But the message was not so single-minded. Indeed, Lader claims that "Friedan, one of the most impressive militants of her time, avoided the abortion issue at first" and that, early on, he urged on her (implicitly to no avail) the proposition that "all feminist demands hinged on contraception and abortion and a woman's control over her own body and procreation." *Id.* at 36.

[17] Quoted in K. Luker, *Abortion & the Politics of Motherhood* 97 (U. Cal. Press paperback 1985).

Those who view abortion as the "first right" are generally the same advocates of abortion rights who refuse to debate the morality of abortion because it is "off-limits" (DeParle, *Beyond the Legal Right: Why Liberals and Feminists Don't Like to Talk about the Morality of Abortion*, Washington Monthly 28 (April 1989). Even some modern abortion-rights supporters recognize the incongruity here.

> If, for some people, to have choice is itself the beginning and end of morality, for most people it is just the beginning. It does not end until a supportable, justifiable choice has been made, one that can be judged right or wrong by the individual herself based on some reasonably serious, not patently self-interested way of thinking about ethics. That standard—central to every major ethical system and tradition—applies to the moral life generally, whether it be a matter of abortion or any other grave matter. An unwillingness to come to grips with that standard not only puts the prochoice movement in jeopardy as a political force. It has a still more deleterious effect: it is a basic threat to moral honesty and integrity. The cost of failing to take seriously the personal moral issues is to court self-deception, and to be drawn to employ arguments of expediency and evasion. —

Callahan, *supra* note 6, at 682.

[18] 947 F.2d 682 (3rd Cir. 1991), *cert. granted*, 112 S. Ct. 931–932 (1992).

hour waiting period to digest the information, and abortion statistical reporting. As discussed below, in the profitable abortion marketplace, women are often deceived or coerced into undergoing abortions they do not want. With an opportunity to evaluate meaningful alternatives to abortions or to consult with a parent (in the case of a minor), many unnecessary, unwanted abortions may be avoided.

II. Do Women Consider Abortion the "First Right"?

A. Current Public Opinion

People who claim to speak for women and their fundamental reliance on completely accessible abortion dominate the airwaves, the press and academic journals. Yet opinion polls taken in recent years do not substantiate the alleged importance of abortion rights to the majority of American women. For example, a New York Times poll of July 1989 indicated that most women were concerned more about job discrimination, child care and balancing work and family than about abortion.[19] These opinion polls did not deeply probe underlying attitudes about abortion and other social issues.

In 1990, the Gallup Organization conducted the largest and most comprehensive survey of U.S. attitudes on abortion to date, the Abortion and Moral Beliefs Survey.[20] One of the most striking conclusions from the survey is that Americans are woefully ignorant about the state of U.S. law on abortion. *Roe v. Wade* legalized abortion throughout pregnancy for any or no reason.[21] Nine out of ten Americans simply do not know the extent to which abortion is legally available.

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[19] Dionne, *Struggle for Work and Family Fueling Women's Movement*, New York Times, Aug. 22, 1989, at A18. *See infra* note 28 and accompanying text.

[20] Abortion and Moral Beliefs Survey (May 1990) [hereinafter Survey]. In this survey, the Gallup Organization conducted interviews with 2,174 adults and asked 200 questions concerning abortion and related areas of moral belief and public policy, requiring a 45-minute personal interview. Gallup conducted the survey interviews and tabulated the survey findings. Question design and development was conducted by a team of social scientists, including James Davison Hunter, Ph.D., of the University of Virginia, Carl Bowman, Ph.D., of Bridgewater College in Virginia, and Robert Wuthnow, Ph.D., of Princeton University. James Rogers, Ph.D., of Wheaton College, Wheaton, Illinois and a Senior Research Associate at Northwestern University School of Medicine, analyzed and interpreted the data. The margin of error does not exceed +/− 3% for questions asked of the entire sample. For questions asked of a subsample, the margin of error may be greater. This survey was commissioned by Americans United for Life and is on file with the authors.

[21] The Supreme Court in *Roe v. Wade* held that the states could not prohibit any abortions prior to viability. After viability, the Court said, the states may prohibit abortion, "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Roe*, 410 U.S. at 165. But the Court then expanded the exception for "health of the mother" in a way to make it impossible for states to prohibit abortions. The Court held that *Roe v. Wade* and *Doe v. Bolton* "are to be read together," *id.* at 165, and the Court defined "health" in *Doe* as "all factors—physical, emotional, psychological, familial and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." Doe v. Bolton, 410 U.S. 179, 192 (1973). Both the Supreme Court and the lower federal courts have applied "health" in the third trimester in a very broad manner. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Colautti v. Franklin, 439 U.S. 379, 400 (1979) ("women's life and health" requires that "all factors relevant to the welfare of the woman may be taken into account by the physician in making his decision" after viability); American College of Obstetricians and Gynecologists v. Thornburgh, 737 F.2d 283, 299 (3d Cir. 1984), *aff'd*, 476 U.S. 747 (1986); Schulte v. Douglas, 567 F.Supp. 522 (D.Neb. 1981); Margaret S. v. Edwards, 488 F.Supp. 181, 196 (D.La. 1980).

Commentators, likewise, have also understood the third trimester "health" exception to be very broad. Wood & Hawkins, *State Regulation of Late Abortion and the Physician's Duty of Care to the Viable Fetus*, 45 Mo. L. Rev. 394 (1980); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J.

Survey respondents were asked whether they were "very familiar," "fairly familiar," "not too familiar" or "not at all familiar" with "the 1973 Supreme Court decision on abortion known as *Roe v. Wade*." Only one in four of those who said that they were "very familiar" with *Roe v. Wade* could accurately state its outcome. Forty-two percent of the sample who stated that they were "very familiar," "fairly familiar" or "not too familiar" thought *Roe* legalized elective abortion only in the first three months. Among women who claimed at least some familiarity with *Roe*, 24% thought *Roe* meant that "abortions are legal only during the first three months, and only when a mother's life or health is threatened"; 39% thought *Roe* meant that "abortions are legal during the first three months, regardless of a woman's reasons for wanting one." Only 18% of this subsample correctly indicated that *Roe* meant that "abortions are legal for the duration of pregnancy, regardless of a woman's reason for wanting one."

This ignorance applies as well to the Supreme Court's July 1989 decision in *Webster v. Reproductive Health Services*.[22] Although the Abortion and Moral Beliefs Survey was conducted 10 months after the decision, during which time there was extensive media coverage, 8 out of 10 respondents stated that they were "not at all familiar" with the decision. Respondents were asked whether they thought they were "very familiar," "fairly familiar" or "not at all familiar" with "the 1989 Supreme Court decision on abortion in the *Webster* case." Among women, 81% conceded that they were "not at all familiar" with *Webster*. Among women who stated that they were "very familiar" or "fairly familiar" with the decision, 23% thought that "the legal outcome of the *Webster* decision" was "best described" as "abortions are permitted only during the first three months and only when a mother's life or health is threatened"; 10% thought that "abortions are now legal during the first three months, regardless of a woman's reason for wanting one"; and another 51% thought that "abortions that are legal in one state may be illegal in another." Only 5% knew that *Webster* means "abortions are legal for the duration of the pregnancy regardless of a woman's reason for wanting one."[23]

920, 921 n.19 (1973); Editorial, *Abortion: The High Court Has Ruled*, 5 Fam. Plan. Perspect. i (Winter 1973) ("Even New York's law appears to be overbroad in proscribing all abortions after 24 weeks except to preserve the woman's life, since the Court has held that an exception must also be made for preservation of the woman's health (interpreted very broadly)").

[22] 492 U.S. 490 (1989).

[23] In *Webster*, the Supreme Court did not explicitly overrule *Roe v. Wade;* nor did the Court uphold any prohibition on abortion for any reason at any time of pregnancy. Rather, the Supreme Court upheld the constitutionality of several provisions of a Missouri abortion statute, including a preamble, tests for fetal viability at or after 20-weeks gestation and prohibitions on public funding for abortion.

The ACLU, in a brief filed before the Ninth Circuit Court of Appeals, has characterized *Webster* as follows:

> In *Webster*, the Court found constitutional provisions of a Missouri statute that, unlike those enjoined here, dealt with the use of public resources for abortions and required certain tests to determine viability. The Court determined only that "none of the challenged provisions of the Missouri Act properly before [it] conflict with the Constitution." 109 S. Ct. at 3058. The *Webster* plurality modified *Roe* only "to the extent" required to uphold the Missouri statute. 109 S. Ct. at 3058. Although Justice O'Connor, the critical fifth vote, mentions with approval her dissenting opinion in *Akron*, she uses the standards of *Roe*, and the majority opinions in *Akron* and *Thornburgh*, to measure the constitutionality of the viability testing requirement and sustains the Missouri law under that test. *Webster*, 109 S. Ct. at 3060–64 (O'Connor, J., concurring). Justice O'Connor agreed with the Chief Justice that

The survey demonstrates that, after 19 years of legalized abortion nationwide, the American public still does not understand *Roe* and its policy of abortion on demand throughout pregnancy. If they did, they might not select the "prochoice" label so readily.[24] In fact, the majority of Americans disapprove of the majority of abortions.[25] Approximately 25% of the sample disapproved of abortion in almost all circumstances except to save the life of the mother (the "consistently disapproves" group). Another 26% disapproved of abortion when it is used for "birth control" or "sex selection" (the "seldom disapprove" group). The largest group, which makes up nearly 50% of the sample, disapproved of abortion except for certain "hard cases"—including danger to the life or physical health of the mother, rape, incest or serious fetal deformity (the "often disapprove" group). Yet, these cases represent no more than 5 percent of the 1.6 million abortions performed each year.[26]

The survey also showed that Americans have strong opinions about the nature of the unborn. Seventy-seven percent of the respondents believed that abortion is either "an act of murder as bad as killing a born human being" (37%), "an act of murder but not as bad as killing a born human being" (12%) or "the taking of human life" (28%). Only 16% believed that abortion is merely a surgical procedure or the removal of tissue. Fully 50% of the respondents believed that, from the moment of the child's conception, the unborn child's right to be born supersedes the woman's "right to choose." Only 23% believed that "the child's right to be born" does not outweigh "the woman's right to choose" until viability (16%) or birth (7%).

Contrary to conventional wisdom, the survey demonstrated that there is no "gender gap" on abortion, or at least not the one commonly assumed.[27] More women than men

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there was "no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe v. Wade*." *Id.* at 3060 (O'Connor, J., concurring). Thus, Justice Blackmun observed in his dissent, "the Court extricates itself from *[Webster]* without making a single, even incremental change in the law of abortion." 109 S. Ct. at 3067. And Justice Scalia severely chastises the Court for failing to take that step. *Id.* at 3064 (Scalia, J., concurring).

Brief of Appellees in Guam Society of Obstetricians and Gynecologists v. Ada, No. 90-16706 (9th Cir.), at 22–23.

The "legal outcome" of *Webster*, therefore, is that it leaves *Roe* undiluted. In the aftermath of *Webster*, abortions are still legal throughout pregnancy virtually for any reason in almost all states. The jurisprudential door has been opened, however, for potentially greater state regulation of abortion. The "practical outcome" is that abortion is perceived as less available and that abortion rights are in jeopardy.

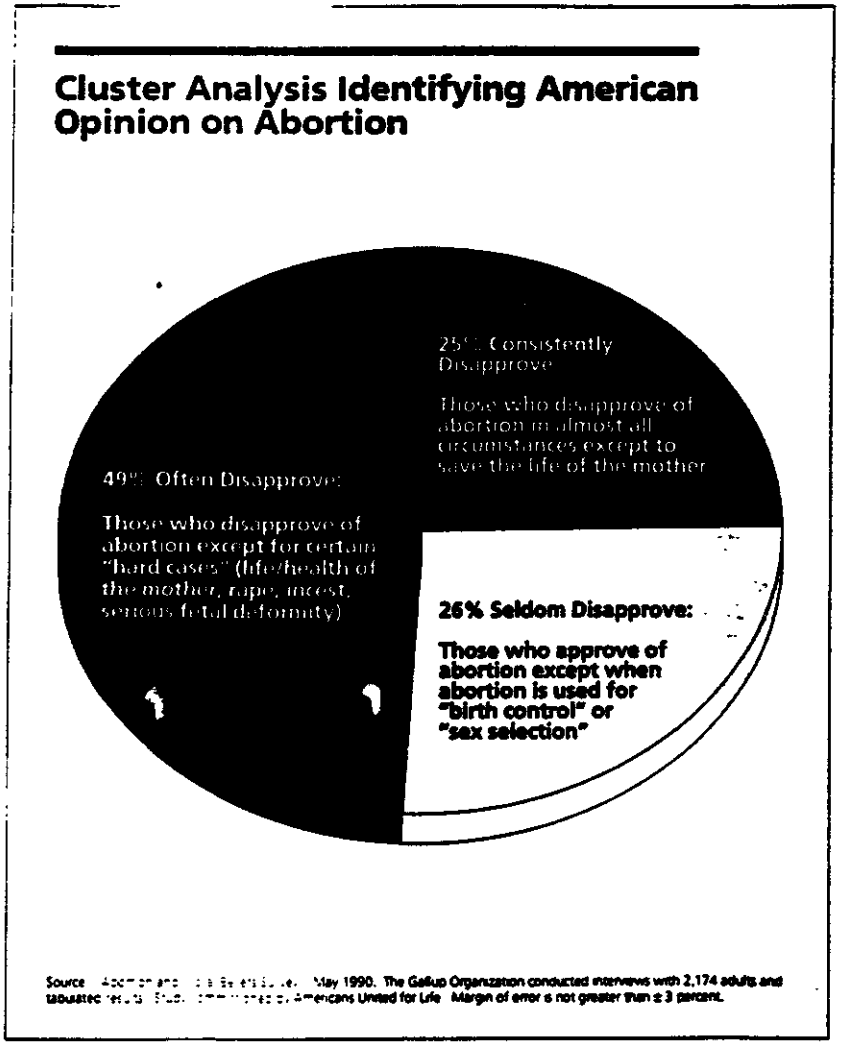
[24] Thirty-three percent of the respondents identify themselves as "moderately prochoice" or "strongly prochoice."

[25] Answers to 29 questions in the survey were submitted to a statistical procedure known as "cluster analysis." The purpose of this analysis was to find groups of individuals who generally hold the same patterns of beliefs regarding abortion. The cluster analysis tests for the consistency of response through a range of questions and plots the attitudes of the survey respondents accordingly. As a result of this analysis, three clusters of public belief emerged:

- those who "*consistently disapprove*" of abortion (25%)
- those who "*often disapprove*" of abortion (49%)
- those who "*seldom disapprove*" of abortion (26%)

[26] *See infra* note 174–76 and accompanying text.

[27] The Abortion and Moral Beliefs Survey was designed by the Gallup Organization to represent the nation as a whole and not any subgroup of the total population. However, although a subgroup analysis may be suggestive of the views held by that particular segment of the population (women) and is valuable for purposes of guiding future research, it should not be portrayed as conclusive evidence of the views of the subgroup in the general population.



(53% to 46%) believed that "the unborn child's right to be born" outweighs the "woman's right to choose whether she wants to have the child *at the moment of conception.*" Sixty-two percent of the women (49% of men) stated that "the fertilized egg inside a mother's womb first becomes a person at the moment of conception," compared to 15% of women (18% of men) who said "when the mother first feels movement," 13% of

women (14% of men) who said "when the baby could survive on its own" and 5% of women (10% of men) who said at the "moment of birth." When women were asked, "[W]hich of these statements best describes your feelings about abortion," 42% (compared to 32% of men) responded that "abortion is just as bad as killing a person who has already been born; it is murder." In general, women in this sample were more protective of unborn human life than were men.[28]

Abortion is often portrayed as an issue that pits most women (assumed to be abortion supporters) against most men (assumed to be abortion opponents). This portrayal fails to explain why *more* men than women favor abortion rights in public opinion surveys. It may be that men perceive greater benefits from freely available, relatively cheap abortion. Why else is the Playboy Foundation such a strong supporter of abortion rights—securing the exercise of the Playboy ethic with no fault, no mess for men?[29] "It is difficult to be loving and caring. It is challenging, demanding, exhausting, and expensive to provide the care and support needed by women in distress. It is much easier, quicker, and cheaper to send a woman to an abortionist."[30] A recent article in *Esquire* about men and abortion reveals that in many cases the male partner suggested the abortion first.[31]

Not only are women less supportive of abortion than men are, public opinion surveys and studies consistently show that many other issues—whether personal or public—are more important to women than abortion.[32] Although women expressed concern about the abortion issue, they were more concerned about other issues nearly a year after the *Webster* decision. The Abortion and Moral Beliefs Survey revealed that, although 52% of the women were "very concerned" and 29% were "concerned" about abortion, a higher percentage were "very concerned" about other public issues: child abuse (85.8%), drug abuse (84.8%), AIDS (68.5%), environmental pollution (61.6%) and homelessness (58.2%).[33] In ranking abortion among personal issues, women are more concerned about equal pay (94%), day care (90%), rape (88%), maternity leave (84%) and job discrimination (82%) than they are about abortion (74%).[34] These levels of concern were expressed after the *Webster* decision when "abortion rights" were considered to be in jeopardy. The rankings are consistent with a poll taken just days before *Webster* when women were asked what should be the most important goal for

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[28] Other surveys indicate that more women than men support criminal penalties for women who injure their unborn child *in utero* through drug use. Curriden, *Holding Mom Accountable*, 76 ABA Journal 50, 51 (March 1990) ("A survey of 15 southern states by the *Atlanta Constitution* found that 71 percent of the 1,500 people polled favored criminal penalties for pregnant women whose illegal drug use injures their babies. Another 45 percent favored prosecuting women whose use of alcohol and cigarettes during pregnancy harms their offspring. Surprisingly, the survey found that more women than men were in favor of criminalizing 'fetal abuse.' ").

[29] C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* 99 (1987); MacKinnon, Roe v. Wade: *A Study in Male Ideology*, in J. Garfield & P. Hennessey, eds., *Abortion: Moral and Legal Perspectives* 51 (1984).

[30] Smith, *Abortion as a Feminist Concern*, in J. Hensley, ed., *The Zero People* 79 (1983).

[31] Baker, *Men on Abortion*, Esquire 114 (March 1990). *See also*, Goodman, *Men and Abortion*, Glamour 178 (July 1989).

[32] *See, e.g.*, A. Hochschild, *The Second Shift: Working Parents and the Revolution at Home* (1989); Wallis, *Onward, Women!* Time 80 (Dec. 4, 1989).

[33] Survey, *supra* note 20.

[34] Wallis, *supra* note 32, at 82 (poll taken Oct. 23–25, 1989).

A Comparison of Male and Female Attitudes on Abortion

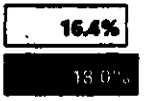
Question 124: Which of these statements best describes your feelings about abortion?

1. Abortion is just as bad as killing a person who has already been born; it is murder.

2. Abortion is murder, but it is not as bad as killing someone who has already been born.

3. Abortion is not murder, but it does involve the taking of human life.

4. Abortion is not murder, it is a surgical procedure for removing human tissue.



5. Can't say.

Source: "Abortion and Moral Beliefs Survey," May 1980. The Gallup Organization conducted interviews with 2,174 adults and tabulated results. Study commissioned by Americans United for Life. Margin of error is not greater than ± 3.8 percent.

women's organizations. Abortion ranked last (2%) behind job equality (27%), equal rights (14%) and child care (5%).[35]

B. Women's Values and Self-Understanding

Despite the opinion of American women as revealed in polls, the organized women's movement has come to stand predominantly for abortion advocacy. There is an obvious discrepancy between the political agenda of the women's movement—and its philosophical underpinnings in academic feminism—and the needs of the majority of mainstream American women. There are several reasons why this may be the case. First, as the Abortion and Moral Beliefs Survey reveals, the women's movement is out of touch with the fact that for a majority of women access to abortion is a low priority. It is also out of touch with the feelings of the majority of women who consider abortion to be murder or killing. Finally, the claim that abortion is a *sine qua non* negates women's own understanding of themselves. One feminist legal scholar has characterized women as valuing intimacy, nurturance, community, responsibility and care.[36] Another observer—an approving male—lauded four virtues of feminist thought, virtues that he perceived abortion as violating: nonviolence, ecological harmony (the "deep connection between our bodies and the earth"), community (inclusivity) and egalitarian power-sharing (cooperation as a replacement for competition).[37] These "feminine" values contrast with allegedly "masculine" values.

> *Women respond to their natural state of inequality by developing a morality of nurturance that is responsible for the well-being of the dependent, and an ethic of care that responds to the greater needs of the weak. Men respond to the natural state of equality with an ethic of autonomy and rights.*[38]

Yet much of the rhetoric of and philosophical support for the abortion-rights movement is couched in "masculine" terms of autonomy ("it's my body") and rights ("not the church, not the state, women must decide their fate").

No matter what explanation is preferred, abortion advocacy fails both the political and philosophical analysis. Politically, the women's movement has abandoned the very people it claims to serve. Philosophically, the abortion ethic contradicts the essence of women by seeking to destroy, rather than protect and nurture, the one with whom the pregnant woman is so intimately connected. Abortion advocacy ignores, or at least buries, the intuitive knowledge of women throughout the centuries. Long before the emergence of rabbit tests or ultrasound, women (and therefore society) have intuitively known the obvious: The entity conceived through intercourse is a child, their child.[39]

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[35] Dionne, *supra* note 19, at A1. Concern about abortion tied with balancing work and family (2%); the "all other problems" category was 18%.

[36] West, *Jurisprudence and Gender*, 56 U. Chi. L. Rev. 1, 28 (1988).

[37] Liias, *The Internal Threat to Feminism*, New Oxford Rev. 4 (Oct. 1990).

[38] West, *supra* note 36, at 28. Despite her recognition that nurturance is a feminine quality, West nonetheless defends the right to abort as necessary to defend against the "danger" of "invasion of the body by the fetus and the intrusion into the mother's existence following childbirth." *Id.* at 70.

[39] *See, e.g.*, Flodin, *Why I Don't March*, Newsweek, Feb. 12, 1990, at 8 ("I was pregnant, I carried two unborn children and I chose, for completely selfish reasons, to deny them life so that I could better my own"). In 1960, the medical director of Planned Parenthood Federation of America acknowledged that "abortion is the taking of a life . . ." Calderone, *supra* note 8, at 951.

A recent, frank revelation on this score is that of California psychologist, Susan Nathanson, in her 1989 book, *Soul Crisis*.[40] Nathanson's account of her abortion, at four weeks' gestation, an abortion that occurred after she had previously given birth to three children, is unique for her candid, strongly stated certainty about the humanity of her fourth, unborn child from conception.[41] "My wish to have this unborn, though very alive, fourth child is so strong it is palpable."[42] In contrast, she writes, the baby "doesn't have much reality" for her husband.[43] Her experience is not unique. Women appear to identify and connect with the fetus as a child—their child—more than men do.[44] Nathanson cites an account of a friend who, upon revealing her own abortion of years ago, said she felt as though she had committed "murder."[45] Years later Nathanson continues to have these feelings: ". . . in ending the life of my child, I also annihilated a part of myself . . ."[46] Nathanson does not retreat from her conclusion. Rather, armed with this belief, she argues that abortion is a version of infanticide; women and society now must accept an ethic that allows (and perhaps encourages) women to both conceive and kill their children according to their individual and family needs.[47] Her goal is to help women reconcile and embrace their power as both life-givers and "murderers."[48] Pro-choice feminist periodicals ignored Nathanson's book, perhaps because she recognizes abortion as murder.[49]

Nathanson's conclusions pinpoint the basis of the profound conflict over abortion among women. Abortion advocacy illustrates the different views of self that women hold, as Faye Ginsburg recognized in *Contested Lives*, a study of women in the pro-choice and pro-life movements.[50] The essential difference in the two concepts of self

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[40] S. Nathanson, *Soul Crisis: One Woman's Journey Through Abortion to Renewal* (Signet paperback ed. 1990).

[41] *Id.* at 2 ("Once a new life has been conceived, there is no turning back; an unalterable event—physical and psychological—has occurred"); *id.* at 26 ("but we are not talking about the choice of whether to conceive a child; this child is a reality, taking shape already deep within my body"); *id.* at 27 ("This fourth child exists, it's here, it's a reality. It's the fate of this child that we have to decide.").

[42] *Id.* at 29.

[43] *Id.* at 40.

[44] *Cf.* Goodman, *supra* note 31, at 210 ("For me, that fetus wasn't a child yet. For her, it was.").

[45] S. Nathanson, *supra* note 40, at 203–204 ("Liz").

[46] *Id.* at 194.

[47] *See id.* at 218 ("I wish now that my fourth child could have been sacrificed with my love and tears, even with my own hands, in the circle of a family or a community of women . . . and not as it was, in a cold and lonely hospital room with instruments of steel."); *id.* at 217 ("I meditate again upon what a different world it would be if we could each become aware of and take responsibility for our capacity to annihilate others!"); *id.* at 209 ("Women have to develop themselves psychologically so that they can accept the consciousness of having the power and capacity to choose to end a life that is also part of their very own being"); *id.* at 205 ("Someday I hope our culture will evolve a new attitude, one that will enable women to bear the responsibility for choosing life or death for our offspring in a different way than is possible now.").

[48] *Id.* at 204–206. "Women have to develop themselves psychologically so that they can accept the consciousness of having the power and capacity to choose to end a life that is also part of their very own being." *id.* at 209.

[49] The *Reader's Guide to Periodical Literature* reveals only one cursory review of *Soul Crisis*—85 Booklist 1493 (May 1, 1989). In addition, a manual review of many issues of Glamour, Ms. Ladies Home Journal, Mademoiselle, McCall's, Mother Jones, Working Woman, Savvy Woman, Vogue turns up no review of the book since publication.

[50] F. Ginsburg, *Contested Lives: The Abortion Debate in an American Community* (1989). *See also* S. Hewlett, *A Lesser Life: The Myth of Women's Liberation in America* 323–337 (1986); Callahan, *supra* note 6 at 684; Bayles, *Feminism and Abortion*, Atlantic Monthly 79 (April 1990); *cf.* Quarles, *Letter to the Editor*,

among women is between those who consider child-bearing to be essential to the definition of womanhood and those who see it as a mark of inequality with men that must be neutralized.[51] As moral philosopher Janet Smith has written:

> *[B]ehind women's demands for unlimited access to abortion lies a profound displeasure with the way in which a woman's body works and hence a rejection of the value of being a woman. Whereas one might hope that the women's movement would be based on the assertion that it is great to be a woman and that women would endeavor to promote the powers and qualities which are theirs, the popularity of abortion indicates quite the opposite. Abortion is a denigration of women, a denial of one of the defining features of being a woman—her ability to bear children. Now some may deny that this is a defining characteristic of women. But is there any more certain criterion? A woman is a woman because she can bear children . . .*
>
> *Child-bearing is basic to them. We might expect that deliberate and violent denial of such a potential may be devastating. Some women argue that the fetus (be it a human being or not) is a part of their bodies and that they may do with it what they will. In one sense—a very different sense—the argument is true. Pregnancy and childbearing are perfectly normal conditions for women, and hence a part of her physical and psychological make-up. To have an abortion is to destroy part of one's self. It is normal for a woman to carry the children she conceives to term. To remove that child forcibly interrupts and harms the healthy functioning of her body. To put it bluntly, an abortion amounts to a mutilation of the woman's body and to a denial of her nature.*[52]

Implicit in the position of those feminists who favor abortion rights is the view that men's inability to conceive is somehow superior to women's unique ability to bear children; women must be able "to have sex on a man's terms, not on a woman's."[53] It is this philosophical difference about the nature of unborn human life and pregnancy more than any other, that distinguishes women's positions on abortion in America and explains why, for many women, elective abortion can never be considered a basic right.

Pro-life women question whether the assertion of "choice" and "rights" in relation to aborting an unborn child can be reconciled with nurturance and other values cherished by feminists. Ginsburg writes that "[i]n opposition to the market relations of capitalism, nurturance stands for noncontingent and self-sacrificing support and love . . ."[54]

> *One of the central notions in the modern American construct of The Family is that of nurturance . . . a relationship that entails affection and*

Ms. Magazine, 19–20 (Jan./Feb. 1989) *with* Harmon, *Letter to the Editor*, Ms. Magazine 20 (Jan./Feb. 1989).

[51] Maggie Gallagher observed that some women consider a child to be "a crucial life goal; a primary form of self-identification." M. Gallagher, *Enemies of Eros* 68 (1989).

[52] Smith, *supra* note 30, at 81, 84.

[53] *Id.* at 86.

[54] F. Ginsburg, *supra* note 50, at 18.

> *love, that is based on cooperation as opposed to competition, that is enduring rather than temporary, that is noncontingent rather than contingent upon performance, and that is governed by feeling and morality instead of law and contract.*[55]

Abortion, a self-centered act, contradicts the very notion of nurturance as "self-sacrificing support and love."[56] Abortion as a prerequisite for equality with men contradicts the value of cooperation. Abortion as a protection against the "invasion" of the unborn child contradicts connectedness with, and care for, that child. Ginsburg perceptively noted that, "[p]ro-life advocates critique a cultural and social system that assigns nurturance to women yet degrades it as a vocation."[57]

Commitment to the family and its associated values of nurturance, love, cooperation, and permanence is not limited to identifiable pro-life advocates. One woman attorney who had a "high-powered job as a commercial litigator" surprised herself when she gave up part-time day care for her infant son in order to be home with him full time. She observed:

> *It is easy to talk about combining kids and careers until you really do the mixing. The problem is not, as many of the young feminists I meet at the law school apparently believe, that some repressive male chauvinists are bent on keeping women in the home, and trying to recreate a stupid, sexist way of having a family. The problem is that women care too much about their children to abandon them to someone else . . .*
>
> *Women naturally love their children and want to spend time with them. To say otherwise, to try to fit ourselves into a new model, is itself a terrible oppression of women—an oppression often by the very people who call themselves feminists.*[58]

Only recently is the feminist movement waking up to this woman's concerns. Columnist Susanne Fields commented, "Almost every poll tells us that mothers of young children would like to spend more time at home with them. Liberal feminists, who have until now stressed individual rights of women over the collective needs of the family, are getting that message."[59] The continuing demand for elective abortion starkly contrasts with this reawakening to family needs. And this reawakening may further erode support for abortion rights.

No individual or group can tolerate forever a basic inconsistency with its human nature, whether this contradiction is imposed by government, religion or academia. Most women affirm their identity as life-giver, child-bearer, nurturer and cooperator and their connectedness with the vulnerable. A claim of the power and right to wield the knife of abortion, whether at her own hands or the physician's, violates the core of woman's values and being. Last but not least, it also stands starkly outside the mainstream of historical feminist thought.

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[55] F. Ginsburg, *supra* note 50, at 254 n.19.
[56] *Id.* at 18.
[57] *Id.* at 18.
[58] Presser, *Mom, a sound concept*, Chicago Tribune, Nov. 20, 1989, sec. 1, p. 19, col. 2.
[59] Fields, *Even feminists now boost the family*, Chicago Sun-Times, May 7, 1991, at 23.

C. The Early Feminist Views on Abortion

Contemporary women's strong convictions against abortion were shared by the early American feminists in the 19th century, who "celebrated motherhood itself as a uniquely female power and strength that deserved genuine reverence."[60] Indeed, "the founding mothers of the women's movement staunchly opposed abortion, even to the point of supporting the late nineteenth century legislative campaign against it."[61]

Early feminist opposition to abortion has been dismissed as nothing more than an insufficient philosophical divorce from 19th century patriarchal society.[62] But this is a superficial reading. The 19th century leaders of the women's movement did not view legalized abortion as a solution to the oppression and disenfranchisement of women. They understood that abortion occurred *because* of that inequality. They understood that abortion is something done to women, by men, for men. Early feminists were uniformly opposed to abortion—including Susan B. Anthony, Elizabeth Cady Stanton, Matilda Gage, Victoria Woodhull, Sarah F. Norton and Mattie H. Brinkerhoff. They commonly called it "ante-natal child murder,"[63] "child murder"[64] and "infanticide."[65] They believed that "[l]ife must be present from the very moment of conception."[66]

The early feminists condemned not only the practice of abortion. They were equally concerned about its causes: ignorance about sexuality and reproduction, the view of pregnancy as a pathological condition, the double standard that promoted male irresponsibility, social pressures against illegitimacy and lack of economic support to single mothers.[67] Susan B. Anthony's and Elizabeth Cady Stanton's journal, *The Revolution*, often contained articles or editorials denouncing abortion's causes and tragic effects. Mattie Brinkerhoff wrote:

> *[A]s law and custom give to the husband the absolute control of the wife's person, she is forced to not only violate physical law, but to outrage the holiest instincts of her being . . .*
> *When a man steals to satisfy hunger, we may safely conclude that there is something wrong with society—so when a woman destroys the life of her unborn child, it is an evidence that either by education or circumstances she has been greatly wronged.*[68]

Dr. Charlotte Lozier, a New York physician, in 1869 reported to the authorities a man who brought a young woman to her for an abortion. She then extended other

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[60] M. Derr, *"Man's Inhumanity to Woman, Makes Countless Infants Die": The Early Feminist Case Against Abortion* i (1991) (privately published); on file with the authors.

[61] Derr, *supra* note 60, at i.

[62] R. Petchesky, *Abortion & Women's Choice* 44–45 (Rev. ed. 1990); J. Mohr, *Abortion in America: The Origins & Evolution of National Policy* 112–113 (1978).

[63] Woodhull & Claflin's Weekly, Nov. 19, 1876, (Sarah F. Norton).

[64] 1 The Revolution 215–16, April 9, 1868, (Matilda E. J. Gage).

[65] 1 The Revolution 65, Feb. 5, 1868, (Elizabeth Cady Stanton).

[66] A. Stockham, *Tokology* 246 (1887). Historian Carl Degler has noted that this valuation of fetal life at all stages "was in line with a number of movements to reduce cruelty and to expand the concept of the sanctity of life . . . the elimination of the death penalty, the peace movement, the abolition of torture and whipping in connection with crimes"—all movements that feminists supported. "The prohibiting of abortion was but the most recent effort in that larger concern." C. Degler, *At Odds: Women and Family in America From the Revolution to the Present* 247 (1980).

[67] *See generally Brief of Feminists for Life, et al.* in *Bray v. Alexandria Women's Health Clinic*, No. 90–985, at 10–25 (U.S. 1991).

[68] 3 The Revolution 138, Sept. 2, 1869.

assistance to the young woman. For this act, Lozier was praised in *The Revolution* a eulogized after her death by Pauline Wright Davis, an eminent suffragist:

> *[Lozier's] sense of justice would not allow her to let the wrong-doer escape the penalty of the law, while at the same time she pitied and tenderly cared for the victim. We have been amazed to hear her denounced for this brave, noble act on the ground of professional privacy. It is said she had no right to expose the outrage of having one thousand dollars offered her to commit murder. The murder of the innocents goes on. Shame and crime after crime darken the history of our whole land. Hence it was fitting that a true woman should protest with all the energy of her soul against this woeful crime.*[69]

The 19th century feminists forcefully wrote that the only remedy for this "fearful ravage" was "the education and enfranchisement of women."[70] They originated the then-radical philosophy of "voluntary motherhood," which declared a woman's right to avoid pregnancy as she chose, through birth control or abstinence but *not* through abortion. They sought "prevention, not merely punishment. We must reach the root of the evil."[71]

Their desire for legal reform to protect and improve the circumstances of women[72] was accompanied by support for legal sanctions against the proliferating abortion trade, known commonly as "Restellism." *The Revolution* editorialized in favor of legislation to restrict abortifacient drugs and remedies on grounds that "Restellism has long found in those broths of Bellzebub, its securest hiding place."[73]

In the early 20th century, opposition to abortion by feminists continued. Alice Paul, founder and chair of the National Woman's Party and author of the original Equal Rights Amendment in the 1920s, is recognized as "the foremost feminist of this century." She said that "[a]bortion is just another way of exploiting women."[74] Contemporary women's opposition to abortion thus has a clear philosophical link to the origins of American feminism.

D. Contemporary Feminist Understanding of Women

It was not until the late 1960s that the women's movement began demanding abortion rights. The movement was conceived and portrayed as a revolt against "the traditional female role," inspired in part by Betty Friedan's book, *The Feminine Mystique*.[75] The stated goal of the women's liberation movement was freedom and autonomy on an

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[69] M. Derr, *supra* note 60, at 4 (citing 4 The Revolution 346, Dec. 2, 1869; 5 The Revolution 41–42, Jan. 20, 1870).

[70] 1 The Revolution 65, Feb. 5, 1868.

[71] 4 The Revolution 4, July 8, 1869.

[72] At the same time, these feminists sought reform in marital property laws, the right to vote and the right to trial by a jury of her peers—women—for women, including the "frenzied mother, who, to save herself from exposure and disgrace, ended the life that had but just begun . . ." S. Anthony, M. Gage, E. Stanton, eds., *History of Women Suffrage* 597–98 (1881).

[73] 1 The Revolution 2, Feb. 5, 1868.

[74] Personal correspondence from Evelyn K. S. Judge to Wendy E. Stone, Nov. 1, 1991 (copy on file with the authors). Judge was a longtime political coworker of Paul's and lobbied with her for 18 years on Capitol Hill and at the United Nations.

[75] B. Friedan, *The Feminine Mystique* (1963).

equal basis with men. This encompassed an effort to attain biological sameness as well. Some women hated the uniqueness of the female body and one called gender differences "metaphysical cannibalism."[76] Abortion was deemed necessary to avoid the burdens of pregnancy, which men would not share. This "female oppression" was seen as the "most deeply ingrained injustice in history."[77]

However, the reality of gender differences could not be ignored. Women came to the realization that being treated exactly like a man was not the panacea they had hoped. "Sameness" did not yield equality. Women learned that the rigors they encountered in the workplace were just as brutalizing to men. In addition, many women ended up going home from work to face the "second shift," where women perform 75% of the housework and child care.[78] Academic feminist thought eventually took into account the reality that this "first-stage" feminism or "equality feminism" lets men have it both ways—enjoying the second income of the wife while expecting her to fulfill a more traditional role at home.[79]

Even Betty Friedan now recognizes the "superwoman" fallacy. Speaking at Smith College's commencement, Ms. Friedan told the audience that "having it all" and being a "superwoman" have been

> *a cruel illusion. Women have been spared petty prejudice only to be met with personal catastrophe. For the first time in American history, women work far harder than their mothers. And they miscarry more, are divorced more, abandoned more, abused more, and fall into poverty more.*[80]

Contemporary feminism then tried to compensate for its disillusionment with "absolute equality" by developing "difference feminism" or "second-stage feminism."[81]

> *None of the very real problems facing women today, from finding ways to combine fruitful work with a nurturing family life, to rescuing women from the economic disaster of divorce, can be resolved without abandoning the failed doctrine of sexual androgyny. That is, without firmly and quite unashamedly acknowledging the distinctive needs, desires, and contributions of women.*[82]

Difference feminism "questioned the move towards full assimilation of female identity with public male identity and argued that to see women's traditional roles and activities as *wholly* oppressive was itself oppressive to women, denying them historic subjective and moral agency."[83] Dr. Barbara Bardes, dean of the University College of Loyola University in Chicago, calls this the "post-feminist age:" "It represents a consciousness that women acknowledge their desire to be mothers—that they want to be different but

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[76] Bayles, *supra* note 50, at 79, 84 (quoting Ti-Grace Atkinson).
[77] *Id.*
[78] *See generally* A. Hochschild, *supra* note 32.
[79] Wallis, *supra* note 32, at 86.
[80] As quoted in K. Monroe, *The Writing on the Wall*, The Harvard Salient 1 (Nov. 1990). *See also* Betty Friedan's recent book, *The Second Stage* (1986).
[81] Bayles, *supra* note 50, at 79.
[82] M. Gallagher, *supra* note 51, at 70. *See* Bayles, *supra* note 50, at 85.
[83] Bayles, *supra* note 50, at 85 (quoting Jean Bethke Elshtain, emphasis in original).

equal."[84] This second-stage feminism (or difference feminism) acknowledges and accepts that women are biologically different than men. Second-stage feminism looks at each problem or human condition from the unique perspective of women. But not all feminists who acknowledge sexual differences seek equality. Some make ". . . no pretense of [desiring] equal treatment but rather the pursuit of privilege to compensate for the great range of psycho-sexual differences between the genders."[85]

Nonetheless, this trend in feminism acknowledges values that most women intuitively share: nurturing, responsibility, caring for others and a sense of community. Carol Gilligan concluded in *In a Different Voice* that men reason from ideas of individual rights and fair play, while women reason from ideas of individual responsibility and concern for others.[86] This, of course, is the age-old dichotomy between justice and mercy, that, together, establish the foundation of the human community. But these "feminine" values are not unique to women. Men, too, can be nurturing and care for others, just as women may pursue autonomy and individual rights. But to negate or compromise nurturance and inclusivity destroys the essence of women's self-concept, a deep, inseparable, part of who they are. Thus, the assumption that women need abortion as their "first right" represents a profound misunderstanding of the nature of women.

The commitment to abortion rights creates some glaring inconsistencies for feminism. "Today, this inconsistency shows up in the heat of political debate, as pro-choice activists switch back and forth between the two kinds of feminism to defend the absolute right to abortion."[87] The reason for this dilemma is not difficult to understand: "It is not easy to reconcile the feminine metaphors of motherhood and community with the feminist defense of abortion on the grounds of individual right."[88] This inability of abortion advocates to reconcile these conflicts, accompanied by determined adherence to abortion rights, leaves many American women—those who do not [illegible] the trends in feminist theory—unpersuaded. Despite the self-proclaimed success of some women's organizations, particularly as abortion advocates, a 1989 survey found that only 25% of women agreed that women's organizations have done something that "made your life better."[89]

This confusion—about who women are, what women want and what women believe "woman's role" to be—is no more evident than in the view of unborn children. If feminine values are nurturing and inclusive, does abortion fit in? As individuals with abilities and aspirations, women make moral choices *as women*, in the context of relationships. Those relationships include those who are dependent and vulnerable. And the one who is most dependent on a woman—for her nurturance, compassion, strength, courage and wisdom—is the child in her womb. Mature feminism, therefore, would contemplate that society accommodate the reproductive capacities of women, that childbearing and rearing be valued just as much as, if not more, than establishing financial security and job satisfaction.

The deep needs and feelings of many American women may more accurately be reflected by what has been described as "conservative feminism" or "classical femi-

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[84] Dionne, *supra* note 19, at A1.

[85] Amiel, *Feminism Hits Middle Age*, National Review 23 (Nov. 24, 1989).

[86] C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development* 19–22 (1982).

[87] Bayles, *supra* note 50, at 85.

[88] R. Bray, *No Feminist Is an Island*, The New York Times Book Review 12 (May 5, 1991) (quoting and reviewing E. Fox-Genovese, *Feminism Without Illusions* [1991]).

[89] Dionne, *supra* note 19, at A11.

nism." In her essay, "What Do Women Want?," Katherine Kersten concludes that classical feminism "teaches women that their horizons should be as limitless as men's."[90] She explains:

> *What sets me apart from most contemporary feminists is that—more than anger at the injustices done to women in the past—I feel gratitude toward the social and political system that has made much-needed reform possible . . .*
>
> *Consequently, I propose an alternative to the feminism of the women's studies departments and "public interest" lobbies. I envision a self-consciously* conservative feminism, *inspired by what is best in our tradition, that can speak to women's concerns in both the private and public spheres. Such a feminism is based on three premises: first, that uniform standards of equality and justice must apply to both sexes; second, that women have historically suffered from injustice, and continue to do so today; and third, that the problems that confront women can best be addressed by building on—rather than repudiating—the ideals and institutions of Western culture.*[91]

The conservative feminist seeks the full participation of women in all aspects of cultural and personal development "to develop their talents, to follow their interests to their natural conclusion, to seek adventure, to ask and answer the great questions, and to select from a multitude of social roles," Kersten says.[92]

This view embraces feminine values, seeing "the special bond of motherhood not as evidence of oppression, but as cause for thanksgiving."[93] Many women would agree. Abortion as the "first right" thus stands outside the early tradition of feminism and most contemporary women's self-perception. And although it may be politically correct to espouse abortion as the foundation for women's freedom and progress, it has not truly benefited women. Abortion promotes neither the core values of women, such as inclusiveness and nurturance, nor the premises of autonomy and choice upon which it is based.

III. Is Abortion Really a Free Choice?

A. Male Coercion, Pressure, Denial, Abandonment

Abortion as women's "first right" is premised on abortion as a free, self-determined choice. The abortion-rights movement raised up "freedom of choice" as its ubiquitous slogan in the 1980s. *Roe v. Wade* symbolizes "freedom" to choose abortion. Press releases and advertising suggest that, unless *Roe v. Wade* is overturned and restrictive abortion laws are reinstated, abortion will remain a "free choice." But is the abortion choice really free?

The creation and expansion of the unlimited abortion doctrine first enunciated in *Roe v. Wade* actually isolated women in their contemplation of abortion. First, in *Roe*,

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[90] Kersten, *What Do Women Want?* Policy Review 4, 6 (Spring 1991).
[91] *Id.* at 4.
[92] *Id.* at 10.
[93] *Id.* at 9.

the Court held that a woman had the "right" to decide to have an abortion for any and every reason at any time of pregnancy. Three years later, in *Planned Parenthood v. Danforth*,[94] the Court imposed a revolutionary social law on American men, women, and children: Men have no rights whatever to protect their child before birth. Ironically, the Court recognized that although the woman presumably makes the abortion decision "with the approval of her physician but without the approval of her husband . . . it could be said that she is acting unilaterally."[95] Nonetheless, it approved the unilateral power of the woman to prevent her *husband* (much less a man to whom she is not married) from protecting his own offspring. These two decisions placed all "choice"—the choice to abort or not to abort—on the pregnant woman. By necessary implication, whether the child lives or dies is solely up to the pregnant woman. Since that exclusive power over the child's life is under the woman's control, the determination whether the father will become the father of born offspring and incur child-support obligations falls entirely on the mother. She becomes the only one who can eliminate this expense.

The logic of women's exclusive control over reproduction is not lost on men. By vesting all rights to abort in the mother alone and by stripping the man of all his parental rights, it psychologically divests the man of all responsibility as well. It undermines healthy relationships between men and women. It destroys responsible communication by creating an artificial barrier to discussing a matter that deeply affects not only the woman but her partner as well. Men naturally may respond with distrust. The motives of all women, both those who demand and those who refuse abortion, come under suspicion. True intimacy cannot develop when a relationship lacks trust and communication. Coercion, pressure, abandonment and denial of responsibility all result.

What exacerbates this legal wedge in the relationship between men and women is the fact that 80% of all abortions are performed on single women.[96] In such a relationship, the man bears no legal obligation unless the child survives. Frequently, he neither prepares for nor desires any child. By its very nature, such a relationship creates the greatest potential for male coercion, denial of responsibility and abandonment when pregnancy results.

One of the myths of the abortion liberty—and *Roe v. Wade*—is that it only created a right to choose abortion for women who wanted abortion; it did not force anyone to abort or to participate in abortion. But over the past 15 years, it has become increasingly clear that coercion and pressure on women play a significant role in many, if not most, decisions to have an abortion.[97]

One of the most compelling accounts is Susan Nathanson's story about her abortion and subsequent psychotherapy.[98] Nathanson is no pro-life advocate. Indeed, she wrote

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[94]428 U.S. 52 (1976).

[95]428 U.S. at 71.

[96]Koonin, et al., *Abortion Surveillance, United States, 1988*, 40 *CDC [Centers for Disease Control] Surveillance Summaries, Morbidity and Mortality Weekly Report* 22 (July 1991) (Table 1) (79.7% in 1988).

[97]D. Reardon, *Aborted Women: Silent No More* x (1987). *See, e.g.*, Linda D. v. Frixx C., 38 Wash. App. 288, 687 P.2d 223, 225 (1984) ("When she informed the father [that she was pregnant], he asked her to have an abortion. She refused."); L. Francke, *The Ambivalence of Abortion* (1978). *See also* S. Nathanson, *supra* note 40, at 201; Baker, *supra* note 31; Goodman, *supra* note 31.

[98]S. Nathanson, *supra* note 40, at 3 ("I did not anticipate how profoundly I would suffer emotionally, or how long my suffering would endure").

[99]*Id.* at 2–5. *See also* Nathanson-Elkind, *Perspectives on the Abortion Debate*, San Francisco Examiner-Chronicle, July 8, 1990, at 1 (review of Laurence Tribe, *Abortion: The Clash of Absolutes*). Susan Nathanson is not related to Bernard Nathanson, M.D.

her book to make the argument for abortion rights and to support *Roe v. Wade*.[99] But she writes honestly. The night before her abortion she sat, watching out the window of her house: "But mostly I sit with the life of my fourth child growing inside me, trying to contemplate this ending, and I grieve and grieve and grieve and grieve."[100]

Coercion by her husband played a primary and determinative role in her abortion. "I am absolutely clear that I do not want a fourth child under any circumstances," he said.[101] "If you don't choose to abort this child, I will push you to do it."[102] Nathanson felt she had little alternative: "It is at this moment that I know that *I* will take responsibility for the decision that must be made and that I will have an abortion, even though Michael and I will repeat this discussion over the next few days with no variation in our positions."[103] Some time after the abortion, her husband realized that he "pushed [her] to make the decision to have an abortion."[104] Much of the last part of her book describes her post-abortion counseling. It does not seem to help when, five years later, her husband suggests that they could have had that fourth child after all: "I was so worried about my physical well-being then. I don't have that apprehension now. Now I feel as if we really could have managed to raise that child."[105] Unable to respond to his untimely admission, Nathanson has "no answer" for her husband. What is remarkable about this account is that it happened *within* an apparently healthy marriage—under ideal economic, social and emotional conditions to support mother and child. If the abortion liberty can prompt such coercion within an intact marriage, its impact on extramarital relationships can only breed more disastrous consequences.

Coercion or pressure to have an abortion is reflected in court cases of various kinds around the country.[106] In some cases, fathers raise the woman's "right to abortion" as an affirmative defense to child support. The defense is usually framed in the following terms: The woman got pregnant by a man to whom she was not married; he did not want to get married or to support the child; she could have had an abortion, and he offered to pay for that abortion; she has a constitutional right to get an abortion, and he is legally helpless to prevent it; by her failure to obtain an abortion, she took sole responsibility for the child; therefore, the man should not be liable for any child support. Fortunately for the women and children involved, all courts have apparently rejected this defense.[107] But they have done so only by evading the logic of *Roe v. Wade*. In other variations on this theme, men have sued to "enforce" a contract to undergo an

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[100] S. Nathanson, *supra* note 40, at 41.

[101] *Id.* at 25.

[102] *Id.* at 28.

[103] *Id.* at 29 (emphasis in original); *id.* at 28 ("this man who is pressuring me to give up my fourth child"); *id.* at 29–30 ("the final responsibility for the choice clearly rests with me alone").

[104] *Id.* at 154.

[105] *Id.* at 287–88.

[106] *See, e.g.*, Noto v. St. Vincent's Hosp. & Med. Center, 142 Misc.2d 292, 537, N.Y.S.2d 446 (1988), *aff'd*, 559 N.Y.S.2d 510 (1990) (abortion after "affair" with hospital psychiatrist; pressure to have abortion alleged); J.L.S. v. W.C., No. PI 90-2333 (Hennepin County Dist. Ct., 4th Jud. Dist., Minn. filed Feb. 8, 1990) (coercion to have abortion alleged).

[107] People in Interest of S.P.B., 651 P.2d 1213 (Colo. 1982); D.W.L. v. M.J.B.C., 601 S.W.2d 475 (Tex. Civ. App. 1980); Harris v. State, 356 So.2d 623 (Ala. 1978); Dorsey v. English, 390 A.2d 1133 (Md. Ct. App. 1978); Dauksas v. Rataj, No. 87 CH 5206 (Cook Co. Ill. Cir. Ct. filed May 28, 1987). *See also In re* Ince, 28 Or. App. 71, 558 P.2d 1253 (1977), *appeal dismissed*, 434 U.S. 806 (1977); *In re* Goodwin, 30 Or.App. 425, 567 P.2d 144 (1977); Isabellita S. v. John S., 132 Misc.2d 475, 504 N.Y.S.2d 367 (1986). *See generally* Swan, *Abortion on Maternal Demand: Paternal Support Liability Implications*, 9 Val. U.L. Rev. 243 (1975).

abortion.[108] Women have been subjected to unconsented abortion performed by a physician-lover,[109] defenses to child support for "misrepresenting" the nonuse of contraception[110] or clauses in surrogate mother contracts requiring the surrogate mother to undergo an abortion for various reasons. Few disputes end up in court, and even fewer appear in published court decisions. There are countless scenarios in which the man threatened nonsupport but did not follow through with a lawsuit.[111]

Coercion to have an abortion is also reported in scholarly journals. A survey from the Medical College of Ohio examined a sample of 150 women who "identified themselves as having poorly assimilated the abortion experience."[112] Of the 81 women who responded, "more than one-third felt they had been coerced into their decision"; less than one-third of these women initially considered the abortion themselves.

There is a tendency to suggest that male coercion is simply a kink that needs to be worked out of our policy of legalized abortion.[113] But male coercion is an inevitable tragic consequence of legal abortion on demand inaugurated by *Roe*. This endemic coercion is revealed in Carol Gilligan's work, *In a Different Voice*.[114] Gilligan determined that the women she interviewed processed their abortion decision consistent with objective moral reasoning and based on principles of care, concern, responsibility and nonviolence. Gilligan suggested, "The sequence of women's moral judgment proceeds from an initial concern with survival to a focus on goodness and finally to a reflective understanding of care as the most adequate guide to the resolution of conflicts in human relationships."[115] Gilligan's sample, however, reveals that many decisions were not independent, moral choices. Male coercion played an important role in a number of cases.[116] Harvard Law Professor Mary Ann Glendon observed: "It is striking how many

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[108] Breidenbach v. Hayden, No. 90-CI-00021 (Jefferson Co., Ky., Cir. Ct. Div. 2); Briedenbach v. Hayden, No. 91-CI-00591 (Jefferson Co., Ky., Cir. Ct. Div. 2) (custody action). A surgeon allegedly impregnated his secretary during an affair, paid her $20,500 to have an abortion, and then sued for breach of contract for her failure to comply. The physician alleged the woman's failure to return his money and also objected to fully supporting the child once it was born. After a paternity suit and proof that the physician was indeed the father of the child, he asked for visitation rights and custody or joint custody. Wolfson, *Lawsuit raises novel questions in abortion case*, Louisville Courier-Journal, Mar. 28, 1991, at 1.

[109] Collins v. Thakkar, 552 N.E.2d 507 (Ind. Ct. App. 1990), *appeal denied*, No. 30A01-8911-CV-00460 (Ind. Oct. 11, 1990), *on remand*, Collins v. Thakkar, No. 73C01-9005-CP-0074 (Shelby Co., Ind., Cir. Ct.) (physician allegedly aborted three-month-old fetus during pelvic examination against Collins' wishes). The same physician allegedly drugged another woman, aborted her eight-month-old unborn child, then killed the infant. Hertzinger v. Thakkar, No. 29C01-8903-CT-00174 (Hamilton Co., Ind. Cir. Ct. 1991); Caleca, *Doctor sued over abortions can't move or hide assets*, Indianapolis Star, Feb. 21 1989, at 1. Dr. Thakkar was found guilty of seducing three women and aborting or attempting to abort their pregnancies without their consent. *Chicago Tribune*, June 13, 1991, at 24.

[110] Linda D. v. Fritz C. 38 Wash. App. 288, 687 P.2d 223 (1984); L. Pamela P. v. Frank S., 449 N.E.2d 713, 59 N.Y.2d 1 (1983); Hughes v. Hutt, 455 A.2d 623 (Pa. 1983); Stephen K. v. Roni L., 105 Cal. App. 3d 640, 164 Cal. Rptr. 618 (1980). *See also* Barbara A. v. John G., 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983).

[111] *See, e.g.*, D. Reardon, *Aborted Women: Silent No More* (1987).

[112] Franco, et al., *Psychological profile of dysphoric women postabortion*, 44 J. Amer. Med. Women's Assoc. 113 (July/August 1989). *See also* M. Zimmerman, *Passage Through Abortion: The Personal and Social Reality of Women's Experiences* (1977).

[113] Callahan, *supra* note 6, at 684.

[114] Gilligan, *supra* note 86. It should be noted that the interviewing group totaled 24 women and "no effort was made to select a representative sample of the clinic or counseling service population." *Id.* at 3.

[115] *Id.* at 105, 82–83, 99.

[116] *See, e.g., id.* at 80 (Cathy), 81 (Denise), 90–91 (Sarah).

of Carol Gilligan's subjects in her chapter on the abortion decision stated that one of the reasons they were seeking abortions was because the men in their lives were unwilling to give them moral and material support in continuing with pregnancy and childbirth. This fact surely must have been central to their moral dilemma, but Gilligan, surprisingly, never picks up on this aspect of her data."[117] Gilligan—who has a reputation as the foremost feminist analyst of women's abortion rights and independent decision-making—evidently could not distinguish independent judgment from coercion.

Gilligan's conclusions have been challenged by moral philosopher Janet Smith and others on precisely this point.[118] Gilligan does not approve of being "self-sacrificing." Nor does she believe that any act, including abortion, is intrinsically immoral, though she believes that abortion is often the "morally responsible" choice.[119] How can the demand for arbitrary life-and-death power over one's own children be morally "responsible," as Gilligan claims? This claim for exclusive dominion over the fetus is nothing short of viewing the child as property.[120] This directly conflicts with what women know about their own children: "This child is flesh of my flesh and bone of my bone." "This daughter has my blue eyes; this son has my dark hair." It was not so long ago that wives were treated as the property of their husbands (and, in some parts of the world, they still are).[121] If it is wrong for men to treat others as possessions, it is wrong for women, too.

Who has abortion freed? Legalized abortion has helped create a sexual climate throughout our country by which men are freed to engage in the most irresponsible sexual relations, and the consequences fall directly and solely upon the woman. Women are left to pay the price. Kathleen Kersten highlights the painful consequences of sex without commitment:

> *Feminists often explain traditional restraints on women's sexual freedom in one-dimensional terms, dismissing them as male attempts to wrest control of women's vital reproductive functions.*
>
> *. . . But women are wrong to assert that sex without commitment is no more dangerous for women than it is for men. We know now that sex of this sort has led to an epidemic of abortions, venereal disease, and female infertility; a host of unwanted children; and a sorry legacy of educations and careers—women's, not men's—cut short.*[122]

Contrary to what might be the popular impression, abortion does not solve or heal relationships. Indeed, it usually dissolves them. "When one partner wants a child and the other doesn't, an abortion often leads to a breakup."[123]

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[117] M. Glendon, *Abortion and Divorce in Western Law* 52 (1987).

[118] Smith, *Abortion and Moral Development Theory: Listening with Different Ears*, 28 Inter. Phil. Q. (March 1988); reprinted in 13 Inter. Rev. 237 (Fall/Winter 1989).

[119] *Id.* at 246–248.

[120] *See* Ryan, *"The Arguments for Unlimited Procreative Liberty: A Feminist Critique,"* Hastings Center Report 6 (July/Aug. 1990).

[121] Elizabeth Cady Stanton wrote in 1873, "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we wish." Monroe, *supra* note 80, at 12.

[122] Kersten, *supra* note 90, at 13.

[123] Goodman, *supra* note 31, at 179.

> *The most common male response to unwanted pregnancy when it occurs outside of marriage has been to "take off," leaving the woman to bear the physical, the emotional and, often, the financial brunt of either having an abortion or carrying the pregnancy to term. Studies of abortion and its aftermath reveal that, more often than not, relationships do not survive an abortion: the majority of unmarried couples break up either before or soon after an abortion.*[124]

Men are freed to engage in behavior without serious personal consequences, knowing that it is both the woman's "right" and "responsibility" to get an abortion if anything goes "wrong."[125] He has the "security" that the woman can obtain an "easy," "safe," "painless," "quick" abortion, for which he might pay $200 to $300.[126]

Freely available legal abortion thus encourages the very kind of male behavior that feminists have railed against for generations. "Modern ideology makes it easy for men to rationalize their defection from family life. . . ."[127] Even an abortion rights advocate like Daniel Callahan can see this: "If legal abortion has given women more choice, it has also given men more choice as well. They now have a potent new weapon in the old business of manipulating and abandoning women."[128] Since 80% of abortions are performed on single women, who are outside the protective circle of family life, it is probable that the man is strongly inclined to not want their child.[129] His pressure on the woman to "choose" her legally endorsed alternative is virtually inevitable.[130] The notion among modern feminists that restrictive abortion laws *support* "male domination" is tragic foolishness. It is directly contradicted by real human experience with abortion on demand in the United States over the past 19 years.

B. Parental Coercion

Men are not the only source of coercion. Parental coercion of teens does occur, and it can be overwhelming.[131] The extent of this pressure is difficult to document, but one example illustrates the extremes to which parents may go to compel their daughter to have an abortion. ChristyAnne Collins is executive director of an organization that provides crisis pregnancy assistance: counseling, medical services and placement services. She was appointed by a Rockville, Maryland circuit judge as legal guardian for a 16-year-old woman ("Jane Doe") who wanted to continue her pregnancy.[132] The previous year, Jane Doe had been forced by her parents to abort an earlier pregnancy.[133]

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[124] K. McDonnell, *Not an Easy Choice: A Feminist Re-examines Abortion* 59 (1984) (citing M. Zimmerman, *supra* note 112).

[125] D. Reardon, *supra* note 97, at xi (1989).

[126] Goodman, *supra* note 31, at 179, 209.

[127] M. Gallagher, *supra* note 51, at 116.

[128] Callahan, *supra* note 6, at 684.

[129] Goodman, *supra* note 31, at 209, 210.

[130] M. Gallagher, *supra* note 51, at 108–110.

[131] *See generally* Ciolli, *Abortion and Consent: Limiting minors' access in next court battleground*, New York Newsday, Sept. 25, 1989, pp. 3, 21; Feder, *Parents in the dark on abortion*, Boston Herald, Dec. 11, 1989; Herrmann, *Fifty percent of teens tell their parents*, Chicago Sun Times, June 26, 1991, p. 42.

[132] In the matter of Jane Doe, C.A. No. 70798 (Mont. Co. Md. Cir. Ct., Feb. 1, 1991).

[133] Telephone conversation with ChristyAnne Collins, May 10, 1991. Her parents appeared to acquiesce in their daughter's refusal. When Jane, accompanied by her parents, agreed to go to a clinic to test for sexually transmitted diseases, she again refused to sign abortion consent papers. The last thing she remembers is the nurse drawing blood for a test. She woke up from anesthesia two hours later with her unborn child aborted.

In order to exercise her choice to carry her second pregnancy to term, Jane Doe had to turn to the courts for protection from her parents. It is ironic that this occurred in Maryland, a state that excludes parental influence in *preventing* an abortion.

Another teenager, this time the victim of rape, was taken against her will to a Bremerton, Washington abortion clinic. Although she screamed that she did not want an abortion, the abortionist and nurse, in unsanitary clothing, forced this teen to undergo the procedure. Police detective Linda Johnson—who had been ordered against her will to gather the fetal remains as evidence against the rapist—attempted suicide more than a dozen times and was treated at a mental health clinic.[134]

A more widely published example of coercion—not choice—is that of Denise Lefebvre in Florida. Denise is apparently psychotic and routinely takes lithium, an antipsychotic drug known to cause birth defects. In 1990, she stopped taking the drug when she suspected she was pregnant, even though her condition renders her dangerous to herself and others when she is not medicated. She apparently stopped the medication to protect her unborn child, and spent virtually all her pregnancy confined to a hospital—strapped to the bed for her own protection. The assistant public defender who eventually represented her said, "This woman is very lucid regarding her baby. Everyone wanted to give the woman an abortion except her."[135] Indeed, the physicians involved, and even her father, sought to order an abortion against her will. They argued that there was a *chance* of fetal defect based on *possible* exposure to lithium. Florida law provides for "termination of pregnancy" for incompetent women if certain procedural safeguards are extended.[136] For example, a three-member examining committee must be appointed before a determination of incapacity is made, and written consent of the woman's court-appointed guardian must be obtained before the pregnancy can be terminated. Lefebvre was originally denied all the procedural protections due her, and the trial court ordered an abortion. The appeals court reversed the decision solely on procedural error. A healthy baby boy was born just after Christmas. At last report, the baby was scheduled to be adopted by other Lefebvre family members.[137]

C. Social Pressure

Perhaps as much as direct coercion, women cite a lack of alternatives—or their belief that they had no alternative—as the reason for abortion.[138] Some women view abortion as a "forced response to a problem, rather than an affirmative action in their lives."[139] This may be due, at least in part, to inadequate counseling.[140] This situation seems not to have changed in 30 years. In 1960, Mary Calderone, the medical director of Planned Parenthood Federation of America, wrote:

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[134] Johnson v. City of Bremerton, No. 89-2-00218-5 (Kitsap Co., Wash. Sup. Ct. 1990); Marez, *Former police officer tells about "abortion duty,"* Bremerton (Wash.) Sun, Oct. 18, 1990, at B1, col. 1.

[135] *Psychotic's pregnancy stirs legal fight*, Chicago Tribune, Aug. 24, 1990, sec. 1, p. 20; *Baby born after abortion fight may be up for adoption*, Chicago Tribune, Jan. 2, 1991, sec. 1, p. 3, col. 2.

[136] Fla. Stat. § 394.467 (1989); Fla. Stat. § 744.331 (1989); Fla. Stat. 390.001(4)(1989).

[137] Lefebvre v. North Broward Hosp. Dist., 566 So. 2d 568 (Fla App. 1990); Los Angeles Times, Jan. 1, sec. A-22, col. 1.

[138] D. Reardon, *supra* note 97; Quarles, Letter to the editor, Ms. Magazine, 19–20 (Jan./Feb. 1989); "Women who have the fewest choices of all exercise their right to abortion the most." Tisdale, *We Do Abortions Here: A Nurse's Story*, Harper's 66, 70 (Oct. 1987).

[139] Franco, *supra* note 109, at 115 (citing Freeman, *Influence of personality attributes on abortion experiences*, 47 Am. J. Orthopsychiatry 503 (1977)).

[140] Callahan, *supra* note 6, at 687.

> *Conference members agreed, and this was backed up by evidence from the Scandinavians, that when a woman seeking an abortion is given the chance of talking over her problem with a properly trained and oriented person, she will in the process very often resolve many of her qualms and will spontaneously decide to see the pregnancy through, particularly if she is assured that supportive help will continue to be available to her.*[141]

Besides feeling alone and without resources, a pregnant woman may also sense the pressure of the workplace. For example, a recent study of female medical residents reported open hostility to pregnant residents from program directors and colleagues.[142] The percent of abortion among female residents was *threefold* that of the control group.[143] And those residents and physicians who chose to carry their pregnancies to term were "more likely to underreport their symptoms in order to minimize the influence of their pregnancy on their work."[144]

Similarly, women lawyers are aware of the same subtle bias against having children. An article in the *National Law Journal* noted that law firms have been unable or unwilling to create an environment supportive of working mothers.[145] Women who want to make partner are told not to get pregnant until the partnership is secure. Those who do choose motherhood are often put on the "mommy track," with no likelihood of achieving partnership. In another recent incident, the New York City Department of Corrections settled a lawsuit filed by several female officers who had been told to have abortions; many who refused were given physically grueling jobs.[146]

D. Failure to Protect Wanted Children

Abortion-rights advocacy goes to such lengths as to vigorously fight against any legislative attempts to protect the child of the woman who chooses nurturance. For example, in 1991 the New Hampshire legislature considered and passed a fetal homicide bill that would penalize the killing of an unborn child by a third person (other than an abortionist). A criminally assaulted pregnant woman who did not previously choose abortion presumably desires to carry her child to term. The bill was opposed by the National Abortion Rights Action League of New Hampshire. Spokesperson Peg Dobbie argued that it would lead to limitations or restrictions on "a woman's reproductive right."[147] A similar bill was defeated by abortion-rights advocates in Delaware in 1991.[148] Thus the pro-choice position claims that a woman who *chooses* to give birth should be given no legal protection, even after viability, for the child she carries in her womb.

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[141] Calderone, *supra* note 8, at 951.

[142] Shulkin & Bari, Letter to the editor, 324 New Eng. J. Med. 630 (Feb. 28, 1991).

[143] Klebanoff, Shiono & Rhoads, *Outcomes of Pregnancy in a National Sample of Resident Physicians*, 323 New Engl. J. Med. 1040, 1041 (Oct. 11, 1990).

[144] Letter, *supra* note 142, at 630.

[145] Stern, *Female Talent at Lawfirms*, National Law Journal 15–16 (Mar. 18, 1991).

[146] Martin, *Women Given Cruelest Choice Now Fight Back*, New York Times, Oct. 21, 1989, at A27. *See* New York Daily News, May 24, 1989 (More than a dozen women claimed they were told to have abortions or resign their jobs. One suffered a miscarriage, although she pleaded with supervisors to allow her to see a doctor. Another who became pregnant was told to "stay home and collect (welfare) checks or get rid of it.").

[147] Kenny, *What Is Life Worth in New Hampshire?* Manchester Union Leader, Feb. 14, 1991, at 45.

[148] Alan Guttmacher Institute, *State Reproductive Health Monitor*, vol. 2, no. 3 at 4 (Sep. 1991).

Nor does the pro-choice position permit state encouragement of healthy prenatal care. This has led to a strange alliance between the National Organization for Women (NOW) and tavern owners in New York, both of whom oppose mandatory posting of signs that warn pregnant women of the dangers of alcohol consumption. The warning-sign legislation is an attack on the woman's right to "choose," according to state NOW president Marilyn Fitterman.[149]

"Freedom of choice" appears to be a one-way street when the issue is abortion. For Denise Lefebvre and Jane Doe, their choice *not* to have an abortion was opposed by those with more power; this resonates of patriarchy and chauvinism. These women, and many like them, are vulnerable to a system that is geared to deal with problem pregnancies by eliminating the unborn child. Feminism supposedly stands against patriarchy and paternalism. Yet silence or outright opposition from the women's movement in the face of real harm to real women belies their claim to represent women. "Choice" has come to mean that abortion is a moral good, and any law that might influence a woman to consider an alternative to abortion or that establishes governmental protection for the child *in utero* is suspect. The "choice" agenda is not truly about protecting women; it is about promoting abortion.

IV. The Impact of Abortion on Women's Health

A. The Use and Misuse of Abortion Statistics

A current abortion-rights slogan is, "Keep abortions safe and legal!" The phrase fosters the assumption that, invariably, legal abortions are safe and illegal abortions are not. The evidence fails to support this claim.

Prior to *Roe v. Wade*, proponents of legalized abortion sought to eradicate "back-alley abortions," alleging they were dangerous because they were illegal. In their view, illegality meant that only criminal abortionists—unskilled and uncaring—performed abortions.[150] Liberalization of abortion laws should therefore eliminate, or at least substantially reduce, abortion morbidity. Part and parcel of this campaign was the claim about the large number of illegal abortions performed before 1973. Based on a 1955 conference sponsored by Planned Parenthood, a figure of 200,000 to 1,200,000 was widely cited for the next 20 years.[151] Although there is anecdotal evidence of illegal

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[149] Sack, "Unlikely Union in Legislative Battle: Feminists and Liquor Sellers," New York Times, April 5, 1991, at A16.

[150] A typical example of this broad brush, undocumented "parade of horribles" is L. Lader, *supra* note 5, at 21–24.

[151] Both Calderone and Tietze relied on the 1955 conference estimate. The papers and discussion from the conference were later published in a book edited by Calderone. M. Calderone, ed., *Abortion in the United States* (1958). Calderone later said, "The best statistical experts we could find would only go so far as to estimate that, on the basis of present studies, the frequency of illegally induced abortion in the United States might be as low as 200,000 and as high as 1,200,000 per year." Calderone, *supra* note 8, at 950. *See also*, Schwarz *Abortion on Request: The Psychiatric Implications* in *Abortion, Medicine, and the Law* 331 (J. D. Butler & D. Walbert eds. 3d ed. 1986), ("1 million" each year, citing Tietze & Lewit, *Abortion*, 220 Scientific Amer. 21, 23 (1969)). Yet, Calderone wrote, "I would like to enlist public health in an effort to establish better figures on the incidence of illegal abortion. Actually, of course, we know that the nature of this problem is such that one will never get accurate ex post facto figures." Calderone, *supra* note 8, at 952.

A 1961 study arrived at a much lower estimate. "During the years 1940–1967, the largest possible number of criminal abortions in any one year was approximately 210,000 . . . in 1961 and the least number in this prelegalization era was 39,000 in 1950; the mean was 98,000." Syska, Hilgers & O'Hare,

abortions and illegal abortion counseling and referral, the actual number of abortions is very difficult to quantify. Most of the anecdotes appear to stem from the 1960s.[152] Just a few years later, both the incidence and dangers of abortion were in question. In 1960, Mary Calderone, Planned Parenthood's medical director, concluded that "90% of all illegal abortions are presently done by physicians."[153]

Calderone wrote:

> *Abortion is no longer a dangerous procedure. This applies not just to therapeutic abortions as performed in hospitals but also to so-called illegal abortions as done by physicians. In 1957 there were only 260 deaths in the whole country attributed to abortions of any kind . . . Two corollary factors must be mentioned here: first, chemotherapy and antibiotics have come in, benefiting all surgical procedures as well as abortion. Second, and even more important, the [1955 Planned Parenthood] conference estimated that 90 per cent of all illegal abortions are presently done by physicians. Call them what you will, abortionists or anything else, they are still physicians, trained as such; and many of them are in good standing in their communities.* They must do a pretty good job if the death rate is as low as it is. *Whatever trouble arises usually comes after self-induced abortions, which comprise approximately 8 per cent, or with the very small percentage that go to some kind of nonmedical abortionist. Another corollary fact: physicians of impeccable standing are referring their patients for these illegal abortions to the colleagues whom they know are willing to perform them, or they are sending their patients to certain sources outside of this country where abortion is performed under excellent medical conditions . . . So remember fact number three; abortion, whether therapeutic or illegal, is in the main no longer dangerous, because it is being done well by physicians.*[154]

Nonetheless, later reports exaggerated the numbers of maternal deaths from illegal abortion as ranging from 5,000 to 10,000 deaths annually.[155] One founder of the Na-

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An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy, in Hilgers, Horan & Mall, *New Perspectives on Human Abortion* 171 (1981).

[152] F. Ginsburg, *supra* note 50, at 37, n. 20. Lader sets forth evidence tending to show that supply increased demand when clergy consultation services arose after the opening of the first service in New York City in May 1967. L. Lader, *supra* note 5, at 42–54, 72–79.

[153] Calderone, *supra* note 8, at 948, 949. Tietze repeated the 90% figure in 1969, relying on Kinsey's studies of sexual behavior. 220 *Scientific Amer.* at 23. Lader provides similar evidence at various points. Lader, *supra* note 5, at viii ("performed in the offices of licensed physicians").

[154] Calderone, *supra* note 8, at 949 (emphasis added).

[155] L. Lader, *Abortion* 3 (Beacon Press paperback 1967) ("5,000 to 10,000 abortion deaths annually"); Maginnis, *Elective Abortion as a Woman's Right*, in A. Guttmacher, ed., *supra* note 7, at 132 ("some 5,000 to 10,000 deaths yearly"); Editorial, *Start on Abortion Reform*, New York Times, April 29, 1967, at 34, col. 1 ("the needless death of 4000 mothers each year").

Lader acknowledged that "Dr. Tietze places the figure nearer 1,000" (*Abortion*, at 3). The late Dr. Christopher Tietze of the Alan Guttmacher Institute called the 10,000 figure "unmitigated nonsense." Graham, *Fetus Defects Pose Abortion Dilemma*, New York Times, Sept. 7, 1967, at 38, col. 2. He would have put the figure at under 1,000. Tietze & Lewit, *supra* note 8, at 21, 23. But Tietze also wrote: "Nor do we have reliable data for determining the number of deaths from illegal abortions in the United States."

tional Association for the Repeal of Abortion Laws (now the National Abortion Rights Action League—NARAL) later conceded, in retrospect, that such claims were completely false and were for rhetorical purposes only.[156] These allegations ignored evidence of the tremendous reduction in abortion-related deaths in the prior 30 years due to advances in medical care.[157] The Centers for Disease Control in Atlanta reported 39 *illegal* abortion-related deaths and 24 *legal* abortion-related deaths in 1972, the last full year before abortion was nationally legalized by *Roe v. Wade*.[158]

Abortion proponents, who argued that legalized abortion would prevent maternal deaths from childbirth, have cited national statistics to prove that abortion is physically safer than childbirth.[159] This argument is undermined, however, by technological advances in the 1960s by which "medical science has now made it possible for all but the most severely medically ill women to give birth safely."[160] Mary Calderone said in 1960, "Medically speaking, that is, from the point of view of diseases of the various systems . . . it is hardly ever necessary today to consider the life of a mother as threatened by a pregnancy."[161] Both general maternal mortality and abortion-related maternal mortality have been on a steady downward trend for decades. The legalization of abortion has had little effect on this trend.[162] Claims that "abortion is safer than childbirth"

Other sources cite other statistics. D. Callahan, *Abortion: Law, Choice, and Morality* 132–36 (1970); Louisell & Noonan, *Constitutional Balance*, in J. Noonan, ed., *The Morality of Abortion: Legal and Historical Perspectives* 231–32 n.53 ("[a]pproximately 250 women each year are known to have died as a result of abortions") (citing *Vital Statistics of the United States*—235 maternal deaths from abortion in 1965; 189 maternal deaths from abortion in 1966); Hilgers & O'Hare, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in Hilgers, Horan & Mall, *New Perspectives on Human Abortion* 80 (1981) (abortion-related maternal deaths: 235 in 1965, 189 in 1966, 160 in 1967, 133 in 1968, 132 in 1969, 128 in 1970, 99 in 1971, 70 in 1972, 36 in 1973) (citing II *Vital Statistics of the United States: Mortality, Part A, 1960–1977*). Tietze also acknowledged the NCHS statistic of 235 from all abortions in 1965 but then said, without documentation or citation, "Total mortality from illegal abortions was undoubtedly higher than that figure . . ." Tietze & Lewit, *supra* note 8, at 23.

[156] "How many deaths were we talking about when abortion was illegal? In N.A.R.A.L., we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always '5,000 to 10,000 deaths a year.' I confess that I knew the figures were totally false, and I suppose the others did too if they stopped to think of it. But in the 'morality' of the revolution, it was a useful figure, widely accepted, so why go out of our way to correct it with honest statistics. The overriding concern was to get the laws eliminated, and anything within reason which had to be done was permissible." B. Nathanson, *Aborting America* 193 (1979).

[157] Dr. Andre Hellegers, Professor of Obstetrics and Gynecology at Georgetown University Hospital, cited a reduction in abortion related deaths from 1,231 in 1942 to 120 in 1971. *Abortion—Part 2: Hearing Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary of the United States Senate on S.J. Res. 119 and S.J. Res. 130*, 93d Cong., 2d Sess. 107 (1976) (April 25, 1974, statement of Andre Hellegers).

[158] U.S. Public Health Service, Centers for Disease Control, *Abortion Surveillance* 61 (Nov. 1980).

[159] Cates, et al., *Mortality from Abortion and Childbirth: Are the Statistics Biased?*, 248 J.A.M.A. 192 (1982); Le Bolt, et al., *Mortality from Abortion and Childbirth: Are the Populations Comparable?*, 248 J.A.M.A. 188 (1982).

[160] Schwartz, *supra* note 151, at 325.

[161] Calderone, *supra* note 8, at 948.

[162] Hilgers & O'Hare, *supra* note 155, at 68, 73.

In Illinois, for example, maternal deaths (defined as deaths attributed to "complications of pregnancy, childbirth, and the puerperium") dropped from 1,141 in 1920, to 699 in 1930, to 114 in 1950, to 40 in 1972 (the last full year before *Roe*). Between 1972 and 1981, however, maternal deaths only dropped from 40 to 27, and the rate only dropped from 2.2 to 1.5. Illinois Dept. of Public health, *Vital Statistics Illinois 1981* I.11 (March, 1984) (Table A).

are compromised not only by the likelihood that deaths relating to abortion are underreported but also by the fact that the methods employed by some statisticians do not represent a valid comparison between abortion and childbirth: Most studies consider as deaths related to "childbirth" virtually all cases of maternal mortality not related to abortion, why and whenever they occur. When comparison is made between abortion and natural pregnancy during corresponding periods of gestation, natural pregnancy is shown to be safer than induced abortion at every stage.[163]

In contrast to unsubstantiated claims about the danger of illegal abortion and the risks of childbirth, legal abortion has been consistently publicized since *Roe* as "safe" and "easy." Abortion advocates vehemently assert that recriminalizing abortion will inevitably make it unsafe. Likewise, proponents allege that legal abortion has little negative psychological impact. At most, abortion advocates concede short-term negative psychological reaction but no long-term negative consequences. And in any case, psychological consequences from abortion are alleged to be less than, or no greater than, those following childbirth.[164] (The psychological impact of legal abortion is discussed in subsection E. below.)

In truth, the physical effects of legalized abortion are difficult to quantify accurately. The late Christopher Tietze, Planned Parenthood's statistician, wrote in a prior edition of this book:

> *Abortion-related deaths are of course only the proverbial tip of the iceberg. Nationwide information on the incidence of nonfatal complications of legal abortion, including major complications requiring inpatient care, is far less complete than information on abortion-related mortality. This is so because there is no agreement among investigators as to what constitutes a major complication, and no system of surveillance is in place.*[165]

Only two national agencies have the capacity to compile national data about abortion, the Centers for Disease Control (CDC) in Atlanta (a division of the federal Department

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It is difficult to determine an objective relationship between legality and safety. "Legal abortion" is defined by CDC officials "as a procedure performed by a licensed physician or by someone acting under the supervision of a licensed physician," while an "illegal abortion" is defined "as a procedure performed by the woman herself or by someone who was not a licensed physician and was not acting under the supervision of a licensed physician." Atrash, et al., *Legal Abortion in the United States: Trends and Mortality*, 35 Contemp. Ob. Gyn. 58, 59 (Feb. 1990). But if any abortion is *defined* as "legal" merely if a physician is licensed and safety is attributed to this fact alone, then most abortions performed before 1973 were, in effect, "legal abortions" as well. Tietze & Lewit, *supra* note 8, at 23; Calderone, *supra* note 8, at 949.

[163] Hilgers & O'Hare, *supra* note 155, at 86–89 (comparison of maternal mortality rates from induced abortion and natural pregnancy during first 20 weeks and final 20 weeks of pregnancy); Lanska, et al., *Mortality from Abortion and Childbirth*, 250 J.A.M.A. 361–362 (1983) (correspondence, emphasizing that "maternal mortality caused by abortion should be compared with both vaginal delivery and cesarean delivery separately . . . the results suggest that the mortality rate among women who had an abortion is almost twice as high as maternal mortality rates for women who have vaginal deliveries.").

[164] Schwartz, *supra* note 151, at 331 (citing David, *Abortion in Psychological Perspective*, 42 Am. J. Orthopsychiat. 61 [1972]; Brewer, *Incidence of Post-Abortion Psychosis: A Prospective Study*, 1 Brit. Med. J. 476 [1977]).

[165] Tietze, *Demographic and Public Health Experience with Legal Abortion: 1973–1980*, in J. Douglas Butler & David F. Walbert, eds., *Abortion, Medicine, and the Law* 303 (3d Rev. ed. 1986).

of Health and Human Services) and the Alan Guttmacher Institute (AGI), a private organization that historically was the research arm of Planned Parenthood.[166] There is no federal abortion statistics reporting law.[167] The CDC relies on voluntary reporting and on reporting made to the individual state departments of health pursuant to state statute. This is a patchwork compilation since abortion reporting laws vary from state to state and some states have no reporting law in effect.[168] Many states have attempted to collect accurate medical data through confidential abortion reporting.[169] Yet these have been regularly struck down by the courts.[170] Some providers may not report or may underreport abortions, as well as deaths and complications, to state authorities.[171] The CDC admits that it annually underreports abortions and abortion deaths and complications.[172] As a result, the CDC reports are not entirely reliable. At the same time, the AGI's ideological support for the broadest abortion rights has enabled it to collect abortion statistics directly from providers for the past 15 years.[173] But the providers have an obvious interest in not releasing complete reports of deaths or complications. And these data are apparently unavailable to the CDC and even less available to the public. As a

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[166] Gorney, *Abortion in the Heartland*, Washington Post Health Section, Oct. 2, 1990, at 12–13 ("the Alan Guttmacher Institute, a research organization formerly funded by Planned Parenthood . . .").

[167] *Teen Pregnancy: What Is Being Done? A State by State Look*, Report of the House Select Committee on Children, Youth and Families, 99th Cong., 2d Sess., 5 (Dec. 1986).

[168] Atrash, et al., *The Need for National Pregnancy Mortality Surveillance*, 21 Fam. Plan. Perspect. 25 (Jan./Feb. 1989). Francke noted this more than a decade ago: "The discrepancy in numbers [of abortions] results from the fact that the CDC receives its abortion data from state health departments, many of whom have not established complete or indeed any reporting systems since the legalization of abortion in 1973. The Alan Guttmacher Institute, on the other hand, seeks out abortion statistics from the actual providers of abortion, and the CDC generally accepts those statistics as more accurate." L. Francke, *The Ambivalence of Abortion* 16 (1978).

As a result of a suit by the ACLU, Illinois, for example, has been prevented by federal court injunction from collecting abortion statistics since 1984. *See* Keith v. Daley, No. 84-5602 (N.D. Ill. Sept. 28, 1984) (continuing temporary restraining order in effect, by agreement of the parties, for more than seven years).

[169] *See generally* Wardle, *infra* note 225, at 958 (citing, *e.g.*, Cal. Health & Safety Code § 25955.5 [West 1984], Fla. Stat. § 390.002 [1989]; Rev. Stat. § 338-9 [1988]; Idaho Code § 18-609 (4) (1987); Ill. Rev. Stat. ch. 38, ¶ 81-30.1 [1989]; Ind. Code Ann. § 35-1-58.5-5 [Burns 1985]; Ky. Rev. Stat. Ann. § 213.055 [Baldwin 1982]; La. Rev. Stat. Ann. 40:1299.35.8 [West Supp. 1989]; Me. Rev. Stat. Ann. tit. 22, § 1596 [2] [1980]; Md. Health-Gen. Code Ann. § 20-208 [1987]; Mass. Ann. Law ch. 38, § 6, ch. 112, § 12R [1983]; Mich. Comp. Laws Ann. § 333.2835 [West 1980]; Minn. Stat. Ann. § 145.413 [West 1989]; Mo. Ann. Stat. § 188.052 [1983]; Mont. Code Ann. § 50-20-110 [1989]; Neb. Rev. Stat. § 28-343 [1985]; Nev. Rev. Stat. § 442.256, § 442.265 [1986]; N.J. Stat. Ann. § 30:4D-6.1 [1981]; N.M. Stat. Ann. § 24-14-18 [1978]; N.C. Gen. Stat. § 14-45.1 [1986]; N.D. Cent. Code § 14.02.1-07 [1981]; Okla. Stat. Ann. tit. 63, §§ 1-738, 1-739 [West 1984]; Or. Rev. Stat. § 435.496 [Supp. 1987]; 18 Pa. Cons. Stat. Ann. § 3207 [a]–[b], 3214 [Purdon Supp. 1989]; S.C. Code Ann. § 44-41-60 [1988]; S.D. Codified Laws Ann. § 34-23A-19 [1986]; Tenn. Code Ann. § 39-4-203 [1982]; Utah Code Ann. § 26-2-23 [3], 76-7-313 [1989]; Va. Code Ann. § 321.1-264 [1988]; Wash. Rev. Code Ann. § 43.20A.625 [West 1983]; W. Va. Code § 16-2F-6 [1985]; Wis. Stat. Ann. 69.186 [West Supp. 1989]; Wyo. Stat. §§ 35-6-107, 35-6-108 [Michie 1977]).

[170] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986). Compare the proposal of the medical director of Planned Parenthood in 1960:

> We will never find out how many illegal abortions have been performed, but how about trying to find out how many are being asked for? Suppose requests for abortion were made reportable? Why not? Suppose that every time a woman comes to a doctor asking for an abortion, he makes a note of it along with some easily obtained information and sends this note to his health officer. Suppose that after a few such efforts, physicians discovered that the sky did not fall in on them in the person of the law and that the privacy of their patients

result, there is substantial reason to doubt the accuracy of currently cited national abortion statistics. However, because they are the only available national statistics, the figures are common currency.

This underreporting of abortion deaths and complications is problematic. If women's health and well-being are truly served by "safe and legal abortions," then accurate statistics should confirm this. Abortion providers should have nothing to hide and nothing to fear from revelation of the truth. On the other hand, if women are maimed or killed by legal abortion, they need protective safeguards. Abortion advocates should be demanding comprehensive, nationwide reporting—open to public scrutiny—if only to substantiate their claim that legal abortions are safe.

Nor do statistics support the argument that legal abortion is necessary to protect women's health. A profile compiled from the available data indicates that few abortions are performed for reasons of "medical necessity."[174] That is, abortion is rarely sought because of a genuine health risk. The typical abortion patient today is white, single and young and is seeking abortion for reasons other than serious health concern, rape or incest.[175] "[T]wo percent of all abortions in this country are done for some clinically identifiable entity—physical health problem, amniocentesis, and identified genetic disease or something of that kind. The overwhelming majority of abortions . . . are performed on women who for various reasons do not wish to be pregnant at this time."[176]

Abortion advocates are thus relying on inaccurate, incomplete and unreliable statistics to support their campaign to keep "safe" legalized abortion on demand. As discussed below, legal abortion is not necessarily safe for women (and obviously is not "safe" for unborn children). Neither was illegal abortion the great killer of thousands of women. Abortion is not needed to avoid death by childbirth. And rarely is it sought for gen.ine reasons of medical necessity. Consequently, the proposition that legal abortion is needed to protect women's health rests on faulty assumptions.

B. Physical Effects and Legal, "Back Alley" Abortions

Despite the clamor to "keep abortions safe and legal," evidence from the CDC's own experts indicates that the incidence of abortion complications and even death is serious:

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was being respected. At the end of two or three years we might really know something about this disease of society.

Calderone, *supra* note 8, at 952–53.

[171] Atrash, et al., *supra* note 162, at 58, 60. "[S]tate vital statistics have also been found to understate maternal deaths by 17–73 percent." Atrash, Ellerbrock, Hogue & Smith, *The Need for National Pregnancy Mortality Surveillance*, 21 Fam. Plan. Perspect. 25 (Jan/Feb. 1989).

[172] Francke cites former CDC official Willard Cates: " 'Go with the Guttmacher figures,' said Willard Cates, Jr., chief of the Abortion Surveillance Branch. 'Some states require the reporting of fetal deaths due to abortion. Others don't. We think we're pretty lucky to have 85 percent of them recorded.' " Francke, *supra* note 168, at 16. *See also*, Atrash, Ellerbrock, Hogue & Smith, *supra* note 171, at 25.

[173] Atrash, et al., *supra* note 162, at 60; Francke, *supra* note 168, at 16.

[174] Torres & Forrest, *Why Do Women Have Abortions?* 20 Fam. Plan. Perspect. 169 (1988).

[175] *Id.*; Atrash, et al., *supra* note 162, at 58.

[176] *Constitutional Amendments Relating to Abortion: Hearings on S.J. Res. 17, S.J. Res. 18, S.J. Res. 19 and S.J. Res. 110 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 97th Cong. 1st Sess. 158 (Oct. 14, 1981) (statement of Irvin M. Cushner, M.D., M.P.H., U.C.L.A. School of Public Health). *See also* Torres & Forrest, *supra* note 174, at 169 (of 1,773 abortion patients surveyed, 3%

The scope of the problem of abortion complications is large, both numerically and economically. For example, in 1977, nearly 100,000 women in the United States sustained complications of abortion, and 16 died . . . Excluding the indirect costs of lost productivity, the estimated direct cost of treating women who suffered complications in 1977 was over $22 million.[177]

Deaths from legal abortion do occur. One study, by the CDC's own statistician relying on CDC data, concluded that there were 213 "legal abortion-related" deaths between 1972 and 1985—an average of 15 per year.[178] Other studies report different totals for deaths of women from legal abortion.[179]

Follow-up on other abortion complications is compounded by women's refusal to admit to the procedure, even when questioned confidentially. Former Surgeon General C. Everett Koop, in a January 9, 1989, letter to President Reagan, noted that reliable assessment of the statistical impact of abortion on women is made difficult by the fact that an estimated "50 percent of women [who] have had an abortion apparently deny having had one when questioned."[180]

Observers, independently of the pro-life movement, agree that the legalization of abortion has not eliminated "back-alley" abortions; it has merely moved them to Park Avenue.[181] Investigative journalist Debbie Sontag, in her expose of the Dadeland Family Planning Center in Florida, wrote: "Even in the days of legal abortion, the back alley persists—on a commercial street, in a medical building, with a front door, and sometimes even with a state license."[182]

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cited maternal health considerations as most important factor for choosing abortion. 1% cited rape or incest).

[177] Grimes & Cates, *Abortion: Methods and Complications*, in E. Hafez, ed. *Human Reproduction: Conception and Contraception* 796 (2d ed. 1980).

[178] Atrash, et al., *supra* note 162, at 58. But 540 deaths were examined as "possibly abortion-related." This article also concluded that among blacks, there is a higher rate of abortion and a higher rate of abortion mortality.

[179] Atrash, Cheek & Hogue, *Legal abortion mortality and general anesthesia*, 158 Am. J. Ob. Gyn. 420 (1988) (citing 193 deaths nationally between 1972 and 1985); Grimes, Kafrissen, O'Reilly & Binkin, *Fatal Hemorrhage from Legal Abortion in the United States*, 157 Surg. Gyn & Ob. 461 (1983) (citing 194 deaths nationally between 1972 and 1979); 248 J.A.M.A. 188 (1982) (citing 138 deaths nationally between 1972 and 1978); Cates, Smith, Rochat, Patterson & Dolman, *Assessment of Surveillance and Vital Statistics Data for Monitoring Abortion Mortality, United States, 1972–1975*, 108 Am. J. Epidemiol. 200 (1978) (citing 240 deaths, "legal," "illegal," and "spontaneous" between 1972 and 1975). In none of these articles is the critical criteria ("legal" abortion versus "illegal" abortion) ever clearly defined.

[180] Letter from C. Everett Koop, Surgeon General of the United States to President Ronald Reagan, January 9, 1989, 21 Fam. Plan. Perspect. 31, 32 (Jan/Feb 1989).

[181] The Louisville Courier Journal reported the temporary closing of an abortion clinic. Operating room equipment was dirty, dusty and in disrepair. Some intravenous medications were administered without any physician present. Patients were not given postoperative instructions. Gil, *Clinic can resume first trimester abortions*, Louisville Courier Journal, Nov 1, 1990, p. B1; Gil, *Doctor at abortion clinic not disciplined by board*, Louisville Courier Journal, May 17, 1991, p. B1.

[182] Sontag, *Do Not Enter*, Miami Herald, Sept. 17, 1989, at 8. "In 1983, four women died from botched abortions at Hipolito Barreiro's notorious Biscayne Boulevard clinic called the Women's Care Center. The media closely followed the closing of the clinic by court order, Barreiro's arrest on charges of manslaughter and his ultimate conviction of practicing medicine without a license." "And in response, the Dade County [Florida] grand jury called for greater state regulation of abortion clinics—regulations previously declared unconstitutional by the Florida Supreme Court." *Id.* at 22.

Legal, "unsafe" abortions are often ignored by abortion activists. Yet reported cases of maternal death and injury may indicate that more women die and are injured from legal abortion than many are willing to admit.[183] And countless more women are physically injured, often permanently. Enormous damages have been levied against physicians for botched abortions.[184] Countless more lawsuits are unreported because the case is settled prior to trial or appeal. Anecdotal information and lawsuits reveal that women suffer mild to severe physical injury and trauma from legal abortions, including punctured uterus,[185] incomplete abortions,[186] pelvic inflammatory disease[187] or stroke.[188]

Occasionally, abortion clinic abuses are publicized and investigated.[189] In Chicago, Illinois, the *Chicago Sun-Times* and the Better Government Association conducted an undercover investigation in the late 1970s into the practices of Chicago abortion clinics. This resulted in a 12-part series in the *Sun-Times*.[190] Their joint investigation discovered *a dozen previously unreported deaths from legal abortion*.[191] In addition, they found that abortions were performed by incompetent, unlicensed or unqualified physicians un-

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[183] Atlanta Obstetrics v. Coleman, 260 Ga. 569, 398 S.E.2d 16 (1990), Collins v. Thakkar, 552 N.E.2d 507 (Ind. App. 1990); Kirby v. Jarrett, 190 Ill. App. 3d 8, 545 N.E. 2d 965 (1989); Joplin v. University of Mich. Bd. Regents, 173 Mich. App. 140, 433 N.W.2d 830 (1988); Sherman v. Ambassador Ins. Co., 670 F.2d 251 (D.C.Cir. 1981); Martinez v. Long Island Jewish Hillside Medical Center, 70 N.Y.2d 697, 518 N.Y.S.2d 955, 512 N.E.2d 538 (1987); Hunte v. Hinkley, 731 S.W.2d 570 (Tex. App. 1987); Jean-Charles v. Planned Parenthood, 99 A.D.2d 542, 471 N.Y.S.2d 622 (1984); Delaney v. Krafte, 98 A.D.2d 128, 470 N.Y.S.2d 936 (1984); Vuitch v. Furr, 482 A.2d 811 (D.C. Ct. App. 1984); Mears v. Alhadeff, 88 A.D.2d 827, 451 N.Y.S.2d 133 (1982); Pierce v. McCroskey, No. 69039 (Ham. Co., Tenn. Ch. Ct. Jan. 3, 1990) ($400,000 settlement for wrongful death from abortion on October 10, 1989); Keys v. Capitol Women's Center No. 90-00926 (D.C. Sup. Ct. 1991) ($565.0 10 settlement for alleged incomplete abortion and ruptured uterus). *See, generally*, Roberts, *Medical Malpractice in Abortion Cases*, 3 Am. J. Trial Ad. 259 (1979).

Thirteen-year-old Dawn Ravenell choked to death under anesthesia for a 21-week abortion at Eastern Women's Center, New York City's second-largest abortion center; her parents were awarded $1.2 million. Under cross-examination, defendant Dr. Allen Kline noted his lack of concern for her youth: "I've done 13-year-olds before. When they're 10, maybe I'll notice." Kerrison, *Horror tale of abortion*, New York Post, Jan. 7, 1991, at 2, 25; New York Post, Dec. 11, 1990, at 7. A second woman died after an abortion at Eastern Women's Center. She was 21. Kerrison, *Abort patients' naivete leads to another death*, New York Post, Aug. 5, 1991, at 2.

Sixteen-year-old Erica Kae Richardson of Cheltenham, Maryland was injured during an abortion without parental knowledge. She was left without attention on the operating table for four hours and died in a hospital emergency room. Perl, *Teen's death after abortion brings suit*, Prince George's Journal Weekly, May 30/31, 1990.

Teresa Causey, a 17-year-old, died a few hours after an abortion from which she never awakened. Fincher, *Macon teen dies after abortion*, Macon Telegraph and News, Dec. 5, 1988, at 1.

Angela Duarte, a 21-year-old mother of two, bled to death after an abortionist perforated her uterus. *Vegas abortion death investigated*, San Francisco Examiner, Nov. 4, 1991, at A-7.

Glenda Davis died on March 14, 1989, as a result of an abortion performed three days earlier at Aaron Family Planning Clinic of Houston. David Davis v. Aaron Family Planning Center of Houston, No. 89-028771 (Harris Co., Tex. July 12, 1989). Just a few months later, a woman died at another Houston clinic, Joe and Janet Montoya v. Women's Pavilion of Houston, No. 89-16747 (Harris Co., Tex. April 20, 1989).

Seventeen-year-old Latachie Veal died after an abortion performed by Dr. Robert Crist, who previously had been sued five times for botched abortions, one resulting in the woman's death. Most were second-trimester abortions. Brawley & McGuire, *Doctor investigated in post-abortion death*, Kansas City Star, Nov. 6, 1991, at A1.

Dr. Abu Hayat's medical license was suspended by the New York Department of Health after he severed the arm of an infant who survived a third-trimester abortion. He had been cited in eight previous

der unsterile conditions, on women who were not pregnant, without anesthesia or before anesthetics could take effect; results of pregnancy tests were intentionally withheld from patients; because of unsanitary conditions and haphazard clinic care, many women suffered debilitating cramps, massive infections and such severe internal damage that all of their reproductive organs were removed; because of assembly-line techniques and severe overcrowding, patients were forced to leave the recovery room while they were still in pain; medical records, including patients' vital signs, were fabricated or falsified; clinics failed to order critical postoperative pathology reports, and ignored the results or mixed up specimens; women received incompetent counseling by untrained staff who often were paid on a commission basis; unscrupulous sales techniques were used to pressure women into having abortions; and kickbacks were paid for abortion referrals. Some of the doctors investigated continued to practice.[192]

In subsequent years, dozens of abortion malpractice cases were filed against Chicago-area clinics and doctors, including the Michigan Avenue Medical Center,[193] Bio-

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cases, including the death of a teenager. Belkin, *Manhattan doctor loses state license over abortion cases*, New York Times, Nov. 26, 1991, at A12.

Earle, Adm. v. Armstrong, No. 91-1343 (Lucas Co., Ohio Ct. Common Pleas, April 24, 1991).

[184] Thomas v. Family Planning Medical Center of Mobile, No. CV-87-000899 (Mobile Co., Ala. Cir Ct. June 5, 1991) ($10 million jury verdict); Ruckman v. Barrett and Central Center for Women, No. CV-188-675CC (Greene Co., Mo. Cir. Ct. Jan. 28, 1991), *appeal docketed*, No. 17453-2 (Mo. Ct. App. Mar. 26, 1991) ($330,000 actual damages and $25 million aggravating damages awarded by jury in wrongful death suit); Gallagher v. Barton, No. 80 L 1539 (Cook Co. Cir. Ct. April 14, 1989), *rev'd sub. nom.*, Northern Trust Co. v. *UpJohn Co.*, 213 Ill. App. 3d 390, 572 N.E.2d 1030 (1991) ($9.4 million jury award for severe brain damage reversed for failure to establish standard of care), Chicago Tribune, April 15, 1989, at sec. 1, p. 6, col. 2; Thompson v. Washington Hospital Center (D.C. Super. Ct.) ($4.6 million for irreversible brain damage), Abramowitz, *Brain damaged patient awarded $4.6 million*, Washington Post, March 24, 1989, at B4, col. 3.

Ellen Williams' family was awarded $1 million after her death at the hands of Dr. Chatoor Bisal Singh and Dr. Nabil Ghali in 1985, resulting from an infection due to a perforated uterus and bowel. Sontag, *supra* note 182, at 12.

[185] The New York Health Department suspended Brooklyn physician Dr. Colin Bailey on April 3, 1991, for cases in which one woman suffered a punctured uterus and another suffered a heart attack. *New York: Physician Suspended*, Abortion Report, April 5, 1991, at 2.

[186] Dr. Ming Kow Hah, a Queens, New York, doctor, was suspended from medical practice by the New York State Health Department in November 1990 after an alleged incomplete abortion in which the fetal head was retained by the woman. Holland, *State Mulls Fate of Queens Abortion Doctor*, New York Newsday, Feb. 4, 1991, at 29; Holland, *State Hears 1st Witnesses Against Doctor*, New York Newsday, Nov. 27, 1990, at 27; Holland, *Why They Suspended Doctor Hah*, New York Newsday, Nov. 25, 1990, at 1, 3, 65; Fischer, *"Danger" Cited in Suspension of Queens Doc*, New York Newsday, Nov. 17, 1990, at 3. This same physician was one of several physicians who were the focus of the Chicago Sun-Times 1978 series entitled, *The Abortion Profiteers*, *infra* note 190. *See also* Watson v. Ming Kow Hah, No. 79 L 24780 (Cook Co. Ill. Cir. Ct.).

[187] Flodin, *Why I Don't March*, Newsweek, Feb. 12, 1990, at 8.

[188] Atlanta Obstetrics v. Coleman, 260 Ga. 569, 398 S.E.2d 16 (1990).

[189] *See, e.g.*, People v. Florendo, 95 Ill.2d 155, 447 N.E.2d 282 (1983); People v. Bickham, 89 Ill.2d 1, 431 N.E.2d 365 (1982).

[190] Zekman & Warren, *The Abortion Profiteers*, Chicago Sun-Times, November 12, 1978, at 1; *Meet the Profiteers*, Nov. 13, 1978, at 1; Nov. 16, 1978, at 19; Nov. 19, 1978, at 25.

[191] *Id.* The series listed abortion deaths of the following women: Evelyn Dudley (March 16, 1973), Julia Rogers (March 28, 1973), Jane Roe No. 1 (no date), Dorothy Muzorewa (August 23, 1974), Linda Fondeen (Foudren) (Jan. 20, 1974), Dorothy Brown (Aug. 16, 1974), Sharon Floyd (Mar. 28, 1975), Sandra Chmiel

genetics Ltd.,[194] Albany Medical Corp.,[195] Concord Medical Center,[196] Women's Aid Clinic,[197] Park Medical Center,[198] American Women's Medical Group[199] and Dr. Ulrich Klopfer.[200] The clinic regulations adopted in Chicago in the 1970s—prior to the *Sun-Times* investigation—had been enjoined by a federal court.[201] The clinic regulations adopted by the Illinois General Assembly in the wake of the 1978 investigative series were also enjoined by a federal judge in 1985 and were eventually scrapped by the Illinois Attorney General in a settlement with the ACLU.[202]

Because of the lack of a nationwide reporting system, it is impossible to provide anything more than a sample of cases on a national scale. But identified abortion malpractice cases have been filed in Alabama,[203] California,[204] Illinois,[205] Michigan,[206] Minnesota,[207] Kentucky,[208] North Dakota,[209] Ohio,[210] Tennessee[211] and West Virginia,[212] among others. Los Angeles County is another metropolitan area with confirmed, but officially unreported abortion morbidity and mortality. Between 1970 and 1987, at least 20 deaths occurred from legal abortion.[213]

(June 3, 1975), Jane Roe No. 2 (Springfield, 1975), Jane Roe No. 3 (1975), Diane Smith (Sept. 11, 1976), Jane Roe No. 4 (1977), Sherry Emry (Jan. 2, 1978). Another woman, Barbalee Davis, died in Granite City, June 14, 1977. Subsequent cases were filed for wrongful death from abortion in Cook County, Illinois. Gilbert v. Women's Aid Clinic, No. 85 L 10455; Moore v. Bickham, No. 87 L 15971; Benson v. Biogenetics, No. 89 L 2906.

[192] *See supra* note 186 regarding Dr. Ming Kow Hah. *See infra* note 215 regarding Dr. Arnold Bickham.

[193] Dr. Florendo, was sued at least ten times between 1977 and 1990 for alleged abortion malpractice: Roberts v. Florendo, No. 77 L 20887; Mears v. Florendo, No. 79 L 19386; Magerkurth v. Florendo, No. 79 L 19366; Wallace v. Florendo, No. 82 L 19014; Tate v. Florendo, No. 83 L 18423; Forsythe v. Florendo, No. 84 L 4948; Henning v. Florendo, No. 85 L 9757; Boykins v. Florendo No. 85 L 18957; Taylor v. Florendo, No. 88 L 4085; Sottile v. Florendo, No. 88 L 22540. Other abortion malpractice suits were filed against other doctors at the clinic—Belisle v. Palmer, No. 78 L . 452; Davis v. Poma, No. 79 L 374; Watson v. MAMC, No. 79 L 24780; Chism v. Agustin, No. 82 L 8727; Liggett v. MAMC, 84 L 6197; Bates v. MAMC, No. 84 L 8588; Wolff v. MAMC, No. 85 L 7571; Jordan v. MAMC, No. 85 L 9488; Lyons v. MAMC, No. 85 L 12356; Williams v. MAMC, No. 85 L 14494; Lockwood v. MAMC, No. 85 L 18607; Parham v. Urban Health Services, MAMC, No. 85 L 18688; Washington v. Perez, No. 85 L 18882; Thomas v. Perez, No. 85 L 19262; Wilson v. Perez, No. 86 L 5824; Ross v. Urban, No. 88 L 5853; Cunningham v. Cruz, No. 89 L 8639; Scott v. Urban, No. 89 L 14859; Spagnola v. Agustin, No. 79 L 16622; Kernaghan v. Agustin, No. 87 L 2097; Colbert v. Agustin, No. 89 L 206. The authors are grateful for the original research identifying these suits by Timothy Murphy and the Pro-Life Action League of Chicago.

[194] Deane v. Bickham, No. 76 L 12753; Kim v. Bickham, No. 77 L 23879; Harrington v. Bickham, No. 78 L 9382; Kroetz v. Baldoceda, No. 78 L 23724; Young v. Baldoceda, No. 79 L 5313; Moreno v. Biogenetics, No. 79 L 8163; Rudowicz v. Zivkovic, No. 79 L 5639; Jones v. Zivkovic, No. 79 L 28651; Najera v. Biogenetics, No. 82 L 9851; Cole v. Baldoceda, No. 82 L 22100; Daylie v. Biogenetics, No. 83 L 12294; Mitchell v. Baldoceda, No. 83 L 13383; Payton v. Baldoceda, No. 83 L 20888; Weidner v. Baldoceda, No. 83 L 23448; Pitts v. Molina, No. 84 L 22841; Patterson v. Biogenetics, No. 85 L 16375; Stinger v. Biogenetics, No. 88 L 19456; Benson v. Biogenetics, No. 89 L 2906; Fernandez v. Okwuje, No. 89 L 13460. Other suits have been filed against physicians at this clinic: Hammond v. Obasi, No. 88 L 717; Pierce v. Obasi, No. 89 L 15575; Patterson v. Obasi, No. 89 L 17575; Harris v. Zapata, No. 84 L 2410; Kernaghan v. Zapata, No. 87 L 2097. *See also*, Robinson & Punaro, *Michigan Avenue abortionist slain*, Chicago Sun-Times, Nov. 4, 1979, at 1 (Biogenetics owner Kenneth Yellin shot to death). The authors are grateful for the original research identifying these suits by Timothy Murphy and the Pro-Life Action League of Chicago and for the research for footnotes 195–200, 213.

[195] Kozlowski v. Albany, No. 76 L 22826; Harris v. Albany, No. 77 L 4168; Mieles v. Myers, No. 79 L 1988; Budacki v. Taparia, No. 79 L 6074; Insalaco v. Albany, No. 79 L 6562; Mourning v. Albany, No. 79 L 8864; Weston v. Albany, No. 79 L 18870; Archambeau v. Myers, No. 80 L 23068; Ostinski v. Myers, No. 81 L 448; Sadowski v. Albany, No. 81 L 10591; Hoffman v. Albany, No. 81 L 16554; Jaffe

It is apparent from abortion malpractice cases and from newspaper stories that the legalization of abortion has not eliminated abortion deaths and injuries or "back-alley abortions" and unskilled abortionists.[214] Many of these physicians are still in business and still operate their clinics in major metropolitan areas.[215] Because some abortion experts assert that the safety of abortion is directly related to the experience of the abortionist,[216] one might think that the physicians who have been sued for malpractice have performed relatively few abortions. Quite the opposite is true. Many of the physicians who are sued in such cases have performed thousands of abortions.[217] They continue to practice in the name of "choice," insulated from government regulation and largely immune from effective private redress.

Despite official support for abortion from major medical organizations like the American Medical Association and the American College of Obstetricians and Gynecologists, a strong and growing stigma against performing elective abortion exists among doctors. Perhaps for this reason, the number of physicians willing to perform abortions

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v. Rebandel, No. 82 L 11472; McGowan v. Myers, No. 82 L 15203; McKenna v. Albany, No. 82 L 22499; Hawk v. Albany, No. 84 L 5490; Bartyzel v. Blumenthal, No. 84 L 18187; Schindel v. Albany, No. 84 L 23584; Schmidt v. Albany, No. 85 L 11809; Konczak v. Rebandel, No. 85 L 17203; Smiley v. Albany, No. 86 L 17935; Ahmed v. Albany, No. 87 L 15875; Mazalan v. Blumenthal, No. 88 L 2016; DiMartino v. Albany, 88 L 5723; Herskovitz v. Myers, No. 88 L 22225. All cases are filed in Cook County, Illinois, Circuit Court.

[196] Allen v. Concord, No. 75 L 17343; Bouwense v. Concord, 79 L 25110, Roe v. Zapata, No. 80 L 1301; Helm v. Zapata, No. 80 L 4880; Wiegand v. Hankin, No. 80 L 8508; Bynum v. Salimi, No. 80 L 25796; Penkala v. Kim, No. 81 L 7731; Burwell v. Kuo, No. 81 L 16352; Sowinski v. Bozorgi, No. 81 L 17059; Levy v. Pelta, No. 81 L 24691; Brandt v. Kim, No. 81 L 26210; Chomsky v. Ventura, No. 82 L 6446; Greve v. Ventura, No. 82 L 14030; Dunn v. Salimi, No. 82 L 17572; Deon v. Concord, No. 83 L 5203; Crum v. Salimi, No. 84 L 13660; Garcia v. Kuo, No. 87 L 7938; Kang v. Bozorgi, No. 88 L 18636; Robinson v. Hankin, No. 90 L 4882. All cases are filed in Cook County, Illinois, Circuit Court.

[197] Kerstein v. Turow, No 75 L 15616; Jones v. Turow, No. 75 L 1; Vogel v. Turow, No. 76 L 10066; Jewell v Olsen, No. 77 L 16890; Welninski v. Turow, No. 78 L 8125; Dobson v. Turow, No. 79 L 16059; Kahn v. Turow, No 79 L 10033; Kelly v. Turow, No. 79 L 20392; Pinto v. Turow, No. 79 L 29343; Vanderhyden v. WAC, No. 80 L 18035; Alexandria v. Turow, No. 81 L 24043; Stanley v. Pirnazar, No. 82 L 19115; Mai v. Turow, No. 83 L 13861; Pope v. Turow, No. 84 L 13350; Cohen v. Olsen, No. 84 L 13571; Kuehne v. Turow, No. 84 L 20307; Goedecker v. Turow, No. 85 L 10455; Hamlin v. Turow, No. 85 L 14364; Skocz v. Pirnazar, No. 88 L 9809. All cases are filed in Cook County, Illinois, Circuit Court.

[198] Goryl v. Nemerovski, No. 80 L 23157; Robinson v. Nemerovski, No. 82 L 21661; Kenny v. Nemerovski, No. 82 L 21835; Peitti v. Arora, No. 85 L 12727; Powell v. Park Medical Center; No. 85 L 17633. *See also* Jackson v. Arora, No. 85 L 19584; Woolworth v. Moragne, No. 91 L 6791. All cases are filed in Cook County, Illinois, Circuit Court.

[199] Girton v. Barton, No. 75 L 1541; Caprio v. Barton, No. 76 L 5835; Duggins v. Barton, No. 78 L 21281; Besenhofer v. Barton, No. 79 L 4629; Guzik v. Barton, No. 81 L 3932; Szostak v. Barton, No. 85 L 19546; Walker v. Barton, 87 L 17994. All cases are filed in Cook County, Illinois, Circuit Court.

[200] Herrara v. Chicago Loop Mediclinic, No. 79 L 26661; Carson v. Chicago Loop Mediclinic, No. 80 L 3966; Tebbens v. Marcowitz Medical Service Corp., No. 82 L 6309. *See also* Zekman, *Abortion Unit Under Fire Here Closed*. Chicago Sun-Times, Jan. 3, 1980, at 18, col. 1. All cases are filed in Cook County, Illinois, Circuit Court.

[201] Friendship Medical Center v. Chicago Bd. of Health, 505 F.2d 1141 (7th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975); Miner, *Two more reports of hysterectomies after abortions at the Friendship center*, Chicago Sun-Times, Mar. 24, 1973, at 12, col. 4 (noting three women undergoing hysterectomies in March 1973, after undergoing abortions at Friendship Medical Center).

[202] Ragsdale v. Turnock, 841 F.2d.3239 1358 (7th Cir. 1988), *juris. postponed*. 109 S. Ct. (1989) (stayed pending hearings below). Subsequently, the Illinois attorney general settled the case with the plaintiffs,

is declining.[218] At the same time, the stigma diminishes the number of hospitals that permit abortions, thereby increasing the extent to which abortions are performed in great numbers in specialty abortion centers. Today, most abortions are performed in approximately 800 specialty centers in the United States.[219]

In many clinics, abortion counseling is either nonexistent or inadequate. Physicians spend little time, if any, with their patients, even if the patients are young girls.[220] Bottom-line profitability controls most abortion practice, and the physician is typically paid per abortion, not for time spent in counseling.[221] The situation was effectively summarized by Justice Sandra Day O'Connor, in her 1983 dissent in *City of Akron v. Akron Center for Reproductive Health:* "It is certainly difficult to understand how the Court believes that the physician-patient relationship is able to accommodate any interest that the State has in maternal physical and mental well-being in light of the fact that the record in this case shows that the relationship is nonexistent."[222] As a practical matter for women, this means that an increasing percentage of abortions are performed in assembly-line fashion by anonymous doctors who spend little time with their patients.

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virtually eliminating the strength of many of the regulations, which was approved by the federal district court. The federal court of appeals affirmed, and the Supreme Court denied an appeal brought by intervenors, ending the litigation. Ragsdale v. Turnock, 734 F. Supp. 1457 (N.D. Ill. 1991), *aff'd in part, dismissed in part*, 941 F.2d 501 (7th Cir. 1991), *cert. denied sub. nom.*, Murphy v. Ragsdale, 112 S. Ct. 879 (U.S. Jan. 13, 1992).

[203] Staniford v. Planned Parenthood of Alabama No. 90-6411 (Jefferson Co., Ala., Cir. Ct. Aug. 21, 1990).

[204] Schlote v. Planned Parenthood, No. 349599 (San Mateo Co., Cal., filed Mar. 21, 1990).

[205] Shirk v. Kelsey, No. 84 L 13308 (Cook Co., Ill., Cir. Ct. Feb. 5, 1991), *appeal filed*, No. 91-0738 (Ill. App. Mar. 8, 1991) ($375,000 jury award of punitive and compensatory damages for abortion increased to $525,000; incomplete abortion at nine weeks gestation); Lamar v. Obasi, No. 89 L 13692 (Cook Co., Ill Cir. Ct. filed Oct. 12, 1989) (alleged wrongful death); Patterson v. Obasi, No. 89 L 17575 (Cook Co., Ill. Cir. Ct. filed Dec. 6, 1989) (alleged incomplete abortion, perforated uterus). *See supra* notes 191–198.

[206] Stanton v. Detroit Macomb Hosp., No. 85-502-157 (Wayne Co., Mich., Cir. Ct.).

[207] Maki v. Mildred S. Hanson, M.D., No. 89-15330 (Minn. 4th Jud. Dist. Ct. filed Sept. 9, 1989) (alleging negligence, battery, infliction of emotional distress, lack of informed consent); Jodel Field v. Mildred S. Hanson, M.D., No. 91-5057 (Hennepin Co., Minn. 4th Jud. Dist. Ct. filed Mar. 1, 1991) (alleging negligence, battery, breach of implied contract); J.L.S. v. J.M., M.D. and G.H.I., No. 90-3303 (Minn. 4th Jud. Dist. Ct. filed Feb. 23, 1990) (alleging abortion on teenager, negligence, malpractice); M.G. v. Planned Parenthood of Minnesota and Dr. Valgamae, No. 90-9090 (Hennepin Co., Minn. 4th Jud. Dist. Ct. filed May 23, 1990) (alleging malpractice of abortion on teenager). The authors are grateful to Michael DeMoss, Esq., for identifying these cases.

[208] Muckle v. Banchongmanie, No. 89-CI-006286 (Jefferson Cir. Ct., Dist. 12) (twins aborted without mother being informed that she carried twins; mother expelled head of one twin at home after the abortion). This abortionist's Louisville clinic was shut down by the state of Kentucky in September 1990, but a state judge ordered the state to allow him to resume abortions up to 14 weeks gestation in November 1990. Gil, *Clinic can resume first-trimester abortions*, Louisville Courier Journal, Nov. 1, 1990, at B-1; State v. Women's Health Services, (Jefferson Co., Ky., Cir. Ct. Nov. 1, 1990).

[209] Tamera Green v. Robert Lacy, M.D., Jane Bovard, and Fargo Women's Health Organization, Inc., No. 901491 (Dist. Ct. E. Central Jud. Dist. Cass Co., N.D. filed Aug. 16, 1990) (alleging malpractice, excessive bleeding, hysterectomy); Nancy Sabot v. Fargo Women's Health Organization, Inc., and George Mills, M.D., No. 89-91 (Dist. Ct. E. Central Jud. Dist. Cass Co., N.D. served Nov. 2, 1988) (alleging malpractice, incomplete abortion, lack of anesthesia).

[210] Perrine v. Dayton Women's Clinic, No. 89-4426 (Montgomery Co., Ohio Ct. Common pleas, filed Dec. 18, 1989); Perrine v. Ray Robinson, M.D., No. 90-3266 (Montgomery Co., Ohio Ct. Common Pleas filed Aug. 9, 1990) (final appealable orders sent to all parties Feb. 26, 1992); Passmore v. Gaujean, No. 175142 (Cuyahoga Co., Com. Pleas Ct. filed Aug. 24, 1989); Tarr v. Mahoning Women's Center, No. 89 CV 1679 (Mahoning Co., Com. Pleas Ct. filed Aug. 11, 1989); Lofton v. Cleveland Center for Reproductive Health, No. 91977 (Cuyahoga Co., Com. Pleas Ct. filed May 23, 1985).

For the vast majority of women, the notion that abortion is "between a woman and *her* physician" is utterly a myth.

C. The Protection of Women's Health

How are women, as health care consumers, to be protected from abortion medical malpractice? In the aftermath of the Supreme Court's legalization of abortion on demand in every state in 1973, many states tried to enact consumer protection laws, including clinic regulations, informed consent requirements, waiting periods and confidential statistical data reporting requirements. All these were challenged immediately by abortion activists and have largely been invalidated by the federal courts. Abortion advocate Dr. Willard Cates has acknowledged that the judiciary "has influenced the practice of abortion most profoundly"—more than the mass media, legislators or regulatory agencies.[223] As a result, abortion in America is a largely unregulated industry.[224]

After *Roe*, many states enacted clinic regulations.[225] However, court decisions have effectively prevented the states from enforcing many of those regulations.[226] This out-

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[211] Bradford v. Chattanooga Women's Clinic, No. 91CV0467 (Ham. Co., Tenn. Cir. Ct. filed Feb. 25, 1991) (patient alleged botched abortion, resulting in shock, massive bleeding and transfer to a hospital emergency room).

[212] CAB and BAB v. Women's Health Center of West Virginia, Inc. and Dr. John Hogan, M.D., No. 91C687 (Kanawha Co. Cir. Ct., W. Va. filed March 1, 1991) (alleging malpractice, perforated uterus, lacerated cervix).

[213] Sara Doe, No. 70-8468 (L.A. County Coroner's Report); Janet Doe, No. 71-9846 (L.A. County Coroner's Report); Blevins v. County of Los Angeles, No. C 24787 (Sup. Ct. Cal., L.A. Co.); Margaret Doe, No. 72-7647 (L.A County Coroner's Report); Kathryn Doe, No. 72-9587 (L.A County Coroner's Report); Natalie Doe, No. 72-11445 (L.A County Coroner's Report); Kathy Doe, No. 73-14675 (L.A County Coroner's Report); Cheryl Doe, No. 75-9493 (L.A County Coroner's Report); Mitsue Doe, No. 75-10935 (L.A County Coroner's Report); Lynette Doe, No. 75-11665 (L.A County Coroner's Report); Maria Doe, No. 76-5654 (L.A County Coroner's Report); Jacqueline Doe, No. 77-14563 (L.A County Coroner's Report); Jennifer Doe, No. 82-8251 (L.A County Coroner's Report); Cora Doe, No. 83-15079 (L.A County Coroner's Report); Chacon v. Avalon Memorial Hospital, No. 84-2948 (L.A County Coroner's Report); Tanner v. Inglewood Hospital, No. C 555 261 (Sup. Ct. Cal., L.A. Co.); Mary Doe, No. 84-16016 (L.A County Coroner's Report); Garcia v. Family Planning Associates Medical Group, No. SOC 82220 (Sup. Ct. Cal., L.A. Co.); Byrd v. Inglewood Women's Hospital, No. SWC 90298 (Sup. Ct. Cal., L.A. Co.).

Abortion-related deaths continue in California. In a 15-month period, one physician was allegedly responsible for the deaths of three women. Ellis, *State Panel Accuses MD of Negligence in 3 Deaths*, Los Angeles Times, May 5, 1990, at B1, Col. 5.

[214] *Tragic End of Ghanaian's Dream*, New York Newsday, June 9, 1989, at 6; *"Battlefield Conditions" Reported at Hospital in Inglewood*, Los Angeles Times, Dec. 3, 1987, at II-8, col. 4; *3 Die after Abortions at Clinic*, Los Angeles Herald Examiner, Feb. 22, 1988, at A-1; Rado, *Scrutiny of abortion clinic standards will continue*, St. Petersburg Times, Oct. 13, 1989, at 20A.

[215] Zekman, *supra* note 190, at 1. One of the physicians publicized in the series, Arnold Bickham, still practiced abortion until 1986, when an abortion he performed allegedly resulted in the death of an 18-year-old woman. *Board Urges Penalty for Doctor*, Chicago Tribune, Aug. 28, 1988, sec. 2, p. 2; *Charges Sought Against Doctor in Woman's Post-Abortion Death*, Chicago Tribune, Mar. 2, 1987, sec. 2, p. 3. *See also Under the Knife*, transcript of June 25, 1989, report of the Channel 2 Investigative Team, WBBM-TV, Chicago.

Dr. Ronachai Banchomangie, whose Louisville abortion clinic was shut down for operating illegally without a license (the clinic was dirty and in disrepair and performed abortions through the 22nd week of pregnancy), was allowed to reopen less than two months later. Gil, *supra* note 208, at B1.

[216] W. Hern, *Abortion Practice* (1984).

[217] The physicians who performed the abortion on Dawn Ravenell (*supra* note 183), resulting in her death, had admittedly performed 5,000 abortions since 1971.

[218] "Under siege from protesters and largely isolated from medical colleagues, doctors who perform abortions say they are being heavily stigmatized, and fewer and fewer doctors are willing to enter the field." Kolata,

come is affirmed by abortion advocates. In an increasingly familiar pattern, people who call themselves pro-choice oppose clinic regulations, even for such blatantly abusive places as the Florida Dadeland Family Planning Center. Full-time activist Janis Compton-Carr explained, "In my gut, I am completely aghast at what goes on at that place. But I staunchly oppose anything that would correct this situation in law."[227] In a recent "60 Minutes" expose of the Hillview abortion clinic in Maryland, Meredith Vieira discovered that "Many pro-choice leaders knew about problems at Hillview, but didn't want them publicized."[228] When confronted with the opposition of Barbara Radford, executive director of the National Abortion Federation, Vieira concluded, "even though those laws could make clinics safer, they [pro-choice leaders] usually fight them." Pro-choice Maryland State Senator Mary Boergers found that her support of laws to make clinics safer made her "the enemy" of the pro-choice movement. She accurately perceived that "all arguments from the pro-choice community can become suspect."[229]

Just as relevant to women's health as clinic regulations, and apparently just as offensive to advocates of "choice," is fully informed consent.[230] Since *Roe v. Wade*,

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Under Pressures and Stigma, More Doctors Shun Abortion, New York Times, Jan. 8, 1990, at 1. Gorney, *Abortion in the Heartland*, Washington Post Health Section, Oct. 2, 1990, at 13, col. 2 ("the increasing reluctance of physicians to participate directly in abortion"); Jouzaitis, *Group: Rural areas lose abortion access*, Chicago Tribune, May 1, 1991, sec. 1, at 10, col. 1. Apparently because of market forces, "abortion services are not available in 83 percent of the nation's counties." *Id.*; Wolinsky, *Doctor lag limits access to abortion, group says*," Chicago Sun-Times May 1, 1991, at 3, col. 1; O'Hara, *Abortion: MDs who do them and those who won't*, Amer. Med. News, Dec. 8, 1989, at 17.

[219] Torres & Forrest, *supra* note 174, at 169 n.* (nonhospital facilities that performed 400 or more abortions in a year—constituting only 25% percent of all abortion providers—accounted for 81% of all abortions).

[220] The counseling . . . occurs entirely on the day the abortion is to be performed . . . It lasts for two hours and takes place in groups that include both minors and adults who are strangers to one another . . . The physician takes no part in this counseling process . . . Counseling is typically limited to a description of abortion procedures, possible complications, and birth control techniques . . . The abortion itself takes five to seven minutes . . . The physician has no prior contact with the minor, and on the days that abortions are being performed at the (clinic), the physician may be performing abortions on many other adults and minors . . . On busy days patients are scheduled in separate groups, consisting usually of five patients . . . After the abortion (the physician) spends a brief period with the minor and others in the group in the recovery room . . .

Planned Parenthood v. Danforth, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring) (ellipses in original).

[221] *See* Sontag, *supra* note 182.

[222] 462 U.S. at 473 (citing 651 F.2d at 1217 [Kennedy, J., concurring in part and dissenting in part]). It is worthwhile noting that the only two women judges who considered the City of Akron's informed consent ordinance (Justice O'Connor and Circuit Judge Kennedy) would have upheld it.

[223] Cates, *The First Decade of Legal Abortion in the United States: Effects on Maternal Health*, in Butler & Walbert, *supra* note 151, at 307.

[224] CBS Television, *60 Minutes*, April 21, 1991, transcript at 17. Only in the most severe cases—usually involving abortion deaths—will state medical officials step in. *See, e.g.*, Department of Professional Regulation v. Obasi, No. 89-2096 (Ill. Dept. of Prof. Reg. Oct. 25, 1989) (temporarily suspending license of Imo Obasi, M.D., after three alleged botched abortions, including one abortion death and two perforated uteruses).

[225] *See generally* Wardle, *Time Enough: Webster v. Reproductive Health Services and the Prudent Pace of Justice*, 41 Fla. L. Rev. 881, 938 (1989) (citing, e.g., Ala. Stat. § 18.16.010 [a] [2]; Ark. Stat. Ann. § 20-9-302 [1987]; Fla. Stat. § 797.03 [1]–[2] [1989]; Ga. Code Ann. § 16-12-141 [b] [Supp. 1989]; Idaho Code § 18-608 [1987]; Ill. Rev. Stat. ch. 111 1/2, ¶ 157-8.1 to -8.16 [1989]; Kan. Stat. Ann. § 21-3407 [2] [a]; Ky. Rev. Stat. Ann. § 311.760 [1989]; Minn. Stat. Ann. § 145.412 [2] [West 1989]; 18 Pa. Cons. Stat. Ann. § 3207 [a]–[b] [Purdon Supp. 1989]; S.C. Code Regs. § 61–12 sec. 101-609 [1976]; S.B. No.

many states have enacted informed consent requirements.[231] The Supreme Court and lower federal courts have routinely struck down laws requiring the doctor to provide certain information to women contemplating abortion.[232]

The Supreme Court and the lower federal courts have also struck down even a brief, 24-hour waiting period before abortion.[233] (In France, by contrast, a week-long "reflection period" is required, as is a counseling session with a psychologist.[234]) These laws, modeled after other consumer protections, have been regularly struck down in the name of "women's choice." There seems to be an underlying fear that too much information might lead a woman to choose childbirth over abortion. Ironically, the result of judicial invalidation of virtually all abortion regulations is that women are forced to rely on private enforcement—on their individual effort to shed their anonymity and initiate a lengthy, emotionally draining lawsuit in court.

Whether or not the Court reverses *Roe* in *Planned Parenthood v. Casey*, it can at least rectify some aspects of abortion exploitation. If the Court upholds the Pennsylvania regulations, protections such as informed consent would be constitutional. As long as

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804, General Assembly of Tennessee (June 2, 1989); Tex. Rev. Civ. Stat. Ann. art. § 4512.8 (Vernon Supp. 1989)).

[226] Ragsdale v. Turnock, 841 F.2d 1358 (7th Cir. 1988), *juris. postponed*, 109 S. Ct. 3239 (1989) (stayed pending hearings below) *settlement approved*, 734 F.Supp. 1457 (N.D. Ill. 1990), *aff'd in part, dismissed in part*, 941 F.2d 501 (7th Cir. 1991), *cert. denied sub. nom.*, Murphy v. Ragsdale, 112 S. Ct. 879 (U.S. Jan 13, 1992). Birth Control Centers, Inc. v. Reizen, 743 F.2d 352 (6th Cir. 1984); Hallmark Clinic v. North Carolina Dept. of Hum. Res., 519 F.2d 1315 (4th Cir. 1975); Friendship Medical Center, Ltd. v. Chicago Board of Health, 505 F.2d 1141 (7th Cir. 1974), *cert denied*, 420 U.S. 997 (1975); Florida Women's Medical Center v. Smith, 746 F. Supp. 89 (S.D. Fla. 1990) (refusing to modify 1982 injunction against abortion clinic regulations); Pilgrim Medical Group v. New Jersey State Board of Medical Examiners, 613 F.Supp. 837 (D.N.J. 1985); Florida Women's Medical Clinic v. Smith, 536 F.Supp. 1048 (D.Fla. 1982), *appeal dismissed*, 706 F.2d 1172 (5th Cir. 1983); Florida Women's Medical Clinic v. Smith, 478 F.Supp. 233 (D.Fla. 1979), *appeal dismissed*, 620 F.2d 297 (5th Cir. 1980); Women's Medical Center of Providence v. Cannon, 463 F.Supp. 531 (D.R.I. 1978); Fox Valley Reproductive Health Care v. Arft, 446 F.Supp. 1072 (E.D. Wis. 1978); Mobile Women's Medical Clinic v. Board of Commissioners, 426 F.Supp. 331 (S.D. Ala. 1977); Village of Oak Lawn v. Marcowitz, 86 Ill.2d 406, 427 N.E.2d 36 (1981) (striking Illinois regulations).

[227] Sontag, *supra* note 182, at 14.

[228] *60 Minutes*, *supra* note 224, at 15.

[229] *Id.* at 16.

[230] *See generally* Renfer, Hegarty & Shaheen, *The Women's Right to Know: A Model Approach to the Informed Consent of Abortion*, 22 Loyola U. Law Rev. 409 (1991).

[231] *See generally* Wardle, *supra* note 225, at 962 (citing, e.g., Del. Code Ann. tit. 24, § 1794 [1987]; Fla. Stat. § 390.001 [4] [1989]; Ga. Code Ann. § 15-11-112 [a] [2] [Supp. 1988]; Idaho Code § 18-609 [1987]; Ill. Rev. Stat. ch. 38, ¶ 81-26 [6] [1989]; Ind. Code Ann. § 35-1-58.5-2 [1] [B] [Burns 1985]; Iowa Code Ann. § 707.8 [West 1979]; Ky. Rev. Stat. Ann. § 311.726, 311.729 [Baldwin 1986 & Supp. 1988]; La. Rev. Stat. Ann. 40:1299.33 [D], 40:1299.35.6 [West 1977]; Me. Rev. Stat. Ann. tit. 22, § 1599 [Supp. 1988]; Md. Health-Gen. Code Ann. § 20-211 [d] [1987]; Mass. Ann. Law ch. 112, § 12S [1985]; Minn. Stat. Ann. § 145.412 [4] [West 1989]; Mo. Ann. Stat. § 188.027, 188.039 [Vernon 1983]; Mont. Code Ann. §§ 50-20-104 [3] [c], 50-20-106 [1987]; Neb. Rev. Stat. § 28-327 [1985]; Nev. Rev. Stat. Ann. § 442.252 [Michie 1987]; N.Y. Penal Law § 125.053 [Kinney 1987]; N.D. Cent. Code § 14-02.1-03 [1] [1981]; Ohio Rev. Code Ann. § 2929. 12 [A] [Anderson 1987]; Okla. Stat. Ann. tit. 63, § 1-738 [West 1984]; 18 Pa. Cons. Stat. Ann. §§ 3205, 3208 [Purdon Supp. 1989]; R.I. Gen Laws § 23-4.7-2 [1985]; S.C. Code Ann. § 44-41-20 [1985]; S.D. Codified Laws Ann. §§ 34-23A-7, 34-23A-10.1 [1986]; Tenn. Code Ann. §§ 39-4-201 [c], 39-4-202 [1982]; Utah Code Ann. § 76-7-305.5 [Supp. 1989]; Va. Code Ann. § 18.2-76 [1988]; Wash. Rev. Code Ann. § 9.02.070 [1988]; Wis. Stat. Ann. § 146.78 [West 1989]).

[232] Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Barnes v. Moore, No. J-91-0425 (S.D.

abortion remains legal, women should be protected from its most obvious abuses. Information about health risks, coupled with a meaningful opportunity to evaluate abortion outside the stress and pressures of a for-profit abortion center, should be provided to every woman contemplating an abortion.

D. RU486 as an Alternative to Surgical Abortion

As abortion advocates have become more aware of the physical trauma and complications of surgical abortion, as well as the very public nature of clinics, they have sought an alternative means for aborting a pregnancy. In the past two years, increasing publicity has been given to the abortifacient RU486 (Mifepristone), the so-called French abortion pill, and its potential effect on women and abortion in the United States.[235] The drug has also been touted as a treatment for brain tumors, but the benefits are minor and results are preliminary.[236] Congress has held hearings about the distribution of the drug in the United States.[237] It appears widely suggested, and believed, that RU486 is an easy, safe, preferable solution to surgical procedures, such that it will quickly replace surgical abortion and make abortion a safe, easy, at-home experience. Abortion clinics will become a thing of the past, and the accompanying demonstrations in front of clinics will be eliminated. Women will no longer need doctors to perform abortions. It will be a private matter, and no one will know the difference. The abortion issue will simply evaporate from the lack of an identifiable target.[238]

Miss. 1991), *appeal docketed*, No. 91-1953 (5th Cir. 1991); Fargo Women's Health Organization v. Sinner, No. 91-95 (D.ND. Aug. 23, 1991)

[235] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 449–51 (1983).

[236] Van Biema, *The Abortion Pill*, Life 75, 76 (July 1990). Nathanson records the irony that she could have proceeded with the abortion immediately but no, with a tubal ligation. Her doctor said, "You'll need to sign a release in advance for permanent sterilization—that's to prevent impulsive decisions, since it's an irreversible procedure." Nathanson, *supra* note 40, at 36.

[237] *See, e.g.*, Wickenden, *Drug of choice: the side effects of RU 486*, 203 The New Republic 24 (Nov. 26, 1990); Van Biema, *supra* note 234, at 73; Sanders, *Whose Right to Choose?* 2 New Statesman & Society 29 (Sept. 29, 1989); Schumer, *The Pill that isn't*, 10 Savvy Woman 94 (Oct. 1989); Carey, *Can the 'abortion pill' save lives?* Business Week 56 (Dec. 17, 1990); *Pro-con (excerpts from congressional investigations concerning the drug RU-486)*, 109 U.S. News & World Rep. 15 (Dec. 3, 1990); *A pill worth testing*, 54 The Progressive 9 (Dec. 1990); Wright, *Fertility Rites*, Scientific American 14 (Dec. 1988); *About-Face Over an Abortion Pill*, Time 103 (Nov. 7, 1988); Langone, *After-the-Fact Birth Control*, Time 103 (Oct. 10, 1988).

[238] Greenberg, Weiss, et al., *Treatment of Unresectable Meningiomas Antiprogesterone Agent Mifepristone*, 74 J. of Neurosurgery 861–866 (June 1991).

[237] Suplee, *Hill Holds Heated Hearing on RU 486*, Washington Post, Nov. 20, 1990, at A21, col. 2.

[238] *See, e.g.*, L. Lader, *RU486* (1991) (bookjacket: "RU486 is a pill that ends an unwanted pregnancy quickly, safely, and without an invasive procedure"); Editorial, *A Mayoral Boost for RU-486*, New York Times, April 8, 1991, at A14 ("would be as private a decision as it should be and considerably safer than it now is with surgical procedures"); Van Biema, *supra* note 234, at 78 ("If the pro-choice movement is founded on the proposition that abortion is a woman's private decision, here was a magic wand to make it a correspondingly private procedure. The woman would act alone, excluding the host of other participants and spectators . . ."); Goodman, *Abortion: By Pill*, Washington Post, July 29, 1989, at A-17, col. 1; *About-Face over An Abortion Pill*, Time 103 (Nov. 7, 1988) ("Administered within the first five weeks of pregnancy, it causes abortions by blocking the action of the hormone progesterone, thus provoking the uterine lining to slough off the embryo. If taken with a prostaglandin . . . RU 486 is about 95 percent effective. Some 8,000 women have used the pill, which has been available only in hospitals and medical clinics and has no harmful side effects"); Pogash, *Science v. Religion*, San Francisco Examiner (Image Sunday magazine), April 14, 1991 at 10 (Women anywhere in the world would be able to abort "in the privacy of their own homes").

However, a review of the medical and popular literature based on the drug's use in France suggests otherwise.[239] The process of using RU486 is more extensive and cumbersome than commonly known and requires, in France, four trips to a clinic.[240] First, the woman visits the clinic to have her pregnancy confirmed by a urine or blood test and clinical examination. If pregnant, she is a candidate for using RU486, which is most effective during the seventh week of pregnancy.[241] The woman returns a week later and is given a 600-mg. oral dose of RU486, which induces an abortion by inhibiting proper implantation or by inducing a sloughing from the uterine wall after implantation.[242] In short, the process induces a miscarriage with "heavy menstrual bleeding."[243] But because Mifepristone by itself is only 50% to 85% effective,[244] the woman must return a third time for administration of a prostaglandin to induce uterine contractions. This allegedly increases the effectiveness rate to 95%.[245] Nausea may set in before the prostaglandin is administered, and the prostaglandin may exacerbate the nausea. The woman spends a few hours in a hospital bed. "A few women . . . expel [the fetus] before coming in for the injection, most do so while at the hospital, and for some it will happen later, at home."[246] For some, the expulsion may be delayed at home as long as five days.[247] The woman must go to the clinic a fourth time, eight to twelve days later. If the abortion is not complete, a surgical abortion must be performed.[248] Even with the combination of RU486 and a prostaglandin, there is still an incomplete abortion rate of 3% to 4%, and a continued pregnancy rate of about 1%.[249]

For most women, the process is like a very heavy menstrual period, with bleeding lasting on average from six to 16 days. During this process, some women require analgesic shots for pain.[250] The French inventor of RU486, Etienne-Emile Baulieu, warns that, "In an out-patient setting, this method requires strict medical supervision in order to monitor cases of aggressive blood loss,"[251] which may continue for as much as three weeks after the prostaglandin is taken. Consequently, Baulieu recommends that any

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[239] An exception to the rosier descriptions in the popular media is Wickenden, *supra* note 232, at 24; Allen, *The Mysteries of RU-486*, The American Spectator 17 (October 1989).

[240] Armstrong, *RU-486: The abortion pill*, Santa Clara Mercury News, Feb. 20, 1990, at 1C.

[241] Baulieu, *Contragestion and other clinical applications of RU486, an Antiprogesterone at the Receptor*, 245 Science 1351, 1354 (Sept. 22, 1989).

[242] Ulmann, Teutsch & Philibert, *RU 486*, 262 Scientific American 42 (June 1990). "RU" comes from the maker's name, Roussel-Uclaf. The authors of this article are employees of Roussel-Uclaf who oversaw the testing of the drug.

[243] Van Biema, *supra* note 234, at 75 (July 1990).

[244] Some reports say RU486 is only 60% effective alone. Riding, *Frenchwoman's Death Tied to the Use of Abortion Pill*, New York Times, April 10, 1991, at A4, col. 1. Baulieu reports 1% to 10% cases of complete failure, 10% to 30% cases of incomplete expulsion and 60% to 85% cases of complete expulsion Baulieu, *supra* note 241, at 1354.

[245] Prostaglandin is a naturally occurring compound that stimulates uterine contractions. It can also be synthesized chemically. There are several types. *Dorland's Illustrated Medical Dictionary* 1077–1078 (26th ed. 1985). Some World Health Organization studies are using a different prostaglandin—gemeprostin—as a vaginal suppository. A third type of prostaglandin is being tested. Riding, *supra* note 244, at A4 col. 1.

[246] Van Biema, *supra* note 234, at 80.

[247] *Id.*

[248] Armstrong, *supra* note 240, at 2C. "Also, follow-up is necessary in cases of failure that may be related to ectopic (extrauterine) pregnancies . . ." Baulieu, *supra* note 241, at 1355.

[249] Baulieu, *supra* note 241, at 1355.

[250] *Id.*

[251] *Id.*

distribution of RU486 be done only by gynecologists in clinics.[252] *Life* magazine described the side effects this way: "The bleeding RU486 causes, the disagreeable cramps and nausea that sometimes results from the prostaglandin, and the extension of a process normally completed in a few traumatic hours over several emotionally taxing days. This last is the most surprising to those who expect the pill to be quick."[253] Dorothy Wickenden wrote in *The New Republic*, "There is no denying that RU486 is an eerie drug."[254]

Even aside from the complexity of the process, the literature indicates that RU486 is not the simple abortifacient that has been commonly thought. It is only effective for about a three-week period, between six and eight weeks of pregnancy.[255] The American Medical Association, which supports RU486 research, agrees with the FDA ban on importing the drug, noting that RU486 "poses a severe risk to patients unless the drug is administered as part of a complete treatment plan under the supervision of a physician."[256] The side effects of the drug make it anything but easy and effortless.[257] These side effects include incomplete abortion, heavy bleeding or hemorrhage, nausea and vomiting and abdominal pain. There is anecdotal evidence that RU486 is stressful and painful.[258] For women with undetected tubal (ectopic) pregnancies, taking RU486 would not end the pregnancy; undetected continuation of the pregnancy might result in a rupture of the fallopian tubes.[259] It is necessary to ensure that *every* woman returns after taking RU486 for the prostaglandin dosage; otherwise an incomplete abortion may result.[260] As a result, some researchers do not believe that RU486 will ever replace suction abortions.

The death of a French woman from RU486 was reported in April 1991.[261] French authorities had previously "recommended against nonsurgical abortion in cases when the women are smokers or have heart problems, diabetes and high cholesterol."[262] In

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[252] Van Biema, *supra* note 234, at 83. A 1990 memo signed by the French director general of health, the director of hospitals and the director of pharmacy and medication noted that the use of the prostaglandin Nalador with RU486 caused "serious undesirable side effects of the cardio-vascular type." The memorandum recommended that the method of use be scrupulously noted and that "training of personnel and the proper use of material are indispensable." The procedures included: 1) the woman must be in a prone position during and after administration of the drug for several hours; 2) cardiorespiratory resuscitators must be available; 3) the patient should have blood pressure taken every half-hour for several hours; 4) electrocardiogram should be given if the patient notes chest pain. (Memorandum on file with authors.)

[253] Van Biema, *supra* note 234, at 76.

[254] Wickenden, *supra* note 235, at 27.

[255] Baulieu, *supra* note 241, at 1354; Allen, *supra* note 239, at 18.

[256] Suplee, *Hill Holds Heated Hearing on RU 486*, Washington Post, Nov. 20, 1990, at A21, col. 1.

[257] *See generally* Allen, *RU-486, the French Abortion Pill: What is Safe?* Wall Street Journal, A20 col. 3 (Oct. 31, 1989) (Midwest Edition); Allen, *supra* note 239, at 17.

[258] One patient stated during the process of taking the drug: "But what's really hard to take is the mental side of it. The emotional side. To feel the egg is in the process of dying. And you are almost . . . assisting in this death for forty-eight hours—forty-eight hours between the pills and the shot and what comes next." Van Biema, *supra* note 234, at 80.

[259] *Id.* at 83.

[260] *Id.* at 83.

[261] Riding, *Frenchwoman's death tied to the Use of Abortion Pill*, New York Times, April 10, 1991, at A4, col. 1. Her death was attributed to her reaction to the hormone prostaglandin injected with the Mifepristone. This article also reported that three other women had died and four had suffered heart attacks after taking the prostaglandin, Nalador, alone. At least another two had suffered heart attacks after taking RU486 with the prostaglandin in 1990.

[262] Riding, *supra* note 261, at A4.

April 1991, shortly after the woman's death, the French Ministry of Health banned the use of RU486 for women who are regular smokers or who are older than 35.[263]

RU486 has created a dilemma for abortion advocates who are also concerned about women's health. In addition to the risks from the procedure, the long-term effects are unknown. The drug may suppress ovulation for three to seven months after it is taken.[264] If RU486 is unsuccessful in aborting the pregnancy, although the effects on the fetus are uncertain,[265] it may cause birth defects.[266] It is not recommended either as a "morning after" pill or as a "once a month" menses inducer,[267] although NOW and the Fund for a Feminist Majority have promoted it as such.[268] Also, it can cause "dysynchrony," a phenomenon "in which a woman's ovulating and menstrual cycles become unlinked," reducing the drug's effectiveness in terminating any pregnancy.[269]

The National Women's Health Network "has serious qualms about introducing reproductive products onto the market without adequate testing."[270] In contrast to extensive testing with Norplant—a time-release contraceptive capsule placed in a woman's arm and allegedly effective for up to five years that underwent over 20 years of research—a coalition of NOW, Fund for a Feminist Majority, the Population Council and Planned Parenthood is pushing to have RU486 approved by the FDA within four years.[271] If protection of abortion availability were not the issue, one would expect aggressive feminist concern about the health ramifications of RU486. One of the few pro-choice feminist groups to question the safety of RU486 is the Institute on Women and Technology; it has been heatedly criticized by other pro-choice feminists.[272] Abortion advocates should still remember the devastation of the Dalkon shield and the first-generation birth control pills. But they ignore, apart from moral or philosophical concerns, the genuine health risks to American women. Their single-minded pursuit of abortion-on-demand by any means belies any legitimate claim to represent the interests of American women.

E. Psychological Effects

Even if aborted women escape physical trauma or death, they have another hurdle to overcome: damage to their psychological and emotional well-being. The psychological impact of abortion may be even more hotly denied by feminists than are physical complications. To admit that abortion causes guilt, remorse or regret violates the fundamental premise that abortion is a "first right." Margaret Liu McConnell, who had an all-too-easy abortion in college, discovered too late: "For all the pro-choice lobby's talk of abortion as a deep personal moral decision, casting abortion as a right takes the weight of morality out of the balance. For, by definition, *a right is something you need*

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[263] *France Forbids Pill Treatment*, Wall Street Journal, May 14, 1991, at B1, col. 6; *How RU 486 Works*, USA Today, May 20, 1991, at 10A, col. 4.

[264] Allen, *supra* note 239, at 18.

[265] Baulieu, *supra* note 241, at 1355.

[266] Allen, *supra* note 239, at 18.

[267] *Id.*

[268] Allen, *supra* note 239, at 19.

[269] Allen, *supra* note 239, at 18.

[270] *Id.* at 20.

[271] *Id.* at 17.

[272] *Feminist Group Dissents on RU-486 Use for Abortion*, Science 199 (Oct. 11, 1991). *See* J. Raymond, et al., *RU 486: Misconceptions, Myths and Morals* (1991).

not feel guilty exercising."[273] Precisely. If abortion is a "right," why does it feel so wrong?

Abortion has long been recognized to have devastating effects on at least some women. There is evidence that the psychological effects of abortion on women were publicized in the middle of the last century.[274] The contemporary debate over the psychological impact of abortion spans 30 years.[275] Studies prior to the liberalization of abortion concluded that abortion had negative psychological consequences.[276] Indeed, Dr. Mary Calderone stated in 1960, based on the 1955 conference of experts sponsored by Planned Parenthood: "I am mindful of what was brought out by our psychologists . . . that in almost every case, abortion, whether legal or illegal, is a traumatic experience that may have severe consequences later on."[277] But writings and research by abortion-rights advocates in the late 1960s concluded that abortion had neither negative nor positive psychological consequences.[278] Later articles by abortion-rights advocates admitted that negative consequences do in fact occur.[279] However, they minimized the impact by claiming that the psychological sequelae from abortion may be less than that following childbirth.[280] Mary Zimmerman, a sociologist who interviewed women who had aborted, suggests that the abortion experience is not uniform for women: Neither the "abortion as crisis" view (by the antiabortion movement) nor the "abortion as harmless" view (by those who favor abortion) fully explains the abortion experience. These two views result in abortion being seen as an "either/or issue . . . either abortion

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[273] McConnell, *Living With* Roe v. Wade, Commentary 34, 36 (Nov. 1990) (emphasis added).

[274] Elizabeth Evans, *The Abuse of Maternity* (Philadelphia: Lippincott 1875).

[275] *See, e.g.*, Schwartz, in Butler & Walbert, eds., *supra* note 151, at 323; Pfeiffer, *Psychiatric Indications or Psychiatric Justification of Therapeutic Abortion*, 23 Arch. of Gen. Psychiat. 402 (1970); Botler, *The Psychiatrist's Role in Therapeutic Abortion: The Unwitting Accomplice*, 119 Am. J. of Psychiat. 312 (1962).

[276] *See, e.g.*, Botler, *supra* note 270, at 312; Galdston, *Other Aspects of the Abortion Problem: Psychiatric Aspects*, in M. Calderone, ed., *Abortion in the United States* (1958); Wilson, *The Abortion Problem in the General Hospital*, in *Therapeutic Abortion* (H. Rosen, ed. 1954); Taussig, *Effects of Abortion on the General Health and Reproductive Functions of the Individual*, in H. Taylor, ed., *The Abortion Problem* (1942).

[277] Calderone, *supra* note 8, at 951.

[278] *See, e.g.*, Notman, *Pregnancy and Abortion: Implications for Career Development of Professional Women*, 208 Annals of the N.Y. Acad. of Science 205 (1973); Payne, et al., *Methodological Issues in Therapeutic Abortion Research*, in H. Osofsky and J. Osofsky, eds., *The Abortion Experience: Psychological and Medical Impact*, (1973); Athanasiou, et al., *Psychiatric Sequelae to Term Birth and Induced Early and Late Abortion: A Longitudinal Study*, 5 Family Planning Persp. 227 (1973).

[279] Schwartz, in Butler & Walbert, *supra* note 151, at 331. Of the 32 articles that Schwartz examined, only 11 were written after 1973 (the year *Roe v. Wade* legalized abortion), and only 2 of the 32 were written as late as the 1980s. *See also* M. Zimmerman, *Passage Through Abortion: The Personal and Social Reality of Women's Experiences*, 3, 20–24 (1977).

One factor that may affect research outcome is that the attitudes of professional psychologists dramatically changed in the 1960s: "Whereas in 1967 only 24 percent of members of the American Psychiatric Association responding to a poll favored abortion on request, 72 percent were in favor by 1969. By the end of the decade, two of the most influential organizations within the profession [the Group for the Advancement of Psychiatry and the American Psychiatric Association] had published official statements favoring legalization of abortion." Schwartz, *supra* note 151, at 324 (cit. omit.).

[280] Schwartz, in Butler & Walbert, *supra* note 151, at 331 (citing David, *Abortion in Psychological Perspective*, 42 Am. J. Orthopsychiat. 61 [1972]); Brewer, *Incidence of Post-Abortion Psychosis: A Prospective Study*, 1 Brit. Med. J. 476 (1977]).

is viewed as a crisis or not; either it constitutes a major disruption or it does not."[281] Women's responses vary.

In any case, because no longitudinal studies have been conducted, the scientific reliability of all previously completed studies has been questioned.[282] A recent article examined all studies published in English between January 1966 and April 1988 that "quantitatively examined psychological sequelae" from abortion through original empirical data.[283] The authors questioned the scientific reliability of many of those studies. Validity is compromised when, for example, "systematic attrition occurs, the reliability of an assessment instrument is unknown, or a sample size is too small to reliably generalize to the underlying population."[284]

Despite the lack of comprehensive national statistics, abortion does affect individual women deeply. Anecdotal evidence of negative reactions is plentiful.[285] In her autobiography, actress Patricia Neal wrote of her abortion of Gary Cooper's child and of the trauma she suffered for 30 years thereafter.[286] Sue Nathanson, in *Soul Crisis*, conveyed the devastation of her abortion in a startling and direct way. She wrote of "the psychological descent into despair I made after the abortion and tubal ligation."[287] She grieved on each anniversary of her abortion.[288] Even five years after her abortion, she felt compelled to "acknowledge the reality and permanence of the pain of my loss. My grief for my unborn fourth child, though perhaps different in quality than the grief I would have for any living child, is just as palpable."[289]

In *Passage Through Abortion*,[290] Mary Zimmerman conducted personal interviews with 40 women from one community who underwent abortion in 1975. She found that

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[281] M. Zimmerman, *supra* note 279, at 3.

[282] Re, Stoms & Phifer, *Psychological Impact of Abortion: Methodological and Outcomes Summary of Empirical Research between 1966 and 1988*, 10 Health Care for Women Int'l 347 (1989). *See also* Posovac & Miller, *Some Problems Caused By Not Having a Conceptual Foundation for Health Research: An Illustration From Studies of the Psychological Effects of Abortion*, 5 Psych. & Health 13 (1990).

[283] Rogers, Stoms & Phifer, *supra* note 282, at 369.

[284] *Id.* at 369.

[285] *See, e.g.*, Lyons, *After Abortion: Stress disorder strikes women (& men) years later*, New York Daily News, March 11, 1991, at 18.

Sandra Kaiser underwent an abortion, without her mother's knowledge, when she was 14. Prior to the abortion, she had been hospitalized three times for psychiatric problems, but the clinic failed to elicit this information. Sandra jumped to her death. Her mother sued the clinic but lost. Jackson, *Jury Considering Abortion-Suicide Suit*, St. Louis Post-Dispatch, March 1, 1991, at 3A, col. 1.

[286] P. O'Neal, *As I Am: An Autobiography* 134 (1988) ("But for over thirty years, alone, in the night, I cried. For years and years I cried over that baby. And whenever I had too much to drink, I would remember that I had not allowed him to exist. I admired Ingrid Bergman for having her son. She had guts, I did not. And I regret it with all my heart. If I had only one thing to do over in my life, I would have that baby."); N. Sorel, *Ever Since Eve: Personal Reflections on Childbirth* 243, 247 (1984) (Gloria Swanson: "The greatest regret of my life has always been that I didn't have my baby, Henri's child, in 1925. Nothing in the whole world is worth a baby, I realized as soon as it was too late, and I never stopped blaming myself.").

[287] *Id.* at 270.

[288] "At some deep place in my mind, I continue to track the development of my unborn child as if he or she were alive." *Id.* at 285.

[289] *Id.* at 268. *See id.* at 285 ("the permanent place occupied by the abortion and tubal ligation . . ."); ". . . I understood yet another underpinning of the horror of abortion. The death of a child, whether unborn or living, triggers an archetypal panic . . ." *Id.* at 287.

[290] M. Zimmerman, *supra* note 112.

> *social change such as is involved in the legalization of abortion exacts severe personal costs from the women she studied. The legitimizing of abortion, followed by the provision of institutional settings where abortions are routinely obtainable—although not uniformly available—has not been accompanied by parallel changes in the moral definitions of abortion. Among many, abortion continues to be viewed as an immoral act. For the individuals involved in this study . . . the guilt feelings which result from the discrepancy between what is legally permissible and moral belief is the price which they must pay.*[291]

It is ironic that so many women are opposed to or ambivalent about an act they also claim as their legal, fundamental right. Zimmerman observed that "the most dramatic trend remains that by far the majority of women studied (70%) reported that they had disapproved of abortion to some degree prior to their own experience with it."[292] About half of the group Zimmerman interviewed were troubled in the first few weeks following their abortion.[293] It is worth noting that the women Zimmerman studied had abortions just two years after *Roe*. They grew up with abortion largely prohibited; few knew anything factual about abortion or had ever discussed it with anyone.[294] However, even for women who have no memory of the pre-*Roe* years, the moral uncertainty, ambivalence and secrecy remain.[295] Why?

One reason may be the inescapably human nature of the fetus, as illuminated by fetal photography and modern developments in medical science. Many women considering abortion have at least a general idea of what a developing fetus looks like.[296] Scientific confirmation of the humanity of the fetus cannot be attributed to the "moralists" in the pro-life movement or shrugged off as the survival of traditionalist or anti-feminist morals. Medical care for the unborn child as a patient preceded the *in utero* photography and technology in the 1960s—and it will survive any demise of the pro-life movement.[297] Traditionally, concern for the fetus has been an essential aspect of prenatal care, intended to promote the health of mother *and* child.[298] That approach is

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[291] *Id.* at vii (Foreword by Harold Finestone).

[292] Zimmerman, *supra* note 112, at 69–70.

[293] *Id.* at 182–185. This study covered only immediate aftereffects; most interviews were conducted between six and ten weeks after the abortion. *Id.* at 43.

[294] *Id.* at 62–63.

[295] McConnell, *supra* note 273, at 34, 35–36 ("I longed for those days I knew only from old movies and novels, those pre-60's days when boyfriends visiting from other colleges stayed in hotels (!) and dates ended with a lingering kiss at the door . . . I am not in the habit of exposing this innermost regret, this endless remorse to which I woke too late.")

[296] On a December 28, 1991, visit to the Museum of Science and Industry in Chicago, one of the coauthors was surprised that one of the longest lines was at the fetal development exhibit.

[297] *Cf.* Zimmerman, *supra* note 279, at 1–2; Callahan, *supra* note 6, at 683.

[298] *See generally* D. Danforth & J. Scott, *Obstetrics and Gynecology* 5 (5th ed. 1986); H. Speert, *Obstetrics and Gynecology in America: A History* 142–43 (A.C.O.G. 1980). Direct therapy for unborn infants appeared as far back as 1928, when transabdominal application of drugs for fetal asphyxia was introduced. Dudenhausen, *Historical and ethical aspects of direct treatment of the fetus*, 12 J. Perinatal Med. 17 (1984 Supp.). "Prior to the recent developments in fetal surgery, the fetus generally was considered a medical patient and certain defects were treated with medicines administered to the mother or directly into the amniotic fluid." Blank, *Emerging Notions of Women's Rights and Responsibilities During Gestation*, 7 J. Legal Med. 441, 461 (1986). "[T]he health of the fetus has always been a concern . . . In some obvious

reflected in current medical practice as well. The American College of Obstetricians and Gynecologists Ethics Committee, in their Opinion No. 55, states that the "current ethical position of the medical community is that a physician treating a pregnant woman in effect has two patients, the mother and the fetus, and should assess the risk and benefits attendant to each in advising the mother on the course of her treatment."[299]

A recent issue of *Discovery* magazine brought into popular view the latest developments in fetal surgery and medicine that have been growing throughout the 1970s and 1980s.[300] It is now possible to care for the unborn child *in utero* at virtually every stage of pregnancy.[301] *In utero* treatments have been performed successfully for hydrocephalus, hydrops fetalis associated with maternal Rh sensitization, congenital adrenal hyperplasia, urinary tract malformation, congenital hydronephrosis, perinatal asphyxia and congenital cystic adenomatoid malformation.[302] Intrauterine blood transfusions have been performed for a variety of fetal diseases.[303] Fetal surgery has also been performed to correct some fetal anomalies *in utero* by removing the fetus from the uterus, operating and then replacing the fetus into the uterus,[304] and to remove a dead fetal twin.[305] These medical developments reaffirm that the fetus is a human child, loved and cared for and highly valued by her parents and society.

Developing technology and surgical techniques, which reinforce traditional princi-

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nontechnical sense, the fetus has always been regarded as a patient." Shinn, *The Fetus as Patient: A Philosophical and Ethical Perspective*, in Milunsky & Annas, eds., *Genetics and the Law III* 318 (1985).

[299] American College of Obstetricians and Gynecologists, *Patient Choice: Maternal-Fetal Conflict* (October 1987) (as cited in *In re A.C.*, 573 A.2d 1235, 1246 n.13 (D.C. Ct.App. 1990).

[300] Ohlendorf-Moffat, *Surgery Before Birth*, Discovery (Feb. 1991).

[301] Proper control of a diabetic mother's fuel metabolism at conception is advised and proper control at six to eight weeks of gestation can prevent fetal malformations. ''elson, *Diabetics and Pregnancy: Control Can Make a Difference*, 61 Mayo Clin. Proc. 825 (1986). Additional therapy available for previable, unborn children in the first trimester include treatments for congenital adrenal hyperplasia, some vitamin-responsive inborn errors of metabolism, neural tube defects and fetal cardiac arrhythmias. Schulman, *Treatment of the Embryo and the Fetus in the First Trimester*, 35 Am. J. Med. Genetics 197 (1990).

[302] Frigoletto, et al., *Antenatal Treatment of Hydrocephalus by Ventriculoamniotic Shunting*, 248 J.A.M.A. 2496 (1982); McCullough, *A History of the Treatment of Hydrocephalus*, 1 Fetal Ther. 38 (1986); Editorial, *Prenatal Treatment of Congenital Adrenal Hyperplasia*, 355 Lancet 510–511 (March 3, 1990); Golbus, et al., *In utero treatment of urinary tract obstruction*, 152 Am. J. Ob. Gyn. 383 (1982); Harrison, et al., *Management of the fetus with a urinary tract malformation*, 246 J.A.M.A. 635 (1981); Manning, et al., *Antepartum chronic fetal vesicoamniotic shunts for obstructive uropathy: a report of two cases*, 145 Am. J. Ob. Gyn. 819 (1983); Vallancien, et al., *Percutaneous Nephrostomy in Utero*, 20 Urology 647 (1982); Harrison, et al., *Fetal Surgery for Congenital hydronephrosis*, 306 N. Eng. J. Med 591 (1982); Kirkinen, et al., *Repeated transabdominal renocenteses in a case of fetal hydronephrotic kidney*, 142 Am. J. Ob. Gyn. 1049 (1982); Jacobs, et al., *Prevention, Recognition, and Treatment of Perinatal Asphyxia*, 16 Clin. Perin. 785 (1989); Nugent, et al., *Prenatal Treatment of Type I Congenital Cystic Adenomatoid Malformation by Intrauterine Fetal Thoracentesis*, 17 J. Clin. Ultra. 675 (1989).

[303] Gonsoulin, et al., *Serial Maternal Blood Donations for Intrauterine Transfusion*, 75 Ob. Gyn. 158 (1990); Kackstein, et al., *Intrauterine treatment of severe fetal erythroblastosis: intravascular transfusion with ultrasonic guidance*, 17 J. Perin. Med. 341 (1989); Pattison, et al., *The Management of Severe Erythroblastosis Fetalis by Fetal Transfusion: Survival of Transfused Adult Erythrocytes in the Fetus*, 74 Ob. Gyn. 901 (1989); Peters, et al., *Cordocentesis for the Diagnosis and Treatment of Human Fetal Parvovirus infection*, 75 Ob. & Gyn. 501 (1990); Pringle, *Fetal surgery: It has a Past, Has it a Future?* 1 Fetal Ther. 25 (1986).

[304] Harrison, *Successful Repair in Utero of a Fetal Diaphragmatic Hernia after Removal of Herniated Viscera from the Left Thorax*, 332 N. Eng. J. Med. 1582 (1990).

[305] Van, *Rare fetal surgery has happy ending*, Chicago Tribune, Apr. 20, 1991, at sec. 1, p. 1.

ples of medical ethics, will be promoted by physicians and sought out by parents, whether or not the pro-life movement disappears in this country.[306] Not only activists in the pro-life movement but physicians outside that movement ask the same ethical question: How and why do we provide surgery and treatment for one unborn child while another unborn child—at the same gestational age and in better health—is legally aborted?[307] Medical technology is thus another factor highlighting the tension over abortion as a legal "right" and a moral "wrong." Women contemplating abortion are vulnerable to this tension.

Not surprisingly, assessment of the psychological effects of abortion continues. Some accepted conclusions demand an appropriate response. One example is the frequent aborter—experts appear to agree that women who have multiple abortions suffer more.[308] The rate of repeat abortions has risen over the past 15 years and now stands at 42%.[309] Some women suffer "anniversary reactions" on the date of the abortion or the date of the predicted birth of the child.[310] An extreme example of mental and emotional suffering is the woman who commits suicide after her abortion.[311]

The aftermath of abortion is detrimental for many, if not most, women. For some of them, the effects may be both severe and long-lasting. As long as abortion is legal, women deserve to know about all possible risks before making any decision. These risks should give pause to those who espouse the position that abortion is an unqualified good, the "first right," "morally responsible," or "safe and easy."

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[306] "The more that parents actually see the fetus and recognize a human form, the more valuable will that fetus become in their eyes . . . [S]ince ultrasound is being more routinely used in obstetrical practice and is indicated for many high-risk pregnancies, we have good reason to believe that a more complex and progressively more human relationship will begin to develop between parents and fetuses." M. Harrison, M. Golbus & R. Filly, *The Unborn Patient: Prenatal Diagnosis and Treatment* 165 (1984).

[307] "The fetus now begins to make serious claims for a right to nutrition, to protection, to therapy. How can tolerance of abortion be morally reconciled with those claims?" Ruddick & Wilcox, *Operating on the Fetus*, 12 Hast. Cent. Rep. 10, 11 (1982) (quoting Richard McCormick); "The paradox here for the abortion debate is evident: a moral status that is denied the fetus when abortion is sought is given the fetus when its future healthy development is desired, though the same generic organism is under consideration." Callahan, *How Technology Is Reframing the Abortion Debate*, 16 Hast. Cent. Rep. 33, 37 (1986). *See generally*, K. Maeda, ed., *The Fetus as a Patient '87 Proceedings of the Third Inter'l Symposium* (1987); A Kurjak, ed., *The Fetus as a Patient, Proceedings of the First International Symposium* (1985); M. Harrison, et al., *The Unborn Patient: Prenatal Diagnosis and Treatment* (1984); E. Volpe, *Patient in the Womb* (1984); Manning, *Reflections on Future Directions of Perinatal Medicine*, 13 Sem. Perin. 342 (1989); Mahoney, *Editorial: The Fetus as Patient*, 150 West. J. Med. 459 (1989); Newton, *The Fetus as a Patient*, 73 Med. Clin. N. Amer. 517 (1989); Rosner, et al., *Fetal Therapy and Surgery: Fetal rights versus maternal obligations*, 89 N.Y. State J. Med. 80 (1989); Brodner, et al., *Fetal Therapy: Ethical and Legal Implications of Prenatal Intervention and Clinical Application*, 2 Fetal Ther. 57, 58 (1987); Chervenak, et al., *Ethical Analysis of the intrapartum management of pregnancy complicated by fetal hydrocephalus and macrocephaly*, 68 Obst. & Gyn. 720 (Nov. 1986); Chervenak & McCullough, *Perinatal ethics: a practical method of analysis of obligations to mother and fetus*, 66 Obst. & Gyn. 442 (1985).

[308] Franco, et al., *Psychological profile of dysphoric women postabortion*, 44 J. Amer. Med. Women's Assoc. 113, 115 (1989).

[309] Henshaw, et al., *The Characteristics and Prior Contraception Use of U.S. Abortion Patients*, 20 Fam. Plan. Perspect. 158, 159 (1988) (Table 1).

[310] Franco, et al., *supra* note 308, at 113, 115 (42% of women studied who "poorly assimilated" their abortion reported "anniversary reactions").

[311] Eidson v. Reproductive Health Services, No. 87206358 (St. Louis City Cir. Ct. Div. 9 March 1, 1991). A verdict was rendered in favor of the defendants.

F. Effects on Minor Women

The impact of abortion on minor women can be particularly negative. Many of them are not sufficiently mature to receive and assimilate the information needed to make a life-impacting decision. These adolescents fluctuate back and forth between dependence on the familial/parental community and the need for self-expression and individuation. Ironically, many adults reflect this same ambiguity in their attitudes toward, and descriptions of, teenagers and pregnancy. There is a great deal of public concern about "children having children," implying that 14- and 15-year-olds are too young to become mothers (although if they are pregnant, they already *are* mothers). On the other hand, these same adults oppose parental involvement legislation that would promote communication and assist these "children" in making responsible decisions about their own children, claiming that the same 14- or 15-year-old—by virtue of her biological ability to get pregnant—is sufficiently mature to make an independent decision to abort.

The open bias toward abortion is clear. Abortion is invariably advocated as the best choice for minors, even when it conflicts with significant feminine values. Why do some feminists fight against another woman's ability and obligation to raise, rear and care for her minor daughter in the context of the minor's abortion? When a daughter is in the midst of a crisis pregnancy, the core values of feminism—connectedness, care, community—are implicated. The mother is connected to her daughter and also to her granddaughter. Her embrace is ample enough to encompass this tiny, vulnerable new member of the family. Both mother and father of a minor daughter are expected to care deeply for her and to prudently exercise their constitutional right to rear their child, along with their obligations and responsibilities toward her.

The need for parental connection with a minor daughter in a stressful time is substantiated by the social sciences and recent litigation concerning parental notice laws. The scope of the problems of teen pregnancy and abortion is vast. Adolescent psychology and targeted research into adolescent abortion provides evidence that elective abortion uniquely impacts minors. Nearly 200,000 abortions are performed every year on minors age 17 or younger, including more than 15,000 on girls 14 years old or younger.[312] More than 40% of all teenagers with confirmed pregnancies obtain abortion.[313] This is 60% higher than the abortion rate for teenagers in 1973, the first year of nationwide legalized abortion.[314]

Nearly 80% of all abortions performed on teenagers are done in abortion clinics.[315] In these unfamiliar surroundings, minors often are furtive, frightened visitors subjected to assembly-line techniques. One study of Minnesota found that, in 1982, four Minnesota abortion clinics performed 78% of the 5,082 abortions performed on minors under 19 years of age.[316]

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[312] Henshaw, Benker, Blaine & Smith, *A Portrait of American Women who Obtain Abortions*. 17 Fam. Plan. Perspectives 90, 92 (1985).

[313] Henshaw, et al., *supra* note 312, at 93; Russo, *Adolescent Abortion: The Epidemiological Context*. in G. Melton, ed., *Adolescent Abortion: Psychological-Legal Issues* 40, 49 (1986).

[314] Russo, *supra* note 313, at 49.

[315] Henshaw & O'Reilly, *Characteristics of Abortion Patients in the United States 1979–1980*. 15 Fam. Plan. Perspect. 5, 11 (1983).

[316] Blum, et al., *The Impact of Parental Notification Law on Adolescent Abortion Decision-Making*. 77 Am. J. Pub. Health 619 (1987).

Despite this high incidence of teen pregnancy and abortion, few family planning clinics have parental consent policies. Less than half of the abortion clinics nationwide require parental notice even for teenagers 15 years of age or younger; even fewer require parental notification before performing abortions on minors age 16 or older.[317] This drives a deeper wedge in what may be fragile parent-child communication; teenagers in crisis often feel unable to confide in their parents. In one survey, nearly half (45%) of the 1,170 teenager abortion patients interviewed admitted to getting an abortion without parental knowledge; this figure obviously could not include teenagers who denied the clandestine nature of their abortion.[318]

Adolescence is a time of tremendous transition in the life of an individual. "Guidance is essential if the transition is to be made successfully and with minimum psychological damage."[319] There is enhanced risk of "replacement pregnancy" and multiple abortions for adolescents.[320] Ambivalence and confusion regarding the abortion decision are even greater for adolescents. "The here and now of an abortion decision for adolescents is more complicated than it is for most adult women."[321] One researcher found

> *[t]he decision to have an abortion was not an easy one. One of the young women admitted getting off the table at the abortion clinic before the procedure began. Another was not told that she was having an abortion and was confused about what was occurring . . . Attitudes about the acceptability of abortion also demonstrate the ambivalence of many [adolescents] who had abortions. Looking back to the time before the abortion, less than one-half approved of abortion at that time . . . less than one-quarter approved of it after the abortion.*[322]

One study found that "[a]lmost one third of the young women (31.8%) changed their minds once or twice about continuing the pregnancy or having the abortion, 18% changed their minds even more frequently, but 50% did not change their minds at all."[323] An-

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[317] Torres, Forrest, & Eisman, *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 Fam. Plan. Perspect. 284, 285 (1980) (Table 1) [hereinafter Torres].

[318] Torres, *supra* note 317, at 289 (Table 7), 287. *See also* Rosen, Beason & Stack, *Help or Hindrance: Parental Impact on Pregnant Teenagers' Resolution Decisions*, 31 Fam. Relations 271, 279 (1982); R. Mnookin, *In the Interests of Children* 158 (1985).

[319] E. Hurlock, *Adolescent Development* 15 (4th ed. 1973).

[320] Henshaw, et al., *supra* note 305, at 92; Teitze, *Repeat Abortions, Why More*, 10 Fam. Plan. Perspect. 205, 206 (1978); Steinhoff, et al., *Women Who Obtain Repeat Abortions: A Study Based on Record Linkage*, 11 Fam. Plan. Perspect. 30 (1979).

[321] Brown, *Adolescents and Abortion: A Theoretical Framework for Decision Making*, 12 J. Ob. Gyn. & Neonatal Nursing 241, 246 (1983).

[322] Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 Social Casework 551, 557 (Nov. 1978). *See also* L. Francke, *supra* note 165, at 178–206 (1978); Olson, *Social and Psychological Correlates of Pregnancy Resolution Among Adolescent Women*, 50 Am. J. Orthopsychiatry 432, 437–41 (1980); Babikan & Goldman, *A Study in Teenage Pregnancy*, 128 Am. J. Psychiat. 755 (1971).

[323] Klerman, Bracken, Jekel & Bracken, *The Delivery-Abortion Decision Among Adolescents*, in Stuart & Wells, ed., *Pregnancy in Adolescence: Needs, Problems, and Management* 219, 227 (1982); Wallerstein, Kurtz & Bar-Din, *Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women*, 27 Arch. Gen. Psychiat. 828 (1972).

other study confirms this ambivalence: "About one-quarter of women having a later abortion [defined as 16 or more weeks' gestation] said their delay was attributable (at least in part) to the long time they had needed to make the abortion decision."[324]

Teenagers who choose abortion typically have more difficulty with the decision than pregnant teenagers who reach other decisions. They are also relatively uninformed. They typically talk with fewer people and receive substantially less counseling than pregnant teenagers who chose to keep the baby or place it for adoption.[325] However, adolescents who choose abortion typically make that decision much more hastily (nine days) than teens who choose to keep the baby (56 days) or place it for adoption (more than 100 days).[326]

There has been inadequate empirical study of the impact of parental notice of abortion statutes on minors and their abortions because the minimal ingredients for such a study—a simultaneous enforcement of a parental notice law and state abortion data reporting—have been in effect in only a handful of states over the past 20 years. Federal or state courts have repeatedly enjoined parental notice and parental consent statutes.[327] One notable exception is the Minnesota parental notice law, which was in effect from August 1, 1981 until it was enjoined by a federal district court on March 2, 1986. The notice requirement applied to teens below the age of 18.[328] The federal district court in Minnesota acknowledged that it was the first district court "ever to examine a parental notification or consent substitute statute in actual operation."[329] The experience of Minnesota during the four and one-half years that its parental notice of abortion law was in

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[324] Torres & Forrest, *supra* note 171, at 169, 174, 175 (Table 5).

[325] Klerman, et al., *supra* note 323, at 231, 233; Paulsen, *Correlation of Outcomes of Premarital Pregnancy*, 18 Fam. Plan. Perspect. 25, 29 (Winter 1984).

[326] Paulsen, *supra* note 325, at 28.

[327] *See, e.g.*, Planned Parenthood v. Neeley, No. 89-489 (D. Ariz. 1989); Smith v. Bentley, 493 F. Supp. 916 (E.D. Ark. 1980); American Academy of Pediatrics v. Van de Kamp, No. 88457 (Cal. Super. Ct. Dec. 28, 1987), *aff'd*. 263 Cal. Rptr. 46, 214 Cal. App. 3d 831 (1989); *In re T.W.* 551 So.2d 1186 (Fla. 1989); Eubanks v. Brown, 604 F.Supp. 141 (W.D. Ky. 1984). *aff'd in part, rev'd in part, sub nom.* Eubanks v. Wilkinson, 937 F.2d 1118 (6th Cir. 1991); Glick v. McKay, 616 F.Supp. 322 (D.Nev. 1985), *aff'd*. 937 F2d 434 (9th Cir. 1991); Planned Parenthood v. Casey, 686 F.Supp. 2089 (E.D.Pa. 1988) (preliminary injunction), 744 F.Supp. 1323 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *cert. granted*, 112 S. Ct. 931–932 (1992); Planned Parenthood Assoc. v. McWherter, 716 F.Supp. 1064 (M.D. Tenn. 1989), *vacated & remanded with instructions to dismiss the case*, No. 89-6026 (6th Cir. Sept. 30, 1991).

[328] Minn. Stat. Ann. 144.343 (2)–(7) (West 1989). In this analysis, it was assumed that any change in the incidence of pregnancy, abortion and childbirth because of the notice law would most heavily fall on teens 17 and below, who were directly affected by the notice law (Minn. Stat. Ann. 645.451 [West 1989]); less heavily on teens ages 18 to 19 who would have recently been subject to the law; somewhat less on women ages 20 to 24; and least on women ages 25 to 54. The notice law itself does not define "minor" by age, and thus it is possible that there was some confusion as to who, among 17- to 19-year-olds, was covered by the law. Moreover, some teens who gave birth at 18 might have been 17 at the time they became pregnant and thus were directly affected by the law. Those who were 18 or 19 in 1983–1986 were subject to the law in 1981, and the group as a whole could reasonably have been influenced by the law through socialization, including schooling and peer contacts. Similarly, some in the 20–24 age group in later years would have been subject to the law in earlier years of its enforcement. Women age 25–54 would never have been personally affected by the law.

[329] Hodgson v. Minnesota, 648 F.Supp. 756, 774 (D.Minn. 1986), *cert. denied*, 479 U.S. 1102 (1987), *rev'd*, 853 F.2d 1452 (8th Cir. 1988), *aff'd*, 110 S.Ct. 2926 (1990).

effect gives some indication of the positive effect of parental notice of abortion laws on minors.[330]

The data collected by the Minnesota Department of Health tell a broader public health story—not only about those Minnesota teens who aborted (.60% in 1982) but also about those who never got pregnant (98.7%) and those who carried their children to term (.66%). The department's data demonstrate that the notice law is reasonably related to protecting the health of minor women because it requires parental notice without causing any increased health problems for minors and, in fact, possibly decreases adolescent pregnancy and abortion rates *without* causing increased birth rates. There is apparently no evidence of even a single report of child abuse caused by the parental notification law or a single report of medical complications caused by the law, or a single case of parental prevention or coercion of an abortion.[331] This is an extraordinary benefit for teens in Minnesota.

The data show that pregnancies for Minnesota preteens and teens, ages 10 to 17, *declined* between 1981 and 1986 while the notice law was in effect. The number of pregnancies in this age group *increased* by 9.0 percent between 1975 and 1980 and *fell* by 27.4 percent from 1980 to 1986. In this age group, the highest number of adolescent pregnancies occurred in the year before the notice law went into effect. For the 18–19 age group, pregnancies *increased* 27.8 percent between 1975 and 1980 and *fell* by 33.8 percent between 1980 and 1986.

The department's data also show that abortions for preteens and teens, ages 10 to 17, declined between 1980 and 1986 while the notice law was in effect. Abortions in this age group *increased* 54.4% from 1975 through 1980 and *fell* by 33.6% from 1980 to 1986. For the eighteen-to-nineteen age group, abortions grew markedly between 1975 and 1980 before decreasing between 1980-1986. Abortions *rose* 92.3% between 1975 and 1980 before *falling* 29.8% between 1980 and 1986.

Finally, it might be speculated that if a parental notice law caused abortions to fall for teens, births would increase, but the Minnesota data show just the opposite. Births for girls ages 10 to 17 declined while the notice law was in effect. Births dropped 18.7% from 1975 to 1980, but they continued to drop 20.3% from 1980 to 1986. For the 18–19 age group, births *increased* by 4.0% from 1975 to 1980 but *decreased* by 36.6% from 1980 to 1986.

The rates of teen pregnancies, abortions and births also fell during the four and one-half years that the parental notice law was in effect.[332] The pregnancy rate for the 10–17 age group rose from 12.7 (12.7 per 1,000) in 1975 to a high of 15.6 in 1980, the year before the notice law took effect, and then declined to a low of 11.3 in 1983 and 12.4 in 1986. Thus, even though the population of 10- to 17-year-olds declined between 1975 and 1986, the pregnancy rate declined as well, by 20.5% between 1980

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[330] Rogers, et al., *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Am. J. Pub. Health 294 (March 1991). *See also, Brief of the Association of American Physicians and Surgeons (AAPS) as Amicus Curiae in Support of State of Minnesota*, in Hodgson v. Minnesota, 110 S. Ct. 2926 (1990). One of the authors was counsel of record in the U.S. Supreme Court on this brief.

[331] *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), Cross Petitioners' Brief (Cross Pet.Br.) at 10–11, 18.

[332] Because raw figures do not take into account possible changes in Minnesota's population for a particular age group from year to year, rates for pregnancies, abortions and births were also calculated based on the department's data. Rates, in this study, equal the occurrence (incidence) of a phenomenon per 1,000 females. This data relies on the department's data for the entire population of Minnesota, not just on a sample.

and 1986. The pregnancy rate for the 18–19 age group rose substantially from 75.5 (75.5 per 1000) in 1975 to a high of 98.5 in 1980, the year before the notice law went into effect, but then fell after 1980 to 96.0 in 1981 and to 73.5 in 1986, *below the 1975 level*. Thus, again, even though the population in Minnesota for the 18–19 age group fell between 1976 and 1986, the pregnancy rate for 18- to 19-year-olds declined 25.4% between 1980 and 1986.

The abortion rate also declined. The abortion rate for the 10–17 age group rose from 4.9 in 1975 to a high of 8.4 in 1980 and then fell 27.4% percent between 1980 and 1986 for 10- to 17-year-olds. The abortion rate also fell for the 18–19 age group. The abortion rate rose from 20.4 in 1975 to a high of 40.1 in 1980 and then fell 4.8% to 38.20 in 1981 and a further 16.8% to a low of 31.80 in 1986. The abortion rate for 18- to 19-year-olds thus rose 96.6% between 1975 and 1980 and fell 20.7% between 1980 and 1986.

Finally, the birth rate fell for 10- to 17-year-olds and for 18-to 19-year-olds. The birth rate for the 10–17 age group fell from 7.8 in 1975 to 7.2 in 1980, but it continued to fall to 7.0 in 1981, to a low of 5.8 in 1983 and then to 6.3 in 1986. The birth rate for 10- to 17-year-olds thus fell 7.7% between 1975 and 1980 but fell 12.5% between 1980 and 1986. The birth rate for the 18–19 age group rose from 54.6 in 1975 to 58.0 in 1980 but fell to 57.4 in 1981 and to a low of 41.5 in 1986. Thus, the birth rate for 18-to-19 year-olds rose 6.2% from 1975 to 1980 but fell 28.4% between 1980 and 1986.

What does this public health story say for young women in Minnesota? The comparison of the pregnancy, abortion and birth rates in Minnesota between 1975–1980 and 1981–1986 supports the conclusion that the notice law effectively caused a decrease in the pregnancy rate in those years. This cannot be absolutely proven because this statistical study did not control for all other possible factors. However, since the abortion rate fell 27.4% for 10- to 17-year olds and 20.7% for 18- to 19-year-olds, while the birth rate throughout Minnesota simultaneously fell 12.5% for 10- to 17-year-olds and 28.4% for 18- to 19-year-olds, the pregnancy rate must have also declined, as the data confirm, supporting the conclusion that the notice law in fact changed adolescent behavior. In other words, since it seems undisputed that the notice law directly decreased abortion rates, while birth rates simultaneously decreased, the law must have decreased abortion rates by affecting pregnancy rates. Decreased unwed pregnancy for young women means decreased abortion and childbirth at a vulnerable age and time in their lives. A law that positively deters young women from pregnancy and abortion benefits young women.

V. Does Legal, Economic, and Social Equality for Women Hinge on *Roe v. Wade*?

As noted above, many feminist abortion advocates view abortion rights as the fundamental basis for all other freedoms. Abortion on demand is seen as necessary not only for freedom from male sexual oppression and domination,[333] but also as a legal basis

[333] Radical feminist Catherine MacKinnon believes abortion is an essential tool for women's liberation:

> A pregnant woman is the reification of male sexuality. Aggression, strength, and potency have triumphed over vulnerability, softness, and passivity. Pregnancy is the manifestation of male dominance and female submissiveness. A similar objectification of children from the male epistemology, in which children are defined in relation to male issues of potency, of continuity as a compensation for mortality, of the thrust to embody themselves or the

for other economic, educational and social rights. Thus, from this perspective, the legal guarantee of readily available abortion, whether based on a right of privacy or some other constitutional claim, is paramount. *Roe v. Wade* must be preserved in order to preserve and promote the development of female equality. In the face of often vociferous argument, it is worthwhile to examine the foundation for women's legal, social and economic rights.

Roe is rarely cited as a precedent for women's rights in any area other than abortion.[334] Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from *Roe v. Wade*.[335] Many specific measures to advance women's rights over the past 30 years have been the result of congressional action. These developments began at least a decade before *Roe*. Congress passed the Equal Pay Act in 1963,[336] Title VII of the Civil Rights Act of 1964[337] and the Pregnancy Discrimination Act amendments in 1978.[338] Additional workplace protections have been added. For example, in 1978 the first appellate court held that sexual harassment

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image of themselves, also underlies the issue of abortion. As MacKinnon notes: 'the idea that women can undo what men have done to them on this level seems to provoke insecurity sometimes bordering on hysteria.' Abortion, to MacKinnon, is a threat to the fundamental premise of male sexuality: the domination of female sexuality.

Cossman, *The Precarious Unity of Feminist Theory and Practice: The Praxis of Abortion*, 44 Toronto Fac. L. Rev. 85, 87 (1986) (citing to C. MacKinnon, *The Male Ideology of Privacy: A Feminist Perspective on the Right to Abortion* [1983] 17 Radical America 23 at 24 [footnote omitted]).

[334] Although *Roe* has been cited in almost 100 cases by [the Supreme Court], and in more than 1,000 cases by other federal and state courts, these citations, outside the context of abortion regulation, have been largely superfluous to the issues decided in those cases. Hundreds of the cited cases involve some regulation of abortion; this body of law will understandably be altered by the reversal of *Roe*. Of the remaining cases, however, very few, if any, could not be resolved by principles other than those pronounced in *Roe*.

Westlaw indicates that *Roe* has been cited in 99 opinions or summary dispositions by this Court. Of these, 18 were cases involving state regulation of abortion, or limitations on abortion funding. Eleven more were summary dispositions, issued shortly after *Roe* reversing and remanding cases to lower courts in light of *Roe*. In 13 cases, *Roe* was cited for its holding on the issue of mootness. *See e.g., United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398 (1980); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 593 (1984) (Blackmun, J., dissenting); *Edgar v. Mite Corp.*, 457 U.S. 624, 655 (1982) (Marshall, J., dissenting). In 16 cases *Roe* was cited in the body of an opinion, but as part of a string citation. *See e.g., Block v. Rutherford*, 468 U.S. 576, 597 (1984) (Blackmun, J., concurring); *Cleveland Board of Education v. LeFleur*, 414 U.S. 632, 639 (1974). In 23 cases, *Roe* was cited in memorandum opinions or dissents therefrom. *See e.g., Whisenhunt v. Spradlin*, 464 U.S. 965 (1983) (Brennan, J., dissenting).

The remaining cases, numbering 18, consist of more substantial reliance upon, or distinguishing of, *Roe*. *See e.g. . . . Carey v. Population Services Int'l*, 431 U.S. 678, 684 (1977); *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Kelley v. Johnson*, 425 U.S. 238, 244 (1976).

However, in no case has this Court relied on *Roe*, to the exclusion of other caselaw, in extending individual rights under the Due Process Clause of the Fourteenth Amendment.

Brief Amicus Curiae of Hon. Christopher Smith, et al., in Support of Appellants at 24–25 & n.53, in Webster v. Reproductive Health Services, *492 U.S.* 490 (1989).

[335] *See generally* H. Kay, *Sex-Based Discrimination: Text, Cases and Materials* (2d ed. 1981); B. Babcock, A. Freedman, E. Norton & S. Ross, *Sex Discrimination and the Law: Causes and Remedies* (1975).

[336] 77 Stat. 56, 29 U.S.C. § 206(d) (1988).

in the workplace was sex discrimination, prohibited by Title VII (equal employment opportunity).[339] Two years later, the Equal Employment Opportunity Commission (EEOC) adopted similar guidelines, prohibiting sexual harassment as a form of sex discrimination.[340] State agencies, as well as federal and state courts, have followed the EEOC's *Guidelines*' basic definition of sexual harassment.[341] Title IX of the Education Amendments of 1972 prohibits sexual discrimination against women in sports in federally funded schools.[342] Sex equity in education was established by the Women's Educational Equity Act of 1974[343] and expanded by the Women's Educational Equity Act of 1984.[344] The Federal Equal Credit Opportunity Act of 1974 prohibits sex discrimination in credit practices.[345] Other developments have come about through presidential order. For example, Executive Order No. 11,246 ensures equal opportunity in federal employment.[346] Progress has been facilitated simultaneously by state legislation. Some states have equal pay laws;[347] fair employment laws barring sex discrimination;[348] prohibitions on sex discrimination in state employment;[349] and prohibitions on sex discrimination in credit and financing practices,[350] sale, lease or rental of property,[351] insurance

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[337] Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e to 2000e-17 [1988]). *See* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986) (holding that plaintiff may establish a violation of Title VII by proving that discrimination grounded in sexual harassment has created a hostile or abusive work environment); Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) (per curiam) (holding state annuity plan violates Title VII); Los Angeles Dept of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding employer plan that required female employees to make larger contributions to pension fund violates Title VII).

[338] Pregnancy Discrumination Act of 1978, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e [k] [1982] [overturning General Electric Co. v. Gilbert, 429 U.S. 125 (1976)]). *See* International Union, U.A.W. v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (holding "fetal protection policy" that barred "all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure" violates Pregnancy Discrimination : ct); Newport News Shipbuilding and Dry Dock Co. v. EEOC, 462 U.S. 669 (1983) (holding pregnancy limitation in employer's health plan that provides for fewer benefits for spouses of male employees violates Pregnancy Discrimination Act); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (denial of accumulated seniority to persons who take mandatory pregnancy leave violates Title VII).

[339] Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1978).

[340] *Equal Employment Opportunity Commission Guidelines on Sexual Harassment*, 29 C.F.R. § 1604.11 (1988).

[341] Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 Stanford L. Rev. 751 at 769 (1989). *See also*, Meritor Savings Bank v. Vinson, 477 U.S. 57 1986).

[342] *See* M. Nelson, *Are We Winning Yet?: How Women are Changing Sports and Sports are Changing Women* (1991).

[343] Section 408 of P.L. 93-380.

[344] Title IV of the Education Amendments of 1984, P.L. 98-511, 98 Stat. 2389 (1984), *codified at* 20 U.S. C. § 3341 (1982).

[345] P.L. 93-495; 15 U.S.C. § 1601, 1691 (1982); 12 C.F.R. § 202 (1991).

[346] Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965), *reprinted in*, 42 U.S.C. § 2000e app. (1982).

[347] *See, e.g.*, Alas. Stat. § 18.80.220(5) (1986 & Supp. 1986); Ariz. Stat. § 23-341 (1983); Ark. Stat. § 11-4-601, -612 (1987); Cal. Lab. Code § 1197.5 (1989); Colo. § 8-5-102 (1986); Conn. § 31-75 (1987); Del. tit. 19, § 1107A (1985); D.C. Code Section 1-2502, -2512 (1987 & Supp. 1990); Fla. Stat. § 48.07 (02), 725.07 (1) (1988 & Supp. 1991); Ga. §§ 34-5-3, 34-5-1 (1991); Idaho § 67-5909 (1989); Ill. Rev. Stat. Ch. 48, ¶ 1004 (b) (Supp. 1990); Ind. § 22-2-2-4 (1986); Kan. § 44-1205 (1986); Ky. § 337.423 (Supp. 1990); La. § 23:1006 (1985); Me. Tit. 26, § 628 (1988); Mass. Ch. 149, 105A (1989); Minn. 181.67 (1) (Supp. 1990); Mo. § 290.410 (1965); Mont. § 39-3-104 (1) (1989); Neb. § 48-1219, -1221 (1984); Nev. § 608.017 (1987); N.H. § 275:37 (1987); N.M. § 28-1-7 (1987); N.Y. Labor 194 (1986); N.D. § 34-06.1-03 (1980); Ohio § 4111.17 (1991); Okla. Tit. 40, § 198.1 (1986); Ore. § 652.220 (1989); R.I. § 28-6-17, -18 (1986); S.C. § 1-13-80(a) (1) (1976 & Supp. 1990); S.D. § 60-12-15, (1978); Tenn. § 50-2-202 (1983); Tex. Civ. article 6825; article 5221(k), 2.01, 5.01 (1960 & Supp. 1991); Utah § 34-35-6 (1990); Vt. Tit.

practices[352] and public accommodations.[353] States have also enacted legislation targeted at domestic violence.[354] In the realm of education, "[t]he states too have been active partners in developing programs to achieve educational equity."[355] At least 14 states have laws modeled on the federal Title IX.[356]

Legislative progress was subsequently buttressed by judicial interpretation of the equal protection clause of the fourteenth amendment. Prior to 1971 the Supreme Court exercised great deference toward legislatively established gender classifications.[357] In 1971 the Court first held that sex discrimination violates the equal protection clause in *Reed v. Reed*.[358] Other similar decisions have followed, striking down some gender classifications.[359]

Few, if any, of these legal and legislative developments rest on *Roe v. Wade*. Some of these events preceded *Roe v. Wade*. And the judicial decisions rely on interpretations of congressional or state policy-making, rather than on *Roe*.

The single-minded pursuit of abortion rights has arguably sidetracked progress on the legal, economic and social issues that are most important to most women: equal

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21, 465(1) (1987 & Supp. 1990); Va. § 40.1-28.6 (1990); Wash. § 49.12.175 (1990); W.Va. Section 21-5b-3 (1989); Wis. § 111.36(1) (a) (1988); Wyo. § 27-4-302 (1987).

[352] *See, e.g.*, Alas. Stat. § 18.80.200 (Supp. 1990); Ariz. Stat. 41-1461 (1985); Cal. Gov. Code §§ 12920, 12926 (1980 & Supp. 1990); Colo. § 24-34-402 (Supp. 1986); Conn. § 46a-51(17), -60(a) (1)2a(10) (Supp. 1991); Del. tit. 19, § 710, 711 (1985); D.C. Code § 1-2502-2512 (1987 & Supp. 1991); Fla. § 760.02, .10 (1986); Idaho § 67-5909 (1989); Ill. Rev. Stat. Ch. 68, ¶ 2-102 (1989); Ind. Stat. § 22-9-2-2, -1, -3 (1986); Iowa § 601A.6 (1988 & Supp. 1991); Kan. Stat. § 44-1009(1) (1986); Ky. Stat. § 344.030, .040, .050, .060, .070 (1983 & Supp. 1990); La. Rev. Stat. § 23:1006 (1985); Me. Tit. 5, 4553(4), 4572-a (1989 & Supp. 1990); Utah § 34-35-6 (1990); Mass. Ch. 151b, sec. 1 (1989 & Supp. 1990); Minn. § 363. 2(1) (1991); Mont. § 49-2-310 (1989) ("reasonable maternity leave"); Neb. § 48-1101, -1102(2), -1104 (1984); Nev. § 613.330 (1987); N.H. § 354-8:8, -a:8(1) (Supp. 1990); N.J. § 10:5-5, -12 (Supp. 1990); N. M. § 28-1-7 (1987); Ohio § 4112.02(a); 4112.01(b) (1991) (pregnancy); Ore. § 659.010(6), .030(1)(a) (1989 & Supp. 1990); Pa. Cons. Stat. Tit. 43, § 955 (1991); R.I. § 28-5-5, -6(b), -7 (Supp. 1991); S.C. § 1-13-30, -80 (1986 & Supp. 1990); S.D. § 20-13-1, -10 to -12 (1987); Tenn. §§ 4-21-401, 4-21-404 (1985); Tex Civ. art. 5221 (K), 2.01, 5.01 (Supp. 1991); Vt. Tit. 21, § 495 (1987 & Supp. 1990); Wash. § 49.60.180 (1990); W.Va. § 5-11-1 to 9 (1990); Wis. 111.31 to .36 (1988 & Supp. 1990); Wyo. § 27-9-102(b), -105 (1987 & Supp. 1990).

[353] *See, e.g.*, Alas. Governor's Code of Fair Practices by State Agencies, art. I (Aug. 11, 1967); Ariz. Exec. Order No. 83-5 (Aug. 31, 1983); Cal. Fair Employment & Housing Act, Cal. Gov. Code § 12926(c) (Supp. 1991); 4 Code of Colo. Regs. § 801-1 (1982); Conn. § 46a-70(a), -51(10) (1986 & Supp. 1991); Del. Exec. Order No. 9, Tit. 19, § 710(2) (1985); D.C. Code § 1-507, 1-607.7 (1987), Mayor's Order No. 79-89 (1979) (sexual harassment); Fla. § 110.105, 760.02 (1982), Exec. Order No. 80-69 (1981) (sexual harassment); Idaho § 67-5902(6)(b) (1989), Exec. Order No. 78-4 (1978); Ill. Rev. Stat. ch. 68, ¶ 2-101, -105(B) (1989 & Supp. 1990), Exec. Order No. 80-1 (1980) (sexual harassment); Ind. § 22-9-1-3(h) (1986).

[354] *See, e.g.*, Alas. Stat. § 18.80.200, .210, .250 (Supp. 1990); Ark. Stat. § 4-87-104 (1987).

[355] *See, e.g.*, Alas. Stat. § 18.80.200, .210, .240 (Supp 1990); Ariz. Stat. § 20-1548 (1990) (mortgage guaranty insurance only).

[356] *See, e.g.*, Alas. Stat. § 21.36.090 (Supp. 1990); Ariz. Stat. § 20-448 (1990).

[357] *See, e.g.*, Alas. Stat. 18.80.200, .230 (Supp. 1990).

[358] *See, e.g.*, Alas. Stat. § 25.35.060 (Supp. 1990); Ariz. Stat. § 13-3601 (1989); Cal. Welf. & Ins. Code § 18291 (1980 & Supp. 1991); Cal. Penal Code §§ 262, 264, 273.5 (1988 & Supp. 1991); Colo. §§ 14-2-101; 14-4-101 (1987); Conn. §§ 46b-15, 53a-71 (1986 & Supp. 1991); Del. tit. 10 §§ 901(9), 921(6) (1975 & Supp. 1990); D.C. Code §§ 16-1001, 22-2801 (marital rape) (1989); Fla. §§ 415.602, 415.603 (spousal abuse), § 741.30, § 794.011 (spousal rape) (1986 & Supp. 1991); Ga. § 19-13-1 (1990); Idaho § 39-5202 (1985); Illinois Domestic Violence Act of 1986, Ill. Rev. Stat. ch. 40, ¶ 2311-1 (1989); Ill. Rev. Stat. ch. 40, ¶ 2401 (1989) (domestic violence shelters).

[359] NOW Legal Defense Fund, *The State-By-State Guide to Women's Legal Rights* 48 (1987).

pay, day care, maternity leave, job discrimination. Minority women in particular are concerned about issues that directly affect the health and welfare of their families: access to education, adequate health care and safe neighborhoods for their children.[360] Despite the "success" of achieving freely available, legal abortion, women's economic rights in domestic-relations law have not progressed; in fact, the opposite has been true. "Divorce reform," which was achieved in the name of equality, has been devastating for women. The "feminization of poverty" is a reality caused, at least in part, by modern divorce laws.[361] With no-fault divorce laws in 43 states, women have suffered *more* than with previous divorce laws. No-fault laws eliminate alimony and force the sale of the family home. There is a 73% drop in the standard of living for the wife and children, and a 42% increase for the husband.[362] The presence of "abortion rights" is irrelevant at best, and at worst, has paralleled women's economic decline.

There may be countless other ways that *Roe* and the expansion of the abortion doctrine have been ineffective and irrelevant in advancing those issues and meeting the needs that are most important to women. The full impact on women and society may not be known for several generations.

VI. Conclusion

Abortion as the "first right" for women runs counter to all the principles of feminism and to the basic human value of protecting the weak and defenseless. By promoting the death of one's own offspring as a positive "good," abortion violently contradicts the core values that are the very essence of a woman's being: nurturance, care, compassion, cooperation, inclusivity, community and connectedness. It denies basic civil rights to an entire class of prenatal human beings. Women, who so recently have begun to achieve equality and opportunity, should be the first to recognize that the diminution of the rights of other human beings threatens the rights of women as well.

The abortion privacy doctrine has spawned a great host of ills for women without remedying any of the real historical injustices against them. Abortion on demand has isolated women, subjected them to coercion, maimed their bodies and wounded their psyches. The abortion-on-demand mentality that *Roe v. Wade*, more than anything else, fostered has not truly benefited women, whether examined from the perspective of women's self-perception, the psychological and physical consequences of abortion, the impact on minors or the relationships between women, their families and their communities. No

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[356] *See, e.g.*, Alas. Stat. § 14.18.010 (1990); Cal. Educ. Code §§ 40, 230, 51500, 51501, 66016 (1978 & Supp. 1991); Cal. Gov. Code § 12943 (1980).

[357] *See, e.g.*, Hoyt v. Florida, 368 U.S. 57 (1961); Goesaert v. Cleary, 335 U.S. 464 (1948); Muller v. Oregon, 208 U.S. 412 (1908); Bradwell v. Illinois, 83 U.S. 130 (1873).

[358] 404 U.S. 71 (1971).

[359] Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 421 U.S. 7 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

[360] Wallis, *Onward, Women!*, Time, Dec. 4, 1989 at 80.

[361] M. Fineman, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform* (1991); D. Medved, *The Case Against Abortion* (1989); L. Weitzman, *The Divorce Revolution* (1985); M. Gallagher, *Enemies of Eros* (1989).

[362] *See* Weitzman, *supra* note 354.