

# ABORTION IN THE UNITED STATES: A CRY FOR HUMAN DIGNITY

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## *Abstract*

In recent years, the debate surrounding abortion has taken flight. It has been one of the most discussed and most controversial topics in the history of the United States as well as around the world. This article undertakes a critical analysis of whether mothers in the United States should maintain their exclusive privacy right to choose to terminate a pregnancy or whether unborn babies also have substantive due process rights, in particular a right to life. The gestational process of human development as well as pregnancy from the mother's perspective shall first be addressed. The various types of abortion procedures, most reported reasons for attaining an abortion, as well as a mother's experiences post abortion and its interaction with the institution of family will also be explored. Conflicting claims from the mother, the unborn child, and the father will be examined as well as the varying doctrines of religious institutions, ideas of philosophy, and the viewpoints of activist organizations from both the pro-life and the pro-choice movements. The legal responses in form of the treatment of abortion in various societies and the United States' history of abortion legislation as well as the jurisprudence of the Supreme Court will also be discussed. Lastly, current and changing conditioning factors in government and politics as well as appraisals of intervention will be

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\* James J. Zumpano, Jr., M.A., J.D. I thank God for placing it in my heart to continue the discussion, education, and enlightenment for society at large regarding such an important topic. I want to thank my parents for instilling strong faith, morals, and values in me and for believing in and supporting me throughout this whole process. I want to personally thank Professor John Makdisi, Professor Siegfried Wiessner, and Professor Roza Pati at St. Thomas University College of Law for their endless time, dedication, effort and critique of this article and for allowing a discussion of such magnitude regarding such a heartfelt issue to be placed into the sphere of academia.

explored via critical legal analysis and a solution proposed with a view toward contributing to an order of human dignity, using the framework of the New Haven School of Jurisprudence.

*Observational Standpoint*

My roots in New Haven, Connecticut go back as far as I do. I, along with my six siblings, was born in what is currently known as Yale-New Haven Hospital Saint Raphael Campus. My father, a General Internist, is an attending Staff Physician at Yale New Haven Hospital and Assistant Clinical Professor at Yale University School of Medicine. My mother, a Bachelor of Science in Nursing (BSN) for 37 years, is currently a Registered Nurse at Yale-New Haven Hospital. It is an honor for me to compose this article under the methodology of the New Haven Jurisprudence, as it not only serves as the bedrock of human dignity, but of my personal upbringing and family's legacy. Having been raised in such a large family, stemming from my grandfather – the youngest of twelve siblings, who along with my grandmother, birthed and raised ten children, which resulted in thirty-five grandchildren, I have learned the value of family and the inherent value that each of us possesses in our right to life. Through this, and as a believer and follower of Jesus Christ, I hold the view that life begins at conception, and consequently, so does motherhood. This background informs my terminology used throughout this article, even though its analysis and argument is based on legal definitions and the most recent findings of science. The topic of abortion is not only a personal and sensitive issue for those specifically involved, but it is a vital issue for society at large.

*General Introduction*

In the United States, for nearly the last 50 years, mothers have maintained the right to choose whether to undergo an abortion.<sup>1</sup> Abortion is defined as the deliberate termination of a pregnancy prior to birth, resulting in the destruction of the fetus.<sup>2</sup> The main issue of this article is whether mothers in the United States should maintain their exclusive privacy right to choose to have an abortion; or, whether unborn babies have substantive due process rights – that is, the right to life, in principle superseding the mother’s right to choose an abortion.

Over decades, the practice of abortion has introduced many moral, ethical, political, and socioeconomic concerns among women, men, families, political groups, religious sects, organizations, and everyday American citizens – all of whom have yet to develop a unanimous consensus on the subject. Topics such as this, that are so controversial and hit so close to home, often never do. The goal of this article is to educate the public about the many scientific facts and value positions regarding abortion and allow readers who may find themselves in the plight of making an abortion decision to gain a more contemplated and well-informed understanding of this highly contentious issue.

As with any societal problem, the New Haven School of Jurisprudence poses an interdisciplinary problem- and policy-oriented methodology which recommends a series of intellectual tasks:<sup>3</sup>

(I) *Delimitation of the Problem*. This section presents the specific problem the article seeks to analyze and resolve. Here, as mentioned, the article delimits the problem of whether mothers in the United States should maintain their exclusive privacy right to choose

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<sup>1</sup> ACLU 100 Years, *The Right to Choose at 25: Looking Back and Ahead* (2020), <https://www.aclu.org/other/right-choose-25-looking-back-and-ahead>.

<sup>2</sup> Keith William Diener & Audrey Wolfson Latourette, *Abortion*, Center for the Study of Federalism (January 2018), <http://encyclopedia.federalism.org/index.php/Abortion>.

<sup>3</sup> W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575 (2007); Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PACIFIC L. REV. 45 (2010).

an abortion or whether unborn babies have substantive due process rights and a right to life, in principle superseding the mother's right to privacy. This section will navigate through the biological processes of childbirth as well as the mother's experience through each stage of her pregnancy. This section will also explore the various types of abortion procedures that exist, the common reasons why abortions are sought, and how abortion affects the mother afterwards. The effect of the abortion on the father and other family members will also be addressed.

(II) *Conflicting Claims*. This section discusses the rivalling claims and viewpoints of the parties who have a stake in the outcome or those who express deep concern for any potential resolutions of the problem. Here, I will present the claims of the mother, the father, the other family members, as well as the unborn child. Further, the bases of religious, philosophical, and organizational viewpoints will be presented as well.

(III) *Past Trends in Decisions and Conditioning Factors*. This section explores the history of the legal decisions regarding the problem along with some of the factors that created them. The ancient history of abortion and its regulation in various societies as well as modern-day legislation and case law in the United States will be presented.

(IV) *Future Decisions in Light of Changed and Changing Conditioning Factors*. This section strives to predict future legal outcomes of the decision-making process. It takes into account the political and cultural climate of the United States, its leadership and its citizens, and how possibly changes in the legislature and the judiciary as well as global events could have long-lasting effects on abortion jurisprudence.

(V) *Appraisal, Intervention of Alternatives and Recommendation of Solutions in the Common Interest*. This final section evaluates the legal responses of the past and predicted future and suggests a possible legal solution that is geared towards the best interests of all with a view to promoting an order of human dignity.

### *I. Delimitation of the Problem*

The problem to resolve in this article is whether mothers in the United States should maintain their exclusive privacy right to choose an abortion or whether unborn babies have substantive due process rights and a right to life, in principle, superseding the right of the mother to choose abortion. This issue impacts not only the mother and her unborn child; it also involves the father of the unborn child as well as other family members. To fully grasp what the mother, the unborn child, the father, and the family members encounter through this decision-making process, we will discuss: (A) the process of human development; (B) the mother's experience during pregnancy; (C) the various forms of abortion; (D) the reasons for abortion; and (E) the effect of abortion on the mother, and (F) the effect of abortion on the family.

#### *A. The Process of Human Development*

Science tells us that human development process begins with fertilization, or conception, where an egg is released from the ovary of a female and is penetrated by a sperm cell from a male.<sup>4</sup> Conception may occur as early as three minutes after sexual intercourse and up to

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<sup>4</sup> *Human body. Basic form and development*, ENCYCLOPEDIA BRITANNICA (last accessed October 31, 2020), <https://www.britannica.com/science/human-body/Basic-form-and-development>; Melissa Conrad Stöppler, MD, *Conception: The Amazing Journey from Egg to Embryo*, MEDICINET (January 15, 2021), [https://www.medicinenet.com/conception\\_pictures\\_slideshow/article.htm](https://www.medicinenet.com/conception_pictures_slideshow/article.htm); Caroline Shannon-Karasik, *Experts Explain Just How Long Conception \*Actually\* Takes*, ROMPER (October 11, 2017), <https://www.romper.com/p/how-long-does-conception-take-experts-break-it-down-to-a-science-2881024>: "Within 18 to 24 hours after the meeting of egg and sperm, the fertilization occurs and an embryo is created in the fallopian tube," says Dr. Aaron Styer, OB-GYN and reproductive endocrinologist with Colorado Center for Reproductive Medicine in Boston. "At this moment, the genetic material of female (egg) and male (sperm) begin to direct to the development of the embryo."

five days.<sup>5</sup> At fertilization or conception, a genetically distinct human organism is formed,<sup>6</sup> and the sex of the fetus is already determined, based on the type of chromosomal DNA<sup>7</sup> the egg receives from a sperm cell (X chromosome for a female and Y chromosome for a

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<sup>5</sup> Rachel Gurevich, *How Soon After Sex Do You Get Pregnant?*, VERYWELL FAMILY (last accessed November 2, 2020) [https://www.verywellfamily.com/does-lying-on-your-back-after-sex-help-with-conception-1960291#:~:text=Conception%20\(when%20the%20egg%20is,days%20after%20you%20had%20sex](https://www.verywellfamily.com/does-lying-on-your-back-after-sex-help-with-conception-1960291#:~:text=Conception%20(when%20the%20egg%20is,days%20after%20you%20had%20sex;); Yasser Ibrahim et al., *The Effect of Bed Rest After Intrauterine Insemination on Pregnancy Outcome*, 20 MIDDLE EAST FERTILITY SOC'Y J. 11–15 (March 2015); Inge M. Custers et al., *Immobilisation Versus Immediate Mobilisation After Intrauterine Insemination: Randomised Controlled Trial*, BMJ 339 (2009).

<sup>6</sup> Rita Lowery Gitchell, *Should Legal Precedent Based on Old, Flawed, Scientific Analysis Regarding When Life Begins, Continue to Apply to Parental Disputes over the Fate of Frozen Embryos, When There Are Now Scientifically Known and Observed Facts Proving Life Begins at Fertilization*, 20 DEPAUL J. HEALTH CARE L. 1 (2018); Maureen Condic, *A Scientific View of When Life Begins*, Charlotte Lozier Institute (June 11, 2014), <https://lozierinstitute.org/a-scientific-view-of-when-life-begins/>; Sarah Terzo, *Science is Clear: Each New Human Life Begins at Fertilization*, Live Action (January 13, 2013), <https://www.liveaction.org/news/life-begins-at-conception-science-teaches/>; John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 6 (2006); RONAN R. O'RAHILLY & FABIOLA MULLER, HUMAN EMBRYOLOGY & TERATOLOGY 5–55 (1996); J.P. GREENHILL & EMANUEL A. FRIEDMAN, BIOLOGICAL PRINCIPLES AND MODERN PRACTICE OF OBSTETRICS 17, 23 (1974); Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 849 (1973); BRADLEY M. PATTEN, FOUNDATIONS OF EMBRYOLOGY 3 (1964).

<sup>7</sup> *DNA Determines Your Appearance!*, The Pennsylvania State University (2018), <https://www.mrsec.psu.edu/content/dna-determines-your-appearance>.

male).<sup>8</sup> The baby receives 23 pairs of chromosomes which have predetermined its genetic features, including: eye color, hair color, height, and every other physical trait that makes up its body.<sup>9</sup>

The single-cell embryo that is created through fertilization is called a zygote.<sup>10</sup> Throughout the next several days, and after multiple

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<sup>8</sup> Cari Nierenberg, *Having A Baby: Stages of Pregnancy* (August 30, 2017), <https://www.livescience.com/44899-stages-of-pregnancy.html>; Mayo Clinic Staff, *Pregnancy Week By Week*, Mayo Clinic (2019), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/prenatal-care/art-20045302>; *Stages of Pregnancy*, Office on Women's Health, U.S. Department of Health and Human Services (April 18, 2019), <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/stages-pregnancy>; University of Melbourne, *Geneticists Make New Discovery About How A Baby's Sex is Determined*, Science Daily (December 15, 2018), [www.sciencedaily.com/releases/2018/12/181215141333.htm](http://www.sciencedaily.com/releases/2018/12/181215141333.htm); Brittany Croft et al., *Human Sex Reversal is Caused by Duplication or Deletion of Core Enhancers Upstream of SOX9*, 9 NAT COMMUN. (1) (2018); Ashley Marcin, *What Is Ovulation? 16 Things to Know About Your Menstrual Cycle*, HEALTHLINE PARENTHOOD (July 20, 2018), <https://www.healthline.com/health/womens-health/what-is-ovulation>, Ovulation is the process by which the woman's ovary releases eggs during her normal menstrual cycle. The egg is released approximately 36 hours after ovulation and survives anywhere from 12 to 24 hours afterwards; Shannon-Karasik, *supra* note 4: "On the flip side, sperm has much more longevity," and "can live for between three to five days within the reproductive tract."

<sup>9</sup> *DNA Determines Your Appearance!*, PennState (2018), <https://www.mrsec.psu.edu/content/dna-determines-your-appearance#:~:text=Half%20of%20the%20DNA%20used,half%20came%20from%20your%20father.&text=The%20genes%20that%20you%20have,which%20is%20called%20your%20phenotype>.

<sup>10</sup> William C. Shiel Jr., *Medical Definition of Zygote*, MEDICINENET (2019), <https://www.medicinenet.com/script/main/art.asp?articlekey=6074>; Patricio Ventura-Juncá & Manuel J. Santos, *The Beginning of Life of a New Human Being from the Scientific Biological Perspective and its Bioethical Implications*, 44 BIOL. RES. 201–07, (2011), "The most recent advances in genetics have corroborated with increasingly more precise information that the life of a new individual begins with the union of two highly specialized haploid cells (each with 23 chromosomes), the spermatozoid and the ovum, which give rise to a new cell when they are joined: the zygote. The zygote contains a new genetic code with 46 chromosomes. An individual and unique set of genes arises representing the beginning of the life of a new human organism, or in effect, a new individual or human being. It is thus all the cells of a human being come from an original cell, the zygote. The zygote has a new genetic structure, distinct from that of the ovum and of the spermatozoid, distinct from those of the parents. This new genome, whose fundamental structure will be



cellular divisions take place, the embryo becomes a group of cells called a blastocyst.<sup>11</sup> The blastocyst then travels through the fallopian tube and implants itself into the uterus, a process called implantation.<sup>12</sup> Once the blastocyst has been implanted, the embryo releases hormones to prepare the mother's body for her baby.<sup>13</sup> Interestingly enough, a human embryo can "implant" onto the bottom of a petri dish without needing maternal tissue to proceed its growth up to 13 days after implantation.<sup>14</sup>

If the blastocyst implants in any area besides the uterus, the result is an ectopic pregnancy,<sup>15</sup> which will not continue to term and

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maintained throughout the development, identifies the unicellular embryo as biologically human."

<sup>11</sup> *Conception: How It Works*, UCSF Health (2019), <https://www.ucsfhealth.org/education/conception-how-it-works>.

<sup>12</sup> *Fertilization and Implantation*, Mayo Clinic (2020), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/multimedia/fertilization-and-implantation/img-20008656>; Paul Bischof & Aldo Campana, *A Model For Implantation of the Human Blastocyst and Early Placentation*, 2 HUM. REPROD. UPDATE (3) 262–70 (1996).

<sup>13</sup> Amy O'Connor, *What is Implantation*, WHAT TO EXPECT (March 4, 2019), <https://www.whattoexpect.com/getting-pregnant/ovulation/implantation/>.

<sup>14</sup> Helen Shen, *The Labs Growing Human Embryos for Longer Than Ever Before*, 559 NATURE 19–22 (2018), <https://www.nature.com/articles/d41586-018-05586-z>; Marta N. Shahbazi et al., *Self-organization of the Human Embryo in the Absence of Maternal Tissues*, 18 NAT. CELL. BIOL. (6) 700–08 (2016), <https://www.nature.com/articles/ncb3347>; Alessia Deglincerti et al., *Self-organization of the In Vitro Attached Human Embryo*, 533 NATURE 251–54 (2016), <https://www.nature.com/articles/nature17948>, The cells of embryos can self-organize into distinct forms of tissue by sensing their position within the circular cell group and adjusting their response to molecules called "growth factors," thus forming isolated regions of cells. Bioethicist Josephine Johnston expressed that the technical advances that have resulted from their research demonstrates that the embryo is "not just a couple of cells in a dish." However, bioethicist Insoo Hyun admits the challenge to define the developing structure of the embryo . . . "the potential is there for something to be constructed that's much further along than 14 days, and that could develop if you were to implant it into the uterus."; Fred Etoc et al., *A Balance Between Secreted Inhibitors and Edge Sensing Controls Gastruloid Self-Organization*, 39 DEV. CELL (3) 302–15 (2016), <https://www.sciencedirect.com/science/article/pii/S1534580716306384>.

<sup>15</sup> Tian Zhu, *Ectopic Pregnancy*, EMBRYO PROJECT ENCYCLOPEDIA (May 6, 2010), <https://embryo.asu.edu/pages/ectopic-pregnancy>.



can cause fatal hemorrhaging in the pregnant woman.<sup>16</sup> If the blastocyst implants properly, its cells will continue to divide and form membranes which create the fetal placenta and circulate the embryo's blood vessels with the mother's blood. This allows nutrients and oxygen to be transferred to the embryo.<sup>17</sup>

A typical pregnancy begins on the first day of the mother's last menstrual period up until the birth of the baby, usually 40 weeks. A normal gestation<sup>18</sup> can last anywhere from 37 to 42 weeks.<sup>19</sup> The pregnancy is divided into three stages: a first, second, and third trimester.<sup>20</sup>

By the fifth week of pregnancy, the embryo's brain, spinal cord, and heart are beginning to form,<sup>21</sup> although some transvaginal ultrasounds have detected a baby's heartbeat as early as 3-4 weeks gestation.<sup>22</sup> In the sixth week, the embryo's heart is beating, and its

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<sup>16</sup> *What to Know About an Ectopic Pregnancy*, MEDICAL NEWS TODAY (2020), <https://www.medicalnewstoday.com/articles/164989>; Justin M. Wolter, *The Process of Implantation of Embryos in Primates*, EMBRYO PROJECT ENCYCLOPEDIA (March 21, 2013), <https://embryo.asu.edu/pages/process-implantation-embryos-primates>.

<sup>17</sup> *Id.*; O'Connor, *supra* note 13.

<sup>18</sup> *Gestational Age*, MEDLINEPLUS (October 8, 2020), <https://medlineplus.gov/ency/article/002367.htm#:~:text=Gestational%20age%20is%20the%20common,37%20weeks%20are%20considered%20premature>; *Fetal Development*, MEDLINE PLUS (October 8, 2020), <https://medlineplus.gov/ency/article/002398.htm>, "Gestation is the period of time between conception and birth when a baby grows and develops inside the mother's womb." Gestational age is measured in weeks from the moment the mother has her last menstrual cycle until the present date. A normal pregnancy usually ranges from 38 to 42 weeks. An infant born before 37 weeks into the pregnancy is considered premature. An infant born after 42 weeks into the pregnancy is considered post-mature.

<sup>19</sup> *Id.*

<sup>20</sup> Melissa Conrad Stöppler, *Stages of Pregnancy: Week by Week*, WebMD (January 23, 2019), [https://www.onhealth.com/content/1/pregnancy\\_stages\\_trimesters](https://www.onhealth.com/content/1/pregnancy_stages_trimesters); Nierenberg, *supra* note 8.

<sup>21</sup> *Pregnancy Visual Timeline*, WebMD (2019), <https://www.webmd.com/baby/interactive-pregnancy-tool-fetal-development?week=5>.

<sup>22</sup> Vincenzo Berghella, *When Can I Hear My Baby's Heartbeat?*, Baby Center (November 3, 2020), [https://www.babycenter.com/pregnancy/health-and-safety/when-can-i-hear-my-babys-heartbeat\\_10349811](https://www.babycenter.com/pregnancy/health-and-safety/when-can-i-hear-my-babys-heartbeat_10349811).

human features are starting to emerge, including two eyes with eyelids. The lungs and digestive system are also starting to branch out and form the organs.<sup>23</sup> By week seven, its body is forming every organ it will need – including the heart, kidneys, liver, lungs, and intestines.<sup>24</sup> Some doctors also say that the sensory receptors necessary to feel pain first develop in the child at seven weeks gestation.<sup>25</sup>

At eight weeks, the beginnings of a face are now visible: two eyes, a nose, ears, and an upper lip. The baby's body has also begun to straighten out.<sup>26</sup> Now that the pain receptors are developing, doctors and researchers have found that the unborn can experience pain in as

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<sup>23</sup> *Pregnancy Visual Timeline*, WebMD (2019), <https://www.webmd.com/baby/interactive-pregnancy-tool-fetal-development?week=6>.

<sup>24</sup> *Pregnancy Visual Timeline*, WebMD (2019), <https://www.webmd.com/baby/interactive-pregnancy-tool-fetal-development?week=7>.

<sup>25</sup> *Fetal Pain: The Evidence* (February 2013), <https://www.doctorson-fetalspain.com/wp-content/uploads/2013/02/Fetal-Pain-The-Evidence-Feb-2013.pdf>, “The first essential requirement for pain is the presence of sensory receptors, which first develop in the perioral area at approximately 7 weeks gestation and are diffusely located throughout the body by 14 weeks.”

<sup>26</sup> *Pregnancy Visual Timeline*, WebMD (2019), <https://www.webmd.com/baby/interactive-pregnancy-tool-fetal-development?week=8>.

early as eight weeks of development,<sup>27</sup> the time at which the embryo is considered a fetus.<sup>28</sup>

At twelve weeks, the end of the first trimester, the fetus looks like a fully formed person. More of its organs are developing, and its kidneys are getting ready to produce urine. The baby also has teeth, and fingers and toes with grown nails.<sup>29</sup> Its external sex organs show if the baby is a boy or a girl, which may be revealed to the mother through an ultrasound in the second trimester.<sup>30</sup> Around this stage, more nerve endings that respond to painful stimuli are present in the palms and soles of the feet, while the remainder of the skin surface gathers more nerve endings by twenty weeks.<sup>31</sup> The second trimester

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<sup>27</sup> *District of Columbia Pain-Capable Unborn Child Protection Act: Hearing on H.R. 1797 Before the Subcomm. on the Const'n and Civil Justice of the H. Comm. on the Judiciary*, 113th Cong., 36–37 (2013) (Testimony of Maureen L. Condit Ph.D.), Dr. Maureen Condit, Associate Professor of Neurobiology and Anatomy at the University of Utah School of Medicine, explained that in order for the fetus to experience pain, a nexus stimuli must be detected; and at eight to ten weeks gestation, the neural structures necessary to detect noxious stimuli are in place. She testified before U.S. Congress that “it is entirely uncontested that a fetus experiences pain in some capacity, from as early as eight weeks of development.”; Brief of Amici Curiae American Association of Pro-Life Obstetricians & Gynecologists and American College of Pediatricians in Support of Petitioners, *Marshall v. West Alabama Women’s Center* (2019) (No. 18-837); *The Neuroanatomy and Physiology of Pain Perception in the Developing Human* Hearing on S.B. 415 Before the Texas Senate Health and Human Services Comm. (2017) (Testimony of Sheila Page, D.O.); Written Testimony of Sheila Page, D.O., in Support of Texas S.B. 415, Charlotte Lozier Institute (2017), <https://s27589.pcdn.co/wp-content/uploads/2017/02/Written-Testimony-of-Sheila-Page-SB-145.docx.pdf>, At this stage, the unborn fetus has an elegantly developed nervous system – the peripheral nerves, spinal cord, and reticular activating system, which is the fundamental unit to experience pain.

<sup>28</sup> *Fetus*, THE MERRIAM-WEBSTER DICTIONARY (last accessed November 22, 2019), <https://www.merriam-webster.com/dictionary/fetus>: “[A] developing human from usually two months after conception to birth”; William C. Shiel Jr., *Medical Definition of Fetus*, MEDICINET (last accessed November 2, 2020), “Fetus: An unborn offspring, from the embryo stage (the end of the eighth week after conception, when the major structures have formed) until birth.”

<sup>29</sup> *Pregnancy Visual Timeline*, WebMD (2019), <https://www.webmd.com/baby/interactive-pregnancy-tool-fetal-development?week=12>.

<sup>30</sup> See *supra* note 7.

<sup>31</sup> Sinno H. Simons & Dick Tibboel, *Pain Perception Development and Maturation*, 11 SEM. IN FETAL & NEONAT. MED. 227–31 (2006).

(weeks 13–27) brings other rapid changes to the fetus, for example:<sup>32</sup> kicking and turning from side to side; asserting reflexes; swallowing and sucking; hearing; responding to certain stimuli; frequently waking from sleep; hair growth; development of red and wrinkly skin covered with soft, downy hair called lanugo;<sup>33</sup> accumulation of fat; opening eyelids; visible eyebrows and eyelashes; fingerprints and toeprints have formed; and rapid growth in size and weight.

By the third trimester, (weeks 28–40), the baby's senses of hearing and touch are improving as the baby learns about its body and its mother's womb. The baby's eyes can sense bright light, but inside the uterus it is too dark for the baby to see. The baby can hear and recognize the mother's voice and may even move by responding to music.<sup>34</sup>

Between weeks 31 and 34 of gestation, the baby prepares for birth and gradually moves into a head-down position.<sup>35</sup> Now that the baby is growing so rapidly, there is less movement because there is less room for the baby to move around in the womb. By 38 weeks gestation, the fetus is considered full-term and its mother can go into labor and give birth at any time.<sup>36</sup>

At the first stage of labor and birth, the mother begins contractions where her cervix gradually opens (dilates), softens, shortens and

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<sup>32</sup> *The Second Trimester*, Johns Hopkins Medicine (2020), <https://www.hopkins-medicine.org/health/wellness-and-prevention/the-second-trimester#:~:text=The%20second%20trimester%20is%20the,grow%20in%20length%20and%20weight.>

<sup>33</sup> *Your Journey Through Pregnancy and Birth*, Maternity-OB-Book-320-S, Samaritan Health Services (2018), <https://www.samhealth.org/-/media/SHS/Documents/English/320-Maternity/2018-Maternity-OB-Book-320-S.pdf>, “Lanugo [is] [f]ine hair that grows on a baby's back and shoulders at birth; it goes away in one or two weeks.”

<sup>34</sup> *Your Baby's Development: The Third Trimester*, American Academy of Family Physicians (October 2020), <https://familydoctor.org/your-babys-development-the-third-trimester/>.

<sup>35</sup> Valencia Higuera, *Prenatal Development*, HEALTHLINE PARENTHOOD (2019), <https://www.healthline.com/health/prenatal-development>.

<sup>36</sup> *Id.*; *Third Trimester of Pregnancy: Fetal Development*, American Pregnancy Association (2020), <https://americanpregnancy.org/healthy-pregnancy/pregnancy-health-wellness/third-trimester-1339>.

thins (effacement). This moves the baby into the birth canal.<sup>37</sup> By the active labor stage, her contractions occur every 3-4 minutes and last about 60 seconds each. Her bag of waters may break, resulting in a gush of fluid as her contractions occur more rapidly and more frequently.<sup>38</sup>

During the second stage of delivery, the mother's cervix reaches full dilation, and is as open as it needs to be for delivery (10 centimeters). The mother may feel the urge to push, as if having a bowel movement. The baby's head may be partly exposed through the vaginal opening as the health care provider guides the baby out of the vagina.<sup>39</sup>

Once the baby has been delivered from the mother's womb, the health care provider cuts the umbilical cord, which connected the mother and baby during pregnancy. Shortly thereafter, the placenta, the organ that gave the fetus food and oxygen through the umbilical cord during the pregnancy, will be delivered through the birth canal.<sup>40</sup>

There are situations where the mother loses the child during her pregnancy. This can occur in 10% of all clinically recognized pregnancies.<sup>41</sup> Approximately 80% of all cases of pregnancy loss occur

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<sup>37</sup> *Labor and Delivery, Postpartum Care, Stages of Labor and Birth: Baby, It's Time!*, Mayo Clinic (May 15, 2019), <https://www.mayoclinic.org/healthy-lifestyle/labor-and-delivery/in-depth/stages-of-labor/art-20046545>.

<sup>38</sup> *The Four Stages of Labor*, Kaiser Permanente, Kaiser Foundation Health Plan of Washington (2019), <https://wa.kaiserpermanente.org/healthAndWellness/index.jhtml?item=%2Fcommon%2FhealthAndWellness%2Fpregnancy%2Fbirth%2FlaborStages.html>.

<sup>39</sup> *What Are the Stages of Labor?*, US Department of Health and Human Services (last accessed September 1, 2017), <https://www.nichd.nih.gov/health/topics/labor-delivery/topicinfo/stages>; American College of Nurse-Midwives, *Second Stage of Labor: Pushing Your Baby Out*, 65 J. MIDWIFERY & WOM. HEALTH (3) 439-40 (June 2020), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/jmwh.13126>.

<sup>40</sup> *Id.*; Lisa Harrington, *Normal Labor and Delivery*, GLOB. LIBR. WOMEN'S MED. (2008), [https://www.glowm.com/section\\_view/heading/Normal%20Labor%20and%20Delivery/item/127](https://www.glowm.com/section_view/heading/Normal%20Labor%20and%20Delivery/item/127).

<sup>41</sup> *Early Pregnancy Loss*, American College of Obstetricians and Gynecologists (2018), <https://www.acog.org/clinical/clinical-guidance/practice-bulletin/articles/2018/11/early-pregnancy-loss>; Michael J. Zinaman et al., *Estimates of Human*

within the first trimester.<sup>42</sup> A miscarriage or spontaneous abortion is the loss of a fetus before the 20th week of pregnancy.<sup>43</sup> Pregnancy losses after the 20th week are called stillbirths.<sup>44</sup> Stillbirths can occur in 1 out of 200 pregnancies. They can occur due to: birth defects in the child; the umbilical cord blocks the baby's oxygen supply before it can breathe on its own; the cord is wrapped too tightly around a limb or the baby's neck prior to delivery; or placental abruption – the placenta separates from the uterine wall too soon.<sup>45</sup>

Some examples of conditions in the mother that can cause a stillbirth are:<sup>46</sup> diabetes; high blood pressure; pregnancy-induced high blood pressure or preeclampsia; intrauterine growth restriction (IUGR), where the fetus is at risk of death from lack of nutrition; se-

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*Fertility and Pregnancy Loss*, 65 FERT. & STERIL. (3) 503–09 (1996); Allen J. Wilcox et al., *Incidence of Early Loss of Pregnancy*, 319 N. ENGL. J. MED. 189–94 (1988).

<sup>42</sup> See American College of Obstetricians and Gynecologists, *supra* note 41; Xiaobin Wang et al. *Conception, Early Pregnancy Loss, and Time to Clinical Pregnancy: A Population-Based Prospective Study*, FERT. & STERIL. (2003), [https://www.fertstert.org/article/S0015-0282\(02\)04694-0/fulltext](https://www.fertstert.org/article/S0015-0282(02)04694-0/fulltext).

<sup>43</sup> Melissa Conrad Stöppler, *Medical Definition of Miscarriage*, WebMD (2020), <https://www.medicinenet.com/script/main/art.asp?articlekey=4395>; Diener & Latourette, *supra* note 2; *Miscarriage*, MEDLINE PLUS (June 3, 2019), <https://medlineplus.gov/miscarriage.html>.

<sup>44</sup> Robert M. Silver et al., *Work-up of Stillbirth: A Review of the Evidence*, 196 OBSTET. GYNEC. (5) 433–44 (2007), [https://www.ajog.org/article/S0002-9378\(06\)02413-6/abstract](https://www.ajog.org/article/S0002-9378(06)02413-6/abstract); *What is Stillbirth?*, Centers for Disease Control and Prevention (last accessed November 4, 2020), <https://www.cdc.gov/ncbddd/stillbirth/facts.html#:~:text=>

[In%20the%20United%20States%2C%20a,early%2C%20late%2C%20or%20term](https://www.cdc.gov/ncbddd/stillbirth/facts.html#:~:text=In%20the%20United%20States%2C%20a,early%2C%20late%2C%20or%20term).

<sup>45</sup> *Understanding Stillbirth – The Basics*, WebMD (2019), <https://www.webmd.com/baby/understanding-stillbirth-basics#:~:text=Still-birth%20is%20the%20delivery%2C%20after,about%201%20in%20200%20pregnancies>.

<sup>46</sup> *Id.*

vere lack of nutrition; infections during pregnancy; exposure to pesticides or carbon monoxide; or blood clotting conditions like thrombosis,<sup>47</sup> thrombophlebitis,<sup>48</sup> or pulmonary embolism.<sup>49</sup>

Understanding week by week the stages of physical development, mental development, and emotional development of a child is important because it shows the early formation of the child's characteristic features and vital signs of life, and puts into perspective the transformational effects that childbirth has on the mother.

### *B. The Mother's Experience During Pregnancy*

During the mother's pregnancy, she often develops an emotional connection with her unborn child. This connection is referred to as the "attachment theory," introduced by John Bowlby in the 1960s.<sup>50</sup>

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<sup>47</sup> *Thrombosis*, Johns Hopkins Medicine (2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/thrombosis>, "Thrombosis occurs when blood clots block your blood vessels. There are 2 main types of thrombosis: Venous thrombosis is when the blood clot blocks a vein. Veins carry blood from the body back into the heart. Arterial thrombosis is when the blood clot blocks an artery. Arteries carry oxygen-rich blood away from the heart to the body."

<sup>48</sup> *Thrombophlebitis*, Mayo Clinic (2020), <https://www.mayoclinic.org/diseases-conditions/thrombophlebitis/symptoms-causes/syc-20354607>, "Thrombophlebitis ... is an inflammatory process that causes a blood clot to form and block one or more veins, usually in your legs. The affected vein might be near the surface of your skin (superficial thrombophlebitis) or deep within a muscle (deep vein thrombosis, or DVT)."

<sup>49</sup> *What is a Pulmonary Embolism?* WebMD (2020), <https://www.webmd.com/lung/what-is-a-pulmonary-embolism#:~:text=Pulmonary%20embolisms%20usually%20travel%20to,a%20long%20flight%20or%20drive>, "Pulmonary embolisms usually travel to the lungs from a deep vein in the legs. Doctors call this "deep vein thrombosis" (DVT). These clots develop when the blood can't flow freely through the legs because your body is still for a long time, say during a long flight or drive. It might also happen if you're on bed rest after surgery or illness."

<sup>50</sup> Vajihe Atashi et al., *Maternal-fetal Emotional Relationship During Pregnancy, Its Related Factors and Outcomes in Iranian Pregnant Women: A Panel Study Protocol*, 15 REPROD. HEALTH (1) 176 (October 17, 2018), <https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-018-0620-6>; Ximena Ossa et al., *Prenatal Attachment and Associated Factors During the Third Trimester of*



It was defined it as “a set of internal behaviors that would cause the infant to become closely related to his/her main caregiver, who is usually the mother.”<sup>51</sup> John Bowlby’s attachment theory has been widely accepted in the scientific community and commonly used in explaining the process of human development.<sup>52</sup>

Attachment between a child in the womb and its mother is a unique maternal-fetal relationship<sup>53</sup> that begins as soon as the mother finds out about her pregnancy.<sup>54</sup> This relationship often progresses during the pregnancy<sup>55</sup> and maintaining that attachment is imperative

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*Pregnancy in Temuco, Chile*. 28 MIDWIFERY 689–96 (2012), <https://www.sciencedirect.com/science/article/abs/pii/S0266613811001318?via%3Dihub>.

<sup>51</sup> *Id.*; see JOHN BOWLBY, ATTACHMENT AND LOSS (VOL. 1) (1969).

<sup>52</sup> *Id.*; Anna R. Brandon et al., *A History of the Theory of Prenatal Attachment*. 23 J. PRENAT. PERINAT. PSYCH. HEALTH (4) 201–22 (2009), [https://www.researchgate.net/profile/Anna\\_Brandon2/publication/51089201\\_A\\_history\\_of\\_the\\_theory\\_of\\_prenatal\\_attachment/links/00b7d528361a0031a3000000/A-history-of-the-theory-of-prenatal-attachment.pdf](https://www.researchgate.net/profile/Anna_Brandon2/publication/51089201_A_history_of_the_theory_of_prenatal_attachment/links/00b7d528361a0031a3000000/A-history-of-the-theory-of-prenatal-attachment.pdf).

<sup>53</sup> Helen Doan & Anona Zimmerman, *Conceptualizing Prenatal Attachment: Toward A Multidimensional View*, 18 J. PRENAT. PERINAT. PSYCHOL. HEALTH 109–130 (2003), <https://www.questia.com/library/journal/1P3-1373167471/conceptualizing-prenatal-attachment-toward-a-multidimensional>; Ayfer Ustunsoz et al., *Comparison of Maternal and Paternal Fetal Attachment in Turkish Couples*, 26 MIDWIFERY 1–9 (2010), <https://www.sciencedirect.com/science/article/abs/pii/S0266613809001594?via%3Dihub>; Britt Sedgmen et al., *The Impact of Two-dimensional Versus Three Dimensional Ultrasound Exposure on Maternal-fetal Attachment and Maternal Health Behavior in Pregnancy*, 27 ULTRASOUND OBSTET. GYNECOL. 245–51 (2006), <https://obgyn.onlinelibrary.wiley.com/doi/epdf/10.1002/uog.2703>; Ayse Gürol & Sevinç Polat, *The Effects of Baby Massage on Attachment Between Mother and their Infants*, 6 ASIAN NURSING RES. 35–41 (2012), <https://www.sciencedirect.com/science/article/pii/S1976131712000072>.

<sup>54</sup> Ulrich Honemeyer & Asim Kurjak, *Pregnancy and Loneliness: The Therapeutic Value of 3D/4D Ultrasound*, 5 PSYCHOLOGY 744–52 (2014), <https://pdfs.semanticscholar.org/02bc/21a68f411cbb2a623989cb4b549e5ce68ec6.pdf>.

<sup>55</sup> Deborah F. Perry et al., *Prenatal Depression Predicts Postpartum Maternal Attachment in Low-income Latina Mothers with Infants*, 34 INFANT BEHAV. DEV. 339–50 (2011), <https://www.sciencedirect.com/science/article/abs/pii/S0163638311000270?via%3Dihub>; Abeer Eswi & Amal Khalil, *Prenatal Attachment and Fetal Health Locus of Control Among Low Risk and High Risk Pregnant Women*, 18 WORLD APPLIED SCI. J. (4) 462–71 (2012), [https://www.researchgate.net/publication/256457566\\_Prenatal\\_Attachment\\_and\\_Fetal\\_Health\\_Locus\\_of\\_Control\\_among\\_Low\\_Risk\\_and\\_High\\_Risk\\_Pregnant\\_Women](https://www.researchgate.net/publication/256457566_Prenatal_Attachment_and_Fetal_Health_Locus_of_Control_among_Low_Risk_and_High_Risk_Pregnant_Women).

to prevent pre-natal loss.<sup>56</sup> The maternal-fetal attachment also plays a vital role in maintaining the health of the mother and her unborn child during the pregnancy.<sup>57</sup> Mothers who maintain an attachment to their unborn children and take care of them during pregnancy fulfill the natural processes of motherhood<sup>58</sup> which contributes to the mother's psychosocial development.<sup>59</sup>

Aside from the emotional attachment the mother has with her baby, the physical attachment she has with her baby causes many intense physical changes in the mother, such as a growing belly, sore

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<sup>56</sup> Pegah Mehran et al., *History of Perinatal Loss and Maternal-fetal Attachment Behaviors*, 26 WOMEN BIRTH 185–89 (2013), <https://www.sciencedirect.com/science/article/abs/pii/S1871519213000632?via%3Dihub>; Carolyn Dayton et al., *The Child as Held in the Mind of the Mother: The Influence of Prenatal Maternal Representations on Parenting Behaviors*, 31 INFANT MENT. HEALTH J. (2) 220–41 (2010), [https://digitalcommons.wayne.edu/cgi/viewcontent.cgi?article=1044&context=soc\\_work\\_pubs](https://digitalcommons.wayne.edu/cgi/viewcontent.cgi?article=1044&context=soc_work_pubs).

<sup>57</sup> Ustunsoz et al., *supra* note 53.

<sup>58</sup> *Mother*, THE MERRIAM-WEBSTER DICTIONARY (last accessed November 22, 2019), <https://www.merriam-webster.com/dictionary/mother>: Mother is defined as “a female parent.” As a verb, “to give birth to” or “to give rise to: PRODUCE”; *What is MOTHER?* Black’s Law Dictionary Free 2nd Ed. and The Law Dictionary, “A woman who has borne a child; a female parent; correlative to “son” or “daughter.” The term may also include a woman who is pregnant. *See Howard v. People*, 185 Ill. 552, 556-7 N. E. 441, 445 (1900) “The word ‘mother,’ [...] means ‘a woman pregnant with child,’ and this we think so clear there can scarcely be two opinions upon the subject.”; “When the term “mother” is construed with the provision in the same section in which it occurs, and also in connection with the provisions of the bastardy act creating the liability, it is made evident that the word in question must be held to mean an unmarried woman who has either been delivered of or is pregnant with a bastard child. In fact a woman may be said to be the mother of the child begotten from the beginning of the period of gestation.” *Latshaw v. State*, 156 Ind. 194, 204, 59 N.E. 471, 474 (1901); AFAF IBRAHIM MELEIS, *TRANSITION THEORY: MIDDLE RANGE AND SITUATION SPECIFIC THEORIES IN NURSING RESEARCH AND PRACTICES* 94–6 (2010), [https://taskurun.files.wordpress.com/2011/10/transitions\\_theory\\_\\_middle\\_range\\_and\\_situation\\_specific\\_theories\\_in\\_nursing\\_research\\_and\\_practice.pdf](https://taskurun.files.wordpress.com/2011/10/transitions_theory__middle_range_and_situation_specific_theories_in_nursing_research_and_practice.pdf); Ramona T. Mercer, *Becoming A Mother Versus Maternal Role Attainment*, 36 J. NURS. SCHOLARSH. (3) 226–32 (2004), <https://sigmapubs.onlinelibrary.wiley.com/doi/abs/10.1111/j.1547-5069.2004.04042.x?sid=nlm%3Apubmed>.

<sup>59</sup> *Id.*

and enlarged breasts, and stretch marks.<sup>60</sup> She may also experience many common discomforts. After all, her body is providing life for another human being.<sup>61</sup> Some of these discomforts include morning sickness, in the form of nausea and vomiting, as well as the constant need to urinate.<sup>62</sup> This usually occurs due to changes in the mother's hormonal levels,<sup>63</sup> stress, traveling, or eating spicy and fatty foods during pregnancy.<sup>64</sup>

Usually during the first trimester, the mother's blood volume increases and her heart pumps faster and stronger so the fetus can be provided adequate placenta and blood circulation.<sup>65</sup> The production of

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<sup>60</sup> *Changes in Your Body During Pregnancy: First Trimester*, American Academy of Family Physicians (January 19, 2018), <https://familydoctor.org/changes-in-your-body-during-pregnancy-first-trimester/>; *Body Changes and Discomforts*, U.S. Department of Health and Human Services (January 30, 2019), <https://www.women-shealth.gov/pregnancy/youre-pregnant-now-what/body-changes-and-discomforts>.

<sup>61</sup> *Common Discomforts During Pregnancy*, Stanford Children's Health (2020), <https://www.stanfordchildrens.org/en/topic/default?id=common-discomforts-during-pregnancy-85-P01207>.

<sup>62</sup> Melanie Haiken, *Morning Sickness*, HEALTH DAY (December 31, 2019), <https://consumer.healthday.com/encyclopedia/pregnancy-33/pregnancy-news-543/morning-sickness-643333.html>;

*Prenatal Care: Urinary Frequency and Thirst*, HEALTHLINE PARENTHOOD (2020), <https://www.healthline.com/health/pregnancy/urinary-frequency-thirst#outlook>;

An extreme form of morning sickness, Hyperemesis Gravidarum (HG), involves severe and persistent nausea and vomiting during pregnancy, which may lead to dehydration and vitamin and mineral deficiency. This disorder is rare, however and only occurs between 1–20 patients per 1000, or 1–2% of pregnancies. See *Hyperemesis Gravidarum*, Kaiser Permanente (2015), <https://wa.kaiserpermanente.org/kbase/topic.jhtml?docId=nord585>; Naci Kemal Kuşcu & Fatma Koyuncu, *Hyperemesis Gravidarum: Current Concepts and Management*, 78 POSTGRAD. MED. J. 76–79 (2001), <https://pmj.bmj.com/content/78/916/76.long>.

<sup>63</sup> See Haiken, *supra* note 62.

<sup>64</sup> Stanford Children's Health, *supra* note 61.

<sup>65</sup> *First Trimester Fatigue*, University of Rochester Medical Center (2019), <https://www.urmc.rochester.edu/encyclopedia/content.aspx?ContentTypeID=134&ContentID=4>; Stanford Children's Health, *supra* note 61.

blood along with the change in hormone levels usually results in fatigue and mood swings.<sup>66</sup> The increased blood volume can also cause a greater chance of constipation.<sup>67</sup>

For most women, the extreme fatigue of the first trimester subsides, and a glow and boost of energy follows in the second trimester.<sup>68</sup> By later stages in the pregnancy, the increased blood volume and pressure on her legs and pelvic veins may result in hemorrhoids – swollen veins in the rectum, as well as varicose veins – swollen, purple veins in the legs and around the mother’s external genital area.<sup>69</sup> The increased blood flow may also bring about gum disease, causing the mother’s gums to become more sponge-like, and bleed more easily. Gum disease can also affect the health of the baby. It is important for a pregnant mother to take care of her teeth and gums and see a dentist,

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<sup>66</sup> *Fatigue During Pregnancy*, American Pregnancy Association (August 1, 2013), [https://americanpregnancy.org/healthy-pregnancy/pregnancy-concerns/fatigue-during-pregnancy-5575/#:~:text=During%20early%20pregnancy%2C%20hormonal%20changes,responsible%20for%20making%20you%20sleepy](https://americanpregnancy.org/healthy-pregnancy/pregnancy-concerns/fatigue-during-pregnancy-5575/#:~:text=During%20early%20pregnancy%2C%20hormonal%20changes,responsible%20for%20making%20you%20sleepy;); *Lack of Energy During Pregnancy*, American Pregnancy Association (March 10, 2017), <https://americanpregnancy.org/health-fitness/lack-of-energy-during-pregnancy-11450/>.

<sup>67</sup> Stanford Children’s Health, *supra* note 61; *Common Discomforts During Pregnancy*, University of Rochester Medical Center (2019), <https://www.urmc.rochester.edu/encyclopedia/content.aspx?contenttypeid=85&contentid=p01207>, “Increased pressure from the pregnancy on the rectum and intestines can interfere with digestion and subsequent bowel movements.”

<sup>68</sup> American Academy of Family Physicians, *supra* note 60; *First Trimester Fatigue*, University of Rochester Medical Center (2019), *supra* note 65.

<sup>69</sup> Stanford Children’s Health, *supra* note 61; *Varicose Veins*, Mayo Clinic (2020), [https://www.mayoclinic.org/diseases-conditions/varicose-veins/symptoms-causes/syc-20350643#:~:text=Varicose%20veins%20may%20not%20cause,like%20cords%20on%20your%20legs](https://www.mayoclinic.org/diseases-conditions/varicose-veins/symptoms-causes/syc-20350643#:~:text=Varicose%20veins%20may%20not%20cause,like%20cords%20on%20your%20legs;); *Pregnancy and Hemorrhoids*, American Pregnancy Association (July 2015); Juan C. Vazquez, *Constipation, Hemorrhoids, and Heartburn in Pregnancy*, BMJ CLIN. EVID. 1411 (February 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2907947/pdf/2008-1411.pdf>; *How to Identify and Treat Vulvar Varicosities*, HEALTHLINE (November 14, 2017), <https://www.healthline.com/health/womens-health/vulvar-varicosities#symptoms>; *Pelvic Congestion Syndrome*, Cedars-Sinai (2019), <https://www.cedars-sinai.org/health-library/diseases-and-conditions/p/pelvic-congestion-syndrome.html>; Stanford Children’s Health, *supra* note 61.

regularly, for checkups.<sup>70</sup> Although most of these pregnancy symptoms are not enjoyable, most of them are mild and entirely normal.<sup>71</sup>

Apart from physical discomforts, a pregnant mother may also experience heightened psychological or emotional discomforts, which are also a normal part of development.<sup>72</sup> Other stressors in pregnancy include unhealthy behaviors such as poor diet/nutrition and smoking, and psychological stressors like stress, anxiety or depression.<sup>73</sup> The emotional conditions a mother can face sometimes affect her health or the health of her baby. If a mother is stressed while pregnant, her child is more likely to develop a mental or physical illness at some point in its life.<sup>74</sup> Cortisol, which is pumped into the blood when we become

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<sup>70</sup> Stanford Children's Health, *supra* note 61; *Dental Care and Pregnancy*, WebMD (2019), <https://www.webmd.com/oral-health/dental-care-pregnancy>.

<sup>71</sup> Jamie Morgan, *Normal Pregnancy Symptoms: Here's What to Expect*, UT Southwestern Medical Center (January 24, 2017), <https://utswmed.org/medblog/normal-pregnancy-symptoms/>; Such problems are mild, do not progress, and are manageable with prompt treatment. *See Pregnancy Complications*, U.S. Department of Health and Human Services (April 19, 2019), <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/pregnancy-complications>; *see also Complications During Pregnancy and Delivery*, HEALTHLINE Media (2009), <https://www.healthline.com/health/pregnancy/delivery-complications#complications>.

<sup>72</sup> *Pregnancy Emotions*, American Pregnancy Association (2020), <https://americanpregnancy.org/healthy-pregnancy/pregnancy-concerns/pregnancy-emotions-9897/>.

<sup>73</sup> Janet A. Dipietro, *Maternal Stress in Pregnancy: Considerations for Fetal Development*, 51 J. ADOLESC. HEALTH (2 Suppl) S3-8 (2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3402207/pdf/nihms383412.pdf>, "The known associations include the well-documented effects that maternal psychological distress (particularly, depression and anxiety) as well as personality characteristics within the normal range have on parenting behaviors, which in turn influence child outcomes."; Pathik Wadhwa et al., *The Contribution of Maternal Stress to Preterm Birth: Issues and Considerations*, 38 CLIN. PERINATOL (3) 351-84 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3179976/pdf/nihms318210.pdf>; Marc H. Bornstein et al., *Maternal Personality, Parenting Cognitions, and Parenting Practices*, 47 DEV. PSYCHOL. (3) 658-75 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3174106/pdf/nihms322973.pdf>.

<sup>74</sup> University of Zurich, *Too Much Stress for the Mother Affects the Baby Through Amniotic Fluid*, SCIENCEDAILY, (May 29, 2017), <https://www.sciencedaily.com/releases/2017/05/170529090530.htm>; Pearl La Marca-Ghaemmaghami et al., *Second-trimester Amniotic Fluid Corticotropin-releasing Hormone and Urocortin in Relation to Maternal Stress and Fetal Growth in Human Pregnancy*, 20 STRESS (3) 231-

anxious, can help the body deal with stress, short term. However, long-term stress can cause anxiety and depression, which is associated with high levels of cortisol.<sup>75</sup> Studies have shown that high levels of cortisol

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40 (2017), [https://www.zora.uzh.ch/id/eprint/136552/1/Second\\_Trimester\\_Amniotic\\_Fluid\\_Corticotropin\\_Releasing\\_Hormone\\_and\\_Urocortin\\_in\\_Relation\\_to\\_Maternal\\_Stress\\_and\\_Fetal\\_Growth\\_in\\_Human\\_Pregnancy.pdf](https://www.zora.uzh.ch/id/eprint/136552/1/Second_Trimester_Amniotic_Fluid_Corticotropin_Releasing_Hormone_and_Urocortin_in_Relation_to_Maternal_Stress_and_Fetal_Growth_in_Human_Pregnancy.pdf); Nicole M. Talge et al., *Antenatal Maternal Stress and Long-term Effects on Child Neurodevelopment: How and Why?* 48 J. CHILD PSYCHOL. PSYCHI. (3–4) 245–61 (2007), “The implication of the existing research is that intervention during pregnancy to reduce stress or anxiety during pregnancy should reduce the incidence of emotional and cognitive problems in the child and later adult. The potential efficacy of different types of such interventions still needs to be explored. We also need to understand much more about the hormonal and other mechanisms underlying these effects and the gestational ages of vulnerability. This will help to design the timing of effective antenatal interventions and help researchers better characterize the biological and hormonal milieu within which the fetus is developing.” pp. 258; Michael T. Kinsella and Catherine Monk, *Impact of Maternal Stress, Depression and Anxiety on Fetal Neurobehavioral Development*, 52 CLIN. OBSTET. GYNECOL. (3) 425–40 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3710585/pdf/nihms487046.pdf>, “Pregnant women’s psychological health may have consequences for fetal neurobehavioral development, and consequently, child outcomes. These findings underscore the importance of considering the effects of women’s mental health on child development during the prenatal, as well as postnatal periods.”

<sup>75</sup> *What is Cortisol?*, Hormone Health Network (November 2018), [https://www.hormone.org/your-health-and-hormones/glands-and-hormones-a-to-z/hormones/cortisol#:~:text=Cortisol%20can%20help%20control%20blood,the%20developing%20fetus%20during%20pregnancy;Stress%20in%20Pregnancy%20May%20Affect%20the%20Unborn%20Child,Society%20for%20Endocrinology%20\(May%2031%2C%202007\),https://www.endocrinology.org/media/1091/2007-05-31\\_stress-in-pregnancy-media-release.pdf](https://www.hormone.org/your-health-and-hormones/glands-and-hormones-a-to-z/hormones/cortisol#:~:text=Cortisol%20can%20help%20control%20blood,the%20developing%20fetus%20during%20pregnancy;Stress%20in%20Pregnancy%20May%20Affect%20the%20Unborn%20Child,Society%20for%20Endocrinology%20(May%2031%2C%202007),https://www.endocrinology.org/media/1091/2007-05-31_stress-in-pregnancy-media-release.pdf), Professor Vivette Glover at Imperial College London and obstetrician Pampa Sarkar, from Wexham Park Hospital, Berkshire, measured levels of the stress hormone cortisol in 267 pregnant women. Scientists sampled blood from the mothers and amniotic fluid from around the fetuses in the womb, and found that, at a gestational age of 17 weeks or greater, the mother’s blood and amniotic fluid both reflected higher cortisol levels. Amniotic fluid is mainly produced by the fetus and will usually indicate which substances the fetus is exposed to, including hormones like cortisol. This evidence shows that an unborn child can be exposed to cortisol, and in turn, maternal stress as early as 17 weeks in development, but it is still unclear the mechanisms by which maternal mood affects fetal development in humans. Thomas G. O’Connor et al., *Prenatal Cortisol Exposure Predicts Infant Cortisol Response to Acute Stress*, 55 DEV. PSYCHOBIO. (2) 145–55 (March 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3398188/pdf/nihms-360580.pdf>.



in pregnant mothers due to maternal stress can affect an unborn child's fetal development when the child is exposed to it.<sup>76</sup>

Another pregnancy risk factor is an ectopic pregnancy – a pregnancy that takes place outside the inner part of the uterus around 6-8 weeks after the mother's last menstrual cycle.<sup>77</sup> This results in a failed pregnancy and can create fatal hemorrhaging in the mother.<sup>78</sup> About 1–2% of pregnancies result in ectopic pregnancies.<sup>79</sup> Other pregnancy risk factors involve preterm birth – a birth that occurs more than three weeks before the baby's due date or before the mother's 37<sup>th</sup> week of pregnancy.<sup>80</sup> Such babies, especially those born very early, often have complicated medical problems.<sup>81</sup> Several factors put women at high risk of preterm labor or birth. Some of these factors include women who have had a previous preterm labor or premature birth;<sup>82</sup> women who are pregnant with twins, triplets, or more;<sup>83</sup> and

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<sup>76</sup> See Society for Endocrinology; University of Zurich, *supra* note 74; Pampa Sarkar et al., *Maternal Antenatal Anxiety and Amniotic Fluid Cortisol and Testosterone: Possible Implications for Foetal Programming*, 20 J. NEUROENDOCRIN. (4) 489–96 (February 7, 2008), <https://onlinelibrary.wiley.com/doi/full/10.1111/j.1365-2826.2008.01659.x>.

<sup>77</sup> Zhu, *supra* note 15.

<sup>78</sup> See *supra* note 16.

<sup>79</sup> Melissa Conrad Stöppler, *Ectopic Pregnancy (Tubal Pregnancy)*, WebMD (2020), [https://www.medicinenet.com/ectopic\\_pregnancy/article.htm](https://www.medicinenet.com/ectopic_pregnancy/article.htm).

<sup>80</sup> *Premature Birth*, Mayo Clinic (2020), <https://www.mayoclinic.org/diseases-conditions/premature-birth/symptoms-causes/syc-20376730>; *Preterm Labor and Birth: Condition Information*, U.S. Department of Health and Human Services (January 31, 2017), <https://www.nichd.nih.gov/health/topics/preterm/conditioninfo/default>.

<sup>81</sup> *Id.*

<sup>82</sup> *Preterm Labor*, Mayo Clinic (December 24, 2019), <https://www.mayoclinic.org/diseases-conditions/preterm-labor/symptoms-causes/syc-20376842#:~:text=Preterm%20labor%20occurs%20when%20regular,health%20risks%20for%20your%20baby>.

<sup>83</sup> *What are the Risk Factors for Preterm Labor and Birth?*, U.S. Department of Health and Human Services (January 31, 2017), [https://www.nichd.nih.gov/health/topics/preterm/conditioninfo/who\\_risk](https://www.nichd.nih.gov/health/topics/preterm/conditioninfo/who_risk), “One study showed that more than 50% of twin births occurred preterm, compared with only 10% of births of single infants.”; *Multiple Pregnancy*, The American College of Obstetricians and Gynecologists (2019), <https://www.acog.org/Patients/FAQs/Multiple-Pregnancy#most>.



women with certain abnormal reproductive organs, such as a short cervix or a cervix that shortens in the second trimester of pregnancy instead of the third trimester.<sup>84</sup>

Other medical conditions that also place a woman at higher risk for preterm labor and delivery and that only occur during pregnancy include:<sup>85</sup> urinary tract infections; sexually transmitted infections; vaginal infections (i.e. bacterial vaginosis and trichomoniasis);<sup>86</sup> elevated blood pressure; vaginal bleeding; fetal developmental abnormalities; in vitro fertilization pregnancy;<sup>87</sup> being underweight or overweight before pregnancy; a short time-span between birth and subsequent pregnancies (less than 6 months); placenta previa – growing placenta that covers all or part of the opening to the cervix;<sup>88</sup> risk of uterine rupture – wall of uterus tears open (more likely if previous cesarean delivery<sup>89</sup> took place or uterine fibroid had been removed); diabetes (high blood sugar) and gestational diabetes (occurs only during pregnancy); and issues involving blood clotting.

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Vaginitis*, U.S. Department of Health and Human Services (December 1, 2016), <https://www.nichd.nih.gov/health/topics/vaginitis>, Trichomoniasis, also known as Vaginitis, is an “inflammation or infection of the vagina that can cause itching, burning, pain, discharge, and bad odor.”

<sup>87</sup> Melissa Conrad Stöppler & Roxanne Dryden-Edwards, *In Vitro Fertilization (IVF) Process, Success Rates, Cost, and Effectiveness*, WebMD (November 13, 2018), [https://www.emedicinehealth.com/in\\_vitro\\_fertilization/article\\_em.htm](https://www.emedicinehealth.com/in_vitro_fertilization/article_em.htm): “In Vitro Fertilization or IVF, is a method of assisted reproduction in which a man’s sperm and the woman’s egg are combined in a laboratory dish, where fertilization occurs. The resulting embryo or embryos is/are then transferred to the woman’s uterus (womb) to implant and develop naturally.”

<sup>88</sup> *Placenta Previa*, American Pregnancy Association (October 10, 2019), [https://americanpregnancy.org/healthy-pregnancy/pregnancy-complications/placenta-previa-923/#:~:text=Placenta%20Previas%20condition,dilate%20\(open\)%20during%20labor](https://americanpregnancy.org/healthy-pregnancy/pregnancy-complications/placenta-previa-923/#:~:text=Placenta%20Previas%20condition,dilate%20(open)%20during%20labor), “Placenta Previa is a condition where the placenta lies low in the uterus and partially or completely covers the cervix. The placenta may separate from the uterine wall as the cervix begins to dilate (open) during labor.”

<sup>89</sup> *Cesarean Section*, MEDLINE PLUS (July 8, 2020), <https://medlineplus.gov/cesareansection.html>. A Cesarean section (C-section) is a surgical procedure where the baby is delivered by being removed from the mother’s abdomen. Nearly one out of three women in the United States gives birth via C-section.

Some of the most severe complications of pregnancy involve severe maternal morbidity (SMM).<sup>90</sup> The most prominent cause of SMM are blood transfusions, where the mother is given donated blood, usually in response to excessive bleeding before or after delivery.<sup>91</sup> The National Inpatient Sample (NIS), one of the largest public all-payer inpatient health care databases in the U.S.,<sup>92</sup> showed in 1993, the rate of delivery hospitalizations resulting in SMM was 49.5 out of 10,000, or .05%. By the end of the study in 2014, the rate of delivery hospitalizations resulting in SMM was 144 out of 10,000, or 1.4%.<sup>93</sup>

Although pregnancy can bring physical and mental problems that affect the health of the mother or the baby, many of these problems are minor and do not progress. Such problems are typically manageable.<sup>94</sup> Regular prenatal health care decreases the risk of pregnancy complications and early detection of complications with proper care, increases the chance that the mother will remain healthy, and deliver a normal, healthy baby.<sup>95</sup>

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<sup>90</sup> *Severe Maternal Morbidity: Screening and Review. Obstetric Care Consensus No. 5*, 128 AM. J. OBSTET. GYNECOL. 54–60 (September 2016), <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/obstetric-care-consensus/articles/2016/09/severe-maternal-morbidity-screening-and-review.pdf>, SMM involves “unintended outcomes of the process of labor and delivery that result in significant short-term or long-term consequences to a woman’s health.”

<sup>91</sup> *AIM Severe Maternal Morbidity (SMM) Data Alert for Blood Transfusions*, Alliance for Innovation on Maternal Health (April 2016), <https://www.cmqcc.org/sites/default/files/AIM-SMM-Data-Alert-Blood-Transfusions-v4-15-2016%20%284%29.pdf>; *Severe Maternal Morbidity in the United States*, Centers for Disease Control and Prevention, <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/severematernalmorbidity.html> (last accessed November 14, 2020).

<sup>92</sup> *Overview of the National (Nationwide) Inpatient Sample (NIS)*, Healthcare Cost and Utilization Project (HCUP) (November 2020), <https://www.hcup-us.ahrq.gov/nisoverview.jsp>.

<sup>93</sup> Centers for Disease Control and Prevention, *supra* note 91.

<sup>94</sup> *Pregnancy Complications*, Centers for Disease Control and Prevention (August 13, 2020), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-complications.html>.

<sup>95</sup> *Id.*; *4 Common Pregnancy Complications*, Johns Hopkins Medicine (2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/staying-healthy-during-pregnancy/4-common-pregnancy-complications>.

Understanding what a mother experiences throughout every stage of her pregnancy, from emotional attachments she has with her baby, to any physical, mental and emotional discomforts, as well as potentially dangerous complications that may arise, underscores the powerful attachment the mother has with her baby even in the midst of undergoing traumatic transformations within herself. This section also emphasizes the importance of maintaining the health and well-being of the mother and her baby throughout the entire pregnancy.

### *C. The Various Forms of Abortion*

There are different types of abortions. A legally induced abortion is an intervention performed by a licensed health care professional,<sup>96</sup> which is intended to terminate an ongoing pregnancy.<sup>97</sup> In the first trimester, a common form of abortion involves the mother ingesting Mifepristone by a pill to halt the pregnancy, and then ingesting Misoprostol to cause cramping and bleeding out of the embryo or fetus.<sup>98</sup> The vaginal bleeding or spotting usually lasts 9 to 16 days but can continue for 30 days or longer. A week or two after taking Mifepristone the mother will receive an ultrasound to confirm that her abortion was successful and to determine how much bleeding occurred.<sup>99</sup> This abortion procedure occurs up to the first ten weeks of pregnancy.<sup>100</sup>

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<sup>96</sup> *Abortion*, MEDLINE PLUS (April 28, 2020), <https://medlineplus.gov/abortion.html>.

<sup>97</sup> *CDCs Abortion Surveillance System FAQs*, Centers for Disease Control and Prevention (November 25, 2019), [https://www.cdc.gov/reproductivehealth/data\\_stats/abortion.htm](https://www.cdc.gov/reproductivehealth/data_stats/abortion.htm).

<sup>98</sup> *Abortion*, American Pregnancy Association (July 2, 2020), <https://americanpregnancy.org/uncategorized/abortion-75934/>; *Emergency Contraceptive Pill and the Abortion Pill: What's the Difference?*, Reproductive Health Access Project (July 2019), <https://www.reproductiveaccess.org/wp-content/uploads/2014/12/difference.pdf>.

<sup>99</sup> *Mifepristone (Mifeprex)*, MEDLINE PLUS (October 27, 2020), <https://medlineplus.gov/druginfo/meds/a600042.html>.

<sup>100</sup> *Types of Abortion*, Real Options Obria Medical Clinics (2020), <https://www.realoptions.net/types-of-abortion/#:~:text=According%20to%20the%20American%20Pregnancy,the%20abortion%20pill%2C%20and%20mifeprex.>

Suction vacuum aspiration, which is usually followed by a Dilation and Curettage (D & C), is an abortion procedure performed up to 14 weeks into the mother's pregnancy.<sup>101</sup> Here, a medical professional uses mechanical dilators and pharmacological agents to dilate the cervix, then he inserts a suction catheter with a knife-edged tip into the uterus. The catheter vacuums the unborn child from the mother's womb with a force 29 times the force of a household vacuum cleaner.<sup>102</sup> The doctor then uses sharp metal curettes to scrape the unborn baby's body, or body parts, from the walls of the uterus until nothing remains.<sup>103</sup> The procedure itself usually takes about 10 to 15

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<sup>101</sup> *What are the Types of Abortion Procedures?*, WebMD (2020), <https://www.webmd.com/women/abortion-procedures#2-4>; *Vacuum Aspiration for Abortion*, C.S. Mott Children's Hospital, Michigan Medicine (May 29, 2019), <https://www.mottchildren.org/health-library/tw1078#:~:text=The%20tissue%20removed%20from%20the,tissue%20has%20not%20been%20removed>.

<sup>102</sup> *Aspiration Abortion*, Live Action (Demonstration by Dr. Anthony Levatino) (last accessed November 14, 2020), <https://www.abortionprocedures.com/aspiration/#1466797067815-ef6545f9-db0b>; *Pictures of Aborted Babies*, Wisconsin Right to Life (2020), <http://www2.wrtl.org/abortion/pictures-of-aborted-babies/>; Rebecca Downs, *Review of Surgical Abortion Procedures*, Live Action (2019), <https://www.liveaction.org/news/review-of-surgical-abortion-procedures/>; *Suction and Curettage Abortion of a 9 Week Old Fetus - Medical Chart*, Nucleus Medical Media (2020), <https://catalog.nucleusmedicalmedia.com/suction-and-curettage-abortion-of-a-9-week-old-fetus/view-item?ItemID=11041>; *Abortion – Archive May 2008: Abortion*, Physicians for Life (April 29, 2008), <http://www.physiciansfor-life.org/may-2008-abortion/> “‘When we do a suction curettage abortion, you know, roughly one of three things is going to happen during the abortion. One would be that the catheter as it approaches the fetus, you know, tears it and kills it at that instant inside the uterus. The second would be that the fetus is small enough and the catheter is large enough that the fetus passes through the catheter and either dies in transit as it's passing through the catheter or dies in the suction bottle after it's actually all the way out.’ (Sworn testimony given in US District Court for the Western District of Wisconsin (Madison, WI, May 27, 1999, Case No. 98-C-0305-S), by Dr. Martin Haskell, an abortionist. He describes legal activity.)”

<sup>103</sup> *Id.*; *Surgical Abortion Methods*, LIFESITENEWS.COM, (2020), <https://www.lifesitenews.com/resources/abortion/abortion-methods/surgical-abortion-methods>.

minutes.<sup>104</sup> Note that the child is alive at this point and can sense the pain of the procedure if it takes place after 8 weeks gestation.<sup>105</sup>

Induction abortion occurs during the second or third trimester of pregnancy. A doctor injects salt water (saline), digoxin, or potassium chloride into the mother's amniotic sac surrounding the fetus (instillation) or injects the substances directly into the fetus – aiming for its heart, torso, or head.<sup>106</sup> These substances stop the unborn child's heartbeat.<sup>107</sup> The mother is then given Oxytocin (Pitocin) by pill or intravenously (IV) to start uterine contractions and to dilate the cervix, so she can deliver the aborted fetus.<sup>108</sup> The child is also alive during this procedure and can sense pain as this procedure is performed beyond 8 weeks gestation.<sup>109</sup>

Another form of induced abortion, Dilation and Evacuation (D & E), usually occurs after 13 weeks gestation, or the second trimester.<sup>110</sup> At this stage, the child is alive, the bones in its head and skeleton have begun to harden, it has all of its vital organs, and can

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<sup>104</sup> *D and C (Dilation and Curettage)*, WebMD (2020), <https://www.webmd.com/women/guide/d-and-c-dilation-and-curettage#1>.

<sup>105</sup> See *supra* notes 27, 29, 31.

<sup>106</sup> *Induction Abortion*, C.S. Mott Children's Hospital, Michigan Medicine (May 29, 2019), <https://www.mottchildren.org/health-library/tw2562>; Patricia A. Lohr, *Surgical Abortion in the Second Trimester*, 16 REPROD. HEALTH MATTERS (31 Suppl) 151–61 (May 2008), <https://www.tandfonline.com/doi/abs/10.1016/S0968-8080%2808%2931388-3?needAccess=true#aHR0cHM6Ly93d3cudGFuZGZvbmxpbmUuY29tL2RvaS9wZGYYvMTAuMTAxNi9TMDk2OC04MDgwJTI4MDglMjkzMTM4OC0zP25lZWRY2Nlc3M9dHJlZUBAQDA=>; *Induction of Fetal Demise Before Abortion*, Society of Family Planning (January 2010), <https://www.societyfp.org/documents/resources/InductionofFetalDemise.pdf>; *Induction Abortion*, Live Action (Demonstration by Dr. Anthony Levatino) (last accessed November 14, 2020), <https://www.abortionprocedures.com/induction/#1466802482689-777ef64c-4991>.

<sup>107</sup> *Second Trimester Labor Induction Abortion*, Michigan Department of Health and Human Services (2020), [https://www.michigan.gov/mdhhs/0,5885,7-339-73971\\_4909\\_6437\\_19077-46297--,00.html](https://www.michigan.gov/mdhhs/0,5885,7-339-73971_4909_6437_19077-46297--,00.html).

<sup>108</sup> C.S. Mott Children's Hospital, *supra* note 106.

<sup>109</sup> See *supra* notes 27, 29, 31, 106.

<sup>110</sup> Web MD, *supra* note 104.

sense pain.<sup>111</sup> The procedure begins when a doctor inserts a pair of forceps into the womb which are used to grasp part of the fetus and break and twist off its limbs until the child is totally dismembered and removed. Usually the spine is snapped, and the skull crushed in order to completely remove the fetus.<sup>112</sup> During this abortion procedure, the child has cardiac activity and other signs of life after a fetal body part has been delivered from the uterus, while the remainder of the fetus is still inside.<sup>113</sup> “Eleven percent of abortions in the United States take place after the first trimester, and national estimates suggest that D & E accounts for roughly 95% of these procedures.”<sup>114</sup>

There is also a procedure called the intact D & E procedure (also known as dilation and extraction, “D & X” or “intact D & X”), which some medical professionals have compared with a “partial-

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<sup>111</sup> *Fetal Development: The 2nd Trimester*, Mayo Clinic (2020), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/fetal-development/art-20046151>. See *supra* notes 27, 29, 31.

<sup>112</sup> *D & E Abortion*, Live Action (Demonstration by Dr. Anthony Levatino) (last accessed November 14, 2020), <https://www.abortionprocedures.com/#1466802055946-992e6a14-9b1d>; *Gonzales v. Carhart*, 550 U.S. 124, 135 (2007): “The doctor grips a fetal part with the forceps and pulls it back through the cervix and vagina, continuing to pull even after meeting resistance from the cervix. The friction causes the fetus to tear apart. For example, a leg might be ripped off the fetus as it is pulled through the cervix and out of the woman. The process of evacuating the fetus piece by piece continues until it has been completely removed.”; Karen E. Walther, *Partial-Birth Abortion: Should Moral Judgment Prevail over Medical Judgment?*, 31 LOY. U. CHI. L. J. 698–90 (2000), <https://lawecommons.luc.edu/cgi/viewcontent.cgi?article=1374&context=lucj>; WARREN M. HERN, ABORTION PRACTICE, 122–60 (1984); Mokhtar Topozada, *Terminations of Pregnancy After 14 Weeks*, 70 MOD. METH. INDUC. ABORT. (1995); Wisconsin Right to Life, *supra* note 102.

<sup>113</sup> *Planned Parenthood of Wisconsin v. Doyle*, 44 F. Supp. 2d 975, 977 (W.D. Wis. 1999).

<sup>114</sup> Meghan K. Donovan, *D&E Abortion Bans: The Implications of Banning the Most Common Second-Trimester Procedure*, Guttmacher Institute (last accessed November 14, 2020), <https://www.guttmacher.org/gpr/2017/02/de-abortion-bans-implications-banning-most-common-second-trimester-procedure>; Tara C. Jatlaoui et al., *Abortion Surveillance—United States, 2013*, 65 MORB. & MORT. WEEKLY REP.: SURV. SUMM. (12) 1–44 (2016), [https://www.researchgate.net/profile/Alexander\\_Ewing3/publication/310797274\\_Abortion\\_Surveillance\\_-\\_United\\_States\\_2013/links/5838577508aed5c6148856fc/Abortion-Surveillance-United-States-2013.pdf](https://www.researchgate.net/profile/Alexander_Ewing3/publication/310797274_Abortion_Surveillance_-_United_States_2013/links/5838577508aed5c6148856fc/Abortion-Surveillance-United-States-2013.pdf).



birth” abortion.<sup>115</sup> The only difference from the D & E is that in an intact D & E, the doctor intentionally removes the fetus from the womb fully intact, feet first, until the fetus’ head reaches the cervix, which is too large to pass through.<sup>116</sup> The doctor then “inserts a scissors into the base of the fetus’[] brain, inserts a tube in the hole made by the scissors, and removes the contents of the skull by suction, causing the skull to collapse. The physician then completes the extraction of the now-dead fetus from the woman’s body, death having occurred while the body of the fetus was in the vagina.”<sup>117</sup>

The third trimester begins at 28 weeks gestation.<sup>118</sup> Although abortions at this stage of a mother’s pregnancy are rare, they do still occur.<sup>119</sup> In 2013, Dr. Sella, who performs third-trimester abortions, was interviewed by *The Irish Times*. In the article, Dr. Sella admitted that the mothers she treats are those who discover fetal abnormalities

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<sup>115</sup> *Planned Parenthood of Wisconsin*, *supra* note 113, at 977–78, “As evidenced by the policy statements of the American Medical Association . . . and the American College of Obstetricians and Gynecologists . . . as well as articles published in prominent medical journals . . . the medical community understands the phrase “partial birth abortion” to refer to the dilation and extraction or “D & X” procedure . . . (“The breech extraction variation of intact D & E, described in the lay press as ‘partial birth abortion’ has been made illegal in several states.”); 18 U.S.C. § 1531. Partial-birth abortions prohibited. “[P]artial-birth abortion” means an abortion in which the person performing the abortion — (A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and (B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus . . . .”

<sup>116</sup> See *Planned Parenthood of Wisconsin*, *supra* note 115 at 978.

<sup>117</sup> *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 466 (7th Cir. 1998), referencing a paper written by Dr. Martin Haskell in which he describes an intact D & E abortion.

<sup>118</sup> Colleen de Bellefonds, *Your Guide to the Third Trimester of Pregnancy*, WHAT TO EXPECT (September 5, 2018), <https://www.whattoexpect.com/third-trimester-of-pregnancy.aspx>; *Pregnancy Week by Week, Fetal Development: The 3rd Trimester*, Mayo Clinic (June 30, 2020), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/fetal-development/art-20045997>.

<sup>119</sup> *Even Third Trimester Abortions are Done for Non-Medical Reasons*, SECULAR PRO-LIFE PERSPECTIVES (September 10, 2018), <https://blog.secularpro-life.org/2018/09/even-third-trimester-abortions-are-done.html>.



in their babies or those with healthy, viable babies who feel they could not cope with their child.<sup>120</sup>

Another doctor who performs late-term abortions is Dr. Warren Hern, founder of Boulder Abortion Clinic,<sup>121</sup> who has been performing abortions for the last 40 years. He claims to perform abortions for women with serious complications,<sup>122</sup> but he also claims to perform late-term abortions for mothers who do not face any grave medical outcome.<sup>123</sup>

Explaining the different methods of abortion reveals the actual procedures that doctors employ when performing various abortions, how abortion can end the life of an unborn child at vital stages in its human development and can cause considerable pain to the unborn child.

#### *D. Reasons for Abortion*

In order to fully demonstrate how abortion affects the mother, her unborn child, and the family in general, it is necessary to understand the circumstances that cause an abortion to occur in the first place. The effect abortion has on a mother after she procures it is often rooted in the difficult circumstances she faces prior to the abortion.

Since not every circumstance is identical to another, abortions are often motivated by many, diverse and interrelated reasons –

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<sup>120</sup> Kate Holmquist, *Abortion 'Is Never, Ever A Casual Decision,'* THE IRISH TIMES (September 21, 2013), <https://www.irishtimes.com/news/health/abortion-is-never-ever-a-casual-decision-1.1534659>.

<sup>121</sup> *Dr. Warren Hern, M.D., M.P.H., PH.D.*, Boulder Abortion Clinic (2020), <https://www.drhern.com/about/>.

<sup>122</sup> *Third Trimester Abortion*, Boulder Abortion Clinic (2020), <https://www.drhern.com/third-trimester-abortion/>.

<sup>123</sup> Alex Burness, *After 40 Years in Boulder, Abortion Doctor Warren Hern is Still at War*, DAILY CAMERA (May 29, 2015), <https://www.dailycamera.com/2015/05/29/after-40-years-in-boulder-abortion-doctor-warren-hern-is-still-at-war/>.

some of which are:<sup>124</sup> the mother is not ready for a child, she cannot afford the child, or the child would interfere with her education or career.<sup>125</sup> In 1987, a survey of 1,900 women at large abortion providers across the country found those were the most common reasons for an abortion.<sup>126</sup>

A structured survey in 2004 involving 1,209 abortion patients with in-depth interviews of 38 women revealed that the most frequent reasons for having an abortion were:<sup>127</sup> the child would interfere with the mother's education, work or ability to care for her dependents (74%); the mother could not afford a baby at the time (73%); and fear of becoming a single mother or relationship problems (48%).

In a more recent survey of 954 abortion patients ranging from 2008–2010, the less frequent reasons for having an abortion were:<sup>128</sup> health-related reasons (12%); the health of the mother (6%); the health of the fetus (5%); drug, tobacco, or alcohol use (5%); and non-illicit prescription drug use and birth control (1%).

Unintended pregnancy is the major contributor to induced abortion and precedes nearly all cases of abortions.<sup>129</sup> According to

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<sup>124</sup> Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSP. ON SEX. AND REPROD. HEALTH (3) 110–18 (September 2005), <https://www.studocu.com/sg/document/singapore-university-of-social-sciences/introduction-to-psychology-2/tutorial-work/reasons-us-women-have-abortions/3662450/view>.

<sup>125</sup> *U.S. Abortion Statistics, Facts and Figures Relating to the Frequency of Abortion in the United States*, Abort73.com (2019), [https://abort73.com/abortion\\_facts/us\\_abortion\\_statistics/](https://abort73.com/abortion_facts/us_abortion_statistics/); *Choice: Is Abortion the Right One?* CEC for Life, Human Life International (September 20, 2009), <https://www.cecforlife.com/wp-content/uploads/2011/09/Choice-Is-Abortion-the-Right-One2.pdf>.

<sup>126</sup> Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?* 20 FAM. PLAN. PERSP. (4) 169–76 (1988).

<sup>127</sup> Finer et al., *supra* note 124.

<sup>128</sup> M. Antonia Biggs et al., *Understanding Why Women Seek Abortions in the US*, 13 BMC WOMEN'S HEALTH 29 (July 5, 2013), <https://bmcmwomenshealth.biomedcentral.com/track/pdf/10.1186/1472-6874-13-29.pdf>.

<sup>129</sup> Tara C. Jatlaoui et al., *Abortion Surveillance—United States, 2016*, 68 MORB. & MORT. WEEKLY REP. SURV. SUMM. (11) 2, 14 (November 29, 2019), <https://www.cdc.gov/mmwr/volumes/68/ss/pdfs/ss6811a1-H.pdf>.

Dr. Warren Hern, other reasons for abortion are if the child has Trisomy 21 (Down Syndrome).<sup>130</sup> There are also “hard cases,” where an abortion is performed because a mother was subject to rape<sup>131</sup> or incest,<sup>132</sup> her life or health is in danger, or her child will be born with defects. These “hard cases” are rare however, because they only make up less than one per cent (<1%) of abortions nationwide.<sup>133</sup>

A common viewpoint is that late-term abortions are most often performed due to “severe fetal anomalies” or to “save the woman’s life.” However, for several decades, peer-reviewed research literature has demonstrated that, “most late-term abortions are elective, done on healthy women with healthy fetuses, and for the same reasons given by women who undergo first trimester abortions.”<sup>134</sup> It is estimated

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<sup>130</sup> *Fetal Anomalies*, Boulder Abortion Clinic (2020), <https://www.drhern.com/fetal-anomalies/>; *Facts about Down Syndrome*, Centers for Disease Control and Prevention (December 5, 2019), <https://www.cdc.gov/ncbddd/birthdefects/downsyndrome.html>, Down syndrome is a mental and physical disorder in which an individual has an extra chromosome, as opposed to the natural 46 chromosomes, which results in mental and physical challenges for the person due to changes in the development of their body and brain.

<sup>131</sup> *An Updated Definition of Rape*, The United States Department of Justice Archives (updated April 7, 2017), <https://www.justice.gov/archives/opa/blog/updated-definition-rape>. Rape is defined as “[t]he penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”

<sup>132</sup> *Incest*, THE MERRIAM-WEBSTER DICTIONARY (last accessed November 16, 2020), <https://www.merriam-webster.com/dictionary/incest>, Incest is “sexual intercourse between persons so closely related that they are forbidden by law to marry.”

<sup>133</sup> *Finer et al.*, *supra* note 124, at 113–14; *Abortions in America*, Operation Rescue (2020), <https://www.operationrescue.org/about-abortion/abortions-in-america/>; *Why Women Abort*, Human Life International (July 23, 2017), <https://www.hli.org/resources/why-women-abort>.

<sup>134</sup> *Finer et al.*, *supra* note 124; James Studnicki, *Late-Term Abortion and Medical Necessity: A Failure of Science*, 6 HEALTH SERV. RES. MANAG. EPIDEM. (2) 1 (April 2019), [https://www.researchgate.net/publication/332297051\\_Late-Term\\_Abortion\\_and\\_Medical\\_Necessity\\_A\\_Failure\\_of\\_Science/fulltext/5caca6df299bf1846055484b/Late-Term-Abortion-and-Medical-Necessity-A-Failure-of-Science.pdf](https://www.researchgate.net/publication/332297051_Late-Term_Abortion_and_Medical_Necessity_A_Failure_of_Science/fulltext/5caca6df299bf1846055484b/Late-Term-Abortion-and-Medical-Necessity-A-Failure-of-Science.pdf).

that every year in the United States, approximately 10,000 to 15,000 abortions occur after 20 weeks gestation,<sup>135</sup> or late-term.<sup>136</sup>

About 4 in 10 women who chose abortion said they had completed their childbearing, and almost one-third were not ready to have a child. Less than 1% said their parents' or partners' desire for them to have an abortion was the most important reason for receiving an abortion. Younger women who received abortions often reported they were unprepared for the transition to motherhood, while older women regularly cited their responsibility to dependents.<sup>137</sup>

In 2014, 926,190 abortions occurred in the United States. Out of those abortions, more than half of the patients were in their twenties. The following statistics illustrate the different age groups of abortion patients in the U.S. in 2014: <sup>138</sup> ages 20-24 (34%); ages 25-29 (27%); ages 8-19 (8%); ages 15-17 (3%); under age 15 (0.2%).

In 2017, just over eighteen percent (18.4%) of pregnancies in the U.S. (excluding miscarriages) ended in abortion.<sup>139</sup> This accounts for approximately 862,320 abortions, with an abortion rate of 13.5 abortions per 1,000 women aged 15–44. “This is the lowest [abortion] rate ever observed in the United States; in 1973, the year abortion became legal, the rate was 16.3.”<sup>140</sup>

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<sup>135</sup> *Id.*

<sup>136</sup> *Finer et al., supra* note 124; Elizabeth Johnson, *The Reality of Late-Term Abortion Procedures*, CHARLOTTE LOZIER INST. 10 (January 2015), [https://s27589.pcdn.co/wp-content/uploads/2015/01/On-Point-The-Reality-of-Late-Term-Abortion-Procedures\\_Elizabeth-Johnson.pdf](https://s27589.pcdn.co/wp-content/uploads/2015/01/On-Point-The-Reality-of-Late-Term-Abortion-Procedures_Elizabeth-Johnson.pdf).

<sup>137</sup> *Finer et al., supra* note 124.

<sup>138</sup> Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Institute (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>.

<sup>139</sup> Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States, 2017*, Guttmacher Institute (September 2019), <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017>.

<sup>140</sup> *Id.*; Studnicki, *supra* note 134. Readers must keep in mind that the abortion reporting system in the United States is demonstrably limited because the Centers for Disease Control and Prevention (CDC) Abortion Surveillance System is a voluntary reporting system. In 2017, states like California, Maryland, and New Hampshire did not report on their abortions and those states accounted for nearly 20% of the total number of abortions nationwide.; *State Facts About Abortion: California*,

Recognizing the motivating factors that lead to the mother's abortion decision is important because it demonstrates that most abortions are performed due to socioeconomic circumstances and non-life-threatening factors. Further, knowing the reasons that mothers procure abortions also shows the root cause of the various effects abortion has on the mother.

#### *E. The Effect of Abortion on the Mother*

Despite the several reasons women have for choosing an abortion, there may be serious consequences to the well-being of the mother, in terms of any physical, psychological, and/or emotional experiences she may encounter, post abortion. Regardless of age, race, or ethnicity, unmarried women and women who have had at least one

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Guttmacher Institute (March 2020); *State Facts About Abortion: Maryland*, Guttmacher Institute (March 2020); *State Facts About Abortion: New Hampshire*, Guttmacher Institute (March 2020). The Guttmacher Institute, which conducts patient surveys, may be the most reliable and comprehensive source for abortion statistics and data because they receive surveys from all 50 states. The problem, however, is that Guttmacher does not survey the states every year and does not make its data readily available to all researchers. *Abortion Reporting Requirements*, Guttmacher Institute (April 1, 2020), Research funding for abortion studies is also inadequate. The National Institutes of Health Research Condition and Disease Categorization System, which reports a significant amount of funded research on over 280 different categories of conditions, diseases, or research areas, failed to include any research category for abortion.; *Estimates of Funding for Various Research, Condition, and Disease Categories (RCDC)*, U.S. Department of Health and Human Services (February 24, 2020), [https://report.nih.gov/categorical\\_spending.aspx](https://report.nih.gov/categorical_spending.aspx).

previous induced abortion are much less likely to give birth than married or nulliparous<sup>141</sup> women.<sup>142</sup> Adolescents with a history of abortion are at higher risk for stillbirth and preterm birth.<sup>143</sup>

Common post-abortion symptoms include bleeding (sometimes severe), cramping, pelvic pain, foul-smelling vaginal discharge and dizziness. Bleeding after abortion usually lasts from five to seven days, and in some cases, up to four or five weeks. Antibiotics and medications can be prescribed to prevent postoperative clotting to prevent bleeding and infection.<sup>144</sup>

Serious complications result in around 1 out of every 100 first-trimester abortions and in 1 out of every 50 late-term abortions. Such complications include:<sup>145</sup> heavy or persistent bleeding; infection or

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<sup>141</sup> William C. Shiel Jr., *Medical Definition of Nulliparous*, MEDICINENET (December 11, 2018), <https://www.medicinenet.com/nulliparous/definition.htm#:~:text=Nulliparous%3A%20Never%20having%20given%20birth,CLICK%20HERE%20FOR%20RELATED%20SLIDESHOW>: Nulliparous is a term which refers to “never having given birth to a child.”

<sup>142</sup> Theodore J. Joyce & Michael Grossman, *Pregnancy Resolution as an Indicator of Wantedness and its Impact on the Initiation of Early Prenatal Care*, National Bureau of Economic Research (January 1989), [https://www.researchgate.net/profile/Ted\\_Joyce2/publication/5190802\\_Pregnancy\\_Resolution\\_as\\_an\\_Indicator\\_of\\_Wantedness\\_and\\_its\\_Impact\\_on\\_the\\_Initiation\\_of\\_Early\\_Prenatal\\_Care/links/54b7c4320cf28faced606e47/Pregnancy-Resolution-as-an-Indicator-of-Wantedness-and-its-Impact-on-the-Initiation-of-Early-Prenatal-Care.pdf](https://www.researchgate.net/profile/Ted_Joyce2/publication/5190802_Pregnancy_Resolution_as_an_Indicator_of_Wantedness_and_its_Impact_on_the_Initiation_of_Early_Prenatal_Care/links/54b7c4320cf28faced606e47/Pregnancy-Resolution-as-an-Indicator-of-Wantedness-and-its-Impact-on-the-Initiation-of-Early-Prenatal-Care.pdf); William F. Pratt et al., *Understanding U.S. Fertility: Findings from the National Survey of Family Growth, Cycle III*, 39 POPULATION BULLETIN (5) (1984).

<sup>143</sup> Birgit Reime et al., *Reproductive Outcomes in Adolescents Who Had a Previous Birth or an Induced Abortion Compared to Adolescents' First Pregnancies*, 8 BMC PREGNANCY & CHILDBIRTH (4) (January 31, 2008), [https://www.researchgate.net/profile/Birgit\\_Reime/publication/5615398\\_Reproductive\\_outcomes\\_in\\_adolescents\\_who\\_had\\_a\\_previous\\_birth\\_or\\_an\\_induced\\_abortion\\_compared\\_to\\_adolescents'\\_first\\_pregnancies/links/0deec519e7264f38e6000000/Reproductive-outcomes-in-adolescents-who-had-a-previous-birth-or-an-induced-abortion-compared-to-adolescents-first-pregnancies.pdf](https://www.researchgate.net/profile/Birgit_Reime/publication/5615398_Reproductive_outcomes_in_adolescents_who_had_a_previous_birth_or_an_induced_abortion_compared_to_adolescents'_first_pregnancies/links/0deec519e7264f38e6000000/Reproductive-outcomes-in-adolescents-who-had-a-previous-birth-or-an-induced-abortion-compared-to-adolescents-first-pregnancies.pdf).

<sup>144</sup> TRAN MINH HANG, GLOBAL DEBATES, LOCAL DILEMMAS: SEX-SELECTIVE ABORTION IN CONTEMPORARY VIET NAM, 125–56 (2018), <https://press-files.anu.edu.au/downloads/press/n4533/pdf/book.pdf>.

<sup>145</sup> *Abortion*, American Pregnancy Association (2020), <https://americanpregnancy.org/uncategorized/abortion-75934/>; *Preventing Unsafe Abortion*, World Health Organization (September 25, 2020), <https://www.who.int/news-room/fact-sheets/detail/preventing-unsafe-abortion>.

sepsis;<sup>146</sup> damage to the cervix; scarring of the uterine lining; perforation of the uterus (piercing the uterine wall); organ damage; and death.<sup>147</sup>

Aside from the physical impact abortion has on women, women can also experience significant psychological and emotional impact.<sup>148</sup> Especially if the mother develops a strong relationship with her child, after she has an abortion, she may experience abortion-related guilt, sometimes referred to as post abortion stress syndrome (PASS).<sup>149</sup> Several doctors refer to PASS to medically describe the post-traumatic stress-related effects many women experience after an abortion, but the term PASS is not yet recognized by the American

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<sup>146</sup> *What is Sepsis?*, Centers for Disease Control and Prevention (August 27, 2019), <https://www.cdc.gov/sepsis/what-is-sepsis.html>, Sepsis is an extreme life-threatening condition where an infection in skin, lungs, urinary tract, or elsewhere can quickly result in tissue damage, organ failure, and even death, if not given timely treatment.

<sup>147</sup> Jatlaoui et al., *supra* note 114, 129.

<sup>148</sup> David C. Reardon, *Abortion Decisions and the Duty to Screen: Clinical, Ethical, and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. CONTEMP. HEALTH L. & POL'Y (6) 33–35 (2003), <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1172&context=jchlp>; *Life Is Precious In Every Circumstance*, Right to Life of Michigan (July 7, 2020), <https://rtl.org/wp-content/uploads/2018/10/HardCasesprint.pdf>; CATHERINE BARNARD, *THE LONG-TERM PSYCHOLOGICAL EFFECTS OF ABORTION* (1990); Robert C. Erikson, *Abortion Trauma: Application of a Conflict Model*, 8 PRE. & PERINAT. PSYCH. J. (1) 33–42 (1993).

<sup>149</sup> Susanne Babbel, *Post Abortion Stress Syndrome (PASS) - Does It Exist?*, PSYCHOLOGY TODAY (October 25, 2010), <https://www.psychologytoday.com/us/blog/somatic-psychology/201010/post-abortion-stress-syndrome-pass-does-it-exist>, “Post Abortion Stress Syndrome (PASS) is the name that has been given to the psychological aftereffects of abortion, based on Post Traumatic Stress Disorder (PTSD). It is important to note that this is not a term that has been accepted by the American Psychiatric Association or the American Psychological Association.”



Psychological Association<sup>150</sup> or the American Psychiatric Association.<sup>151</sup> Nevertheless, such stress-related symptoms include:<sup>152</sup> guilt from defying your own sense of morality; eating disorders, alcohol and/or substance abuse; promiscuity; memories or nightmares of lost or aborted babies; anxiety, headaches; dizziness; stress; abdominal

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<sup>150</sup> *Id.*; PAUL C. PRICE ET AL., RESEARCH METHODS IN PSYCHOLOGY (2017), <https://opentextbc.ca/researchmethods/chapter/american-psychological-association-apa-style/#footnote-958-1>: “APA style is a set of guidelines for writing in psychology and related fields. These guidelines are set down in the Publication Manual of the American Psychological Association.” The manual was produced by the APA and contains the “standards for preparing manuscripts to be submitted for publication” in order to “facilitate scientific communication by promoting clarity of expression and standardizing the organization and content of articles and book chapters.”; AMERICAN PSYCHOLOGICAL ASSOCIATION, PUBLICATION MANUAL OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION (6TH ED.) (2010).

<sup>151</sup> *Standard of Care and State Based Regulations*, American Psychiatric Association (2020), <https://www.psychiatry.org/psychiatrists/practice/telepsychiatry/toolkit/standard-of-care-and-state-based-regulations>, “APA has the best long-term perspective on standard of care and state regulations, in general, and due to its collaboration with the American Medical Association... Standards of care are usually defined as the degree of watchfulness, attention, caution and prudence that a reasonable person in the circumstances would exercise. If a person’s actions do not meet this standard of care, then his/her acts fail to meet the duty of care and may be deemed as negligent... In medicine, there are guides for the clinician on the standard of care... The requirements of the standard are closely dependent on circumstances... The ultimate judgment regarding the care of a particular patient must be made by the clinician in light of all circumstances presented by the patient and his or her family, the diagnostic and treatment options available, resources, and in light of all pertinent clinical, administrative and regulatory circumstances.”; AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION PRACTICE GUIDELINES FOR THE PSYCHIATRIC EVALUATION OF ADULTS, THIRD EDITION (2016). “The APA Practice Guidelines are not intended to serve or be construed as a “standard of medical care.” Judgments concerning clinical care depend on the clinical circumstances and data available for an individual patient and are subject to change as scientific knowledge and technology advance and practice patterns evolve.”

<sup>152</sup> Teri K. Reisser & Paul C. Reisser, “*Dealing With the Trauma of a Past Abortion*,” FOCUS ON THE FAMILY (December 16, 2016), <https://www.focusonthefamily.com/pro-life/dealing-with-the-trauma-of-a-past-abortion/>; Priscilla Coleman et al., “*Is There a Post-Abortion Syndrome? A Symposium*,” HUMAN LIFE REV. (last accessed November 21, 2020), <https://humanlifereview.com/is-there-a-post-abortion-syndrome-a-symposium/#>.

cramps; muscle tightness; sleep disturbances; psychological numbing—which unconsciously prevents you from enjoying an emotional, intimate relationship; depression; loss of appetite; suicidal thoughts; loss of normal sources of pleasure; thoughts of suicide; preoccupation with becoming pregnant, with the hopes to replace your aborted baby; anxiety over fertility and childbearing issues; difficulty bonding with your other children by being overprotective or feeling detached from them; as well as symptoms around the anniversary of the abortion and/or the aborted baby’s due date.

Abundant clinical and research evidence indicates that induced abortion is an intentionally caused human death experience, and as such, can cause psychological trauma.<sup>153</sup> In a study of 374 women who underwent a first, second, or third trimester abortion, the results demonstrated significantly higher post-traumatic stress disorder (PTSD) symptoms<sup>154</sup> in women who had an abortion for social reasons versus women who had an abortion based on health concerns. In such cases, the abortion often seems unwarranted or frivolous to the woman and “incites deep feelings of guilt or remorse” that trigger traumatic

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<sup>153</sup> Vincent M. Rue & Priscilla K. Coleman, *The Question Too Dangerous To Ask: What if Post-abortion Syndrome is Real?*, 33 HUMAN LIFE REV. (2) 68–79 (2007); Vincent M. Rue et al., *Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Women*, 10 MEDICAL SCIENCE MONITOR SR 5–16 (2004); Dennis Bagarozzi, *Identification, Assessment and Treatment of Women Suffering From Post-Traumatic Stress After Abortion*, 5 J. FAM. PSYCHOTHER. 25–54 (1994); Alexandria Speckhard & Vincent M. Rue, *Postabortion Syndrome: An Emerging Public Health Concern*, 42 J. SOCIAL ISSUES 95–119 (1992); Alexandria Speckhard & Vincent M. Rue, *Post-Abortion Trauma: Incidence & Diagnostic Considerations*, 6 MED. & MIND 57–74 (1991); see PETER DOHERTY (ed.), POST-ABORTION SYNDROME: ITS WIDE RAMIFICATIONS (1995); see also THERESA BURKE & DAVID C. REARDON, FORBIDDEN GRIEF: THE UNSPOKEN PAIN OF ABORTION (2002); see also TERRY SELBY, THE MOURNING AFTER: HELP FOR POST-ABORTION SYNDROME (1990).

<sup>154</sup> Center for Substance Abuse Treatment, *Substance Abuse Treatment: Addressing the Specific Needs of Women* (2009), [https://www.ncbi.nlm.nih.gov/books/NBK83252/pdf/Bookshelf\\_NBK83252.pdf](https://www.ncbi.nlm.nih.gov/books/NBK83252/pdf/Bookshelf_NBK83252.pdf), “The essential characteristics of a traumatic event include the following: (1) the person has experienced, witnessed, or been confronted with an event or events that involve actual or threatened death or serious injury, or a threat to the physical integrity of oneself or others; and (2) the person’s response involved intense fear, helplessness, or horror.”

symptoms over time.<sup>155</sup> Pregnancy-wantedness<sup>156</sup> is also predictor of post-abortion distress.<sup>157</sup>

Evidence also shows that repeated abortion increases the risk for emotional distress during interpersonal relationships.<sup>158</sup> Repeated abortion patients exhibited significantly higher distress scores when measuring “interpersonal sensitivity, paranoid ideation, phobic anxiety, and sleep disturbance” when compared with women who had only one abortion. In the same study, women who had more than one abortion also showed elevated signs of somatization,<sup>159</sup> hostility, and psychoticism.<sup>160</sup>

A study was conducted following long-term outcomes of abortions among 3,935 women while comparing wanted versus unwanted

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<sup>155</sup> Priscilla K. Coleman et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, J. PREGNANCY (2010), <https://www.hindawi.com/journals/jp/2010/130519/>.

<sup>156</sup> *Id.*; Joseph B. Stanford et al., *Defining Dimensions of Pregnancy Intendedness*, 4 MATERNAL & CHILD HEALTH J. (3) 183–89 (2000). The distinction between intendedness and wantedness is that intendedness has to do with cognition and conation, specifically with the degree of prior planning for a pregnancy. Wantedness has to do with affect and the feelings—both positive and negative—that occur in response to a pregnancy. Christine A. Bachrach & Susan Newcomer, *Intended Pregnancies and Unintended Pregnancies: Distinct Categories or Opposite Ends of a Continuum?* 31 FAM. PLANN. PERSP. (5) 251–52 (1999), [https://www.guttmacher.org/sites/default/files/article\\_files/3125199.pdf](https://www.guttmacher.org/sites/default/files/article_files/3125199.pdf).

<sup>157</sup> *Id.*; Coleman et al., *supra* note 155.

<sup>158</sup> Ellen W. Freeman et al., *Emotional Distress Patterns Among Women Having First or Repeat Abortions*, 55 OBSTET. & GYNEC. (5) 630–36 (1980); Pirkko Niemelä et al., *The First Abortion—And The Last? A Study of the Personality Factors Underlying Repeated Failure of Contraception*, 19 INT’L. J. GYNEC. & OBSTET. (3) 193–200 (1981).

<sup>159</sup> *Somatic Symptom Disorder*, Mayo Clinic (last accessed November 22, 2020), <https://www.mayoclinic.org/diseases-conditions/somatic-symptom-disorder/symptoms-causes/syc-20377776>. Somatic symptom disorder involves a person who abnormally places an extreme focus on physical symptoms, like pain or fatigue, resulting in severe emotional distress and problems functioning. Such individuals may or may not have other diagnosed medical conditions relating to these symptoms. The individual often thinks the worst about his or her symptoms while continuing to seek medical care and find an explanation even after serious conditions have been excluded. Such health concerns may become a central focus of the person’s life that it becomes difficult for them to function and sometimes leads to disability.

<sup>160</sup> Freeman et al., *supra* note 158.

pregnancies. Measurements were made while diagnosing suicidal thoughts, depression and anxiety, drug abuse, opioid abuse, alcohol abuse, cannabis abuse, and a summary of total disorders. The results revealed that “women who terminated one or more wanted pregnancies experienced a 43% higher risk of affective problems relative to childbirth, compared to women terminating only unwanted pregnancies.”<sup>161</sup> The overall conclusions reveal that “compared to corresponding births, abortions of wanted pregnancies are associated with a greater risk of negative psychological effect, particularly depression and suicide ideation, but not greater risk of substance abuse, than are abortions of unwanted pregnancies.”<sup>162</sup>

From 1995 to 2011, thirty studies were examined to determine if there was a correlation between abortion and post-abortion mental problems, specifically depression, anxiety disorders (post-traumatic stress disorder), and substance abuse disorders.<sup>163</sup> In studies comparing abortion with childbirth, thirteen studies showed a “clear risk for at least one of the reported mental problems in the abortion group versus childbirth.”<sup>164</sup> In five studies where women did not consider losing the baby to be difficult, or the fetus survived after a filed fetal reduction,<sup>165</sup> the results showed no difference in mental problems. Only one

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<sup>161</sup> Donald Paul Sullins, *Affective and Substance Abuse Disorders Following Abortion by Pregnancy Intention in the United States: A Longitudinal Cohort Study*, 55 MEDICINA (11) 741 (November 15, 2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6915619/>.

<sup>162</sup> *Id.*

<sup>163</sup> Carlo V. Bellieni & Giuseppe Buonocore, *Abortion and Subsequent Mental Health: Review of the Literature*, 67 PSYCH. & CLINIC. NEURO. 301–10 (July 16, 2013), <https://onlinelibrary.wiley.com/doi/epdf/10.1111/pcn.12067>.

<sup>164</sup> *Id.*

<sup>165</sup> Mark I. Evans et al., *Fetal Reduction: 25 Years' Experience*, 35 FET. DIAG. & THER. (2) 69–82 (2014), Fetal reduction (formerly known as “selective termination”) is a clinical procedure developed in the 1980s that attempts “to reduce the usual and high adverse sequelae of multifetal pregnancies by selectively terminating or reducing the number of fetuses to a more manageable number.” Essentially, fetal reduction involves terminating one or more fetuses in a group of quadruplets, triplets, twins, etc.; Anna K. Sfakianaki et al., *Potassium Chloride–Induced Fetal Demise A Retrospective Cohort Study of Efficacy and Safety*, 33 J. ULTRASOUND MED. (2) 337–41 (2014), <https://onlinelibrary.wiley.com/doi/epdf/10.7863/ultra.33.2.337>, A

paper showed the mother suffered a worse mental outcome due to childbearing.<sup>166</sup>

In studies comparing abortions with unplanned pregnancies that ended in childbirth, four studies showed there was a greater risk of mental problems in the abortion groups, whereas three studies showed no difference.<sup>167</sup> In studies comparing abortion and miscarriage, three studies showed abortion put women at greater risk of mental disorders, and four studies found no difference. Two studies found the miscarriage group had a greater chance of short-term anxiety and depression, while only the abortion group exhibited long-term anxiety and depression.<sup>168</sup>

To summarize the thirty studies, women seem to be at higher risk for mental disorders when losing a fetus compared to giving birth to the child. Some studies also showed that abortion is a more relevant risk factor than miscarriage, but more research is needed in this area.<sup>169</sup> In cases of mothers who became pregnant due to incest and/or rape, studies have found that receiving an abortion exacerbates the mental and emotional pain from the rape or incest.<sup>170</sup>

While some women experience post-traumatic stress after an abortion, other women suffer no repercussions at all. Studies reveal that some women feel relieved after having an abortion.<sup>171</sup> A study of women's psychological well-being was conducted on 956 women, each of whom either had an abortion or were denied an abortion because their pregnancy was just beyond the facility's gestational limit.<sup>172</sup> The women were interviewed via telephone one week after

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method to induce fetal demise (termination) is performed by injecting potassium chloride into the fetus' heart or umbilical vein.

<sup>166</sup> Bellieni & Buonocore, *supra* note 163.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Basile Uddo, *The Hard Cases: Rape, Incest, and Public Policy*, in THE ZERO PEOPLE 113 (Jeffrey Hensley ed., 1983).

<sup>171</sup> Babbel, *supra* note 149.

<sup>172</sup> M Antonia Biggs et al., *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion. A Prospective, Longitudinal Cohort Study*, 74 JAMA PSYCH. (2) 169–78 (2017), <https://jamanetwork.com/journals/jamapsychiatry/fullarticle/2592320>.

seeking an abortion, then twice a year for five years afterwards. The results showed that the women who were denied an abortion while at the gestational limit initially experienced greater adverse psychological outcomes than those who had abortions. Over time however, both groups of women's psychological well-being improved.<sup>173</sup> It is important to note that women who support their abortion decision are usually more likely to talk about their experiences than women who are ashamed and regret their decision to have an abortion.<sup>174</sup>

Much controversy still remains as to whether science and medicine can definitively claim PASS as a clinical diagnosis. *The New York Times Magazine* has raised the issue that even if abortion has adverse emotional outcomes, the science supporting post-abortion stress syndrome (PASS) does not "prove" that abortion causes psychological harm.<sup>175</sup> However, many who have opposed public health regulations in the past often try to discredit scientific evidence and label it as "junk science" if such evidence or research becomes a threat to any of their political or societal interests. David Michaels PhD uses the phrase "manufacturing uncertainty" to describe how those who disagree with scientific research respond when such information tends to harm their industry's reputation, i.e. the tobacco industry and other producers of hazardous products.<sup>176</sup> "Whether denied, dismissed, or politically incorrect, the invisible and inconvenient injury of [post-abortion stress syndrome] remains. In the end, it is that cumulative toll of individual lives harmed that will render the decisive judgment about abortion's fate."<sup>177</sup>

In conclusion, although some women suffer no negative repercussions after having an abortion, it should be evident that an abortion can cause serious devastating consequences for the mother. Some of the physical consequences include her having a less likely chance of

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<sup>173</sup> *Id.*

<sup>174</sup> Babbel, *supra* note 149.

<sup>175</sup> Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES (January 21, 2007), <https://www.nytimes.com/2007/01/21/magazine/21abortion.t.html>.

<sup>176</sup> David Michaels & Celeste Monforton, *Manufacturing Uncertainty: Contested Science and The Protection of the Public's Health and Environment*, 95 AM. J. PUB. HEALTH S39-S47 (2005).

<sup>177</sup> *Id.*

giving birth again, heavy bleeding, damage to her reproductive system, and even death. Some of the psychological and emotional consequences she may face include post-traumatic stress, psychological guilt, severe depression and anxiety, sleep disturbances, and substance abuse.

#### *F. The Effect of Abortion on the Family*

Abortion not only has a great effect on the mother, but that effect often extends to the father of the unborn child, as well as other family members. Abortion affects the institution of family in terms of giving and receiving intimacy, friendship, and loyalty. We will explore the dynamic between the unborn child and the mother, as well as the perspectives of the siblings and the father of the aborted child and how they may or may not be impacted.

As mentioned earlier, unborn babies have emotions and intuition which enables them to sense love from their parents. According to Carista Luminare-Rosen, PhD, “prenates can see, hear, feel, remember, taste, and think before birth.”<sup>178</sup> Marilee Hartling, RN says that bonding or attachment occurs before and after birth and is a part of the unborn babies’ personality development. If there is a “healthy attachment between baby and parent... [t]his is the beginning of the establishment of trust.”<sup>179</sup> The attachment bond often results from nonverbal emotional communication that the mother develops with her child. “This form of communication affects the way her child develops mentally, physically, intellectually, emotionally, and socially.” This bond also determines the strength of the relationship between the mother

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<sup>178</sup> Carol Sorgen, *Bonding with Baby Before Birth*, WebMD (2019), <https://www.webmd.com/baby/features/bonding-with-baby-before-birth>; See CARISTA LUMINARE-ROSEN, *PARENTING BEGINS BEFORE CONCEPTION: A GUIDE TO PREPARING BODY, MIND, AND SPIRIT FOR YOU AND YOUR FUTURE CHILD* (2001).

<sup>179</sup> *Id.*



and her infant as well as the child's success both in school and in life.<sup>180</sup>

When a pregnancy is unwanted, studies have shown this can have negative effects on the child's later cognitive, emotional and social processes.<sup>181</sup> Children born as a result of an unwanted pregnancy have a greater chance of engaging in criminal behavior as adults, being dependent on public assistance, and having instability in their marriages.<sup>182</sup>

Other studies did not conclude that pregnancy-wantedness had a bearing on the later attachment between the mother and her child, due to the difficulty in measuring "wantedness." However, the same studies suggest that the mother's underlying motivations for having a child did affect later attachment of the child and how she relates with her child.<sup>183</sup>

Abortion primarily affects the mother in choosing whether to terminate her unborn child. However, several clinical studies and case studies have shown that young children can be severely emotionally and psychologically disturbed after knowing (either consciously or subconsciously) of their mother's pregnancy, miscarriage, and/or abortion.<sup>184</sup>

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<sup>180</sup> Jeanne Segal et al., *What is Secure Attachment and Bonding?*, Help Guide (November 2019), <https://www.helpguide.org/articles/parenting-family/what-is-secure-attachment-and-bonding.htm>.

<sup>181</sup> *Abortion and Mental Health*, American Psychological Association (2020), <https://www.apa.org/pi/women/programs/abortion>; Nancy Felipe Russo, *Abortion, Unwanted Childbearing, and Mental Health*, 37 SALUD MENTAL (4) 283, 89–90 (2014), [http://revistasaludmental.com/index.php/salud\\_mental/article/download/SM.0185-3325.2014.033/2436](http://revistasaludmental.com/index.php/salud_mental/article/download/SM.0185-3325.2014.033/2436); Henry P. David, *Born Unwanted, 35 Years Later: The Prague Study*, 14 REPROD. HEALTH MATTERS (27) 181–90 (2006), <https://www.tandfonline.com/doi/full/10.1016/S0968-8080%2806%2927219-7>.

<sup>182</sup> *Id.*

<sup>183</sup> Warren Bailey Miller et al., *Pregnancy Wantedness and Child Attachment Security: Is There A Relationship?*, 12 MATERNAL & CHILD HEALTH J. 478–87 (2008), <https://link.springer.com/article/10.1007%2Fs10995-007-0254-8>.

<sup>184</sup> *Abortion Hurts Siblings*, Right to Life Michiana (2018), <https://www.prolifemichiana.org/ah-siblings>; Philip G. Ney, *A Consideration of Abortion Survivors*, 13 CHILD PSYCH. & HUM. DEVEL. (3) 168–79 (1983), <https://link.springer.com/content/pdf/10.1007/BF00705857.pdf>; Judy Dunn & Carol Kendrick, *The Arrival of a Sibling: Changes in Patterns of Interaction Between Mother and First-Born Child*,

Not only does experiencing the death of a sibling, let alone the abortion of a sibling, have substantial detrimental effects on the surviving sibling,<sup>185</sup> but such event can also impact how the mother interacts with her current children. A sibling of an aborted child may feel a heavy psychological burden in that they need to live up to their parents' expectations; and if that sibling disappoints their parents, the sibling may act in frustration because they as the "wanted" child have let the parents down. This can interfere with the mother's ability to bond with children born subsequent to aborted children, putting these siblings at a greater risk of abuse.<sup>186</sup>

Multiple studies provide evidence that growing rates of abortion may lead to growing rates of abuse.<sup>187</sup> "People who have had an abortion are more likely to abuse their children and people who have been abused are more likely to have an abortion."<sup>188</sup> A 2005 study by Priscilla Coleman showed that women who obtained abortions were 144 percent more likely to abuse their own children when compared

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21 J. CHILD PSYCHO. PSYCHIA. (2) 119–32 (1980); Jesse O. Cavenar et al., *Child's Reaction to Mother's Abortion: Case Report*, 144 MILIT. MED. 412–13 (1979); Anita H. Weiner & Eugene C. Weiner, *The Aborted Sibling Factor: A Case Study*, 12 J. CLINIC. SOCIAL WORK (3) 209–15 (1984).

<sup>185</sup> Jason Fletcher et al., *A Sibling Death in the Family: Common and Consequential*, 50 DEMO. (3) 803–26 (June 2013); Geraldine Crehan, *The Surviving Sibling: The Effects of Sibling Death in Childhood*, 18 PSYCHOAN. PSYCHOTHER. (2) 202–19 (2004).

<sup>186</sup> Leslie Rabkin & Robert Krell, *The Effects of Sibling Death on the Surviving Child, A Family Perspective*, 18 FAM. PROC. 471–77 (1979).

<sup>187</sup> Philip G. Ney, *Relationship between Abortion and Child Abuse*, 24 CAN. J. PSYCHIATRY (7) 610–20 (1979).

<sup>188</sup> PHILIP G. NEY & ANNA PEETERS, *HOPE ALIVE: POST ABORTION AND ABUSE TREATMENT. A TRAINING MANUAL FOR THERAPISTS* 28 (1993); Julia R. Steinberg & Jeanne M Tschann, *Childhood Adversities and Subsequent Risk of One or Multiple Abortions*, 81 SOC. SCI. & MED. (2012); Maria E. Bleil et al., *Adverse Childhood Experiences and Repeat Induced Abortion*, J. AM. OBSTET. GYNEC. (November 12, 2010), [https://www.ajog.org/article/S0002-9378\(10\)01176-2/fulltext](https://www.ajog.org/article/S0002-9378(10)01176-2/fulltext).

with women who had no history of induced abortion.<sup>189</sup> “Abortion results in more post-partum depression and therefore less bonding, less touching and less breast feeding.”<sup>190</sup>

Not only is the relationship between the mother and her children affected after an abortion, but the relationship between the mother and father of the child is also greatly affected. After an abortion, the rate of marital breakups and relationship dissolution is anywhere from 40 to 75 percent.<sup>191</sup> One survey study found that 50 percent of the participants’ relationships with their partners were significantly altered by the abortion.<sup>192</sup> According to a 1975 study based on post-abortion discussions with clinic patients, 70 percent of unmarried relationships dissolved within a month of the abortion.<sup>193</sup>

The father of the child is also affected on a deep emotional level because of his emotional involvement in creating the unborn child. There is a great deal of evidence to show that abortion often negatively affects the father’s mental health and that a significant proportion of fathers regret their partner’s abortion afterwards. Fathers may often suffer from persecutory or depressive anxiety as well as behavioral disorders following the abortion.<sup>194</sup>

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<sup>189</sup> Priscilla K. Coleman et al., *Associations Between Voluntary and Involuntary Forms of Perinatal Loss and Child Maltreatment Among Low-income Mothers*, 94 ACTA PAEDIATR. (10) 1476–83 (October 2005).

<sup>190</sup> Ney & Peeters, *supra* note 188.

<sup>191</sup> DEVEBER INSTITUTE, WOMEN’S HEALTH AFTER ABORTION: THE MEDICAL AND PSYCHOLOGICAL EVIDENCE 217 (2017), <https://www.deveber.org/wp-content/uploads/2017/09/Chap15.pdf>; James M. Robbins, *Out-of-Wedlock Abortion and Delivery: The Importance of the Male Partner*, 31 SOC. PROBS. (3) 334 (1983), Research has shown that since women have gained easier access to abortion in North America, between one-half and two-thirds of women who have received abortions during an out-of-wedlock pregnancy ended their relationships within one year.

<sup>192</sup> *Elective Abortion: Medical Risks Incurred by Women*, GÉNÉTIQUE (October 4, 2017), <https://www.genethique.org/elective-abortion-medical-risks-incurred-by-women/?lang=en>.

<sup>193</sup> Arthur B. Shostak, *Abortion as Fatherhood Lost: Problems and Reforms*, 28 FAM. COORD. (4) 569–74 (1979).

<sup>194</sup> Catherine T. Coyle & Vincent M. Rue, *Men’s Experience of Elective Abortion: A Mixed Methods Study of Loss*, J. PASTOR. COUNS. (45) 4–31 (2010), [https://www.menandabortion.net/wp-content/uploads/2015/07/NOV\\_Coyle\\_Rue\\_2010.pdf](https://www.menandabortion.net/wp-content/uploads/2015/07/NOV_Coyle_Rue_2010.pdf); Michael Y. Simon, *Male Partners and the Psychological Sequelae*

In March of 1989, the *Los Angeles Times* published a poll which found that two-thirds of men surveyed, who were the fathers of aborted children, felt guilt after the abortion. One-third of those fathers felt regret.<sup>195</sup> One study showed that men overwhelmingly felt they were the cause of the unwanted pregnancy more than women. This may indicate the men's sense of responsibility for their partners by having a higher internal locus of control, which creates guilt in them for causing the abortion.<sup>196</sup>

This section emphasizes that the emotional bond between an unborn child and its mother starts inside the womb and that any discord in that relationship can have grave consequences in the development of the child, both before and after birth. This section further shows that siblings of aborted babies can be seriously psychologically impacted, such that it can interfere with their relationship with their mother and can potentially lead to abuse in the household. Lastly, a high percentage of marriages and relationships fail after an abortion takes place during the relationship since the father is also often affected on a great emotional level.

To summarize the delimitation of the problem of whether mothers should have the right to choose an abortion or whether unborn children have a right to life, we have examined the process of human development from conception to birth and the mother's experience in pregnancy throughout that process. We have also examined the various types of abortion procedures that end the life of the child at not only early stages, but vital stages in its human development. Further, we examined the many reasons mothers seek abortions and that alt-

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*of Abortion: A Psychodynamic-Relational View*, Effects of Abortion on Men (1997), [https://www.afterabortion.com/mens\\_react.html](https://www.afterabortion.com/mens_react.html). "Lees' (1975) study of relational difficulties pre- and post-abortion in which he found stress levels in male partners (as compared to other less involved people in the woman's life) significantly higher pre- and post-abortion."; Paola Benvenuti et al., *Abortion and the Man. Psychological and Psychopathological Manifestations in the Face of Lost Fatherhood*, 104 RIV. PATOL. NERV. MENT. (6) 255-68 (December 1983).

<sup>195</sup> George Skelton, *Many in Survey Who Had Abortion Cite Guilt Feelings*, L.A. TIMES (March 19, 1989).

<sup>196</sup> Simon, *supra* note 194.

though some mothers maintain that they suffered no negative repercussions afterwards, many face serious devastating consequences physically, mentally, and emotionally after receiving an abortion. Lastly, we examined that emotional attachment with a mother and her unborn child, which begins early in the womb, often determines the success of that child's human development and later well-being; that the siblings of aborted children can suffer grave psychological harm, experience a rift in their relationship with their mother, and potentially be subject to abuse; and that a large percentage of marriages and relationships fail after an abortion takes place during the relationship since the father of the aborted child can also suffer great emotional anguish.

## *II. Conflicting Claims*

From the ancient times to the contemporary world, issues regarding abortion have always been intimately connected to the values, organization, and structure of societies,<sup>197</sup> being that they are riddled with legal, moral, and ideological concerns. Abortion has been at the center of debate in the political sphere, in government, within many fundamental institutions, religious groups, as well as amongst citizens and families – specifically the mother, her unborn child, the father, and other members of the family unit.<sup>198</sup>

Regarding our main issue which is whether mothers should have a right to an abortion or whether unborn children have a right to life, in principle, this section will explore the conflicting viewpoints of each claimant or set of claimants involved: the unborn child, the mother, the father and other family members, various religious institutions, schools of philosophy, and activist organizations. Miscellaneous claims regarding the effect of abortion will be discussed as well.

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<sup>197</sup> Rochelle N. Shain, *A Cross-Cultural History of Abortion*, CLIN. OBSTET. GYNAECOL. (March 13, 1986), "Abortion is a universal phenomenon, occurring throughout recorded history and at all levels of societal organization."

<sup>198</sup> NATHAN STORMER, *SIGN OF PATHOLOGY: U.S. MEDICAL RHETORIC ON ABORTION, 1800S–1960S* (2015), <https://www.psupress.org/books/titles/978-0-271-06555-7.html>.

*A. The Unborn Child*

The main issue surrounding the topic of abortion is whether the woman's right to terminate her pregnancy supersedes any right to life the unborn child may have.

The claim of the unborn would be to oppose abortion at any stage of its development because the child in the womb has the fundamental inclination of all living things to preserve itself from destruction. This can be seen in the way it responds to its nourishment both physically and emotionally through touch and sound,<sup>199</sup> the fact that it can sense pain as early as the first trimester<sup>200</sup> and would not be inclined to experience pain through an abortion,<sup>201</sup> and its desire to maintain the emotional relationship of trust it began with its mother while in the womb.<sup>202</sup> As a member of the human race, it claims its right to life no less than everyone else's right to life.<sup>203</sup>

The question often posed is what if a child was conceived as a result of incest or rape? Would those circumstances justify preventing the child from coming into the world? Attorney Shauna Prewitt speaks eloquently on behalf of the child:

The mother is the victim. The father is the perpetrator. The unborn child is an innocent bystander whose life was created through an illegal act. An unborn child's life shouldn't be taken because his or her father is a criminal. The only person who deserves punishment in this situation is the perpetrator, not an innocent person.

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<sup>199</sup> American Academy of Family Physicians, *supra* note 60.

<sup>200</sup> See *supra* notes 25, 27, 29, 31.

<sup>201</sup> The Silent Scream (1984), YOUTUBE (July 26, 2015), 15:08 – 19:52, <https://www.youtube.com/watch?v=dEZGzvoASW4>, Dr. Bernard Nathanson, former abortion provider and co-founder of NARAL, narrates a visual ultrasound of an unborn child in the womb evading abortion instruments while its mother is undergoing an abortion procedure.

<sup>202</sup> See *supra* notes 50-51, 53-55.

<sup>203</sup> Right to Life of Michigan, *supra* note 148, "Why does an unborn child have value? Because they are a member of the human race. All human beings have an inalienable right to life."

Abortion sentences an unborn child to a punishment worse than the rapist—the person responsible for the crime.<sup>204</sup>

The next question posed is what if the child is born with defects or has a slim chance at being a healthy baby once it is born? Would those circumstances justify preventing that child from being born?

Firstly, there are several types of birth defects<sup>205</sup> that exist. Birth defects can be mild with only one minor issue or they can be very severe and complicate more than one organ or part of the body. Some can cause lifelong physical and mental disabilities, whereas others can be fatal or life-threatening, even at a young age. Some birth defects are incurable, usually those that cause learning or thinking disabilities. However, many birth defects are treatable with surgery, such as a cleft lip or cleft palate, and certain heart defects.<sup>206</sup>

In the case of babies born with Down Syndrome,<sup>207</sup> which usually involves lifelong physical and mental impairment, a major study in 2011 was published in the *American Journal of Medical Genetics* regarding the attitudes of people with Down Syndrome and their families. When surveying those individuals with Down Syndrome, 99% claimed to be happy with their lives, 97% of those with Down Syndrome liked who they are, 96% liked the way they look, and 86% could easily make friends.<sup>208</sup>

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<sup>204</sup> Right to Life of Michigan, *supra* note 148.

<sup>205</sup> *Birth Defects in Children*, Stanford Children's Health (2020), <https://www.stanfordchildrens.org/en/topic/default?id=overview-of-birth-defects-90-P02113>, “A birth defect (congenital anomaly) is a health problem or abnormal physical change that is present when a baby is born.”

<sup>206</sup> *Id.*

<sup>207</sup> See *supra* note 130.

<sup>208</sup> Brian Clowes, *Shouldn't Abortions be Allowed for Serious or Fatal Birth Defects?*, HUMAN LIFE INT'L (May 22, 2017), <https://www.hli.org/resources/abortion-serious-fatal-birth-defects/>; Brian G. Skotko et al., *Having a Son or Daughter with Down Syndrome: Perspectives from Mothers and Fathers*, AM. J. MED. GENET. [A] 2,335–2,347 (2011).



One individual who survived after a contemplated abortion maintains that mothers should have the right to choose abortion. Understanding that his life had “hung between the emotions of a young, scared pregnant girl and the whims of her parents” who feared embarrassment due to her out-of-wedlock pregnancy, then writer and medical student, Jonathan M. Berkowitz, felt like “a man who had just beaten a death sentence.” He was thankful for the life he was given, but despite contemplating his own non-existence and reflecting on the situation, it has strengthened his views that a woman should have the right to have an abortion.<sup>209</sup>

He explains that his mother “‘resented the fact that [she] was forced to carry a child [she] did not want’, a child that ‘invaded [her] body’” during a time when abortion was illegal in 1961. Berkowitz admits that his biological parents were irresponsible during their youth and made a mistake as a result. He also claims he was fortunate enough to have been adopted and brought up in a decent household, as he now is happily married with a successful career. However, after learning of his 17-year old mother’s fear and confusion regarding the difficult circumstance she faced, along with the family pressures to receive an abortion, and the fact that no doctors were readily available to legally procure her abortion, he believes his mother should have been given the choice to abort him.<sup>210</sup>

### *B. The Mother’s Claim*

As mentioned previously, mothers undergo abortion procedures for many diverse and interrelated reasons. Some of the common claims for a woman’s right to an abortion include:<sup>211</sup> the mother cannot afford the child at the time they become pregnant, the child would

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<sup>209</sup> Jonathan M. Berkowitz, *How I Was Almost Aborted: Reflections on a Prenatal Brush With Death*, 17 J. MED. ETHICS (3) 136–37 (1991), <https://jme.bmj.com/content/medethics/17/3/136.full.pdf>; Jonathan M. Berkowitz, *What Right to Life?*, 2 RES. J. PHIL. SOC. SCI. 71–81 (1987).

<sup>210</sup> *Id.*

<sup>211</sup> Finer et al., *supra* note 124; Torres and Forrest, *supra* note 126; Biggs et al., *supra* note 128.

interfere with her education or career, relationship difficulties exist with her partner, or the mother's and/or baby's health is in jeopardy. In a very small percentage of cases,<sup>212</sup> women also claim they should have an abortion because the pregnancy occurred from incest,<sup>213</sup> or the pregnancy resulted from a rape.<sup>214</sup>

The basic premise many women ascribe to is the concept of personal bodily autonomy,<sup>215</sup> sometimes recognized by the modern phrase, "my body, my choice,"<sup>216</sup> which originally was used to promote women's freedom from sexual abuse. A common claim from the mother's perspective based on her personal bodily autonomy is that the pregnancy was unplanned and unintended, and she never wanted

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<sup>212</sup> See *supra* note 133.

<sup>213</sup> THE MERRIAM-WEBSTER DICTIONARY, *supra* note 132.

<sup>214</sup> The United States Department of Justice Archives, *supra* note 131; see *supra* note 133.

<sup>215</sup> *Bodily Autonomy*, SEXINFO ONLINE (last accessed December 4, 2020), <https://sexinfoonline.com/bodily-autonomy/>; Bodily autonomy involves "the right to self-governance over one's own body without external influence or coercion." It specifically relates to affirmative consent, which requires knowingly and voluntary participation in any sexual encounter. Bodily autonomy also applies to every individual's right to choose how to plan a family specifically with regard to privacy, abortion, and medical treatment. See also Joyce Outshoorn et al., *Women's Movements and Bodily Autonomy: Making the Case for Bodily Citizenship*, in EUROPEAN WOMEN'S MOVEMENTS AND BODY POLITICS. THE STRUGGLE FOR AUTONOMY 153 (2015).

<sup>216</sup> Bina Shah, *Mera jism meri marzi*, THE FEMINISTANI (November 29, 2019), <https://thefeministani.wordpress.com/2019/11/29/mera-jism-meri-marzi/>, *Mera Jism Meri Marzi* (Urdu: میری جسم میرا; Hindi: मेरा जिस्म मेरी मर्ज़ी; English: My body, my choice) is a slogan used by feminists in Pakistan and India to promote women rights.; Umer Ali, *Women's Day: Pakistani Women Demand Bodily Rights, Gender Equality*, DW (August 3, 2020), <https://www.dw.com/en/womens-day-pakistani-women-demand-bodily-rights-gender-equality/a-52685628>, The slogan refers to actions between people that require consent; specifically, that women should not experience their bodies getting groped, harassed, violated, or abused.; Suzannah Weiss, *5 Things That Are #MyBodyMyChoice*, BUSTLE (September 25, 2015), <https://www.bustle.com/articles/113094-5-things-that-are-mybodymychoice-because-respecting-them-is-essential-for-creating-a-culture-of-consent>.: In the U.S. in 2015, "my body, my choice," was used as a hashtag, to support Planned Parenthood, which was in jeopardy of losing government funding.

the child to begin with, so she has the right to terminate it.<sup>217</sup> The mother may claim that the fetus inside the womb is not a person with rights because the fetus is not a fully formed human being since it does not have its vital organs yet – a functioning brain, a beating heart, or active lungs. She may further claim that inside of her womb is nothing more than a clump of cells that are not living tissue.<sup>218</sup>

Some women on the other hand feel that their right to choose includes their right to choose not to have an abortion, even in circumstances where the child was conceived as a result of incest or rape.

Attorney Shawna Prewitt is an advocate in promoting custody laws that protect women who give birth following rape. She herself is a “rape survivor” whose daughter was conceived as a result. She points out how many politicians claim that women who are raped and who choose to give birth would be reliving the trauma of the rape throughout their pregnancy. She expresses her opinion in response to the politician’s views: “They’ll be forced to give birth to a rapist’s child, an animal’s child, a monster’s child. That was my child, right? Not my rapist’s child.”<sup>219</sup> In a recent study regarding abortions after rape, 50% of women who were raped had abortions and the other 50% chose to give birth. Of those who gave birth, 32% kept their children, 6% put their child up for adoption, and 12% had unfortunate miscarriages.<sup>220</sup>

In other instances where a child is diagnosed with a birth defect or disability, some mothers also claim their right to choose not to abort their child. In the 2011 study from the *American Journal of Medical Genetics* regarding the attitudes of people with Down Syndrome (DS) and their families, it revealed that, “99% of parents loved their DS son

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<sup>217</sup> Joseph E. Potter et al., *Challenging Unintended Pregnancy as an Indicator of Reproductive Autonomy*, 100 *CONTRACEPTION* (1) 1–4 (2019), [https://www.contraceptionjournal.org/article/S0010-7824\(19\)30039-3/fulltext](https://www.contraceptionjournal.org/article/S0010-7824(19)30039-3/fulltext).

<sup>218</sup> John Stonestreet, *End of ‘Clump of Cells’ Argument: Autonomous Life in Womb Proves Personhood Starts at Conception*, *CNS NEWS* (February 9, 2017), <https://www.cnsnews.com/commentary/john-stonestreet/end-clump-cells-argument-autonomous-life-womb-proves-personhood-starts>.

<sup>219</sup> Right to Life of Michigan, *supra* note 148.

<sup>220</sup> Melisa M. Holmes et al., *Rape-related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 *AM. J. OBSTET. GYNECOL.* (2) 320–25 (1996).

or daughter, 97% were proud of them, and 79% felt their outlook on life was more positive because of them. Only 5% were embarrassed by them and a mere 4% regretted having them.”<sup>221</sup>

### *C. The Father's Claim*

The individual who may be found in a vastly different, yet also difficult position is the father of the unborn child.<sup>222</sup> The father may or may not have a significant role to play if he provides for the financial stability of the home, which is often a strong factor in deciding whether an abortion will take place.<sup>223</sup> The father obviously played a role in creating the unborn child inside the mother, whether it was planned or unplanned, therefore his claim has merit.

In the case of a planned pregnancy where both partners agree to procreate, the father and mother each voluntarily participated in the conception and equally contributed to the product of that conception, the child. In this scenario, it seems natural that the father would want to share in the decision concerning what happens with that child considering his acts are part of the reason the mother is pregnant to begin with.<sup>224</sup> As mentioned previously, this claimant has been found to suffer deep emotional distress as a result of the abortion,<sup>225</sup> in the cases where the father wants to keep the child and the mother does not. Studies also show that a great number of relationships dissolve post-abortion.<sup>226</sup>

Some fathers may also claim that the mother should not have the child, in the event she wishes to keep it, because of the financial and emotional burden it will place on the father and the household in

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<sup>221</sup> See *supra* note 208.

<sup>222</sup> See *supra* notes 194-196.

<sup>223</sup> See *supra* notes 124-128.

<sup>224</sup> See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the Supreme Court struck down a spousal consent requirement for abortion because gathering the husband's consent was deemed to have placed an undue burden on the mother to receive an abortion.

<sup>225</sup> See *supra* notes 194-196.

<sup>226</sup> See *supra* notes 191-193.

raising the child.<sup>227</sup> Like the mother, he may feel that he is not financially fit to raise the child, the child would interfere with his work or education, or the pregnancy was unexpected, and he simply does not want to have the child.<sup>228</sup>

#### *D. Religious Perspectives*

A fundamental Christian moral view regarding this issue is that God made the world, his creation is good, and human beings are part of that creation, including their reproductive system. To defy that or try and change that would be going against God's design by interfering with the natural and good order of things. Under this reasoning, abortion is wrong.<sup>229</sup> More specifically, most evangelicals of the Christian community do not support abortion legalization under any circumstances<sup>230</sup> and adhere to Biblical principles from Scripture to justify their viewpoint that human life is sacred at all stages.<sup>231</sup>

In Psalm 139:13-14, David says to God, "For You formed my inward parts; You wove me in my mother's womb. I will give thanks to You, for I am fearfully and wonderfully made."<sup>232</sup> In Jeremiah 1:5, God told Jeremiah, "Before I formed you in the womb I knew you,

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<sup>227</sup> Melanie G. McCulley, *The Male Abortion: The Putative Father's Right to Terminate His Interests in and Obligations to the Unborn Child*, 7 J. L. & POL'Y (1998); *Rivera v. Minnich*, 483 U.S. 574, 584 (1987).

<sup>228</sup> See, e.g., McCulley *supra* note 227; *D.S. v. D.A. (In re R.A.S.)*, 826 S.W.2d 397, 398 (Mo. Ct. App. 1992).

<sup>229</sup> Jonathan Kelley et al., *Moral Reasoning and Political Conflict: The Abortion Controversy*, 44 BRIT. J. SOC. 589, 592 (1993); Alan Clarke, *Moral Protest, Status Defence, and the Anti-Abortion Campaign*, 38 BRIT. J. SOC. 235-53 (1987); Donald Granberg & Beth W. Granberg, *Abortion Attitudes, 1965-1980: Trends and Determinants*, 12 FAM. PLANN. PERSP. 250-61 (1980); Stanley K. Henshaw & Greg Martire, *Abortion and the Public Opinion Polls*, 14 FAM. PLANN. PERSP. 57-63 (1982).

<sup>230</sup> Silvia Virginia Silva de Souza, *Arms Decree and the Evangelical Bloc*, 29 SUR - INT'L J. ON HUM. RTS. 97 (2019).

<sup>231</sup> Joseph J. Martins, *Abortion in America: A Jurisprudence of Contradiction*, Scholar's Viewpoint, LIBERTY J. (June 12, 2019), <https://www.liberty.edu/journal/article/abortion-in-america-a-jurisprudence-of-contradiction/>.

<sup>232</sup> *Psalm* 139:13-14 (New American Standard Bible).

And before you were born I consecrated you.”<sup>233</sup> This community strengthens their view with the premise that the embryo is a distinct living person at the time of conception, with rights and interests of its own, including the right to live and have a destiny; and that abortion is the murder of an innocent human being.<sup>234</sup>

The Roman Catholic Church also ascribes to the tenets of Jeremiah 1:5, that God forms children in the womb. The Catechism teaching on abortion refers to this verse by saying, “Human life must be respected and protected absolutely from the moment of conception. From the first moment of his existence, a human being must be recognized as having the rights of a person – among which is the inviolable right of every innocent being to life.”<sup>235</sup>

The Catechism further states, “Since the first century the Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable. Direct abortion, that is to say, abortion willed either as an end or a means, is gravely contrary to the moral law: You shall not kill the embryo by abortion and shall not cause the newborn to perish.”<sup>236</sup> Thomas Aquinas states, it is unlawful to kill the innocent because “we ought to love the nature which God has made,” and it is God who is Lord of both life and

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<sup>233</sup> *Jeremiah* 1:5 (New American Standard Bible).

<sup>234</sup> Jonathan Kelley et al., *supra* note 229.

<sup>235</sup> *Catechism of the Catholic Church*, 2270-2271, THE VATICAN, [http://www.vatican.va/archive/ENG0015/\\_P7Z.HTM](http://www.vatican.va/archive/ENG0015/_P7Z.HTM); *Respect for Unborn Human Life: The Church's Constant Teaching*, United States Conference of Catholic Bishops (2020), <https://www.usccb.org/issues-and-action/human-life-and-dignity/abortion/respect-for-unborn-human-life>; *Declaration on Procured Abortion*, Sacred Congregation for the Doctrine of the Faith (1974), [https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_19741118\\_declaration-abortion\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html); see JOHN R. CONNERY, *ABORTION: THE DEVELOPMENT OF THE ROMAN CATHOLIC PERSPECTIVE* (1977).

The position is summarized in a web entry on *Abortion*, at <https://www.usccb.org/prolife/abortion>:

God loves each human life from the instant of his or her conception and entrusts this gift to the protection of a mother and father. Abortion ends the life of a child and offends God. It also deeply wounds the women and men involved.

<sup>236</sup> *Id.*

death.<sup>237</sup> The Book of Job puts it well: “Naked I came from my mother’s womb, and naked I shall return there. The Lord gave and the Lord has taken away. Blessed be the name of the Lord.”<sup>238</sup>

The Orthodox church has similar views that “conception is a sacred gift of God; anyone who encroaches on this gift, anyone who destroys it is breaking God’s law.”<sup>239</sup> The Orthodox Church has always condemned abortion, confessing that “human life . . . is not given unconditionally by God, but is given to man under the condition that he will be responsible for preserving it. The testimony that God respects life above all else is contained in the words of the Gospel: ‘For God so loved the world, that he gave his only begotten Son, that whosoever believeth in him should not perish, but have everlasting life’ (John 3:16).”<sup>240</sup>

Other sects of Mainline Protestants have more liberal views on abortion legislation. According to the 2014 U.S. Religious Landscape Study based on telephone interviews with over 35,000 Americans from all 50 states, the following sects of Protestants felt that abortion should be legal in all or most cases:<sup>241</sup>

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<sup>237</sup> THOMAS AQUINAS, THE SUMMA THEOLOGICÆ OF ST. THOMAS AQUINAS. SECOND AND REVISED EDITION (1920) (last accessed December 24, 2020), <https://www.newadvent.org/summa/3064.htm>.

<sup>238</sup> *Job* 1:21 (New American Standard Bible).

<sup>239</sup> Fr. Victor Potapov, *The Orthodox View on Abortion*, The Russian Orthodox Cathedral of St. John the Baptist (last accessed December 5, 2020), <http://www.orthodoxchristian.info/pages/abortion2.htm>; Fr. John Garvey, *Orthodox Christians and Abortion*, Orthodox Church in America (last accessed December 5, 2020), <https://www.oca.org/parish-ministry/familylife/orthodox-christians-and-abortion>.

<sup>240</sup> *Id.*

<sup>241</sup> *Views About Abortion Among Mainline Protestants by Religious Denomination* (2014), Pew Research Center (2020), <https://www.pewforum.org/religious-landscape-study/compare/views-about-abortion/by/religious-denomination/among/religious-tradition/mainline-protestant/>; *About the Religious Landscape Study*, Pew Research Center (2020), <https://www.pewforum.org/about-the-religious-landscape-study/>; *Pew Research Center 2014 Religious Landscape Study (RLS-II) Main Survey of Nationally Representative Sample of Adults Final Questionnaire* (May 30, 2014), [https://www.pewforum.org/wp-content/uploads/sites/7/2015/11/201.11.03\\_rls\\_ii\\_questionnaire.pdf](https://www.pewforum.org/wp-content/uploads/sites/7/2015/11/201.11.03_rls_ii_questionnaire.pdf).



<i>Protestant Group</i>	<i>%</i>	<i>Sample Size:</i>
American Baptist Churches USA	47%	467
Anglican Church	56%	111
Episcopal Church	79%	494
Evangelical Lutheran Church in America (ECLA)	65%	641
Interdenominational	69%	139
Presbyterian Church (USA)	65%	428
United Church of Christ	72%	227
United Methodist Church	58%	1,637

Of these Protestant denominations whose members felt abortion should be legal in certain instances, some of these beliefs coincide with statements made by the official church sects themselves. For example, since 1967, the Episcopal Church has always opposed legislation that would “abridge or deny the right of individuals to reach informed decisions [about the termination of pregnancy] and to act upon them.”<sup>242</sup> They believe that “legislating abortions will not address the root of the problem” and that such laws must respect individual conscience and allow the individual to make informed decisions regarding the matter.<sup>243</sup> At the General Convention in 2018, The Episcopal Church called for women’s “reproductive health procedures to be treated as all other medical procedures” since they are an “integral part of a woman’s struggle to assert her dignity and worth as a human being.”<sup>244</sup>

Since 1970, the Presbyterian Church (U.S.A.), declared that, “the artificial or induced termination of a pregnancy is a matter of

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<sup>242</sup> *Summary of General Convention Resolutions on Abortion and Women's Reproductive Health*, The Episcopal Church (May 17, 2019), <https://episcopal-church.org/posts/ogr/summary-general-convention-resolutions-abortion-and-womens-reproductive-health>.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

careful ethical decision of the patient ... and therefore should not be restricted by law.”<sup>245</sup> In 2006, the Presbyterian Church (U.S.A.) maintained their position on abortion by stating in their 217th General Assembly, “When an individual woman faces the decision whether to terminate a pregnancy, the issue is intensely personal,” and she is “empowered by the spirit prayerfully to make significant moral choices, including the choice to continue or end a pregnancy.” They also note this decision “must be based on Scripture, faith and Christian ethics.”

It is evident that there is an array of conflicting views regarding abortion amongst religious institutions, particularly the Christian and Catholic communities.

#### *E. Philosophical Perspectives – The Potentiality Principle*

One popular philosophy that was pondered by Aristotle and has been given modern-day application is the “potentiality principle.” It has been argued to propose that embryos and fetuses should not be killed because they possess every trait and characteristic that they will have once they become a fully-developed person.<sup>246</sup> This principle reflects one author’s discussion regarding “abortion and the golden rule”: “If it would be wrong to kill an adult human being because he has a certain property, it is wrong to kill an organism (e.g., a fetus) which will come to have that property if it develops normally.”<sup>247</sup>

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<sup>245</sup> *Abortion/Reproductive Choice Issues*, Presbyterian Church (U.S.A.) (2020), <https://www.presbyterianmission.org/what-we-believe/social-issues/abortion-issues/>.

<sup>246</sup> Lynn M. Morgan, *The Potentiality Principle from Aristotle to Abortion*, 54 CURR. ANTHROP. [S7] (October 2013), <https://www.journals.uchicago.edu/doi/pdf/10.1086/670804>.

<sup>247</sup> Richard M. Hare, *Abortion and the Golden Rule*, 4 PHIL. & PUB. AFF. (3) 201–22 (1975), <https://eclass.uoa.gr/modules/document/file.php/PPP504/Hare%20R.%20M.%20C%20Abortion%20and%20the%20Golden%20Rule.pdf>.

Although Aristotle believed abortion should occur up until 40 days gestation or when the child becomes an “animate organism,”<sup>248</sup> as a world famous philosopher, his understanding was that “things could not exist without potentials, yet paradoxically potentials could only be realized by actuals.”<sup>249</sup> “What is the builder to the house, the [bronze] to the statue, the acorn to the oak, the block of stone to the threshold?”<sup>250</sup> He reasoned that the complete and perfect realization of a thing must be inherent in its nature. His science and metaphysics held to the premise that “all living things, including mindless plants, have a good or an end proper to their species toward which they naturally tend to develop from a formless or potential state.”<sup>251</sup>

Such line of thinking has been translated into Catholic moral philosophy, which argues that “‘all potential persons have a serious right to life’ and that because stem cells, embryos, and fetuses are potential or intrinsic persons, they should not be killed.”<sup>252</sup> They interpret potentiality in terms of humanness within the aspects of personhood that they value; in particular: sentience, consciousness, and rationality.<sup>253</sup> Such arguments relating to potentiality do not emphasize the soul but rather the moral status of the unborn. Put succinctly, potentiality is viewed as “a hidden force determined to manifest itself – something that with or without intervention has its future built into it.”<sup>254</sup>

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<sup>248</sup> Joanna G. Patsioti, *Aristotelian Perspectives on Social Ethics*, THEORETICAL ETHICS (last accessed December 5, 2020), <https://www.bu.edu/wcp/Papers/TEth/TEthPats.htm>; THOMAS A. MAPPES & JANE S. ZEMBATY, *SOCIAL ETHICS: MORALITY AND SOCIAL POLICY* (5th ed.) 3 (1997); Lambrini Kourkouta et al., *Views of Ancient People on Abortion*, 7 J. HEALTH SCI. (1) (2013), <https://www.hsj.gr/medicine/views-of-ancient-people-on-abortion.pdf>.

<sup>249</sup> Morgan, *supra* note 246.

<sup>250</sup> Morgan, *supra* note 246; TERENCE IRWIN, *ARISTOTLE’S FIRST PRINCIPLES* 78, 104, 225, 400 (1988), <http://www.cyjack.com/cognition/Aristotle%27s%20first%20principles.pdf>.

<sup>251</sup> Morgan, *supra* note 246; SARAH BROADIE, *ETHICS WITH ARISTOTLE* 49 (1993).

<sup>252</sup> Morgan, *supra* note 246; Phil Gosselin, *Can the Potentiality Argument Survive the Contraception Reduction?*, J. PHIL. RES. (25) 437 (2000).

<sup>253</sup> *Id.*

<sup>254</sup> Karen-Sue Taussig et al., *The Anthropology of Potentiality in Biomedicine: An Introduction to Supplement 7*, 54 CURR. ANTHROP. [S7] S3–S14 (2013), [https://www.journals.uchicago.edu/pb-assets/docs/journals/CA\\_S7\\_v54nS7\\_potentiality\\_supplement-1593017836633.pdf](https://www.journals.uchicago.edu/pb-assets/docs/journals/CA_S7_v54nS7_potentiality_supplement-1593017836633.pdf).

### F. *Philosophers Opposed to the Potentiality Principle*

Some philosophers did not agree with the “potentiality principle” and used other philosophical ideas to discredit its rationale. Early 1900’s philosopher Ayn Rand, developed “objectivism,” the ideology based on rational self-interest and reason; that things in existence can only be evidenced by things in nature.<sup>255</sup> She attacked the potentiality principle in order to defend abortion, by saying, “to equate a potential with an actual, is vicious; to advocate the sacrifice of the latter to the former, is unspeakable.”<sup>256</sup> Her view was that rights do not pertain to a potential, only to an actual being, and that the living take precedence over the unborn.<sup>257</sup> She believed that birth is an absolute fact, but before that moment, the child is not an independent, living organism, but rather part of the body of the mother. She believed the child only has rights “inherent in the nature of a human individual” at the time of birth.<sup>258</sup>

Philosopher Joel Feinberg also argues against the premise that potential persons should have any moral standing such as the right to life. Feinberg acknowledges that persons most definitely have moral

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<sup>255</sup> Craig Biddle, *What is Objectivism?*, THE OBJECTIVE STANDARD (February 5, 2014), <https://theobjectivestandard.com/what-is-objectivism/>: “Objectivism advocates the virtues of rational self-interest—virtues such as independent thinking, productiveness, justice, honesty, and self-responsibility. Culturally, Objectivism advocates scientific advancement, industrial progress, objective (as opposed to “progressive” or faith-based) education, romantic art—and, above all, reverence for the faculty that makes all such values possible: reason. As to the alleged existence of a “supernatural” being who creates and controls reality, no evidence or rational argument supports such a thing.” Objectivism holds that “[t]hings *in nature* can be evidence only for the existence of things *in nature* (as, for instance, the fossil record is evidence for evolution); they cannot be evidence for the existence of things “outside of nature” or ‘above nature’ or ‘beyond nature.’”

<sup>256</sup> Ayn Rand, *A Last Survey*, 4 AYN RAND LETTER (2) 383 (1975).

<sup>257</sup> Ben Bayer, *Ayn Rand’s Radical Case for Abortion Rights*, NEW IDEAL (September 9, 2019), <https://newideal.aynrand.org/ayn-rands-radical-views-on-abortion/>; Ayn Rand, *Of Living Death*, Ayn Rand Institute (2020), <https://courses.aynrand.org/works/of-living-death/>.

<sup>258</sup> *Id.*

standing but argues that potential persons do not.<sup>259</sup> “It is a logical error ... to deduce actual rights from merely potential (but not yet actual) qualification for those rights.”<sup>260</sup> He analogizes different constitutional rights to justify his reasoning. A three-year old is a potential adult but does not share the same rights of speech, religion, and autonomy as a thirty-year old adult would.<sup>261</sup> Using another basic example, while children, Jimmy Carter and Franklin Delano Roosevelt were both potential presidents but neither of them could assume command of the U.S. military until they were actually elected President.<sup>262</sup>

The other premise that a potential person exists at the moment of conception is challenged by stating that, at the beginning of human development, neither the sperm nor the egg can develop individually on their own, and thus are not potential persons without the process of fertilization.<sup>263</sup> Even more so, at fertilization, challengers pose that a fertilized egg is unable to develop singularly on its own, but requires intervention from the mother whose tissue must necessarily provide protection and nutrition to the developing embryo.<sup>264</sup> They find the potentiality principle to be irrational and continue to pose the question as to why potential persons should deserve moral standing to begin with.<sup>265</sup>

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<sup>259</sup> Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. (4) 689, 710 (1992), <https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1954&context=bclr>; Joel Feinberg, *Potentiality, Development, and Rights*, in JOEL FEINBERG, *THE PROBLEM OF ABORTION* 145–51 (1984).

<sup>260</sup> See Brownstein & Dau, *supra* note 259 at 711.

<sup>261</sup> Brownstein & Dau, *supra* note 259 at 711; Feinberg, *supra* note 259 at 147–48. See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976): The Court acknowledged that minors and adults are both protected by the Constitution and possess constitutional rights. However, based on *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944), The state has more power to control the conduct of children than it does to control the conduct of adults, since children do not have the full and legal discretion to make decisions for themselves.

<sup>262</sup> See Feinberg, *supra* note 259 at 147–48.

<sup>263</sup> Brownstein & Dau, *supra* note 259 at 704–05.

<sup>264</sup> *The Human Life Bill: Hearings on S.158 Before the Subcomm. on Separation of Powers* (1981), reprinted in *ABORTION, MED. AND LAW* 161, 169 app. 2 at 456–57. (John Douglas Butler & David F. Walbert eds., 1986).

<sup>265</sup> Brownstein & Dau, *supra* note 259 at 704–05.

### G. Right to Life Movement

The “right to life” or “pro-life”<sup>266</sup> movement includes secular and non-religious groups such as the National Right to Life Committee (NRLC). Their mission statement is to “protect and defend the most fundamental right of humankind, the right to life of every innocent human being from the beginning of life to natural death.”<sup>267</sup>

They base their ideals on America’s first document as a new nation, *The Declaration of Independence*, which states, “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”<sup>268</sup> The Founding Fathers emphasized the preeminence of the right to “Life” by citing it first among the unalienable rights the United States was established to secure.<sup>269</sup>

The NRLC aims to promote respect for the worth and dignity of every individual human being, born or unborn, including unborn children from their beginning; those newly born; persons with disabilities; older people; and other vulnerable people, especially those who cannot defend themselves. Their areas of concern include abortion, infanticide, euthanasia, assisted suicide, and the killing of unborn children for their stem cells.<sup>270</sup>

The NRLC works to achieve its mission through education, legislation and political action by providing research, educational materials, information and leadership training for effective right-to-life citizenship; as well as sponsoring legislation which will advance the protection of human life and supporting the election of public officials who defend life.<sup>271</sup>

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<sup>266</sup> *Pro-life*, THE MERRIAM-WEBSTER DICTIONARY (2020), <https://www.merriam-webster.com/dictionary/pro-life>, “Definition of pro-life: opposed to abortion.”

<sup>267</sup> *National Right to Life Mission Statement*, National Right to Life (last accessed December 5, 2020) <https://www.nrlc.org/about/mission/>.

<sup>268</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>269</sup> National Right to Life, *supra* note 267.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

The NRLC consists of a nation-wide network of 50 affiliated state groups, thousands of community chapters, hundreds of thousands of members and millions of individual supporters, since their inception in 1968 as the first nationwide right to life group.<sup>272</sup>

Another popular pro-life group is the Pro-Life Action League, founded by Joseph M. Scheidler in 1980 with the hopes to save unborn children from abortion in their own communities.<sup>273</sup> The Pro-Life Action League is one of the most recognized national leaders in dynamic pro-life activism. Some of their activism includes, witnessing outside of abortion clinics through prayer vigils and sidewalk counseling to abortion-bound women and couples regarding abortion alternatives, access to pregnancy resources, and protecting life inside the womb.<sup>274</sup>

Pro-Life Action League also raises awareness of abortion through marches and pickets, and coordinates events like the National Day of Remembrance for Aborted Children. They protest outside abortion facilities like Planned Parenthood and pro-abortion events and have also published testimonies of former abortion providers.<sup>275</sup>

#### *H. Pro-Choice Movement*

Those who identify as “pro-choice”<sup>276</sup> believe that everyone maintains “the right to decide when and whether to have children” and that women should have “the ability to choose abortion as an option for an unplanned pregnancy.”<sup>277</sup> Planned Parenthood, one of the most well-

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<sup>272</sup> *Id.*

<sup>273</sup> *About the Pro-Life Action League*, Pro-Life Action League (2020), <https://prolifeaction.org/about/>.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Pro-choice*, THE MERRIAM-WEBSTER DICTIONARY (2020), <https://www.merriam-webster.com/dictionary/pro-choice>, “Definition of pro-choice: favoring the legalization of abortion.”

<sup>277</sup> *Can You Explain What Pro-choice Means and Pro-life Means?*, PLANNED PARENTHOOD (October 16, 2019), [https://www.plannedparenthood.org/learn/teens/ask-experts/can-you-explain-what-pro-choice-means-and-pro-life-means-im-supposed-to-do-it-for-a-class-thanks#:~:text=When%20you%20say%](https://www.plannedparenthood.org/learn/teens/ask-experts/can-you-explain-what-pro-choice-means-and-pro-life-means-im-supposed-to-do-it-for-a-class-thanks#:~:text=When%20you%20say%20)



known providers, educators, and advocates for women's reproductive health rights also uses the phrase "pro-reproductive rights" to encompass a variety of beliefs while specifically focusing on abortion access.<sup>278</sup> Pro-choice individuals strongly support legislation that ensures women have access to all forms of reproductive health care, which includes abortion, and they want to strike down laws that create social or financial barriers for women to access abortion.<sup>279</sup> They fully support "access to birth control, sex education, care at Planned Parenthood health centers, and other forms of sexual and reproductive health care."<sup>280</sup>

Planned Parenthood is also well known for providing sex education programs, tools, and resources to help individuals make informed decisions regarding sexuality and relationships. Their programs are widespread in classrooms, communities, and online to over 1.2 million people each year.<sup>281</sup>

Planned Parenthood also advocates for policies that will provide all Americans access to sexual reproductive healthcare, education, and information by reaching out to families, religious institutions, Congress and even arguing cases in front of the U.S. Supreme Court.<sup>282</sup> With 12 million activists and supporters nationwide, Planned Parenthood has active members campaigning the advancement of protecting women's rights and healthcare in all 50 states.<sup>283</sup>

Other groups who belong to the "pro-choice" movement include the National Abortion and Reproductive Rights Action League (NARAL) Pro-Choice America. NARAL assembles its 2.5 million members to "fight for reproductive freedom for every person in every state." Each day, they organize and mobilize to protect that freedom

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20you're,often%20call%20themselves%20pro%2Dlife; *Who We Are*, PLANNED PARENTHOOD (2020), <https://www.plannedparenthood.org/about-us/who-we-are>.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

by fighting for access to abortion care, birth control, paid parental leave and protections from pregnancy discrimination.<sup>284</sup>

They believe abortion must remain legal and accessible and work to ensure that abortion access is not only protected but expanded for every American. Since 1969, their member-driven campaigns have propelled political and cultural change at every level, from the statehouse to the White House and they are known for rallying by the thousands on the steps of the Supreme Court in support of abortion access.<sup>285</sup>

Their goal is to make sure leaders at every level hear from their constituents, to educate citizens, lawmakers and other influencers about the impacts of anti-choice policies, work with their network of state affiliates to promote progressive, proactive policies that advance reproductive freedom, and to fight back against abortion restrictions.<sup>286</sup>

### *III. Past Trends in Decisions and Conditioning Factors*

The following section will explore the history of the problem as well as the factors that created it and how society responded to the problem, customarily and legally. We will lay out the ancient history of abortion and its practice leading up to the modern-day legislation in the United States, as well as the factors that produced our current legislation and pertinent case law.

#### *A. The Ancient History of Abortion*

Dating back to Ancient Hebrew times, sterility was seen as a divine curse.<sup>287</sup> It was a man's duty to have children in order to leave

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<sup>284</sup> *Who We Are*, NARAL Pro-Choice America (last accessed December 5, 2020), <https://www.prochoiceamerica.org/about>.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Kourkouta et al., *supra* note 248.

behind another worshiper of God to take his place.<sup>288</sup> In Ancient Greek times, the famous Oath of Hippocrates (460–380 B.C.), states: “I will not give to a woman an abortive remedy,”<sup>289</sup> which held to the purity and holiness of the “Pythagorean way of life.” The “Hippocratic Oath” was contested from a medical perspective however, and defying the Oath was not seen as medically unethical.<sup>290</sup>

Some ancient physicians did not accept abortion under any circumstances. They reasoned based on the Oath’s prohibition of abortion and in accordance with their obligation to preserve what is produced naturally.<sup>291</sup> Hippocrates believed the fetus was viable from the moment one could recognize its various organs. Galen (130–200 A.C.) also shared this view.<sup>292</sup>

The Pythagoreans saw the embryo as a living human being from its moment of conception, and an abortion was considered the destruction of a living being. The Pythagoreans rejected abortion without any conditions.<sup>293</sup> Most Athenian writers also considered abortion an offensive practice. The famous Athenian orator Lysias (5th century B.C.) questioned whether abortion should be seen as an abuse to the mother.<sup>294</sup>

The philosopher Plato (428–347 B.C.) supported feticide as an ideal state institution; and believed an embryo should be destroyed at any time he thinks a patient is too old to have children.<sup>295</sup> Plato also

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<sup>288</sup> Kourkouta et al., *supra* note 248.

<sup>289</sup> *Id.*; *The Hippocratic Oath and others*, McMaster University (2021), <https://hslmcmaster.libguides.com/c.php?g=306726&p=2044095>.

<sup>290</sup> Kourkouta et al., *supra* note 248; Despina Sapountzi-Krepia, *Inherited Historic Elements of Greek Nursing*, 41 NOSILEFTIKI (2) 129–37 (2001).

<sup>291</sup> Kourkouta et al., *supra* note 248; Aliko Dimitriadou, “Greek Nursing from the Ancient Times Until to the Second World War,” 4 ROSTRUM OF ASCLEPIUS (1) 16–24 (2005).

<sup>292</sup> Kourkouta et al., *supra* note 248.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*; *Greek and Roman Attitudes to Abortion*, The Word Internet Bible College (last accessed December 15, 2020), <http://internetbiblecollege.net/Lessons/Greek%20Roman%20&%20Jewish%20attitudes%20to%20abortion.pdf>.

believed that abortion should only be performed once the population of Athens exceeds 5040.<sup>296</sup>

Aristotle (384–322 B.C.) shared this view, believing abortion was the best method to limit the population to maintain what he considered a “well-ordered community.”<sup>297</sup> He believed abortion should take place before the fetus attains “animal life”<sup>298</sup> or experiences sensations;<sup>299</sup> any abortion after that point, he considered unholy.<sup>300</sup>

Many philosophers and scientists considered the fetus to be human once the soul (*psyche*) entered into it.<sup>301</sup> In old Roman law, any woman who had an abortion was exiled; and if she was paid to have an abortion, she was given the death sentence.<sup>302</sup> Cicero (106–43 B.C.) reported that a woman from Malta was given the death sentence after committing a drug-induced abortion.<sup>303</sup>

Emperors Septimious Sevirus and Antonius Caracallas (195–211 A.C.) punished abortion “not as a crime against life, but as an offense of deception of the husband.”<sup>304</sup> Soranus (2nd century B.C.), a great ancient gynecologist, deemed it necessary to consider the life of the mother before the life of the child, as did many other physicians at that time. Although he did not approve of abortion, he resorted to the procedure only to preserve beauty or conceal any adulterous behavior.<sup>305</sup>

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<sup>296</sup> Kourkouta et al., *supra* note 248.

<sup>297</sup> *Id.*; LUDWIG EDELSTEIN, ANCIENT MEDICINE 9–20 (1987); The Word Internet Bible College, *supra* note 295.

<sup>298</sup> *Animal*, SCIENCE DAILY (2020), <https://www.sciencedaily.com/terms/animal.htm>, “In general they are multicellular, capable of locomotion and responsive to their environment, and feed by consuming other organisms.”

<sup>299</sup> Aristotle, POLITICS (Book 7) 81, <http://www.perseus.tufts.edu/hopper/text?doc=Perseus:abo:tlg,0086,035:7>.

<sup>300</sup> Kourkouta et al., *supra* note 248; Edelstein, *supra* note 297.

<sup>301</sup> Kourkouta et al., *supra* note 248.

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*; Edelstein, *supra* note 297.

During the Middle Ages (400's–1400's A.D.),<sup>306</sup> Medieval common law afforded fetuses human rights by equating abortion with homicide. Any harm done to a fetus before “quickening,” the point at which it was believed the fetus acquired a soul, around the fourth month, was considered contraception; beyond that, any such harm was considered abortion, and thus a homicide.<sup>307</sup>

The medieval church was firmly opposed to any act that suppressed life, so medical treatises that discussed the subject began to use terminology that was ambiguous.<sup>308</sup> For example, Abortifacients, venomous concoctions of herbal remedies often mixed with rue and sage, were ingested with water to cure a “sickness which is in the womb”; the sickness referring to an unwanted fetus.<sup>309</sup> Such “cures” or even removing a dead fetus are ways that medical literature spread recipes for abortive remedies while hiding their true intent.<sup>310</sup>

By the Renaissance period (1300–1700 A.D.),<sup>311</sup> ecclesiastical authorities tried to stamp out illicit sexuality of various kinds. For them, abortions were problematic because they could hide sinful sexual relationships, such as those between priests and women in their spiritual care. In the 1570–80's, abortion was increasingly seen as an “atrocious and grave” crime regardless of whether the fetus was ensouled or not.<sup>312</sup>

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<sup>306</sup> *The Middle Ages – Introduction to the Middle Ages*, Read Works (last accessed December 17, 2020), [http://edmonds.wednet.edu/UserFiles/Servers/Server\\_313355/File/The%20Middle%20Ages%20Intro%20Reading%202016.pdf](http://edmonds.wednet.edu/UserFiles/Servers/Server_313355/File/The%20Middle%20Ages%20Intro%20Reading%202016.pdf).

<sup>307</sup> Sarah Butler, *Abortion Medieval Style? Assaults on Pregnant Women in Later Medieval England*, 40 WOMEN'S STUDIES (6) 778, 780 (September 2011), <https://hcommons.org/deposits/objects/hc:31334/datastreams/CONTENT/content>; JOHN M. RIDDLE, *EVE'S HERBS: A HISTORY OF CONTRACEPTION AND ABORTION IN THE WEST* 94–95 (1997).

<sup>308</sup> See Butler, *supra* note 307 at 781.

<sup>309</sup> Butler, *supra* note 307 at 781–82; Riddle, *supra* note 307 at 91; See CAROLE RAWCLIFFE, *MEDICINE & SOCIETY IN LATER MEDIEVAL ENGLAND* at 204 (1999).

<sup>310</sup> Butler, *supra* note 307 at 782.

<sup>311</sup> Benjamin Elisha Sawe, *What was the Renaissance Period?*, WORLD ATLAS (October 6, 2017), <https://www.worldatlas.com/what-was-the-renaissance-period.html>.

<sup>312</sup> Livia Gershon, *What A 16<sup>th</sup>-Century Abortion Ban Revealed*, JSTOR DAILY (February 13, 2018), <https://daily.jstor.org/what-a-16th-century-abortion-ban-revealed/>.

In 1588, Pope Sixtus V issued a public decree, which also became criminal law, classifying abortion as homicide, regardless of the fetus' stage in development. Violators were excommunicated from the church and subject to worldly punishment.<sup>313</sup>

### *B. American History of Abortion Jurisprudence*

From 1776 until the mid-1800's, abortion was viewed as socially unacceptable in America.<sup>314</sup> Up until 1821, it was illegal unless it took place before "quickening."<sup>315</sup> Quickening is referred to as the point where a pregnant mother can feel the fetus moving in her womb.<sup>316</sup> Any abortion performed after quickening took place was considered a criminal misdemeanor.<sup>317</sup> Since there were no reliable tests at that time to reveal a woman's pregnancy, quickening became the standard used to determine whether a woman had become pregnant because it could confirm the pregnancy with absolute certainty.<sup>318</sup>

By the 1860's, a number of states passed anti-abortion laws.<sup>319</sup> Shortly thereafter, stronger anti-abortion laws were passed and were

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<sup>313</sup> John Christopoulos, *Abortion and the Confessional in Counter-Reformation Italy*, 65 RENAISS. QUART. (2) 443–84 (2012).

<sup>314</sup> Zoila Acevedo, *Abortion in Early America*, 4 WOMEN & HEALTH (2) 159–67 (1979).

<sup>315</sup> Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028–34 (2011); Ranana Dine, *Scarlet Letters: Getting the History of Abortion and Contraception Right*, CENTER FOR AMERICAN PROGRESS (August 8, 2013), <https://www.americanprogress.org/issues/religion/news/2013/08/08/71893/scarlet-letters-getting-the-history-of-abortion-and-contraception-right/#:~:text=Official%20abortion%20laws%20did%20not,force%20would%20have%20stopped%20her>.

<sup>316</sup> Katherine Brind'Amour, *Quickening*, THE EMBRYO PROJECT ENCYCLOPEDIA (October 30, 2007), <https://embryo.asu.edu/pages/quickening>.

<sup>317</sup> *Abortion in American Law: The Nineteenth Century*, NET INDUSTRIES (2019), <https://law.jrank.org/pages/446/Abortion-Abortion-in-American-law-nineteenth-century.html>.

<sup>318</sup> LINDA K. KERBER ET AL., WOMEN'S AMERICA: REFOCUSING THE PAST 203 (2016); See JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978).

<sup>319</sup> Joshua J. Craddock, *Protecting Prenatal Persons: Does the Fourteenth Amendment Prohibit Abortion*, 40 HARV. J. L. & PUB. POL'Y 539, 552 (2017); John D.

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Gorby, *The "Right" to an Abortion, the Scope of Fourteenth Amendment Personhood, and the Supreme Court's Birth Requirement*, 4 S. ILL. U. L.J. 9, 15 (1979); *Roe v. Wade*, 410 U.S. 113, 174-75 (1972) (Rehnquist, J., dissenting) "By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion." The following jurisdictions had enacted abortion laws prior to the Fourteenth Amendment's adoption in 1868: 1. Alabama -- Ala. Acts, c. 6, § 2 (1840). 2. Arizona -- Howell Code, c. 10, § 45 (1865). 3. Arkansas -- Ark. Rev. Stat., c. 44, div. III, Art. II, § 6 (1838). 4. California -- Cal. Sess. Laws, c. 99, § 45, p. 233 (1849-1850). 5. Colorado (Terr.) -- Colo. Gen. Laws of Terr. of Colo., 1st Sess., § 42, pp. 296-297 (1861). 6. Connecticut -- Conn. Stat. Tit. 20, § 14, 16 (1821). By 1868, this statute had been replaced by another abortion law. Conn. Pub. Acts, c. 71, § 1, 2, p. 65 (1860). 7. Florida -- Fla. Acts 1st Sess., c. 1637, subs. 3, § 10, 11, subs. 8, §§ 9, 10, 11 (1868), as amended, now Fla. Stat. Ann. §§ 782.09, 782.10, 797.01, 797.02, 782.16 (1965). 8. Georgia -- Ga. Pen. Code, 4th Div., § 20 (1833). 9. Kingdom of Hawaii -- Hawaii Pen. Code, c. 12, §§ 1, 2, 3 (1850). 10. Idaho (Terr.) -- Idaho (Terr.) Laws, Crimes and Punishments §§ 33, 34, 42, pp. 441, 443 (1863). 11. Illinois -- Ill. Rev. Criminal Code §§ 40, 41, 46, pp. 130, 131 (1827). By 1868, this statute had been replaced by a subsequent enactment. Ill. Pub. Laws §§ 1, 2, 3, p. 89 (1867). 12. Indiana -- Ind. Rev. Stat. §§ 1, 3, p. 224 (1838). By 1868 this statute had been superseded by a subsequent enactment. Ind. Laws, c. LXXXI, § 2 (1859). 13. Iowa (Terr.) -- Iowa (Terr.) Stat. 1st Legis., 1st Sess., § 18, p. 145 (1838). By 1868, this statute had been superseded by a subsequent enactment. Iowa (Terr.) Rev. Stat., c. 49, §§ 10, 13 (1843). 14. Kansas (Terr.) -- Kan. (Terr.) Stat., c. 48, §§ 9, 10, 39 (1855). By 1868, this statute had been superseded by a subsequent enactment. Kan. (Terr.) Laws, c. 28, §§ 9, 10, 37 (1859). 15. Louisiana -- La. Rev. Stat., Crimes and Offenses § 24, p. 138 (1856). 16. Maine -- Me. Rev. Stat., c. 160, §§ 11, 12, 13, 14 (1840). 17. Maryland -- Md. Laws, c. 179, § 2, p. 315 (1868). 18. Massachusetts -- Mass. Acts & Resolves, c. 27 (1845). 19. Michigan -- Mich. Rev. Stat., c. 153, §§ 32, 33, 34, p. 662 (1846). 20. Minnesota (Terr.) -- Minn. (Terr.) Rev. Stat., c. 100, §§ 10, 11, p. 493 (1851). 21. Mississippi -- Miss. Code, c. 64, §§ 8, 9, p. 958 (1848). 22. Missouri -- Mo. Rev. Stat., Art. II, §§ 9, 10, 36, pp. 168, 172 (1835). 23. Montana (Terr.) -- Mont. (Terr.) Laws, Criminal Practice Acts § 41, p. 184 (1864). 24. Nevada (Terr.) -- Nev. (Terr.) Laws, c. 28, § 42, p. 63 (1861). 25. New Hampshire -- N. H. Laws, c. 743, § 1, p. 708 (1848). 26. New Jersey -- N. J. Laws, p. 266 (1849). 27. New York -- N. Y. Rev. Stat., pt. 4, c. 1, Tit. 2, §§ 8, 9, pp. 12-13 (1828). By 1868, this statute had been superseded. N. Y. Laws, c. 260, §§ 1, 2, 3, 4, 5, 6, pp. 285-286 (1845); N. Y. Laws, c. 22, § 1, p. 19 (1846). 28. Ohio -- Ohio Gen. Stat. §§ 111(1), 112(2), p. 252 (1841). 29. Oregon -- Ore. Gen. Laws, Crim. Code, c. 43, § 509, p. 528 (1845-1964). 30. Pennsylvania -- Pa. Laws No. 374 §§ 87, 88, 89 (1860). 31. Texas -- Tex. Gen. Stat. Dig., c. VII, Arts. 531-536, p. 524 (Oldham & White 1859). 32. Vermont -- Vt. Acts No. 33, § 1 (1846). By 1868, this statute had been amended. Vt. Acts No. 57, §§ 1, 3 (1867). 33. Virginia -- Va. Acts, Tit. II, c. 3, § 9, p. 96 (1848). 34. Washington (Terr.) -- Wash. (Terr.) Stats., c. II, §§ 37, 38, p. 81 (1854).



more vigorously enforced. As a result, many women began to utilize illegal underground abortion services.<sup>320</sup> By the 1870's, couples were determined to prevent conception and induce abortions. As these practices became more prevalent, "Comstock laws" were enacted, prohibiting the mailing of birth control information and products. Despite these laws, information on various methods used to induce abortions began to spread, such as<sup>321</sup> withdrawal,<sup>322</sup> douching,<sup>323</sup> the use of condoms,<sup>324</sup> spermicides,<sup>325</sup> and abortion-inducing drugs.<sup>326</sup> By 1880, every state in America introduced laws criminalizing abortion, but made narrow exceptions in order to preserve the life of the mother.

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35. West Virginia -- Va. Acts, Tit. II, c. 3, § 9, p. 96 (1848). 36. Wisconsin -- Wis. Rev. Stat., c. 133, §§ 10, 11 (1849). By 1868, this statute had been superseded. Wis. Rev. Stat., c. 164, §§ 10, 11; c. 169, ss 58, 59 (1858).

<sup>320</sup> Acevedo, *supra* note 314.

<sup>321</sup> See JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA (1994).

<sup>322</sup> *Withdrawal Method (Coitus Interruptus)*, Mayo Clinic (2019), [https://www.mayoclinic.org/tests-procedures/withdrawal-method/about/pac-20395283#:~:text=The%20withdrawal%20method%20of%20](https://www.mayoclinic.org/tests-procedures/withdrawal-method/about/pac-20395283#:~:text=The%20withdrawal%20method%20of%20,), "The withdrawal method of contraception (coitus interruptus) is the practice of withdrawing the penis from the vagina and away from a woman's external genitals before ejaculation to prevent pregnancy. The goal of the withdrawal method – also called "pulling out" – is to prevent sperm from entering the vagina."

<sup>323</sup> *Douching*, U.S. Department of Health and Human Services (April 1, 2019), <https://www.womenshealth.gov/a-z-topics/douching>. "The word 'douche' means to wash or soak. Douching is washing or cleaning out the inside of the vagina with water or other mixtures of fluids."

<sup>324</sup> *What Are Condoms and How Are They Used*, MEDICAL NEWS TODAY (2019), <https://www.medicalnewstoday.com/articles/152833#cautions>: "A condom creates a physical barrier that prevents the sperm from reaching the egg. The barrier makes sure fertilization and pregnancy do not occur. Condoms are mainly from very thin latex rubber or polyurethane, and they contain a lubricant and a spermicide that either destroys or damages the sperm."

<sup>325</sup> *Spermicide*, Mayo Clinic (2019), <https://www.mayoclinic.org/tests-procedures/spermicide/about/pac-20384550#:~:text=Advertisement&text=Spermi-cide%20isn't%20a%20very,protect%20against%20sexually%20transmitted%20in-fecti-> "Spermicide is a type of contraceptive that kills sperm or stops it from moving. You insert spermicide in the vagina before sex. The chemicals in the spermicide, such as nonoxynol-9, prevent sperm from entering the uterus."

<sup>326</sup> See *supra* notes 98-100.

Many doctors still performed abortions, however, despite them being illegal.<sup>327</sup>

During the 1930's and 1940's, advancements in obstetric and gynecological care made it difficult for physicians to find abortion necessary in order to save a woman's life, so many doctors demanded reform.<sup>328</sup> In 1959, the American Law Institute (ALI), a group of legal experts, argued that medicine should govern abortion practices and eventually adopted a model statute that would make abortion legal in cases of rape or incest, where the child would be born with abnormalities, or when there was a threat to the mother's life or health.<sup>329</sup>

Many forces soon moved for reform. Feminists as well as members of the population-control movement demanded a repeal of all abortion restrictions.<sup>330</sup> As liberal sex standards were becoming more widely accepted throughout the United States, less people believed that an unmarried pregnant woman should be forced to "pay" by giving birth and raising her child.<sup>331</sup>

The right for a mother to undergo an abortion in the United States was ultimately built on the framework of a series of cases.<sup>332</sup> In *Griswold v. Connecticut* (1965), Appellant Griswold, Executive Director of the Planned Parenthood League of Connecticut and Appellant Buxton, licensed physician and professor at Yale Medical School who served as the League's Medical Director, both examined a married couple and prescribed them medical advice on how best to prevent conception. Appellants were arrested for assisting the married couple

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<sup>327</sup> Mary Ziegler, *A Brief History of US Abortion Law, Before and After Roe v. Wade*, HISTORY EXTRA (June 21, 2019), <https://www.historyextra.com/period/20th-century/history-abortion-law-america-us-debate-what-roe-v-wade/>.

<sup>328</sup> *Id.*

<sup>329</sup> Greenhouse & Siegel, *supra* note 315, at 2087.

<sup>330</sup> Ziegler, *supra* note 327.

<sup>331</sup> Rolf Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 POPUL. STUD. (1) 53-67 (1974).

<sup>332</sup> David Masci, *A History of Key Abortion Rulings of the U.S. Supreme Court*, Pew Research Center (January 16, 2013), <https://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/>.

in violating a Connecticut state statute that prohibited the use of drugs that prevented conception.<sup>333</sup>

Appellants were found guilty as accessories and were fined \$100 each. The Connecticut accessory statute, in its application, violated the Fourteenth Amendment and was struck down as unconstitutional because it infringed upon the couples' private behaviors within their marital relationship.<sup>334</sup> Although such "privacy" is not explicitly mentioned in the Bill of Rights, Justice William O. Douglas wrote for the majority that the right was to be found in the "penumbras" and "emanations" of other constitutional protections.<sup>335</sup>

The court referenced other constitutional guarantees that are not explicitly mentioned in the Constitution but are still afforded protections. For example, the right of association in the First Amendment does not just afford an individual the right to attend a meeting, but the right to express one's opinion through membership in a group.<sup>336</sup>

The court mentions other zones of privacy, such as the Third Amendment's prohibition against quartering soldiers "in any house" in time of peace without the consent of the owner. "The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures' which implies a privacy right. The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'" In other words, individuals' rights are not limited to only those listed expressly in the Constitution.<sup>337</sup>

With respect to the Fourteenth Amendment, the Court in the 1923 decision of *Meyer v. State of Nebraska* had stated: "While this

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<sup>333</sup> *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

<sup>334</sup> *Id.* at 480, 499.

<sup>335</sup> *Id.* at 484, 487.

<sup>336</sup> *Id.* at 483.

<sup>337</sup> *Id.* at 484.

court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also (for example,) the right to marry, establish a home and bring up children.”<sup>338</sup> The Court had ruled that “the right ‘to marry, establish a home and bring up children’ was an essential part of the liberty guaranteed by the Fourteenth Amendment.”<sup>339</sup>

In sum, the Court in *Griswold* determined this case concerned a “relationship lying within the zone of privacy” that emanates from the Due Process clause of the Fourteenth Amendment. As seen in other cases, the state’s goal is to maintain privacy surrounding the marriage relationship. “Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.”<sup>340</sup> The law that forbade the use of contraceptives rather than regulating their manufacturing or sale, sought to have a destructive impact upon that private marriage relationship.<sup>341</sup>

The next monumental case that helped legalize abortion was the 1973 Supreme Court decision in *Roe v. Wade*.<sup>342</sup> Jane Roe (Norma McCorvey), an unmarried pregnant woman living in Dallas County, Texas, wished to terminate her pregnancy via abortion performed by a licensed physician. A set of Texas statutes criminalized abortions in all cases unless necessary to save the life of the mother. Roe claimed she was unable to get a “legal” abortion in Texas because her life did not appear to be endangered by her pregnancy; and that she could not afford traveling to another jurisdiction to receive a legal abortion under safer conditions. Roe claimed the Texas statutes were unconstitutionally vague and improperly invaded her right to choose an abortion.<sup>343</sup>

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<sup>338</sup> *Id.* at 488, referring to *Meyer v. State of Nebraska*, 262 U.S. 390 (1923).

<sup>339</sup> *Id.* at 495.

<sup>340</sup> *Id.* at 485–86.

<sup>341</sup> *Id.* at 485.

<sup>342</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>343</sup> *Id.* at 118–20.

As previously mentioned, the Constitution does not explicitly state any right of privacy, but the Court has recognized that certain zones of privacy exist under the Constitution. As previously mentioned, there are privacy rights in the First Amendment,<sup>344</sup> in the Fourth and Fifth Amendments,<sup>345</sup> in the “penumbras” of the Bill of Rights,<sup>346</sup> in rights reserved to the people by the Ninth Amendment,<sup>347</sup> and in the concept of liberty guaranteed in the first section of the Fourteenth Amendment.<sup>348</sup>

These cases demonstrate that “only personal rights that can be deemed ‘fundamental’ or implicit in the concept of ordered liberty ... are included in this guarantee of personal privacy.”<sup>349</sup> Prior case law makes clear that such rights can be extended to activities within a marriage,<sup>350</sup> procreation,<sup>351</sup> contraception,<sup>352</sup> family relationships,<sup>353</sup> as well as child rearing and education<sup>354</sup> as referred to by the Court.<sup>355</sup>

The Court in *Roe* ruled that the right of privacy, whether founded in the concept of personal liberty from the Fourteenth Amendment’s Due Process Clause, in personal marital, familial, and sexual privacy protected by the Bill of Rights or its “penumbras,” or the Ninth Amendment’s reservation of rights to the people, it can include a mother’s choice to terminate her pregnancy. The Court describes the detriment that the State would impose upon a pregnant woman if she were denied her choice to terminate a pregnancy altogether:

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<sup>344</sup> *Stanley v. Georgia*, 394 U.S. 557 (1969).

<sup>345</sup> *Terry v. Ohio*, 392 U.S. 1 (1968), *Katz v. United States*, 389 U.S. 347 (1967).

<sup>346</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>347</sup> *Id.*

<sup>348</sup> *Meyer v. State of Nebraska*, referred to in *Roe*, at 152.

<sup>349</sup> *Palko v. Connecticut*, 302 U.S. 319 (1937).

<sup>350</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>351</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>352</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>353</sup> *Prince v. Massachusetts*, 321 U.S. 158 (1944).

<sup>354</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>355</sup> *Roe*, *supra* note 342, at 152–53.

Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.<sup>356</sup>

The Court reiterates, “[w]here certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’<sup>357</sup> and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”<sup>358</sup>

The Court makes clear that the privacy right is by no means absolute but must be balanced against important state interests in regulation, such as to safeguard health, maintain medical standards, and protect potential life. At some point in pregnancy, such interests can become sufficiently compelling to uphold regulation of the factors that control the abortion decision.<sup>359</sup>

Appellee argued that the fetus is a “person” based on the language and meaning of the Fourteenth Amendment, while outlining the well-known facts of fetal development. He argued that life begins at conception and exists throughout pregnancy, and therefore, the State

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<sup>356</sup> *Id.* at 153.

<sup>357</sup> *Id.* at 155, referring to *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969), *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), and *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

<sup>358</sup> *Id.* referring to, inter alia, *Griswold*, *supra* note 333, at 485.

<sup>359</sup> *Id.* at 149–50.

has a compelling interest in protecting that life from the moment of conception and onward.<sup>360</sup>

The Court did not seek to resolve the question of when life begins, reasoning that they did not want to speculate on a subject upon which those trained in medicine, philosophy, and theology at the time were unable to develop a consensus.<sup>361</sup> The Court did note however, that if “personhood” is established, *Roe*’s case would collapse,<sup>362</sup> as the fetus’ right to life would then be warranted specifically by the Fourteenth Amendment. Although the Constitution does mention “person,” the Court did not find those definitions applicable to the unborn.<sup>363</sup>

Based on what the Court felt was consistent with the weight of each respective interest involved, the medical and legal history to date, the “lenity” of the common law, and the demands surrounding the issues of the then-present day, the Court ultimately held the Texas statutes to be unconstitutional as violative of the Due Process Clause of the Fourteenth Amendment, and thus afforded “Jane Roe” the right to receive an abortion. The Court also posed a trimester framework in its holding:

a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman’s attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.<sup>364</sup>

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<sup>360</sup> *Id.* at 150, 156–57.

<sup>361</sup> *Id.* at 159.

<sup>362</sup> *Id.* at 156–57.

<sup>363</sup> *Id.* at 157–59.

<sup>364</sup> *Id.* at 164–65.



*Roe* struck down many U.S. state and federal abortion laws. As a result, we still have an ongoing national debate in the United States related to the subject: specifically, whether it should be legal and to what extent; what methods the courts should use in their decision-making; and whether and how religious and moral views in politics should play a role in the law. *Roe* reformed U.S. politics and divided much of the United States into pro-life<sup>365</sup> and pro-choice<sup>366</sup> camps, while building grassroots movements on both sides that still stand strong today.<sup>367</sup>

Decided on the same day as *Roe* was another famous case from 1973, *Doe v. Bolton*.<sup>368</sup> The opinions of both cases coincide with one another and are to be read together.<sup>369</sup> In *Doe*, a 22 year-old Georgia citizen was married and nine weeks pregnant. She sought an abortion but was denied because she did not qualify pursuant to a Georgia statute. The statute only permitted women who had been raped, whose lives were in danger from the pregnancy, or who were carrying fetuses likely to be seriously, permanently malformed to receive abortions.<sup>370</sup> The law also required women seeking abortions to get approval for the procedure from their personal physician, two consulting physicians, and a committee at the admitting hospital.<sup>371</sup>

The District Court initially held that the procedural conditions in the Georgia statute required before an abortion could be sought, improperly infringed upon Doe's rights of privacy, which emanate from the Due Process Clause of the Fourteenth Amendment as articulated in *Griswold v. Connecticut* (1965), and of her personal liberty, both of which were broad enough to include her choice to terminate her pregnancy.<sup>372</sup>

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<sup>365</sup> THE MERRIAM-WEBSTER DICTIONARY, *supra* note 266.

<sup>366</sup> THE MERRIAM-WEBSTER DICTIONARY, *supra* note 276.

<sup>367</sup> See LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY (2005).

<sup>368</sup> *Doe v. Bolton*, 410 U.S. 179 (1973).

<sup>369</sup> *Roe*, *supra* note 342, at 165.

<sup>370</sup> *Doe*, *supra* note 368, at 179, 185.

<sup>371</sup> *Id.* at 180.

<sup>372</sup> *Id.* at 186.

Once the case reached the Supreme Court, it held that the Georgia law violated the Fourteenth Amendment on several grounds. First, the law required all abortions, regardless of what stage of pregnancy, to be performed in a hospital instead of in a clinic; but the State failed to prove that only hospitals are capable of fully protecting the patient; and a hospital requirement failing to exclude the first trimester of pregnancy would be invalid on that ground alone.<sup>373</sup>

The statute's requirement that a special hospital staff committee give permission before an abortion can be performed was ruled to be unduly restrictive of the patient's rights because such permission was not required for any other surgery. Further, this portion of the statute limited "the woman's right to receive medical care in accordance with her licensed physician's best judgment."<sup>374</sup> Also, by subjecting a doctor's personal medical judgment to committee approval and to two separate doctor's confirming consultations, this has no rational connection to fulfilling the patient's needs and further restricts the physician's right to practice medicine.<sup>375</sup>

The Court also struck down the accreditation requirements that hospitals must meet in order to perform abortions because they did not need to meet such requirements when performing surgical procedures that did not involve abortion; and furthermore, Georgia has failed to show that only hospitals that meet these accreditation requirements can satisfy the health interests it seeks to achieve.<sup>376</sup>

The state statute's resident requirement also violated the Privileges and Immunities Clause of Art. IV, Sect. 2 because it denied non-Georgia residents who enter Georgia the ability to receive medical treatment. A contrary holding would allow states to limit general medical care to only its own residents.<sup>377</sup>

In later years, more cases went to the Supreme Court and women's access to abortion expanded. In *Planned Parenthood v. Casey* (1992), the U.S. Supreme Court upheld the "central holding" of

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<sup>373</sup> *Id.* at 195; see *Roe, supra* note 342, at 163.

<sup>374</sup> *Id.* at 197-98.

<sup>375</sup> *Id.* at 192-93, 199-200.

<sup>376</sup> *Id.* at 193-94.

<sup>377</sup> *Id.* at 180, 200.

*Roe* which afforded a woman the right to choose an abortion, but it replaced the trimester framework with a “viability” standard.<sup>378</sup> *Casey* held that a state cannot ban abortion before viability (the point at which a fetus can survive outside the uterus), and that any restriction on abortion after viability must contain exceptions to protect the life and health of the mother.<sup>379</sup>

This decision was based on the Due Process Clause’s guarantee of liberty which deviated from the framework established in *Roe* regarding the woman’s fundamental right to privacy. The Court was now seeking to weigh the woman’s liberty interest against the governmental interest in women’s health as well as in the life of the unborn baby.<sup>380</sup> The Court also ruled that no law can create an undue burden if its purpose or effect is to place a “substantial obstacle” in the path of a mother seeking an abortion before the fetus attains viability.<sup>381</sup>

In utilizing the undue burden test, the Court upheld portions of a Pennsylvania statute that were found not to place substantial obstacles in the path of the mother, but rather further legitimate governmental interests. For example: requiring a physician to provide the mother with information regarding the risks and alternatives to the abortion procedure is related to maternal health and furthers the State’s interest in obtaining informed consent from the patient mother.<sup>382</sup>

The twenty-four-hour waiting period to receive an abortion was upheld because it helps to ensure the mother makes a well-considered decision before choosing to abort her child. Such requirement is rationally related to furthering the State’s legitimate interest in protecting maternal health as well as in protecting unborn life.<sup>383</sup>

The requirement of parental consent for minors was upheld because it furthered the State’s important and legitimate interest in pre-

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<sup>378</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 872–73, 878–79 (1992).

<sup>379</sup> *Id.* at 879.

<sup>380</sup> Katherine Kubak et al., *Abortion*, 20 GEORGETOWN J. GENDER & THE LAW 265, 270 (2019).

<sup>381</sup> *Casey*, *supra* note 378, at 876–79, in particular, 877.

<sup>382</sup> *Id.* at 838.

<sup>383</sup> *Id.* at 838, 840–41.

serving “the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.”<sup>384</sup>

The medical emergency definition that would excuse adherence with other provisions, and require abortion clinics and their physicians to report on the abortions, imposed no undue burden on the woman’s right to an abortion because the intent of the regulations was to prevent significant threats to the woman’s life or health.<sup>385</sup>

The Court did find, however, that requiring spousal notification created an undue burden for the mother because it forced women to reveal a deep and personal decision in the face of potential criminal sanctions. Her confidentiality may not be guaranteed either, because her records are subject to subpoena.<sup>386</sup> Furthermore, a woman may be reluctant to reveal her decision in order to avoid marital difficulties which in some cases can result in incidents of violence.<sup>387</sup>

Later, criminal statutes in the United States were proposed. Some began to take effect, while others did not. In *Stenberg v. Carhart* (2000), the Court held (5–4) that a Nebraska statute criminalizing the performance of “partial birth abortions”<sup>388</sup> violates the U.S. Constitution, as interpreted in *Casey* and *Roe*. The sharply divided Court struck down the statute because it placed an undue burden on a woman’s right to have an abortion and did not allow for exceptions in cases of the mother’s health being in danger.<sup>389</sup>

Restrictions regarding that same issue would soon arise. In 2003, a U.S. law was enacted, The Partial-Birth Abortion Ban Act of 2003, which prohibits a “partial-birth abortion.” This law punishes any physician “who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus . . . [the physician] shall be fined under this title or imprisoned

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<sup>384</sup> *Id.* at 841.

<sup>385</sup> *Id.* at 833, 837, 880.

<sup>386</sup> *Id.* at 839, 888–89.

<sup>387</sup> *Id.* at 892–94.

<sup>388</sup> Neb. Rev. Stat. Ann. § 28-328 (Supp. 1999).

<sup>389</sup> *Stenberg v. Carhart*, 530 U.S. 914, 945–50 (2000).

not more than 2 years, or both.”<sup>390</sup> As indicated in the next section, this law was upheld by the Supreme Court.

### C. Judicial Recognition of the Harm of Abortion

Court cases outline evidence that women who have had abortions suffer long-term emotional damage and impaired relationships from their decision. The forerunner of this evidence was Norma McCorvey, otherwise known as “Jane Roe” from the 1973 landmark case that helped legalize abortion, *Roe v. Wade*. She staunchly regretted her decision to bring forth her case to receive an abortion.<sup>391</sup> However, some newspaper outlets reported that she was paid to publicly denounce her decision to receive an abortion.<sup>392</sup>

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<sup>390</sup> 18 U.S.C. § 1531, *supra* note 115.

<sup>391</sup> Harold Cassidy, *Remembering Jane Roe and Mary Doe: The Courage of Norma McCorvey and Sandra Cano*, PUBLIC DISCOURSE (February 23, 2017), <https://www.thepublicdiscourse.com/2017/02/18843/>: “In Norma’s case [*Roe v. Wade*], the entire record consisted of a single affidavit that Norma signed but never read. Norma met with her attorney only twice. The first time, they met in a bar over a pitcher of beer to discuss Norma’s willingness to be a plaintiff. The second time, Norma signed the affidavit. Norma, whose education never went beyond freshman year of high school, later testified that she never knew or understood what an abortion was. She thought that the procedure just prevented a human being from coming into existence, like birth control. It wasn’t until the mid-1990s, when she worked at an abortion clinic, that Norma started to understand what an abortion really was. One day she was in the ‘Parts’ room, where parts of the babies, like limbs and heads, were brought after the unborn children had been aborted. It was then that Norma realized that abortions terminated the lives of actual living human beings. Soon after, she had her conversion to the pro-life side and, in 1997, started her ministry: ‘*Roe No More*.’”

<sup>392</sup> Monica Hesse, ‘*Jane Roe*,’ from *Roe v. Wade*, Made a Stunning Deathbed Confession. Now What? THE WASHINGTON POST (May 20, 2020), [https://www.washingtonpost.com/lifestyle/style/jane-roe-from-roe-v-wade-made-a-stunning-death-bed-confession-now-what/2020/05/20/fad9d296-9a09-11ea-89fd-28fb313d1886\\_story.html](https://www.washingtonpost.com/lifestyle/style/jane-roe-from-roe-v-wade-made-a-stunning-death-bed-confession-now-what/2020/05/20/fad9d296-9a09-11ea-89fd-28fb313d1886_story.html), In a documentary entitled, “*AKA Jane Roe*,” aired on “FX,” a public television station, Norma McCorvey claims she was paid to make statements condemning her decision to receive an abortion, despite making a public religious and political conversion and spending two decades of her life crusading against her case that legalized abortion.

In the case of *McCorvey v. Hill* (5th Cir. 2004), McCorvey attempted to revisit the Supreme Court's decision in *Roe v. Wade* and sought to have it overturned. Although her request was denied based on mootness,<sup>393</sup> Judge Edith Jones nevertheless placed evidence on the record to demonstrate the severe emotional and physical risk women face over an abortion as well as the lack of information they receive before undergoing it:

McCorvey presented evidence that goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child. First, there are about a thousand affidavits of women who have had abortions and claim to have suffered long-term emotional damage and impaired relationships from their decision. Studies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions. Second, *Roe*'s assumption that the decision to abort a baby will be made in close consultation with a woman's private physician is called into question by affidavits from workers at abortion clinics, where most abortions are now performed. According to the affidavits, women are often herded through their procedures with little or no medical or emotional counseling.<sup>394</sup>

More cases would continue to unfurl as other women formerly in the pro-choice movement would begin to speak out against their

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<sup>393</sup> *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004): "In general, a matter is moot for Article III purposes if the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Sierra Club v. Glickman*, 156 F.3d 606, 619 (5th Cir.1998), Suits regarding the constitutionality of statutes become moot once the statute is repealed. See *Diffenderfer v. Cent. Baptist Church*, 404 U.S. 412, 414-15 (1972)."

<sup>394</sup> *Id.* at 850-51.

decisions to attain an abortion. Most notably was Sandra Cano, “Mary Doe” of *Doe v. Bolton*, who has since suffered deep guilt and remorse after her case helped legalize abortion during the same year as *Roe*.<sup>395</sup> Cano was quoted in the Supreme Court case of *Gonzales v. Carhart* (2007), which upheld the Partial-Birth Abortion Ban Act of 2003 as constitutional.<sup>396</sup>

*Gonzales* emphasized that government may regulate the methods employed to perform an abortion “to show its profound respect for the life within the woman,” by vindicating the interest in protecting potential life as first recognized in *Roe v. Wade*.<sup>397</sup> *Gonzales* also sought to protect women from the regret they will feel from aborting their children:

Whether to have an abortion requires a difficult and painful moral decision. *Casey, supra*, at 852–853 ... (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief for Sandra Cano et al. as *Amici Curiae* in No. 05–380, pp. 22–24. Severe depression and loss of esteem can follow. See *ibid.*<sup>398</sup>

The court discusses how women are not provided enough details from doctors regarding the abortion procedure, in order to make an informed decision of whether to go forward with the abortion:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to

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<sup>395</sup> Cassidy, *supra* note 391.

<sup>396</sup> *Gonzales v. Carhart*, 550 U.S. 124, 127 S.Ct. 1610 (2007).

<sup>397</sup> Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE LAW J. 1641–92 (April 2008).

<sup>398</sup> *Gonzales, supra* note 396, 127 S.Ct. at 1634.



the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. See, *e.g.*, *National Abortion Federation*, 330 F.Supp.2d, at 466, n. 22 (“Most of [the plaintiffs’] experts acknowledged that they do not describe to their patients what [the D & E and intact D & E] procedures entail in clear and precise terms”); see also *id.*, at 479.<sup>399</sup>

The Court notes that informed consent is the most paramount protocol required before an abortion takes place and is thus a state legitimate interest:

It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. *Casey, supra*, at 873, ... (plurality opinion) (“States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning”). The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.<sup>400</sup>

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<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

As the concerns for lack of informed consent and women facing grave emotional and physical consequences from abortion arose, more laws began to address these issues. In April 2008, Oklahoma lawmakers overrode a gubernatorial veto and enacted legislation requiring a woman to receive an ultrasound prior to her getting an abortion and that the ultrasound images must be displayed to her.<sup>401</sup>

#### *D. Recent State Legislation For and Against Abortion*

In 2019, the State of Alabama passed the most restrictive abortion ban in the United States since *Roe v. Wade*'s decision to legalize it in 1973. The bill prohibited all abortions in the State of Alabama, "except when abortion is necessary in order to prevent a serious health risk to the woman." "The legislation made no exceptions for victims of rape or incest." It criminalized the procedure, and classified abortion as a Class A felony, punishable by up to 99 years in prison for doctors who administer the abortions. Attempted abortions were classified as a Class C penalty. The Alabama law was eventually struck down in federal court.<sup>402</sup>

Alabama was not the only state to propose legislation to restrict abortion. Kentucky, Mississippi, Ohio, Georgia, and Louisiana proposed bills to ban abortion once the heartbeat of the child is detected, which is around six weeks into the mother's pregnancy.<sup>403</sup> Each of

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<sup>401</sup> Emily Bazelon, *Required Viewing: Oklahoma's Gallingly Paternalistic Ultrasound Law*, SLATE (October 22, 2008), <https://slate.com/news-and-politics/2008/10/oklahoma-s-ultrasound-law-for-abortion.html>.

<sup>402</sup> Kate Smith, *Alabama Governor Signs Near-total Abortion Ban Into Law*, CBS NEWS (May 16, 2019), <https://www.cbsnews.com/news/alabama-abortion-law-governor-kay-ivey-signs-near-total-ban-today-live-updates-2019-05-15/>; Leada Gore, *Alabama Abortion Law Passes: Read The Bill*, AL.COM (May 15, 2019), <https://www.al.com/news/2019/05/alabama-abortion-ban-passes-read-the-bill.html>; Tucker Higgins, *Federal Judge Halts Alabama Abortion Law Deemed the Strictest in the Nation*, CNBC (October 29, 2019), <https://www.cnn.com/2019/10/29/federal-court-strikes-down-alabama-abortion-law.html>.

<sup>403</sup> Russ Bynum, *More 'Heartbeat' Abortion Bans Advancing in South, Midwest*, ASSOCIATED PRESS (May 12, 2019), <https://apnews.com/article/cf0e0c3184fd461fbc2b98144f091967>; Jonathan Abbamonte, *Heartbeat Bills*

those states' heartbeat bills, however, were also struck down in federal court.<sup>404</sup>

Missouri faced opposition in federal court after the bill it proposed to ban abortions after eight weeks into pregnancy was also struck down. Parts of the bill did pass however, which prohibit doctors from performing abortions on mothers who seek to abort solely based on her child's sex or because her child has Down Syndrome.<sup>405</sup> Not a day after South Carolina passed its heartbeat bill, which prevents abortions once cardiac activity in the unborn child is detected, except in cases of rape, incest, or the mother's life being in danger – a federal

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*an Important Pro-Life Priority in 2020*, Population Research Institute (January 22, 2020), <https://www.pop.org/heartbeat-bills-an-important-pro-life-priority-in-2020/>; Berghella, *supra* note 22, Although the proposed Kentucky legislation created its laws based on the baby's heartbeat beginning at 6 weeks, a child's heartbeat has been detected as early as 3-4 weeks into the mother's pregnancy via transvaginal ultrasound.

<sup>404</sup> *Kentucky Fetal Heartbeat Abortion Ban (SB 9)*, LEGISLATIVE TRACKER (last updated September 20, 2019) (last accessed January 17, 2021), <https://rewirenews-group.com/legislative-tracker/law/kentucky-fetal-heartbeat-abortion-ban-sb-9/>; *Appeals Court Upholds Block on Mississippi Heartbeat Bill on Likely Path Toward Supreme Court*, Kaiser Family Foundation (February 21, 2020), <https://khn.org/morning-breakout/appeals-court-upholds-block-on-mississippi-heartbeat-bill-on-likely-path-toward-supreme-court/>; Jonathan Stempel, *U.S. Judge Blocks Ohio 'Heartbeat' Law to End Most Abortions*, Reuters (July 3, 2019), <https://www.reuters.com/article/us-usa-abortion-ohio/u-s-judge-blocks-ohio-heart-beat-law-to-end-most-abortions-idUSKCN1TY2PK>; Madeleine Carlisle, *Federal Judge Blocks Georgia's Controversial Law Banning Most Abortions After 6 Weeks*, TIME (July 14, 2020), <https://time.com/5866714/georgia-heartbeat-abortion-law-ban/>; Case Western Reserve University, *"Supreme Court Strikes Down Louisiana's 'Heartbeat Bill,' Roe v. Wade Remains Intact,"* NEWS WISE (June 29, 2020), <https://www.newswise.com/coronavirus/supreme-court-strikes-down-heartbeat-bill-in-louisiana-roe-v-wade-remains-intact>.

<sup>405</sup> Kate Smith, *Missouri's 8-week Abortion Ban Was Blocked, But These New Restrictions are Still Going into Effect*, CBS NEWS (August 28, 2019), <https://www.cbsnews.com/news/missouri-abortion-law-missouri-abortion-ban-was-blocked-down-syndrome-ban-goes-into-effect-today-2019-08-28-live/>; H.B. 126, 100<sup>th</sup> Gen. Assemb., 1<sup>st</sup> Reg. Sess. (Mo. 2020), <https://www.house.mo.gov/billtracking/bills191/hlrbillspdf/0461H.01D.pdf>.

court temporarily suspended the bill to allow Planned Parenthood to pursue legal action against it.<sup>406</sup>

The state of Arkansas also recently had two abortion bills blocked in federal court – one which sought to ban abortions 18 weeks into a mother’s pregnancy, and the other which sought to ban abortions performed because the child has Down Syndrome.<sup>407</sup> Now a new heartbeat bill in Arkansas has been ratified by its state legislature. The law which would ban most abortions except ones to “save the life or preserve the health of the unborn child, remove a dead unborn child caused by spontaneous abortion, remove an ectopic pregnancy,” or to “save the life of a pregnant woman in a medical emergency.” The bill needs only a signature from its governor to become law and further Arkansas legislators’ hopes to set precedent to overturn *Roe v. Wade*.<sup>408</sup>

The State of Florida recently passed abortion bills which are now in effect. One is a parental consent law, requiring doctors to obtain written consent from the parent or guardian of a minor prior to that minor receiving an abortion.<sup>409</sup> Another requires the mother to have an ultrasound and be provided the option to view it before attainting an abortion.<sup>410</sup> Similar ultrasound requirements are in effect in seven other states.<sup>411</sup>

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<sup>406</sup> Vanessa Romo, *Court Temporarily Blocks South Carolina Heartbeat Abortion Ban*, NPR (February 19, 2021), <https://www.npr.org/2021/02/19/969653569/court-temporarily-blocks-south-carolina-heartbeat-abortion-ban>.

<sup>407</sup> Andrew DeMillo, *Appeals Court Upholds Hold on Arkansas Abortion Laws*, ASSOCIATED PRESS (January 5, 2021), <https://apnews.com/article/arkansas-abortion-little-rock-courts-9bcff3c762f6168a1833b448e03d4900>.

<sup>408</sup> S.B. 6, 93rd Gen. Assemb. (Ark. 2021), [https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills\\_%2F2021R%2FPublic%2FSB6.pdf](https://www.arkleg.state.ar.us/Bills/FTPDocument?path=%2FBills_%2F2021R%2FPublic%2FSB6.pdf); Sarah Kellogg, *Arkansas Legislature Votes To Pass Abortion Ban, Awaits Action From Governor*, Public Radio from UA Little Rock News & Culture for Arkansas (March 3, 2021), <https://www.ualrpublicradio.org/post/arkansas-legislature-votes-pass-abortion-ban-awaits-action-governor>.

<sup>409</sup> S.B. 404 (Fl. 2020), <https://flsenate.gov/Session/Bill/2020/404/BillText/er/PDF>; Fla. Stat. § 390.01114.

<sup>410</sup> Fla. Stat. § 390.0111.

<sup>411</sup> *Requirements for Ultrasound*, Guttmacher Institute (January 1, 2021), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound>, The following eight states each require physicians to conduct an ultrasound procedure and

As of January 1, 2021, forty-three states restricted abortions at specific stages of pregnancy. Of these forty-three states, twenty restricted abortions at the point of fetal viability.<sup>412</sup> Seventeen states restricted abortions beginning at 22 weeks gestation.<sup>413</sup> There are also ten states with “trigger laws” which will automatically make some, if not all, abortions illegal pending the overturning of *Roe v. Wade*.<sup>414</sup>

These proposed forms of legislation did not arise, however, from any cutting-edge scientific discoveries, but were swift responses to some of the most progressive abortion bills ever passed. New York’s *Reproductive Health Act* (RHA)<sup>415</sup> was signed by Democratic Governor Andrew Cuomo on January 22, 2019, the anniversary of *Roe v. Wade*, the landmark Supreme Court decision that guaranteed a woman’s right to choose an abortion.<sup>416</sup> “With the signing of this bill, we are sending a clear message that whatever happens in Washington,

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offer to show the woman before she can receive an abortion: Alabama, Arizona, Florida, Indiana, Iowa, Kansas, Mississippi, Ohio.

<sup>412</sup> *State Bans on Abortion Throughout Pregnancy*, Guttmacher Institute (January 1, 2021), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>.

<sup>413</sup> *Id.*

<sup>414</sup> Isaac Sabetai, *A Look at Abortion Bills Around the U.S. in 2019*, AJC (January 10, 2020), <https://www.ajc.com/news/state--regional-govt--politics/look-abortion-bills-around-the-2019/rjgjjwPxL6ZKBOOPB J1Sqmk/>; Madeleine Aggeler, *These States Could Lose the Right to Abortion Overnight*, THE CUT (October 27, 2020), <https://www.thecut.com/2020/10/what-are-trigger-laws-anti-abortion-roe-v-wade.html>; *Abortion Policy in the Absence of Roe*, Guttmacher Institute (January 1, 2021), [#](https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-ro). States with “trigger laws”: Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, South Dakota, Tennessee, and Utah.

<sup>415</sup> Diana Stancy Correll, *Josh Hawley: Alabama Abortion Ban is ‘Direct Response’ to New York’s Late-term Abortion Law*, WASHINGTON EXAMINER (May 16, 2019), <https://www.washingtonexaminer.com/news/josh-hawley-alabama-abortion-ban-is-direct-response-to-new-yorks-late-term-abortion-law>.

<sup>416</sup> *Governor Cuomo Signs Legislation Protecting Women’s Reproductive Rights*, NEW YORK STATE (January 22, 2019), <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-protecting-womens-reproductive-rights>; *Roe*, *supra* note 342.

women in New York will always have the fundamental right to control their body,” Cuomo said.<sup>417</sup>

The New York RHA removed abortion from the state’s criminal code, which now protects medical professionals who perform abortions from criminal prosecution. The law also now allows medical professionals who are not doctors to perform abortions in New York.<sup>418</sup> With the new legislation, a woman may have an abortion up to 24 weeks into her typical 38 to 42-week pregnancy. Additionally, if a medical professional determines the fetus is no longer viable or that the mother’s life or health is at risk, an abortion may take place at any time beyond the 24 weeks, which includes up until the day of birth.<sup>419</sup>

The New York RHA also repealed section 4164 of New York’s public health law.<sup>420</sup> Section 4164 originally provided that abortions after 12 weeks of pregnancy must be performed in a hospital, and for abortions after 20 weeks, a separate physician must be on hand to provide medical care for any infant born alive during the abortion.<sup>421</sup>

In New York, a child born alive during an abortion procedure is no longer immediately protected by New York law, since there is no longer a requirement that medical records of the child be kept in order to care for the infant. Without section 4164, the public health

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<sup>417</sup> Angelo Fichera, *Addressing New York’s New Abortion Law*, FACTCHECK.ORG (February 4, 2019), <https://www.factcheck.org/2019/02/addressing-new-yorks-new-abortion-law/>; NEW YORK STATE, *supra* note 416; Marie Elena Giossi, *New York Passes Abortion Rights Bill*, THE TABLET (January 23, 2019), <https://the-tablet.org/new-york-passes-abortion-rights-bill/>.

<sup>418</sup> S. 240, 2019-2020 Leg., Reg. Sess. (N.Y. 2019), <https://legislation.nysenate.gov/pdf/bills/2019/S240>; Sam Sawyer, S.J., *Explainer: What New York’s New Abortion Law Does and Doesn’t Do*, AMERICA (January 30, 2019), <https://www.americamagazine.org/rha2019>; *How New York’s Abortion Law Has Changed*, WQAD (January 25, 2019), <https://www.wqad.com/article/news/local/drone/8-in-the-air/how-new-yorks-abortion-law-has-changed/526-fa7131fb-ad31-439e-8498-5864a6a39a2b>.

<sup>419</sup> *Id.*

<sup>420</sup> Fichera, *supra* note 417.

<sup>421</sup> N.Y. Pub. Health Law § 4164 (Repealed), <https://casetext.com/statute/consolidated-laws-of-new-york/chapter-public-health/article-41-vital-statistics/title-5-a-induced-viable-births/section-4164-repealed>.

law no longer recognizes the status of an infant born alive during an abortion.<sup>422</sup>

New York was not the only state to adopt such extreme non-restrictive measures for abortions. The State of Illinois also followed the trend and has now given women the “fundamental right” to have an abortion.<sup>423</sup>

Illinois’ *Reproductive Health Act* provides that, “every individual who becomes pregnant has a fundamental right to continue the pregnancy and give birth or to have an abortion, and to make autonomous decisions about how to exercise that right.” A fertilized egg, embryo, or fetus has no independent rights under the state laws of Illinois.<sup>424</sup> The new Act also removes spousal consent and parental consent requirements regarding liability expenses incurred due to the abortion.<sup>425</sup>

Furthermore, Illinois no longer requires medical doctors to perform abortions. The law also allows registered nurses with a master’s degree, physician assistants, or anyone under a health care professional’s supervision, as part of their training, to perform abortions.<sup>426</sup> Most notably, many restrictions on late-term abortions have

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<sup>422</sup> Sawyer, *supra* note 418.

<sup>423</sup> Jamie Munks, *Illinois Senate Approves Sweeping Abortion Rights Bill, Sending the Plan to Gov. J.B. Pritzker*, CHICAGO TRIBUNE (May 31, 2019), <https://www.chicagotribune.com/politics/ct-met-illinois-abortion-legislation-senate-20190531-story.html>; H.B. 2495, 101<sup>st</sup> Gen. Assemb. (Ill. 2019).

<sup>424</sup> See H.B. 2495 (Synopsis as Introduced).

<sup>425</sup> See H.B. 2495, Section 910-75 4 (b); (c).

<sup>426</sup> See H.B. 2495, “Section 1-25. Reporting of abortions performed by health care professionals. (a) A health care professional may provide abortion care in accordance with the health care professional's best professional judgment and training and based on accepted standards of clinical practice. . . ‘Health care professional’ means a person who is licensed, certified, or otherwise authorized or permitted by law to administer health care, acting within the scope of the person’s practice and training, including, but not limited to, a physician, advanced practice registered nurse, physician assistant, or person acting under the supervision of one of the above. A health care professional may, using the health care professional’s best clinical judgment, delegate tasks and duties to a person under the health care professional's supervision, consistent with the delegee’s scope of practice and training.”



been removed – including a partial-birth abortion ban, and any penalties on doctors who perform them.<sup>427</sup> As of August 2020, the District of Columbia along with seven other states currently has no gestational

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<sup>427</sup> Sophia Tareen, *Illinois Governor Signs Law Expanding Access to Abortion*, ASSOCIATED PRESS (June 12, 2019), <https://apnews.com/article/9c12061cc3964ecf96d6bf004d93035b>; Jack Crowe, *Illinois House Passes Bill Repealing Partial-Birth-Abortion Ban*, NATIONAL REVIEW (May 28, 2019), <https://www.nationalreview.com/news/illinois-house-passes-bill-repealing-partial-birth-abortion-ban/>.

limit on abortions whatsoever.<sup>428</sup> Those states include Alaska,<sup>429</sup> Colorado,<sup>430</sup> New Hampshire,<sup>431</sup> New Jersey,<sup>432</sup> New Mexico,<sup>433</sup> Oregon,<sup>434</sup> and Vermont.<sup>435</sup>

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<sup>428</sup> *States with Gestational Limits for Abortion*, Kaiser Family Foundation (August 1, 2020), <https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortion/?currentTimeframe=0&sort=Model=%7B%22collId%22:%22Location%22,%22sort%22:%22asc%22%7D>; *An Overview of Abortion Laws*, Guttmacher Institute (2020), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>.

<sup>429</sup> ALASKA ADMIN. CODE tit. 12, § 40.120 “(a) During the second or third trimester of a pregnancy, abortions shall be performed under sterile conditions . . . (b) From and after the point in time when a fetus becomes viable, as determined by those medical examinations and tests that in the physician’s professional judgment are necessary, an abortion may only be performed at a hospital with a neonatal intensive care unit (NICU).”

<sup>430</sup> 10 COLO. CODE REGS. § 2505-10:8.770. ABORTION SERVICES [There is no mention of any limitations on when an abortion may be procured.] 8.770.4.B. “In cases of a life-endangering circumstance, the physician must make every reasonable effort to preserve the lives of the pregnant woman and the unborn child.” 8.770.4.C. A licensed physician shall perform the procedure in a licensed health care facility . . . [except] [w]hen the pregnancy substantially threatens the life of the client, and the transfer to a licensed health care facility would, in the medical judgment of the attending physician, further threaten the life of the client, the abortion may be provided outside of a licensed health care facility.”

<sup>431</sup> N.H. CODE R. Former Div. Hum. Serv. [HE-W], Ch. HE-W 500, Pt. HE-W 542. ABORTION SERVICES EXPIRED; *State Facts About Abortion: New Hampshire*, Guttmacher Institute (2020), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-new-hampshire>; Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States*, 2017, Guttmacher Institute (2019), <https://www.guttmacher.org/report/abortion-incidence-service-availability-us-2017>; Liza Fuentes & Jenna Jerman, *Distance Traveled to Obtain Clinical Abortion Care in the United States and Reasons for Clinic Choice*, 28 J. WOMENS HEALTH (12) 1623–31 (2019).

<sup>432</sup> N.J. ADMIN. CODE § 10:54-5.43 “(b) A physician may take the following factors into consideration in determining whether a termination of pregnancy is medically necessary on a Medicaid/NJ FamilyCare program beneficiary: 1. To save the life of the mother; 2. That the pregnancy was the result of an act of rape; 3. That the pregnancy was the result of an act of incest; or 4. That in the physician’s professional judgment, the termination was medically necessary and consistent with the Federal court ruling that a physician may [consider: i. Physical, emotional and psychological factors; ii. Family reasons; and iii. Age] . . . in determining whether a termination of pregnancy is medically necessary.”

Many of these laws across the United States have resulted in a mighty uproar from advocates of abortion and their opponents alike.<sup>436</sup> This right to choose vs. right to life controversy has been rummaging through legislatures, political circles, religious groups, and other activist communities for nearly half a century.<sup>437</sup> This is an issue that must be looked at from all angles.

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<sup>433</sup> N.M. STAT. ANN. § 30-5-1 (West) C. “[J]ustified medical termination” means the intentional ending of the pregnancy of a woman at the request of said woman . . . by a physician licensed by the state of New Mexico using acceptable medical procedures in an accredited hospital upon written certification by the members of a special hospital board that: (1) the . . . pregnancy, in their opinion, is likely to result in the death of the woman or the grave impairment of the physical or mental health of the woman; or (2) the child probably will have a grave physical or mental defect; or (3) the pregnancy resulted from rape, as defined in Sections 40A-9-2 through 40A-9-4 NMSA 1953.; or (4) the pregnancy resulted from incest.”

<sup>434</sup> *Abortion Access*, NARAL Pro-Choice Oregon (2020), <https://prochoiceoregon.org/issue/abortion-access/>; *State Facts About Abortion: Oregon*, Guttmacher Institute (2020), <https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-oregon>, Oregon is one of the least restricted states for abortion in the United States. Oregon does not require waiting periods, parental involvement, nor do they limit publicly funded abortions.

<sup>435</sup> *State Laws Vermont*, NARAL Pro-Choice America (2020), <https://www.prochoiceamerica.org/state-law/vermont/>, “There are no provisions in Vermont law that prohibit Nurse Practitioners or Physician’s Assistants from providing surgical abortion.”; VT. STAT. ANN. tit. 18 § 9494 (2019), Vermont has created an affirmative fundamental right to choose abortion and even ensures women will maintain access to pre-viability abortion should *Roe v. Wade* be overturned. The law also prohibits public entities from interfering with this right and prohibits any type of law enforcement from prosecuting any individual for performing their own abortion.

<sup>436</sup> Cindy Dampier & Chad Yoder, *Changing Abortion rights: How Illinois' New Law Compares with What Other States are Doing*, CHICAGO TRIBUNE (June 5, 2019), <https://www.chicagotribune.com/news/ct-viz-how-illinois-abortion-law-compares-htlmlstory.html>, “Crossing a state line often means crossing a deep divide in abortion laws and policies. We’re tracking which states are aiming for more regulation of abortion and which ones are aiming for less as the debate heats up nationally.”

<sup>437</sup> Shain, *supra* note 197.

*E. Recent Federal Legislation Protecting the Unborn Child*

The Unborn Victims of Violence Act of 2004 is a section of the United States Code (18 U.S.C. § 1841) which recognizes an embryo or fetus in utero as a legal victim, if that child in utero is injured or killed during the commission of any of over 60 listed federal crimes of violence.<sup>438</sup> This Act, also known as “Laci and Conner’s Law,” was enacted after California mother Laci Peterson and fetus Conner Peterson’s deaths were widely publicized. Her husband Scott Peterson was convicted of double homicide under California’s fetal homicide law.<sup>439</sup>

Pursuant to the Act, “the term ‘unborn child’ . . . [or] ‘child in utero’ . . . means a member of the species homo sapiens, at any stage of development, who is carried in the womb.”<sup>440</sup> If the killing of the unborn child is intentional, such person shall be punished “for intentionally killing or attempting to kill a human being.”<sup>441</sup> The law is codified in two sections of the United States Code.<sup>442</sup> Although federal criminal law does not apply to crimes prosecuted by the individual states,<sup>443</sup> thirty-eight states also recognize the fetus or “unborn child” as a crime victim for the purposes of homicide or feticide.<sup>444</sup>

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<sup>438</sup> H.R. Rep. 212, 108<sup>th</sup> Cong., 2d Sess. (2004); 18 U.S.C. § 1841 (a)(1) (2004).

<sup>439</sup> April Walker, *From State of California v. Scott Peterson to State of Utah v. Mark Hacking Will More States Adopt Fetal Protection Laws?*, 4 AM. UNIV. CRIM. LAW BRIEF (2) 48–52 (2009), <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1077&context=clb>.

<sup>440</sup> 18 U.S.C. § 1841 (2004).

<sup>441</sup> *Id.*

<sup>442</sup> *Id.*; 10 U.S.C. § 919 (a) (2017).

<sup>443</sup> *Criminal Law*, Legal Information Institute (2020), [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law): “Each state decides what conduct to designate a crime. Thus, each state has its own criminal code. Congress has also chosen to punish certain conduct, codifying federal criminal law in Title 18 of the U.S. Code. Criminal laws vary significantly among the states and the federal government.”

<sup>444</sup> *State Laws on Fetal Homicide and Penalty-enhancement for Crimes Against Pregnant Women*, National Conference of State Legislatures (May 1, 2018), <https://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.

The law mentions that it is not construed to prosecute a pregnant woman or person authorized on her behalf for “conduct relating to an abortion,” or any person for providing “medical treatment of the pregnant woman or her unborn child.”<sup>445</sup>

However, the fact that the law recognizes a child carried in the womb at any stage of development as a member of the species “homo sapiens,” and a legal victim of a potential crime; and the fact that its perpetrator is punished for killing or attempting to kill a “human being,” it raises a grave concern for a double-standard<sup>446</sup> in our legal system. In U.S. codified criminal law, a child in the womb is held with the utmost regard and can be considered a victim of murder; but in U.S. constitutional law, a child in the womb is given no regard and considered an obstruction with no victims’ rights whatsoever.

#### *IV. Future Decisions in Light of Changed and Changing Conditioning Factors*

This section will outline the possible future legal outcomes of the problem that may result due to various evolving factors. Addressing the current political climate in the United States through its leadership and its citizens will help explain how changes in the judiciary as well as changes on a global scale could have potentially long-lasting effects on abortion legislation.

The current political status of the U.S. citizenry reveals a dichotomy of views regarding abortion. In terms of state political opinion, 28 states are leaning to restrict abortion after introducing a variety of abortion bans in early 2019.<sup>447</sup> However, many progressive states

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<sup>445</sup> 18 U.S.C. § 1841 (c).

<sup>446</sup> *Double Standard*, CAMBRIDGE DICTIONARY (2019), <https://dictionary.cambridge.org/us/dictionary/english/double-standard>, “[T]he habit of treating one group differently than another when both groups should be treated the same.” See, e.g., Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L. J. 221 (1973).

<sup>447</sup> *Radical Attempts to Ban Abortion Dominate State Policy Trends in the First Quarter of 2019*, Guttmacher Institute (April 2019), <https://www.guttmacher.org/article/2019/04/radical-attempts-ban-abortion-dominate-state-policy-trends-first-quarter-2019>.

are fighting back with strong statewide abortion measures as outlined earlier in the article.<sup>448</sup> In a poll conducted by Marist University,<sup>449</sup> three-quarters of American wanted to keep the ruling of *Roe v. Wade*, but a strong majority still wants to see restrictions on abortion rights.<sup>450</sup> Two-thirds of people claimed to be somewhat or very dissatisfied with current abortion policy, 66% of whom are “pro-life” and 62% who are “pro-choice.”<sup>451</sup> Sixty-one percent (61%) of those surveyed claimed to be in favor of allowing abortion, but with various limitations. For example, 23% of people wanted to limit abortion to the first trimester;<sup>452</sup> 29% want to allow abortion in cases of rape, incest or to save the mother’s life; and 9% want to allow abortion only in order to save the mother’s life.<sup>453</sup>

With the abortion battle continuing to heat up in the United States, many are looking to changes in legislation, but more specifically changes within the United States Supreme Court. The U.S. Supreme Court is currently more conservative-leaning (6-3), but still has some competing liberal interests.<sup>454</sup> According to the Supreme Court

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<sup>448</sup> See *supra* notes 415-435.

<sup>449</sup> Domenico Montanaro, *Poll: Majority Want to Keep Abortion Legal, But They Also Want Restrictions*, NPR (June 7, 2019), <https://www.npr.org/2019/06/07/730183531/poll-majority-want-to-keep-abortion-legal-but-they-also-want-restrictions>; NPR/PBS NewsHour/Marist Poll National Adults. Interviews conducted May 31st through June 4th, 2019 (last accessed January 4, 2021), [http://maristpoll.marist.edu/wp-content/uploads/2019/06/NPR\\_PBS-NewsHour\\_Marist-Poll\\_USA-NOS-and-Tables-on-Abortion\\_1906051428\\_FINAL.pdf#page=3](http://maristpoll.marist.edu/wp-content/uploads/2019/06/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables-on-Abortion_1906051428_FINAL.pdf#page=3).

<sup>450</sup> *Id.*

<sup>451</sup> *Id.*; THE MERRIAM-WEBSTER DICTIONARY, *supra* note 266; THE MERRIAM-WEBSTER DICTIONARY, *supra* note 276.

<sup>452</sup> *Id.*; cf. *supra* notes 22-31.

<sup>453</sup> *Id.*

<sup>454</sup> Jessica Glenza, *US Supreme Court Takes Up Most High-profile Abortion Case in Decades*, THE GUARDIAN (March 4, 2020), <https://www.theguardian.com/world/2020/mar/04/us-supreme-court-abortion-case-louisiana-arguments>; BRIAN FARMER, AMERICAN CONSERVATISM: HISTORY, THEORY AND PRACTICE 52 (2005): “To traditional conservatives, there most definitely are moral absolutes and they can most definitely and definitively identify those moral absolutes”; ROBERT BALDWIN, CONGRESSIONAL TRADE VOTES: FROM NAFTA APPROVAL TO FAST-TRACK DEFEAT 30 (2000): “Conservatism generally is associated with pro-business, anti-labor, and strong-national-defense stances, all of which lead to support for free

Database, a little more than half (62%) of Chief Justice John Roberts' court's precedent-altering decisions have resulted in a conservative holding.<sup>455</sup> Justice Anthony Kennedy was known as the Court's "swing" justice who although typically conservative, has ruled in favor of liberal ideas such as gay rights; but now that Justice Brett Kavanaugh has replaced Kennedy, and Justice Amy Coney Barrett succeeded upon Justice Ruth Bader Ginsburg, some liberal precedents may be in danger.<sup>456</sup>

However, as of recent, a few Supreme Court decisions regarding an immigration program, LGBT workers' rights, and abortion rights have caught the nation off guard. What looked like a conservative majority on the Supreme Court bench has yielded results that brought joyful reactions from the liberal community.<sup>457</sup> In the recent abortion case of *June Medical Services v. Russo*, the Supreme Court struck down a Louisiana law that required abortions could only be performed by doctors who had permission by a local hospital to admit patients.<sup>458</sup> The majority argued that the law would place substantial obstacles in the path of the mother seeking an abortion.<sup>459</sup> The law found to be unconstitutional was practically identical to a Texas law

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trade principles"; PAUL KRUGMAN, *THE CONSCIENCE OF A LIBERAL* 244 (2007): Today's liberal ideology strongly believes in public funding for education, health care, and welfare. It also regards social issues such as economic income inequality, affirmative action, and women's right to abortion; PHILLIP L. HAMMACK, *THE OXFORD HANDBOOK OF SOCIAL PSYCHOLOGY AND SOCIAL JUSTICE* 206 (2018) on promoting rights for the LGBT community; DEBRA L. DELAET, *U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS* 69 (2000) regarding immigration reform.

<sup>455</sup> Amelia Thomson-DeVeaux, *Is the Supreme Court Heading for a Conservative Revolution?* FIVETHIRTYEIGHT (October 7, 2019), <https://fivethirtyeight.com/features/is-the-supreme-court-heading-for-a-conservative-revolution/>.

<sup>456</sup> *Id.*

<sup>457</sup> Tucker Higgins, *Abortion Case Could End — or Add to — Streak of Liberal Wins at Supreme Court*, CNBC (2020), <https://www.cnbc.com/2020/06/21/supreme-court-abortion-case-could-end-or-add-to-liberal-win-streak.html>.

<sup>458</sup> Alice Miranda Ollstein, *Supreme Court Strikes Down Louisiana Abortion Law*, POLITICO (June 29, 2020), <https://www.politico.com/news/2020/06/29/supreme-court-louisiana-abortion-case-344296>; Jess Bravin, *Louisiana Abortion Law Struck Down by Supreme Court*, WALL STREET J. (June 29, 2020), <https://www.wsj.com/articles/supreme-court-strikes-down-louisiana-abortion-law-11593440418>.

<sup>459</sup> *Id.*



that was struck down just four years prior.<sup>460</sup> This was the first abortion case to be argued since President Donald Trump appointed conservative Justices Neil Gorsuch and Brett Kavanaugh to the United States Supreme Court. Its holding brought a hopeful result for the liberal community,<sup>461</sup> after Trump pledged to nominate judges who would overturn *Roe v. Wade*.<sup>462</sup>

Staying true to his pledge, however, weeks prior to the 2020 Presidential Election, President Trump nominated Appellate Court Judge Amy Coney Barrett to the United States Supreme Court after the late Justice Ruth Bader Ginsburg's recent passing left a vacancy on the Court's bench.<sup>463</sup> Those in the Democratic party have cause for concern over Judge Barrett's nomination because her appointment could potentially sway the demeanor of the U.S. Supreme Court in a conservative direction, and potentially jeopardize the future of abortion rights for years to come.<sup>464</sup>

Barrett is known for having a conservative reputation as well as strong religious convictions based on her Roman Catholic faith.<sup>465</sup> She also clerked for the late Justice Antonin Scalia,<sup>466</sup> one of Ginsburg's close contemporaries,<sup>467</sup> who believed *Roe*, the case that helped

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<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> Higgins, *supra* note 457.

<sup>463</sup> *President Donald J. Trump Announces Intent to Nominate Judge Amy Coney Barrett to the Supreme Court of the United States*, The White House (September 26, 2020), <https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-amy-coney-barrett-supreme-court-united-states/>.

<sup>464</sup> Elizabeth Dias & Adam Liptak, *To Conservatives, Barrett Has 'Perfect Combination' of Attributes for Supreme Court*, N.Y. TIMES (September 20, 2020), <https://www.nytimes.com/2020/09/20/us/politics/supreme-court-barrett.html>; Tomiko Brown-Nagin et al., *How Amy Coney Barrett Would Reshape the Court — and the Country*, POLITICO (September 26, 2020), <https://www.politico.com/news/magazine/2020/09/26/amy-barrett-scotus-legal-experts-422028>.

<sup>465</sup> *Id.*

<sup>466</sup> *Id.*

<sup>467</sup> Denise Crosby, *Column: What We Can Learn from the Friendship Between Justices Scalia and Ginsburg*, CHICAGO TRIBUNE (September 22, 2020), <https://www.chicagotribune.com/suburbs/aurora-beacon-news/opinion/ct-abn-crosby-justices-st-0923-20200922-vg6jzkbghjapp2yefbpx5kx74-story.html>.

legalize abortion, was wrongly decided.<sup>468</sup> Despite strong objections to Barrett's appointment from the Democratic party, urging for the administration following Trump to be given the opportunity to fill the vacancy, Barrett has since been confirmed by the Senate Judiciary Committee and has begun her tenure on the highest bench in the land.<sup>469</sup>

During President Trump's administration, he appointed 197 Article III federal judges, all of whom the Senate confirmed. These are the second-most Article III judicial appointments in a presidency since Jimmy Carter.<sup>470</sup> Although President Trump has undone many of the policies from the previous Obama administration, it is unclear how many of his appointments effect desired policy change.<sup>471</sup> Now that Joe Biden has assumed the U.S. Presidency, Biden plans to revert back to many of President Obama's policies. Some of those policies involving abortion include: allowing the U.S. to fund foreign organizations who provide abortion;<sup>472</sup> allowing abortion providers and promoters to receive Title X family planning funding;<sup>473</sup> and reinstating the Affordable Care Act, which would cover contraception and abortion expenses.<sup>474</sup> President Biden also publicly stated that he would appoint federal judges and support legislation that codified *Roe v. Wade* into a

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<sup>468</sup> *Casey*, *supra* note 378, at 944; *Antonin Scalia on Abortion*, ON THE ISSUES (February 1, 2020), [https://www.ontheissues.org/Court/Antonin\\_Scalia\\_Abortion.htm](https://www.ontheissues.org/Court/Antonin_Scalia_Abortion.htm).

<sup>469</sup> Ed Pilkington & David Smith, *Amy Coney Barrett Confirmed to Supreme Court in Major Victory for US Conservatives*, THE GUARDIAN (October 26, 2020), <https://www.theguardian.com/us-news/2020/oct/26/amy-coney-barrett-confirmed-supreme-court-justice-vote>.

<sup>470</sup> Sara Reynolds, *Trump Has Appointed Second-Most Federal Judges Through June 1 of a President's Fourth Year*, BALLOTPEDIA NEWS (June 3, 2020), <https://news.ballotpedia.org/2020/06/03/trump-has-appointed-second-most-federal-judges-through-june-1-of-a-presidents-fourth-year/>.

<sup>471</sup> *Tracking Deregulation in the Trump Era*, The Brookings Institution (December 21, 2020), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/>.

<sup>472</sup> Jessie Hellmann, *Biden to Rescind Controversial Abortion Rule in Coming Days*, THE HILL (January 21, 2021), <https://thehill.com/policy/healthcare/535212-biden-to-rescind-controversial-abortion-rule-in-coming-days>.

<sup>473</sup> *Id.*

<sup>474</sup> *Health Care*, Biden Harris (2021), <https://joebiden.com/healthcare/>.

federal statute with the hopes to enshrine a woman's right to an abortion.<sup>475</sup>

In terms of global significance, on October 22, 2020, a gathering was held in Washington D.C. for a multinational ceremonial signing of the *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family*. The declaration was signed by thirty-two countries, representing over 1.6 billion people throughout the world.<sup>476</sup> Most notably, it declared that "there is no international right to abortion," and there is no international obligation for States "to finance or facilitate abortion," although "each nation has the sovereign right to implement programs and activities consistent with their laws and policies."<sup>477</sup>

The declaration reaffirmed that all people are equal before the law,<sup>478</sup> "every human being has the inherent right to life,"<sup>479</sup> and every person should be afforded dignity and worth as a human being.<sup>480</sup> It further declared that women's rights are an "inalienable, integral, and indivisible part of all human rights and fundamental freedoms,"<sup>481</sup> and

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<sup>475</sup> Jessie Hellmann, *Biden Reaffirms Commitment to Enshrining Roe v. Wade in Federal Law*, THE HILL (January 22, 2021), <https://thehill.com/policy/healthcare/535427-biden-reaffirms-commitment-to-enshrining-roe-v-wade-in-federal-law>.

<sup>476</sup> *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family*, U.S. Department of Health & Human Services (2020), <https://www.hhs.gov/about/agencies/oga/global-health-diplomacy/protecting-life-global-health-policy/geneva-declaration.html>; Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family, W.H.A. 73, Oct. 22, 2020, <https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english-11-10-2020.pdf>; See also *Geneva Consensus Declaration on Promoting Women's Health and Strengthening the Family* (2020), <https://geneva.usmission.gov/wp-content/uploads/sites/290/GenevaDeclaration.pdf>.

<sup>477</sup> *Id.*

<sup>478</sup> See *supra* note 476; G.A. Res. 217 (III) A, art. 7, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>479</sup> See *supra* note 476; G.A. Res. 2200 (XXI) A, art. 6.1, International Covenant on Civil and Political Rights (Dec. 16, 1966), <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>.

<sup>480</sup> See *supra* note 476; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>481</sup> See *supra* note 476; Rep. of the Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20/Rev.1 annex, par

it reassured its commitment to enable women to safely undergo pregnancy and childbirth while providing couples the best chance of having a healthy baby.<sup>482</sup> The declaration sought to reaffirm the special safeguards and care of all children,<sup>483</sup> both before and after birth,<sup>484</sup> based on the best interests of the child.<sup>485</sup>

It is important to note that the declaration is not legally binding under international law and does not change any domestic laws that currently exist, but it certainly formulates new global standards regarding women's reproductive health care (i.e. abortion), family planning, their relation to the rights of the unborn.<sup>486</sup> Declarations such as these may not have any immediate effect, but they are designed to promote principles for law-governing bodies to adopt while providing guiding lights as new policies and laws are implemented.<sup>487</sup>

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9 (Sept. 5, 1995), <https://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf>.

<sup>482</sup> See *supra* note 476; U.N. International Conference on Population and Development, *Programme of Action of the International Conference on Population Development* (Section 7.2) (Sept. 5-13, 1994), [https://www.unfpa.org/sites/default/files/event-pdf/PoA\\_en.pdf](https://www.unfpa.org/sites/default/files/event-pdf/PoA_en.pdf).

<sup>483</sup> See *supra* note 476; G.A. Res. 2200 (XXI) art. 10[3], International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966), <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>.

<sup>484</sup> See *supra* note 476; G.A. Res. 1386 (XIV), Declaration on the Rights of the Child, U.N. Doc. A/4354 (Preamble) (1959), <http://hrlibrary.umn.edu/instree/k1drc.htm>.

<sup>485</sup> See *supra* note 476.

<sup>486</sup> Miriam Berger, *U.S. Signs International Declaration Challenging Right to Abortion and Upholding 'Role of the Family'*, THE WASHINGTON POST (October 22, 2020), <https://www.washingtonpost.com/world/2020/10/22/trump-geneva-consensus-abortion-family/>.

<sup>487</sup> *Declaration on Human Rights Defenders*, United Nations Human Rights (last accessed January 23, 2021), <https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx>; *International Documents of a Non-Legally Binding Character*, <https://2009-2017.state.gov/documents/organization/65728.pdf>.

*V. Appraisal, Invention of Alternatives and Recommendation of Solutions in the Common Interest*

As we have reiterated, the delimited problem this article seeks to resolve is whether a mother should maintain the right to have an abortion or whether an unborn child should have a right to life, superseding, in principle, the mother's right. This section will make a critical legal analysis of the meaning of personhood regarding an unborn fetus in its relation to a mother's right to an abortion. This section will also address any claims made throughout this article and provide each with a response in the context of resolving the main delimited problem. This section will then recommend a solution to the problem that is in the best interests of society while adhering to the tenets of a public order of human dignity.

*A. Analysis of Roe and "Personhood"*

As it stands, *Roe v. Wade* pointed out that the mother has the right to choose an abortion as part of a "penumbra" emanating from the right of privacy provided for in the Due Process Clause of the Fourteenth Amendment. It further stated that the mother's right may only be infringed upon if the law regulating it is necessary and narrowly tailored to fulfill a compelling government interest.<sup>488</sup> The Court in *Roe* justified the mother's right to choose her abortion by noting several cases that relate to the right of privacy. However, as outlined in *Roe* and reiterated in *Casey*, choosing to abort is "inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner*, and *Pierce* and *Meyer* were respectively concerned."<sup>489</sup>

*Casey* points out that abortion involves "the purposeful termination of potential life, and therefore the decision to abort is 'sui generis' (unique), and 'different in kind from the rights protected in the

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<sup>488</sup> *Roe*, *supra* note 342, at 154.

<sup>489</sup> *Roe*, *supra* note 342, at 159; *Casey*, *supra* note 378, at 951–52.

earlier cases under the rubric of personal or family privacy and autonomy.”<sup>490</sup>

Crucial to the argument is when personhood begins, because *Roe* made clear that if “personhood” can be established, the case for *Roe* collapses because “the fetus’ right to life would then be guaranteed specifically by the [Fourteenth] Amendment.”<sup>491</sup>

When the appellee in *Roe* argued that life begins at conception, and the State has a compelling interest to protect that life from conception onward, the Court chose not to answer the question of when life begins because at that time, they felt there was not a consensus in medicine, philosophy, and theology and did not want to speculate as to the answer.<sup>492</sup> However, it seems that there is now a scientific consensus of when life begins. Science has demonstrated through thousands of independent, peer-reviewed publications over the last 40 years leading up to present day, that human life begins at the moment

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<sup>490</sup> *Casey*, *supra* note 378, at 952.

<sup>491</sup> *Roe*, *supra* note 342, at 156–57.

<sup>492</sup> *Roe*, *supra* note 342, at 159.

of conception.<sup>493</sup> At conception, also referred to as sperm-egg fertilization, a genetically distinct human organism is formed,<sup>494</sup> and this can occur as early as three minutes after sexual intercourse and up to five days.<sup>495</sup>

The Fourteenth Amendment reads, in part, that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>496</sup> When interpreting any part of the Constitution, courts often look to the originalist interpretation of the Amendment to discover the

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<sup>493</sup> Gitchell, *supra* note 6; Condic, *supra* note 6, “The conclusion that human life begins at sperm-egg fusion is uncontested, objective, based on the universally accepted scientific method of distinguishing different cell types from each other and on ample scientific evidence (thousands of independent, peer-reviewed publications). Moreover, it is entirely independent of any specific ethical, moral, political, or religious view of human life or of human embryos... A neutral examination of the evidence merely establishes the onset of a new human life at a scientifically well-defined ‘moment of conception,’ a conclusion that unequivocally indicates that human embryos from the one-cell stage forward are indeed living individuals of the human species; i.e., human beings”; Terzo, *supra* note 6, “In 1981 (April 23-24), a Senate Judiciary Subcommittee held hearings on the question of when human life begins. Appearing to speak on behalf of the scientific community was a group of internationally known geneticists and biologists who had the same story to tell – namely, that human life begins at conception (fertilization) – and they told their story with a complete absence of opposing testimony (Subcommittee on Separation of Powers to Senate Judiciary Committee S-158, Report, 97th Congress, 1st Session, 1981) ... Dr. Micheline M. Mathews-Roth, Harvard Medical School, gave confirming testimony, supported by references from over 20 embryology and other medical textbooks that human life began at fertilization. ‘It is incorrect to say that biological data cannot be decisive...It is scientifically correct to say that an individual human life begins at conception.’”; Keown, *supra* note 6; O’Rahilly & Muller, *supra* note 6; Greenhill & Friedman, *supra* note 6, Drs. Greenhill and Friedman write in their 1974 obstetrical textbook, “The term *conception* refers to the union of the male and female pronuclear elements of procreation from which a new living being develops ... [T]he zygote thus formed represents the beginning of a new life.”; Byrn, *supra* note 6, The scientific and medical answer as to whether a prenatal life qualifies as a distinct human being had been available for over a century at the time of *Roe*; Patten, *supra* note 6, Dr. Patten of Michigan Medical School writes in his 1964 *Foundations of Embryology*, “The union of two such sex cells to form a zygote constitutes the process of fertilization and initiates the life of a new individual.”

<sup>494</sup> *Id.*

<sup>495</sup> Gurevich, *supra* note 5; Ibrahim et al., *supra* note 5; Custers et al., *supra* note 5.

<sup>496</sup> U.S. CONST. amend. XIV § 1.



Framer's true intent while drafting the Amendment, and thus reveal its true meaning.<sup>497</sup> In order to determine whether this clause applies to the unborn, we must clarify the meaning of the term "person" in its original public meaning.

The Fourteenth Amendment of the U.S. Constitution was drafted in 1868. Therefore, to determine how "person" was used in its originalist interpretation, it is necessary to examine the legal usage of the term "person," its common usage, and its interpretation in the various state statutes and common law practice during that time.<sup>498</sup>

The opinion in *Roe* was decided based on the claim that throughout most of the 19th century, legal abortion practices were more liberal and therefore the term "person" as used in the Fourteenth Amendment, must not have included the unborn.<sup>499</sup> However, there is strong evidence to the contrary.

When looking to the common usage dictionaries of the 19th century, the time at which the Fourteenth Amendment was drafted, the term "person" largely referred to "human being" or "man."<sup>500</sup> Noah Webster's American Dictionary of the English Language from 1864 defined the term "person" as relating to "a living human being; a man,

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<sup>497</sup> BRANDON J. MURRILL, CONG. RESEARCH SERV., R45129, MODES OF CONSTITUTIONAL INTERPRETATION (March 15, 2018), <https://fas.org/sgp/crs/misc/R45129.pdf>; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1211 (1987).

<sup>498</sup> Lawrence B. Solum, *We Are All Originalists Now*, in ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE 1, 2–4 (2011), Originalist methodology discovers the original public meaning by looking at a term's usage, its context within the Anglo-American common law tradition, and its historical interpretation in cases with precedential value; ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997), Justice Scalia held the view that, "A text should not be construed strictly, and it should not be construed leniently; it should be construed *reasonably*, to contain all that it fairly means."

<sup>499</sup> *Roe*, *supra* note 342, at 158.

<sup>500</sup> 2 ALEXANDER M. BURRILL, A NEW LAW DICTIONARY AND GLOSSARY 794 (1851); 3 THOMAS EDLYNE TOMLINS & THOMAS COLPITTS GRANGER, THE LAW-DICTIONARY 104 (1st Am. ed. 1836); 2 NOAH WEBSTER ET AL., AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), "An individual human being ... is applied alike to a man, woman or child."

woman, or child; an individual of the human race.”<sup>501</sup> The entry for “human” included all those belonging to “the race of man.”<sup>502</sup> The most complete and authoritative dictionaries of that time never included birth or the status of being born in their definitions of “person,” “man,” or “human being.” In fact, all the dictionaries defined “person” in terms of humanness, individual humanness, and the state of being a human being.<sup>503</sup> These interpretations of “person” simply refer to a human being of the human race, regardless of whether that human was born or unborn. Where the child is located inside the mother’s womb is merely incidental to what the child actually is, and that is a human being, a person.

Next, to determine the originalist constitutional interpretation of the term “person,” we must look to the intent of the drafters of the Fourteenth Amendment during the time of its enactment. William Blackstone, 18th century English jurist, judge and British politician who wrote the *Commentaries on the Laws of England*, saw “no distinction . . . between biological human life and legal personhood.” To

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<sup>501</sup> 1 NOAH WEBSTER ET AL., AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 974 (1864).

<sup>502</sup> *Id.* at 643. “Man” is defined as, “An individual of the human race; a human being; a person.”

<sup>503</sup> Gorbey, *supra* note 319, at 23; THE OXFORD ENGLISH DICTIONARY (1970) defines “person:” “II. An individual human being; a man, woman, or child; IV. *Law*. A human being (*natural person*).” It also defines “human” as “I. Of, belonging to, or characteristic of man; 2. Of the nature of man . . .”; WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY defines person as: “I. a) an individual human being; c) a human being as distinguished from an animal or thing; 8. a being characterized by conscious apprehension, rationality, and a moral sense; 9. a living individual unit; The 1865 version of Noah Webster’s AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE defined “person” as: “3. The corporeal manifestation of a soul; the outward appearance, expression, & c., body; 4. A living soul; a self-conscious being; a moral agent; especially a living human being; a man, woman, or child; an individual of the human race; In AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), Webster defined “human being” as: “1. Belonging to man or mankind; pertaining or relating to the race of man; 2. Having the qualities of a man.” The 1865 version defined “human” as: “I. Belonging to man or mankind; having the qualities or attributes of a man; pertaining or relating to the race of man; 2. A human being; one of the race of man.”

him, all members of the human species were considered legal persons.<sup>504</sup> The principle of Blackstone's rule was "where life can be shown to exist, legal personhood exists."<sup>505</sup>

The primary Framer of the Fourteenth Amendment, Representative John Bingham, expressed his view a few years prior to 1868, that the term "person" as used in the Fifth Amendment included all human beings:<sup>506</sup> "[N]atural or inherent rights, which belong to all men irrespective of all conventional regulations, are by this constitution guarantied [sic] by the broad and comprehensive word 'person,' as contradistinguished from the limited term citizen - as in the fifth article of amendments, guarding those sacred rights which are as universal and indestructible as the human race .... No State may rightfully, by constitution or statute law, impair any of these guarantied [sic] rights, either political or natural. They may not rightfully or lawfully declare that the strong citizens may deprive the weak citizens of their rights, natural or political ...."<sup>507</sup> Bingham modelled the language in the Fifth Amendment, which included the term "person," and used it accordingly in the Fourteenth Amendment.<sup>508</sup>

Bingham never explicitly addressed abortion in any of the Amendments, but there was a general consensus in 1868 that preborn life was human and therefore was entitled to protection just like any

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<sup>504</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND at 25; Michael S. Paulsen, *The Plausibility of Personhood*, 74 OHIO ST. L.J. 13, 24, 26 (2013), Blackstone distinguishes "natural persons" (human beings) from "artificial" persons, which "are created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic." at 119. In utilizing this distinction, the Supreme Court has determined that the constitutional usage of the term "person" includes corporations, which exist as artificial persons. See *Santa Clara City v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886); If courts are to rely on Blackstone's distinction between types of persons, specifically that "person" includes corporations as "artificial persons," then that term should *a fortiori* include preborn individuals as "natural persons."

<sup>505</sup> See Paulsen, *supra* note 504, at 28 (discussing Blackstone's rule).

<sup>506</sup> John Bingham, Address at Bowerston, Ohio (Aug. 24, 1866), reprinted in *The Constitutional Amendment Discussed by its Author*, CINCINNATI COMM., Sept. 11, 1866, at 19.

<sup>507</sup> CONG. GLOBE, 35th Cong., 2d Sess. 983 (1859).

<sup>508</sup> *Id.*

other human being.<sup>509</sup> It would be irrational if the Fourteenth Amendment was legitimately interpreted “to exclude a group of individuals who were regarded as human beings at the time the fourteenth amendment was written ....”<sup>510</sup>

To gain a clearer picture of the intent of the drafters of the Fourteenth Amendment in 1868, we must look to the state laws and statutes of that era. At the time when the Fourteenth Amendment was ratified in 1868, thirty-six laws enacted by states and territories provided for criminal sanctions for abortion, most of which were classified as “offenses against the person.”<sup>511</sup>

By the end of 1868, the statutes of at least twenty-three states<sup>512</sup> and six territories<sup>513</sup> used the term “child” when referencing the unborn and other states followed suit at earlier or later dates.<sup>514</sup>

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<sup>509</sup> Craddock, *supra* note 319; Gorby, *supra* note 319, at 15.

<sup>510</sup> Robert A. Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 CAL. L. REV. 1250, 1289 (1975): The appellee in *Roe* “assumed that the term ‘human being’ was synonymous with the term ‘person,’” just like Congressmen John Bingham did when he interpreted the Fourteenth Amendment publicly a century before *Roe*. See *id.* at 1333–34.

<sup>511</sup> Craddock, *supra* note 319, at 552; Gorby, *supra* note 319, at 15; *Roe*, *supra* note 342, at 174–75. (Rehnquist, J., dissenting) “By the time of the adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures limiting abortion.” The following jurisdictions had enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868: Alabama; Arizona; Arkansas; California; Colorado; Connecticut; Florida; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nevada; New Hampshire; New Jersey; New York; Ohio; Oregon; Pennsylvania; Texas; Vermont; Virginia; Washington; West Virginia; Wisconsin. For details, see *supra* note 319. See also James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29, 48 (1985).

<sup>512</sup> See Witherspoon, *supra* note 511: Arkansas; California; Colorado; Connecticut; Florida; Illinois; Kansas; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Nebraska; Nevada; New Hampshire; New Jersey; New York; Pennsylvania; Virginia; West Virginia; Wisconsin.

<sup>513</sup> *Id.*, Arizona; Colorado; Idaho; Montana; New Mexico; Washington.

<sup>514</sup> *Id.*, Alaska; District of Columbia; Georgia; Hawaii; Indiana; Kentucky; North Carolina; North Dakota; Oklahoma; South Carolina; South Dakota; Tennessee; Wyoming.

American courts also no longer used the “quickening rule”<sup>515</sup> to determine when an abortion was permitted but now chose to protect the unborn from the moment fertilization began.<sup>516</sup> The mood of that era can be shown in the Pennsylvania Supreme Court’s ruling in 1850 that “the moment the womb is instinct with embryo life, and gestation has begun, the crime [of abortion] may be perpetrated .... and a crime at common law [took place].”<sup>517</sup> The Supreme Court of Maine also upheld a statute, doing away with the quickening rule in *Smith v. State*.<sup>518</sup>

More states continued to follow the trend of criminalizing abortion. By the end of 1849, no less than 18 of the 30 states had anti-abortion statutes; by the end of 1864, 27 of the 36; by the end of 1868, 30 out of 37,<sup>519</sup> in addition to six territories.<sup>520</sup> Out of those 30 states, 27 states criminalized abortion before and after quickening took place and 20 states utilized the same punishment “irrespective of quickening.”<sup>521</sup> There may have been minor political differences amongst the states in their views on abortion at common law, but there was a general consensus to treat unborn human beings as “persons.”<sup>522</sup>

Based on the 19<sup>th</sup> century definition of the term “person” as being a “human being” of the “human race,” irrespective of whether born or unborn, Blackstone’s usage of the term person with no distinction between biological human life and legal personhood, Framers John Bingham’s interpretation of the term “person” to include “all human beings” while drafting the Fifth and Fourteenth Amendments,<sup>523</sup> and the 19<sup>th</sup> century states-wide practice to protect the unborn from the moment of fertilization, the 19<sup>th</sup> century states-wide practice to criminalize abortion as an “offense against the person,” and the 19<sup>th</sup> century

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<sup>515</sup> See *supra* notes 307, 315-318.

<sup>516</sup> Keown, *supra* note 6, at 6.

<sup>517</sup> *Mills v. Commonwealth*, 13 Pa. 631, 632–33 (1850); Gorby, *supra* note 319, at 15.

<sup>518</sup> 33 Me. 48 (1851).

<sup>519</sup> Keown, *supra* note 6.

<sup>520</sup> Witherspoon, *supra* note 511.

<sup>521</sup> See *supra* notes 307, 315-318.

<sup>522</sup> Destro, *supra* note 510.

<sup>523</sup> Bingham, *supra* note 506.

states-wide practice to use the term “child” when referencing the unborn – these facts all demonstrate that at the time the Fourteenth Amendment was drafted, abortion was a criminal act, and the unborn had legal “personhood,” which afforded them legal protection from the moment of conception.

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>524</sup> Based on its original intent and public meaning, we have established that the Fourteenth Amendment to the U.S. Constitution does include the unborn as “persons” who should be afforded the substantive due process right to life from the moment of conception.

Abortion is the termination of the life of an unborn fetus.<sup>525</sup> Therefore, abortion infringes upon an unborn fetus’ right to life as referenced in the Due Process clause of the Fourteenth Amendment. Any law that infringes upon this substantive due process right will only stand if the law’s regulation is necessary and narrowly tailored to promote a compelling government interest.<sup>526</sup> Here, the compelling governmental interest is to preserve life, both the life of the mother as well as the life of the unborn child. As we have established, abortion is the deliberate termination of the life of an unborn child. The question remains in situations of direct conflict, does refusing to allow abortion of the child unlawfully interfere with a higher interest in the preservation of the life of the mother? This question may be moot if there are no instances where abortion is necessary to preserve the life of the mother.

Today, experts in obstetrics and gynecology say that “direct abortion” is not medically necessary to save the mother’s life, and affirm there is “a fundamental difference between abortion, and [other] necessary medical treatments that are carried out to save the life of the mother, even if such treatment results in the loss of life of her unborn

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<sup>524</sup> U.S. CONST amend. XIV § 1.

<sup>525</sup> Diener & Latourette, *supra* note 2; *Roe*, *supra* note 342, at 116–122.

<sup>526</sup> ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 529 (1997): “Under strict scrutiny a law is upheld if it is proven necessary to achieve a compelling government purpose.”; JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 638–46 (6th ed. 2000).

child.”<sup>527</sup> The American Association of Pro-Life Obstetricians and Gynecologists further maintain that late-term abortions are “never necessary” and that any new subspecialties designed to prevent “potentially-life threatening conditions” are merely an “attempt to increase the number of board-certified OB-GYNs trained to perform second and third trimester abortions.”<sup>528</sup>

If the scientific data presenting that abortion is never medically necessary to preserve the life or health of the mother prove correct, and as abortion always involves the termination of the life of the unborn child – in the interests of the government preserving life, the right to privacy as protected by the Fourteenth Amendment ought not to include the mother’s right to an abortion.

### *B. Response to the Claims*

To the mother who claims that she should be able to abort her child if she faces financial circumstances, relationship difficulties, or the child would interfere with her relationship or career, I would argue that none of these circumstances justify taking a human life, especially at the moments where the child shows signs of vital life. Science has shown that based on the biological factors of human development, the unborn child’s brain begins to form by the fifth week of gestation, the child’s heart begins beating at six weeks gestation, and the child’s lungs begin forming at seven weeks.<sup>529</sup> The child even has the sensory receptors necessary to feel pain by the seventh week of gestation<sup>530</sup> and can undoubtedly can experience pain by eight weeks gestation.<sup>531</sup>

This article has demonstrated that unborn children also experience an emotional attachment with their mother while in the womb, as they can respond, both physically and emotionally, through touch

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<sup>527</sup> Witherspoon, *supra* note 511, at 47; *Dublin Declaration on Maternal Healthcare* (2018), <http://www.dublindeclaration.com>.

<sup>528</sup> Studnicki, *supra* note 134.

<sup>529</sup> See *supra* notes 21-24. See specifically *supra* note 22, Noting that some ultrasounds have detected the child’s heartbeat as early as 3-4 weeks.

<sup>530</sup> See *supra* note 25.

<sup>531</sup> See *supra* note 27.



and through the sound of their mother's voice.<sup>532</sup> We have also demonstrated that an unborn child establishes an emotional relationship of trust with its mother that begins in the womb that impacts how that child will turn out later in life.<sup>533</sup> If an unborn child can respond physically and emotionally while in the womb, there is evidence of a human life, and no human life should be terminated.

To the mothers who claim they should not get an abortion because their child will be born with a birth defect or disability and would not experience quality of life, I would argue that such children, like those with Down Syndrome, have proven that they live happy and wonderful lives. Based on the study that evaluated the attitudes of individuals with Down Syndrome, 99% were happy with their lives, 97% liked who they are, 96% liked the way they look, and 86% could easily make friends.<sup>534</sup>

Less than 1% of abortions occur due to incest or rape,<sup>535</sup> but even in those important cases, mothers who claim they should get an abortion in the case of rape and/or incest should not get an abortion because an innocent child should not have to suffer at the hands of another's criminal act.<sup>536</sup> Just because one criminal act was done, does not mean it should be repaid with another criminal act, especially when it is towards an innocent person and not even the criminal himself. Further, statistics show that abortion after rape is harmful to the mother because abortion tends to exacerbate the mental anguish from the rape, not remove it.<sup>537</sup>

With regard to the claims of the mothers who argue they should be able to receive an abortion because the fetus inside the womb is not a fully-formed human being with a functioning brain, a beating heart, or active lungs, and is nothing more than a clump of cells which are not living tissue – a group of studies has shown that when placed onto a petri dish, the cells of an embryo can self-organize

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<sup>532</sup> American Academy of Family Physicians, *supra* note 34.

<sup>533</sup> See *supra* notes 50-57, 178-183.

<sup>534</sup> See *supra* note 208.

<sup>535</sup> See *supra* note 133.

<sup>536</sup> Right to Life of Michigan, *supra* note 148.

<sup>537</sup> Uddo, *supra* note 170.

into distinct forms of tissue without requiring maternal tissue to proceed its growth up to 13 days after implantation.<sup>538</sup> Furthermore, at the moment of conception, when the egg and sperm meet through fertilization, a distinct living organism has been created with DNA which predetermines its sex, eye color, hair color, height, and every other physical trait that individual will possess until the day he or she dies.<sup>539</sup>

Since an embryo has the capability to form by itself, outside of the mother, that is an indication of life, and such life should not be terminated by an abortion. Also, since at the moment of conception, a living organism is formed with DNA that can describe that organism's physical characteristics, that would also show evidence of life – human life, and no human life should be terminated.

### *C. Abortion Harms Mothers, Fathers, and Children*

Abortion is harmful to mothers because most women suffer physical consequences afterwards, like having a lesser chance of giving birth again, damage to their reproductive system, heavy bleeding, and even death.<sup>540</sup> Most women also suffer mental and emotional harm afterwards, including post-traumatic stress, psychological guilt, severe post-partum depression and anxiety, sleep disturbances, and substance abuse.<sup>541</sup>

Abortion negatively effects the siblings because not only is losing a sibling psychologically traumatizing,<sup>542</sup> but the abortion can sometimes interfere with their relationship with their mother and can potentially lead to abuse in the household.<sup>543</sup> One study by Dr. Priscilla Coleman showed that in homes where an abortion takes place, abuse in the household increases by 144% in comparison with households where no abortion takes place.<sup>544</sup> Abortion also negatively

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<sup>538</sup> See *supra* note 14.

<sup>539</sup> See *supra* notes 6-9.

<sup>540</sup> See *supra* notes 141-147.

<sup>541</sup> See *supra* notes 148-170.

<sup>542</sup> See *supra* notes 184-185.

<sup>543</sup> See *supra* notes 186-189.

<sup>544</sup> See *supra* note 189.

effects the mother's relationship with her partner because 40-75% of marriages and relationships fail after an abortion takes place.<sup>545</sup> Abortion negatively effects the father as well because he often may feel regret and deep emotional distress after an abortion,<sup>546</sup> and sometimes may feel he has no say in whether the woman gets an abortion or not, even though he contributed to creating the child.<sup>547</sup>

Not only does abortion terminate the life of a child, but in some instances, can exert pain on the child. To illustrate, a child can undoubtedly feel pain at 8 weeks gestation;<sup>548</sup> and since a D & C abortion can be performed on a child up to 14 weeks gestation, that provides roughly a 6-7 week timeframe where that child will experience the pain of a catheter sucking it through a tube with a force 29 times than that of a vacuum cleaner. If the child is still alive after that point, it may also experience the pain of a sharp metal rod scraping its body parts from the inside of the uterus.<sup>549</sup>

Induction abortion also causes pain to an unborn child. In this instance, the doctor injects a lethal saline into the unborn baby's body to stop the baby's heart, before it is delivered from the uterus.<sup>550</sup> The doctor specifically aims to inject the needle directly into the baby's heart, torso, or head.<sup>551</sup> At this point, it is undeniable that the child is living since the baby's heart is beating at the time this procedure occurs. Further, this abortion method occurs at 13 weeks gestation and beyond, which is well after the 7-8 week stage in the baby's development, the time at which the baby can feel pain.<sup>552</sup> Therefore, induction abortion causes pain to a child because it is performed on a baby at a stage in its development when the baby can already feel pain; and the pain is exerted on the baby when the needle penetrates the baby's body

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<sup>545</sup> See *supra* notes 191-193.

<sup>546</sup> See *supra* notes 194-196.

<sup>547</sup> See *supra* note 224, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), where the Supreme Court struck down a spousal consent requirement for abortion because gathering the husband's consent was deemed to have placed an undue burden on the mother to receive an abortion.

<sup>548</sup> See *supra* note 27.

<sup>549</sup> See *supra* notes 101-105.

<sup>550</sup> See *supra* notes 106-109.

<sup>551</sup> *Id.*

<sup>552</sup> See *supra* note 27.

tissue and organs and transmits the lethal saline which ends the baby's life.<sup>553</sup>

A D & E abortion causes pain to an unborn child because it is performed on a baby who is alive and at a stage in its development when the baby's bones and skeleton have hardened, all of its organs are functioning and intact, and it can most definitely sense pain.<sup>554</sup> In this procedure, we demonstrated that the doctor uses forceps to tear the baby limb from limb, snap its spine, and crush its skull.<sup>555</sup> Sometimes after a body part of the baby has been removed, the baby still shows signs of cardiac activity and other signs of life while the remainder of the baby is still inside.<sup>556</sup> These abortion procedures undoubtedly have the potential to cause severe pain to the unborn child who is clearly alive and can feel pain in most circumstances. Such procedures should not be acceptable.

#### *D. The Pillars of Human Dignity*

Every person, born and unborn is afforded the "right to life, liberty, and the pursuit of happiness," as outlined in the *Declaration of Independence*.<sup>557</sup> Abortion not only deprives the child of its right to life, but it deprives the mother of her pursuit of happiness, through abortion-related guilt, depression, anxiety, and sometimes physical harm.<sup>558</sup>

The New Haven School of Jurisprudence poses an interdisciplinary, problem-solving framework which aims at ensuring, through the law, a number of things humans value, i.e. values of human dignity.<sup>559</sup> Here, we will make a recommendation to solve the main problem while adhering to those values, as pertinent:

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<sup>553</sup> See *supra* notes 106-109.

<sup>554</sup> See *supra* notes 110-113.

<sup>555</sup> *Id.*

<sup>556</sup> *Planned Parenthood of Wisconsin*, *supra* note 113.

<sup>557</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>558</sup> Stormer, *supra* note 198.

<sup>559</sup> Reisman et al., *supra* note 3, at 576; for broader analysis, see HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY:

(1) The value of “enlightenment” includes the gathering and spreading information through research agencies and other media-based news sources. This article has enlightened its readers by demonstrating the data, statistics, and scientific research pertaining to human development, pregnancy, and abortion. We have shown that a child’s life begins at conception and proceeds throughout the womb. We have shown that abortion terminates the life of a child and can cause considerable physical pain to the child. We have also shown that pregnancy is a natural life process and when an abortion takes place, it can have extreme detrimental effects, not only physically on the mother, but mentally and emotionally on her, the father, and the siblings of the aborted child.

(2) Another pertinent value is “well-being.” It, *inter alia*, offers the opportunity for safety, health, and comfort through medical care and disease prevention. During a mother’s pregnancy, she may not always feel safe, healthy or comfortable while receiving her medical care, but if she receives an abortion, she may experience worse negative health outcomes both physically and emotionally. Further, an unborn child can never receive the opportunity for safety, health, comfort or quality of life if it suffers pain from an abortion procedure or is deprived of its life altogether.

(3) “Skill” is the opportunity to acquire excellence in a particular operation such as a school or any vocational and professional organizations. A mother who is forced to keep her child may not feel she would have the opportunity to excel in her education or career because those might conflict with her pregnancy and motherhood, however many women who give birth and experience motherhood are still able to excel in their education or career. If the mother does not feel she can handle raising a child while attending school or advancing in her career, once she gives birth, she may place her child up for adoption and then pursue her career or education.

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STUDIES IN LAW, SCIENCE AND POLICY 336–38 (1992). The goal of a public order of human dignity is maximization of access by all to the processes of shaping and sharing the values of power, wealth, enlightenment, well-being, affection, skills, respect, and rectitude. Wiessner, *supra* note 3, at 52.

(4) “Affection” means giving and receiving intimacy, friendship, and loyalty through the institutions of family and intimate friends. This article has shown that abortion does not promote affection because it can disrupt the institution of family through each individual’s negative responses to abortion: 1) the mother and father both can experience emotional distress and anxiety which can often create a barrier in their relationship resulting in break-up or divorce; 2) the unborn child likely experiences not only physical harm through an abortion but emotional harm because it has already developed an emotional relationship of trust with its mother, which is severed once the baby is aborted; 3) lastly, the siblings face severe emotional trauma when they learn of the loss of their sibling from abortion. This can create a feeling of rejection and abandonment in the siblings who may now consider themselves “abortion survivors” who need to live up to their parents’ expectations in order to be accepted.<sup>560</sup> This trauma can create a rift in the relationship with the mother and her existing children and thus lead to potential abuse in the household.<sup>561</sup>

(5) “Respect” recognizes and honors the freedom of choice and recognizes every person’s common merit as a human being. When balancing the mother’s right to choose abortion versus the child’s inherent right to life, each individual possesses the merit as a human being, both of whom are worthy of respect. A mother should be treated with care and respect throughout her pregnancy process and receive the proper health care, financial resources, and emotional support she needs to have a healthy and successful delivery – as well as a strong, healthy and stable motherhood. Abortion does not respect a mother, her unborn child, the father, or the siblings because as mentioned, it results in the mother experiencing negative physical and mental health consequences; it results in the unborn child experiencing emotional pain, physical pain and being deprived of its life; and it results in both the father and siblings experiencing deep emotional suffering.

(6) “Rectitude” refers to responsibility for conduct which is celebrated through religious, metaphysical, or ethical norms. When acting irresponsibly, the law exists to keep us accountable, but also to

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<sup>560</sup> Rabkin & Krell, *supra* note 186.

<sup>561</sup> See *supra* notes 186-189.

protect us from harm. This article has demonstrated the harmful dangers of abortion and the severe consequences it can have on the mother – physically and emotionally, as well as the negative consequences that can severely impact the father and siblings.

From a religious and metaphysical standpoint, every human life has inherent value and worth, and no human life is more valuable than another. To value the mother's life over her unborn child's would be immoral, and the inverse is true. However, unlike the mother, the unborn child cannot determine its existence, nor can it control how it is brought into the world. Mothers have been given the divine responsibility to nurture and raise their children from the womb until their children can maintain responsibility for themselves. Therefore, unborn children should at least be given the opportunity to be brought into the world and be afforded a fair chance, however slight, to be nurtured by someone who is willing to take care of them.

The ethical concerns from abortion have existed for centuries and still exist today. Abortion is the taking of the life of an unborn child. Not only is the child defenseless in the womb, but it is innocent. In no society have we ever punished criminals without them being able to defend themselves and fight to preserve their innocence. How much more should we allow an innocent child to defend itself and fight for its innocence when it has committed no crime? We, as a society, have turned our back on logic, justice, and human dignity.

#### *F. Final Thought*

The main problem we faced was whether women should continue to have the exclusive right to an abortion or whether the unborn have a substantive due process right to life, superseding, in principle, the right of the mother. We purport that an unborn child, at any stage of human development, has "personhood"<sup>562</sup> and thus is entitled the right to life. Therefore, our recommended legal solution to this problem is to advocate that an exclusive woman's right to choose an abortion as prescribed in *Roe v. Wade* must be held to be unconstitutional.

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<sup>562</sup> *Roe*, *supra* note 342, at 150, 156–57. *See supra* notes 500–524.



We further pose that a child in the womb must be recognized as being afforded basic Constitutional rights as if it were a minor child outside the womb, i.e. be free from abuse, neglect, abandonment, or lack of support.

Our recommendation also includes creating more pro-family organizations that advocate, provide counseling, and raise funds for pregnant mothers, post-partum mothers, and couples who have physical, emotional, financial, and familial needs regarding pregnancy and/or family planning. We also recommend creating organizations that facilitate more healthy and long-lasting relationships for newborns via adoption by interviewing couples and individuals who have proven loyalty, dedication, and the ability to properly love and raise a child whose biological parents are unable to look after. The process to adopt a child will require providing information regarding prior criminal history, current financial status, present family situation, and any other social, moral, and ethical information deemed necessary to ensure the child is placed and raised in a stable, loving and supportive environment. We feel these resolutions best promote an order of human dignity by furthering the best interests of the mother, the unborn, the father, the siblings, and society as a whole.