ECHOES OF EUGENICS: ROE V WADE

THESIS

Presented to the Graduate Council of the
University of North Texas in Partial
Fulfillment of the Requirements

For the Degree of

MASTER OF ARTS

By

Jo Wunderlich, B.A.

Denton, Texas

August, 1995
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Traces the inter-related histories of the eugenics movement and birth control, with an emphasis on abortion. Discusses Sarah Weddington's arguments and the Supreme Court's ruling in *Roe v Wade*. Shows the eugenic influences in the case and asserts that these influences caused the decision to be less than decisive.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>Chapter</td>
<td></td>
</tr>
<tr>
<td>1. THE EUGENICS MOVEMENT</td>
<td>3</td>
</tr>
<tr>
<td>2. A BRIEF HISTORY OF BIRTH CONTROL</td>
<td>21</td>
</tr>
<tr>
<td>3. WEDDINGTON'S ARGUEMENTS</td>
<td>42</td>
</tr>
<tr>
<td>4. THE SUPREME COURT'S DECISION</td>
<td>61</td>
</tr>
<tr>
<td>5. EUGENIC ASPECTS OF ROE V WADE</td>
<td>70</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>91</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>94</td>
</tr>
</tbody>
</table>
INTRODUCTION

After reading the Supreme Court's landmark decision in *Roe v Wade* the lawyer who argued the case, Sarah Weddington, expressed surprise at the court's ruling regarding abortion. Weddington voiced astonishment at the court's ostensibly unique, trimester approach to pregnancy. The court, she maintained, originated the trimester concept, as neither her oral arguments nor the accompanying amicus briefs contained any reference to a trimester approach to pregnancy. Initially, perhaps, Weddington might have had cause for her incredulity, but upon closer scrutiny, the opinion of the court and its trimester approach mirrored the thinking and the sentiments of an earlier era. The Supreme Court's decision in *Roe v Wade* and, indeed, Weddington's own arguments in the case, reflected the ideas and reasoning of the eugenics movement. The popularity and influence of the eugenics movement peaked many years earlier and then fell from fashion, but its arguments still proved persuasive and compelling enough to influence this significant court decision. Although Weddington did not consciously argue eugenic ideas and the court's decision contained no overt eugenic thinking, both clearly reflected ideas promoted by the eugenics movement.

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This study intends to trace the history of eugenics, showing how this way of thinking gained popularity and how it fell from favor. The history of eugenics goes hand in hand with that of birth control. This study focuses on that relationship and, more specifically, eugenics as it relates to the most radical and most controversial form of birth control, abortion. Abortion constitutes the most extreme measure of birth control. In terms of physical measures required to prevent a birth, but also in terms of legal and moral considerations, abortion represents a most problematical issue. Both historical and legal aspects of the history of abortion in the United States are examined, leading up to the Supreme Court's decision in 1973. By reviewing Sarah Weddington's arguments and the Court's ruling, this study attempts to demonstrate that the Supreme Court's decision in Roe v. Wade echoed the ideas and reasoning of the eugenics movement.
CHAPTER I

THE EUGENICS MOVEMENT

The first chapter in this study focuses on the history of the eugenics movement. Those in the eugenics movement believed that society could be improved through careful and selective breeding. Proponents of the movement asserted that society would benefit if members with desirable qualities multiplied in number while those with undesirable qualities diminished in number. Those in the eugenic movement believed that many of society's ills resulted from the excessive number of lower class people. To improve society the numbers of the less desirable needed to be diminished and to this end, birth control needed to be employed. The eugenists advocated various forms of birth control including contraceptives, sterilization and abortion. Thus, this history of the eugenics movement refers to various methods of birth control but, to the extent that it is possible, this chapter focuses on the eugenics movement and the following chapter traces the history of the birth control movement.

Although the eugenics movement culminated in this century, its origins extended to ancient times. Society's attempts to restrict its offspring for economic and social reasons descended from preliterate eras. For example, natives of New Guinea and the Easter Islands realized that too many children endangered the well being of the entire
settlement. These early eugenic ideas received acceptance and during the eleventh
century the church exempted poorer women from its prohibition on birth control. By the
medieval times this direct relationship between birth control and economic necessity was
assumed. For several centuries preceding the industrial era, landowners sought to maintain
their patrimonial dominion over their land via population control. French landowners
restricted excessive numbers of heirs by sending unnecessary daughters off to convents
and extraneous sons to monasteries or into the military. Limiting fertility by postponing
marriage was a common tactic with economic justification for both men and women, to
avoid "diluting the inheritance." From the sixteenth to the eighteenth centuries, women
frequently delayed marriage, and thus children, to work and acquire a craft or to earn
money for a dowry.

Thus when English minister Thomas Malthus (1766-1834) published The Essay on
Population, a source often referred to by early members of the eugenics movement, the
concept of having too many children as an economic liability was already in place.
Malthus' influential essay, published in 1798, codified existing ideas concerning the
desirable number of offspring. Malthus disagreed with the Enlightenment's notions
maintaining that mankind could create a better society. The young cleric posited that "the
future improvement" of society would be prevented by population growth. This growth of
the population, he maintained, occurred at an exponential rate, while subsistence increased

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1Norman Himes, Medical History of Contraception (New York: Gamut Press,
Inc., 1963), 20, 22.

2Rosalind Pollack Petchesky, Abortion and Woman's Choice (New York:
Longman Inc., 1984), 35.
only arithmetically. Malthus did not encourage state intervention into the plight of the poor. On the contrary, government interference could only prove counterproductive to "nature's laws." The middle and upper classes seized upon Malthus' ideas to preserve the status quo.3

After acquiring an economic legitimation, the eugenics movement found a scientific rationalization during the mid-nineteenth century when great advances in physical, biological and social sciences occurred. Members of the movement employed Charles Darwin's natural selection theory proposed in The Origin of the Species in 1859, as a means of accounting for the rise and fall of civilization. Institutions such as education, welfare, medicine and charity interfered with natural selection, enabling the less "fit" to survive. Without such intervention, the innately superior people would exceed in quantity and quality. The Social Darwinists viewed modern society as interfering with natural selection to society's own detriment. From this "interference" modern eugenics emerged.4

Charles Darwin's cousin, Sir Francis Galton (1822-1911), founded and lead the eugenics movement in England. Based on natural selection and human heredity, Galton theory visualized eugenics as a social science, as a logical application of evolution for the betterment of society. For Galton the overwhelmingly determining factor was heredity. Heredity served to better society if the "superior" elements maintained a higher fertility


rate than the "inferior." He believed in biologically superior and inferior races, and in superior and inferior classes within those races. Galton maintained that these races and class positions were hereditary and were perpetuated from one generation to the next. Just as Malthus had discouraged any aid to the poor, Galton cautioned that public assistance should be used selectivity lest greater numbers of inferiors result. Instead, through rational, scientific means, the "better" aspects of society would flourish, thereby improving society as a whole.\(^5\)

The flourishing of sciences during Galton's lifetime and the wide acceptance of the scientists' new findings, seemingly demonstrated by the divisions in industrialized society, caused the concept of eugenics to gain broad acceptance. As a branch of the science of human heredity, eugenics applied genetic theories to the betterment of society. Members of the eugenics movement approached their subject from two aspects. Positively, eugenics encouraged "fit" individuals to increase in numbers. The fit commonly included the upper class and those of Anglo-Saxon or "Nordic" heritage. Negatively, eugenics discouraged the breeding and immigration of the "unfit." The unfit commonly included the lower classes and immigrants from south and central Europe.\(^6\) As the eugenics movement took hold during the late eighteen hundreds in the United States, Americans viewed themselves as superior, and they owed their exceptional character to their Anglo-


\(^6\)Shapiro, *Population Control Politics*, for a concise definition of eugenics see 33.
Saxon heritage. Efforts that sought to preserve this racial purity involved birth control.

Through the use of birth control, those in the eugenics movement intended to improve all of society, even at the expense of the individual. The individual did not have rights if those rights clashed with the best interests of society as a whole. The individual served as a means to the betterment of the state. The eugenics movement assumed that responsible people used contraceptives voluntarily. The irresponsible, i.e., the unfit, multiplied with apparent random and therefore the state should intervene for the sake of the greater community. According to many Americans during the last decades of the nineteenth century, many aspects of society demanded extensive intervention.

The progressive movement, spanning approximately 1890 to 1920, attempted to reform American society, by curing its many ills. This period of social unrest witnessed the emergence of the industrial capitalist, economic instability, extremes of haves and have-nots, waves of immigration and the rise of politically radical groups. The progressives, whose members hailed from the middle and upper-classes, sensed a threat to their positions and organized a response to regain social stability. Eugenics helped the progressives unify their program by suggesting one overall solution. Eugenics could

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7 Pickens, *Eugenics and the Progressives*, 16.


9 Pickens, *Eugenics and the Progressives*, 93 and 95.

abolish the many existing vices in American society through the simple implementation of birth control.¹¹ The ideas of the eugenics movement held great appeal for Americans. By the turn of the century, eugenics organizations numbered at seventy, with half of them having begun in the last ten years.¹²

The eugenics movement especially appealed to members of the American upper class. A few elites perceived a threat to their position in society, and sought to restore a proper balance, sought to preserve the status quo. Under the auspices of progressive ideas and modern science, the eugenics movement created an illusion of radicalism. The movement, however, was conservative to its core.¹³ Members of the eugenics movement considered the notion of a woman controlling her own fertility dangerous and subversive, lest the very aspects of society to be eliminated, the "bad stock," overrun the desirable elements of society.¹⁴ Thus the eugenists appeared to be serving the best interests of society by adopting an ostensibly progressive program to eliminate or lessen the number of "undesirables," but what they actually promoted was an inherently conservative movement which sought to preserve their own elite positions in society. The eugenics movement wanted to reform the lower classes while conserving the upper classes.

This dialectic of overt radicalism with conservative roots appealed to various aspects of the progressive movement. The feminists of the late nineteenth century found


¹²Pickens, *Eugenics and the Progressives*, 16.

¹³Ibid., 75.

¹⁴Petchesky, *Abortion and Woman's Choice*, 79.
the eugenic ideology especially appealing. Feminists adopted eugenic arguments to gain more political and social power in many male-dominated professions and institutions such as the church, medicine and academia.\textsuperscript{15} Eugenic ideas also held personal ramifications for the feminists. Social purity involved voluntary motherhood, which in turn necessitated women’s control over their own reproductive capacities. Feminists used eugenic arguments in an attempt to determine the size of their families. Elizabeth Cady Stanton regarded the future of the human race as contingent on quality children born to willing mothers.\textsuperscript{16} Devoted to selfless domesticity and sheltered from the cruel effects of industrialization, women offered uncontaminated, superior morals and played a crucial role in civilization’s future.\textsuperscript{17} Society’s conception of women’s role facilitated the feminists’ adoption of eugenic ideas. The goal of motherhood evolved to emphasize quality children over the number of children. If a woman was to raise better children she needed to control the number of children she had as well as their spacing. The expanded role of child rearing, of quality superseding quantity, reinforced the logic for family planning.\textsuperscript{18}

The issue of involuntary motherhood was discussed at length in much of the writing on the subject of voluntary motherhood between the years of 1890 and 1910.

\textsuperscript{15}Gordon, \textit{Woman’s Body}, 131.


\textsuperscript{17}Ibid., 40.

\textsuperscript{18}Petchesky, \textit{Abortion and Woman’s Choice}, 39.
While suggesting that birth control would eliminate existing evils, writers also suggested that it would be likely that unplanned children would probably be physically and morally flawed. 19 A leading early member of the eugenics movement, Moses Harman, wrote, in 1890, in favor of strictly voluntary motherhood:

... in order that she may worthily fulfill her function of motherhood; in order that she shall no longer be compelled to become the unwilling creator and builder of mental and moral dwarfs and imbeciles — in order that she may no longer be compelled to help supply the gallows, the prison, the poorhouse, the house of ill-fame, with birth-predestined victims. 20

Practice birth control, the eugenics movement maintained, and society would eliminate crime, poverty and prostitution.

Some members of the eugenics movement argued further that not only could birth control eradicate all social suffering, but abolish women's subjection, the root of this suffering, as well. At the National Purity Congress in 1894, speaker Helen Gardener argued, the "pretended subservience but resentful acquiescence of wives helps to account for the mendacity of their offspring." 21 Suffragist Harriet Stanton Blatch wrote in 1891, that for society to progress three primary conditions must be fulfilled: "voluntary maternity, including financial independence for women, broader education for women, and

19Gordon, Woman's Body, 121.

20Ibid., 127. Gordon quotes the pamphlet, The Next Revolution: or, Woman's Emancipation for Sex Slavery (Valley Falls, Kansas: Lucifer Publishing Co. [1890]), 24. She notes it is unsigned but that Harman is probably the author.

21Ibid., Gordon quotes Gardener's speech from the Congress page 104, but gives no publisher for the source.
assurance of women's sole authority over their children." Some members of the eugenics movement in this period took women's subjection as the cause of society's ills to the extreme. Indeed, they held the position that a positive eugenic effect would automatically result from women's independence.

The notion that the community would improve directly from the independence of women derived from the changing concept of motherhood in the late nineteenth century. The Victorians perceived motherhood as an exalted, almost sacred profession. They viewed motherhood as a woman's highest duty, her ultimate virtue. Feminists combined this elevated notion of motherhood with the eugenic concept of quality over quantity children, resulting in the professionalization of the role motherhood. When addressing the 1891 National Council of Women Frances Willard employed the term "scientific motherhood." Charlotte Perkins Gilman linked genetics with child psychology to create the professional role of motherhood in a "child-culture."

Other aspects of society during the Progressive era grew increasingly professional and secular, including social welfare agents, educators, scientists and physicians. In her


23Ibid., 128-30.

24Petchesky, Abortion and Women's Choice, 41.

25Gordon, Woman's Body, 29.

26See following chapter in this study on the professionalization of the medical profession.
book, *Abortion and Woman's Choice*, Rosalind Pollack Petchesky asserted that these new professionals, from the late nineteenth century on, wrote the state intervention policies in the previously sacrosanct arena of family life. She notes that they

combined a focus on eugenics, or a belief in "selective breeding" that would promote the propagation of "fitter" populations and encourage that of the "unfit"; an epidemiological, or public health, approach that provided a hygienic rationale for birth limitation and sexual restraint, especially among the lower classes; and emphasis on "quality" mothering, guided by "experts" in child rearing.\(^{27}\)

At the beginning of the Progressive era, various organizations in American society attached their carts to the eugenic bandwagon in efforts to promote their own individual purposes. Progressivism afforded these groups a paragon of ideological support for their causes.

After the turn of the century eugenics received support from various other aspects of American society. The patrician class, exemplified by Mrs. E. H. Harriman, contributed substantially to the cause. Prominent businessmen, such as Andrew Carnegie, used their financial influence to promote eugenics. Respected scientists, Alexander Graham Bell among them, crusaded for the cause and organized the movement. With financial and popular backing, the findings of the scientists received wide exposure and acceptance. The elite members of American society employed the scientists' findings to reinforce their own social positions and, ultimately, to justify their veneration of their own race and ancestry.\(^{28}\)

To this end, supporters of the eugenics movement founded the Carnegie Institution

\(^{27}\)Petchesky, *Abortion and Woman's Choice*, 72.

\(^{28}\)Pickens, *Eugenics and the Progressives*, Chapter 3, especially pages 45 and 53.
in 1902. This venerable academy funded and supported several leading eugenics movement early in the century. The activities received support from various highly regarded Americans including Harvard's President Charles Eliot, Coleman DuPont and Henry Clay Frick. Classes on eugenics were on the curriculum at such esteemed institutions as Harvard, Yale, Columbia and Stanford. Furthermore many of these colleges and universities funded scientific research which supported and promoted the eugenics movement.29

Among the scientific discoveries used to promote eugenic ideas were the newly found works of Johann Mendel (1822-1884). Although Mendel's works refuted the letter of Galtonian thought, his genetic theory aided in promoting the eugenics movement. Mendel disproved Galton's notion of the restoration of ancestral types. Mendel proved that genes did not blend but retained their own particular identity. Therefore, the genes of a lower class person could not blend with those of an upper class person, thereby rendering an offspring of "lesser" class than that of the upper class parent. Rather the genes of the lower class person remained true but would be either dominant or recessive, depending on the genes with which they paired. Despite the fact that Mendel's ideas refuted those of Galton, the eugenics movement promoted the hereditary aspects of the new scientific discovery, lending their creed greater support.30

Other thinkers in the early decades of the twentieth century further promoted the eugenics movement via the social sciences. Charles Benedict Davenport (1886-1944) lent

29 Aldrich, "Capital Theory and Racism," 34.

30 Pickens, Eugenics and the Progressives, 47, 50-3.
his administrative skills to various eugenic organizations while promoting heredity as the source of the human condition. David Starr Jordan (1851-1931) propagandized eugenics in order for it to appeal to other reform movements such as pacifism and a return to rural settings. Harry H. Laughlin (1880-1943) influenced public policy as an expert for the House of Representatives Committee on Immigration and Naturalization, 1921-31.\textsuperscript{31}

William McDougall (1871-1938) constituted perhaps the greatest eugenics influence in the field of social sciences. As a professor of psychology, McDougall endorsed hereditary instincts or "propensities" as the determining factors in mankind. McDougall cautioned against propensities which encouraged procreation with one's own kind creating a dysgenic effect. To prevent social degeneration, McDougall recommended the establishment of national goals, with the state's unity as the prime consideration, thereby guaranteeing the welfare of every citizen.\textsuperscript{32}

McDougall's association of eugenics with the well-being of the country appealed to Americans and found its political voice in Theodore Roosevelt. President Roosevelt cautioned, as had Galton earlier, against "racial suicide." Racial suicide threatened due to the different rates of fertility between the upper and the lower classes. If the upper-classes continued to restrict their fertility without regard to the lower-classes, superior Americans would disappear. To prevent this occurrence, the President recommended decent Americans should produce a minimum of four children, with six being the optimum number of offspring. Roosevelt represented the positive aspect of eugenics. He

\textsuperscript{31}Ibid., Chapter 4.

\textsuperscript{32}Ibid., Chapter 8, especially 154-62.
advocated, "But as yet there is no way possible to devise which could prevent all undesirable people from breeding. The emphasis should be laid on getting desirable people to breed."\textsuperscript{33}

Roosevelt's outspoken advocacy of eugenic ideas met with some resistance from the feminists. Several, such as Charlotte Perkins Gilman called for a birth strike lest the children they bore serve only to feed men's armies.\textsuperscript{34} While many feminists opposed Roosevelt's race suicide propaganda, they also adapted some of its concepts to suit their cause. Emma Goldman wrote in 1914:

\par
Woman no longer wants to be a party to the production of a race of sickly, feeble, decrepit, wretched human beings, who would have neither the strength nor moral courage to throw off the yoke of poverty and slavery. Instead she desires fewer and better children, begotten and reared in love and through free choice; not by compulsion as marriage imposes.\textsuperscript{35}

Clearly, eugenics accommodated a diverse assortment of causes.

Like many other feminists, Margaret Sanger adapted eugenic ideas to legitimize her cause, birth control. Sanger relied on the conservative aspects of eugenics to gain respectability for birth control. She quoted the likes of Galton and McDougall lending scientific and medical respectability to her campaign against the incursion of the unfit. The use of birth control, she maintained, arrested the growth of the lower classes, permitted

\begin{flushleft}
\textsuperscript{33}\textit{Ibid.}, 119-29. Quote on 125.
\textsuperscript{34}\textit{Gordon, Woman's Body}, 146.
\end{flushleft}
racial regeneration and, thus, secured the future of civilization. Her emphasis evolved from focusing on women's right to birth control to family planning as it applied to the community. Sanger's message also modified during her lifetime crusade. While adapting eugenics to legitimize her cause, Sanger also softened its message and in so doing lent broader legitimacy to the eugenic creed, as well.

The broad endorsement which eugenics received was perhaps best realized in the sanction, and increasingly frequent practice of a particular form of birth control, that of sterilization. Legal sterilization, grounded in the belief in the hereditary nature of mental deficiency, was first used in an attempt to control the feebleminded population. Members of the eugenics movement believed that society would benefit by the sterilization of these individuals and mental problems would eventually disappear. As the eugenic creed increased in popularity, the state became increasingly involved. By the mid-1920's over forty states had enacted sterilization legislation. As acceptance of the practice broadened, so, too, did the categories of its subjects. The eugenics movement recommended sterilization of the "socially inadequate," which it estimated at about ten percent of the country, including the feebleminded, vagrants, orphans, paupers, the "criminalistic," and the insane. Between 1907 and 1945 over 45,000 persons were sterilized involuntarily, most of them poor women. By the mid-1920s, compulsory sterilization had reached such proportions that those deemed as mentally retarded or

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36Pickens, *Eugenics and the Progressives*, 82-3.


unstable were routinely admitted to institutions for the sole purpose of sterilization, and then released.  

In 1926 the U.S. Supreme Court sanctioned compulsory sterilization in *Buck v. Bell*. The case involved a poor, seventeen-year-old rape victim, Carrie Buck, whose mother was a prostitute. Buck was hospitalized and then sterilized as a condition of her release. When the case came before the Supreme Court, Justice Oliver Wendell Holmes, Jr., warranted the state's action:

> She may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization . . . It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from breeding their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . Three generations of imbeciles are enough.

The Court's eugenic message rang clear. Society was not only justified in "vaccinating" itself against the "degenerate" and the "unfit," but insured the well-being of the state by so doing. For the first time, with the *Buck v. Bell* ruling, the federal government joined the eugenic crusade.

The court ruling reflected American sentiments. The eugenics movement reached its zenith of popularity during the 1920s and 1930s. But increasingly, American interests turned to economic issues and international affairs during the depression. With reference to economics, many in the eugenics movement doubted the viability and permanence of

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capitalism. The radical changes of the New Deal left many eugenists behind in their own conservative dust. Abroad, the horrors of Hitlerism dealt the movement another blow. As Nazi Germany's sterilization procedures became public American interest in eugenics and sterilization dwindled. Adding to the decline of eugenics in popularity were genetic discoveries which discredited the possibility of isolating crucial qualitative genes.  

Eugenics declined in popularity but its effects proved lasting. The very group that promoted eugenics continued to work for its cause; eugenics and those who endorsed the creed were self perpetuating. Those who advocated eugenic ideas occupied elite stations in society and had their own best interests in mind. From Malthus' time, when only the upper-class had the leisure to theorize, until eugenics' heyday in the 1920's, when many in the eugenics movement occupied positions of influence, the proponents of the movement had consistently been members of the middle and upper classes. While ostensibly promoting society's best interests, the eugenics movement sought to perpetuate the middle and upper class roles in society, to maintain the status quo.

Increasingly, the eugenics movement emphasized environmental factors while down playing the role of hereditary determinism. As head of the American Eugenics Society in the 1930s, Frederick Osborn spoke for many in the eugenics movement when he endorsed better living conditions, not only for better children, but to encourage more and better offspring at a time when the birth rate approached a level of less than replacement. Some in the eugenics movement endorsed public investments in the form of

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education, improved housing, child care centers and subsidized medicine, with the intent of not only producing better children, but raising the birth rate as well.\(^43\) These public investments necessarily involved the federal government.

Since the *Buck* decision the eugenics movement worked to increase the federal government's involvement in perpetuating the eugenics creed. In 1952 the Rockefeller family founded the Population Council. While consistently receiving funding from wealthy elites, this organization has been a key influence in American population policy, from its inception to the present. Albeit subtle, the council's eugenic leanings were apparent. It recommended birth control, including sterilization, of the poor and welfare recipients as a means of reducing social costs. With the council's urging, federal funding for sterilization became available in 1971 when many other social programs underwent drastic cutbacks. Family planning acquired sufficient legitimacy for federal support, and the role the government took was under the strong influence of a group of wealthy elites acting in their own best interests.\(^44\)

The Population Council concerned itself with overpopulation. There were too many poor, they maintained, and rather than redistribute the wealth, threatening their own positions, they advocated birth control to eliminate the large number of impoverished people. Although not as overt as they had been previously, these eugenic based sentiments were alive and thriving when the Supreme Court ruled on *Roe v Wade*.

\(^{43}\) *Reed, From Private Vice*, 136, 212-13.

\(^{44}\) *Shapiro, Population Control Politics*. Shapiro discusses the Council's founding on 24. He lists backers on 80. Discussion of sterilization is on 115, 6.
President Reagan announced in 1971 that unemployment was not just due to the recession, but also because, "the work force is so big." The problem lay, not in too few jobs, but in too many people in the working class. In this atmosphere the Supreme Court made its critical decision regarding abortion. To better understand the court's ruling let us first survey the history of abortion within the context of birth control.

CHAPTER II

A BRIEF HISTORY OF BIRTH CONTROL

The Supreme Court bases its decisions on the law, on judicial precedents and on the Constitution. In order to understand the Court's ruling in *Roe v. Wade*, it is necessary to establish a historical context, to examine what statues were in effect in 1973 and how they came to be legislated. Thus, this chapter discusses the history of birth control in general, and of abortion in particular.

The declining birth rate in white American families during the nineteenth century attested to the increased practice of birth control. The number of children born to married women between 1800 and 1900 dropped by half, from 7.04 to 3.56. Demographers pinpointed the decline as occurring between the first decade of the century and the Civil War.¹ As noted earlier, society's perception of women's role during this century moderated, giving motherhood an exalted position. To fulfill this expectation women needed to have fewer children and to space their births. Therefore, women practiced birth control in the form of abstinence, contraception and abortion. In terms of the latter two forms of birth control, no significant advances had been made at that time, women simply availed themselves of existing techniques with greater frequency. The prevalence

with which women practiced abstinence remained, naturally, impossible to appraise. The use of contraceptives, also, proved difficult to assess as many methods required no prescription or doctor's care. The incidence of medically recorded and performed abortions, however, lends itself to greater measurability. Who had abortions, how often and how society reacted to these abortions culminated in anti-abortion legislation at the end of the century. These intransigent sanctions against abortion remained uncontested for over one hundred years, until the Supreme Court's ruling in *Roe v Wade*.

Although effective contraception has existed since the earliest days of mankind, the diffusion of knowledge regarding birth control in Western societies has only occurred in the last two centuries. When, in 1831, Robert Dale Owen (1801-1877) wrote the first American book on birth control, it was met with such demand that his publishers printed several editions in the first year alone. Several tracts on contraception followed, receiving similar popularity, which recommended accepted methods such as *coitus interruptus*. Other writers such early in the century, including John Humphrey Noyes (1811-1886) of the utopian Oneida community, recommended less favored methods such as *coitus reservatus*, or male continence.

During these early years of the nineteenth century, abortion, as a form of birth control, occurred infrequently in the United States, and with the public generally accepting the practice. This tolerance resulted, in part, from society's reaction to the women having

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3. Ibid., see section on Owen and others, 224-30. For Noyes, 269-76.
these abortions. Women who sought the procedure until approximately 1830 tended to be young and unwed. They attempted not to limit their fertility, but rather to escape the social stigma of an illegitimate pregnancy. Society looked upon them with pity, referring to these young women as, "the victim(s) of passion" or "the child(ren) of nature" in "an unrelenting world."^4

Americans sanctioned abortion in the early nineteenth century based on the accepted notion of quickening. The quickening doctrine, originating in British common law, held that a fetus existed only after the phenomena of quickening occurred. Quickening was said to happen late in the fourth or early in the fifth month of gestation when the mother first perceived fetal movement. Until such time as quickening occurred, abortion constituted no crime. Indeed, no abortion legislation whatsoever existed in the early nineteenth century because most procedures took place before pregnancy could even be determined. Owing to a lack of reliable tests for pregnancy, quickening offered the only irrefutable proof that a fetus existed. Given that before quickening a woman only had the potential for life, and given that a host of other ills could be responsible for the woman's condition, Americans condoned the practice of abortion prior to the onset of quickening.^5

Americans accepted abortion prior to quickening despite the church's stand against the practice. Christian doctrine opposing abortion was based on the theological principle of the sanctity of life. The sanctity of life referred to the value of human life as entrusted


^5Ibid., 3-5.
by God to mankind. In his book *Contraception: A History of Its Treatment by the Catholic Theologians and Canonists* John T. Noonan Jr. traced the earliest writing on the sanctity of life to St. Augustine. Noonan pointed out that St. Augustine wrote against contraception and abortion and that his writings became the basis for Roman Catholic doctrine on birth control. This encyclical, according to Noonan, "became the law of the Catholic Church" up to and including the Church's present position. The Church's stand against abortion was based on its belief that life begins at conception and, thus, abortion, which violated the sanctity of life, constituted a mortal sin.

Consequently, those seeking abortion in the mid-nineteenth century were almost exclusively Protestant. And for those women it was also a relatively safe procedure. Physicians who trained at formal medical schools or apprenticed under a regular doctor possessed the surgical skills and physiological knowledge to complete procedures far more complicated than abortions. Although no surgery at the time was without risk, abortion, which necessitated no incision, involved less danger than many other commonly performed procedures. Dr. Edwin M. Hale, a leading mid-century spokesman for homeopathic medicine wrote, "My observation and experience in this matter have been quite extensive, and I have been led to the conclusion that, if the operation is skillfully performed, the fatal results need not exceed one in a thousand."

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These three factors, the legal and moral acceptability of abortion and its relative safety, coupled with society's increasing pressure on women to have fewer but "better" children precipitated a moderation in the pattern of abortion in the United States. Between 1840 and 1880 three major changes occurred in American abortion. First, abortion grew increasingly visible. The practice came before the public eye with greater frequency largely due to its growth as a viable business. The practice constituted one of the first specialities in American medicine. Abortion grew into a competitive business in which practitioners vied for their clients. As the procedure remained, as yet, unregulated, any and all practitioners could and did advertise extensively. Many advertisements made efforts at thinly veiled suggestions of treatment, others touted their wares blatantly. As highly competitive periodicals readily accepted the advertising revenue, abortion advertisements pervaded the American press in the form of daily and weekly newspapers, magazines, specialty publications, private cards and even religious publications.8

The increased visibility of abortion in the United States between 1840 and 1880 reinforced the second major character change in the practice of abortion. In his incisive work on the subject, Abortion in America, James C. Mohr notes, "It is not unreasonable to assume that abortion became more visible at least in part because it was becoming more frequent. And as it became more visible, more and more women would be reminded that it existed as a possible course of action to be considered." Abortion rates increased from approximately one per twenty-five or thirty live births in the early nineteenth century to 308, 313-320.

8Ibid., 46-70.
one abortion per five or six live births in the years 1850 to 1880. Dr. Hale noted, "I have met with women who have had respectively eight, ten and thirteen children, and as many abortions!" Between the years 1810 and 1890 the number of children under the age of five per 1000 white women of childbearing age decreased from 1358 to 685. The sharpest decennial decline in the birth rate occurred at mid-century when abortion advertising, abortion services and abortion visibility reached its apex.9

This dramatic rise in the incidence of abortion at the mid-point of the nineteenth century related directly to its availability and visibility but also as a consequence of society's continued belief in the quickening doctrine. Prior to quickening no issue existed concerning life or death of a fetus. Unlike their twentieth century counterparts, therefore, nineteenth century women had no serious moral dilemma with which they had to contend. The pervasiveness of abortion in American society in the mid-nineteenth century did not reflect a morally bankrupt society. On the contrary, the frequency of the practice reflected a society that availed itself of a safe procedure which it deemed legally and morally acceptable.10

Mohr posited that if abortion posed a moral dilemma, it posed only the same quandary as that presented by contraception, and many women, he contends, practiced


10Ibid., 74.
contraception. The dramatic decline in the nineteenth century birth rate attested to the fact that women were practicing birth control and this practice did not always involve abortion. Women increasingly used sponges, suppositories, douches and pessaries with some degree of success. This increase in the use of other forms of contraception related directly to women's greater reliance on abortion. Women who practiced other forms of contraception had already made a conscious decision to limit their family size. The methods they had access to, however, often proved unreliable and they turned to abortion as a backstop. Paradoxically, although women increasingly practiced other forms of birth control, in theory lowering their need for abortions, the number of abortions instead increased.

The rise in the number of women having abortions and the increase in the practice's visibility constituted the first changes in the pattern of abortion during the mid-nineteen hundreds. Abortion became more conspicuous because it had become a competitive, unregulated business enterprise. More women were having abortions because they were acceptable, as was birth control. But none of these phenomena addresses the cause of the dramatic rise of the practice. The increasing number of abortions sought by American women in the mid-nineteen hundreds relates directly to the third change in the pattern of abortion in mid-nineteenth century America.

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11Ibid.


This final moderation in abortion patterns involved an alteration in the social character of the practice. Earlier in the century women who sought abortions were usually young and unmarried. Society looked on them with leniency and forebearing. Between 1840 and 1880 the type of women seeking the practice evolved whereby a typical candidate would be a native-born, white, Protestant married woman from the middle- to upper-class society. Women no longer sought abortions to avoid the scorn of unwed motherhood. Women in the mid-nineteen hundreds had abortions for the sole purpose of limiting the size of their families.14 Women desired to limit their families based on society's shift in its concept of motherhood. Society defined motherhood increasingly in terms of the socialization of children and less on the physical bearing of them. Women were expected to raise quality children rather than many children. In order for a middle-class, white, Protestant wife to realize her role, she need to space and limit her offspring.

Thus, in mid-nineteenth century the practice of abortion in America had evolved from an infrequently occurring incident sought by wayward unmarried, to a highly visible, frequently used practice pursued by native-born, respectable, Protestant matrons. This moderation in the social base of abortion and society's perception of this change precipitated a reaction in public policy on abortion. Rosalind Pollack Petchesky notes in her book, *Abortion and Woman's Choice*, that:

The shifting class base of abortion, even more than its overall rise undoubtedly accounts for the severity of the political attack against it. Abortion in the mid-nineteenth century became the object of organized opposition, not because of the numbers of women practicing it, but because of who those women were and the sex-race-class implications of their conduct. For abortion, unlike abstinence,

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14Ibid., Chapter 4, especially 86-102.
directly communicates that women who utilize it are engaging in sex without the intention to procreate, are having sex for its "own sake" (to satisfy "male lust" if not their own). Abortion brings the sexual aspect of fertility and its control into the open; and for this to occur among married "respectable" women was to shatter delicately established boundaries of class, race, and gender.\(^{15}\)

American society reacted to the shift in abortion's social base with abortion legislation, but it had the American Medical Association as its driving force.

Mohr refers to the American physicians' efforts against legal abortion as "a great medieval crusade" and "the single most important factor in altering the legal policies toward abortion in this country." The physicians used abortion to establish the credentials of their profession. The reasons behind the physician's crusade directly affected the outcome of their efforts. The doctors sought sanctions against their competition, as well as on their own members, effecting professionalization from within the occupation. The physicians hoped to gain for their profession the respect and influence which they deemed it deserved.

The physicians also held personal reasons for abolishing abortion. One personal reason the physicians opposed abortion related to the quickening doctrine. Those in the medical profession in the nineteenth century believed that gestation was a continuing process in which quickening held no significance. Since physicians could not pinpoint the moment at which life began, many considered abortion morally wrong. Another personal reason for the physician's crusade against abortion involved blatant nativism as it related to their view of women's role. Many physicians expressed concern over who sought abortions -- women, like themselves, from white, upper-class, native-born American

\(^{15}\text{Petchesky, Abortion and Woman's Choice, 78.} \)
families. Petchesky maintains that the physicians, "more than any other group (were) the social agents who ... propagated the Victorian ideology of 'true womanhood.'"

Respectable women did not engage in sex without the intent to procreate, therefore, respectable women did not have abortions.

Motivated by these professional and personal considerations the physicians aggressively campaigned from the 1860's to the 1880's against the practice of abortion. They began their crusade in their own medical literature with increasingly forceful censure of abortifacient techniques and of the practice itself. Physicians then turned to literature written for public consumption such as Hale's diatribe, *The Great Crime of the Nineteenth Century*, in which he characterized abortion as, "A CRIME AGAINST PHYSIOLOGY . . . A CRIME AGAINST MORALITY . . . A CRIME AGAINST THE LAW." Physicians also enlisted the sensationalist public press. Beginning in the 1840's, but with increased aggression after the Civil War, physicians urged American tabloids to publish grisly stories of abortion related deaths. By the early 1870s the American press no longer carried abortion advertisements and actively campaigned with the physicians for anti-abortion legislation.

In addition to the press, the physicians also turned to religious leaders for support.

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17 Petchesky, *Abortion and Women's Choice*, 82.

in their crusade against abortion. Since the doctrines of St. Thomas Aquinas, the Catholic Church and, subsequently, the Protestant Churches, condemned contraception in general and abortion in particular. A soul existed from the moment of conception and therefore, any action that impeded conception or interfered with birth constituted a sin in the eyes of the church. Despite the churches' stand on abortion, the clergy lent very little overt support to the anti-abortion movement. Mohr suggested that the clergy might have been reluctant to address sexual issues, especially those issues that, for many Americans, were morally ambiguous. He concluded, "The origins and evolution of anti-abortion attitudes in the United States owed relatively little to the influence or the activities of organized religion."19

Nonetheless, owing to the physician's aggressive campaign and the press's assistance, the 1870s also saw a systematic censorship of all birth control information. This censorship attempted to compel Americans to live up to their moral ideals regarding the sanctity of motherhood. Physicians perceived their professional integrity as dependent on public opinion. Therefore, it proved incumbent on medical men to defend the community's high moral standards. Included in these standards was the expectation that healthy women should be willing mothers. As a result, the majority of American doctors paid little attention to assisting women avoid conception. Even doctors specializing in gynecology focused their efforts on successful conception and on treating birth related

19Himes, Medical History, 166-68 and Mohr, Abortion in America, 183-96.
complications. Contraception became the domain of the underlings and the quacks. Physicians frequently condemned birth control, and in the extreme, even abstinence as a violation of a woman's role. One doctor claimed that childless women would have a "continuous tendency to degeneracy and atrophy of the reproductive organs." An influential textbook author warned, "Disease of the maltreated organ, and revenges their [sic] wrong by torturing the brain and nervous system."

The efforts of the doctors against birth control fomented an anti-obscenity movement across the country. Led by New York moralist Anthony Comstock, the movement rose to prominence in the 1870's. The anti-obscenity quest included abortion in its definition of indecent and this embrace proved decisive to the anti-abortion campaign. Comstock convinced Congress in 1873 to legislate "an Act for the Suppression of Trade in and Circulation of, Obscene Literature and Articles of Immoral Use." The "Comstock Law," as it came to be known, made contraception, including abortion, and the dissemination of contraception materials, a federal offense. Empowered as a special agent of the federal government, Comstock continued his crusade against birth control.

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two years following the legislation of the Comstock Law, Anthony Comstock traveled 23,500 miles, made 55 arrests and confiscated 60,300 "obscene rubber articles." As it grew increasingly dangerous to even discuss contraception, the subject was omitted from publications whose earlier editions had addressed the topic. Despite Herculean efforts to repeal it, this vexing law remained on the books well into the twentieth century.

The Comstock Law constituted the federal government's only involvement in the physicians' anti-abortion crusade. The doctors achieved greater success with anti-abortion legislation at the state and local level. Between 1860 and 1880 the states and territories passed more than forty anti-abortion statutes. By the turn of the century every state had enacted some sort of legislation regarding abortion. Laws regulating and licensing the medical practice went hand in hand with those restricting abortion. By 1880 the physicians, via their crusade against abortion, had regulated themselves, achieved recognition as a profession and had attained a position of spokesmen for the nation's mores. Having achieved their goals, the physicians abandoned their campaign against abortion, and for all intents and purposes, American abortion policy remained fixed, at its 1880 position, for the next ninety years. Ironically, while the doctors campaigned against abortion, they also made significant medical advances in antiseptic techniques, rendering

\[^{24}\text{Reed, From Private Vice, 38-9.}\]

\[^{25}\text{Ibid., 200, 229-30. Reed notes that Kentucky was the one exceptional state, but that in that state the courts had prohibited the practice.}\]
abortion as safe as, or safer than, childbirth.\textsuperscript{26}

While the Comstock Laws prohibited doctors from distributing either contraceptives or information regarding their use, other factors impeded the successful use of birth control methods. Although medical science had made considerable strides regarding antiseptic techniques, scientists conducted no new contraceptive research. The relative safety and effectiveness of various methods of birth control remained enigmatic. Medical school curriculums in the nineteenth century excluded classes on contraception. Adding to this deficiency of concrete information on birth control was a paucity of controls and standards, whether within the medical profession or in terms of governmental regulations, with regard to contraception.\textsuperscript{27} The lack of regulation of birth control methods exacerbated their unreliability.

Without readily available and dependable methods of birth control, women in the nineteenth century relied extensively on abstinence to limit the size of their families. But abstinence in the late eighteen hundreds served a purpose other than preventing pregnancies. Abstinence also facilitated society's concept of motherhood. Since women's maternal nature obviated her sexual instincts, women necessarily abstained from intercourse to devote their attentions to their resulting fewer offspring. Fewer children were testimony that woman were chaste and in fulfillment of their duty.\textsuperscript{28} Abstinence

\textsuperscript{26}Mohr, \textit{Abortion in America}, 238-9. Also, Petchesky, \textit{Abortion and Women's Choice}, 80.

\textsuperscript{27}Reed, \textit{From Private Vice}, 45.

\textsuperscript{28}Petchesky, \textit{Abortion and Women's Choice}, 76-7.
also received endorsement for eugenic reasons. Tired, satiated parents produced week, feeble progeny, according to members of the eugenic movement, whereas, parents who practiced abstinence retained their vitality resulting in more vigorous children. Eugenic reasoning and women's image in society, compounded with the laws against birth control, compelled women to rely heavily on abstinence to limit their offspring in the late nineteenth century.

After the turn of the century, Americans continued to use abstinence, relying on it as the most trustworthy means of family limitation. But at the same time they also pursued a socially acceptable form of contraception. Almost single handedly, Margaret Sanger maneuvered birth control from the realm of the obscene to the realm of the decent. A study of Sanger's crusade for birth control acceptability was synonymous with birth control's history during at least the first half of the century. Linda Gordon notes that Sanger's "personal-political transformation is a useful microcosm of the general transformation of the birth control campaign." As Margaret Sanger had affiliated with radical groups just prior to World War I, so, too, did birth control acquire extremist connotations. In its efforts to become more readily available to the women who needed it, birth control advocates allied with various and sundry movements, including, among others, the eugenics movement, free love supporters, anarchists and trade unionists. Receiving no support from any of the radical groups, Sanger affiliated her movement with society women, and their financial resources, while embracing the logic of any and all

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29 Reed, *From Private Vice*, 24.

other causes which might promote that of her own.31

Under the rubric of these crusades, Sanger successfully conducted her own campaign from 1914 to 1937, against birth control's obscenity stigma and for the establishment of clinics across the nation where reliable contraceptives were available to all women. In 1914, with the publication of her first pamphlet Family Limitation, Sanger consistently agitated against the Comstock Law resulting in her arrest, her incarceration and in her fleeing the country. Sanger's crusade brought birth control out into the open, making it an acceptable topic of polite conversation and, ultimately, making it an acceptable practice. By 1929 only five percent of married white women in America had never practiced contraception, and those who did had switched to more effective methods. Also, just as in the previous century when a rise in contraception occurred, statistics showed a similar increase in the number of women seeking abortions.32

As her emphasis shifted from an ideological focus to a more scientific and logical bent, Sanger turned to the courts for reform. In 1936 the court ruled in United States v. One Package of Japanese Pessaries that physicians could receive contraceptive materials through the mails. The court ruled that what society deemed obscene in 1873 was not necessarily considered obscene in 1936. As a result of the One Package decision, physicians could dispense contraceptives to prevent disease but the law continued to

31Ellen Chesler, Woman of Valor: Margaret Sanger and the Birth Control Movement in America (New York: Simon and Schuster, 1992), Chapters 3-11.

32Reed, From Private Vice, see charts on 124 and 126 for statistics on contraceptives and 125 for numbers on abortion.
disallow the dissemination of birth control information. But perhaps Sanger's greatest moment came in 1937 when the American Medical Association (AMA), heretofore reluctant to endorse birth control despite Sanger's years of wooing, recognized contraception as a viable medical service.

Sanger's success in making contraception legitimate stemmed in part from her persistent agitation in the courts and of the medical profession, but her accomplishments also ensued as a result of her cunning alliance with the ideology that was popular at the time, minimizing any ideological differences between the two causes. The ideology most popular in the 1920s and early 1930s when Sanger achieved her greatest impact was eugenics. By the early 1920s the names of those in the eugenic movement dominated the roster at birth control conferences, while Sanger herself attended Neo-Malthusian conferences. She used eugenic ideology to promote birth control despite her personal lack of total espousal. Sanger notes:

... eugenics without birth control seemed to me a house built upon sands. It could not stand against the furious winds of economic pressure which had buffeted into partial or total helplessness a tremendous proportion of the human race. The eugenic movement wanted to shift the birth control emphasis from less children for the poor to more children for the rich. We went back of that and sought first to stop the multiplication of the unfit. This appeared the most important and greatest step towards race betterment.

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34 Chesler, Woman of Valor, 373-74.

Sanger's espousal of eugenics served to help shift birth control from the realm of the radical into that of a conservative program of social benefit.

When birth control achieved this status of having socially redeeming value, the AMA judged contraception a legitimate medical practice. The AMA had a motive other than serving society. Contraception had become big business. In 1937 Americans spent $250 million on devices, since contraceptives were still illegal, which "prevented disease." Since public regulation of the industry remained non-existent, manufacturers frequently charged exorbitant prices. Consequently, Americans spent immoderate amounts of money on devices that, at best, proved marginally effective. In a effort to regain control of their domain the AMA, in 1943, adopted official standards for contraceptives to be prescribed by all physicians.  

Regulation of contraceptives facilitated in effecting methods of birth control with far greater reliability. This dependability constituted perhaps the greatest contribution to birth control since the vulcanization of rubber, in 1843, which rendered condoms not only more reliable but also more affordable. In the twentieth century scientists devised improvements on methods women had employed for thousands of years. For instance, when Sanger opened her first clinic in 1916 she introduced a European innovation which improved upon the ancient pessary, rendering the device stronger and more effective. Other scientific advances were achieved with regard to intrauterine devices (I.U.D.s). Women had used I.U.D.s for centuries but with innovations during in the early half of the

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36 Reed, *From Private Vice*, Chapter 18, especially 239-40, 245-6.

twentieth century the device became much less likely to cause detrimental side effects.\textsuperscript{38} Improvement on these ancient methods of birth control coupled with the medical profession's regulation of contraception greatly facilitated the overall effectiveness of existing methods of birth control. No innovative, nor truly reliable, method of contraception was available until the invention of the anovulant pill.

Advances, by mid-century, in endocrinology and steroid chemistry facilitated scientists' development of an oral contraceptive. Working at the Worcester Foundation for Experimental Biology the early 1950s, scientist Georgory Pincus explored the use of hormones as a means of suppressing ovulation, and hence, preventing pregnancy. By 1955 Pincus perfected the oral contraceptive and in 1960 the drug gained the approval of the Food and Drug Administration. At last women had access to a reliable, convenient and relatively inexpensive means of birth control. But there were still strings attached, women could only access this innovation through their physicians.\textsuperscript{39}

In fact, the most reliable forms of contraception remained available to women only by prescription. Perhaps it is for this reason that many women, despite innovations in contraception, continued to seek abortions. In 1958 \textit{Time} magazine described the number of abortions as "astronomical."\textsuperscript{40} While some of these procedures were

\textsuperscript{38}Reed, \textit{From Private Vice}. For Sanger's promotion of the new pessary see 106 and innovations on the IUD see 274-6.

\textsuperscript{39}Chelser, \textit{Woman of Valor}, 429-34 and Reed, \textit{From Private Vice}, Part Seven, especially Chapters 24 and 27. Dates on oral contraceptives first use on 363 and FDA approval on 364.

\textsuperscript{40}Time, 2 June 1958, 70.
"therapeutic," a large but undetermined number were performed illegally. In the 1960s the press gave increased coverage to the horrors of illegal abortions in the United States and ran other stories on the growing numbers of women seeking abortions outside the country. Although not yet ready to call for the repeal of abortion laws, these publications increasingly urged the reform of abortion laws. 41

The press voiced the opinions of a quiet but active group of Americans who had been attempting to reform birth control laws through the court system. For almost forty years Planned Parenthood of Connecticut attempted to challenge the constitutionality of the Comstock Law. In 1965, under the direction of Estelle Griswold, the group successfully brought its case before the Supreme Court. The court ruled in Griswold v Connecticut that the state's law against dispensing contraceptives to a married couple unconstitutional. 42 Justice William O. Douglas wrote the majority opinion:

We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions. 43 In the Griswold ruling the Supreme Court not only found the dispensing of contraceptives legal but also set a precedent establishing the right to privacy.


42 Garrow, Liberty and Sexuality, thorough coverage of the Griswold case Chapters 3 and 4. For the courts ruling see 252-60.

While the Griswold decision ruled contraceptives legal, the constitutionality of the state's anti-abortion laws remained unchallenged. A wide assortment of constituencies sought to repeal the abortion laws both through legislation and through the courts. California, in 1969, was the first state to find its abortion laws unconstitutional. A year later, many states repealed or significantly modified existing anti-abortion laws, resulting in a hodgepodge of laws regarding abortion. In some states, such as New York, abortion was available "on demand," in others, such as Texas, anti-abortion laws remained unchallenged. Other states fell into a middle ground permitting abortion in cases of fetal deformity, rape, incest or the save the life of the woman.

No comprehensive federal legislation or federal judicial decision unified the abortion laws in 1973. The laws lacked cohesiveness despite a federal law, signed by President Richard Nixon in 1971, which repealed the ninety-eight-year-old statues prohibiting the dissemination of birth control materials. The many and diverse state statutes regarding abortion needed a single abortion rights case in the Supreme Court to unify the status of abortion across the country. Roe v. Wade would pose such a challenge.

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44 Garrow, Liberty and Sexuality, the California case, People v. Leon P. Belous on 376-79. State legislation discussed in Chapter 6 and 407-33.


46 Garrow, Liberty and Sexuality, 471.
CHAPTER III

WEDDINGTON'S ARGUMENTS

In the late 1960s the multiplicity of state anti-abortion laws precipitated the landmark Supreme Court decision, *Roe v. Wade*. Attempts to repeal anti-abortion laws through the state legislators had proved painstakingly slow, at best. The most effective changes in the status of birth control had previously been achieved through the court system. An effort, which began simply as an attempt to clarify whether or not information on abortion could be disseminated legally at a women's clinic, accelerated rapidly to the highest court in America. Within one year the federal court ruled on the Texas anti-abortion laws and in the following year the Supreme Court heard arguments against the constitutionality of the statutes against abortion.

*Roe v Wade* originated on the campus of the University of Texas when volunteers at an information referral center expressed concern about criminal prosecution. They disseminated information regarding abortion and referred clients to doctors outside the state who performed legal abortions. Legal abortions, available in several states and countries, involved the termination of a pregnancy by a registered physician. The number of women using the center burgeoned, but lobbyists' efforts in the state legislature to reform the state anti-abortion law failed dismally. The only apparent solution to fill a very real and urgent need in the community was a lawsuit challenging the constitutionality of
the Texas laws against abortion. The center's volunteers turned to Sarah Weddington to file and argue their case.

Weddington, born in a small West Texas town in 1945, was the daughter of a Methodist minister. While maintaining an excellent academic record, Weddington sped through school at an accelerated rate, by age twenty-two she had earned a law degree from the University of Texas. But despite her apparent acumen in the field of law, she received not a single job offer upon graduation. Female attorneys were the exception in Texas in the late 1960s. Thus, when the clinic volunteers approached Weddington in 1967, she was employed as an assistant to a law professor. Her only previous experience in practicing law involved helping a relative adopt a child and assisting a friend in obtaining a divorce.¹

The case joined many similar claims pending in various courts throughout the country. Weddington anticipated one of the other state's challenges to the anti-abortion statues reaching the Supreme Court first. Nonetheless, she decided to file the case in a federal court since the Supreme Court generally accepted cases that were at odds over the same issue within the federal court system. Being unfamiliar with drafting federal lawsuits, Weddington called on a former classmate, Linda Coffee. Coffee, at the time, clerked for Federal District Judge Sarah T. Hughes. Throughout her years in state politics

and on the federal court bench, Hughes consistently championed women's rights. Both lawyers agreed that Hughes might prove sympathetic to their case and decided to file in her district, the United States District Court for the Northern District of Texas, Dallas Division.

Although many women eagerly volunteered to act as plaintiff in the lawsuit, Weddington experienced some difficulty in finding an appropriate claimant. The woman had to be pregnant but too impoverished to be able to seek a legal abortion in another state or country. After a lengthy search, Coffee and Weddington found such a plaintiff in Norma McCorvey. Wanting to retain her anonymity, but intimidated by the many anonymous "Jane Does" she had heard about dying as a result of botched illegal abortions, McCorvey assumed the name "Jane Roe." On March 2, 1970 they filed their case as a class action suit on behalf of all pregnant women against the District Attorney of Dallas County, Henry Wade. The lawyers asked that the case be heard by a three-judge court, such a panel would lend more weight to the decision than a single federal district judge's ruling. Weddington maintained that it was simply luck, not only that the court agreed to the three-judge panel, but also that one of the members of that court included Judge Hughes in addition to Federal District Judge William M. Taylor and Federal Circuit Judge

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2Garrow, *Liberty and Sexuality*, 397. Also see the *Dallas Times Herald*, 24 April 1985, 1.


4Ibid., 50-54.

Irving L. Goldberg.  

When Weddington made her oral arguments before the federal court neither she nor Hughes anticipated the ultimate importance of the case. Hughes later recalled that the decision seemed easy and that more important issues awaited a ruling in her court.  

Weddington challenged the constitutionality of the Texas statutes. She and Coffee focused their arguments on the impact of illegal abortions on women in Texas and the issue of when legal rights begin.  

In their arguments, the lawyers cited the Ninth and Fourteenth Amendments and Griswold to support their contention that the Texas anti-abortion laws were unconstitutional and an invasion of privacy. But during the oral arguments on May 22, 1970, Judge Goldberg repeatedly interrupted Weddington with questions on compelling state interests in regulating abortions. Weddington eventually conceded that some limitation on the length of the pregnancy would constitutionally be proper. The panel's decision reflected its concern over these last two controversial aspects of Roe, whether or not the state had a compelling interest and a need to qualify different stages of pregnancy.  

The panel ruled unanimously, on June, 17, 1970, finding the Texas anti-abortion statutes unconstitutional. With regard to the plaintiff's complaint that the Texas provisions disallowed women their right to decided whether or not to have children, the court ruled,  

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6Weddington, A Question of Choice, 54-59.  


8Garrow, Liberty and Sexuality, 433-42.
"We agree. The essence of the interest sought to be protected here is the right of choice over events which, by their character and consequences, bear in a fundamental manner on the privacy of individuals." The court cited the Ninth Amendment as securing the right for women to choose whether or not to have a child or to seek an abortion. The court also cited to Griswold as a precedent for the woman's right to privacy in making the decision to have an abortion. The panel's ruling concerning the issue of compelling state interests proved equally clear. The court noted:

several compelling justifications for state presence in the area of abortions. These include the legitimate interests of the state in seeing to it that abortions are performed by competent persons and in adequate surroundings. Concern over abortion of the 'quickened' fetus may well rank as that, even if they promote these interests, they far outstrip these justifications by disallowing all abortions. The issues of a compelling state's interest, as well as the concept of quickening haunted Roe v. Wade all the way to the Supreme Court.9

Owing to the wording of the panel's decision, little time lapsed until Roe reached the Supreme Court. In its ruling the Texas court declined to issue an injunction which would prohibit the District Attorney from prosecuting doctors who performed abortions. Wade, therefore, vowed to continue to indict all physicians who effected such procedures. He noted, "Apparently we're free to try them, so we'll still do that." This expedited Roe v. Wade's route to the Supreme Court. When a lower federal court ruled a state law unconstitutional but local authorities continued enforcing it, the Supreme Court could hear the case directly, without the case appealing first to a circuit court. Within six weeks the lawyers filed an appeal with the Supreme Court and on May 21, 1971, the Supreme Court

listed *Roe* among the cases to be considered the following session.\textsuperscript{10}

When Weddington presented her oral and written arguments regarding *Roe v. Wade* on December 13, 1971 volumes of amicus briefs supported her arguments. According to Weddington, "The documents for *Roe* stood more than a foot high . . . I cannot believe there was anything pertinent to the case that was not in one or more of the briefs."\textsuperscript{11} The volume of documents increased following the Court's announcement, on June 26, 1972, that it had set *Roe* for reargument. Weddington and several supporting groups submitted supplementary briefs and Weddington reargued the case the following October 11th.\textsuperscript{12} Coupled with the counter evidence from Jay Floyd and Robert Flowers, who represented the state of Texas in the first and second oral arguments respectively, the briefs and arguments involved in the case were considerable and inclusive.

Given this substantial volume of evidence submitted for the case, this study focuses only on those arguments and documents which proved germane to its thesis that *Roe v. Wade* reflected eugenic thinking. Four aspects of Weddington's arguments before the Supreme Court echoed eugenic ideas. These points in her arguments which reflected eugenic ideas include: the concept of compelling state interest, Weddington's version of

\begin{itemize}
\item \textsuperscript{11}Ibid., 88-99, quotation on 99.
\item \textsuperscript{12}Garrow, *Liberty and Sexuality*, 557-63, suggests the court made the unusual rescheduling due to a shift on the bench in favor of legalizing abortion. Weddington, *A Question of Choice*, suggests, as do other sources, that since there were two vacancies on the bench, the Court wanted to wait until all nine justices could be present for such a momentous decision.
\end{itemize}
the history of abortion, the threat of overpopulation, and the discrimination of particular aspects of society by the anti-abortion laws. The remainder of this chapter concentrates on Weddington's evidence and how her arguments related directly to the eugenics movement.

One such argument involved the doctrine of compelling state interest which Weddington employed to demonstrate that although the state previously needed to intervene, time had altered the situation. Before examining Weddington's intent with regard to compelling state interest, it is essential to define the phrase. Compelling state interest refers to a situation which exhibits serious grounds for the use of police power to enforce a law, policy or action. Police power, in this instance does not refer to criminal law, but, instead, to the right of the government to promote order and safety to maintain the general welfare of society as a whole. Under the doctrine of compelling state interest an individual's constitutional rights may be adversely affected in the general interests of society if the state demonstrates justifiable grounds. Only the states have the authority to exercise this police power and the Supreme Court constitutes an important limitation of that power by determining whether or not the state has a compelling interest.13

The term abortion also needs clarification before this study turns to Weddington's arguments. Weddington used a medical publication to qualify her definition of the term. Accordingly, abortion referred to the cessation of a pregnancy at any point before the fetus attains viability. She further defined viability as having a weight between 400 grams

and 1,000 grams or as having a gestation period between two weeks and twenty-eight weeks. This wide variance in delineating exactly when viability occurred proved fodder for questions by the judges later in Weddington's oral reargument.\textsuperscript{14}

Weddington approached the compelling state interest doctrine with regard to abortion from two aspects. First she addressed the jumbled assortment of statutes across the country. While conceding that some decisions suit the representative process, such as "decisions on medical facilities, wars, or the release of a convict," other crucial decisions remained in personal domain and were best served there. Weddington described the situation with regard to abortion:

A representative or majority decision making process has led to chaos. Indeed, in the face of two difficult, unresolvable choices - to destroy life potential in either a fetus or its host - the choice can only be left to one of the entities whose potential is threatened.

Weddington maintained that a chaotic hodge podge of abortion laws resulted when the majority attempted to write and enforce these statutes. With vast discrepancies in the states' abortion laws, the general welfare of society had not been served and, therefore, the state had no compelling interest in enacting such laws. The decision, she argued, remained with the individual, not the state.\textsuperscript{15}

Weddington addressed the other aspect of whether or not a compelling state interest existed when considering the issue of exactly when life begins. She pointed out


the dearth of scientific data or concrete facts related to whether or not the fetus is a human being. Lacking any empirical basis for its decision, the state must, she argued, defer to the individual to choose whether or not to host a potential life. The state, "must give way to the individual for it can never bear its burden of demonstrating that facts exist which set up a compelling state interest for denying individual rights." Weddington's argument here was crucial, if the court had no basis for determining whether or not the fetus was a human being, then the state had no compelling interest in denying an individual her constitutional rights.\(^16\)

Although Weddington did not dwell on the compelling state interest aspect of her arguments the justices themselves lent import to the concept by their questions on the subject. The justices interrupted Weddington's oral argument several times to clarify her exact intent on the subject of compelling state interest and to redirect her to the topic. The members of the court appeared most interested in Weddington's insistence that, not only was the fetus not a person, but that never, during the course of gestation, did the fetus achieve such status. Much of her rebuttal during the reargument focused on this issue and Weddington reiterated, "there is no indication to show that the Constitution would give any protection prior to birth."\(^17\)

Jay Floyd and his team, on the other hand, argued that the state did have a compelling interest in prohibiting abortion. A lengthy amicus brief submitted by the Association of Texas Diocesan Attorneys attested to the status of the fetus as a person

\(^16\)Ibid., vol. 1, 260.

\(^17\)Ibid., vol. 2, 489, 490, 507-10.
and argued that these persons deserved protection. Floyd submitted several medical briefs and twenty-two pages of pictures showing the development of the fetus. By establishing that the fetus constituted a human being, he could then posit that "the state has an interest in the arbitrary and unjustified destruction of this being." But within the concept of compelling state interest, Floyd also allowed that "under limited circumstances" some abortions could be permitted.\(^18\)

The question of whether the state had any interest in becoming involved in birth control had its sources in eugenics. The Malthusians and the Social Darwinists, among the early eugenists, urged caution in the use of state intervention to reduce the number of the lower classes. Galton proposed selective assistance by the state, lest the poor increase in number. But later, as eugenic ideas took hold, proponents of the ideology maintained that the less desirable and the unfit multiplied with a randomness that threatened the well being of society. Those in the eugenics movement, therefore, claimed the primacy of the state's interests, with the individual's rights remaining secondary. Eugenist William McDougall recommended that the primacy of state goals guaranteed the welfare of the individual even at the expense of the individual's rights.\(^19\)

The sterilization trend in the early half of the century constitutes perhaps the best example of state's interest employed for eugenic purposes. Tens of thousands of poor women were sterilized involuntarily in the name of state's interest. *Buck v Bell* not only sanctioned involuntary sterilization, but following the Supreme Court ruling, the federal

\(^{18}\)Ibid., vol. 1, 373, pictures on 397-419. Vol. 3, 3-156.

\(^{19}\)See first chapter in this study for more on McDougall.
government became actively involved in birth control for eugenic purposes. In his work on birth control, *From Private Vice to Public Virtue*, James Reed argued that the impetus to help the poor to limit their fertility originated with taxpayers as an attempt to deal with the high cost of welfare. With the growth of the welfare state, the government's role in birth control increased. But it was not the middle to upper-class women who sought state assistance with birth control. More likely than not, the women who sought state help in obtaining birth control were of limited economic means. Thus, the state became involved in assisting the lower class in limiting its numbers while acting in its own best interests in limiting the number on welfare. For the first time, in 1965, Congress began hearings on a bill to give federal agencies direct responsibility in birth control. Protecting the rights of these poorer women, determining whether or not a compelling state interest existed, remained the responsibility of the court.

The doctrine of compelling state interest also applied, according to Weddington, at the inception of the anti-abortion legislation. In her brief, Weddington devoted extensive space to familiarizing the Court with the history of abortion legislation. She traced the origins of Texas' 1854 anti-abortion law to a 1849 New Jersey statute. This New Jersey law focused on guarding the well being of the mother, rather than on preventing abortions, per se. According to Weddington's brief, doctors in the mid-nineteenth century performed

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22See first chapter in this study.
only "external," or cesarean section, abortions and, she noted, "surgery was almost always fatal." She submitted several amicus briefs which supported her argument that abortions, at the time of anti-abortion legislation, constituted a serious threat to the health of the woman. The intent of Texas' anti-abortion laws, Weddington argued, was to protect the health of the woman. Thus, originally, the state had a compelling interest in the anti-abortion laws.23

Weddington further argued that if the state's initial goal rested in protecting the health of the woman, it was falling far short of its goal in 1970. By prohibiting abortions, she contended, anti-abortion laws hindered a woman's health in that they forced women to seek abortions in back alleys. Weddington noted, "Today, only abortions performed in non-medical environments present significant risks of morbidity and mortality." Therefore, she contended, if the original intent of the laws against abortion was to protect the health of the woman, in order to enforce the original intent of the law, the court must permit licensed physicians in proper medical facilities to perform safe abortions.24 Furthermore, she continued, abortion posed less threat to a woman's well being than delivering a baby, "legal abortion in early pregnancy is eight times safer than carrying a pregnancy to term."25 Planned Parenthood further supported Weddington in an amicus


24Ibid., vol. 1, 438, 174.

brief containing statistics on the safety of abortion.26

The argument that legal abortion posed less of a threat to a woman's health than delivering a baby had a legitimate foundation but other of Weddington's arguments concerning threats to women's health proved less sound. Weddington's statement that abortion in the nineteenth century was virtually fatal constituted a gross misinterpretation of the conditions at the time. In fact, her interpretation mirrored that of the nineteenth century physicians who portrayed abortion as undesirable for a number of reasons, although not necessarily because abortion posed a legitimate threat to a woman's health. Physicians objected to abortions because of the nature of the individuals who sought the procedure. Physicians opposed abortions because women of the middle and upper-classes were the ones seeking abortions. If abortion became legal, the numbers of the upper classes would decline and the lower classes would multiply. Physicians opposed abortion for eugenic reasons. Due to the physician's successful crusade against abortion, harrowing stories concerning the dangers of abortion prevailed. Weddington's arguments perpetuated the physician's position.27

Weddington's misconception of the dangers of abortion typified those of many others as a result of the campaign against the anti-abortion statutes. Those crusading for legalized abortion naturally exaggerated the horrors of illegal abortion. As to the actual safety of the procedure in the nineteenth century, Linda Gordon noted, "This is one of the most important lessons both of anthropological studies and of recent studies of the


27See first chapter in this study.
contemporary legal abortion industry." Gordon pointed out that even a death rate of six percent was probably far too high, especially considering that most abortions went unreported and often only those with complications became statistics.\(^2\) Thus one of Weddington's arguments against the anti-abortion statutes, that of its former threat to a woman's health, constituted a commonly held misconception which physicians initially perpetuated for eugenic reasons.

Another of Weddington's arguments had its basis in a concept which had become popular in the 1960s, that of the threat of overpopulation. She placed the anti-abortion laws in historical perspective by noting:

In the early history of our country's colonization and settlement, there was a felt need for more persons. Consequently population growth was encouraged by anti-abortion law . . . Unfortunately, our abortion law is dangerously out of date. Many of our laws and customs still reflect the desires of a nation seeking to fill a frontier. These laws, sensible enough at earlier stages of history when man's survival may have depended on encouraging population maintenance and growth, have become foolish and dangerous in the light of changed circumstances.\(^2\)

These "changed circumstances" referred to a growing awareness of the world's burgeoning population.\(^3\) Weddington argued that the state had a legitimate interest early in the nation's history in disallowing abortion in order to populate an expanding country. But, she added, in light of evidence in the 1960s revealing the threat of overpopulation, the state's interests were best served if the court legalized abortion.


\(^3\) Mersky, Roe v Wade, vol. 2, 260.

\(^4\) For further discussion of the role that perceived overpopulation played in Roe v Wade, see the third chapter in this study.
Weddington's argument for legalized abortion in light of the population explosion typified American sentiments. Americans were concerned, not so much with the number of babies being born, as with who was bearing these babies. Population groups such as the Population Council and the Draper group published brochures depicting masses of brown faces covering a diminutive earth. Newspapers ran advertisements bearing the signature of prominent industrialists which played on middle-class urbanite's fears of violent crime, riots, slums and city blight. Human fertility, it appeared, threatened the social order. Thus when the First National Congress on Optimum Population and Environment met in 1970 it recommended repealing all anti-abortion legislation. This repeal was necessitated because of who was perceived as responsible for the rapid increase in population and because of the methods of birth control these prolific people used. As A. L. Todd reported in Population Bulletin magazine, for the "uneducated and impoverished who live in crowded conditions, with irregular or casual sex lives, birth control methods directly connected with the sex act are not effective on the broad scale." Furthermore, Todd noted, illegal abortions were to be had but that the women having them were married and middle-class, not the women who should be having them.

These concerns, that middle and upper-class women were having abortions and

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that poor women were giving birth to a multitude of babies, reflected earlier apprehensions which had their roots in eugenic thinking. In the late nineteenth century upper-class women sought abortions, as noted earlier, to enhance their role of motherhood and to have fewer and "better" children. In the twentieth century members of the eugenics movement, such as Walter Lippman, viewed the progeny of the lower classes as posing a threat to American social order. Children born as a result of a denied application for abortion became neglected, and thus a burden to society. In order for the state to maintain a social order in which the wealthier did not support the poorer masses, birth control must be available to all. Therefore, the eugenics movement argued, the state needed to become increasingly involved in population control.  

Weddington's arguments also addressed the idea that the state had previously engaged in population control, establishing a precedent. When the country experienced rapid expansion in the nineteenth century, she maintained, the government had encouraged large families and an increase in the overall population to settle the frontier. Weddington and supporting amicus briefs observed that population growth "is not now a valid justification for invading personal liberties," based on the world's rapidly increasing population. These briefs also argued, that even when appropriate, population growth laws could not infringe on individual liberties. The National Legal Program on Health Problems of the Poor pointed out inconsistencies in federal and state policies on family limitation. This group argued that since the government "not only permitted but . . .

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34 See the first chapter in this study and Pickens, Eugenics and the Progressives, 73-5.
openly encouraged" birth control, a coherent and uniform government policy included abortion. All of these amicus briefs shared a tacit understanding of to the government's involvement in population control.35

Given the state's involvement in population control, Weddington argued that the court needed to address the inequities of the abortion statutes across the country. She maintained that "Contraception is not widely available in the United States" and that doctors had "limited willingness to prescribe contraception." She further noted that many of these methods had a high degree of failure, forcing women who intended not to have children, to become pregnant. Weddington argued that women of limited means had equally limited access to contraception: in 1969, 4.3 million women who needed subsidized family planning received no such services. She quoted statistics showing that one third of the abortions sought in New York were by women from out of state. In fact, 728 women from Texas traveled to New York City from July 1, 1970 to March 31, 1971. Women who chose not to travel often obtained abortions at their local private hospital if they could qualify for legal abortions on therapeutic grounds. Thus, she argued, states with restrictive abortion laws discriminated against women of limited financial means.36

Several amicus briefs supported Weddington in pointing out that the restricted abortion laws also discriminated against non-whites. For the period 1951-1962, white women in New York City obtained abortions at five times the non-whites and twenty-six times that of Puerto Rican women. Yet during the six months immediately following

abortion’s legalization in New York, non-whites and Puerto Ricans received half the abortions performed in that city. Correspondingly, Weddington argued, the maternal mortality rate, in 1967, averaged three times higher for non-whites than whites, with criminal abortion as the greatest single cause of maternal mortality. Furthermore, Weddington pointed out that half of the unwanted babies born in 1960-1965 were born to poor, near-poor or African Americans. Therefore, she concluded, the anti-abortion laws, and hence, the state, interfered with basic freedoms of poor women who, when faced with an unwanted pregnancy, were forced to resort to unsafe, criminal abortions.  

In fact, even two years after the federal panel in Texas declared its anti-abortion laws unconstitutional, white, affluent women in the state could "shop" for abortions, an opportunity unavailable to poorer women.  

What Weddington argued revolves around the idea that the state should resolve these inequities between the have and the have-not women in America. Curiously, when the state initially entered the abortion controversy in the late nineteenth century, it was to outlaw abortions because only upper class women obtained them, while the lower classes multiplied with apparent random. Again, in 1973 the state became involved because upper and not lower-class women were the ones having abortions. Ostensibly, Weddington’s purpose was to seek justice for all classes of women. Indeed, her argument resonated with the eugenics movement’s alarm over the multiplication of the lower class and the disturbance of the status quo. Again, too many

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babies were being born, and to the wrong mothers.

Weddington's arguments in *Roe v Wade* echoed the eugenics movement's ideas in terms of state intervention, the history of abortion, overpopulation and discrimination. The Supreme Court's decision also reflected eugenic thinking. To some extent the Court shared Weddington's emphasis on particular aspects of the case, but the Court's decision also included other aspects not addressed by Weddington. The following chapter deals with the specifics of the Court's decision, the subsequent chapter addresses the eugenic aspects of its decision.
CHAPTER IV

THE SUPREME COURT'S RULING

Like Weddington's arguments and those submitting supporting amicus briefs, the Supreme Court's decision spared no words in discussing *Roe v Wade*. The Court's ruling spanned almost seventy pages. Unlike Weddington's sundry arguments, however, most of the Court's decision proved germane to this paper's thesis that the case reflected eugenic thinking. Justice Harry M. Blackmun delivered the Court's decision, with seven justices concurring. Blackmun prefaced the Court's decision with an extensive history of abortion before stating its ruling on the right to privacy and whether or not the state had a compelling interest with regard to abortion. The emphasis that Blackmun placed on medical history directly effected the Court's ruling. Since a significant aspect of the Court's ruling involved the right to privacy, this study addresses this facet of the decision, but only as it is relevant. Most of this chapter concerns the more pertinent aspects of the decision, including the question of compelling state interest and the repercussions of the Court's decree.

In his introduction, while grappling with the controversial nature of abortion, Blackmun defined the Court's responsibility. He wrote, "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection." To what extent could the Court possibly deliver a ruling independent of earlier modes of thinking,
such as eugenics? Blackmun continued:

We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.¹

This emphasis on medical history, which necessarily included the predilections and biases of their respective times, did, in fact, impede the court's ability to render a ruling uninfluenced by eugenic thinking.

Although the Court recognized that the restrictive abortion laws originated in the nineteenth century and had no roots in either ancient or common law, it launched a lengthy narration of the history of abortion. Blackmun's history, however, extended considerably farther back in time than Weddington's chronicle of the procedure. After initially establishing that the Persians performed abortions, he proceeded to observe the treatment of abortion ancient Greece. The Greeks, as well as the Romans, he maintained, did not bar abortion, and appeared comfortable with the procedure. The Greeks addressed ethical aspects of medicine in the Hippocratic Oath which contained a clause prohibiting doctors from performing abortions. Although none of the briefs submitted by either side of the Roe case mentioned the Hippocratic Oath the Court seemed especially interested in reconciling the Oath with the performance of abortion by medical care givers.²


² Ibid., 129-31. Blackmun quotes A. Castiglioni, A History of Medicine, 84. His translation of the relevant portion of the Hippocratic Oath reads, "I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner I will not give to woman a pessary to produce abortion . . . I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy."
Further complicating the discrepancy between the Hippocratic Oath and the fact that some of those who practiced medicine performed abortions, Blackmun noted most Greek thinkers, including Plato and Aristotle, commended abortion. The dilemma of the ancient Greeks, apparently, paralleled that of modern medicine's quandary as to whether or not to permit doctors to perform abortions. By way of reconciling how the Hippocratic Oath could be revered and adhered to by centuries of medical practitioners performing abortions, Blackmun consulted a work by a doctor and recognized authority on the Oath. The abortion clause in Hippocratic Oath, Blackmun explained, "echoed" Pythagorean doctrines which maintained that "the embryo was animate from the moment of conception, and abortion meant destruction of a living being." Blackmun further extrapolated that the Pythagoreans, and this one particular clause in the Oath, represented an aberration in the usually far more lenient opinions of the Greeks. Therefore, Blackmun implied, the Court could disregard the abortion clause in the Hippocratic Oath, and, thereby, he established abortions as ethical.

Continuing his chronicle of abortion, Blackmun cited the Greek philosophers again in addressing whether or not the procedure constituted a crime in early English common law. His query focused on determining at what point during pregnancy abortion was designated as a criminal offense. To calculate this, Blackmun employed the concept of quickening, which, he noted received earliest mention by the Greeks. According to these early thinkers, abortion prior to quickening "was not an indictable offense." But even post-quickenings abortions in common law, according the Blackmun, received various

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treatments as misdemeanors or lesser offenses. He concluded by noting that "it now appear(s) doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." Thus, the Court indicated that, according to common law, abortion appeared legal throughout pregnancy, this notion proved relevant to the Court's ultimate decision.

Blackmun's treatment of the history of American abortion also proved pertinent to the Court's ruling. He noted that since American law had its basis in pre-existing English common law, most states considered abortion legal until the mid-nineteenth century. Blackmun emphasized that the practice enjoyed extensive acceptance for many years in American history. He noted:

a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century.  

Blackmun's confirmation of abortion as a recognized legal practice through many years of American history was reflected the Court in its decisive ruling. He further reiterated Weddington's argument that the states had initially enacted anti-abortion laws to protect women's health, but, owing to safer procedures, this no longer posed a valid concern.  

In concluding his history of abortion, Blackmun noted the role played by and the position of the American Medical Association (AMA). He lent credence to the AMA's

\[\text{Ibid., 132-36.}\]

\[\text{Ibid., 138-41.}\]

\[\text{Ibid., 148-51.}\]
role in the anti-abortion legislation in the late nineteenth century, but he also noted the Association's unchanged stand on abortion until the late 1960s. At that time, Blackmun observed, changes in the AMA's abortion policy took place only in response to rapid changes in state laws and pending judicial decisions. A greater resource than the AMA for the Court's decision, he noted, was the American Public Health Association (APHA). In 1970 the APHA issued standards for abortions which included guidelines for determining the duration of pregnancy at any given time. The APHA concluded "The factor of gestational age is of overriding importance." This concept, of approaching abortion differently depending on the length of the pregnancy, persisted further in Blackmun's writing on the American Bar Association (ABA). The ABA's Uniform Abortion Act, of 1972, delineated twenty weeks as the appropriate time before which abortions should be performed. After twenty weeks, the ABA maintained, the procedure threatened the health of the mother. This concept of addressing the various lengths of pregnancy differently directly effected the Court's ultimate decision.

Based on the positions of the AMA, the APHA and the ABA and with a strong emphasis on historical background, the Supreme Court rendered its decision on *Roe v. Wade*. The Court agreed with Weddington's argument in the lower court that the Fourteenth Amendment encompassed a woman's decision to have an abortion. The personal liberty concept in the Fourteenth Amendment assured a woman's right to seek an abortion, but, this right was also "inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education." The Court

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7Ibid., 141-47.
ruled this right to privacy, which included abortion, was not absolute. Citing several cases including *Buck v Bell*, Blackmun wrote, "We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." The Court decided that although the right to privacy gave women the right to seek an abortion, she was not "isolated in her privacy" from state interests.

The Court upheld the notion that at some point state interests superseded the right of privacy if the court found the state interests "compelling." In order to determine whether or not compelling interests existed, Blackmun first defined the term. He maintained that compelling interests included, not only the well being of a person, but also the potentiality of the existence of a person. If the state had an interest in protecting the rights of the mother, it also had an interest in protecting the rights of the potentiality of human life. Blackmun noted that, "These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"

While acknowledging the fetus's potential as a human being, the Court declined to recognize a fetus as person within the parameters of the Constitution. The Court dissented from the briefs of the Attorneys General, who had argued for the state, that under the Fourteenth Amendment the fetus had the same status as a person. The Court found that the word "person" as used in the Constitution "does not include the unborn."

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8Ibid., 152-54, 159.

9Ibid., 150, 155-565.
Therefore, Blackmun, wrote, "the unborn have never been recognized in the law as persons in the whole sense."\textsuperscript{10}

Blackmun wrote that the state was compelled to protect the potential for human life, but the fetus itself had no rights under the Fourteenth Amendment by virtue of the fact that it was not a person. Alternatively, the state, according to Blackmun, had a compelling interest to protect the health of the woman. To secure the woman's well being, Blackmun devised a trimester approach to abortion. During the first trimester the Court ruled that the decision to have an abortion should be made solely by the woman's physician. During the second trimester, however, the state may intervene to protect the woman, it may, "if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health." During the last trimester, until the state of viability, which occurred between the sixth and seventh month, Blackmun concluded that the state's role increased considerably. The Court ruled that the state may, "if it chooses, regulate, and even proscribe, abortion except were it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother." During the first trimester the attending physician was to decide if the woman would have an abortion and during the second two trimesters "medical judgment" was the determining factor. The Court summarized the physician's critical role by writing that "the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."\textsuperscript{11}

\textsuperscript{10}Ibid., 156-58, 162.

\textsuperscript{11}Ibid., 164-66.
Blackmun concluded by attributing the Court's ruling to medical and legal history, the leniency of common law and "with the demands of the profound problems of the present day." Exactly which "profound problems," Blackmun failed to enumerate. He reiterated, however, the state's increasing role with the relative length of gestation:

The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention.

With this exact delineation of the state's role and the distinctions of the various stages of pregnancy, the Court ruled the Texas statues as being too vague and broad and therefore, unconstitutional.\(^\text{12}\)

Thus, Blackmun concluded the opinion of the majority, but the two dissenting voices also deserve notice. As written by William H. Rehnquist the dissenting opinion took umbrage, not so much with the ruling which found the Texas anti-abortion statues unconstitutional, but with the Court's trimester approach to abortion. Rehnquist argued that the trimester concept "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the Fourteenth Amendment." To Rehnquist, the trimester approach seemed more appropriate to legislation than to a judicial decision. In quoting other cases he admonished the Court that "it should never 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" According to Rehnquist, the Court erred by exceeding its task, in formulating

\(^\text{12}\)Ibid., 165-66.
the trimester approach and in writing a decision that appeared closer to law enactment than law adjudication.\textsuperscript{13}

Years later Rehnquist's dissenting opinion would haunt the Supreme Court's decision in \textit{Roe v. Wade}. But before this study considers the applicability of Rehnquist's opinion, it must first examine the eugenic aspects of the Court's ruling. This facet of the Supreme Court's decision is examined in the following chapter.

\textsuperscript{13}Ibid., 171-78.
CHAPTER V

EUGENIC ASPECTS OF ROE V WADE

As Blackmun began his writing of the Court's opinion he described his task as that of resolving, without predisposition, the controversial issue of abortion. To what extent did he succeed? To what extent was it even possible for the Court to arbitrate its ruling unincumbered by previous ideologies? Given Blackmun's emphasis on medicine and medical history, he subjected the ruling to the influence of earlier values and modes of thinking. Yet even without this emphasis the Court hardly existed in a vacuum. As G. Edward White pointed out in his book on the Court, Patterns of Legal Thought:

the 'juristic mix' of various periods of American history - the complex interaction of ideas and events that produces a discernable social and intellectual perspective - affects conceptions of legal history just as conceptions of the Constitution, nonconstitutional law and judging.¹

Indeed, just as law adjusted to the mores of society, so, too, did historians and justices adapt their view of history. As law makers, in the late 1960s and early 1970s, altered policy with regard to abortion, historians gained new perspectives on the social shifts in the late nineteenth century which initially provoked the anti-abortion statutes.² Given the


changes in historical and judicial outlook, it is necessary to examine the perspective of Justice Harry Blackmun when he wrote the ruling for the Supreme Court.

In some respects, Blackmun's position reflected that of the Court as a whole. With dozens of abortion-related cases pending in state and federal courts, the Supreme Court anxiously awaited an abortion case which would enable the Court to resolve the divisive issue. Curiously, the Court agreed to hear *Roe v Wade*, not as a case to settle the abortion question, but, rather as a determining case to resolve a totally unrelated matter. In 1971 there occurred a series of rulings restricting federal intervention into the proceedings of state courts. Since, in *Roe*, a federal court had ruled on a state law, the Supreme Court took the case with the intent of deciding a matter of federal jurisdiction, not with resolving the divisive issue of abortion.\(^3\)

Although the Court accepted *Roe* with other intentions, after Chief Justice Burger appointed Blackmun to write the majority's opinion, the case acquired a new focus. Not only did the direction of the case alter, but specific aspects of the decision also acquired a unique and determining focus as result of Blackmun's own predispositions. As the Court expressed anxiety over the contentious topic, so too did Blackmun. As the *Washington Post* described him during the oral arguments, Blackmun "showed personal anguish at the difficulty of the case." But the Justice's consternation lay, not with the nature of the abortion issue, but with one particular aspect of the matter. In its description of Blackmun the *Post* continued, attributing his anxiety in the case "to claims that the professional life

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of doctors was being subjected to official interference."

Blackmun's focus on the physician's role in the abortion issue stemmed directly from his previous involvement with the Mayo Clinic. For many years, Blackmun served as counsel to the clinic, and it was in the Mayo Clinic's medical library, during the summer preceding the Court's decision, that he sought answers to the question of abortion. As a result, Blackmun sympathized with the doctors, who, in his view, had their patients' treatment interrupted by the state. The states' anti-abortion laws directly interfered with the medical determinations made by the doctors, causing them frustration and apprehension. According to Bob Woodward and Scott Armstrong in The Brethren, "Blackmun would do anything he could to reduce the anxiety of his colleagues [the doctors]." Woodward and Scott continued that Roe v. Wade "was not so much a legal task as an opportunity for the Court to ratify the best possible medical opinion."

Blackmun intended to deter the state from interfering with the physician's decisions. To effect this, he devised the trimester approach. Although the trimester approach received a fleeting mention in one of the amicus briefs filed by the District Attorney's office, the concept was neither mentioned in any of the other arguments, nor in the lower court decision. At one point in Weddington's oral arguments the Justices questioned her extensively on whether or not the court should make a differentiation between various stages of gestation. Weddington asserted that the Texas statute made no

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5Woodward and Armstrong, The Brethren, 167, 229, 175.
distinction between the different months of pregnancy. The responsibility for the unique trimester approach rested with Blackmun and his association with the Mayo Clinic as a means of freeing the physicians to follow through on their own judgments.6

In his definitive Abortion in America, Mohr described Blackmun's trimester approach as a successful reconciliation of social issues with the state's interest in protecting both the health of the mother and of the fetus. Other commentators on the trimester approach proved less generous. The New Republic referred to the "notorious trimester" as Roe v Wade's "greatest weakness." An article in the periodical questioned the importance the Court placed on viability by asking "What is the magic about 'viability'?" Indeed, Blackmun himself in an early draft on the decision, admitted the trimester delineation was arbitrary and that "any other selected point, such as quickening or viability, [was] equally arbitrary." The New Republic article further argued that if the state had a legitimate interest in protecting the rights of the fetus "that interest exists throughout pregnancy." The trimester approach appeared, not only arbitrary in its designations, but inconsistent in its application, as well.7

Blackmun's trimester approach to the abortion question resulted from his previous close association with physicians and his continued concern for this group. The ruling


showed no consideration for the woman's right to make her own decision. This perspective stems directly from society's justification for abortion. Grounds for the legalization of abortion in the late 1960s and early 1970s derived from eugenic thinking. As Blackmun wrote in the Court's decision, "population growth, pollution, poverty and racial overtones tend to complicate and not simplify the problem." Eugenic influences further complicated the situation and assumed various forms including a distorted fear of overpopulation, the necessity of population control, the need for state involvement in population control and a concern with the growing welfare state. Accordingly, this study turns to these eugenic influences on the Court's decision in *Roe v Wade*.

As noted earlier in this study, Weddington's arguments exhibited signs of being influenced by the fear of overpopulation. The Court also fell prey to this concern. Beginning in the 1940's the Planned Parenthood Federation and the International Planned Parenthood Federation increasingly emphasized world overpopulation. By the mid-1960s Americans' world hegemony appeared threatened by the rapidly increasing populations of other countries. An article in a 1966 publication of the *Population Bulletin* exclaimed, "The hypothesis of Malthus has become an acute reality." The threat of a population explosion received verification and documentation through numerical projections and extensive statistics, lending a new scientific basis to eugenic thinking, giving the eugenics movement renewed legitimacy.

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This enhanced validity conformed to a pattern the eugenics movement had exhibited throughout the twentieth century. The movement gained popularity and prospered during economic instability or politically turbulent times, such as the Red Scare in 1919, and achieved its greatest popularity at the onset of the depression. During these periods the eugenics movement flowered as a countermovement, flourishing as a result of a splintering American society. The perceived threat of overpopulation caused a similar cleavage. As a result, Americans, not only feared the burgeoning populations of other countries, but attributed many of their own social ills to overpopulation, as well. At a hearing of the President's Commission on Population Growth and the American Future, Rufus E. Miles, Jr., a writer for the Population Bulletin expressed typical concerns. Miles noted the large number of Americans born just following World War II who were out of work. This unemployment, he maintained,

is one of the major factors in the extraordinarily bad social conditions in many of our major cities, with the drug addiction leading to high rates of crime and violence; and these leading to the exodus of business and middle class residents from central cities.  

The population explosion, the eugenic movement asserted, precipitated everything from unemployment to the decline and fall of the American city.

On the other hand, aside from the impressive charts and graphs and wealth of statistics, to what extent did the population explosion really exist? An amicus brief

94. Petchesky, Abortion and Woman's Choice, 119.

submitted on the side of the district attorney refers to the problem as "alleged" and argued that the U.S. was "approaching a zero growth rate." Indeed, the eugenics movement perpetuated a great deal of misconception concerning the status of the world's population. The extensive statistics and scientific data were selectively applied. Western industrialized societies with dense populations, such as Holland, did not suffer the stigma of overpopulation. However, poorer but sparsely populated nations, such as Brazil, were labeled as overpopulated. The term received application only with reference to poorer countries without regard to population size or density, or to the country's growth rate or available resources. The problem was far more complex than whether or not a nation was economically rich or poor. If a country were overpopulated it could be impoverished but the connection was not necessary. Rather, overpopulation existed as a social condition of that poverty, not necessarily as a result of population density.\footnote{Merskey, \textit{Roe v Wade}, vol. 2, 359. Shapiro, \textit{Population Control Politics}, 15.}

As a direct result of the perception of overpopulation in the world and, more specifically, in America, the states began to repeal existing laws prohibiting the dissemination of birth control information and devices. The repeal of these laws constituted a direct attempt to curb the numbers of inner-city poor, especially African Americans, who, it was perceived, inflated the welfare rolls. After a wave of inner-city violence during the 1960s in such cities as Los Angeles, Washington, D.C., Newark and Detroit, the drive to repeal the anti-abortion statues also receive new impetus. According to Allan Chase in his work \textit{The Legacy of Malthus: the Social Costs of the New Scientific Races}: 
Although originally organized by people determined to make surgically safe abortions accessible to the poor as they had been to the rich for nearly a century, the earliest successes of these efforts to accomplish the repeal of state anti-abortion laws owed far more to the fears inspired by the angry blacks of Watts and Detroit than to the humanitarian pleas of the reformers.  

Thus, the eugenic concept that overpopulation caused the problems of the inner-city served as an impetus to the abortion movement, and its influence continued to serve as a motivating factor when the Supreme Court contemplated *Roe v Wade*. 

The acceptance of the increasing role of the state into the area of birth control constituted another influential factor at the time of the Court's ruling. Since the 1920s and later with the *Buck v Bell* decision, the state's role in birth control had expanded steadily. But overt endorsement and involvement in contraception proved impossible until the subject lost its disreputable associations. By the 1960s the subject found acceptance in polite conversation and increasingly the state addressed the issue more directly. Coupled with the specter of the population explosion, government officials could openly discuss contraception in the context of problem solving. For the first time, in his 1965 State of the Union Address, the president referred to the urgent necessity for population control. Later that year the Senate began hearings on a bill to make federal agencies directly responsible for population control. 

The state's increased involvement in population control reflected society's acceptance of the state in such a role. The Supreme Court's ruling further legitimized this 

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expanded function. With reference to a woman's first trimester of pregnancy Blackmun wrote, "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." After viability, the Court ruled, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where necessary." In the interests of protecting women's health or preserving potential life, depending on whether or not the fetus had reached viability, the Court confirmed the legitimacy of state interference in birth control.14

The increased involvement of the state into birth control constituted one influence on the Supreme Court. Earlier in this study the influence of the population explosion was addressed and the question asked as to whether or not a population explosion constituted a legitimate concern. The issue of expanded state involvement also requires questioning. A typical attitude of the period was that of the World Bank's Robert McNamara who lamented that decisions affecting population size were left to common mothers and fathers. McNamara argued that these matters were best resolved if delegated to "the exclusive control of a few governments." However, years of state regulated and enforced birth control in third world countries showed that individuals were willing to accept these policies only after they themselves gained control of their own lives, their survival and their future. When they achieved a minimum quality of life, when the infant mortality rate dropped and diseases were prevented, birth rates also naturally decreased. Nonetheless, state involvement in birth control had received acceptance and within a few years the U.S.

government's role had increased to the point that it spent almost three billion dollars annually specifically designated for population control.\textsuperscript{15}

The term population control refers to the increased state involvement in birth control. Specifically, population control involves limiting births on a large scale throughout an entire society as a matter of policy. Population control also refers to limiting births in particular social groups for the purpose of altering political or economic conditions. Abortion fell under the domain of population control in the nineteenth century when the state's anti-abortion laws certified the practice as their legitimate domain.

Following the growth of the eugenics movement, and the feminist's association with it, birth control became confused with population control and much of that confusion still lingers. Members of the eugenics movement eased naturally and imperceptively into population control. With the impending threat of overpopulation, whether worldwide or within the American inner-city, the rationalization for liberalized abortion laws escalated and lobbying increased. The Supreme Court was not immune to these developments. Woodward and Amrstrong in \textit{The Brethren} described Justice Potter Stewart's view prior to the Court's ruling, "Abortion was becoming one reasonable solution to population control." \textsuperscript{16}

The Supreme Court's decision striking down the anti-abortion statutes


corresponded with the emergence of the state as the coordinator of population control in the U.S. Wittingly or not, the Court is involved in population control. Whether or not the Court consciously decided to become involved in population policies was difficult to determine. The American public appeared unaware of state policies regarding fertility. In his book, *Population Control Politics*, Thomas M. Shapiro pointed out:

Too often in the past the success of population control politics depended finally on the inability of the American people to see through the mystification of Malthusianism. Too frequently, the politics of fertility control were substituted for social reform and allowed to operate without public understanding.\(^\text{17}\)

With its *Roe v Wade* decision, the Supreme Court offered Americans abortion as a device with which to practice population control and to solve the social ills of America.

The problems in American society that the state proposed to solve by legalizing abortion included the burgeoning welfare state. The growing welfare state paralleled the states' increased involvement into what had previously constituted strictly private spheres of social life. But Americans were oblivious to welfare as a possible instrument for social change. Instead, they used welfare to perpetuate the status quo of the recipients. If Americans shared a concern over welfare it involved the growing number of recipients, and more specifically, the number of African Americans and unmarried women on the welfare roles. Americans perceived legalized abortion as the solution to the large number of minorities on the welfare rolls. This eugenic based thinking not only proved erroneous, but actually miscarried. In the first place, most women on welfare were white. And, secondly, legalizing abortions gave African American women access to medically

safe abortions. As a result, fewer minority women died as a consequence of abortion, so
more, not fewer, African American women stayed on the welfare rolls.\textsuperscript{18}

This concept of swelling welfare rolls, augmented by a concern about
overpopulation and an increased acceptance of the states' expanded position in population
control, influenced America's justification for the legalization of abortion. Although the
Court absorbed these influences, as noted previously, the predominant influence on the
Courts' ruling was Blackmun's association with the physicians. As a result, the decision as
to whether or not a woman should have an abortion fell solely in the hands of the
attending physician, making women targets for the state's population control policy.
Despite developments in contraceptive technology, control over women's reproductive life
remained in the hands of doctors, especially if the woman had limited economic means.
Middle- and upper-class women frequently used methods they controlled themselves, such
as the diaphragm and the pill. Poorer women, however, relied on their doctor for
contraceptive measures such as the I.U.D and sterilization. A study conducted between
1976 and 1980 revealed that white middle-class couples frequently choose vasectomies
but it also showed that ninety-eight percent of all sterilizations paid for by Medicaid were
performed on women.\textsuperscript{19}

The \textit{Roe v Wade} decision enhanced and legitimized the physicians' determining role
in a woman's means of birth control. By requiring the establishment of a medical necessity

\textsuperscript{18}Ibid., 19, 179, 23, 190-91. Chase, \textit{The Legacy of Malthus}, 411.

\textsuperscript{19}Shapiro, \textit{Population Control Politics}, 12, 10. Shapiro quotes a study presented
to the American Public Health Association in November, 1981.
prior to an abortion, the Court made the doctor the final arbiter in any abortion decision. Even the Court's definition of private choice pivoted on the involvement of a medical authority. This aspect of the Court's decision echoed the eugenic idea that childbearing constituted a scientific undertaking limited to only certain "fit" women. The Court not only replaced the responsibility of the decision with the physician, where the medical profession had campaigned so actively a century before to have it, but also rested the decision in the hands of a group of men with a lengthy past in the eugenics movement.²⁰

As noted earlier, the physicians acted as the chief proponents of anti-abortion legislation of the late nineteenth century. Their anti-abortion effort succeeded, not only in banning abortion, but in legitimizing and regulating their profession. Their anti-abortion effort accomplished another crucial concern; it successfully elevated the physicians' status to one of manifest respectability as a profession. As a result of their efforts, the physicians secured their position among the elite class in American society. Having achieved their desired respectability, those in the medical profession closed ranks to maintain their new status. The eugenics movement assisted them in maintaining this position.

The eugenics movement gained popularity in the late nineteenth century, paralleling the physicians' rise in legitimacy and status; not surprisingly, as the physicians and the members of the eugenics movement held much in common. Indeed, the two often coincided. Typically, characteristics of both groups included white, upper-class, well educated males intent on maintaining their status quo in society. As eugenics in the twentieth century acquired a increased scientific inclination, the physicians' relationship

with the movement became closer, as did their involvement in population control.

Although both the physicians and the members of the eugenics movement advocated that only "fit" women should have babies, as noted earlier, doctors especially endorsed this notion, but neither the physicians nor those in the eugenics movement necessarily endorsed abortion as a means of birth control. But, as birth control itself acquired a less taboo status, the notion of birth control as a means of population control gained acceptance by family planners. The fear of the population explosion added to abortion's acceptability as a means of limiting particular segments of society. Similarly, the tolerance of therapeutic abortions, those performed for mental health reasons, served to enhance abortions' overall social acceptability. By the late 1960s many professionals, members of the clergy, academics and policy makers accepted the legalization of abortion as inevitable.

Americans' opinion of abortion pivoted sharply during the late 1960s. In 1965 ninety-one percent disapproved of changing the abortion laws. The percentage moderated to eighty-five percent opposed to changes in 1968, but a swift and dramatic conversion of American sentiment ensued. In March of 1970, following a proposal by President Richard Nixon, Congress established the Commission on the Population Growth and the American Future. A study conducted by the Commission the following year demonstrated that half of the American public favored lifting abortion restrictions. The study also indicated that Americans believed the abortion decision should be made by a woman and her doctor. More interesting, however, were the public's reasons for the reform of abortion laws. The study revealed, less than two months before Weddington argued *Roe v Wade*, that more
than half of all Americans thought the government should control the country's population growth and that it should take actions that would result in an improved distribution of its population.  

Many churches and religious organizations endorsed the public's changed perception of abortion. In 1961 the National Council of Churches urged abortion reform and subsequently specific churches including the Baptist and Presbyterian Churches, also recommend revision of the anti-abortion statutes. Although the Roman Catholic Church remained adamantly opposed to the procedure, fifty-six percent of American Catholics believed the abortion decision rested with the woman and her doctor. In 1966, with reiteration and clarification in 1970, the Defense Department altered its policy on abortion to permit abortions on military bases. The position of the AMA, also, had been gradually shifting since the 1960s. But perhaps John D. Rockefeller best assessed the situation:

"abortion is inevitable and unstoppable, its prohibition leads to large-scale disrespect for the law, which in turn creates a gradual erosion of the moral fabric that holds society together." Although Rockefeller's portended "eroded moral fabric" was arguable, that the legalization of abortion was unavoidable and inescapable remained irrefutable.  

Indeed, with various segments of American society decidedly in favor of changing the anti-abortion laws, the reform of these statutes was inevitable. The inevitability of

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their revision resulted, not only because of changing American beliefs, but also because of
the Court's reflection of these evolving opinions. For over fifty years legal analysts had
viewed law as a social phenomenon. The contemporary Court had adjusted and reflected changing mores; its revisions in jurisprudence represented an ideological reply to social changes. As G. Edward White noted, "the close association of 'law' with current social attitudes and the decisions of an activist, 'lawmaking' judiciary has . . . immersed American judges in contemporary social issues." By the early 1970s abortion constituted a social imperative the Justices could not ignore.23

*Roe v Wade* demonstrated that the Court, at times, was reactive, mirroring changes in society. As a follower, rather than an leader of social changes, the Court accommodated conservative political and cultural inclinations to more liberal notions and ideas by providing legal and conceptual tools of change. The Supreme Court's ruling in *Roe v Wade* provided just such an agent. The anti-abortion statutes remained on the books for a century and represented a conservative attitude no longer in favor in the country. As it had in the past, the Court's decision echoed the sentiments of American society in ruling the anti-abortion laws unconstitutional.24

That the Court reflected American sentiments was evidenced by the rapid shift toward abortion reform in the late 1960s. The polls reflected the change in Americans'

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opinions, but the pollsters failed to recognize the remaining conservative sentiment within the country. It was to this attitude that Blackmun's decision appealed. The Justice's emphasis on the physician's role in abortion adapted to the conservative elements within society who clung to the century old, eugenic-related concept of the omniscient, all-knowing doctor. The Court's ruling in *Roe v Wade* accommodated the physician-focused concept of abortion to the more liberal notions of the procedure in the early 1970s. Blackmun's decision, in keeping with the Court's tradition, attempted to provide a tool for change, to settle the controversial question.

As a direct result of Blackmun's emphasis on the importance of the physician's role in abortion, the controversy remained unresolved. One of the decision's staunchest critics, Supreme Court Justice Ruth Bader Ginsburg, argued that the ruling suffered because of "the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex equality perspective." Ginsburg continued that the Court should have "placed the woman alone, rather than the woman tied to her physician, at the center of its attention." But, in fact, the Court joined a woman's ability to have an abortion with the authority of the medical profession, a segment of American society with a history of involvement in the eugenics movement.  

The notion that the decision focused on the physician's role and not on constitutional issues is reminiscent of Rehnquist's dissenting opinion:

> The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example, partakes

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more of judicial legislation than it does of a determination of the intent of the
drafters of the Fourteenth Amendment.\textsuperscript{26}

Rehnquist argued that the Court's decision more closely resembled judicial legislation than
it resembled an interpretation of the Constitution. Ginsburg concurred and asserted that
the Court's ruling was an over extension of its role. Ginsburg argued that "the Court
ventured too far," that an appropriate ruling would have invalidated the Texas statute, and
nothing more. Instead, she asserted, the Court engaged in "heavy handed judicial
intervention." Immediately following the \textit{Roe} decision other opponents to the Court's
trimester approach agreed, labeling the ruling, "a typical legislative judgement."\textsuperscript{27}

If the Court's emphasis on the physician's role was inappropriate, so too was its
role as judicial legislature, as Rehnquist argued in his dissenting opinion. By imposing the
trimester approach to abortion, the court, in effect, arrested the political process which
moved concurrently toward reform. In 1972, in all but five states legislatures had before
them bills to reform or repeal abortion laws. Ginsburg deemed \textit{Roe} responsible for
"stopping a political process that was moving in a reform direction." In effect, \textit{Roe} was
premature.\textsuperscript{28}

When questioned as to whether or not she found the \textit{Roe} verdict untimely, Sarah

\textsuperscript{26}\textit{Roe v Wade} 410 U.S. 174.


\textsuperscript{28}Garrow, \textit{Liberty and Sexuality}, 616, quotes Ginsburg from "A Moderate View
Case Against," C3.
Weddington disagreed with Ginsburg and those who saw the decision as premature. Weddington argued the infeasibility of effecting substantive changes in abortion laws through the state legislatures. It should be noted, however, that Weddington served three frustrating years, 1973-76, in the Texas House of Representatives fighting unsuccessfully for repeal of the state's anti-abortion statues. Weddington's expectations were, perhaps, unrealistic with respect to her agenda. For even the most zealous of young lawyers to have changed laws which were not only on the books, but enforced for over a hundred years, would have been extraordinary. Instead, the Supreme Court thrust a decision on Texas and the other states before politics had sufficient time to run its natural course. The Court's trimester based approach not only halted on-going legislative reform but simultaneously left virtually no state law in conformance with its ruling.29

Although legislative reform was pending in most states, none of the new statutes approached abortion from the trimester aspect. Thus, as a result of the Court's ruling, virtually every state law became null and void. The decision, intended to definitively clarify the issue, caused every state to readdress the controversial question of abortion. But the decision had farther reaching consequences. While abortion activists rested on their laurels following Roe, the decision acted as a forceful stimulant to the right-to-life movement. These right-to-life activists functioned effectively even before Roe, posing a threat to recent New York legislation permitting abortion. Following Roe, their avid anti-abortion position served as the cornerstone of the emerging New Right, a group that

became a powerful political body. Rather than resolving the abortion issue once and for all, the Supreme Court sent the issue into a state wide legislative tailspin and served as the impetus for a new and powerful political force.  

Many right-to-life members grounded their position in religious doctrine. While the churches had remained relatively silent during the physicians’ crusade in the late nineteenth century, many clergy and their congregations felt compelled to speak out following the *Roe v Wade* decision. By 1990 many religious denominations including the Episcopal, Presbyterian, United Methodist and American Baptist churches no longer held positions favorable to abortion. Religious groups, perhaps best exemplified by the Reverend Jerry Falwell's Moral Majority, became outspoken. They argued that the courts expressed the opinions of secular society and had no bearing on church doctrine.  

But the churches also spoke out because they no longer had their long time allies. The physicians, formerly against the procedure had actually become part of the abortion process. The state which previously had a compelling interest in protecting the health of the mother, no longer had cause to intervene. Thus, it became incumbent on the churches to speak out.

Immediately following *Roe* the *New York Times* optimistically announced that the decision, provided "a sound foundation and reasonable resolution of a debate that has divided America too long." Had the Court addressed the real issue, that of women's need

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for safe, legal abortions, the *Times* hopeful assessment might have proved correct.

Instead, due to the Court's emphasis on abortion as a medical decision, the Supreme Court nullified all state abortion laws, motivated a new right wing movement and, thus, precipitated more debate than it resolved. Due to the Supreme Court's misguided emphasis, *Roe v Wade* only perpetuated the abortion controversy.\(^{32}\)

CONCLUSION

Although neither the lawyer who argued the case, nor the justices making the ruling, consciously voiced the ideas of the eugenics movement, concepts of this persuasive ideology echoed throughout the landmark Roe v Wade decision. Both the eugenics movement and birth control use had their origins in ancient civilizations and to varying degrees, they relied on one another to promote their causes. During the late 1800s, when the eugenics movement gained momentum in the United States, the ideology became linked with the practice of birth control. Women needed to limit and space their offspring in order to fulfill the exalted role of motherhood and to have "better" children. Physicians linked contraception with eugenic ideas in order to promote their profession. Birth control and the eugenics movement became inextricably united during the movement's zenith when many women underwent forced sterilization. Even though the concept had fallen from favor by 1973, eugenic notions still lingered in American thinking.

When Sarah Weddington argued Roe v Wade before the Supreme Court several aspects of her assertions echoed the eugenics movement. She maintained that the state had a compelling interest in interceding in matters of birth control, an argument reminiscent of the earlier state imposed sterilizations. Weddington referred to the frenzy concerning overpopulation and implied that abortion offered a solution. But, perhaps Weddington's strongest eugenic arguments involved the physicians. She accepted the
propaganda of the nineteenth-century physicians that abortion posed a deadly threat to women. In fact, this ruse was perpetuated by the physicians to establish the prestige and power of their profession. A further eugenic argument, on Weddington's part, was that of who was having the abortions. This had also concerned the eugenics movement and doctors in the 1800s. At that time, as well as in the 1960s, wealthy women were the ones who obtained abortions, while poor women had babies at random, threatening the well being of society. Even though Weddington's arguments were not overtly eugenic, they echoed earlier ideas of the eugenic movement.

The Supreme Court's ruling acquired a eugenic tenor when Justice Harry Blackmun centered the Court's decision on the physician's role in abortion. Given that the Court reflected society, the Court was predisposed to reflect eugenic ideas popular at the time. Many were concerned with overpopulation and a growing welfare state. Worry over these issues prejudiced Blackmun's ruling, but not to the extent that the physicians influenced him. Due to the justice's attempt to sustain and safeguard the physician's role in abortion, the ruling focused on the infamous trimester approach to the procedure.

But it was not specifically the trimester aspect of the Court's decision that echoed eugenics, rather, it was the emphasis on the physicians themselves that reflected eugenic thinking. By making the doctor crucial to the abortion decision, the Court perpetuated the all-important role the physicians had created for themselves a century earlier. This role was intrinsically eugenic. The physicians crusaded against abortion because they wanted to establish their elite position in society, and because they did not believe in the practice. They did not believe in abortion, not because it threatened women's health, on the
contrary, physicians had the expertise to perform safe abortions. Physicians opposed abortion because of who was having abortions. As members of the upper-class, doctors were concerned that since only wealthy women could afford the procedure and were having abortions, that poor women would breed with abandon and upset the delicate balance of society. By focusing on the physician's role in abortion, the Supreme Court perpetuated the doctors' eugenic ideas. The abortion decision, as a result of the Court's ruling, remained in the hands of an elite few, who would determine methods of birth control for all women.

With Roe v Wade the Supreme Court wanted to settle, unequivocally, the controversial question of abortion. Indeed, Sarah Weddington thought the Court had etched its decision in stone. Twelve years later, however, Weddington realized that the Roe decision was written in yielding sand rather than obdurate stone. Lower court rulings began to erode the Supreme Court's decision as these courts attempted to grapple with Blackmun's trimester approach. If the decision was not final, if it is being worn away, it is because of the Court's emphasis on the physician's role in abortion and not on women's need for safe, legal abortions. If the Supreme Court's ruling is eroded away it is because of the lingering eugenic influences which were echoed in the Roe v Wade decision.

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1Sarah Weddington, "Some Women Are Born Leaders," a lecture delivered at the University of Texas, Richardson, Texas, 15 February 1995.
BIBLIOGRAPHY

Books


Periodicals

*Population Bulletin*

*Radical American*

*Review of Radical Political Economics*
Saturday Evening Post

The Dallas Morning News

The New York Times

Statesman and Society

The Washington Post

Time

Other Sources


Buck v Bell, 274 U.S. 200.

Congressional Record. 89th and 93rd Congresses. 1965 and 1969.

Griswold v Connecticut, 381 U.S. 486.


Roe v Wade, 410 U.S. 113.