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THE POLITICS OF PROTECTION: THE FORGOTTEN HISTORY OF GEORGIA  
FEMINISTS AND *DOE V. BOLTON*

by

ALEXANDRA MCGEE

Under the Direction of Wendy Venet, PhD

ABSTRACT

In this thesis, I will argue that *Doe v. Bolton*, 410 U.S. 179 (1973), a United States Supreme Court case originating in Georgia, enabled all women access to abortion, including groups of marginalized women previously denied this right. An examination of the background of *Doe* uncovers the roles played by Georgia feminists and the medical community. By comparing *Doe v. Bolton* with the concurrent Supreme Court case of *Roe v. Wade*, I will shed light on the history of abortion in America as well as continuing divisions over abortion access in America today.

INDEX WORDS: Georgia, Second Wave Feminism, Abortion, *Doe v. Bolton*, *Roe v. Wade*

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FEMINISTS AND *DOE V. BOLTON*

by

ALEXANDRA MCGEE

A Thesis Submitted in Partial Fulfillment of the Requirements for the Degree of

Master of Arts

in the College of Arts and Sciences

Georgia State University

2015

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2015

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FEMINISTS AND *DOE V. BOLTON*

by

ALEXANDRA MCGEE

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Electronic Version Approved:

Office of Graduate Studies

College of Arts and Sciences

Georgia State University

August 2015

## DEDICATION

In Memory of my beautiful Tigger

We had a wonderful 19 years together. You showed me that I could love unconditionally  
at a young age, and I will never forget you.

> ^..^ <

Meow

And for Mom and Andy

I would not be the person I am today if it weren't for your love and support.

## ACKNOWLEDGEMENTS

Thank you to those who have encouraged and supported me these past few years, lending an ear, or reading a draft. Your words, whether they were gentle criticisms or sweet platitudes, were not forgotten. I am especially indebted to my friends and family who kept me grounded during this process, particularly Richard Harker, Geoff Hetherington, Katy Clarke, Michele Lantz, Andy McGee, and Tyler Rogers. Through the ups and downs, I have been blessed with these wonderful people in my life. It is hard to overstate my gratitude to all of you.

I also owe a great deal to my advisor Wendy Venet, who pushed me to delve deeper into the complicated issues I was writing about and provided valuable feedback to ensure I had a final product that did my subjects justice. Many thanks as well to Rob Baker whose constitutional history seminar ensured I had a thorough understanding of the legal concepts I was writing about. Together, their help made all the difference. Lastly, I must thank Morna Gerrard, Women's Collection Archivist at Georgia State's Special Collections and Archives. I am forever grateful that she saw the potential in me, selecting me to be her endowed GRA, when I first enrolled at Georgia State. Working under her the past three years has bestowed many gifts, the greatest being the inspiration for this thesis as well as her friendship and support. Together we have shared a lot of tears and a lot of laughs, and I would not trade any of it. Thank you.

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## 1 INTRODUCTION

In 1969, Judith Rooks, a Feminist activist and member of Georgia Citizens for Hospital Abortion, took to the steps of the state's capitol building and announced during a live press conference that "because the Georgia legislature had turned its back on the health needs of Georgia women, [the Georgia Citizens for Hospital Abortion] would establish a counseling service to provide information and arrange legal abortions in Washington D.C. or New York for Georgia women who could not access necessary health services" in Georgia.<sup>1</sup> Concurrently, feminists and activists in Georgia began preparing for their own legal challenge to the state's liberalized abortion law, setting the stage for what would later become *Doe v. Bolton* (1972), a companion case to *Roe v. Wade* (1972). Argued and decided the same day as the more famous *Roe v. Wade*, *Doe* has its own important points of distinction on the issue of abortion. Despite its significance in the history of abortion rights, *Doe* has continued to be overlooked by most scholars since the day the pair of decisions came down. This moment on the Capitol steps reflects much larger concerns surrounding female reproductive control in a male dominated government: what is the ultimate impact of a state attempt to control reproduction? What are the costs? And what responses can it inspire?

In this thesis, I will argue that *Doe v. Bolton* allowed oppressed women to seize control of their reproductive rights, a crucial step in the march toward equality. The work of Georgia feminists in cooperation with the medical community, specifically at the Centers for Disease Control and Grady Hospital, can illuminate the impact of Georgia's liberalized abortion statute on historically marginalized groups. In addition, a closer look at this neglected chapter in the abortion rights struggle will reveal the important work of Georgia feminists and the local medical

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<sup>1</sup> Judith Rooks, *interview by Janet Paulk*, 26 April 2004, Judith Rooks, Donna Novak Coles Georgia Women's Movement Archives, Georgia Women's Movement Oral History Project, Box 3, Special Collections and Archives, Georgia State University, Atlanta.

community and how they shaped attorney Margie Pitts Hames' arguments before the Supreme Court.<sup>2</sup> Also through reexamination, increased understanding of *Doe* in relation to the larger abortion rights struggle of the twentieth century can be discerned, most significantly what the implications of the decision mean for future laws relating to abortion access.

## 1.1 Historiography

As recently as forty years ago, topics like sexuality, reproduction, contraception, and abortion were rarely viewed as appropriate topics for historical study. Writing in 1965, social historians only had two serious books as resources on reproductive control in the past: Norman E. Himes' *Medical History of Contraception*, and Frederick Taussig's *Abortion, Spontaneous and Induced: Medical and Social Aspects*.<sup>3</sup> Both books were written from a medical perspective, and remained the only texts since their publication in 1936.<sup>4</sup> In the years since, there have been multitudes of historical studies about sexuality, reproduction, contraception, and abortion. Depending on one's perspective, the narrative of this history can be separated into two camps. The more liberal camp argues that over the past few decades women have made significant strides in the area of reproductive rights, and conversely, the conservative camp presents a narrative where traditional values are in sharp decline as a result of increased availability of

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<sup>2</sup> The Oyez Project. "Doe v. Bolton, 410 U.S. 179 (1973) Oral Argument." Last visited May 3, 2013, [http://www.oyez.org/cases/1970-1979/1971/1971\\_70\\_40](http://www.oyez.org/cases/1970-1979/1971/1971_70_40); The Oyez Project. "Doe v. Bolton, 410 U.S. 179 (1973) Oral Reargument." Last visited May 3, 2013, [http://www.oyez.org/cases/1970-1979/1971/1971\\_70\\_40](http://www.oyez.org/cases/1970-1979/1971/1971_70_40); John D. Asher, M.D., "Abortion Surveillance in a Metropolitan Hospital: First Year's Findings." Margie Pitts Hames Papers, Manuscript, Archives, and Rare Book Library, Emory University; Roger W. Roach, M.D., Carl W. Tyler, Jr., M.D., and Albert K. Schoenbucher, M.D., "An Epidemiological Analysis of Abortion in Georgia," *American Journal of Public Health* 61, no. 3 (1971); Judith Rooks, interview by Janet Paulk, 26 April 2004, Judith Rooks, Donna Novak Coles Georgia Women's Movement Archives, Georgia Women's Movement Oral History Project, Box 3, Special Collections and Archives, Georgia State University, Atlanta.

<sup>3</sup> Norman E. Himes, *Medical History of Contraception* (New York: Schocken Books, 1970) and Frederick Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* (New York: C. V. Mosby Company, 1936). Both books are discussed in James C. Mohr's historiographic review of abortion literature (James C. Mohr, "Sexuality, Reproduction, Contraception, and Abortion: A Review of Recent Literature," *Journal of Women's History* 8, no. 1 (1996): 172.)

contraception and wider access to abortions. Both sides of the debate present contraception and abortion as new concerns in American history. However, historians recognize that these are not new issues and neither the practice of abortion nor the use of contraception was invented in the twentieth century.

Historians have traced the earliest mentions of abortion in law to early modern English and colonial law, where the purpose was to protect the potential mother from the abortionist. Women who attempted or had successful abortions that resulted in their own death were viewed as victims, and instead, the abortionist was charged with the felony. If an abortion successfully killed a “viable” fetus, it was a serious misdemeanor. To prove such a crime, the pregnancy had to be established before any charge could be brought for the attempted abortion. This could only be accomplished with evidence of the quickening (movement in utero) of the fetus.<sup>5</sup> Early Judeo-Christian teachings were similar. In the Bible, a fine was levied on anyone performing an abortion, and an abortionist faced death if the woman died. Talmudic scholars concluded that there was no crime unless the fetus had quickened, but abortion was permitted if pregnancy endangered the mother’s life. Early Islamic writers like Avicenna portrayed abortion as a birth control method, yet by the early modern period, the Roman Catholic Church had declared their disapproval of all contraception.<sup>6</sup>

Connecticut became the first state to criminalize abortion in 1821, and the primary purpose of the law was to state the conditions under which the state could prosecute the abortionist for an abortion. The law did not attempt to criminalize attempted abortions or successful abortions before quickening, nor did it make the woman an accessory to the crime.<sup>7</sup>

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<sup>5</sup> N.E.H. Hull and Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (Lawrence: University Press of Kansas, 2010), 17.

<sup>6</sup> Hull & Hoffer, 18.

<sup>7</sup> *Ibid.*, 20.

Through the 1880s, more states passed anti-abortion statutes; many of these statutes now declared all abortion attempts, all practitioners and accessories to abortion, and all providers or advertisers of abortion paraphernalia subject to penalty.<sup>8</sup> Concurrently, conservative social activists such as Anthony Comstock gained influence in the United States. As part of the “social purity movement,” Comstock was able to lobby Congress successfully for the passage of a bill that strengthened federal law against sending obscene materials through the mail. The amendments favored by Comstock came to be known as the federal Comstock Law. Obscene items included literature relating to the prevention of pregnancy.<sup>9</sup> Many states followed suit and passed their own “little Comstock laws,” condemning different forms of obscenity, including materials related to birth control. Responsible advocates of birth control maintained that “Comstock’s efforts set back for decades the quest for circulating the best contraceptive advice available.”<sup>10</sup>

Enacted in 1879, Connecticut’s “little Comstock” law “remained as a relic of a Comstockian philosophy which had long since ceased to be widely held, if it ever had been.”<sup>11</sup> The Connecticut statute would go on to be challenged and struck down in *Griswold v. Connecticut* (1965), where the principle of a right to privacy was first formally elucidated by Justice William O. Douglas, writing in his opinion that “the First Amendment has a penumbra where privacy is protected from governmental intrusion.”<sup>12</sup> The right to sexual privacy merely deals with this right, as discussed by Justice Douglas, in regards to issues that arise from people’s sexuality (i.e. reproductive rights, sexual conduct, etc.). Douglas believed that because these acts

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<sup>8</sup> Ibid., 34.

<sup>9</sup> John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (Lawrence: University Press of Kansas, 2005), 7.

<sup>10</sup> Ibid.

<sup>11</sup> Thomas I. Emerson, “Nine Justices in Search of a Doctrine,” *The Right of Privacy: A Symposium* (New York: Da Capo, 1965), 23.

<sup>12</sup> *Griswold v. Connecticut* 381 U.S. at 483 (1965).

took place in “zones of privacy,” they were protected. Such a right affects all in the United States regardless of gender, marital status or sexual orientation and has significant implications for a variety of individuals. It entails what is arguably the most private aspect of a person’s life, granting everyone the choice of sexual partner and granting women control of their reproductive abilities through birth control and abortions. The right to privacy was expanded for reproductive rights gradually through the cases of *Griswold v. Connecticut*, *Eisenstadt v. Baird* (1972), *Roe v. Wade* (1973), and *Doe v. Bolton* (1973).

The right to privacy has foundations in various parts of the Constitution, specifically the Fourteenth and the Ninth Amendments. The Fourteenth Amendment, known for the Due Process Clause, asserts: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor to deny any person within its jurisdiction the equal protection of the laws.”<sup>13</sup> The Court utilizes this clause to recognize the substantive due process, which facilitates liberty-based due process challenges that seek a certain outcome. In general, substantive due process prohibits the government from infringing on fundamental constitutional liberties. By contrast, procedural due process refers to the procedural limitations placed on the manner in which a law is administered, applied, or enforced. Thus, procedural due process prohibits the government from arbitrarily depriving individuals of legally protected interests without first giving them notice and the opportunity to be heard.

The Ninth Amendment simply states, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>14</sup> This supports

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<sup>13</sup> U.S. Constitution, amend. 14, sec. 1.

<sup>14</sup> U.S. Constitution, amend. 9.

the arguments of some that due process liberty is an inclusive and open-ended phrase. Together, these two amendments allow United States citizens to argue for the right to sexual privacy.

On the heels of *Griswold v. Connecticut* and *Eisenstadt v. Baird*, the decision that extended the right to privacy for birth control to unmarried women, followed *Roe v. Wade* and *Doe v. Bolton*. In a seven-to-two vote, the Court found that the Texas statute *Roe* challenged violated the Due Process Clause of the Fourteenth Amendment. *Doe v. Bolton* differs from *Roe* in how the Court compared the abortion procedure to other surgical procedures, noting that Georgia's law regulated abortion in ways that were unfathomable for other surgical procedures. In addition, it made a point to emphasize the importance of the physician's medical judgment and conceived it broadly, allowing physicians to take into account emotional, psychological, and "familial" factors. With this language, the Court promoted a medical model of abortion, placing the abortion decision primarily in the hands of the physician, a move feminist scholars have criticized for deemphasizing a woman's personal and moral judgment. At its worst, these critics argue that the medical model of abortion simply transfers authority over women's bodies from the state to the physician while keeping women disempowered. The language of *Doe* can be used to further explore this belief and its veracity in the modern reproductive rights debate.

## **1.2 Method and Theory**

In order to analyze the goals of Georgia feminists and Hanes in *Doe*, a radical feminist analysis will be used to explore the role of women's oppression and its ties to reproductive control. Kate Millet's *Sexual Politics* provides a useful explanation of patriarchy and its role in women's oppression, connecting both to the institution of marriage and the traditional family unit. As Millet discussed, the family acts as the chief institution of patriarchy, arguing that it is "both a mirror of and a connection with the larger society; a patriarchal unit within a patriarchal



whole.”<sup>15</sup> Serving as this agent, the family encourages its own members to conform and “act as a unit in the government of the patriarchal state which rules its citizens through its family heads.”<sup>16</sup> The story of *Doe* is directly connected to that of women’s rights advocacy in Georgia. Second wave feminists’ efforts to gain control of their reproduction and challenge the oppression of women through the Georgia abortion statute can be seen throughout the history of *Doe*.

In this thesis, I will explain how second wave feminism influenced the work of activists like Judith Rooks, who brought Mary Doe’s case to Margie Pitts Hames and how Hames’ argument before the Court was shaped by feminist concerns. Hames’ argument in *Doe* reflects an undeniably feminist stance, in which she questioned the workings of patriarchy, namely its hold over the family, and challenged it. For her, the nature of women’s reproduction is a personal choice that should be free from interference by the male heteronormative government, who attempted to pass legislation that restricted their reproductive rights in a last ditch effort to save the family, patriarchy’s chief institution.

In addition, Shulamith Firestone’s feminist-Marxist interpretation of the modes of production is also useful for examining the significance of women’s reproductive rights for which Hames was arguing. Like Millet, Firestone agreed that there is a discriminatory sex class system, privileging men over women, that can no longer be justified by argument that the differences are based on nature, arguing, “Humanity has begun to outgrow nature.”<sup>17</sup> While men are capable of ending the sex class system that has given them power over women and children, they have little incentive to do so, making this a political problem. While there may no longer be a relevant biological basis for the current sex class system, it does not mean the

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<sup>15</sup> Kate Millet, *Sexual Politics* (Urbana: University of Illinois Press, 2000) 33.

<sup>16</sup> Ibid.

<sup>17</sup> Shulamith Firestone, “The Dialectic of Sex,” in *Radical Feminism*, ed. Barbara Crow (New York: New York University Press, 2000), 94.

exploitation of women and children will end. Feminists worried that fertility control could be used against women to reinforce the system of exploitation in place for poor, young, unmarried, and minority women. Firestone suggested that women needed to seize the means of production, including “the full restoration to women of ownership of their own bodies, but also their seizure of control of human fertility—the new population biology as well as all the social institutions of childbearing and childrearing.”<sup>18</sup> Hanes’ fight on behalf of women in Georgia to gain such control over their reproduction, challenges “the tyranny of the biological family,” uprooting the basic social organization of patriarchal society.<sup>19</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

## 2 Chapter 1: The Story of Jane

“In obtaining a legal abortion, to use the old cliché, it is not what you know but who you know that matters . . . [C]ompetent doctors make their services discreetly available to their middle class patients, and the informal networks circulate this information among people similar in background, while poor women find only non-physicians or self-induced methods available to them.”<sup>1</sup>

On January 22, 1973, the United States Supreme Court handed down one of its most controversial decisions of the twentieth century—*Roe v. Wade*. Recognized as the case that secured the legal right for women to have abortions, it is the case everyone remembers when discussing abortion rights. However, *Roe v. Wade* was not the only case dealing with abortion the court decided that day. *Doe v. Bolton*, a case originating in Georgia, was argued and decided the same days as *Roe*, and has its own merits that distinguish it from *Roe*. The case challenged the state of Georgia’s liberalized yet restrictive 1968 abortion statute, which required women seeking abortions to satisfy five specific requirements, making it especially difficult for economically disadvantaged women and women of color to access safe, legal abortions in Georgia. Margie Pitts Hames was the attorney who argued on behalf of Doe, and part of her argument focused on the barriers to accessing safe abortions for these women. Hames suggested that the state’s requirements drove up the cost of the procedure for women, forcing many either to seek an illegal abortion or attempt to self-induce through other means, often with dangerous outcomes. While some women hoped the new law would make abortions safer and easier to access, the reality was that such safe and legal procedures were only available to those who could afford it.

This chapter will explore the experience of women who sought abortions nationally and in Georgia when it was illegal and then after the liberalized abortion laws were passed.

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<sup>1</sup> Nancy Howell Lee, *The Search for an Abortifacient* (Chicago: University of Chicago Press, 1969), 167.

Concerns that such laws negatively impacted these women were shared by feminists nationwide, who responded in a variety of ways to address the resulting inequalities in access and care. By illuminating the conditions women in Georgia faced trying to obtain legal and illegal abortions the motivations of the Georgia feminists behind *Doe v. Bolton* can be better understood.

Historians have traced the earliest references of abortion in law to early modern English and colonial law, where the purpose was to protect the potential mother from the abortionist. Women who attempted or had successful abortions that resulted in their own death were viewed as victims, and instead, the abortionist was charged with the felony. If an abortion successfully killed a “viable” fetus, it was a serious misdemeanor. To prove such a crime, the pregnancy had to be established before any charge could be brought for the attempted abortion. This could only be accomplished with evidence of the quickening (movement in utero) of the fetus.<sup>2</sup> Early Judeo-Christian teachings were similar. In the Bible, a fine was levied on anyone performing an abortion, and an abortionist faced death if the woman died. Talmudic scholars concluded that there was no crime unless the fetus had quickened, but abortion was permitted if pregnancy endangered the mother’s life. Early Islamic writers like Avicenna portrayed abortion as a birth control method, yet by the early modern period, the Roman Catholic Church had declared its disapproval of all contraception.<sup>3</sup>

The first English law outlawing all attempted abortions, at whatever stage of the pregnancy, was passed in 1803. This statute was part of an attempt to codify a number of capital crimes, including pickpocketing and stealing clothing items worth more than one shilling. As a result, abortion or attempted abortion became an offense with a punishment of transportation to a penal colony. The death of a quick fetus from abortion was manslaughter. The 1803 English

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<sup>2</sup> N.E.H. Hull and Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (Lawrence: University Press of Kansas, 2010), 17.

<sup>3</sup> Hull & Hoffer, 18.

law, however, did not immediately move to the United States.<sup>4</sup> It would be 1821 before Connecticut became the first state to pass an anti-abortion statute criminalizing abortion.<sup>5</sup> Concurrent with the growing anti-abortion movement, which will be explored later, conservative social activists such as Anthony Comstock were gaining influence in the United States. As part of the “social purity movement,” Comstock was able to lobby Congress successfully for the passage of a bill that strengthened federal law against sending obscene materials through the mail. The amendments favored by Comstock came to be known as the federal Comstock Law. Obscene items included literature relating to the prevention of contraception.<sup>6</sup> Many states followed suit and passed their own “little Comstock laws,” condemning different forms of obscenity, including materials related to birth control. Responsible advocates of birth control maintained that “Comstock’s efforts set back for decades the quest for circulating the best contraceptive advice available.”<sup>7</sup>

In its early conception, the Comstock Act of 1873 contained a physician’s exemption to the section banning that possession, sale, or mailing of contraceptive devices, but during discussion in the Senate, a Republican senator, William A. Buckingham, presented an amendment that removed the medical exemption for birth control. Because there was little discussion on the floor of the Senate, it is believed that senators may have been confused about what the amendment sought to achieve. The amendment was approved, and the amended Comstock Act was passed and sent to the House of Representatives. There, with no discussion

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<sup>4</sup> Ibid., 19.

<sup>5</sup> Ibid., 20.

<sup>6</sup> John W. Johnson, *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy* (Lawrence: University Press of Kansas, 2005), 7.

<sup>7</sup> Ibid.

about the substance of the bill, the House approved the entire bill, and it was signed into federal law shortly thereafter.<sup>8</sup>

Enacted in 1879, Connecticut's "little Comstock" law "remained as a relic of a Comstockian philosophy which had long since ceased to be widely read, if it ever had been."<sup>9</sup> The Connecticut statute would go on to be challenged and struck down in *Griswold v. Connecticut* (1965), where the principle of a right to privacy was first formally elucidated by Justice William O. Douglas, writing in his opinion that "the First Amendment has a penumbra where privacy is protected from governmental intrusion."<sup>10</sup> The right to sexual privacy merely deals with the privacy right, as discussed by Justice Douglas, in regards to issues that arise from people's sexuality (i.e. reproductive rights, sexual conduct, etc.). Justice Douglas believed that because these acts took place in "zones of privacy," they were protected.<sup>11</sup> Such a right affects all in the United States regardless of their gender, marital status or sexual orientation and has significant implications for a variety of individuals. It entails what is arguably the most private aspect of a person's life, granting everyone the choice of whom they engage in sexual conduct with and women control of their reproductive abilities through birth control and abortions.

Margaret Sanger celebrated the *Griswold* decision, which made birth control legally available to married couples. Sanger played a central role in funding the research that eventually produced the birth control pill. Developed in the 1950s and commercially produced beginning in the 1960s, the birth control pill promised the reproductive control so many women had hoped for and provided a solution to the "Malthusian nightmare" of uncontrolled population growth among

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<sup>8</sup> *Ibid.*, 16.

<sup>9</sup> Thomas I. Emerson, "Nine Justices in Search of a Doctrine," *The Right of Privacy: A Symposium* (New York: Da Capo, 1965), 23.

<sup>10</sup> *Griswold v. Connecticut* 381 U.S. at 483 (1965).

<sup>11</sup> *Griswold v. Connecticut* 381 U.S. at 484.

the poor.<sup>12</sup> The pill and other birth control options freed women's sexuality from the fear of unwanted pregnancy. While some critics suggested the pill was responsible for the "sexual revolution," historians like Andrea Tone and Elaine Tyler May agree that the social and cultural issues of the 1960s were primed for changes in sexual behavior and the availability of the pill merely accelerated such changes.<sup>13</sup> More importantly though, the pill gave women of the period a choice they did not previously have, which made the concept of choice central within the emerging women-centered consciousness of second wave feminism.

## 2.1 Early Abortion Law in America

The history of abortion laws in America is complex, but knowing it, provides context for the contemporary debate over abortion rights. In *Abortion: The Clash of Absolutes*, constitutional scholar Laurence H. Tribe sketches out the history of abortion in America, arguing that the abortion debate is presented as "an insoluble conflict between two fundamental values: the right of a fetus to live and the right of a woman to determine her own fate. ... This vision of abortion almost totally obscures the fact that these competing values are in significant part peculiar to late-twentieth century America."<sup>14</sup> Tribe asserts that these dichotomies are not "inevitable outgrowths of the natural order of things," but rather "socially constructed," an assertion the early history of abortion law in America appear to support.<sup>15</sup> In eighteenth and nineteenth century American society, abortions were generally sought by single women in order to conceal the sexual encounters that resulted in the pregnancy. But as Tribe argues, abortion was not seen

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<sup>12</sup> Hull and Hoffer, 90.

<sup>13</sup> Andrea Tone, *Devices and Desires: A History of Contraceptives in America* (New York: Hill and Wang, 2001) and Elaine Tyler May, *America and the Pill: A History of Promise, Peril, and Liberation* (New York: Basic Books, 2011).

<sup>14</sup> Laurence H. Tribe, *Abortion: The Clash of Absolutes* (New York: W.W. Norton & Company, 1992), 27.

<sup>15</sup> Ibid.

as a moral concern. Instead, abortion was only discussed in relation to the illicit sexual behavior that enabled it.<sup>16</sup>

The actual regulating of abortion by law did not begin in the United States until the nineteenth century, and those early laws were meant to address women's health. The first law, passed by the state of Connecticut in 1821, prohibited only the inducement of abortion through usage of dangerous poisons. In addition, this law only applied to postquickening abortion, which illustrates early support for the idea that a woman should be able to end an unwanted pregnancy in the earlier stages. By 1840, only eight states had enacted a statute restricting abortion. However, between 1800 and 1900, the rate women were having children and the number they had dropped by almost 50 percent, from 7.04 to 3.56 children, which Tribe argues, increased the visibility of abortion.<sup>17</sup> Advertisements ran in popular newspapers and magazines, promoting home abortifacients, and the rate of abortion increased.

When restrictive abortion laws were passed in the United States in the mid-nineteenth century, the organized medical profession was the proponent behind them. Physicians' motivations ranged from concerns regarding the safety of abortion to the need to police the boundaries of who could perform an abortion. With the rise in alternative practitioners attempting abortions, physicians were eager to halt these self-proclaimed abortionists and legitimize their own practices more.<sup>18</sup> In 1857, Dr. Horatio Storer launched a national campaign by the American Medical Association (AMA) to end legal abortion, and eventually, the physicians organized a media and lobbying campaign that focused on the fetus's right to life, successfully reshaping attitudes toward abortion in the United States. Interestingly, the Roman

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<sup>16</sup> Ibid., 29.

<sup>17</sup> Ibid.

<sup>18</sup> James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (Oxford: Oxford University Press, 1978), 36-37.



Catholic Church and the religious press did not address abortion until after the Civil War. While religious opposition did grow in the second half of the nineteenth century, it was the clergy who were influenced by the medical profession's lobbying, not the other way around.<sup>19</sup> By 1860, the birthrate among white Americans of British and northern European descent had decreased significantly when compared to that of new immigrant groups. Doctors used the changing demographics to rouse Protestant middle and upper class fears of "race suicide" regarding the ethnic makeup of the United States. Historian James Mohr asserts that opposition to abortion by Protestant clergy was motivated more by fears of "racial suicide" than by morality concerns.<sup>20</sup>

In addition, evidence suggests that the physicians' campaign for abortion regulation was also motivated by the belief that abortion posed a threat to traditional sex roles. Allowing women reproductive control enabled them to pursue opportunities beyond those traditionally designated for women, and an 1871 report by the AMA's Committee on Criminal Abortion reflects these patriarchal concerns. The AMA described women seeking abortions as "unmindful of the course marked out for her by Providence" and painted them as selfish and immoral. The report illustrates the inability of these male physicians to separate female sexuality from the traditional roles of wife and mother:

She yields to the pleasures—but shrinks from the pains and responsibilities of maternity. ... Let not the husband of such a wife flatter himself that he possesses her affection. Nor can she in turn ever merit even the respect of a virtuous husband. She sinks into old age like a withered tree, stripped of its foliage; with the stain of blood upon her soul, she dies without the hand of affection to smooth her pillow.<sup>21</sup>

Perhaps unsurprisingly, the nineteenth century physician led campaign altered public opinion on abortion, and within less than two decades, over forty anti-abortion statutes had passed in the

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<sup>19</sup> Tribe, *Abortion: The Clash of Absolutes*, 30-32.

<sup>20</sup> Mohr, *Abortion in America*, 167.

<sup>21</sup> Brief of 281 American Historians as Amici Curiae Supporting Appellees in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989) (no. 85-605), 17-18.

United States. These laws abandoned the language of quick and nonquick fetuses, replacing this language with exceptions for “therapeutic” abortion. Such abortions would be allowed when deemed necessary *by a physician* to preserve a woman’s life. While regular physicians successfully took control of the practice of abortion, the laws also reflected a significant change in the role of the medical profession by making abortion a “matter of medical judgment.”<sup>22</sup>

With new antiabortion laws in place, there was little debate, however. This, Tribe suggests, was because women continued to have abortions in roughly the same proportion as they had before it was criminalized. They were not prevented from obtaining an abortion when they desired one, so no pushback materialized against the restrictive statutes. Most statutes remained the same throughout the United States from their adoption in the 1880s, and all made exceptions for therapeutic abortions necessary to save the mother’s life. However as Rickie Solinger notes in *Beggars and Choosers*, “Because the laws governing abortion did not precisely define what was criminal and what was not, this had to be worked out in practice, in policing, and in the courts. The complexity of defining ‘legal’ and ‘illegal’ abortions for medical practitioners and legal authorities alike, the gray and ever shifting nature of ‘criminality,’” was an important distinction.<sup>23</sup> Similarly, the medical understanding of therapeutic abortions was also not reliable. Solinger says, “Physicians disagreed on the conditions that mandated a therapeutic abortion and on the methods: there was no consensus.”<sup>24</sup> The result was a stalemate between the medical and legal communities, each looking to the other to define the legality of abortion practices. By the 1930s, therapeutic abortions became increasingly important, and the scope of the therapeutic abortion continued to evolve. In the 1930s, poverty became a widely

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<sup>22</sup> Tribe, *Abortion: The Clash of Absolutes*, 34.

<sup>23</sup> Rickie Solinger, *Beggars and Choosers: How the Politics of Choice Shapes Adoption, Abortion, and Welfare in the United States* (New York: Hill and Wang, 2001), 5.

<sup>24</sup> *Ibid.*

accepted reason for therapeutic abortion. In the 1940s and 50s, psychiatric reasons became acceptable.<sup>25</sup>

The modern era of debate on abortion, according to Tribe, began in the 1950s. As medical care advanced for women with life-threatening pregnancies, doctors found it harder to justify abortions for these women. The availability of “legal” abortions shrank as a result, and scrutiny increased for those making medical abortion decisions. Hospitals established review boards to decide in which cases abortions were “necessary.” As the number of therapeutic abortions declined, doctors began asking for clarification of the laws. First, doctors were concerned about potential lawsuits over varying interpretations of the “preservation of the woman’s life” language in states’ abortion statutes. Second, doctors felt that hospital review boards were arbitrarily limiting the number of therapeutic abortions, preventing them from acting in their patient’s best interest.<sup>26</sup>

The American Law Institute (ALI), an influential body of legal academics and practicing lawyers, suggested in 1959 a revision of its widely adopted Model Penal Code. This version allowed for three defenses for a charge of criminal abortion: first, that continuation of the pregnancy “would gravely impair the physical and mental health of the mother”; second, that the child was likely to be born with “grave physical or mental defects”; and third, that the pregnancy resulted from rape or incest.<sup>27</sup> This Model Code required certification by two doctors confirming justification for the abortion. By the 1960s, however, doctors began to focus on comparisons of the danger of carrying a pregnancy to term with having an abortion. Where in 1955, one hundred out of every one hundred thousand abortions resulted in death, by 1972, that number

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<sup>25</sup> Tribe, *Abortion: The Clash of Absolutes*, 35.

<sup>26</sup> *Ibid.*, 36.

<sup>27</sup> American Law Institute, *Model Penal Code*, (Philadelphia, PA: Executive Office, American Law Institute, 1962).

had fallen to three out of a hundred thousand.<sup>28</sup> Coupled with a widening definition of what “health” meant to physicians, doctors also began to consider the child’s quality of life. The lack of therapeutic abortions nationwide spurred the feminist campaigns for the reform and repeal of criminal abortion laws.<sup>29</sup>

Georgia was no exception to calls for reform and in 1968, the state legislature passed its own liberalized abortion law modeled after the American Law Institute’s Model Penal Code. Effective on July 1, 1969, this new law specified that “anyone who uses any means upon any woman with the intent to produce a miscarriage or abortion, commits criminal abortion.”<sup>30</sup> The penalty for conviction of criminal abortion under this new law ranged from imprisonment from one to ten years. Additionally, the new Georgia law allowed for a misdemeanor penalty to be applied if deemed appropriate. Most significantly, however, the law allowed for legal abortions under specific circumstances. Under the liberalized Georgia abortion statute, five requirements had to be satisfied, many requiring significant financial resources. First, a doctor, licensed to practice in Georgia, must decide the abortion was necessary and determine if the pregnancy met one of the following conditions: 1) Continuing the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; 2) the fetus was likely to be born with serious permanent physical or mental defects; 3) the pregnancy was the result of rape. In addition, the woman requesting the abortion had to certify in writing and under oath that she was a legal resident of Georgia; the doctor performing the abortion had to also certify he believed the woman to be a legal resident of Georgia, two other state licensed doctors had to certify that the abortion is necessary, and finally, the abortion must be performed in a state

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<sup>28</sup> Tribe, *Abortion: The Clash of Absolutes*, 36.

<sup>29</sup> Solinger, *Beggars and Choosers*, 5.

<sup>30</sup> “Law Revised on Abortion for Georgia” in Planned Parenthood Scrapbook 11, Planned Parenthood Association of Atlanta (PPAA), 1963-1997, Planned Parenthood Southeast Records, W084, Archives for Research on Women and Gender. Special Collections and Archives, Georgia State University, Atlanta.

licensed hospital. The hospitalization requirement severely limited rural Georgia women's access to legal abortion care. In 1971, 105 of Georgia's 159 counties had no accredited hospital. As a result, women who were dependent upon their county hospital for free medical services were denied reasonable access to a safe, legal, therapeutic abortion.<sup>31</sup>

## 2.2 Inequality of Abortion Services



Figure 2.1 Feminist Abortion Postcard<sup>32</sup>

<sup>31</sup> "Doe v. Bolton, 410 U.S. 179 (1973) Oral Argument," last visited March 8, 2015, [http://www.oyez.org/cases/1970-1979/1971/1971\\_70\\_40](http://www.oyez.org/cases/1970-1979/1971/1971_70_40).

<sup>32</sup> "No Return to Backstreet Abortion" postcard, folder 1, Feminist Postcard Collection, W075, Archives for Research on Women and Gender. Special Collections and Archives, Georgia State University, Atlanta.

In her eye-opening 1969 study, *The Search for an Abortionist*, Nancy Howell Lee shed light on “one of the most common forms of illegal activity practiced in the United States,” abortion.<sup>33</sup> Lee spoke with 114 women living in New York, Massachusetts, California, Pennsylvania, Connecticut, New Jersey, Michigan, Oklahoma, Oregon and Washington, D.C. While Lee acknowledges the limitations of her study due to the illegality of abortion, she does attempt understand the experiences of a few of the women who obtained deliberate abortions during this period. During the 1960s, the number of women obtaining abortions was estimated to be one million per year, with only ten thousand successfully getting the procedure performed legally in a hospital.<sup>34</sup> And while Lee’s sample population was small and limited due to its voluntary nature, she managed to speak with a number of women who undermined the popular belief that most women seeking abortions were unmarried and hoping to escape illegitimacy. Instead, contemporary studies at the time suggested that while the abortion rate was higher for unmarried women, married women, particularly those who had all the children they choose to have, were obtaining the majority of abortions.<sup>35</sup>

Of interest to Lee, however, is how women, who were law-abiding, respectable citizens, managed to arrange illegal abortions during this period. For all women seeking an abortion, there is a time limit on their search for an abortionist. Because most women were already five to six weeks along before confirming their pregnancies and the majority of abortionists refused to accept cases that were twelve or more weeks along, those seeking an abortion usually had fewer than six weeks to decide what they wanted to do, locate an abortionist, make financial

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<sup>33</sup> Lee, *The Search for an Abortionist* 3.

<sup>34</sup> *Ibid.*, 5.

<sup>35</sup> Paul H. Gebhard, et al., *Pregnancy, Birth, and Abortion* (New York: Harper & Bros. and Paul H. Hoeber, Inc., 1958).

arrangements and have the procedure.<sup>36</sup> Taking all this into account, Lee notes, “It is surprising, on one level, that such a large number of people are willing to undertake the risks of an illegal abortion rather than carry out the pregnancy. [Yet] it is even more surprising, when one thinks about it, that hundreds of thousands of times each year people manage this complicated procedure, in the *absence* of institutional facilities to help them (emphasis added).”<sup>37</sup> The fact is that abortions took place in the United States almost invisibly. People would know of someone who had one; physicians knew of more cases; but public attention only came about when a woman was taken to the hospital or died.

Lee details the experiences of 114 women, who voluntarily shared their experiences, beginning with how each one found out about her pregnancy, found an abortionist, and the procedure. Many women experienced dead-ends, obtaining information of one abortionist, only to find that he was gone or no longer performing the procedure. In one account a newly married woman fails to find an abortionist and suffers serious consequences:

When her friend was unable to reach the illegal abortionist she knew of, and the pregnancy was advanced beyond the three-month time limit that most illegal abortionists insist upon, this woman went to a third legitimate doctor recommended by a friend of a friend. This doctor according to the informant, was “extremely sympathetic to my plight. He advised me on the catheter system”... This advice was given when the pregnancy was four months along. She used the catheter method to start an abortion, only to be taken to a private hospital where they managed to “save” the pregnancy and discharged her. Two weeks later she tried again and dislodged the pregnancy completely. The bleeding was so profuse that her husband again called an ambulance to take her to the hospital for five days, where she was questioned by police and hospital authorities on suspicion of deliberate abortion, but no charges were brought. She felt she was extremely badly treated, especially by the nurses at the hospital.<sup>38</sup>

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<sup>36</sup> Lee, *The Search for an Abortionist* 7.

<sup>37</sup> *Ibid.*, 7.

<sup>38</sup> *Ibid.*, 80.

Other women were exploited financially. In Lee's study, multiple women reported receiving unskilled abortions after trying to find and paying for what they were misled to believe would be the best care possible. A nineteen-year-old woman, with the help of her mother:

located a source for an expensive, supposedly highly qualified, doctor. The girl was picked up on a street corner following telephone arrangements, and paid \$650 to the driver of the car, who took her to an expensive motel outside of town. Inside, she was blindfolded, and a man came in who was addressed as "Doctor" by the driver of the car. He inserted a catheter, and the two men left the girl alone. She phoned her mother to come there and stay with her while the abortion was completed. When the abortion had not been completed naturally by the next day, the mother took the girl to a local hospital where a D. and C. was performed at a cost of \$250. With the best of intentions and considerable sophistication about how competent abortions are arranged, they ended up paying \$900 for a particularly dangerous and frightening experience.<sup>39</sup>

Today, this would have cost them over \$6,500. In Lee's sample, forty-eight couples borrowed money to cover the costs of the abortion. Twelve borrowed from a bank or loan company, providing a fake reason for the loan. The other thirty-six borrowed from family or friends, where thirty were told the true reason for the loan.<sup>40</sup>

Distance proved to be another obstacle for Lee's subjects. Less than one third of Lee's subjects had the abortion done in the area where they were living. The majority traveled by car, bus, airplane, or train to have the procedure performed.<sup>41</sup> In New York State, a study was conducted on the relationship between distance and abortion utilization in 1970 and 1971, prior to *Roe* and *Doe*. The study found that the greater distance women had to travel, the lower the utilization of New York's abortion facilities.<sup>42</sup> Four years later, researchers in Georgia replicated the study to see if the decisions in *Roe* and *Doe* had led to increased abortion utilization. Their

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<sup>39</sup> Ibid., 83.

<sup>40</sup> Ibid., 91.

<sup>41</sup> Ibid., 94.

<sup>42</sup> James D. Shelton et al., "Abortion Utilization: Does Travel Distance Matter?" *Family Planning Perspectives* 8, no. 6 (Nov-Dec 1976), 260.



results illustrated the negative impact of distance on abortion utilization, highlighting its detrimental effect on young black women:

The effect of distance is particularly strong for black teenagers, but the correlation is somewhat lower for white teenagers. One possible explanation is that white teenagers may be thought of as being composed of two groups. The group of older, more affluent, more well-informed teenagers (such as most of the college students) may have relatively little difficulty in traveling considerable distances to obtain abortions. Some in fact may prefer to travel to maintain anonymity. For younger, less affluent, less well-informed teenagers, the effect of distance may be much more important... The time, money and effort needed to travel may not be the only impediment to utilization of a distant abortion facility. A woman who wants an abortion may simply not know of the existence or the availability of an abortion provider outside her community. Operationally, however, the effect is probably the same. A woman who lives farther away from abortion facilities will be less likely to obtain an abortion.<sup>43</sup>

Underlying their assessment was the understanding that women who are the intersection of inequalities, such as race and class, are at a loss when it comes to abortion utilization. Their lack of knowledge, money, and time, made them vulnerable to a system that allowed for unequal access to help. By limiting availability in rural counties, especially, these women faced an uphill battle in gaining access to abortion services in Georgia.

## 2.3 The Search for an Abortionist

Prior to Georgia's adoption of the liberalized abortion law, all abortions except those approved for therapeutic reasons were considered "criminal." As a result, abortions became harder to obtain, more expensive, and more dangerous. With no legal alternatives, women not wishing to be pregnant were forced to see back-alley abortionists or "plumbers." Under these conditions, Solinger notes that "a discretionary and discriminatory system developed in which race and class privilege came to the forefront."<sup>44</sup> The few that could afford the timely process to obtain a safe, legal, therapeutic abortion were usually white women with private health

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<sup>43</sup> Ibid., 262.

<sup>44</sup> Solinger, *Beggars and Choosers*, 193.

insurance. However, it should also be noted that this was not an easy process for these women either. Inequality was rampant for both legal and illegal abortions. Although, arguably, low-income and minority women suffered more from illegal abortions than wealthier white women.



Figure 2.2 Staged photo of woman entering an illegal abortion facility, Atlanta, GA, 1967<sup>45</sup>

In an article published March 1966 in the *Atlanta Journal*, Eugene Moore illuminated the plight of these women at Grady Memorial Hospital.<sup>46</sup> Opening with the story of nineteen year old “Z,” who arrived at the hospital in the middle of the night, she was crying and alone. After a preliminary exam, doctors managed to stop the bleeding and prepare her for surgery. “Criminal abortion,” explained the doctor, who proceeded to phone the police. Pressed for details

<sup>45</sup> Joe McTyre, *Staged photo of woman entering an illegal abortion facility, Atlanta, Georgia, August 1967*, Atlanta Journal-Constitution Photographic Archives, Special Collections and Archives, Georgia State University Library.

<sup>46</sup> Eugene Moore, “Make Me Stop Hurting” in Planned Parenthood Scrapbook 11, Planned Parenthood Association of Atlanta (PPAA), 1963-1997, Planned Parenthood Southeast Records, W084, Archives for Research on Women and Gender. Special Collections and Archives, Georgia State University, Atlanta.

regarding the procedure, “Z” stated she would rather not talk about it to detectives, and instead, begged the doctors, “Just make me stop hurting.” Respecting her wishes the doctor asked the detective to come back later. But that was too late. “Z” died while “surgeons battled to undo what had been savagely done to her body.” A wire coat hanger had been inserted and punctured her uterus, ripping the abdominal cavity. “Z” was the victim of one of the one million plus estimated criminal abortions in the United States that year. In 1966, Grady Memorial Hospital in Atlanta, Georgia, a public hospital that served 80 percent low-income patients, many of whom were African American, reported that an estimated 250 women a year came in for treatment for infection or bodily damage resulting from criminal or self-induced abortions.<sup>47</sup>

Two years later, in November 1968, Dr. John Asher and those in the CDC’s Epidemiology Program’s Family Planning Evaluation Division were tasked with studying the state of abortion, beginning with the collection of data regarding who was having abortions or coming in because of non-hospital induced abortions at Grady Memorial Hospital. Grady served as the pilot hospital for the Abortion Reporting Service under the CDC, a program that would eventually expand on a national scale. From November 1968 to October 1969, the total abortion population at Grady Memorial Hospital was 782 abortion patients. In the same time period, there were 6,181 live deliveries, with 608 abortions for black women and 174 for white women.<sup>48</sup>

Dr. Asher found that of the sixty non-hospital induced abortions treated at Grady, twenty-five percent of them were self-induced, a measure “always available to a desperate woman.”<sup>49</sup> The one death among these women was an eighteen year old black honor student, in college, and

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<sup>47</sup> Ibid.

<sup>48</sup> John D. Asher, “Abortion Surveillance in a Metropolitan Hospital: First Year’s Findings,” Margie Pitts Hames Papers, Manuscript, Archives, and Rare Book Library, Emory University, 2.

<sup>49</sup> Ibid., 5.

engaged to be married. Among the hospital induced abortions, there were no deaths. One of the few anomalies of Asher's study, the number of white patients treated for hospital-induced abortions exceeded black hospital-induced patients, a surprising factor given the general population Grady serves. Asher attributed this to privileged white women seeking care at Grady because their regular private physicians were unwilling to provide induced abortion care, "the patient's desire for anonymity, and the emergent nature of the situation."<sup>50</sup> Of the new Grady patients, over 40% came from wealthier socio-economic areas of Atlanta, whereas only 8% of the old Grady patients resided in such neighborhoods. In his conclusion, Asher argues that in order to completely eliminate non-hospital abortion morbidity and mortality, acceptable alternatives to continuing a pregnancy must be available to pregnant women. Specifically, "hospital abortion care in a simple dignified manner to *all* segments of our population is the key to eradicating death and disease secondary to non-hospital induced abortion in this country" (emphasis added).<sup>51</sup>

The economic means of patients seeking safe, hospital-induced abortions created a significant barrier for many women, a condition greatly impacted by the gender of the patient. Similarly, it is the same economic considerations that prevented women of color, young women, and rural women from affording a legal abortion in Georgia. In Nancy Howell Lee's 1969 study, *The Search for an Abortifacient*, she found that less than a third of women in her sample felt they had the luxury to choose an abortionist for reasons like competence or because the practitioner was recommended. Ultimately, women were not in a position to compare alternatives and choose the safest option, and the most logical option—a doctor—was out of the question. One woman told Lee, "I never even tried to find a doctor to help me. I was too afraid that the doctor

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<sup>50</sup> Ibid., 4.

<sup>51</sup> Ibid., 7.

would turn me into the police.”<sup>52</sup> Even more troubling, Lee found that a quarter of the women who suffered complications from their back alley abortion did not seek or receive competent medical care because they “feared prosecution from a physician or hospital.”<sup>53</sup> Under the law, the medical community was seen as the enemy, a dangerous reality for women in the United States and Georgia.

Under such restrictive abortion laws, women were forced to enter an “underworld,” where danger was always a potential, especially for those who were financially vulnerable. Nancy Howell Lee calculated the average cost of an abortion in the late 1960s to be around \$300 (equivalent to over \$3,000 today), and some procedures could cost as much as \$1,000 or more.<sup>54</sup> With travel, the cost was even greater. Researchers James D. Shelton, Edward A. Brann, and Kenneth F. Schulz found for women in Georgia specifically that the farther a woman must travel to obtain an abortion the less likely she is to obtain one. Additionally, the effect is even greater for black teenagers. They found that despite increased accessibility to abortion facilities compared to the early 1970s, the farther a woman was from Atlanta, the less likely she was to obtain a legal abortion.<sup>55</sup> Together, time, money and effort create a powerful impediment to obtaining a safe, legal abortion.

In March 1971, a second study of abortion in Georgia was published, which provided an even broader examination of how the new liberalized abortion law affected women throughout the state. Beginning with a brief overview of the Georgia abortion law, the authors note that “One might have expected hospital abortions to become as readily available in Georgia as in

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<sup>52</sup> Solinger, *Beggars and Choosers*, 38.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*, 41.

<sup>55</sup> James D. Shelton et al., “Abortion Utilization: Does Travel Distance Matter?,” 262.

other states with similar laws.”<sup>56</sup> Examining nonhospital abortion trends for 1950-1969 and hospital abortion data for April 1968 to June 1970, the researchers found that such expectations regarding the abortion law were not fulfilled during the first two years after its passage. Throughout, researcher Roger Rochat and his team at the CDC’s study kept noticing a disturbing trend. Between 1950 and 1969, nonhospital abortions resulted in the deaths of 205 residents in 55 of Georgia’s 159 counties. While abortion mortality declined 67 percent for whites and blacks combined, abortion mortality declined 86 percent for white women and 46 percent for black women between the first and the last five year periods of the 20 years being studied. Of the 205 nonhospital abortion deaths, 69 percent were black women, and from 1964-1969, 88 percent of the abortion deaths were black women.<sup>57</sup> Rochat and his team noted that “[a]bortion mortality from nonhospital abortions in Georgia is becoming increasingly a black health problem,” adding that “presumably, this reflects the lower socio-economic status of blacks in Georgia.”<sup>58</sup> This was further complicated when age in brought in to consideration. Researchers found that pregnant black teenagers were 11 times more likely to die from nonhospital abortions than pregnant white teenagers.<sup>59</sup> While this law affected all women, when gender intersected with race and class, the results were devastating. Margie Pitts Hames, the attorney for Doe in *Doe v. Bolton*, recognized this, and while her arguments did not specifically address the concerns of race, she would address the question of class, discussing the availability of services and the cost to obtain a legal abortion in Georgia. While it was not explicit, the race of women struggling to obtain a legal abortion was implicit in her discussion of class and the mortality rate of nonhospital abortions.

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<sup>56</sup> Roger W. Rochat et al., “An Epidemiological Analysis of Abortion in Georgia,” *American Journal of Public Health* 61, no. 3 (March 1971): 543.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid.*, 544.

<sup>59</sup> *Ibid.*, 545.

This same inequality extended to hospital abortion services. Dr. Rochat and his team found that from April 12, 1968 to June 30, 1970, only 461 women obtained legal hospital abortions. Of those, the black abortion ratio was less than one-third that of white women. While discussing their findings, Rochat and his team concluded that “deaths due to nonhospital abortion have been reduced to essentially zero for white women [which] indicates that abortion mortality can be eliminated in Georgia.”<sup>60</sup> Such a decline indicated that the same could be achieved for black women in Georgia. Rochat and his fellow researchers concluded that “mortality from nonhospital abortions for unmarried black women in Georgia will be reduced only if contraceptive, abortion, and other maternal health services are provided more equitably to all women in need of such services.”<sup>61</sup> Rochat and those in the epidemiology team at the CDC understood that gender played a role in the socio-economic status of women that directly impacted the kind of medical care they could afford to receive when seeking an abortion. “Doctors of conscience” like Dr. Jane Hodgson summed up the alarming truth: “In obtaining a legal abortion, to use the old cliché, it is not what you know but who you know that matters . . . [C]ompetent doctors make their services discreetly available to their middle class patients, and the informal networks circulate this information among people similar in background, while poor women find only non-physicians or self-induced methods available to them.”<sup>62</sup>

## 2.4 Georgia Second Wave Feminists Respond

Within the women’s liberation movement, reproductive control was regarded as fundamental to women’s freedom. Underscoring the decision whether to have an abortion was the idea that women have an active choice about their lives. In the 1960s, others in addition to

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<sup>60</sup> Ibid., 550.

<sup>61</sup> Ibid., 551.

<sup>62</sup> Lee, *The Search for an Abortionist* 167.

the women's liberation movement were working to change abortion laws like those in Texas and Georgia. Organizations like the Association for the Study of Abortion in New York, population control groups like ZPG (Zero Population Growth), and NARAL, then, The National Association for Repeal of Abortion Laws, supported legislative change and challenged the constitutionality of restrictive abortion laws. Meanwhile, women like Judith Rooks and women's liberation groups organized speak-outs, where women shared their experiences with illegal abortions. Marches, demonstrations all illustrated their efforts to bring abortion out of the closet where it had been shrouded in secrecy and shame. For feminists, the issue of abortion moved beyond the language of privacy in sexual relations in the legal arena or the neutral language of choice. They framed abortion in terms of "a woman's freedom to determine her own destiny as she defined it, not as others defined it."<sup>63</sup>

The legal historian Laurence Tribe suggests that two widely reported tragic episodes during the 1950s and early 1960s helped change medical opinion of abortion. The first stemmed from the use of the tranquilizer thalidomide. While it was banned in the United States, it continued to be marketed in Europe. The medication caused horrible birth defects when taken by pregnant women. As a result pregnant women in Europe gave birth to badly deformed children; "[i]nfants were born with seallike flippers instead of arms or with shortened thighs and twisted legs. Others were missing ears or had paralyzed faces."<sup>64</sup> In 1962, an American woman, Sherri Finkbine, discovered early in her fifth pregnancy that she had unknowingly taken a tranquilizer that had been thalidomide. Advised by her physician, Finkbine scheduled a legal abortion at a local hospital. Hoping to alert other women, she contacted a friend at a newspaper. The story ended up on front pages across the country, creating enough controversy for the hospital to back

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<sup>63</sup> Laura Kaplan, *The Story of Jane: The Legendary Underground Feminist Abortion Service* (New York: Pantheon Books, 1995), xi.

<sup>64</sup> Tribe, *Abortion: The Clash of Absolutes* 37.



out before the procedure was performed. No physician had said Finkbine's own health was at risk, yet some contended it was too easy for her to obtain permission for the legal abortion. Unable to get an abortion legally, even after challenging the decision in the courts, Finkbine traveled to Sweden for the abortion. Tribe argues that "the Finkbine case left in its wake a controversy in the medical community over the proper reach of the exceptions physicians were morally and legally allowed to make under the criminal abortion laws."<sup>65</sup>

The second episode Tribe cites is the rubella, or German measles, outbreak of 1962-65. Contracting rubella during pregnancy caused severe birth defects as well. When contracted early in the pregnancy, rubella could cause blindness, deafness, and severe mental disabilities in the child. Because of the outbreak, an estimated fifteen thousand children were born with birth defects.<sup>66</sup> Doctors, already reconsidering the changing medical realities, were moved to action due to these two tragedies. Now, medical professionals, who were behind the restrictive abortion laws of the nineteenth century, mobilized in favor of less restrictive abortion laws. Many cited the belief that abortion could be less tragic than childbirth. In addition, physicians now feared legal liability, when attempting to act in their patients' best interest. It did not take long either for such a case to materialize. In 1970, a Minnesota Physician, Dr. Jane Hodgson, was convicted for performing an abortion on a twenty-three year old mother who had contracted German measles. Hers was the first conviction of a physician performing an abortion in American history, and was later reversed following the Supreme Court's decision in *Roe* and *Doe*.<sup>67</sup>

During the outbreak, an Atlanta woman, daughter-in-law of the founder of Atlanta's Planned Parenthood chapter, Judith Taylor, saw firsthand the difficult realities of abortion under the restrictive laws. Pregnant with her own child, Taylor had the good fortune of having

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<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

<sup>67</sup> Ibid., 38.

contracted German measles as a child. However, Taylor had hired a young Puerto Rican woman, who not too long after she started working, found out she was pregnant. Unmarried, the woman confided to Taylor that she had contracted German measles at the last home she had worked in. Taylor insisted the young woman have an abortion for the sake of the child, and turned to her personal doctor, at Piedmont Hospital. Concerned that he had performed too many, he declined Taylor's request for help. Many physicians believed that they were being watched for a pattern of performing too many abortions, and during the German measles epidemic, doctors were performing more than they would have preferred. While he refused to perform the abortion himself, he referred Taylor and the young woman to a younger doctor, who he believed had not performed "too many" abortions yet. While the doctor did not make any promises, he did take the woman's case before the hospital committee for permission to perform the procedure. The committee, Taylor states, took the position that there was only a 70 percent or 60 percent chance that anything would be wrong with the baby. In response, the young doctor argued that if it's your baby and there's something wrong with it, it's 100 percent. The committee denied her request.<sup>68</sup>

In Atlanta, women like Judith Taylor were horrified with how little impact Georgia's liberalized abortion statute had on the ability for women to obtain safe, legal, therapeutic abortions. In 1970, the Georgia Women's Abortion Coalition hosted a public tribunal on abortion. During the tribunal, fifteen women shared their stories with a crowd of 100 men and women, testifying for more than three hours. In "near whispers," these women shared the gruesome details of their experiences. Their goal was to promote free and safe abortions and

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<sup>68</sup> Judith Taylor, interview by Morna Gerrard, 29 April 2010, Donna Novak Coles Georgia Women's Movement Archives, Georgia Women's Movement Oral History Project, Box 3, Special Collections and Archives, Georgia State University, Atlanta.

access to contraception. One woman's story illustrates that the sexism and control exerted over young women in the name of the traditional family:

At 19 I found out I was pregnant. In my mind the only solution was to get married because all my life I had been taught abortion was murder. Three years later and two children and one miscarriage later, I got pregnant again, even though I was taking the Pill. I begged my doctor for an abortion. He told me to "settle down and have the baby." I had the baby and I began to search for a doctor who would perform a sterilization. One after another, they told me I was too young, "What if all your children were killed in an automobile accident?" they kept saying. What they were really saying was that I was not capable of making this decision for myself.<sup>69</sup>

Across the state, virtually all hospitals that performed therapeutic abortions under the 1968 Georgia law, like Grady Memorial Hospital in Atlanta, imposed a firm, unspoken monthly quota on the number of abortions—six in the case of Grady—that would be approved each month, regardless of applicants' individual situation.<sup>70</sup> In response, groups like the Georgia Citizens for Hospital Abortion were created, whose goals were to reform or repeal that law and help women obtain safe, legal abortions in the meantime. For activist Judith Rooks, the legalization of abortion in Washington D.C. and New York proved to be a crucial step forward in the efforts to help women. Concurrently, activists like Rooks began preparing for their own legal challenge to the state's abortion law, what would later become *Doe v. Bolton*.

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<sup>69</sup> Colleen Teasley, "Women Tell Abortion Experiences," *The Atlanta Constitution* (1946-1984), Oct 24, 1972.

<sup>70</sup> Judith Rooks, interview by Janet Paulk, 26 April 2004, Donna Novak Coles Georgia Women's Movement Archives, Georgia Women's Movement Oral History Project, Box 3, Special Collections and Archives, Georgia State University, Atlanta.

### 3 Chapter 2: *Doe v. Bolton* and the Courts

While initial support for repeal came from doctors, clergy, and public health advocates, the repeal initiatives also garnered support as well from the broader and more powerful feminist movement on the 1960s and 70s. For feminists, access to abortion was central to the underlying philosophy of the movement. When examining the history of this issue, it is helpful to have an understanding of the politics at work. Kate Millet's *Sexual Politics* provides a framework that facilitates this understanding. Although it seems contradictory, it is necessary to jump from a place where sex is seen as private act to something broader—politics. Although these people argued for a right to privacy in court, their status in society is politicized regardless, and their position in the power-structured relationships—as the dominated—is important when attempting to understand why they must fight at all.

Kate Millett, an American feminist, earned her bachelors degree in English literature from the University of Minnesota, and attended Oxford University, becoming the first American woman to finish with honors at Oxford's St. Hilda's. However, she is best known for her 1970 book *Sexual Politics*, which was first her doctoral dissertation at Columbia University. Returning to the United States, Millet became involved in the Civil Rights Movement and eventually, Millet joined the National Organization for Women in 1966, and later, New York Radical Women, and Radicalesbians. Her book, *Sexual Politics*, served as one of many manifestos for second wave feminism, expounding much of the theory driving feminism in the 1960s and 70s. Its success made her one of the many spokespersons of second wave feminism, a position she was often uncomfortable with.<sup>1</sup> Regardless, Millet's *Sexual Politics* serves as an

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<sup>1</sup> Alice Echols, *Daring to Be Bad: Radical Feminism in America, 1967-1975*, (Ann Arbor: University of Michigan Press, 1989), 74.

excellent source for the theory underlying the motivations of second wave feminists, including those in Georgia. In *Sexual Politics*, Millet makes clear the connection between reproduction and women's rights.

Millet first asks readers, "Can the relationship between the sexes be viewed in a political light at all?" For Millet, the simple answer is yes when defining politics as the "power-structured relationships, arrangements whereby one group of persons is controlled by another."<sup>2</sup>

Ultimately, sex is a status category with political implications, and "politics" is used when speaking of the sexes because it successfully outlines the true nature of their relative status, historically and at the present. Within the fight for a right to reproductive control, the power-structured relationships are those of men over women, whites over people of color. Millet notes that because certain groups, notably women and people of color, have little or no representation in various political structures, their positions as the dominated are stable and their oppression is continuous.<sup>3</sup> The legislation that denies these groups of people their right to reproductive control is one example of their domination within such power-structured relationships. This is based on the understanding that the legislators behind Georgia's abortion reform bill were almost exclusively white men with little stake in reproductive issues.

Feminist theorist, Ti-Grace Atkinson, regarded as the most radical of radical feminists, is equally useful when discussing the relationship between sex politics and reproductive rights. Atkinson was raised in an upper-class, Republican household in Louisiana. Married at the age of seventeen, Atkinson moved to Philadelphia where she earned her B.F.A. from the University of Pennsylvania. Divorced in 1961, Atkinson moved to New York in the mid-1960s and enrolled in

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<sup>2</sup> Millet, *Sexual Politics*, 23.

<sup>3</sup> *Ibid.*, 24.

Columbia University's graduate program in political philosophy. Atkinson joined NOW in 1967 when she was twenty-eight years old. At the time she was a registered republican with no prior political experience. However, like so many other feminists Atkinson had read Simone de Beauvoir's *The Second Sex* in 1962, and was deeply affected by it. She wrote to Beauvoir in 1965, who suggested Atkinson contact Betty Friedan. She did, and initially, Friedan saw Atkinson as her protégé. Atkinson's involvement in the New York NOW chapter put her in touch with other radical feminists, Kate Millet, feminist playwright Anselma dell'Olio, and civil rights attorney, Florynce Kennedy. Through NOW, Atkinson met women who radicalized her, teaching her about other forms of oppression and putting her in touch with the "radical factions" at Columbia University. According to Atkinson, "my feminism radicalized me on other issues, not vice versa."<sup>4</sup> As a result of her radicalization, Atkinson became disillusioned with NOW and left the group in October 1968, and eventually founded The Feminists in 1969. The group held that sex roles were the root of the problem, specifically who conformed and who refused. In order to dismantle the system of male dominance, feminists would have to "annihilate" the sex-role system.<sup>5</sup>

In her own theoretical writing, Ti-Grace Atkinson finds that women were the first political class, defining political classes as "classes that are treated by other classes in some special manner distinct from the way other classes are treated."<sup>6</sup> However, Atkinson makes one distinction that Millet does not—that these "political" classes are artificial. Atkinson argues "They define people *with* certain capacities *by* that capacity, changing the contingent to the

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<sup>4</sup> Echols, *Daring to Be Bad: Radical Feminism in America*, 168.

<sup>5</sup> *Ibid.*, 171.

<sup>6</sup> Ti-Grace Atkinson, "Radical Feminism," in *Radical Feminism*, ed. Barbara Crow (New York: New York University Press, 2000), 85.

necessary, thereby appropriating the *capacity* of an individual as a *function* of society.”<sup>7</sup> By doing such, these individuals are deprived of their human status, because as Atkinson points out, a “function” of society cannot be a free individual. They cannot exercise “the minimum human rights of physical integrity and freedom of movement.”<sup>8</sup> In seizing control of their reproductive abilities, women find themselves unable to exercise such rights, and as a result, they sued for constitutional protection of their rights.

The sexual dominion in America remains one of the most pervasive ideologies, providing the basis for power. Kate Millet argues this stems from our society’s grounding in patriarchy, noting, “the military, industry, technology, universities, science, political office, and finance—in short, every avenue of power within the society, including the coercive force of the police, is entirely in male [heteronormative] hands.”<sup>9</sup> The women suing for their right to safe, legal abortions were ones removed from political power. With women only beginning to enter politics at all levels in the 1960s, the authors of the abortion statutes were mostly men.

In addition to the significance of sex in politics, the marital status of women has a number of significant implications for understanding *Roe* and *Doe*. First, marriage and by extension, the family, play an important role in maintaining patriarchy’s oppression of women. As Kate Millet discussed in *Sexual Politics*, the family acts as the chief institution of patriarchy, arguing that it is “both a mirror of and a connection with the larger society; a patriarchal unit within a patriarchal whole.”<sup>10</sup> Serving as this agent, the family encourages its own members to conform and “act as a unit in the government of the patriarchal state which rules its citizens

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<sup>7</sup> Ibid., 85.

<sup>8</sup> Ibid.

<sup>9</sup> Millet, *Sexual Politics*, 25.

<sup>10</sup> Ibid., 33.

through its family heads.”<sup>11</sup> Is it a coincidence then that abortion is accused of attacking the family unit? Millet argues that the family successfully controls and socializes people where political and other authorities are not enough. In this sense, the family is a patriarchal tool for conformity, and women seeking to control their own fertility, by seeking a hospital or non-hospital induced abortion challenge the notion of family. These women, for a variety of reasons, wish to procreate as they see fit and operate outside of the traditional family structure, seen by some as an attack on patriarchy and its unit of control. And as Millet argues, the fate of three patriarchal institutions, the family, society, and the state are interrelated. If women have the ability to control their own reproductive fates, these institutions and their power are directly threatened.

Later, Millet asserts that patriarchy’s greatest weapon is its universality and longevity. Having claimed support because of its basis in nature, it has been difficult for many to undermine patriarchy’s existence. However, Millet notes, “when its workings are exposed and questioned, it becomes not only subject to discussion, but even to change.”<sup>12</sup> Second Wave feminists’ battle for the right of women to control their reproduction does just that. All parties questioned the workings of patriarchy, namely its hold over the family, and challenged it. For them, the nature of women’s reproduction is a personal choice that should be free from interference by the male heteronormative government, passing legislation restricting reproductive freedom in a last ditch effort to save the family, patriarchy’s chief institution.

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid., 58.



Radical feminist Shulamith Firestone provides an equally useful work of theory, *The Dialectic of Sex*. Just over five feet tall, Firestone was referred to within the movement as “the firebrand” or “the fireball.”<sup>13</sup> Firestone helped generate the essential discourse of radical feminism, introducing the fundamental concepts of “the personal is political” and “the myth of the vaginal orgasm.” In *Dialectic of Sex*, Millet reinterprets Marx, Engels, and Freud to illuminate the pervasive nature of the sex class system, which she argues is deeper than any economic or social divide.

Like Millet, Shulamith Firestone agrees that the discriminatory sex class system, privileging men over women, can no longer be maintained on the grounds of its origins in nature, arguing, “Humanity has begun to outgrow nature.”<sup>14</sup> While men are capable of ending the sex class system that has given them power over women and children, they have little incentive to do so, making this a political problem. Sadly, while there may no longer be a relevant biological basis for the current sex class system, it does not mean the oppression of women and children will end. Feminists rightly worried that fertility control could be used against women to reinforce the system of exploitation that exists. To prevent such an outcome, feminists argue that women need to seize their own means of production. For feminists like Firestone, this included the full restoration to women of ownership of their own bodies, but also their seizure of control of human fertility—the new population biology as well as all the social institutions of childbearing and childrearing. Hanes’s fight on behalf of women in Georgia to gain such control

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<sup>13</sup> Susan Faludi, “Death of a Revolutionary,” *The New Yorker*, April 15, 2013.

<sup>14</sup> Shulamith Firestone, “The Dialectic of Sex,” in *Radical Feminism*, ed. Barbara Crow (New York: New York University Press, 2000), 94.

over their reproduction, challenges “the tyranny of the biological family,” uprooting the basic social organization of patriarchal society.<sup>15</sup>



Figure 3.1 Margie Pitts Hames, Atlanta, Georgia, June 21, 1989<sup>16</sup>

### 3.1 The Making of *Doe v. Bolton*

Following repeated failed attempts to pass a 1970 repeal bill in Georgia, Judith Rooks told the press in February 1970 that Georgia Citizens for Hospital Abortions (GCHA) would now “strongly consider” turning to the courts to address the statute. At a panel session at the YWCA, sponsored by the Atlanta chapter of the National Organization for Women (NOW), the Georgia Citizens for Hospital Abortions, and the Women’s Liberation Convention, Judith Rooks

<sup>15</sup> Firestone, 95.

<sup>16</sup> Michael A. Schwartz, Margie Pitts Hames, Atlanta, Georgia, June 21, 1989, June 1989, *Atlanta Journal-Constitution* Photographic Archive, Special Collections and Archives, Georgia State University Library.

reiterated the critiques of Shulamith Firestone and Kate Millet, arguing that abortion laws like Georgia's are "kept alive by the puritan ethic—women have children and men make laws."<sup>17</sup> Ministers, doctors, and college professors joined Rooks and her fellow panelist Betty Mayo, an associate of Emory's family planning program and expressed concern that Georgia's abortion law gave preference to the affluent and that even illegal abortions are more easily obtained by middle-class women than poor and minority women. Troubled by the medical red tape surrounding therapeutic abortions, Betty Mayo cut to the chase: "Why should a woman have to stand up in front of a psychiatrist all day to prove she's crazy so she won't have to have a baby."<sup>18</sup>

At the time, no one had challenged the 1967-68 reform laws in the courts, and Rooks decided to put such a case together. Through her husband, Judith knew Agnes "Ruste" Kitfield, the executive director of the American Civil Liberties Union in Georgia. Rooks contacted Kitfield for names of any attorneys who may be interested in such a case, and Kitfield put her in touch with thirty-six year old Margie Pitts Hames. Born in Milton, Tennessee, Hames worked as a legal secretary when she first started studying law at Middle Tennessee State University. She transferred to Vanderbilt University, where she earned her bachelor's and later, her law degree in 1961. In 1962, Hames and her husband moved to Atlanta, where she joined the firm Fisher and Phillips. In 1968, she went on leave prior to the birth of her first child and had not returned. When Kitfield approached Hames, her first question was quotidian: "She asked me would I be interested in doing a women's rights case." Hames replied, "That would be fun." At the time Hames was nine months pregnant with her second child, so she cautioned Kitfield that she

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<sup>17</sup> Kathy McGrath, "Panel Session here Demands Repeal of Abortion Law," *The Atlanta Constitution* (1946-1984), Dec 04, 1969.

<sup>18</sup> Ibid.

couldn't do much for a while. Kitfield reassured her that all they needed was to plan at the moment. With that reassurance, Hames happily agreed to help.<sup>19</sup>



Figure 3.2 Judith Rooks, Georgia feminist and activist<sup>20</sup>

In late February 1970, the first planning meeting for a Georgia abortion case took place at Kitfield's ACLU of Georgia office. Judith Rooks and Kitfield explained their goals to the three women they assembled. In addition to Hames, Tobiane Schwartz, an attorney with Atlanta Legal Aid, and Elizabeth Roediger Rindskopf, who worked at Emory Neighborhood Law Office, joined Kitfield's team. Each woman met two to three times with Taylor and Kitfield, with Betty Kehrer from Georgia Legal Services, and private attorney Orinda Evans joining in at times as well. As GCHA continued to be inundated with calls from women seeking assistance to obtain abortions, the lawyers' discussions turned towards identifying what kind of plaintiffs would be best. They ultimately agreed a wide range of plaintiffs should be counted, including doctors, nurses and clergy. Hames and Rooks took it upon themselves to make most of the calls. They

<sup>19</sup> David J. Garrow, *Liberty and Sexuality* (New York: Macmillan, 1994), 423-424.

<sup>20</sup> Donna Novak Coles Georgia Women's Movement Archives, Georgia Women's Movement Oral History Project, Special Collections and Archives, Georgia State University, Atlanta.

enlisted doctors like Rooks's husband, Peter Bourne, who oversaw a community health center through Emory; Emory's Dr. Robert A. Hatcher, a highly regarded expert on contraceptives, and Emmett Herndon, a clergy counselor. However, all agreed that their lead plaintiff should be a woman, and probably, an unwillingly pregnant woman who had unsuccessfully attempted to obtain a legal abortion in Georgia. In early March, Judith Rooks used her connections at Grady Memorial Hospital to ask two of the women responsible for interviewing and evaluating abortion applicants, Sallie Craig Huber and Kit Young, to take note of any applicant who may be denied an abortion due to Grady's quota and be a strong candidate for a federal court challenge to the 1968 statute.<sup>21</sup>

Within two weeks, Kit Young interviewed a candidate who met the requirements. Twenty-two year old Sandra Bensing was several weeks along in what was her fourth pregnancy. Bensing was the daughter of an Atlanta sanitation employee and a mother who had her when she was sixteen. Bensing dropped out of school in the ninth grade and married Joel Lee Bensing, a drifter from Oklahoma, when she was seventeen. She gave birth to a son in May 1966, and a daughter in May 1967. Both Joel and Sandra worked sporadically, and their marriage was troubled from the start. Joel was arrested several times for attempting to abuse several different children. In June 1968, Sandra's mother attempted to have Sandra committed to the Central State Hospital in Milledgeville, Georgia. Sandra left after a brief stay and returned to Joel. In May 1969, Sandra was seven months pregnant with her third child, and Joel left Georgia for Oklahoma.

Sandra initiated divorce proceedings, citing Joel's history of child abuse as her motivation. The following month, however, Sandra joined Joel again in Texas, where she gave birth to and gave up for adoption her third child. By Fall 1969, the Bensings returned to Georgia,

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<sup>21</sup> Garrow, *Liberty & Sexuality*, 426.

and in early 1970, both of the older children were removed from their custody and placed in a foster home. In March 1970, Sandra left Joel and moved in with her mother, only to realize she was again pregnant. On March 12, Bensing went to Grady to begin the process of obtaining a legal abortion. Four days later, she returned for a series of interviews with psychiatrist Dr. Charles W. Butler and two psychologists. She informed them that she had renewed divorce proceedings and would be unable to care for a new child if the pregnancy continued. She was brought in again on March 24<sup>th</sup> and 28<sup>th</sup> for additional psychiatric consultations, and on April 1, received an obstetrical exam. On April 10<sup>th</sup>, Dr. Butler informed Bensing that her application had been denied.<sup>22</sup>

On April 13, 1970, Tobi, Judith and Margie Hames were put in touch with Bensing and proceeded to finalize their draft complaint on Bensing's behalf. On April 16, Bensing filed an affidavit recounting her unsuccessful attempt to obtain a therapeutic abortion at Grady Hospital and authorized the filing of a federal court challenge against the 1968 abortion statute on her behalf. Agreeing to be designated publicly as "Mary Doe," Sandra discussed in an affidavit how all of her children were no longer in her custody, her prior stay at Central State Hospital, and her inability to financially support and care for another child. That same day, Margie Hames and Tobi Schwartz filed their complaint and Sandra's sealed affidavit in federal district court for the Northern District of Georgia. "Mary Doe" and Peter Bourne were the first two named in a list of twenty-four people and two organizational plaintiffs.<sup>23</sup> Eight more doctors, seven nurses, five ministers, and two social workers rounded out the list of plaintiffs. Instead of naming Grady Hospital as a defendant, however, Hames and Schwartz named Georgia's Attorney General,

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<sup>22</sup> Ibid., 426-427.

<sup>23</sup> Colleen Teasley, "Atlanta Attorney to Argue 'Mary Doe' Abortion Case," *The Atlanta Constitution* (1946-1984), Nov 24, 1971.

Arthur Bolton, and asked for the appointment of a three-judge court to hear their request for both declaratory and injunctive relief against enforcement of the 1968 abortion statute.<sup>24</sup>

By late April, Fifth Circuit Chief Judge John Brown named District Judges Sidney O. Smith, Jr. and Albert J. Henderson, Jr., and Circuit Judge Lewis R. Morgan as *Doe*'s special three-judge court. Around the same time, Dr. Peter Bourne and Dr. Donald L. Block, an obstetrician/gynecologist at Georgia Baptist Hospital secured approval of Bensing's abortion at Georgia Baptist. Hames, Schwartz and the Bournes cobbled together the several hundred dollars needed to pay for the abortion. Weeks later, the Bournes and Bensing's attorneys received news that Sandra had failed to show up for her scheduled abortion at Georgia Baptist and was nowhere to be found. Quietly, they began to search for another candidate to substitute for Sandra for the case. A week before the scheduled hearing on June 15<sup>th</sup>, Sandra contacted Margie Hames from Oklahoma. Joel had taken her to Oklahoma and then abandoned her with no money. More importantly, Sandra told Hames that she had felt the fetus move and was now convinced she did not want an abortion anymore. Hames assured Sandra that no one would force her to have an abortion, but asked that she return to Atlanta for the June 15<sup>th</sup> hearing. Using the money originally intended for her abortion, they got a pre-paid plane ticket for Sandra to return to Atlanta on June 14<sup>th</sup>.<sup>25</sup>

Heavily influenced by Roy Lucas's legal arguments surrounding the right to privacy, Hames, Schwartz and Rindskopf stated in their brief that "*Griswold* is not an isolated decision confined to its facts, but one in a continuing line of decisions involving various aspects of personal privacy and family autonomy."<sup>26</sup> They went on to argue that "the State has no compelling interest to justify interfering with a women's basic right to privacy in matters related

<sup>24</sup> "Abortion Obstacles Attacked in Suit," *The Atlanta Constitution (1946-1984)*, Oct 11, 1970.

<sup>25</sup> Garrow, *Liberty & Sexuality*, 444-445.

<sup>26</sup> Hames, Schwartz, and Rindskopf, "Brief of Plaintiffs," *Doe v. Bolton*, #13676, June 8, 1970, p. 9.

to sex, family, and marriage,” and therefore, the 1968 Georgia reform statute “is an unconstitutional invasion of the right to privacy.”<sup>27</sup>

At the hearing, the three-judge court emphasized the questions of jurisdiction and merits of the case and rejected the need for evidence on behalf of the plaintiffs. Hames, Schwartz, and Rindskopf had prepared multiple witnesses for such testimony and were dismayed at the judges’ dismissal of such evidence. On July 31, 1970, however, the Atlanta court found the 1968 statute unconstitutional. While they agreed that the state could not limit the grounds on which a woman could obtain an abortion, the requirement that hospitals oversee each individual physician’s decision with some sort of committee approval, like Georgia did, was found to be constitutional. They agreed that a declaratory judgment should be issued, but they would not issue formal injunctive relief prohibiting state enforcement of the 1968 statute:

While the Court agrees that the breadth of the right to privacy encompasses the decision to terminate an unwanted pregnancy we are unwilling to declare that such a right reposes unbounded in any one individual. Rather, we are of the view that although the state may not unduly limit the reasons for which a woman seeks an abortion, it may legitimately require that the decision to terminate her pregnancy be one reached only upon consideration of more factors than the desires of the woman and her ability to find a willing physician...

For whichever reason, the concept of personal liberty embodies a right to privacy which apparently is also broad enough to include the decision to abort a pregnancy. Like the decision to use contraceptive devices, the decision to terminate an unwanted pregnancy is sheltered from state regulation which seeks broadly to limit the reasons for which an abortion may be legally obtained. However, unlike the decision to use contraceptive devices, the decision to abort a pregnancy affects other interests than those of the woman alone, or even husband and wife alone.

Once conception takes place and an embryo forms, for better or for worse the woman carries a life form with the potential of independent human existence. Without positing the existence of a new being with its own identity and federal constitutional rights, we hold that once the embryo has formed, the decision to abort its development cannot be considered a purely private one affecting only husband and wife, man and woman.

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<sup>27</sup> Hames, et al., 30, 35.



A potential human life together with the traditional interests in the health, welfare and morals of its citizenry under the police power grant to the state a legitimate area of control short of an invasion of the personal right of initial decision.<sup>28</sup>

In regards to the requirements over how women reach such a conclusion, the Georgia panel that the current requirements of the reform statute were “reasonable and seemingly sound inasmuch as medical practitioners are in the best position by virtue of training to judge concurrently the basis as well as the risk inherent in such a decision.” The panel determined that because of the weight of the decision to have an abortion it was reasonable of the state to require women to consult with doctors to ensure the women were taking into consideration “all relevant factors, whether the be emotional, economic, psychological, familial or physical.” Providing further examples of “reasonable” required consultations, the panel suggested that “the legislature might require any number of conditions such as consultation with a licensed minister or secular guidance counselor as well as the concurrence of two licensed physicians or any system of approval related to the quality and soundness of the decision in all its aspects.” The reasoning of the Court for why it was acceptable for the state to require further consultation beyond a single woman or the woman and her doctor? To protect against abortion mills. While a noble sentiment, in practice, it restricted both the woman and her doctor from making medical decisions in a timely fashion. Adding in the fact that the process women had to go through required time and money, two things many women cited as reasons for seeking abortions, the reform statute negatively impacted poor women and women of color the most. However, the Georgia panel rejected this argument stating that “where abortions may be obtained only from licensed physicians and surgeons, and only after psychiatric consultation, the mere fact that physicians and psychiatrists are more accessible to rich people than to poor people, making abortions more

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<sup>28</sup> *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga.), July 31, 1970, 1054-1056.

available to the wealthy than to the indigent, is not in itself a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.”<sup>29</sup>

White Hames was pleased with the court’s decision overall, she was dismayed that the panel had upheld the hospital committee process. After some discussion, it was agreed they would appeal the upholding of the hospital abortion committee review process. Due to the Atlanta panel’s refusal to order injunctive relief, the plaintiffs had the opportunity for a direct appeal to the Supreme Court. At this point, it was decided that Margie, with the assistance of regional ACLU attorney Reber Boulton, would take charge of the *Doe* appeal.<sup>30</sup>

### 3.2 Oral Arguments and the Supreme Court

On April 22, 1971, the Supreme Court narrowly decided in private to hear both *Roe v. Wade* and *Doe v. Bolton*, five-to-four. On May 3, the decision was formally announced that both cases would be heard sometime in the fall. During the summer leading up to oral arguments, Hames worked on the primary brief for *Doe*. However, she ended up spending significant amounts of time trying to help address racial tensions in Columbus, Georgia. An ACLU intern, Pam Walker, was assigned to assist Hames with the brief. Tobiane Schwartz had the responsibility of handling *Doe*’s lead plaintiff, Sandra Bensing. Weeks after Bensing gave birth to her baby “*Doe*,” her husband Joel kidnapped a six-year old girl, taking her from Atlanta to Oklahoma. In January 1971, he pled guilty and immediately began serving a twenty-year prison sentence. Tobi helped Sandra renew her efforts to divorce Joel, and by May 1971, the divorce was finalized. Sandra moved in with her mother and stepfather, and by the end of the summer remarried.<sup>31</sup>

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<sup>29</sup> Ibid.

<sup>30</sup> Garrow, *Liberty & Sexuality*, 462-463.

<sup>31</sup> Ibid., 497.

It was during this period that Hames began to look into research conducted by the CDC on maternal mortality and morbidity with abortion. CDC researcher Roger Rochat worked on one study that heavily influenced the briefs in *Doe* and Hames's oral arguments. Rochat's study concluded that Georgia's abortion reform statute was not making therapeutic abortions more accessible, the intention of the reform. While Rochat and his colleagues were aware of the necessity of such research for public health, the utilization of their study in *Doe v. Bolton* illuminated a needed collaboration between the medical and legal community on behalf of women:

And so what was important out of that wasn't in a sense that I had done the study, but that a lawyer, Margie Pitts Hames, took that data along with other CDC studies and other information and appealed Georgia's law to the Supreme Court and that led to the *Doe v. Bolton* decision. So that's...that was in a sense one of the most memorable events of my professional career. I mean, a lot of other good things along the way too, but to have, with a small amount of data, really been able to contribute to such a momentous decision was just extraordinary.<sup>32</sup>

Four months after the Court announced it would hear *Roe* and *Doe*, in September 1971, aging Justices Hugo L. Black and John M. Harlan announced their resignations back-to-back, reducing the number of Justices hearing arguments from the usual nine to seven. Despite their replacements, Lewis F. Powell and William H. Rehnquist, not having been seated yet, the Court moved forward with oral arguments. In her first oral argument before the Supreme Court, Hames was understandably nervous. Her argument went smoothly, and she focused on emphasizing the cumbersome nature of Georgia's requirements for obtaining a legal, hospital induced abortion, specifically that the procedure must be performed in a state licensed hospital. Hames directed most of her argument towards the shortcomings of the three-judge panel's ruling, stating, "It is

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<sup>32</sup> Roger Rochat, *interview by Alex McGee*, 24 October 2013, Donna Novak Coles Georgia Women's Movement Archives, Georgia Women's Movement Oral History Project, Special Collections and Archives, Georgia State University, Atlanta.

our contention that the procedural requirements left standing by the court below have virtually manipulated out of existence the right to terminate an unwanted pregnancy.” Hames argued, “The hospital licensing...requirement limits abortions in Georgia and then many rural women access to abortion services. Of Georgia’s counties, 105 had no accredited hospital. So that those women who were dependent upon their county hospital for free medical service are denied by virtue of this hospital accreditation requirement.” Dorothy Beasley’s argument focused on “the value which is to be placed on fetal life,” and addressed the question of *Griswold* head on: “A person has a right to be let alone, certainly, but not when another person is involved, or another human entity is involved.”<sup>33</sup>

The Justices’ private, post- argument conference revealed a majority favored affirming the lower court’s ruling against the Texas statute *Roe* challenged, but there was no consensus on *Doe*.<sup>34</sup> Chief Justice Warren Burger assigned the preparing of both decisions to Justice Harry A. Blackmun, who in early 1972, once Justices Rehnquist and Powell were seated, nominated both *Roe* and *Doe* as candidates for possible rearguing. In May 1972, Blackmun circulated a brief draft of his *Roe* opinion, which to the frustration of his colleagues, proposed that the Court hold Texas’s anti-abortion law unconstitutional solely on the grounds that its only exception when mother’s life was threatened was void for vagueness.<sup>35</sup> Justices Brennan and Douglas complained directly to Blackmun, and several days later, Blackmun circulated a more substantial draft for *Doe v. Bolton*.<sup>36</sup> In response to the *Doe* draft, Justice Byron R. White circulated a draft of his dissent to Blackmun’s *Roe* opinion, arguing that holding Texas’s statute as unconstitutionally vague would essentially override the Court’s thirteen month old holding in

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<sup>33</sup> “Doe v. Bolton, 410 U.S. 179 (1973) Oral Argument.”

<sup>34</sup> Garrow, *Liberty and Sexuality*, 528-32.

<sup>35</sup> *Ibid.*, 547-48.

<sup>36</sup> *Ibid.* 550.

*United States v. Vuitch* 402 U.S. 62 (1971) that found the District of Columbia's statute banning abortions except when "necessary for preserving the mother's life or health" was not unconstitutionally vague.<sup>37</sup> In his draft dissent, White argued that "[i]f a standard which refers to the 'health' of the mother . . . is not impermissibly vague, a statutory standard which focuses only on 'saving the life' of the mother would appear to be *a fortiori* acceptable."<sup>38</sup> Essentially, White argued that if the Court held the "health" of the mother was not vague in *Vuitch*, the standard in *Roe* for "saving the life" of the mother was essentially the same and therefore not vague. The Court would be reversing its own opinion with such a finding.

Within forty-eight hours of White's dissent circulating, Harry Blackmun sent a memo to his colleagues:

Nearly all of you, other than Lewis Powell and Bill Rehnquist, have been in touch with me about these cases. A number of helpful and valid suggestions have been made.

You will recall that when we were canvassing the list for possible candidates for reargument when the bench would be full, I suggested that, although the Texas case perhaps might come down, the Georgia case should go over. This suggestion was not enthusiastically received. It was the consensus, as I recall, that I produce some drafts and we would see what reactions ensued. I have done this and, frankly, I prepared the Texas memorandum the way I did in the hope that we might come near to agreement there irrespective of disposition of the Georgia case.

Although it would prove costly to me personally, in the light of energy and hours expended, I have now concluded, somewhat reluctantly, that reargument in both cases at an early date in the next term, would perhaps be advisable. I feel this way because:

1. I believe, on an issue so sensitive and so emotional as this one, the country deserves the conclusion of a nine-man, not a seven-man court, whatever the ultimate decision may be.
2. Although I have worked on these cases with some concentration, I am not yet certain about all the details. *Should we make the Georgia case the primary opinion and recast Texas in this light? Should we refrain from emasculating of the Georgia statute and, instead, hold it unconstitutional in its entirety and let the state legislature reconstruct from the beginning? Should we spell out—although it would then*

<sup>37</sup> *United States v. Vuitch* 402 U. S. 67-73 (1971).

<sup>38</sup> Bernard Schwartz, *The Unpublished Opinions of the Burger Court* (London: Oxford University Press, 1988), 141-143.

*necessarily be largely dictum—just what aspects are controllable by the State and to what extent?* [emphasis added]<sup>39</sup>

By the end of summer 1972, Blackmun's two departing law clerks responsible for the *Roe* and *Doe* decisions, were still contemplating making *Doe* the more constitutionally significant decision over *Roe*. Clerk George Frampton wrote to Blackmun that the opinions should give states "a comprehensive prescription" for how to amend their abortion statutes, explaining how in *Doe*:

I have written in, essentially, a limitation of the [abortion] right depending on the time during pregnancy when the abortion is proposed to be performed . . . I have chosen the point of viability for the 'turning point' (when state interests become compelling) for several reasons: a) it seems to be the line of most significance to the medical profession . . . ; b) it has considerable analytic basis in terms of the state interest as I have articulated it.<sup>40</sup>

On September 5, the Court notified counsel that *Roe* and *Doe* would be reargued on October 11. In her oral reargument almost a year later, Hames took her argument a step further, directly calling the Court's attention to who Georgia's statute oppresses:

I believe I've pointed out before in the prior argument that we have had some 23-- 25 cases now reported involving abortions in Georgia and many of those involved nurses or contractors and, I believe, a plumber in one case, and you can find those kinds of cases all over the United States, [a] woman placing their hands -- their life in the hands of an unskilled abortionist. Therefore, we feel that the statute must be viewed in the health context. 1,579 women received abortions in Georgia in 1971 and 3,410 women -- Georgia women went to New York for abortions... I give you these statistics to show that there is still a considerable limitation on the availability of abortion services in Georgia.<sup>41</sup>

By discussing women who could afford to fly to New York, Hames also illuminated the plight of those who could not. These were the poor, rural or young women. Unable to afford the

<sup>39</sup> Harry A. Blackmun, "Memorandum to the Conference," May 31, 1972, Box 282, William J. Brennan Papers, Manuscript Division, Library of Congress, Washington D.C.

<sup>40</sup> George T. Frampton, "Letter from George T. Frampton to Justice Blackmun," August 11, 1972, Box 152, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington D.C.

<sup>41</sup> "Doe v. Bolton, 410 U.S. 179 (1973) Oral Reargument," last visited March 8, 2015, [http://www.oyez.org/cases/1970-1979/1971/1971\\_70\\_40](http://www.oyez.org/cases/1970-1979/1971/1971_70_40).

costly process under the Georgia law or the trip to New York for a safe, legal abortion, these women took chances and visited a plumber, an illegal abortionist, or self-induced, which often included the ingestion of poison.

Figure 1. Before *Roe v. Wade*, thousands of American women traveled to New York to obtain a legal abortion.

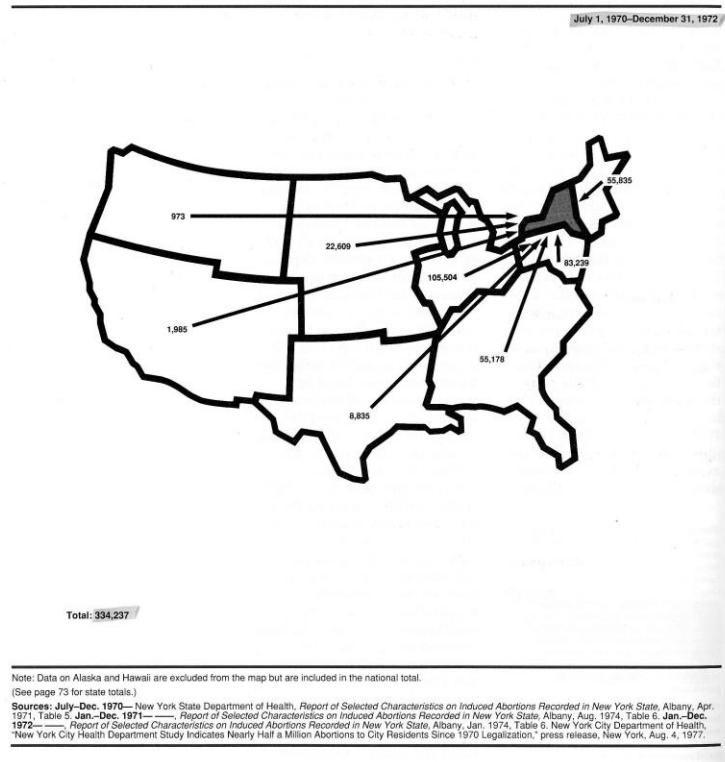


Figure 3.3 Numbers of Women Traveling to New York State for Legal Abortions<sup>42</sup>

Later, Hames discussed another CDC study conducted at Grady Memorial Hospital, which found that 54% of the applicants for abortion in compliance with the Georgia law were forced to discontinue their applications altogether. Their alternatives were to go to New York if they had money, but in reality, these women would not have been applying to the public hospital in the first place if they had the resources. If they could not afford the trip to New York, their options were to choose a \$500-illegal abortion in Atlanta, give birth to the child and find

<sup>42</sup> The Alan Guttmacher Institute, *Abortion and Women's Health*, New York, 1998. Archives for Research on Women and Gender, Georgians for Choice Records, Box 53, Folder 17, Special Collections and Archives, Georgia State University, Atlanta.

adoptive parents, or rear the child. The same study further showed that by the end of the work up period of all the paperwork that 56% of those applicants of that hospital had become second trimester pregnancies, which meant the only option after that was the saline procedure, both more time-consuming and costly.<sup>43</sup>

Under this system, black women, poor women, rural women and the young suffered most due to the costly nature of the procedure imposed by the state's requirements. Hames understood that the oppression of women was tied to their reproductive rights, and similarly, it was the economic exploitation of women under patriarchy that would continue to prevent them from seizing control of their own reproduction. Statistics from the Women's Bureau of the U.S. Department of Labor show that in 1967, the wage scale for white and non-white women were the lowest of all. White men earned an average of \$6,704, and non-white men earned \$4,277. White women, on the other hand, earned \$3,991, and non-white women earned \$2,861. In the end, the manipulative use of black workers and women have been a severe handicap to ending the oppression of women, feeding the vicious cycle that continued to prevent them from seizing control of their reproduction.<sup>44</sup>

Margie Pitts Hames recognized the oppressive nature of Georgia's abortion law, choosing to emphasize the time consuming and unnecessarily costly nature of the procedure in Georgia. For her purposes, there was an undue burden being placed on women wishing to control their reproductive abilities, but an even greater burden existed for women of color and the economically disadvantaged. These women were already struggling under the patriarchal power

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<sup>43</sup> "Doe v. Bolton, Oral Reargument."

<sup>44</sup> Frances Beal, "Double Jeopardy," in *Radical Feminism*, ed. Barbara Crow (New York: New York University Press, 2000), 157.



structure, and most significantly, the economic inequality forced on women. In addition to these inequalities, they found their opportunity to have a safe, legal abortion in Georgia made even more difficult. The implications of such an imposition have profound consequences, specifically for the preservation of patriarchy and the family. In order to end women's oppression, it is essential that women seize control of their reproduction, and by limiting access to safe abortions, the majority male legislators in Georgia made such a task more difficult. Arguably, they perceived abortion and universal reproductive rights for women as a threat to the family unit, patriarchy's chief institution for controlling women and indoctrinating children. Ultimately, Hames's case in *Doe* contributed to liberating the reproductive abilities of women in the United States, allowing them to take a step forward toward ending their oppression under patriarchy.

Dorothy Beasley's reargument attempted to flip the interpretation of the Ninth Amendment, insisting that the fetus ought to have "the right to be let alone." Justice Thurgood Marshall responded "You can't recognize the Ninth Amendment for the fetus and not recognize the Ninth Amendment for the mother, can you?" Justice Blackmun pushed Beasley on why Georgia's statute did not include an incest exception, and in response, Beasley reiterated her basic argument that Georgia's interest was in protecting fetal life.<sup>45</sup>

### **3.3 Justice Harry A. Blackmun and the Opinion**

Days after the two rearguments, Blackmun still wanted to make *Doe* the lead opinion on the Fourteenth Amendment privacy right question and strike the Texas statute in *Roe* for vagueness, leaving *Vuitch* untouched. However, Lewis Powell expressed that health concerns, not economic concerns, should be the primary explanation for the decisions. Therefore, Powell

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<sup>45</sup> "Doe v. Bolton, Oral Reargument."

suggested that the Texas statute in *Roe* should be struck down on the basic constitutional question of a right to privacy and *Roe* be the lead opinion. Powell's comments led Blackmun to concede that he would be open to bypassing vagueness in *Roe* and instead, decide both cases on the same basic constitutional grounds.<sup>46</sup>

Five weeks later, Blackmun circulated heavily revised drafts for both *Roe* and *Doe*. In the cover memo for these drafts, Blackmun stated "I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other point, such as quickening or viability, is equally arbitrary."<sup>47</sup> In the new draft of *Roe*, Blackmun wrote that during the first trimester "[a state] must do no more than to leave the abortion decision to the best medical judgment of the pregnant woman's attending physician." However, for the second and third trimesters, "the State may, if it chooses, determine a point beyond which it restricts legal abortions to state reasonable therapeutic categories that are articulated with sufficient clarity so that a physician is able to predict what conditions fall within the state classifications."<sup>48</sup> Later drafts refined the time test further due to a December 12 letter from Justice Marshall. Marshall wrote the he believed that the line drawn for state interests should be at viability rather than the end of the first trimester. His rationale took into consideration the experience of women facing an unplanned pregnancy, arguing "Given the difficulties which many women may have in believing that they are pregnant and in deciding to seek an abortion, I fear that the earlier date may not in practice serve the interests of those women, which your opinion does seek to serve." Marshall wrote that his concerns could be assuaged if "the opinion state explicitly that, between the end of the first trimester and viability, state regulations directed at health and safety alone were permissible."

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<sup>46</sup> David Garrow, "How *Roe v. Wade* Was Written," *Washington and Lee Law Review* 71 (2014): 909.

<sup>47</sup> Harry Blackmun, "Cover Memorandum from Justice Blackmun to Justices of the Supreme Court," November 22, 1972, Box 151, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington D.C.

<sup>48</sup> Harry Blackmun, "Draft Circulation from Justice Blackmun to Justices of the Supreme Court, *Roe* #2," November 21, 1972, Box 151, Harry A. Blackmun Papers, Manuscript Division, Library of Congress, Washington D.C.

While Marshall accepted that at some point the state's interest in protecting the potential life of the fetus could override any individual interest of the women, he concluded that if that point was before viability, as it was in Blackmun's second draft, it would lead states to ban abortions completely at any later date.<sup>49</sup> Blackmun modified his definition of "viability" to satisfy Marshall, but received his most significant critique in a December 14<sup>th</sup> letter from Justice Potter Stewart:

One of my concerns with your opinion as presently written is the specificity of its dictum—particularly in its fixing of the end of the first trimester as a the critical point for valid state action. I appreciate the inevitability and wisdom of the dicta in the Court's opinion, but I wonder about the desirability of the dicta being quite so inflexibly "legislative."<sup>50</sup>

This criticism of the Court as acting more as a legislature than a court continues to be a common one for *Roe*.

When the opinions were announced January 22, 1973, both *Roe v. Wade* and *Doe v. Bolton* looked significantly different than the initial drafts Blackmun circulated in May 1971. After two sessions of oral arguments and multiple drafts and memos between the Justices, *Roe v. Wade* was the lead opinion, although Blackmun stated that the two opinions should be read alongside one another. For while *Roe* invalidated the laws of the thirty states whose abortion statutes were identical to the statute in Texas, the *Doe* opinion invalidated the Georgia law as well as the similar reform laws adopted by fourteen states in the years after 1967. In the final opinion, Blackmun held that both "Mary Doe" and the physician plaintiffs in the case had standing to challenge Georgia's abortion statute. While the law was not voided for vagueness, all of the provisions that had been upheld by the lower court were unconstitutional, and the opinion went on to nullify them one by one. In regards to the hospitalization requirement, Blackmun wrote

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<sup>49</sup> Schwartz, *The Unpublished Opinions of the Burger Court*, 149.

<sup>50</sup> *Ibid.*, 150.

“We feel compelled to agree with appellants that the State must show more than it has in order to prove that only the full resources of a licensed hospital, rather than those of some other appropriately licensed institution, satisfy these health interests [that the Court acknowledge in *Roe*].”<sup>51</sup> Addressing the hospital committee authorization required by the Georgia statute, the Court held that “we see no constitutionally justifiable pertinence in the structure for the advance approval by the abortion committee.”<sup>52</sup> Finally, the opinion assessed the statute’s requirement that two doctors validate any given physicians finding as unconstitutional. “Required acquiescence by co-practitioners has no rational connection with a patient’s needs and unduly infringes on the physician’s right to practice.”<sup>53</sup>

Three justices of the seven justice majority for *Roe* and *Doe* filed concurrences. Justice William O. Douglas’s was the longest at thirteen pages, and further explored the constitutional right to privacy. Douglas’s opinion aligns with Blackmun’s, acknowledging that there is no mention of privacy in the Bill of Rights, but that earlier decisions have “recognized it as one of the fundamental values those amendments were designed to protect.”<sup>54</sup> While Douglas yielded that the Ninth Amendment did not create federally enforceable rights, its reference to many other unenumerated rights enjoyed by Americans included many that also fall under the meaning of Fourteenth Amendment “liberty.” Douglas proceeds to outline in three parts what elements of privacy fall under “liberty.”<sup>55</sup>

Douglas wrote that “First is the autonomous control over the development and expression of one’s intellect, interests, tastes, and personality.”<sup>56</sup> The First and Ninth Amendments protects

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<sup>51</sup> *Doe v. Bolton*, 410 U.S. 195.

<sup>52</sup> 410 U.S. 197.

<sup>53</sup> 410 U.S. 199.

<sup>54</sup> 410 U.S. 209.

<sup>55</sup> 410 U.S. 210.

<sup>56</sup> 410 U.S. 211.

these facets of the right of privacy. Second, was “freedom of choice in the basic decisions of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.”<sup>57</sup> Earlier decisions *Loving*, *Skinner*, *Griswold*, *Eisenstadt*, and *Pierce* all dealt with these liberties and while they were subject to state control, any such regulation had to be justified by a compelling state interest. In a footnote, Douglas denied that *Griswold* and other decisions invoked “substantive due process,” insisting that was a bridge the Court opinion did not cross. The third area “is the freedom to care for one’s health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll or loaf.”<sup>58</sup>

Ultimately, Douglas concluded that “[t]he Georgia statute is at war with the clear message of these cases -- that a woman is free to make the basic decision whether to bear an unwanted child. Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future.”<sup>59</sup> He did acknowledge the state’s interest in both protecting the health of the woman and the fetus after quickening, but quoted former Justice Tom Clark to address the question of when that becomes valid:

To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity -- the known, rather than the unknown. When sperm meets egg, life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and, until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life.

In summary, the enactment is overbroad. It is not closely correlated to the aim of preserving prenatal life. In fact, it permits its destruction in several cases, including

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<sup>57</sup> Ibid.

<sup>58</sup> 410 U.S. 213.

<sup>59</sup> 410 U.S. 214.

pregnancies resulting from sex acts in which unmarried females are below the statutory age of consent. At the same time, however, the measure broadly proscribes aborting other pregnancies which may cause severe mental disorders. Additionally, the statute is overbroad because it equates the value of embryonic life immediately after conception with the worth of life immediately before birth.<sup>60</sup>

Douglas concludes, “The right of privacy has no more conspicuous place than in the physician-patient relationship,” and that Georgia statute’s mandated approval process represented “a total destruction of the right of privacy between physician and patient,” violating a Fourteenth Amendment liberty.<sup>61</sup>

Joining Douglas’s concurrence were ones by Justice Potter Stewart and Chief Justice Warren Burger. Burger’s was the shortest at only three paragraphs long, emphasizing that both the Georgia and Texas statutes “impermissibly limit the performance of abortions necessary to protect the health of pregnant women.”<sup>62</sup> In addition, though, Burger added that he would be “inclined to allow a State to require the certification of two physicians to support an abortion,” insisting that “the Court today rejects any claim that the Constitution requires abortion on demand.”<sup>63</sup>

In Georgia, reactions to the case were polarized. Unsurprisingly, Georgia’s attorney general, Arthur K. Bolton, declined to comment until he had time to digest the entire opinion. However, right to life groups were swift to comment in his place. Jay Bowman, chairman of the 900 member group, Georgia Right to Life, told the *Atlanta Constitution*, “We are shocked and disappointed...It remind us of the 1857 Dred Scott decision which said that although he may have a beating heart and a functioning brain, and be biologically human, the black man was not a legal person...It required an amendment to the U.S. Constitution to give the black man his right

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<sup>60</sup> 410 U.S. 217-218.

<sup>61</sup> 410 U.S. 219.

<sup>62</sup> 410 U.S. 209.

<sup>63</sup> 410 U.S. 208.

to freedom and it may take a constitutional amendment to restore the unborn child's right to life."<sup>64</sup> Dorothy Beasley declined to ever record her reaction to the decision, but when the Clerk's Office at the Supreme Court, following its customary procedure sent collect telegrams to the *Roe* and *Doe* attorneys, Western Union notified the Court's Clerk that "Dorothy T Beasley Asst Atty General of Georgia . . . declined to accept your message and charges."<sup>65</sup> Hames on the other hand told press she was "very pleased," calling *Doe* "a very important decision because it has given the woman's right to terminate an unwanted pregnancy constitutional standing. It's now a constitutional right." Calling it "one of the most important women's rights cases," Hames added that "If a woman can control her reproductive life, then she is getting a very substantial chunk of freedom."<sup>66</sup>

Ultimately, both *Roe v. Wade* and *Doe v. Bolton* helped legitimize the belief that a personal reproductive decision made by a woman should be understood as an individual right. While Justice Harry Blackmun did not rest the Court's decision on women's equality or the goal of undermining patriarchy, he did recognize that the power women possessed to decide whether or not to have a child could be viewed as a right.

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<sup>64</sup> Bob Fort and Gregory Jaynes, "State's Abortion Law Voided by U.S. Supreme Court, 7-2," *The Atlanta Constitution* (1946-1984), Jan 23, 1973.

<sup>65</sup> Garrow, *Liberty & Sexuality*, 602.

<sup>66</sup> Fort and Jaynes, "State's Abortion Law Voided."

#### 4 Chapter 3: Abortion in a Post-Doe World



Figure 4.1 Georgia demonstrators outside a meeting of the "Moral Majority," Omni Coliseum, Atlanta, GA, October 11, 1980.<sup>1</sup>

When New York's legislature debated legalizing abortion in 1969 and 1970, radical feminists passed out copies of their ideal abortion law—a blank sheet of paper. For them, repeal was the goal and repeal meant no laws on abortion period. They argued that “any reform, no matter how liberal, was a defeat since it maintained the State’s right to legislate control over women’s bodies.”<sup>2</sup> With the state’s control codified in any law regulating abortion, like the New York statute that passed, feminists believed the door was now open to further restrictions. These radical feminists could envision a time when abortion was legal, but inaccessible to many women. Over forty years after the decisions in *Roe v. Wade* and *Doe v. Bolton*, it seems these

<sup>1</sup> Charles Pugh, *Georgia demonstrators outside a meeting of the "moral majority" Omni Coliseum, Atlanta, Georgia, October 11, 1980*. AJCP178-009c, Atlanta Journal Constitution Photographic Archives. Special Collections and Archives, Georgia State University Library.

<sup>2</sup> Kaplan, *The Story of Jane*, xv.



feminists were not too far off. As this is being written, legislatures across the United States continue to attempt to restrict access to abortions. In Texas, the Center for Reproductive Rights has submitted an emergency appeal to the Supreme Court in response to Texas House Bill 2, which if allowed to go into effect July 1, 2015 will close all but 9 abortion clinics in the state. Assessing the situation in Texas, one is left wondering what the legacy of *Roe v. Wade* and *Doe v. Bolton* is when such circumstances still exist. Legal historian Mary Ziegler has argued that *Roe* and *Doe* encouraged abortion proponents to fully embrace a rights based argument in support of abortion, abandoning the once popular argument for abortion as a tool to reign in population growth. The timing of these decisions coupled with the rapid growth of cultural feminism in the 1970s has certainly influenced generations of women to view reproductive freedom as a right, but it has also inspired the growth of pro-life organizations now behind the increase in legislation aimed at restricting abortion access. It is necessary to consider both sides of the abortion debate in the decades following *Roe* and *Doe* to understand the legacy of the decisions.

#### **4.1 The Effects of *Doe***

In the wake of the decisions in *Doe* and *Roe*, the immediate effects for women seeking abortions were significant. Four states had repealed abortion restrictions for at least the first trimester, while many others had moved to liberalize their laws, such as Georgia. New York was the only state unaffected. The other three “repeal” states saw their residency requirements overturned by *Doe*. Spelling out some of the implications of *Roe*, *Doe* held that states could not outlaw abortions simply because the women who seek them were not state residents, could not require abortions to be performed in specially accredited hospitals, or that the procedure be approved by a hospital committee or other physicians. Whereas prior to these decisions, black

market abortionists were able to help (or hurt) women, together *Roe* and *Doe* made abortion widely available, legal, and safe for women in the United States. Through legalization, the safety of abortions grew substantially. Within three years of *Roe* and *Doe*, the death rate for women undergoing legal abortions was ten times lower than that of women who had illegal abortions and five times lower than that for women who opted to proceed with childbirth.<sup>3</sup>

**Deaths from abortion have declined dramatically since legalization.**

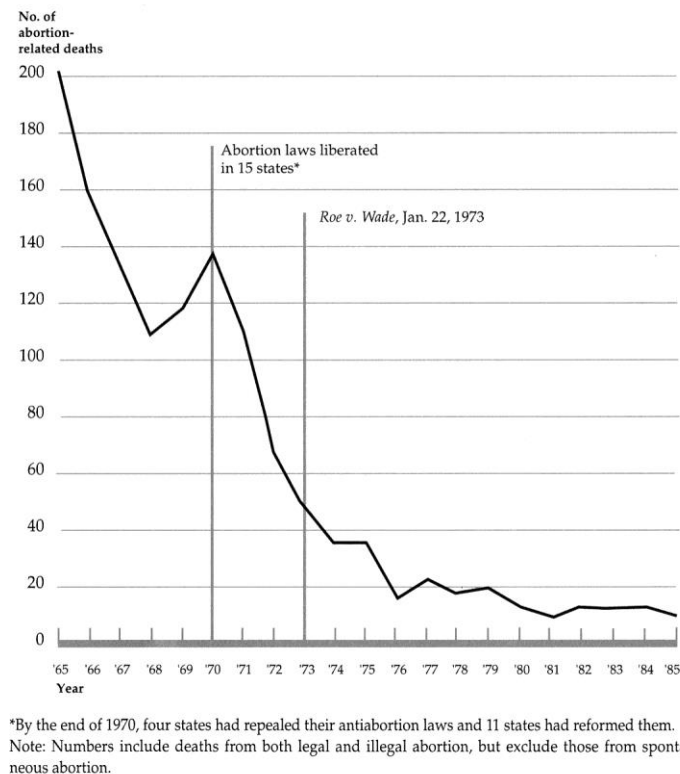


Figure 4.2 Alan Guttmacher Institute Graph Illustrating Decline in Abortion Deaths<sup>4</sup>

In the decades since *Roe* and *Doe* the abortion rate has continued to decline. In 2014, it reached the lowest level since the decisions in 1973. Sadly, according to the Guttmacher Institute, as abortions continue to decline divisions remain over the source of the decline. “The

<sup>3</sup> Tribe, *Abortion: The Clash of Absolutes*, 140.

<sup>4</sup> The Alan Guttmacher Institute, *Abortion and Women's Health*, New York, 1998. Archives for Research on Women and Gender, Georgians for Choice Records, Box 53, Folder 17, Special Collections and Archives, Georgia State University, Atlanta.

philosophical divide over what constitutes effective and acceptable ways to further reduce the incidence of abortion in the United States has never been more stark. The rival policy approaches — one centered almost entirely on restricting women’s choices, and the other on supporting and expanding them — have now become mutually exclusive,” policy analyst Joerg Dreweke wrote.<sup>5</sup> Even though it’s unclear exactly what’s contributing to the recent drop in abortions in each state, the correlation between increased access to contraception and a decrease in unplanned pregnancy has been significantly documented over the last two decades. Teen pregnancy rates have also dropped to historic lows, a trend that has been connected to the change in social norms surrounding contraception and increased birth control availability. An additional factor believed to be behind the decline is the contraceptive coverage requirements in the Affordable Care Act. A recent study found that women are significantly more likely to choose long-term options such as intrauterine devices when co-pays and prescription charges are taken out of the equation. Notably, only two states did not see a decline. Louisiana and Michigan both saw their abortion rates increase, which researchers attribute to their neighbor states Texas and Ohio respectively. Texas and Ohio have both enacted some of the strictest abortion restrictions in the country, forcing clinics to close and women to travel elsewhere for abortion services.<sup>6</sup>

Less than a month after the decisions, the first walk-in abortion clinic in Georgia opened to headlines. Opening in Sandy Springs, the clinic was reported to cut the cost of an abortion in Atlanta in half. Planned Parenthood Association of Atlanta’s assistant director, Helen S. Ford, told the *Atlanta Constitution* that Atlanta area hospitals charged \$400 to \$450, prompting the organization to continue referring women to New York and Washington D.C., despite the ruling in *Doe*, for less expensive abortions. A Georgia woman flying to New York in 1973 would have

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<sup>5</sup> Joerge Dreweke, “U.S. Abortion Rate Continues to Decline While Debate over Means to the End Escalates,” *Guttmacher Policy Review* Vol. 17, No. 2, (2015), 7.

<sup>6</sup> *Ibid.*, 5-6.

paid roughly \$135 for the abortion plus \$100 for round-trip airfare. The new clinic charged women \$200 and performed 250 to 300 abortions a month. So while Atlanta's Planned Parenthood chapter had 400 referrals a month, sending women out of state, the first clinic was able to absorb a significant number of Planned Parenthood's referrals.<sup>7</sup>

In regards to the discussion of abortion, *Roe* and *Doe* had a significant impact. In her article "The Framing of a Right to Choose: *Roe v. Wade* and the Changing Debate on Abortion Law," Mary Ziegler explores how the framing of the right to abortion was shaped by *Roe* and *Doe*. Ziegler notes that before the decisions, policy-based arguments were as significant as rights-based arguments for abortion. Specific policy-based arguments included the connection between public health and population control.<sup>8</sup> During the 1960s, a diverse coalition advocating for abortion for population control existed, but with decisions in *Roe* and *Doe* these organizations like Zero Population Growth (ZPG) experienced a decline in membership and members saw a shift in popular pro-abortion support. In their wake, arguments relating to abortion shifted from the public health driven issue of population control to the rights-based arguments invoked by Margie Pitts Hames and her fellow second wave feminists.<sup>9</sup>

Ziegler's case study examines the evolving strategies utilized by NARAL, NOW, and Planned Parenthood to illustrate the fluid nature of the abortion debate and how the discussion of population control and abortion shifted. Beginning in 1967, Ziegler finds that major abortion organizations began to invoke rights-based arguments. For example, Planned Parenthood asserted that there was a "right of every patient to decide without coercion of any kind whether and when to have a child" and that "the right to abortion must be viewed as a corollary to the

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<sup>7</sup> Sam Hopkins, "First Abortion Clinic in State to Open Here," *The Atlanta Constitution* (1946 1984), Feb 15, 1973.

<sup>8</sup> Mary Ziegler, "The Framing of a Right to Choose: *Roe v. Wade* and the Changing Debate on Abortion Law," *Law and History Review* Vol. 27, No. 2 (2009): 282.

<sup>9</sup> Ibid.

right to control fertility which was recognized in *Griswold*.”<sup>10</sup> While rights-based arguments were present before *Roe* and *Doe*, policy-based arguments, which are designed to promote legislative change, played a greater role in shaping the abortion debate. Georgia feminists utilized the policy-based argument surrounding public health concerns to gain public support for abortion reform legislation. Ziegler notes that the political appeal of such policy-based arguments was less divisive and controversial than rights-based arguments.<sup>11</sup> Joseph Nellis of NARAL explains, “Courts would more easily strike down state anti-abortion laws if the test case were presented in terms of interference [with] medicine than if it were done on the basis that many women’s rights groups have advocated—namely, the right of a woman to control her own body.”<sup>12</sup> The appeal of these arguments in *Roe* and *Doe* is illustrated by the support of the American Medical Association and the American Psychiatric Association. Pro-reform activists also employed policy-based population control arguments, which they found had broad appeal in the 1960s. Politicians, judges, and the general population were more receptive to abortion reform couched in such terms.

With the Court’s decisions in *Roe* and *Doe*, the debate surrounding abortion changed. Where rights-based arguments for abortion had been a part of the rhetoric since the late 1960s, these arguments gained new significance in the wake of *Roe* and *Doe*. Mary Ziegler has suggested that this is due in part to the rise of anti-abortion organizations hoping to overturn *Roe* and *Doe*. Through a series of discussions, abortion reform organizations concluded that the best means to defend legalized abortion was to switch to a rights-based argument for abortion. Second, Ziegler holds that by the mid-1970s, feminist lawyers assumed leadership positions in

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<sup>10</sup> Garrow, *Liberty & Sexuality*, 502.

<sup>11</sup> Eileen Shanahan, “Doctor Leads Group’s Challenge to Anti-Abortion Law,” *New York Times*, (New York, NY) October 5, 1971, 28.

<sup>12</sup> *Ibid*.

NOW, Planned Parenthood, and NARAL and supported increased reliance on rights-based constitutional arguments in preserving legalized abortion.<sup>13</sup>

For Planned Parenthood, the decisions in *Roe* and *Doe* were an important turning point for the organization, leading to the diminishment of policy-based population control arguments. After the decisions, abortion opponents sent thousands of letters to Congress, criticizing *Roe* and *Doe*, and multiple state legislatures began to consider legislation that would give fetuses personhood. Nine months after the Court handed down its decisions, Planned Parenthood leaders met in Denver, Colorado to revamp the organization's strategy top to bottom. Robin Elliot summarized the result of the meeting in a letter that the organization must defend *Roe* and *Doe*: "The reversal of the Supreme Court decisions on abortion . . . would merely take the conflict back one step further. . . This society cannot afford."<sup>14</sup> Deciding this, the issue for Planned Parenthood became how best to defend *Roe* and *Doe* from a constitutional amendment. Organizers correctly worried that pro-life groups would exploit Planned Parenthood's connection to population control, using it against them with minority groups. To counter this, Elliot suggested that abortion reform advocates utilize a new strategy that reaffirms the "commitment to freedom of choice in parenthood." In this illuminating memo, Elliot prompts Planned Parenthood to draw on the rights-based language in *Roe* and *Doe*, and that "an important thematic idea to be stressed is that abortion in a pluralistic society is to be considered as a matter for determination according to personal choice." Understanding the role of rhetoric in the debate, Elliot explains the need for a "redefinition in the terms of public debate—for example,

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<sup>13</sup> Ziegler, "The Framing of a Right to Choose," 305.

<sup>14</sup> The Denver Conference Memorandum November 2, 1973, National Abortion Rights Action League Records, 1968-1976, MC 313, Carton 8. Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, Mass.

‘Abortion: Is It Murder or Not?’ or ‘Freedom of Choice in Abortion: Is It Necessary or Not in a Pluralistic Society?’”<sup>15</sup>

With this shift in argument formally adopted, Planned Parenthood joined forces with the ACLU’s Reproductive Freedom Project in June 1974. Denise Spalding, the project’s director, had all publicity and education efforts designed to draw on the rhetoric of *Roe* and *Doe*’s rights-based arguments rather than policy-based or population control arguments. For Spalding, the Court’s decisions were valuable precedents to be utilized, writing “now we must do the unglamorous follow-up work to protect each woman’s right to have an abortion.”<sup>16</sup> Later that year, Planned Parenthood also began expanding its argument that *Roe* and *Doe* represented a right to privacy, but also for equal abortion access for poor women and women of color. While Planned Parenthood always argued that greater abortion access would serve the poor, this strand of argumentation became more significant with the abandonment of all population control rhetoric. The emphasis now became one of equal access for all women to abortion services.<sup>17</sup> Planned Parenthood’s rights-based strategy was solidified further in 1978 with the appointment of Faye Wattleton, Planned Parenthood’s first female president. For many, Wattleton’s appointment signaled that the organization was now fully committed to women’s rights issues and to the preservation of legal abortion.<sup>18</sup>

The development of a rights-based argument for abortion also aligns with rise of second wave feminism and its tenet of equal rights for women. Alice Echols chronicles the development of radical feminism in *Daring to be Bad: Radical Feminism in America, 1967-1975*. Echols charts the emergence of radical feminism in the late 1960s through its rise to dominance within

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<sup>15</sup> Ibid.

<sup>16</sup> Ziegler, “The Framing of a Right to Choose,” 310.

<sup>17</sup> Ibid.

<sup>18</sup> Judy Klemesrud, “Planned Parenthood’s New Head Takes a Fighting Stand,” *New York Times*, (New York, NY), February 3, 1978.

the women's movement in the early 1970s. Frustrated by the liberalism of the National Organization for Women (NOW), which focused on legal reform at the expense of more meaningful change and the New Left with its denigration of women's concerns as merely personal matters not worthy of political debate, growing numbers of young women in the late 60s began calling themselves radical feminists. With their mantra "the personal is political" they created collectives to develop theory and put it into practice. However, they were also determined to avoid the elitism of NOW and the New Left. As a result radical feminists fractured as a movement quickly. They condemned authors who dared to speak for their sisters, struggled with a division between those who identified as gay or straight in addition to the valorization of "feminine" qualities as put forth in Jane Alpert's "Mother Right" in 1973. By 1975, radical feminism gave way to cultural feminism, which broke with the Left and focused on increasingly personal concerns, surrendering the political arena to liberal feminists, who Echols argues, dissipated feminist energy on the largely symbolic and doomed ERA.<sup>19</sup>

The influence of radical feminism and the decisions of *Roe* and *Doe* in NOW are evident. Founded in 1966 as a women's rights organization, NOW's original focus was to address equal employment opportunities for women. However, in 1967, Betty Friedan, NOW's president, suggested that NOW endorse a constitutional amendment either guaranteeing women's right to access abortion or one that called for the complete repeal of all criminal bans on abortion. After a day of debate and one failed vote on a resolution, NOW passed a resolution which called for the repeal of all criminal abortion bans. From 1967 on, NOW's arguments for abortion were grounded in the larger argument for women's rights. At NOW's 1968 National Conference in Atlanta, Friedan summed up their position: "[I]t is the human right of every woman to control

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<sup>19</sup> Alice Echols, *Daring to Be Bad: Radical Feminism in America, 1967-1975*, Ann Arbor: University of Michigan Press, 1989.



her own reproductive process, and to establish that right as an inalienable human, civil right would require that all abortion law be repealed . . . The basic idea of our revolution is, in the end, self-determination: that you cannot decide anything about a woman's life, especially such a thing as her reproductive process, without woman's voice itself being heard."<sup>20</sup>

However, interestingly, NOW activists co-mingled their rights-based arguments with population control arguments, even aligning for periods with population control groups like Zero Population Growth (ZPG). Like Planned Parenthood though, a change in leadership in 1974 brought about significant change to NOW's message. Karen DeCrow, another feminist attorney, pushed the organization to clarify its stand on abortion, leading the group to publish a Bill of Women's Rights to Choose Abortion and designated abortion rights as an organizational priority. DeCrow called on the board to commit greater resources to the protection of *Roe* and *Doe*.<sup>21</sup> By the late 1970s, the true impact of the decisions was solidified. Both Planned Parenthood and NOW had replaced their policy-based arguments with rights-based ones.

While radical feminism gave way to cultural and liberal feminism, it gave women the basis for much of the rights-based arguments that developed with *Roe* and *Doe*. Influenced by radical feminists like Ti-Grace Atkinson and Shulamith Firestone, second wave feminism and its strands of liberal and cultural feminism developed rhetoric of rights and equality for women in all areas of life, including reproductive control. Major organizations like Planned Parenthood and the National Organization for Women embodied these changes, illustrating the impact of *Roe* and *Doe* on women. Armed with the language of the decisions, women were now empowered to claim their right to privacy and expand it to include a right to equal access of services.

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<sup>20</sup> "Conference to Look Ahead to Seek Women's Equality." *The Atlanta Constitution* (1946 1984), Dec 04, 1968.

<sup>21</sup> Ziegler, "The Framing of a Right to Choose," 319-322.

## 4.2 Backlash

Legal historian Michael Klarman has explored the idea of public backlash against the Court's decisions, arguing that when the Court moves "too far in advance of public opinion" its efforts can "undermine the cause advanced by social movement members."<sup>22</sup> Writing about *Brown v. Board of Education*, Klarman notes that while "litigation had performed valuable service in mobilizing racial protest and securing Court victories, some of which concretely advanced racial change, it could not fulfill all of the functions of direct action."<sup>23</sup> The nullification of *Brown* by white southerners illustrated the limited efficacy of lawsuits alone to produce real social change. Instead, Klarman argues that sit-ins, Freedom rides, and street demonstrations encouraged black agency more than litigation, which asked blacks to put their faith in elite black lawyers and white judges rather than themselves. In addition, Klarman illustrates how *Brown* incited a white southern backlash that increased the chances that once civil demonstrators took to the streets, they would be greeted with violence. It was southern violence against civil rights demonstrators that changed national opinion. By the early 1960s, northerners were not willing to tolerate the violence against peaceful black demonstrators, and they demanded civil rights legislation that directly addressed Jim Crow.<sup>24</sup>

Can this interpretation be applied to the decisions in *Roe v. Wade* and *Doe v. Bolton*? Some critics of the decisions believe they did even greater political damage. In 2013, Supreme Court Justice Ruth Bader Ginsburg gave her opinion of *Roe v. Wade* and *Doe v. Bolton* during a talk at the University of Chicago Law School. Ginsburg called the decision faulty, arguing that it was too far-reaching in its scope, and ultimately, it gave anti-abortion rights activists a very

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<sup>22</sup> Michael J. Klarman, *From the Closet to the Altar: Courts, Backlash, and the Struggle for Same-Sex Marriage*, (New York: Oxford University Press, 2013), 203.

<sup>23</sup> Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, New York: Oxford University Press, 2004, 467.

<sup>24</sup> Ibid.

tangible target to rally against in the decades since. Ginsburg added that “[*Roe*] seemed to have stopped the momentum on the side of change.” Instead, Ginsburg stated that she would have preferred that abortion rights be secured more gradually, in a process that included state legislatures and the courts, she added. Ginsburg suggested that a more restrained judgment would have sent a message, allowing momentum to build at the state level, denying opponents the argument that abortion rights resulted from an undemocratic process in the decision by “unelected old men.” In a different strain, Ginsburg also expressed her concern that the decision was not written to further women’s rights. “*Roe* isn’t really about the woman’s choice, is it?” Ginsburg said. “It’s about the doctor’s freedom to practice...it wasn’t woman-centered, it was physician-centered.”<sup>25</sup> Other critics have echoed Ginsburg, arguing that the decisions enabled the radicalization of gender politics, creating greater extremes than had existed previously. To better determine the validity of the backlash argument, it is necessary to understand the development of right to life organizations following the decisions.

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<sup>25</sup> Meredith Heagney, “Justice Ruth Bader Ginsburg Offers Critique of *Roe v. Wade* During Law School Visit,” *The University Chicago School of Law*, May 15, 2013, <http://www.law.uchicago.edu/news/justice-ruth-bader-ginsburg-offers-critique-roe-v-wade-during-law-school-visit>.

### 4.3 The Anti-Choice Movement Post-*Doe*

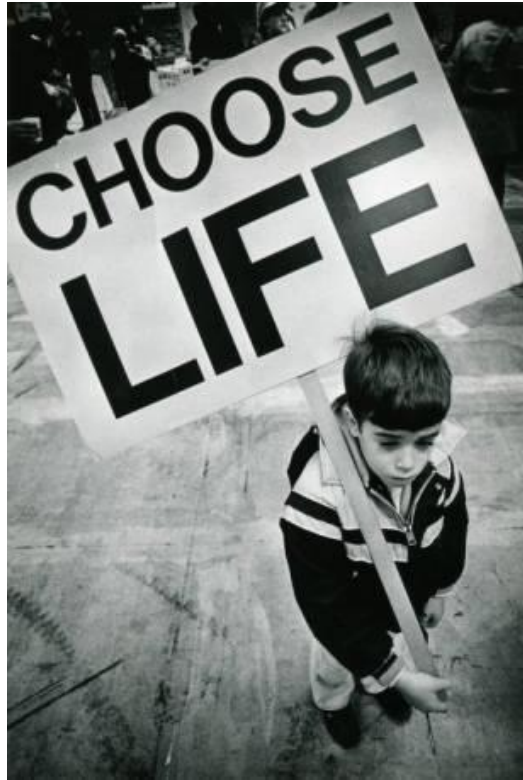


Figure 4.3 Johnny Fuchko, seven-years-old, holds anti-abortion sign, "Choose Life," at protest on 12th anniversary of U.S. Supreme Court decision *Roe v. Wade*, in Atlanta, GA, January 22, 1985.<sup>26</sup>

While the decisions in *Roe* and *Doe* were dramatic losses for those who opposed abortion, it gave their side both attention and a sense of urgency. Similar to how *Brown v. Board of Education of Topeka* (1954) set off the white supremacist backlash in the South, *Roe v. Wade* and *Doe v. Bolton* gave serious pro-life activists a case against which to react.<sup>27</sup> Writing on the philosophical and political divide of abortion in the United States, Laurence Tribe argues that *Roe* and *Doe* “made concrete for the right-to-life movement the evil its adherents sought to combat.”<sup>28</sup>

<sup>26</sup> Rich Addicks, *Johnny Fuchko, seven-years-old, holds anti-abortion sign, "Choose Life" at protest on 12th anniversary of U.S. Supreme Court decision *Roe v. Wade*, in Atlanta, Georgia, January 22, 1985*, AJCP178-009b, *Atlanta Journal Constitution* Photographic Archives. Special Collections and Archives, Georgia State University Library.

<sup>27</sup> *Brown v. Board of Education of Topeka* 347 U.S. at 483 (1954).

<sup>28</sup> Tribe, *Abortion: The Clash of Absolutes*, 141.

In the early 1970s, anti-abortion groups responded to the Rockefeller Commission on Population Control, created by Richard Nixon, with two arguments. First, they discussed what the fetus looked like, felt, and deserved as opposed to abortion. Second, they popularized the “black genocide” argument, which suggested that abortion as a method of population control was designed to reduce the population of African-Americans or people on public assistance.<sup>29</sup> By 1973, right to life proponents had grown in number and become increasingly organized. In response to the decisions, new organizations were created, including the Ad Hoc Committee on the Defense of Life, the National Right to Life Committee, American Citizens Concerned for Life, and the Right to Life League.<sup>30</sup> Most were upset that the Court had ruled that a fetus was not a person, that women were entitled to have an abortion under certain circumstances, and the abortion law was related to women’s rights.<sup>31</sup> While the rhetoric of the anti-abortion groups criticized population growth and abortion, the decisions in *Roe v. Wade* and *Doe v. Bolton* provided them with specific targets to refute.

Now when abortion opponents wrote to Congress, they addressed the Court’s holding that a fetus was not a person and that women had a right to abortion. In a letter sent to NARAL, the new rhetoric of abortion opponents is made clear: “Every human being gets his or her right to live, not from the Supreme Court, but from God. . . . Where does the woman get her so-called ‘right’ to destroy another human life? In short, she does not have that right.”<sup>32</sup> On the heels of the decisions, two efforts to counter the impact of *Roe* and *Doe* were put forth by abortion opponents. First, North Carolina Senator Jesse Helms successfully amended a bill on population

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<sup>29</sup> Ziegler, “The Framing of a Right to Choose,” 323.

<sup>30</sup> Suzanne Staggenborg, “The Consequences of Professionalization and Formalization in the Pro-Choice Movement,” *American Sociological Review* 53 (1988), 585-586.

<sup>31</sup> Ziegler, “The Framing of a Right to Choose,” 323.

<sup>32</sup> Marcia Fields to NARAL, September 23, 1973, National Abortion Rights Action League Records, 1968-1976;, MC 313, Carton 8. Schlesinger Library, Radcliffe Institute, Harvard University, Cambridge, Mass.

control that prohibited the use of any federal money for abortions. Second, Senator James Buckley from New York proposed a constitutional amendment which would have changed the meaning of person in the Fifth and Fourteenth Amendments to apply to all human beings, “including their unborn offspring.”<sup>33</sup>

By the mid-1970s, abortion opponents found new allies. Many right-wing organizations, including the Phyllis Schlafly Report, the American Conservative Union, and the John Birch Society voiced their opposition to legalized abortion, seeing it as part of the greater decay of American morality. Much like abortion rights-based arguments became a staple of second wave feminism, opposition to abortion became linked with the rise of the New Right, the Religious Right and the Republican Party in the late 1970s and early 1980s. Conservative groups ensured that abortion was an election issue, and by the end of fall 1978, it was reported that right-to-life activism was a major issue in multiple national and state elections.<sup>34</sup> Interestingly, Mary Ziegler writes that working with the New Right pushed abortion opponents to radically revise their position. Previously, the pro-life movement had not taken a position on major reforms like the ERA. Other groups like Feminists for Life actively supported the ERA. However, after aligning with the New Right, organizations like the National Right to Life Committee came out against the ERA and pushed to end funding for feminist conferences like International Women’s Year. As a result of this new alliance, opposition to abortion became synonymous with social conservatism, and pro-choice organizations concluded that antifeminist sentiments rather than religion or fetal rights motivated their opponents. In 1980, Planned Parenthood president Faye Wattleton expounded on her opinion of abortion opponents as “an increasingly vocal and at times violent minority which seeks to deny all of us our fundamental rights of privacy and

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<sup>33</sup> Ziegler, “The Framing of a Right to Choose,” 324.

<sup>34</sup> John Herbers, “Convention Speech Stirs Foes of Abortion,” *New York Times*, June 24, 1979.

individual decision making.”<sup>35</sup> By 1984, it was reported that violence against abortion clinics and family planning centers was increasing. In 1984 alone, fires or explosions had damaged at least 19 abortion clinics and family planning centers in seven states, including Georgia. In Atlanta, two clinics, one in North Atlanta and one in Marietta were firebombed in September that year, causing thousands of dollars in damage. In addition to an increase in violence, it was reported that clinics also saw a rise in harassment of doctors and patients. Protestors handcuffed themselves to furniture, slashed tires on doctors’ cars, and photographed women as they arrived for their procedures.<sup>36</sup>

The new strategies of anti-abortion groups reinforced this opinion. By the late 1970s, abortion opponents were working to pass multipart laws restricting access to abortion, through statutes and ordinances that required informed consent, spousal and parental consent. Other laws restricted saline abortions, required attempts to save the life of the fetus following an abortion, or attempted to define fetal viability even narrower than the Court had in *Roe* and *Doe*.<sup>37</sup> With the rise of the New Right and the Religious Right, abortion opponents gained powerful allies with millions of dollars at their disposal to restrict abortion access.

In the decades since, abortion opponents have continued successfully to limit access to abortions. Beginning in 1977, Republican legislators pass the Hyde Amendment, allowing states to deny Medicaid funding for abortions except in cases of rape, incest, or "severe and long-lasting" damage to woman's physical health, and in 1980, the Supreme Court upheld the Hyde amendment in *Harris v. McRae* (1980), ruling that there is no constitutional right for women to

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<sup>35</sup> Mary Ziegler, "Beyond Backlash: Legal History, Polarization, and *Roe v. Wade*," *Washington & Lee Law Review* No. 969 (2014): 1013-1014.

<sup>36</sup> James Barron, "Increasing Attacks on Abortion Clinics Raise Fears on Both Sides," *The Atlanta Constitution* (1946-1984), Nov 22, 1984.

<sup>37</sup> Ziegler, "Beyond Backlash," 1014.

receive abortions at the public expense.<sup>38</sup> Three years later in *Akron v. Akron Center for Reproductive Health* (1983), the Supreme Court struck down state requirements that abortions performed after the first trimester be performed in a hospital, women's right to know laws, and mandatory waiting periods for the women after information is provided but before she can consent to the abortion. However, the Court ruled that states could require only licensed physicians to perform the procedure.<sup>39</sup> The biggest rollback of *Roe* and *Doe*, however, came in 1992. In *Casey v. Planned Parenthood* (1992), the Court reaffirmed *Roe*, but it upheld four of Pennsylvania's five provisions, including the state's 24-hour waiting period, informed consent, and parental consent requirements. The justices opted to impose a new standard to determine the validity of laws restricting abortions, now asking whether a state abortion regulation has the purpose or effect of imposing an "undue burden," which is defined as a "substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."<sup>40</sup> A decade after the Court's decision in *Casey*, Congress introduced a ban on "partial-birth" abortions, which the Supreme Court upheld in *Gonzales v. Carhart* (2007).<sup>41</sup>

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<sup>38</sup> *Harris v. McRae* 448 U.S. 297 (1980).

<sup>39</sup> *Akron v. Akron Center for Reproductive Health* 462 U.S. 416 (1983).

<sup>40</sup> *Casey v. Planned Parenthood* 505 U.S. 877 (1992).

<sup>41</sup> *Gonzales v. Carhart* 550 U.S. 124 (2007).





Figure 4.4 Anti-violence signs in the window of the Feminist Women's Health Center, Atlanta, Georgia, January 20, 1985<sup>1</sup>

## 5 Conclusion

In 1994, CDC researcher and now Emory Rollins School of Public Health professor, Dr. Roger Rochat found himself once again confronting the inequities of abortion access in Georgia. “Working again with the [Georgia] State Health Department and [I] learned of the death of [an Atlanta HBCU] student, a third year student, who had been using condoms. They failed. She made an appointment at an abortion facility, was deterred by protestors, and went home and put a—inserted a coat hanger, and subsequently died as a result.”<sup>2</sup> In years since the decisions in *Roe* and *Doe*, abortion opponents have taken up more aggressive tactics, including protesting

<sup>1</sup> John Spink, “Anti-violence signs in the window of the Feminist Women's Health Center, Atlanta, Georgia, January 20, 1985,” AJCP136-005d, *Atlanta Journal-Constitution* Photographic Archives. Special Collections and Archives, Georgia State University Library.

<sup>2</sup> Roger Rochat, *interview by Alex McGee*, 24 October 2013, Donna Novak Coles Georgia Women's Movement Archives, Georgia Women's Movement Oral History Project, Special Collections and Archives, Georgia State University, Atlanta. In his interview, Rochat refers to a Morehouse student; however, because Morehouse is all male, it is assumed that he meant a different HBCU in Atlanta.

abortion clinics in cities across the country. Operation Rescue, a Kansas organization, made headlines when its members came to Atlanta to protest various clinics around the city, including Atlanta's Feminist Women's Health Center. As a result of such protests, clinics have had to take extra measures to ensure the safety of their employees and clients. Escort services were developed to ensure that women could safely make it to their appointments in the hopes of preventing the tragedy Rochat encountered. At Georgia State University's Special Collections, a gas mask used by Feminist Women's Health Center employees to get to their office safely is now a haunting artifact used in exhibits.

On January 22, 1973, the Supreme Court issued its opinions in *Roe* and *Doe*, extending the right to a safe and legal abortion to all women. In a seven-to-two vote, the Court found that the Texas statute that *Roe* challenged violated the Due Process Clause of the Fourteenth Amendment. Justice Harry Blackmun observed in his majority opinion that "The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back...the Court has recognized that a right to personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."<sup>3</sup> Blackmun continued, "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty'...are included in this guarantee of personal privacy."<sup>4</sup> He later observed that "most of the lower courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute and is subject to some limitations; and that at some point the State interests as to protection of health, medical standards, and prenatal life, become dominant."<sup>5</sup>

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<sup>3</sup> *Roe v. Wade* 410 U.S. 152.

<sup>4</sup> 410 U.S. 152.

<sup>5</sup> 410 U.S. 155.

Blackmun concluded that after the end of the first trimester a state could regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Additionally, this meant, “for the period of pregnancy prior to this ‘compelling’ point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.”<sup>6</sup> Because the “compelling” point was at viability, the State could protect fetal life after viability and could go as far as to outlaw abortions after this point except in cases when an abortion was necessary to save the life or health of the mother.<sup>7</sup>

The decision for *Doe v. Bolton*, again authored by Blackmun, reinforced the notion in *Roe* that a woman’s constitutional right to abortion was not absolute. Blackmun invalidated the procedural conditions of Georgia’s liberalized abortion statute being challenged, citing *Roe* for each. First, the Joint Commission of Accredited Hospital was invalid, because the State failed to show that only hospitals meet the State’s interest in fully protecting the life of the patient. Second, the requirement that a hospital committee on abortion review all applicants seeking an abortion, a procedure not required of any other surgery, was unduly restrictive of the patient’s rights, which are already safeguarded by her physician. Third, the Court found that the certification of two other state licensed doctors that the abortion was medically necessary had no rational connection with the patient’s needs, and infringed on her physician’s right to practice. Fourth, the Georgia residency requirement violated the Privileges and Immunities Clause of the Fourteenth Amendment by denying protection to people that enter Georgia for medical services there. Thus, just as *Roe* voided the abortion laws of all thirty states whose statutes resembled the

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<sup>6</sup> 410 U.S. 163.

<sup>7</sup> 410 U.S. 163.

one in Texas, the *Doe* opinion invalidated not only the Georgia law but also the similar reform provisions that had been adopted by fourteen other states since 1967.<sup>8</sup> In regards to abortion, the Court has relied on the precedent of *Roe* far more than *Doe*. Because *Roe* dealt with an individual's "freedom of personal choice in matters of marriage and family life," it is cited most often as where a woman's right to choose originates.<sup>9</sup> However, *Doe* is often cited for its consideration of the medical practice's use of therapeutic abortions. Specifically, because abortion is a medical procedure, "the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment.'"<sup>10</sup> Additionally, *Roe*'s protection of privacy (which Lawrence Tribe described as "a logical extension of *Griswold v. Connecticut*") has also been used to challenge same-sex sodomy laws.

Legal historians have argued that *Roe* and *Doe* encouraged abortion proponents to embrace fully a rights based argument in support of abortion, abandoning the once popular argument for abortion as a tool to reign in population growth. The timing of these decisions coupled with the rapid growth of cultural feminism in the 1970s has certainly influenced generations of women to view reproductive freedom as a right, but it also inspired the growth of pro-life organizations now behind the increase in legislation aimed at restricting abortion access. It is necessary to consider both sides of the abortion debate in the decades following *Roe* and *Doe* to understand the legacy of the decisions. Coupled with the rise of cultural and liberal feminism, women gained the language for much of the rights-based arguments that developed with *Roe* and *Doe*. Influenced by radical feminists like Ti-Grace Atkinson and Shulamith Firestone, second wave feminism and its strands of liberal and cultural feminism developed

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<sup>8</sup> David J. Garrow, *Liberty and Sexuality* (New York: Macmillan, 1994), 595.

<sup>9</sup> *Roe v. Wade* 410 U.S. 169 (1973).

<sup>10</sup> *Akron v. Akron Center for Reproductive Health* 462 U.S. 427 (1983).

rhetoric of rights and equality for women in all areas of life, including reproductive control. Major organizations like Planned Parenthood and the National Organization for Women embodied these changes, illustrating the impact of *Roe* and *Doe* on women. Armed with the language of the decisions, women were now empowered to claim their right to privacy and expand it to include a right to equal access of services. Conversely, *Roe* and *Doe* provided abortion opponents with a target and contributed to the creation on assorted right to life groups as well as the rise of the New Right and the Religious Right. With this collaboration, abortion opponents gained powerful allies with millions of dollars at their disposal to restrict abortion access.

Reflecting on the legacy of *Roe v. Wade* and *Doe v. Bolton*, Sarah Weddington, the attorney who argued for “Jane Roe,” writes that she worries the impact of cases is weakened. Taking in the various decisions from the Court over the years and the continuing efforts by conservative legislators to restrict abortion access with measures not so different from Georgia’s abortion reform statute in *Doe*, she may not be wrong. But for Weddington as well as so many other feminists, the biggest threat to abortion rights and women’s rights in general is that young women be ignorant of their own history. In her book *A Question of Choice*, Weddington describes an encounter with a young flight attendant:

A few years ago I was wearing a pin on a flight that featured a photo of a coat hanger with a red circle around the edge of the pin and a red slash across the hanger. I was seated in an aisle seat, as I prefer. A young flight attendant came by and paused to examine my pin. She went on down the aisle but returned a bit later to examine it again. That happened several times. Then she stopped and asked, “What do you have against coat hangers?” I explained to her the symbolic importance of that pin, highlighting the fact the liberties established in *Roe* eliminated the need for women to undergo dangerous back alley or coat hanger abortion.<sup>11</sup>

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<sup>11</sup> Sarah Weddington, *A Question of Choice*, (New York: Feminist Press, 2013), 283.

Dichotomously, Weddington's flight attendant was unaware of the significance of a coat hanger, but Roger Rochat's student was able to learn what it could be used for. These women existed at different ends of the spectrum, but their experiences in the decades after *Roe* and *Doe* are both dangerous. While it is at first a heartwarming thought that Weddington's flight attendant not know the horrors of back alley abortions that feminists worked to end, it is harmful because she does not truly know what is at stake. She has not heard the stories recounted. Women at their most vulnerable were taken advantage of and exploited. Worse, they were hurt, sometimes irreparably. Rochat's student also living in a post-*Roe* and *Doe* world faced the modern repercussions of the decisions. However, her story illustrates that those horrible stories of yesteryear are not so far away. Here Dr. John Asher's words in his first study of Grady Hospital in 1968 remain applicable. Self-induced abortions remain a measure "always available to a desperate woman."<sup>12</sup>

The dangerous reality of abortion prior to *Roe* and *Doe* has been explored by many over the years, but the story of Georgia women was documented in great detail thanks to the CDC's Family Planning and Evaluation Unit and Georgia feminists. Their work along with that of others allows us to trace the story of *Doe v. Bolton*, from the high hopes of safer, increased access to abortion services under Georgia's 1968 liberalized law to the sad truth of who ultimately paid the price for inequality in abortion services. Thanks to the costly requirements of the Georgia's law, many women were forced to either seek an illegal abortion or attempt to self-induce through other means often with dangerous outcomes. While the hope was that the new law would make abortions safer and easier to access, the reality was that such safe and legal procedures were only available to those who could afford it. Recognizing such inequality in Georgia, feminist activists were driven to challenge the law, ultimately contributing to one of the

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<sup>12</sup> Asher, "Abortion Surveillance in a Metropolitan Hospital," 5.

most significant gains in women's rights in the twentieth century. Arguably, much like *Brown v. Board of Education* inspired activists to fight for their civil rights, *Roe v. Wade* and *Doe v. Bolton* gave millions of women the understanding and the language to assert their right to reproductive freedom. Hopefully, through reflection and recognition of what once was, we can begin to appreciate the significant efforts of feminists in Georgia and nationwide and the battle they undertook to save women's lives.

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