

The Psychology of Abortion Discourse

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Abstract

In A Defense of Abortion (1971), Judith Jarvis Thomson said it would be “insane” to deny an abortion sought by a desperately frightened fourteen-year-old rape victim, and “positively indecent”—though not necessarily unjust—to allow one to someone who, in her seventh month, seeks to avoid the nuisance of postponing a trip abroad. For the past half-century since Roe, half of Americans have consistently agreed with Thomson that the moral status of abortion depends on the circumstances surrounding the abortion. This half makes up the “mushy middle,” of which Norma McCorvey (aka Jane Roe) happens to be a member. The other half, however, would treat all abortions as categorically legal (30% in 2025) or illegal (13% in 2025). According to a 2025 Gallup poll, a quarter of Republicans would outlaw all abortions, while two-thirds of Democrats would outlaw none. For those Republicans and Democrats, an abortion in response to rape should be legally indistinguishable from an abortion for the purpose of sex-selection, and an early abortion legally indistinguishable from a late one.

According to Westlaw, a whopping 778 law review articles have come out in the past four years with the words “Dobbs,” “Roe,” or “abortion” in the title. Yet this Article is the first to come to grips with the alarming if not quite hidden fact that half of Americans take these extreme positions that well might embrace a myth. After demonstrating in Part II that the law has never treated all abortions the same, this Article takes up three phenomena that emerged in the 1980s within the

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United States: broad political polarization, which followed a more niche polarization over abortion (Part III); within such polarization, an elevated-but-rational “passionate intensity” that is either over- or under-emotional (Part IV); and the psychoanalytic defense mechanism of projection, whereby the unpleasant burden of adjudging abortions justified, excused, or “positively indecent” is fended off by both the Right and the Left (Part V).

To voice here some sub-conscious thoughts, feelings, and conflicts of abortion interlocutors at both margins is to attempt to render those thoughts, feelings, and conflicts conscious, and therefore to render them more likely subject to being resolved.

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"The emotions are deep, and the convictions on both sides are solid."

– Harry A. Blackmun¹

*"The best lack all conviction, while the worst/Are full of passionate
intensity."*

– W.B. Yeats²

I. INTRODUCTION

The language of abortion functions not as philosophical discourse, but as advertising, which "uses repetition and variation into infinity to get its claims accepted."³ If abortion talk were peddling truth, then if believed, hearing it once would be enough.⁴ As it is, abortion talk is engaged not in "criticism (the negation of advertisement) but censoriousness (negative advertising)."⁵

And what exactly is *being* advertised? At the well-populated margins, both sides advertise that all abortions are the same, whether, as posed pre-*Roe* by Judith Jarvis Thomson, sought by a "desperately frightened fourteen-year-old . . . pregnant due to rape," or by a woman who "in her seventh month . . . wants the abortion just to avoid the nuisance of postponing a trip abroad."⁶ But not all abortions are the same. Even if, in what Thomson calls an act of "pretending,"⁷ we grant "that the fetus is a person from the moment of conception,"⁸ it would be "insane" to deny an abortion in the first case,⁹ and "positively indecent"—

1. Interview by Harold Hongju Koh with Harry A. Blackmun, Assoc. Just. U.S. Supreme Court, in Wash., D.C. (Sep. 18, 1995).

2. William Butler Yeats, *The Second Coming*, in THE MAJOR POETS: ENGLISH AND AMERICAN 467, 468 (Charles M. Coffin & Gerrit Hubbard Roelofs eds., 2d ed. 1969) (1954).

3. PAULINE Kael, *Morality Plays Right and Left*, in I LOST IT AT THE MOVIES 319, 322 (1954).

4. *Id.*

5. STANLEY CAVELL, THE WORLD VIEWED 99 (enlarged ed., Harv. Univ. Press 1979) (1971).

6. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47, 65–66 (1971).

7. *Id.* at 66.

8. *Id.* at 48.

9. *Id.* at 65.

though not necessarily unjust¹⁰—to permit one in the second.¹¹ If Thomson is right that the moral distinction between the two cases is obvious, then why would we not all see it?

For the past half-century since *Roe*, half of Americans have consistently agreed with Thomson that the moral status of abortion depends on the specifics of the abortion.¹² This half makes up the “mushy middle,”¹³ of which Norma McCorvey, also known as Jane Roe, happens to be a member.¹⁴ Remarkably, the other half would treat *all* abortions as categorically legal (30% in 2025) or illegal (13% in 2025).¹⁵ According to a 2025 Gallup poll, 24% of Republicans would outlaw all abortions, while 56% of Democrats would outlaw none.¹⁶ For those responders, an abortion in response to rape¹⁷ should be legally

10. *Id.* at 57 (“For if you do not kill him unjustly, you do not violate his right to life, and so it is no wonder you do him no injustice.”).

11. *Id.* at 65–66.

12. *See Abortion*, GALLUP, <https://news.gallup.com/poll/1576/abortion.aspx> (last visited Mar. 25, 2026) (polling opinions on abortion).

13. Texas Senator Ted Cruz may be the first to deploy “mushy middle” politically, in his case negatively, to attribute the defeats of centrist Republicans Gerald Ford, Bob Dole, John McCain, and Mitt Romney to their painting “in pale pastels,” rather than in the “bold colors” of Ronald Reagan. *See* Jonathan Martin, *An Awkward Exception to Cruz’s Recipe for Winning the White House*, N.Y. TIMES (Apr. 9, 2015, at 18:43 ET), <https://archive.nytimes.com/www.nytimes.com/politics/first-draft/2015/04/09/an-awkward-exception-to-cruzs-recipe-for-winning-the-white-house/>.

14. David Leonhardt, *The Mushy Middle*, N.Y. TIMES (Oct. 27, 2021), <https://www.nytimes.com/2021/10/27/briefing/abortion-texas-roe-v-wade.html>; *cf.* Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 448 (2018) (noting that McCorvey “repudiated” *Roe* while accusing her lawyers of “overreaching”).

15. GALLUP, *supra* note 12. For an alternative poll addressing many of the same issues, see Laura Santhanam, *Support for Abortion Rights Has Grown in Spite of Bans and Restrictions, Poll Shows*, PBS NEWS (Apr. 26, 2023, at 05:00 ET), <https://www.pbs.org/newshour/health/support-for-abortion-rights-has-grown-in-spite-of-bans-and-restrictions-poll-shows>.

16. *See Abortion Trends by Party Identification*, GALLUP, <https://news.gallup.com/poll/246278/abortion-trends-party.aspx> (last visited Mar. 25, 2026). Among independents polled by Gallup in 2025, 30% would allow all abortions, while 10% would allow none. *Id.*

17. *See* Anna K. Martin, *Making Pro-Abortion Laws Pro-Choice for Female Rape Victims*, 33 WIS. J.L. GENDER & SOC’Y 63, 63 (2018) (“Approximately 25,000–32,000 of . . . rapes result in a child’s conception per year [in the U.S.]”).

indistinguishable from an abortion for the purpose of sex-selection,¹⁸ and an early-term abortion legally indistinguishable from a late-term one.¹⁹

There is a difference between not *knowing* that not all abortions are the same and not *acknowledging* as much. A failure of knowledge stems from missing a piece of information which, if supplied, would clear things up. A failure to acknowledge is much worse in that it manifests not a blank, but a denial—a refusal to own up to what, *at some level*, one does know. Knowledge is an inner mental state. Acknowledgment of the cares and commitments of others is an action in the public observable world, an action that can preserve community, just as withholding acknowledgment can tear it apart.

For example, were adherents of “polygenesis,” the Civil War-era doctrine positing the sub-humanity of African Americans,²⁰ simply *mistaken*? That would mean if supplied with more information they could be brought out of their mistake, as one might placate a child frightened by a stage-play. But what could we tell them that they do not already know? That we are all the same? No one in their right mind would say otherwise. Likewise, it may be that the failure of abortion interlocutors to see what is right under their noses is not a failure of knowledge, but a denial. Everyone knows (don’t they?) that while an

18. See, e.g., Rachel Rebouché, *Testing Sex*, 49 U. RICH. L. REV. 519, 543 (2015) (discussing “evidence of son preference in the United States, specifically in immigrant communities ‘tracing their origins to countries where sex-selection abortion is prevalent’” (citations omitted)).

19. Cf. Jay A. Friedman, *Taking the Camel by the Nose: The Anencephalic as a Source for Pediatric Organ Transplants*, 90 COLUM. L. REV. 917, 958 (1990) (“Anencephaly is the only condition upon which there is wide agreement that even very late third trimester abortions are morally permissible.”).

20. See, e.g., GEORGE M. FREDRICKSON, *Science, Polygenesis, and the Proslavery Argument*, in *THE BLACK IMAGE IN THE WHITE MIND* 71, 73 (1971).

The spokesmen for *Herrenvolk* egalitarianism . . . were sometimes attracted by the new doctrine precisely because it provided support for the view that Negroes were creatures set apart who did not have to be conceded any social status at all . . . The difference between a variety and a species meant also . . . the difference between a black man who was inferior to the whites but akin to them, and therefore deserving of affection and a protective social status, and a black man who was more animal than human and could, for most purposes, be treated as such.

Id. at 84.

embryo “is no more a person than an acorn is an oak tree,”²¹ nor is an embryo nothing at all.²²

This Article attempts to answer what would lead half of Americans, then and now, to take these extreme positions that embrace what may be a myth. Part II demonstrates that the law has never treated all abortions the same. This Article then takes up three phenomena that emerged in the U.S. during the 1980s: broad political polarization, which followed a more niche polarization over abortion (Part III); within such polarization, an elevated-though-rational “passionate intensity”²³ that is either over- or under-emotional (Part IV); and the psychoanalytic defense mechanism of projection, where the unpleasant burden of adjudging abortions justified, excused, or “positively indecent” is fended off by both the political Right and Left (Part V).

To voice here some sub-conscious thoughts, feelings, and conflicts of abortion interlocutors on both margins is to attempt to render those thoughts, feelings, and conflicts conscious, and therefore to render them more likely to be resolved.

II. A PRIMER ON THE HISTORY OF EXCEPTIONS TO ABORTION BANS

Histories on the regulation of abortion are “numerous and substantial.”²⁴ The Supreme Court has written a couple itself.²⁵ This Article is not exactly one, but it does take some care to bring out that, while half of Americans tell themselves that all abortions are the same,²⁶ the law has never seen it that way.

When the health and life of a pregnant person are on the line, physicians’ immunity from criminal prosecution for performing

21. See Thomson, *supra* note 6, at 48.

22. Cf. Naomi Wolf, *Our Bodies, Our Souls: Rethinking Pro-Choice Rhetoric*, 213 NEW REPUBLIC 26, 33–34 (1995) (“I could no longer tolerate the fetus-is-nothing paradigm of the pro-choice movement.”).

23. Yeats, *supra* note 2.

24. See Natalia Niedmann Álvarez, *Feminism Without Roe*, 27 J. GENDER, RACE & JUST. 251, 254 (2024).

25. See *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 241–63 (2022); *Roe v. Wade*, 410 U.S. 113, 129–62 (1973).

26. See *supra* notes 12–15 and accompanying text; see, e.g., I. Glenn Cohen, *Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?*, 43 J.L. MED. & ETHICS 85, 87 (2015) (arguing that rape and incest are no better a basis to tolerate abortion than any other basis).

abortions “has a long history in the common law.”²⁷ Monica Eppinger traces this common-law tradition to the seventeenth century,²⁸ a background fact admitted by the Court in *Dobbs*.²⁹ No state court “deemed pre-quickening abortion,” i.e., before fetal movement is discernible, “punishable at common law until many decades after the Founding.”³⁰ Statutes criminalizing abortion appeared in the nineteenth century,³¹ the first of which was Connecticut’s in 1821.³² By 1857 nearly two-thirds of all thirty-one states had done the same.³³ Statutory exceptions for therapeutic abortions emerged concurrently, beginning with New York in 1828.³⁴ By 1857 there were a dozen more such statutory carve-outs for maternal life; the real point of contention was *who* could perform the procedure.³⁵ The upstart American Medical Association arranged for male physicians to perform abortions, rather than the midwives and other “irregulars” who traditionally supervised pregnancy.³⁶

27. Mary Claire Bartlett, Note, *Physician Mens Rea: Applying United States v. Ruan to State Abortion Statutes*, 123 COLUM. L. REV. 1699, 1720 (2023).

28. See Monica E. Eppinger, *The Health Exception*, 17 GEO. J. GENDER & L. 665, 687, 693 (2016).

29. See *Dobbs*, 597 U.S. at 217 (“At common law, abortion was criminal in at least some stages of pregnancy . . .”); *id.* at 242 (“We begin with the common law, under which abortion was a crime at least after ‘quickening . . .’”); *cf. id.* at 217 (“[T]he fact that many States in the late 18th and early 19th century did not criminalize pre-quickening abortions does not mean that anyone thought the States lacked the authority to do so.”).

30. Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1097 (2023) (citing *Dobbs*, 597 U.S. at 253).

31. See *Dobbs*, 597 U.S. at 260.

32. See Eppinger, *supra* note 28, at 706 & nn.296–98.

33. *Id.* at 718.

34. *Id.* at 709 & n.318 (“New York Revisers introduced the first explicit therapeutic exception to an abortion prohibition in Anglophone legislation.”).

35. *Id.* at 709 & n.322.

36. See LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 11, 13 (1997) (discussing how “[r]egular medical men entered the [abortion] debate”); Luke Isaac Haqq, *The Impact of Roe on Prenatal Tort Litigation: On the Public Policy of Unexpected Children*, 13 J. TORT L. 81, 101–02 (2020) (“One of the most relevant changes in professional healing during these decades was the displacement of midwives and birth attendants by obstetricians.”). For an argument that safe abortion could be “demedicalized,” see Joanna N. Erdman, *Access to Information on Safe Abortion: A*

Dobbs would repudiate much of *Roe*'s own account of abortion history. What *Dobbs* did not repudiate is that nineteenth-century statutory abortion bans commonly exempted procedures performed both pre-quickening and when maternal life—to which maternal health was key³⁷—was at risk.³⁸ In fact, the maternal-life justification, often attributed to a theory of self-defense,³⁹ would come to be seen by Justice Rehnquist, and later by Justice Kavanaugh, as constitutionally mandated.⁴⁰

According to nineteenth-century medicine, the body, “as a system of dynamic interactions with its environment,” was in a constant “state of becoming—and thus always in jeopardy.”⁴¹ To ward off disease and death, Eppinger explains, practitioners during that period

Harm Reduction and Human Rights Approach, 34 HARV. J.L. & GENDER 413, 448 (2011).

37. See Eppinger, *supra* note 28, at 737.

38. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 261 (2022) (noting that until *Roe*, “abortion was never allowed (except to save the life of the mother) in a majority of States for over 100 years”); *id.* at 339 n.2 (Kavanaugh, J., concurring) (“Abortion statutes traditionally and currently provide for an exception when an abortion is necessary to protect the life of the mother.”); *cf.* James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29, 45 (1985) (“With only a few exceptions, the state antiabortion statutes enacted between 1828 and 1960 excepted from criminal prohibitions only those abortions which were, or were believed by the actor and/or a physician . . . to be, necessary to preserve the life of the pregnant woman”); *id.* at 45 n.49 (detailing statutes).

39. See, e.g., Thomson, *supra* note 6, at 52–53; Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1611–18 (1979); Stephen G. Gilles, *Roe's Life-or-Health Exception: Self-Defense or Relative Safety?*, 85 NOTRE DAME L. REV. 525, 534–38 (2010); Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1824–28 (2007); Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 340–49 (2010).

40. See *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) (“If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective”). Justice Kavanaugh echoed this sentiment in *Dobbs*. 597 U.S. at 339 n.2 (Kavanaugh, J., concurring).

41. Charles E. Rosenberg, *The Therapeutic Revolution: Medicine, Meaning, and Social Change in Nineteenth-Century America*, in THE THERAPEUTIC REVOLUTION: ESSAYS IN THE SOCIAL HISTORY OF AMERICAN MEDICINE 3, 5 (Morris J. Vogel & Charles E. Rosenberg eds., 1979).

sought to restore equilibrium among “humors” (blood, phlegm, bile) and “elements” (hot, cold, wet, dry).⁴² Techniques included induced menstruation through ingested purgatives or emmenagogues,⁴³ which if administered with a curative, non-malicious intention to restore flow, operated outside the reach of abortion law when the practice would, as a byproduct, end a pregnancy.⁴⁴ Eppinger doubts that the practice was even considered abortion.⁴⁵ At most, the practice posed an “ethical dilemma” for physicians who suspected that pregnancy had caused the patient’s menstrual pause.⁴⁶ This practice (a nod and a wink between doctor and patient) persisted, even though post-Civil War legislation separating maternal health from maternal life “had the potential to narrow the grounds for medically justifiable intervention.”⁴⁷ But it did not. What we got instead was a “history of nonenforcement of abortion laws,”⁴⁸ marked by cases involving procedures that were neither pre-quickening nor necessary to preserve maternal life in a literal sense.

As doctors and hospital boards insinuated sociology, which linked poverty to disease, and psychiatry, which broadened our notion of health, into their judgments under these abortion statutes, the lawful grounds for abortion expanded between 1940 and 1959.⁴⁹ By 1959, thirty-one states had codified exceptions to their abortion bans to cover cases that threatened maternal life, which hospital committees were

42. See Eppinger, *supra* note 28, at 676–77.

43. Cf. Pat Tucker, Comment, *The Long History and Tradition of a Right to Pre-Quickening Abortion in the United States*, 59 IDAHO L. REV. 333, 349–50 (2023) (“Advertisements for abortion services, such as Madame Restell’s ‘Female Monthly Pills,’ ‘French Lunar Pills,’ and ‘French Periodical Pills’ began appearing on newspaper pages, sometimes prominently, during the 1840s to late 1860s.”).

44. See Eppinger, *supra* note 28, at 719–24; Rosenberg, *supra* note 41, at 13, 24 n.22 (“Pious physicians sometimes found it difficult to balance their professional desire to restore a normal menstrual flow against a fear of being placed in the position of inducing abortion.”).

45. See Eppinger, *supra* note 28, at 687. For a history of the ready availability of abortion in the nineteenth century, see Miranda McGowan, *The Democratic Deficit of Dobbs*, 55 LOY. U. CHI. L.J. 91, 132–44 (2023).

46. See Rosenberg, *supra* note 41, at 13.

47. See Eppinger, *supra* note 28, at 738–42.

48. Melissa Murray, *Making History*, 133 YALE L.J.F. 990, 999 (2024).

49. See Eppinger, *supra* note 28, at 741–42.

reading to cover psychiatric threats to maternal health.⁵⁰ That same year, the American Law Institute (“ALI”), as part of an ambitious project to overhaul state criminal laws,⁵¹ pitched a broadened sense of therapeutic abortions that codified the link between health and life.⁵² In 1962, the ALI finalized its draft legislation.

As David Garrow details in his exhaustive *Liberty and Sexuality*, Sherri Chesson Finkbine’s harrowing predicament that same year became national news and a hinge case in the way abortion was perceived.⁵³ A twenty-nine-year-old with a recurring role on a children’s television show, Finkbine was pregnant with her fifth child when she read in the *Arizona Republic* that thalidomide, a drug contained in the sedatives her husband Bob, a history teacher, picked up on a field trip to Europe, caused mind-bending fetal defects.⁵⁴ When Sherri reported to her doctor that she had been taking the sedatives for months to treat headaches, he recommended a therapeutic abortion, which was

50. See Herbert L. Packer & Ralph J. Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417, 418 (1959) (“The California statute . . . is typical of the law in thirty-one American states. It proscribes as a felony the performance of an abortion upon a woman ‘unless the same is necessary to preserve her life’” (citation omitted)).

51. See generally Gregory Antill, Note, *Fitting the Model Penal Code into a Reasons-Responsiveness Picture of Culpability*, 131 YALE L.J. 1346, 1348 n.1 (2022) (noting that more than “two-thirds of states have adopted the Model Penal Code (MPC) in whole or in part, and ‘even within the minority of states without a modern code, the Model Penal Code has great influence’” (quoting Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 319–20, 326–29 (2007))).

52. See Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 1123 n.751 (1991) (“The modern American abortion reform movement began with the ALI’s Model Penal Code reform”).

53. See DAVID J. GARROW, *LIBERTY AND SEXUALITY* 285–89 (Univ. of Cal. Press 1998) (1994); Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims That Engendered Roe*, 90 B.U. L. REV. 1875, 1879 (2010) (noting how Sherri Finkbine’s prosecution, and others like hers, were “met with increasing public disapproval”); cf. *Bichler v. Eli Lilly & Co.*, 436 N.E.2d 182, 189 (N.Y. 1982) (discussing defendant drug company’s assertion that 1962 was “when the first thalidomide babies were born”). A rubella epidemic causing thousands of babies to be born with severe disabilities or die in infancy also began in 1962. See Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 135–36 (2012).

54. GARROW, *LIBERTY AND SEXUALITY*, *supra* note 53, at 285–86.

thereafter approved by a three-physician board at Phoenix's Good Samaritan Hospital.⁵⁵ The weekend before the scheduled procedure, Sherri called the *Arizona Republic*, both to thank them for alerting her to the danger she was in and to push the paper to publish a follow-up piece to alert other women.⁵⁶ When the follow-up piece appeared that Monday, the hospital got cold feet, conditioning its participation on court approval of the abortion.⁵⁷ The Finkbines accordingly sued for a declaration that the procedure was lawful, but because defendant-prosecutors had not yet threatened providers with charges if the abortion took place as planned, the trial court dismissed the complaint as unripe.⁵⁸

The Finkbines then set their sights on Tokyo, but visas would take as long as a week to obtain.⁵⁹ Sweden, it turned out, was more accommodating, though the approval process there was slow enough to expose the couple not only to nosy American journalists, but also to repeated denunciations, including from Vatican Radio.⁶⁰ Due to thalidomide's effects, doctors at Stockholm's Karolinska Hospital described the thirteen-week abortion not as the termination of a baby, but as the removal of an "abnormal growth."⁶¹ Sherri spent almost a week in the hospital and shelled out about \$43,000 in 2026 money, all told.⁶² A side effect was that publicization of this "perfect suburban housewife and mother," who was reduced to flying around the world for permission to end a contaminated pregnancy, changed the American public's perception of abortion like no other single event.⁶³

55. *Id.* at 286.

56. *Id.*

57. *Id.*

58. *See id.* at 286–87.

59. *Id.* at 287.

60. *Id.* at 287–88.

61. *Id.* at 288.

62. *Id.* ("Their long and traumatic journey had cost them some four thousand dollars"); *see also* *CPI Inflation Calculator*, U.S. DEP'T OF LAB. STATS., https://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 31, 2026)

63. GARROW, LIBERTY AND SEXUALITY, *supra* note 53, at 288–89.

Beginning in 1967 with California, Colorado, and North Carolina,⁶⁴ fourteen states would, in just two years,⁶⁵ pass ALI-like laws permitting abortion in cases of rape, incest, fetal deformity,⁶⁶ or profound threats to maternal health.⁶⁷ What could *constitute* a profound threat to maternal health caused what Eppinger calls “high anxiety” for both sides.⁶⁸ At a textual level, the ALI model was restrictive enough to preclude almost all abortions.⁶⁹ At an operative level, however, the ALI model was “completely elastic,” precluding almost no abortions, even after the twentieth week.⁷⁰ Eight years before the ALI final draft, the revelatory title of Alan Guttmacher’s *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*⁷¹ noted psychiatrists’ worry about the “shadowy line between mental and social justification.”⁷² Psychiatric justifications were hard to identify, but also hard to rule out.

64. See David J. Garrow, *Abortion Before and After Roe v. Wade: An Historical Perspective*, 62 ALB. L. REV. 833, 834 (1999).

65. Lain, *supra* note 53, at 137.

66. “Of the first eleven states adopting the A.L.I. provisions, only California chose to exclude the A.L.I.’s provision on fetal defects.” Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 682 n.207 (1986) (citation omitted).

67. See *Roe v. Wade*, 410 U.S. 113, 140 n.37 (1973); Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028, 2047 (2011) (“By 1967, states were beginning to enact abortion reform laws on the medical or ‘therapeutic’ model recommended by the ALI, authorizing medical committees to review women’s petitions for abortion and allow the procedure if needed for reasons of health, sexual assault, or concern about birth defects.” (citing MODEL PENAL CODE § 230.3 (A.L.I., Proposed Official Draft 1962))).

68. See Eppinger, *supra* note 28, at 667–68.

69. Thomas H. Barnard, Jr., *An Analysis and Criticism of the Model Penal Code Provisions on the Law of Abortion*, 18 CASE W. RES. L. REV. 540, 551 (1967) (“[T]he Model Penal Code recommendation states that the physical or mental health of the mother must be ‘gravely’ impaired, a term which cannot be expected to receive a construction broad enough to include, for example, social and economic considerations.”).

70. See Paul Benjamin Linton, *Abortion Convictions Before Roe*, 36 ISSUES L. & MED. 77, 79 (2021); *People v. Barksdale*, 503 P.2d 257, 267 (Cal. 1972) (In Bank) (ruling ALI model “impermissibly vague”).

71. See Alan F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in THERAPEUTIC ABORTION: MEDICAL, PSYCHIATRIC, LEGAL, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS 12, 12–21 (Harold Rosen ed., Julian Press, Inc. 1954).

72. Barnard, *supra* note 69.

Consequently, abortions increased nearly sevenfold between 1963 and 1968.⁷³ Meanwhile, social justifications—the big one being poverty—were frowned upon.⁷⁴

“The legislatures had moved,” adds Corinna Barrett Lain, “but the public had moved faster—the reform statutes were old even when they were new.”⁷⁵ In fact, “most women were having abortions for reasons not covered by the reform statutes, leaving the vast majority of illegal abortions untouched.”⁷⁶ That the ALI model dragged behind public opinion in the pre-*Roe* era is indicated by the clever if not subversive interpretations providers came up with. Consider Connecticut’s restrictive 1860 statute, which criminalized any abortion not designed to save the mother’s life,⁷⁷ a statute that in 1967 the state legislature declined to relax to cover pregnancies by rape.⁷⁸ A student-published pamphlet at Yale in 1970 explained that Connecticut-licensed physicians at the university health center were prepared to “save your life by preventing you from taking matters into your own hands and seeking

73. See Mary Ziegler, *The (Non)-Right to Sex*, 69 U. MIA. L. REV. 631, 663 (2015); Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and Roe v. Wade*, 71 WASH. & LEE L. REV. 969, 984 (2014) [hereinafter Ziegler, *Beyond Backlash*].

74. See EVERETT CARLL LADD & KARLYN H. BOWMAN, PUBLIC OPINION ABOUT ABORTION 8 (2d ed. 1999) (“[I]n 1962, only 15 percent said that abortion operations should be legal when ‘the family does not have enough money to support another child.’ Seventy-four percent said they should not.”); Jane Lang McGrew, Comment, *To Be or Not to Be: The Constitutional Question of the California Abortion Law*, 118 U. PA. L. REV. 643, 646 (1970) (“It was understood by courts, juries, and doctors that . . . social or economic considerations were not acceptable justifications for the abortion.”); cf. CELESTE MICHELLE CONDIT, DECODING ABORTION RHETORIC 149 (Univ. Ill. Press 1990) (1956) (noting that by 1978, “only 16 percent supported abortion for economic reasons”).

75. Lain, *supra* note 53, at 137.

76. *Id.*

77. Connecticut law criminalized even pre-quickening abortions, exempting those “necessary to preserve the life of such woman” See 1860 Conn. Pub. Acts 65.

78. See GARROW, LIBERTY AND SEXUALITY, *supra* note 53, at 316.

assistance—and perhaps, death, from a criminal abortionist.”⁷⁹ “Maternal life” had taken on an extended sense in Connecticut.⁸⁰

Social disapproval of abortion had decreased in a numbers-sense by the late 1960s.⁸¹ But the intensity of those who did disapprove stymied the ALI trend, as pushback mounted against groups who, finding the ALI exceptions too narrow, sought repeal of *all* abortion restrictions.⁸² *Roe* superficially settled this conflict on January 22, 1973, by nullifying criminal prohibitions on abortion in forty-six states in favor of a four-state minority. Those four states were Alaska, Hawaii, New York, and Washington, each of which allowed early abortions on demand, invariant to reasons.⁸³

But the reasons, not just the state of fetal development, matter to half of Americans. Abortion polls were spotty until after *Roe*, when Gallup began producing them annually. Two pre-*Roe* studies come to mind. First is *Trends in Attitudes Toward Abortion (1972-1975)* by Dartmouth’s William Arney and William Trescher, who used data from the National Fertility Study (“NFS”), conducted in 1965 by Norman

79. LINDA GREENHOUSE & REVA B. SIEGEL, BEFORE *ROE V. WADE*: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 64 (Linda Greenhouse & Reva B. Siegel eds., 2010).

80. Illegal abortions were no doubt dangerous, especially so for women of color.

[W]hile white women were as likely to have illegal abortions, the death rate from illegal abortions was far higher among women of color. . . . [O]ne study indicated that in New York City there were 0.8 abortion deaths for every 10,000 live births by white women. Among black women there were 7.1 abortion deaths per 10,000 births, and for Puerto Rican women the figures were 4.5 deaths for every 10,000 births.

Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEX. L. REV. 1189, 1212 (2017) (citations omitted).

81. See Lynn D. Wardle, *Instilling Pro-Life Moral Principles in Difficult Times: The Experience of One Faith Community*, 11 AVE MARIA L. REV. 299, 305 (2013).

82. See Mary Ziegler, *Abortion and the Law of Innocence*, 2021 U. ILL. L. REV. 865, 876 (2021).

83. See Greenhouse & Siegel, *supra* note 67; cf. Samuel W. Calhoun, *Justice Lewis F. Powell’s Baffling Vote in Roe v. Wade*, 71 WASH. & LEE L. REV. 925, 950 n.123 (2014) (“The *Roe* Court in essence denied that it had imposed abortion on demand.” But *Roe* did allow for abortion on demand “[f]or the first two trimesters.”).

Ryder and Charles Westoff.⁸⁴ Second is Berkeley demographer Judith Blake's *Abortion and Public Opinion: The 1960–1970 Decade*, which uses portions of the NFS, plus five Gallup polls (three at Blake's request) between 1962 and 1969.⁸⁵ Regrettably, the NFS polled only married women under fifty-five,⁸⁶ and Gallup polled only white persons.⁸⁷ But consider this from the NFS anyway: when asked whether abortion should be permitted for any of six reasons (each labeled “hard” or “soft”),⁸⁸ 5% answered affirmatively to all six, while 9% responded negatively to all six.⁸⁹ That is a slim population on the extremes. And it makes historical sense, too, given that abortion regulation has never treated all abortions identically.

Yet Gallup's post-*Roe* polls, where responders need only have reached eighteen years, are much more heavily populated at the extremes than the 14% stated above. Consistently from *Roe* on, about half of responders believe that *some* abortions should be legal, other abortions not, while about half would treat *all* abortions as either legal or illegal.⁹⁰ This non-trivial increase at the extremes is worth examining.

III. POLARIZATION IN ABORTION DISCOURSE AND AMERICAN POLITICS

Why after *Roe* so many Americans would view all abortions on the same plane—when abortion has never been entirely legal *or* illegal—is opaque. One constant from *Roe* to *Dobbs* is a large uptick in

84. William Ray Arney & William H. Trescher, *Trends in Attitudes Toward Abortion, 1972–1975*, 8 FAM. PLAN. PERSPS. 117, 117–18 (1976), <https://www.jstor.org/stable/2133633> [<https://doi.org/10.2307/2133633>].

85. See Judith Blake, *Abortion and Public Opinion: The 1960–1970 Decade*, 171 SCI. 540, 540–41 (1971), <https://www.jstor.org/stable/1730938>.

86. *Id.*

87. See *id.* at 541. Yes, overlapping with President Johnson's Great Society. See L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 650 (2003) (“[U]nder President Johnson much of the New Deal order was . . . extended through the Great Society legislation typified by the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the establishment of Medicare.”).

88. See Arney & Trescher, *supra* note 84, at 118 (describing “hard” reasons as mother's health/life, rape, or high risk of serious birth defect, and “soft” reasons as low income, unmarried, or no desire for more children).

89. *Id.*

90. See GALLUP, *supra* note 12; Leonhardt, *supra* note 14; Santhanam, *supra* note 15.

polarization within abortion discourse specifically, beginning in the prime ALI era (1967-1970) and culminating in what scholars call *Roe* “backlash” and “beyond” *Roe* backlash.⁹¹ Thereafter we find, not accidentally, polarization in American politics more generally, beginning in the Reagan era (1980-1988).

A. Backlash Shepardized

Searching Westlaw for “abortion” in the same sentence as derivations of “polarize” produces 613 hits in the law-reviews database, more than half of them from 2014 or later. Accordingly, no more than highlights of “the best which has been thought and said”⁹² about polarization are possible to discuss here. The conditions of abortion-based polarization are elaborated in a body of “new scholarship”⁹³ from a group that includes Cary Franklin, Barry Friedman, Linda Greenhouse, Corinna Barrett Lain, Melissa Murray, Robert Post, Reva Siegel, Katherine Shaw, and Mary Ziegler.⁹⁴ As these scholars grapple with constitutional judicial review by “unelected judges striking down the choices by popularly elected legislatures,”⁹⁵ they direct themselves specifically

91. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373 (2007); Ziegler, *Beyond Backlash*, *supra* note 73, at 983, 1016.

92. See MATTHEW ARNOLD, *CULTURE AND ANARCHY: AN ESSAY IN POLITICAL AND SOCIAL CRITICISM* viii (1869).

93. Cary Franklin, *Roe As We Know It*, 114 MICH. L. REV. 867, 872–73 (2016). To understand this new scholarship as an intellectual activity, picture Structuralism mapped onto judicial/legislative functions. See generally LOUIS MENAND, *THE FREE WORLD: ART AND THOUGHT IN THE COLD WAR* 197–224, 469–74 (2021) (discussing Structuralism, described as the search for *invariants* within kinship systems, language, architecture, or, for Northrup Frye, literature).

94. See, e.g., Franklin, *supra* note 93, at 867; Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232 (2010); Greenhouse & Siegel, *supra* note 67, at 2034; Lain, *supra* note 53, at 133; Melissa Murray & Katherine Shaw, *Dobbs and Democracy*, 137 HARV. L. REV. 728, 739 (2024); Post & Siegel, *supra* note 91; MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE* (2015).

95. See Erwin Chemerinsky, *A Grand Theory of Constitutional Law?*, 100 MICH. L. REV. 1249, 1251 (2002); cf. Álvarez, *supra* note 24, at 254–55 (“*Roe* has figured prominently in discussions over the democratic adequacy of judicial review” (citing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 177 (2000))). Álvarez understands Tushnet to be “arguing in favor of a populist

toward, though not only toward,⁹⁶ locating abortion within a polarized America.

To that end, the new scholars reveal it as a misconception to blame both “backlash” against *Roe* and “beyond backlash”—a resulting drag “on the larger geography of American politics,” stirring up “extreme positions”—on a countermajoritarian Court out of step with the public.⁹⁷ Greenhouse and Siegel summarize that misconception.

The premise of the *Roe* backlash narrative is that there is something about the judicial declaration of minority rights that produces an especially virulent and polarizing reaction among losers who would not respond in a similar fashion to legislative defeat. On this view, court decisions that vindicate minority rights or that pick winners of vigorously contested claims have the harmful effect of shutting down ordinary politics and giving birth to a new, deformed politics: “*Roe* Rage,” as one of us has labeled it. Winning, in other words, can be even worse than losing. The message seems to be that minority claimants should stay away from courts.⁹⁸

constitutional conversation in which the judiciary holds no institutional privilege grounded on a minimum set of agreed upon values he calls the ‘thin’ constitution.” *Id.* at 255 n.5.

96. The new scholars are not concerned *solely* with abortion. *See, e.g.*, Corinna Barrett Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 VAND. L. REV. 1019, 1022 & n.15 (2016) (exemplifying Lain’s work on judicial review of capital punishment and school prayer).

97. *See, e.g.*, Ziegler, *Beyond Backlash*, *supra* note 73, at 977, 979; Cass R. Sunstein, *From Theory to Practice*, 29 ARIZ. ST. L.J. 389, 394 n.23 (1997); Katherine Rath, *The Speciation of Partisan Ideology in the United States: How Preventing Ideological Gene Flow Contributes to Political Factions*, 49 MITCHELL HAMLINE L. REV. 440, 462–63 (2023). Examples of this “beyond backlash” drag are that the Equal Rights Amendment tanked on the watch of Reagan, who also withdrew support for ratification of the Convention on the Elimination of All Forms of Discrimination Against Women. Suzanne Zakaria, Note, *Fair Trade for Women, at Last: Using a Sanctions Framework to Enforce Gender Equality Rights in Multilateral Trade Agreements*, 20 GEO. J. GENDER & L. 241, 244–47, 247 n.36 (2018). For a thorough take on backlash, see Post & Siegel, *supra* note 91, at 388–91.

98. Linda Greenhouse & Reva B. Siegel, *Backlash to the Future? From Roe to Perry*, 60 UCLA L. REV. DISCOURSE 240, 243 (2012).

On this account, backlash is the reaction of the New Right⁹⁹—a 1970s caricaturized¹⁰⁰ reboot of Barry Goldwater’s 1964 presidential platform¹⁰¹—to the *Roe* Court for arrogating to itself a legislative prerogative.¹⁰²

For the new scholars, Greenhouse and Siegel prominent among them,¹⁰³ the backlash narrative overstates *Roe*’s role as *provocateur*. The new scholars find it “nearer the truth to say that polarization around abortion produced ‘*Roe*’ . . . than to say that *Roe* produced polarization around abortion.”¹⁰⁴ Pre-*Roe* polarization mobilized a “small but intense minority” that undercut “a diffuse and silent majority” with whom *Roe* would end up siding.¹⁰⁵ That paradox, the new scholars report, is no more than public-choice theory at work, whereby “determined minorities can thwart majority preferences.”¹⁰⁶ As it turns out, the new scholars add, “*Roe* was not countermajoritarian” at all,¹⁰⁷ but

99. See Ziegler, *Beyond Backlash*, *supra* note 73, at 1006 (“The New Right, a name chosen by its leaders, emerged in the wake of the Watergate scandal.”).

100. See generally Judith Miller, *Goldwater Vows to Fight Tactics of ‘New Right,’* N.Y. TIMES (Sep. 16, 1981), <https://www.nytimes.com/1981/09/16/us/goldwater-vows-to-fight-tactics-of-new-right.html> (discussing Goldwater’s denouncement of the New Right’s extremism as self-defeating and arrogant).

101. See, e.g., Vanessa Waldref, Note, *Reagan’s National Labor Relations Board: An Incomplete Revolution*, 15 GEO. J. POVERTY L. & POL’Y 285, 286 (2008) (“Republican presidential candidate Barry Goldwater’s landslide loss in the 1964 election fueled the modern conservative movement, the ‘New Right,’ of which Ronald Reagan was a political star.”).

102. See, e.g., Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 766 (1991) (explaining that *Roe* “may well have created the Moral Majority, helped defeat the equal rights amendment, and undermined the women’s movement by spurring opposition and demobilizing potential adherents”).

103. See Franklin, *supra* note 93, at 870 n.23 (citing Greenhouse’s work on point); Katharine T. Bartlett, *Feminist Legal Scholarship: A History Through the Lens of the California Law Review*, 100 CALIF. L. REV. 381, 421 n.250 (2012) (citing Siegel’s work on point).

104. See Franklin, *supra* note 93, at 875.

105. See *id.* at 872 n.27 (citation omitted); *id.* at 886–88.

106. Lain, *supra* note 53, at 141.

107. See Franklin, *supra* note 93, at 871 (describing the Court’s decision as bringing about “majoritarian change that could not occur in state legislatures because lawmakers had grown reluctant to oppose a . . . minoritarian interest group”); cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 607–08 (1993)

a win for a 64% majority.¹⁰⁸ What that determined minority pulled off was no “spontaneous, grassroots uprising” either, but a win for directed “New Right strategizing.”¹⁰⁹

Once the ALI statutes got rolling in the run-up to *Roe* (1967–1970), non-judicial arms of the New Right (state legislatures, national parties, religious groups) kicked it into gear.¹¹⁰ In fact, the New Right revved up so effectively that, by the time *Roe* was handed down, the promise of ALI reforms to expand abortion rights “was already dead.”¹¹¹ Proof that “progress toward abortion-law liberalization at the state level had stalled”¹¹² is in the fact that in the late 1960s, some states repealed the permissive abortion statutes they had only recently enacted.¹¹³ On top of that, “pro-choice forces won *no* political victories” during 1971 and 1972,¹¹⁴ when ALI-type statutes were defeated in every state that considered them.¹¹⁵

This is not to say that the new scholars deny *Roe* any backlash effect at all. Some do buy into backlash as the New Right’s reaction to the *Roe* Court; a reaction not, however, to the Court’s stepping outside

(“Since *Roe*, at least a plurality of those polled consistently favor the *Roe* result. Admittedly, the numbers are close. But close is not countermajoritarian.”).

108. See Friedman, *supra* note 107, at 607 (“Before the *Roe* decision . . . fully sixty-four percent of those polled agreed the decision whether to have an abortion should be made solely by a woman and her physician.” (citation omitted)).

109. See Franklin, *supra* note 93, at 880.

110. Post & Siegel, *supra* note 91, at 377 (“Although *Roe* was immediately subject to jurisprudential critique, political mobilization against the decision expressed opposition to the liberalization of abortion law that had begun years before *Roe* was decided.”).

111. See Lain, *supra* note 53, at 143 (explaining that “*Roe* did not kill legislative reform”).

112. Franklin, *supra* note 93, at 888.

113. *Id.* at 870.

114. See Garrow, *supra* note 64, at 841; see also *id.* (“Thus, by November 1972, when Richard Nixon was overwhelmingly re-elected . . . after mounting a very explicitly anti-abortion general election campaign, prospects for making any sort of non-judicial headway with abortion law liberalization looked very bleak indeed.”).

115. There is disagreement over how many states make up that group. Compare Greenhouse & Siegel, *supra* note 67, at 2047 n.69 (counting twelve states), with Daniel K. Williams, *The Real Reason to Criticize Roe*, PUB. DISCOURSE (Jan. 24, 2013), <http://www.thepublicdiscourse.com/2013/01/7679> (counting twenty-five states).

its optimally “minimalist” role,¹¹⁶ but to the Court’s taking the wrong side on the merits.¹¹⁷ Still, it’s a fair paraphrase that for the new scholars, the backlash narrative is overblown in two senses.

First, the backlash narrative is overblown in that the pre-*Roe* mobilization of non-judicial actors bent on “realignment”—the New Right’s wooing of Catholic, and later, Protestant Democrats¹¹⁸—also started *before Roe*, and did not fully consolidate until the onset of the Reagan administration.¹¹⁹ Until that 1980 presidential campaign, Republicans in Congress were more likely to see an early abortion as a right than would their Democratic counterparts.¹²⁰ Realignment’s delicate project of attracting new voters without alienating old ones has

116. On the operation of “minimalist” in this context, see Franklin, *supra* note 93, at 886 & n.94 (citing CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 4–6, 50 (1999)). Here is Chris Peters on Sunstein’s minimalism, which holds that

judicial decisionmaking generally is less democratically legitimate, but not less fallible, than decisionmaking by the political branches. The minimalist response to these perceived shortcomings has two potentially contradictory manifestations. First is procedural minimalism, which holds that a court (particularly the Supreme Court) should do what is necessary to resolve a constitutional case, but should avoid issues not necessary to the resolution of that particular case. Second is substantive minimalism, which holds that the Court should presumptively avoid invalidating the government action challenged in a particular constitutional case, whether by upholding the action on the merits or by avoiding decision of the constitutional issue. Procedural minimalism is thus about the scope of the Court’s decision . . . [S]ubstantive minimalism is about the content

Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1459–60 (2000).

117. See Franklin, *supra* note 93, at 877–78 (citing ZIEGLER, *supra* note 94, at 37–40).

118. See Reva B. Siegel, *Memory Games: Dobbs’s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1149–51 (2023).

119. See Post & Siegel, *supra* note 91, at 423 (“[R]esistance to the liberalization of abortion began before *Roe* as a largely Catholic movement; . . . it was not until some years after *Roe* that significant numbers of Protestant evangelicals joined a pan-Christian movement opposing abortion as a symbol of secular humanism and disintegrating family values . . .”).

120. See Franklin, *supra* note 93, at 869–70, 869 n.17 (citation omitted).

become habit since 1972.¹²¹ As a selling point for realignment, *Roe* was just one target of the New Right, alongside other symbols of America's secular permissiveness¹²² on "sex, sexuality, race, and religion," which the New Right juxtaposed to its own attachment to "family values."¹²³

Second, the new scholars also consider the backlash narrative overblown based on what happened *after Roe*. New Right strategy, they argue, was anything but a knee-jerk reaction to *Roe*.¹²⁴ In actuality, "the charge . . . that the Court exceeded its authority in declaring a fundamental right to abortion—was not central to pro-life politics in the years immediately following the decision," but "only later in the 1970s."¹²⁵ Evidence that *Roe* was just one skirmish in a long war against the Left includes a nugget which reveals that, due to an oil embargo, prospects of a Vietnam peace deal, Nixon's own Watergate scandal, plus former

121. Abortion was absent as an issue in presidential elections until Nixon's reelection campaign. Cf. GREENHOUSE & SIEGEL, *supra* note 79, at 257 (explaining that Republicans made abortion an issue to attract Catholic voters in 1972). Until then, from Eisenhower on, only the related question of birth control would pop up in campaigns. The first pre-1972 presidential allusion to abortion seems to be Nixon's statement to Congress early in his second term in 1969. See Richard Nixon, *Special Message to the Congress on Problems of Population Growth*, AM. PRESIDENCY PROJECT (July 18, 1969), <https://www.presidency.ucsb.edu/documents/special-message-the-congress-problems-population-growth> (discussing "illegal abortion" as an undesirable byproduct of "[u]nwanted or untimely childbearing").

122. See Franklin, *supra* note 93, at 883 (explaining that *Roe* "provided a target that was useful to the organizers of the New Right, who used *Roe* to link the legalization of abortion to a constellation of related grievances with liberal courts and with liberalism in general").

123. See Siegel, *supra* note 118, at 1149.

124. See, e.g., Ziegler, *Beyond Backlash*, *supra* note 73, at 973 ("[J]udicial review did not intensify abortion conflict in the way we have often believed."); *id.* at 972–73 ("[T]he ideological entrenchment we associate with *Roe* came later than we thought and emerged for reasons beyond the Court's decision."); *id.* at 974 ("[S]cholars have overstated the degree to which *Roe* immediately polarized discussion."); Franklin, *supra* note 93, at 883–84 ("[T]he decision itself did not spark anything like the backlash we customarily attribute to it.").

125. Franklin, *supra* note 93, at 876; see Greenhouse & Siegel, *supra* note 67, at 2083 ("By 1979, Republicans could invoke abortion to talk about opposition to the Equal Rights Amendment and Christian concerns of 'secular humanism' as well as to protest the excesses of a Supreme Court that, in matters of family and faith (and, for many, crime and race) had strayed far from the Framers' intent." (citations omitted)).

President Lyndon Johnson's same-day death, *Roe* got no mention in the daily diary of Nixon's chief of staff.¹²⁶

Even in its overblown state, the new scholars posit, if the New Right had kicked into gear before *Roe*, then *Roe* kicked the New Right into overdrive, "mobilizing the political process to resist the ruling in every possible way."¹²⁷ While legislation, not just court rulings, can trigger backlash (Obamacare, for example),¹²⁸ there is nothing like being on the wrong end of a Supreme Court ruling to "energize the opposition[,] . . . unite critics, inspire action, and . . . provide a clear target for directing resistance."¹²⁹ Put slightly differently, nothing can "rouse popular passions" quite like a constitutional-law ruling inflicted on a divided populace; invariably, "the losers will complain."¹³⁰

In sum, the backlash narrative has been put in its place by the new scholars, for whom *Roe* did not "ignite[] a conflagration," but did "act[] as an accelerant."¹³¹ For the new scholars to have recast backlash this way is far from light work. It is to call out the academic writings of celebrated scholars John Hart Ely, William Eskridge, Michael

126. See Ron Elving, *The Leaked Abortion Decision Blew Up Overnight. In 1973, Roe Had a Longer Fuse*, NPR (May 8, 2022, at 13:24 ET), <https://www.npr.org/2022/05/08/1097118409/the-leaked-abortion-decision-blew-up-overnight-in-1973-roe-had-a-longer-fuse>. Additionally, when Justice Stevens was confirmed to the Court in December 1975, just under three years after *Roe*, "he was not asked a single question about *Roe* or abortion rights." See Murray & Shaw, *supra* note 94, at 734 n.19; Linda Greenhouse, *Justice John Paul Stevens as Abortion-Rights Strategist*, 43 U.C. DAVIS L. REV. 749, 751 (2010).

127. Corinna Barrett Lain, *Soft Supremacy*, 58 WM. & MARY L. REV. 1609, 1667 (2017); see Ziegler, *supra* note 82, at 881 (discussing how *Roe* "invalidated the majority of abortion laws then on the books in the states, but abortion foes immediately explored options for limiting or undoing the decision's effects").

128. See Lain, *supra* note 127, at 1665 & n.226; see also Greenhouse & Siegel, *supra* note 98, at 243 n.8 ("[A] backlash against 'tin foil hat' issues pushed by the Tea Party-dominated legislature' . . . led to the loss of the Republican majority in one house and its near loss in the other.").

129. Lain, *supra* note 127, at 1665.

130. Barry Friedman, *Popular Dissatisfaction with the Administration of Justice: A Retrospective (and a Look Ahead)*, 82 IND. L.J. 1193, 1211 (2007). But cf. Frederick Schauer, *The Supreme Court 2005 Term—Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 22 (2006) (locating abortion "fifteenth or lower in the public's rankings of most important issues").

131. Linda Greenhouse, *Democracy and the Courts: The Case of Abortion*, 61 HASTINGS L.J. 1333, 1337, 1343 (2010).

Klarman, Gerald Rosenberg, and Cass Sunstein,¹³² plus the academic writings of Judges Bork,¹³³ Ginsburg,¹³⁴ and Posner.¹³⁵ The new scholarship also calls out the court opinions of Justices White, Scalia, Thomas, Alito, and Roberts, who have expressed what Melissa Murray and Katherine Shaw have outed as a fetishized privileging of “democratic deliberation” over “judicial imperialism.”¹³⁶

B. Inter-Party Intolerance

Developments within abortion helped catalyze polarization, but broader polarization across American politics came later. As an explanation, Richard Pildes’ *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*,¹³⁷ while not about abortion, details the erosion of inter-party tolerance from Reagan forward,¹³⁸ along with the extremism both of Congress, compounded by

132. See Post & Siegel, *supra* note 91, at 388–406; Ziegler, *Beyond Backlash*, *supra* note 73, at 975–77.

133. See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 110–26 (1990).

134. See Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375 (1985) (stating that the *Roe* decision “sparked a legal and political controversy that continues to this day”).

135. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 79, 124–27 (Harv. Univ. Press 2005) (2003).

136. See Murray & Shaw, *supra* note 94, at 734–48; see also Franklin, *supra* note 93, at 867–68, 878, 886–88.

137. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

138. *Id.* at 280. Confirmation of Supreme Court justices became polarized during the second Reagan term, demonstrated by the Senate’s 58–42 rejection of Robert Bork, only the third nominee since 1955 to be blocked on philosophical grounds. See Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 389–90 (2010); *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> (last visited Apr. 4, 2026). Once appointed, Supreme Court justices have become ideologically predictable in their alignment with the president who appointed them. See Erin Sheley, *Self-Defense and Political Rage*, 11 TEX. A&M L. REV. 591, 619 (2024).

gerrymandering,¹³⁹ and of voters.¹⁴⁰ From Reagan on, voters dependably line up along their party platforms near one pole or the other, while non-voters clump around the middle.¹⁴¹ It is the “engaged” rather than the indifferent voter who is most extreme of all.¹⁴² Engagement is demonstrated by political activities other than just voting, like “trying to persuade someone else to vote for their preferred candidate.”¹⁴³ Together, inter-party intolerance and extremism have pushed reconciliation with the Other to one of its lowest priorities in modern history—comparable to when “nineteenth-century armies . . . marched shoulder to shoulder onto the battlefield” over equality.¹⁴⁴

Take just one of Pildes’ examples of our “extreme partisan polarization.”¹⁴⁵ From Eisenhower until Reagan, only 22% to 39% of citizens who identified with one party disapproved of a president from the other party.¹⁴⁶ In Reagan’s first year, the point gap was up to 45%.¹⁴⁷ Overall for the 1980s, “80% of the party-in-power’s voters approved of the President’s performance, but only 20% of other parties’ voters did.”¹⁴⁸ The gap during the second Bush presidency was most extreme. “In 2004, this gap was 75.3 points, with 90.5% of Republicans approving of his performance and only 15.2% of Democrats doing so.”¹⁴⁹ Obama fared not much better with a 64% gap.¹⁵⁰ And in February 2024,

139. See Lain, *supra* note 53, at 147–53 (citing Pildes, *supra* note 137, at 277, 312, 323–24, 326–32).

140. See Pildes, *supra* note 137, at 278–80.

141. *Id.* at 279 n.15 (“Similarly, those who describe themselves as ‘independents’ who lean either to the Democratic or Republican side actually vote much like loyal partisans; . . . they do not move back and forth between parties over election cycles but actually vote in consistently partisan patterns.”).

142. *Id.* at 279.

143. *Id.*

144. *Id.* at 277 (citation omitted).

145. *Id.* at 275.

146. *Id.* at 278.

147. *Id.* at 280 & n.22.

148. *Id.* at 278 n.11.

149. *Id.*

150. *Id.* at 280; see also *id.* (“[B]efore Reagan, no president had averaged more than a forty point gap in approval rating during his term; starting then, only the elder George Bush has averaged less than a fifty-point gap.”).

only 2% of Americans favored *both* President Biden and then former President Trump.¹⁵¹

Yet for historian David Kennedy, polarization is just a natural byproduct of a constitutional system built on differences of opinion that are regulated through checks and balances, which unfortunately make it hard to get things done, but fortunately make it easy to tamp down tyranny.¹⁵² Parties were introduced early in the nineteenth century, paving the way for tolerable differences to turn into intolerable “factions” of the type that would fight a civil war.¹⁵³ For Kennedy, polarization in the U.S. has not only been uneven, but has been at times undetectable, as in the harmonious aftermaths of the War of 1812 and of World War II.¹⁵⁴ Kennedy adds that the Voting Rights Act of 1965, which is for Pildes a main leverage point for polarization,¹⁵⁵ might not be all that polarizing. It passed in 1965 and was renewed in 2006 by overwhelming majorities of both parties.¹⁵⁶

A broadened polarization in the 1980s cannot be decoupled from a more niche, pre-existing polarization regarding abortion, an issue that Reagan emphasized in his successful campaigns like no previous presidential candidate had.¹⁵⁷ Nor can polarization be decoupled

151. Shanay Gracia & Hannah Hartig, *About 1 in 4 Americans Have Unfavorable Views of Both Biden and Trump*, PEW RSCH. CTR. (Mar. 19, 2024), <https://www.pewresearch.org/short-reads/2024/03/19/about-1-in-4-americans-have-unfavorable-views-of-both-biden-and-trump/>.

152. See David M. Kennedy, *What Pildes Missed: The Framers, the True Impact of the Voting Rights Act, and the Far Right*, 99 CALIF. L. REV. 351, 352–54 (2011) (discussing partisanship as a normal condition of a government designed to contain power).

153. *Id.* at 352–53.

154. *Id.*

155. See Pildes, *supra* note 137, at 287–94 (discussing theories of how the Voting Rights Act realigned and sorted the political parties).

156. Kennedy, *supra* note 152, at 353.

157. Cf. Michael J. Klarman, *Judicial Statesmanship: Justice Breyer’s Concurring Opinion in Van Orden v. Perry*, 128 HARV. L. REV. 452, 453 (2014) (“*Roe* ignited a politically potent right-to-life movement that had not previously existed in national politics, helped elect Ronald Reagan President in 1980, and made abortion the dominant issue in subsequent Supreme Court confirmation hearings.”); Mary Ziegler, *Grassroots Originalism: Judicial Activism Arguments, the Abortion Debate, and the Politics of Judicial Philosophy*, 51 U. LOUISVILLE L. REV. 201, 213 (2013) (“During Reagan’s presidential campaign, to an unprecedented extent, the antiabortion movement allied itself with both the New Right and the Religious Right.”). *But see* Donald

from passion, a second phenomenon that may help explain why half of Americans believe all abortions are the same.

IV. IS PASSION RATIONAL?

The Greek *πάσχω* reads passion as “to be affected in any way,” that is, to “suffer.”¹⁵⁸ If “the worst/[a]re full of passionate intensity,”¹⁵⁹ it is because passion’s root—suffering—is also the root of passive. Passion under such a view is not a manifestation of agency, but something that *happens to you*; and there’s nothing autonomous about that. Accordingly, it is not murder to kill in the heat of passion, because one is not one’s true self when in such a state of agitation.¹⁶⁰ For example, when just before killing two of her sons, Euripides’ Medea says, “I see the horror of what I am doing, but anger overwhelms my second thoughts,”¹⁶¹ she is afflicted by passion, which blinds her to “the True and the Good.”¹⁶² Unlike a purified instance of self-defense, to kill in a rage as Medea did is unnecessary.¹⁶³ Unnecessary but understandable, as in all too human. Because to be passionate is to be cut off from one’s valuing self, passion diminishes responsibility.

Granberg & James Burlison, *The Abortion Issue in the 1980 Elections*, 15 FAM. PLAN. PERSPECTIVES 231, 233–34, 237–38 (1983), <https://www.jstor.org/stable/2135282?origin=crossref> [<https://doi.org/10.2307/2135282>] (arguing that while the Right and Left were more polarized than ever on abortion in 1980, abortion did not play a particularly salient role in Reagan’s defeat of incumbent Carter).

158. *Πάσχω*, A HOMERIC DICTIONARY (GREEK-ENGLISH), https://homeric_el_en.en-accademic.com/7708/%CF%80%CE%AC%CF%83%CF%87%CF%89 (last visited Mar. 9, 2026).

159. Yeats, *supra* note 2.

160. See *Padie v. State*, 557 P.2d 1138, 1141 (Alaska 1976) (“A provoked killing in the heat of passion is not murder; the provocation negates the malice which is an essential element of murder. Such a killing constitutes manslaughter . . .” (internal citations omitted)). But cf. Deborah E. Milgate, Note, *The Flame Flickers, but Burns On: Modern Judicial Application of the Ancient Heat of Passion Defense*, 51 RUTGERS L. REV. 193, 224 (1998) (“[T]he whole paradigm of the heat of passion defense may rest on a vision of irrationality or loss of control that does not exist.”).

161. EURIPIDES, *MEDEA* 45 (Sheila Murnaghan ed. & trans., Norton 2018).

162. See SUSAN WOLF, *FREEDOM WITHIN REASON* 87–88 (1990).

163. For a compelling take on the convergence of rage and self-defense, see generally Sheley, *supra* note 138.

Martha Nussbaum and Dan Kahan would call the above account of the passions “mechanistic,” whereby “[e]motions feel like things that sweep over us, or sweep us away, or invade us, often without our consent or control,” going “their own way without embodying reasons or beliefs.”¹⁶⁴ Emotions are under such a view impervious to moral assessment.¹⁶⁵ Nussbaum and Kahan challenge the mechanistic view of cutting off emotions from beliefs, a view they find false to the “aboutness” of emotions.¹⁶⁶

In opposition to the mechanistic view is an “evaluative” view, which they trace to Aristotle, for whom

changes in belief yield changes in emotions. In order to have fear, he argues, a person must believe that some impending event threatens his well-being, and that the threat is serious. In order to be angry, he must believe that someone has wronged him (or someone or something dear to him), not inadvertently but deliberately, or perhaps negligently or recklessly, in a more than trivial way. In order to have pity, he must believe that someone else has suffered something seriously bad in a way that he or she does not deserve, or at least deserve fully.¹⁶⁷

Under the evaluative view, emotions are “cognitive appraisals” that can be morally assessed.¹⁶⁸ Passivity under the evaluative view is in the face of “the ungoverned events of life” that occasion our emotional response, which only *feels* like an external event (only feels like a gust of wind) because the emotion involves objects, goals, projects (friends, children, citizenship, country) about which we care deeply.¹⁶⁹ Though rational, emotions can misfire from excessive attachment to others, or to ideas, values, or objects (“honor, money, love”).¹⁷⁰ Education under

164. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotions in Criminal Law*, 96 COLUM. L. REV. 269, 279–80 (1996).

165. *Id.* at 273.

166. *Id.* at 282–83.

167. *Id.*

168. *Id.* at 273.

169. *Id.* at 288–89.

170. *Id.* at 293–94. Nussbaum and Kahan give the following example of what they call “inappropriate” emotions:

the mechanistic view can take someone from a “seething cauldron of inappropriate impulses with a lid held tightly on” to being able to hold that lid down.¹⁷¹ Education under the evaluative view adjudges excessive or misdirected anger as a failure of moral perception, not a failure of willpower.¹⁷²

In politics, passion manifests as conviction. Unlike a lie, which is an outward expression one inwardly knows to be false, conviction is an inward certainty that one has attained truth.¹⁷³ “It is not the struggle of opinions that has made history so violent,” writes Nietzsche in one of his penetrating aphorisms, “but rather the struggle of *belief in opinions*, that is, the struggle of convictions.”¹⁷⁴ Nietzsche cautions that the belief that one has obtained “absolute truth” is a state of arrogance,¹⁷⁵ thereby paralyzing the will that otherwise might engage in “examination, investigation, caution, [and] experiment.”¹⁷⁶

If passion in abortion discourse is an inappropriate evaluative (not mechanistic) reaction, then what are we reacting *to*? What pushes half of us to the extremes on abortion to the point where no position is provisional? “Extreme” here is no exaggeration. According to Erin Sheley, “roughly a quarter of the [U.S.] population seems to endorse

imagine a woman who kills a man in anger after discovering that he has sexually abused the woman’s young daughter. From the evaluative perspective, one would say that her emotion embodies appraisals of mixed quality. She has appraised her circumstances in a way correctly, since her anger reflects her appropriate valuation of her daughter’s well-being; but in a way she has also appraised them wrongly, since she should not have thought that this good was all-important, taking precedence over all other considerations, including the value of the man’s life and the importance of lawful resolution of disputes.

Id. at 313.

171. *Id.* at 298.

172. *Id.* at 299.

173. FRIEDRICH NIETZSCHE, *HUMAN, ALL TOO HUMAN: A BOOK FOR FREE SPIRITS* 261, ¶ 630 (Marion Faber & Stephen Lehmann trans., Univ. of Neb. Press Lincoln 1986) (1878); *see also id.* at 234, ¶ 483 (“Convictions are more dangerous enemies of truth than lies.”).

174. *Id.* at 262, ¶ 630 (emphasis added).

175. *Id.*

176. FRIEDRICH NIETZSCHE, *THE WILL TO POWER* 247–48, at ¶ 452 (Walter Kaufmann ed., Walter Kaufmann & R.J. Hollingdale trans., Vintage Books 1968) (1901).

... violence in service of the political side they believe to be just.”¹⁷⁷ We are not talking here about a playful sort of hate-based rivalry like the Yankees and Red Sox, but a real one.¹⁷⁸

There is comparatively less passion in the mushy middle, where there is less “engagement” in the sense that Pildes understands the term. Mushy-middlers are not who we think of when we lament “the intractable, depressing national divide over abortion.”¹⁷⁹ Nor are they the ones whom *Roe* and *Dobbs* left “feeling as though they had been ‘dis-owned’ by their country.”¹⁸⁰ While Neal Devins offers that “*Roe*’s maximalism did not stop pro-choice and pro-life interests from talking with each other in the years following the decision,” he does not tell us what it was they were saying.¹⁸¹ At the extremes, “the aspiration for ‘mutual respect’ cannot offer much guidance in negotiating the controversies” at hand.¹⁸² This is a point of Laurence Tribe’s book, *Abortion: The Clash of Absolutes*, which reviewer Stephen Carter summarizes as about an impasse among those who care most about the regulation of abortion.

Putting to one side the millions of Americans whose views are reflected in opinion surveys, most of whom clearly find this issue a tough one, there are at the core of both the pro-choice and pro-life movements people sufficiently sure of their starting points that conversation with others whose axioms differ is virtually impossible. To speak of dialogue is to talk past both groups. *The*

177. Sheley, *supra* note 138, at 653; *see id.* at 622–23.

178. E.g., Harvey Gilmore, *Misadventures of a Law School Misfit*, 51 DUQ. L. REV. 191, 206–10 (2013) (describing getting razzed by his professors and classmates in his Boston law school for being a Yankees fan). *But cf.* *People v. Cameron*, No. B214398, 2010 WL 1380755, at *2–3 (Cal. Ct. App. Apr. 8, 2010) (affirming seven-year sentence of intoxicated defendant for stabbing a man repeatedly to resolve a Yankees/Red Sox argument at 2:00 AM at a West Hollywood party).

179. Ziegler, *Beyond Backlash*, *supra* note 73, at 972 (citation omitted).

180. Franklin, *supra* note 93, at 886 n.92 (quoting William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1312 (2005)).

181. *See* Neal Devins, *Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government*, 69 VAND. L. REV. 935, 983 (2016).

182. Post & Siegel, *supra* note 91, at 408.

argument, finally, is about power. The only issue is who wins.¹⁸³

Carter notes that Tribe did have an intention to build bridges, but only by getting the Right to accept *Roe*'s constitutional basis.¹⁸⁴ Tribe's approach to bridge-building has gone nowhere in thirty-five years. Not so much because "even-handedness contrasts with the majority of existing abortion literature, which is decidedly either pro-choice or pro-life,"¹⁸⁵ but because "even-handedness," Tribe's included, can lapse into dismissing the Other, at times "sanctimoniously."¹⁸⁶

Twenty-five published opinions from U.S. state and federal courts have dubbed abortion "emotionally charged,"¹⁸⁷ while another fifty-seven have dubbed it a subject about which humans are "passionate," or derivations thereof.¹⁸⁸ Afflicted by a sense of having one's hand forced, the question for those at the extremes is no longer whether abortion is a self-harm more akin to self-mutilation than a rightful disposition of one's own property.¹⁸⁹ Instead, the question for those at the

183. See Stephen L. Carter, *Abortion, Absolutism, and Compromise*, 100 YALE L.J. 2747, 2763 (1991) (emphasis added) (book review).

184. See *id.* at 2750.

185. Sara J. Vance, *Abortion and Divorce in Western Law*, 86 MICH. L. REV. 1404, 1406 n.9 (1988) (reviewing MARY A. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987)).

186. *Id.* at 1406.

187. E.g., *Whole Woman's Health v. Paxton*, 978 F.3d 896, 912 (5th Cir. 2020) (Willett, J., dissenting).

188. E.g., *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 230 (2022).

189. Brownstein and Dau state the extreme positions this way:

[o]n one side, "pro-life" or "conservative" factions advocate a rigorous regulatory approach to abortion. From this perspective, abortion is always, or almost always, a grievously immoral act. In the vast majority of cases, abortion is culpable homicide, usually murder. On the other side, "pro-choice" or "liberal" factions advocate an unqualified "deregulatory" position on abortion. From this perspective, abortion is a matter of purely private concern for the woman involved. It is morally comparable to an appendectomy or to plastic surgery.

Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 701 (1992) (citations omitted).

extremes is about how we will *respond* when an interlocutor *says* that it is one or the other. Can I form a community with someone like *that*?¹⁹⁰

As Siegel and Greenhouse report, in the run-up to *Roe*, on the Left were feminists who cautioned against “flamboyant tactics” that could be “self-defeating.”¹⁹¹ To name just one such tactic, the subversive-but-legal protest staged by the New York Radical Women at the 1968 Miss America in Atlantic City came off to some protesters as ironically anti-woman.¹⁹² Additionally, while even the ACLU would come to recognize fetal rights,¹⁹³ pro-choice amici curiae put their foot down in *Roe*, insisting that “in any conflict between women’s rights and fetal rights, the woman’s interest in autonomy should prevail.”¹⁹⁴ As a consequence, “*Roe* removed any reason for pro-lifers to settle for second-best solutions.”¹⁹⁵

On the Right, Barbara and John Willke, after authoring an abstinence-only sex-education tract, *The Wonder of Sex*,¹⁹⁶ pumped out two monumentally influential pre-*Roe* self-publications: first, the *Handbook on Abortion*,¹⁹⁷ then the four-page color pamphlet *Life or Death*,¹⁹⁸ which was rendered infamous for its gory photos of actual abortions and fetal remains. Although the Willkes deny the relevance of their Catholicism to their enthusiasm,¹⁹⁹ it may be worth noting that

190. Cf. Amy H. Nemko, Note, *Saving FACE: Clinic Access Under a New Commerce Clause*, 106 YALE L.J. 525, 529 (1996) (noting that “Sheriff James T. Hickey of Nueces County, Texas testified that because of his personal anti-abortion beliefs, if confronted with illegal anti-abortion activities in his jurisdiction,” he would not enforce the law).

191. Jimmie Kimmey, *Abortion Law Reform in the United States*, in *BEFORE ROE V. WADE*, *supra* note 79, at 31, 33.

192. See Yxta Maya Murray, “Creating New Categories:” *Anglo-American Radical Feminism’s Constitutionalism in the Streets*, 9 HASTINGS RACE & POVERTY L.J. 449, 449–53 (2012).

193. Ziegler, *Beyond Backlash*, *supra* note 73, at 1001–02.

194. *Id.* at 997.

195. *Id.*

196. DR. & MRS. J.C. WILLKE, *THE WONDER OF SEX: HOW TO TEACH CHILDREN, A GUIDE FOR PARENTS AND TEACHERS* (1964).

197. JACK C. WILLKE & BARBARA WILLKE, *HANDBOOK ON ABORTION* (rev. ed. 1979).

198. JACK C. WILLKE & BARBARA WILLKE, *LIFE OR DEATH* (1972).

199. See Greenhouse & Siegel, *supra* note 67, at 2051.

in 1967 the National Conference of Catholic Bishops met in Chicago to activate its National Right to Life Committee's pro-life position—"An Almost Absolute Value in History"—against the ALI's influence on state abortion law.²⁰⁰ And it worked. By the end of the 1970s, due in part to the emergence of the Moral Majority and the Concerned Women for America, plus the publication of the pro-life *Whatever Happened to the Human Race?*²⁰¹ and the election of a conservative president of the Southern Baptist Convention, millions of evangelical and conservative Protestants would join their Catholic counterparts in the cause.²⁰²

The passionate Right and Left argued and argued, not so much about reconciling the delicate interests of embryos/fetuses, mothers, physicians, and the State, but about Right-Left binaries: whether the essence of abortion is baby murder²⁰³ as opposed to discarding of a "blob of protoplasm,"²⁰⁴ and whether support for abortion is directed at

200. Robert N. Karrer, *The National Right to Life Committee: Its Founding, Its History, and the Emergence of the Pro-Life Movement Prior to Roe v. Wade*, 97 CATH. HIST. REV. 527, 527–28, 528 n.2 (2011), <https://muse.jhu.edu/article/443939> [<https://doi.org/10.1353/cat.2011.0098>].

201. FRANCIS A. SCHAEFFER & C. EVERETT KOOP, *WHATEVER HAPPENED TO THE HUMAN RACE?* (1979).

202. See Daniel K. Williams, *The Partisan Trajectory of the American Pro-Life Movement: How a Liberal Catholic Campaign Became a Conservative Evangelical Cause*, 6 RELIGIONS 451, 459 (2015), <https://www.mdpi.com/2077-1444/6/2/451> [<https://doi.org/10.3390/rel6020451>] ("But by 1980, a Gallup Poll showed that evangelical Protestants—most of whom were political conservatives—were more likely than either Catholics or mainline Protestants to oppose abortion.").

203. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 327 (1992) ("[O]pponents of abortion call 'that tiny little atom of humanity' a 'baby,' and condemn the practice as murder . . ."); Thomson, *supra* note 6, at 66 ("A very early abortion is surely not the killing of a person . . .").

204. See Lauren A. Varga, Note, *Does Fear of Immigration Trump Love for Fetal Life? How Trump's Policies Quietly Endanger Migrant Fetuses in Spite of the Administration's Pro-Life Agenda*, 35 GEO. IMMIGR. L.J. 631, 635 n.22 (2021) (citing Brief for Appellee at 29–30, *Roe v. Wade*, 410 U.S. 113 (U.S. 1971) (No. 70-18), 1971 WL 134281); Wolf, *supra* note 22, at 32 ("So, what will it be: Wanted fetuses are charming, complex, REM-dreaming little beings whose profile on the sonogram looks just like Daddy, but unwanted ones are mere 'uterine material'?"); GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 230 (1957) (calling a fetus a "uterine tumour").

stirring up sexual promiscuity, while resistance to abortion is directed at protecting patriarchy.²⁰⁵

When Justice Blackmun, who wrote *Roe*, noted in his *Oral History Project* that “[t]he emotions are deep, and the convictions on both sides are solid,”²⁰⁶ he might have mistaken a cause of our impoverished abortion discourse for too much conviction, too much emotion/passion. It may be more accurate, however, to say that what has impoverished abortion discourse is not *too much* emotion/passion, but *too little*. In the place of emotion/passion we have a surplus of *theories* that unavoidably cut us off from the cares and commitments—including the emotional lives—of flesh-and-blood humans. For example, “polygenesis,” described in the Introduction above as the Civil War-era doctrine positing the sub-humanity of African Americans, is *not* an emotional response by free Whites to enslaved African Americans.²⁰⁷ Instead, polygenesis is a pernicious theory about the conditions of personhood, of equality, of humanity. In fact, polygenesis could exist *only* on a theoretical level, not on an emotional one. To tap into one’s own emotions about the Other is invariably to see the Other *in* oneself, *as* oneself, not as sub-human. If abortion discourse is just censorious advertising of theories about personhood, about tripartite systems of government, and so on, then “simply dumping more theories into the world can only contribute to the disease, not to its cure.”²⁰⁸ It is theory, not emotion, that holds that an early abortion is either baby-murder or the disposal of a blob of protoplasm; to be taken in by such theory only “masks from both sides of the debate what genuinely *is* abhorrent about abortion.”²⁰⁹ And a debate of the high-school type it is,²¹⁰ where the goal is to

205. See Ross Douthat, *What Do Liberals Believe About Late-Term Abortion?*, N.Y. TIMES (Oct. 11, 2024), <https://www.nytimes.com/2024/10/11/opinion/harris-walz-trump-abortion.html> (explaining how participants in the abortion debate often mischaracterize opposing motivations rather than engaging with substantive moral disagreements).

206. Blackmun, *supra* note 1, at 291.

207. See FREDRICKSON, *supra* note 20, at 71–74.

208. See Paul J. Gudel, *The Skepticism of Critical Legal Studies and the Function of Moral Discourse*, 24 U.N.H. L. REV. 41, 47 (2025).

209. *Id.* at 109.

210. References to abortion as a “debate” are common in the Court. See *Roe v. Wade*, 410 U.S. 113, 133 n.22 (1973); *id.* at 174 (Rehnquist, J., dissenting); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 853, 861 (1992); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 232, 269, 292 (2022); *id.* at 343 (Kavanaugh, J.,

vanquish opponents in the adversarial sense (rendering them silenced), not reconcile with them in the Socratic sense (rendering them satisfied).²¹¹

Whether pushed to the brink by too much conviction, too much emotion/passion, or too little (but instead by too many theories), it is worth asking: what *keeps* us in that state—tyrannized by our own convictions—for the long haul? The answer may owe to the psychoanalytic defense mechanism of projection, a third phenomenon that explains why half of Americans believe all abortions are the same. More specifically, Part V holds that abortion interlocutors at the margins know well enough what they are doing; they just do not know why.

V. FREUD'S NOTION OF PROJECTION IN ABORTION DISCOURSE

On June 4, 1938, three months into Germany's occupation of Vienna, Sigmund Freud left for London, where he would die at the start of WWII.²¹² Compared with other psychiatric treatments, Freud's "talking cure" (aka free association), which relied on mining the hiddenness of human motivations, was like the sun to a candle. In the 1950s U.S., Freudian approaches moved psychiatric care from asylums to shrinks' offices.²¹³ But by the end of the 1960s, the openness of his method had become a turn-off. Plus, with good cause, feminists found him sexist, while health insurers found billable hours for office visits

concurring); *id.* at 358 (Roberts, C.J., concurring in the judgment); *id.* at 389 (Breyer, J., dissenting).

211. See PAUL J. GUEDEL, MODERNISM AND SKEPTICISM 58 (2023) (unpublished manuscript) (on file with author) ("Cavell's method is reminiscent of the old ideal of Socratic dialectic, the goal of which is not refutation, which is the province of rhetoric and which is accomplished when one's opponent can say nothing more, but reconciliation, in both the intellectual and erotic senses of the term, which is accomplished only when one's opponent no longer wants to say anything, when he is not merely silenced, but satisfied."); Hannah Marije Altorf, *Dialogue and Discussion: Reflections on a Socratic Method*, 18 ARTS & HUMANS. IN HIGHER EDUC. 60, 62 (2019) [<https://doi-org/10.1177/1474022216670607>] ("Socratic dialogue . . . moves away from an emphasis on winning and losing . . . to the importance of the conversation itself as a shared undertaking."); *id.* at 63 ("Socratic dialogue . . . aims for mutual understanding and agreement . . .").

212. Louis Menand, *Why Freud Survives*, NEW YORKER (Aug. 21, 2017), <https://www.newyorker.com/magazine/2017/08/28/why-freud-survives>.

213. *Id.*

prohibitively pricier than drugs. If that were not enough, Freud's critics alleged fudged results, cocaine abuse, and sexual indiscretion (did he really seduce his wife's sister?).²¹⁴

Yet Freud has staying power, not only because psychiatry has not done so great without him, but because it turns out he was more "poet of the mind" than hard scientist. And refutation has no place in poetry. Penis envy might be a crock, but *The Interpretation of Dreams*,²¹⁵ *The Psychopathology of Everyday Life*,²¹⁶ *Five Lectures on Psycho-Analysis* (aka The Clark Lectures),²¹⁷ *Totem and Taboo*,²¹⁸ *The Ego and the Id*,²¹⁹ *The Future of an Illusion*,²²⁰ and *Civilization and Its Discontents* decidedly are not.²²¹

The above account is nicked from Louis Menand's 6,000-word, 2017 *New Yorker* essay, *The Stone Guest*, whose title he lifted from Pushkin's stage play (derived in turn from Mozart's *Don Giovanni*), where in Act I, Don Juan kills off the commander, who then shows up for dinner in the final act.²²² Aptly, the online version of Menand's essay is titled *Why Freud Survives*. To this day, Freud remains useful to academic lawyers for decoding, *inter alia*, human actions and

214. See *id.*

215. 4 SIGMUND FREUD, *The Interpretation of Dreams*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1953) (1900).

216. 6 SIGMUND FREUD, *The Psychopathology of Everyday Life*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1960) (1901).

217. 11 SIGMUND FREUD, *Five Lectures on Psycho-Analysis*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1957) (1910).

218. 13 SIGMUND FREUD, *Totem and Taboo*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1955) (1913).

219. 19 SIGMUND FREUD, *The Ego and the Id*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1961) (1923).

220. 21 SIGMUND FREUD, *The Future of an Illusion*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1961) (1927).

221. 21 SIGMUND FREUD, *Civilization and Its Discontents*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD (James Strachey ed. & trans., 1961) (1930).

222. See Menand, *supra* note 212.

intentions.²²³ But because none of that work in law explicates the origin and criteria of projection as a defense mechanism,²²⁴ I will briefly do so here.

A. Projection Basics

The Neuro-Psychoses of Defence was Freud's first foray into defense mechanisms, which occur after one's "ego was faced with an experience, an idea or a feeling which aroused such a distressing affect that the subject decided to forget about it because he had no confidence in his power to resolve the contradiction between that incompatible

223. For applications of Freudian theory to interpretations of human behavior and intentions, see generally Jonathan Boyarin, *Another Abraham: Jewishness and the Law of the Father*, 9 YALE J.L. & HUMANS. 345 (1997); David S. Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 IND. L.J. 651 (1991); Anne C. Dailey, *The Hidden Economy of the Unconscious*, 74 CHI.-KENT L. REV. 1599 (2000); Deborah W. Denno, *Criminal Law in a Post-Freudian World*, 2005 U. ILL. L. REV. 601 (2005); Mladen Dolar, *Freud and the Political*, 4 UNBOUND 15 (2008); David L. Eng, *Reparations and the Human*, 21 COLUM. J. GENDER & L. 159 (2012); Steven Goldberg, *Evolutionary Biology Meets Determinism: Learning from Philosophy, Freud, and Spinoza*, 53 FLA. L. REV. 893 (2001); Peter Goodrich, *Maladies of the Legal Soul: Psychoanalysis and Interpretation in Law*, 54 WASH. & LEE L. REV. 1035 (1997); John Lawrence Hill, *Mill, Freud, and Skinner: The Concept of the Self and the Moral Psychology of Liberty*, 26 SETON HALL L. REV. 92 (1995); Austin Sarat, *Fathers in Law: Violence and Reason in 12 Angry Men*, 82 CHI.-KENT L. REV. 863 (2007); Jane O'Sullivan, "Loquacious with an Obstinate Silence": *Sexual and Textual Subversions in Freud's Dora and Fowles' A Maggot*, 15 LAW & LITERATURE 209 (2003); Jean Roiphe, *Aggression, Unconscious Conflict, and the Role of the Lawyer*, 16 CARDOZO L. REV. 1205 (1995); Robin West, *Law, Rights, and Other Totemic Illusions: Legal Liberalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986); Davida A. Williams, *Punishing the Faithful: Freud, Religion, and the Law*, 24 CARDOZO L. REV. 2181 (2003); Charles Yablon, *Freud as Law Professor: An Alternative History*, 16 CARDOZO L. REV. 1439 (1995) (utilizing Freud to decode human actions and intentions).

224. For sources that discuss projection as a defense mechanism, see generally David S. Caudill, *supra* note 223; Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

idea and his ego by means of thought-activity.”²²⁵ In non-psychoanalytic terms, defense mechanisms are unconscious strategies to reduce anxiety and internal conflict, at times distorting reality in order to cope. Familiar defense mechanisms include denial, displacement, identification, intellectualization, regression, repression, sublimation, and, for our purposes here, projection.²²⁶

Projection in the psychoanalytic sense externalizes an unpleasant idea, thereby preventing the patient from confronting and transcending it. Projection first appears in Freud’s discussion of paranoia, detailed in an early paper, *Draft H*,²²⁷ which is part of his correspondence with eccentric Berlin nose-and-throat specialist William Fliess.²²⁸ *Draft H* is based on a case study in which Freud’s patient, an upper-class woman, experienced a seduction scene in which a male acquaintance made a vulgar gesture toward her in a rooming house owned by her family. The patient thereafter fell ill, but in therapy with Freud she would deny the scene, instead imagining that her neighbors were pitying and gossiping about her. Having suggested to her that the scene was “embarrassing,” Freud’s attempts to overcome her resistance to recounting the scene eventually led her to terminate her therapy, despite his efforts to draw her out through hypnosis.²²⁹ Freud concluded that the patient “was sparing herself . . . the reproach of being a ‘bad woman,’” who in fact was not uniformly horrified by the scene.²³⁰ To spare herself self-reproach, Freud posited, the patient “transposed” her self-judgments into judgments from the outside; what she might have said of herself she instead attributed to others.²³¹ The patient’s net gain

225. 3 SIGMUND FREUD, *The Neuro-Psychoses of Defence*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 42, 47 (James Strachey ed. & trans., 1962) (1894).

226. ANNA FREUD, THE EGO AND THE MECHANISMS OF DEFENCE 42–44 (Ernest Jones ed., Cecil Baines trans., Hogarth Press, rev. ed. 1937) (1936).

227. 1 SIGMUND FREUD, *Draft H: Paranoia*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 206, 209 (James Strachey ed. & trans., 1966) (1895).

228. James Strachey, *Editor’s Note*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 175, 175 (James Strachey ed. & trans., 1962).

229. FREUD, *supra* note 227, at 207–09.

230. *Id.* at 208.

231. *Id.* at 208–09.

from such a transposition of judgment is that self-judgments must be accepted whereas judgments by others can be rejected.²³²

When we experience an internal change, we attribute it to either an internal or external cause. If for some reason we block ourselves from acknowledging the internal cause, we cite the external cause. Although we are accustomed to manifestations of our emotions being observed by others, with projection of the paranoid variety we *misread* what people know about and have done to us.²³³ By attributing to others knowledge of us that we ourselves lack, we “project” onto them by way of defense what is too dark for us to acknowledge ourselves.

This notion of paranoia is not limited to cases like Freud’s patient in *Draft H*. For example, a litigious person challenges judgments rather than confronting that he may be wrong; a proud nation denies that it lost a war; a hypochondriac believes he is being poisoned rather than cop to the sexual origins of his perceived illnesses; an official passed over for promotion defends against questions about his own merit by seeing himself as an object of conspiracies and spying colleagues.²³⁴ Sometimes, Freud adds, a paranoiac’s delusions are not of persecution. Megalomania, too, protects the ego from distressing ideas, as where an insecure person takes simple politeness as erotic attentions. In the end, the paranoiac applies equal energy both to the delusional idea—a copy of the distressing idea fended off—and to the attempt to keep the distressing idea at bay.²³⁵ Love of the self is manifested as love of the delusion (or what is not the same, love of the self produces a hallucination).²³⁶

It is worth noting that sixteen years after *Draft H*, Freud noted that

projection . . . makes its appearance not only in paranoia but under other psychological conditions as well, and in fact it has a regular share assigned to it in our attitude towards the external world. For when we refer the causes of certain sensations to the external world, instead of

232. *Id.* at 209.

233. *Id.*

234. *Id.* at 209–10.

235. *Id.* at 210–12.

236. *Id.* at 212.

looking for them (as we do in the case of others) inside ourselves, this normal proceeding, too, deserves to be called projection.²³⁷

The projection defense is not unitary,²³⁸ but has both “relatively innocuous” and “more pathological” modes.²³⁹ What separates the two modes is that in more innocuous cases, patients can articulate their fears in therapy, whereas in more pathological cases, patients cannot. What all cases share is four steps: (1) the world presents a distressing idea to the patient; (2) the patient represses the idea to avoid self-reproach; (3) the idea is projected or externalized to the outside world, to which the patient relates with distrust; and (4) the patient rejects the idea rather than empathize with it, as the patient would in a case of projective identification.²⁴⁰

B. Justifying Human Action

Outside the mushy middle, abortion interlocutors are prone to projection. The distressing idea being fended off at the extreme Right and Left is that not all abortions are the same. What’s distressing about the idea is that it puts one in the position of making moral judgments about the worthiness of a given woman’s claim to a given abortion. Who are we to say whether an abortion is necessary, not necessary but excused, or “positively indecent”? And what are the implications of making such judgments?

237. 12 SIGMUND FREUD, *On the Mechanism of Paranoia*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 59, 66 (James Strachey ed. & trans., 1958) (1911).

238. For a history of the phenomenon, see Aubrey Lewis, *Paranoia and Paranoid: A Historical Perspective*, 1 PSYCH. MED. 2, 2–11 (1970), <https://www.cambridge.org/core/journals/psychological-medicine/article/abs/paranoia-and-paranoid-a-historical-perspective/C1BDE1E255ED3A855CCA2586F01D89E0> [https://doi.org/10.1017/S0033291700039969].

239. Zareena Kheshgi-Genovese, *The Crystallization of a Paranoid Symptom: Three Theories*, 24 CLINICAL SOC. WORK J. 49, 49 (1996), <https://link.springer.com/article/10.1007/BF02189941> [https://doi.org/10.1007/BF02189941].

240. See FREUD, *supra* note 227 (“She would have had to accept the judgement pronounced from inside; she could reject the one arriving from outside. *In that way the judgement, the reproach, was kept away from her ego.*”).

For a half-century after *Roe*, the Supreme Court took the position that a pregnant woman had a constitutional right to an early abortion. Before *Roe*, the ALI deemed therapeutic abortions justified (read: necessary) and therefore non-criminal, which might suggest there is nothing wrong with having a therapeutic abortion. That, however, misreads the grammar or criteria of “justification.”²⁴¹ To justify an action is “to give reasons for doing it: not to say, to brazen it out, to glory in it, or the like.”²⁴² If, as some legal philosophers argue, we “approve, support, applaud” a justified action,²⁴³ then it would make little sense to insist that the person who performed the action *justify* himself at all. We do not ask the Good Samaritan how, having found a man beaten, robbed, and left for dead by the side of the road, he justifies tending the man’s wounds, taking him to an inn, prepaying his bill, and offering him aid and succor.²⁴⁴ What would it mean to ask the Good Samaritan to justify helping others in their hour of need? Good Samaritans do not

241. “Grammar in this sense is not a set of verb declensions and conjugations; rather, it is more like an accounting of acceptable and accepted uses of language.” Bruce A. Markell, *Truth?*, 72 IND. L.J. 1115, 1128 (1997). Markell elaborates Wittgenstein’s notion of grammar, which

governs the accepted syntax of sense The effect is not unlike the process by which an architect determines whether a particular bolt should be used to fasten two beams. Some bolts—like some words—can be used in many different situations; others are specially made for only a few. A trained architect—like a mature and competent speaker of a language—can select which bolt, or word, is appropriate because it has been designed to apply to the particular case at hand.

Id.

242. J.L. AUSTIN, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 175, 176 (J.O. Urmson & G.J. Warnock eds., Oxford 3d ed. 1979).

243. LEO KATZ, BAD ACTS AND GUILTY MINDS 65 (1987); see George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISR. L. REV. 367, 373 (1973) (“When we justify a choice between evils, we applaud the defendant’s judgment in choosing the superior value.”); Larry Alexander, *Self-Defense, Justification, and Excuse*, 22 PHIL. & PUB. AFFS. 53, 53 (1993) (explaining that because justified acts vindicate the actor’s rights and violate no one else’s rights, they are not “regrettable”).

244. For the Parable of the Good Samaritan, see *Luke* 10:25–37. See also Daniel Yeager, *Cop Killers*, 48 CRIM. L. BULL. 428, 431 (2012) (detailing the story of the Good Samaritan).

need to justify their actions because there is nothing *wrong* with being a Good Samaritan.²⁴⁵

Paradigmatic instances of justification—such as using deadly force to save your own or someone else’s life—*do* need to be justified, and should not be applauded. To say that an act of deadly force is justified is to say that such action is the permissible, sensible, right, or good thing to do in that it is *necessary* on those facts, not a matter of choice.²⁴⁶ There *are* actions that someone justified in using deadly force could take that would be worth applauding, such as subduing or talking a suspect into turning himself in, even at considerable risk to the justified actor. A warning shot or aiming low would be next best, but killing a person, even lawfully, is at best a regrettable thing to do, something that could be *at best* justified. Who would applaud a killing?²⁴⁷ The problem for justified actors is *being* in a situation with no non-problematic course of action, where the best one can do is to do what is necessary, but “good” only in a tragic sense of the term.

In her review of Judge Robert Bork’s book, *The Tempting of America*, Suzanna Sherry argues that “[t]he implication that those who support *Roe* view abortion as a positive good—rather than as a lamentable but sometimes necessary private choice—is a manipulative and

245. Consider the last lines of Terry Teachout’s review of four books on Frank Sinatra.

But when the last standing ovation has died away and the fully comprehending biography is finally written, we will be left with something in which conventional notions of honor play no part: the records, those haunting testaments of passion and fear that arise from and explain his life—and, perhaps, justify it as well.

Terry Teachout, *An American Icon*, N.Y. TIMES (Nov. 5, 1995), https://www.ny-times.com/1995/11/05/books/an-american-icon.html?unlocked_article_code=1.OVA.PWDw.m9jY9leJ9dy7&smid=url-share. Teachout thinks Sinatra’s life was other than exemplary; otherwise there would be nothing for Sinatra’s records *to* justify. Unless Sinatra has done something wrong, there would be no *call* for justification. Yeager, *supra* note 244. And what may complicate our judgment of Sinatra is that those aspects of his life that need justification are the same that produced the beautiful art.

246. AUSTIN, *supra* note 242.

247. Giving medals to soldiers who commit justifiable killings expresses our relief that someone else is willing to do our dirty work for us more than our sense that killing others—even enemies—is other than regrettable.

derogatory tactic used by those who oppose abortion.”²⁴⁸ Moreover, the tactic bespeaks the Right’s intention to arouse suspicion that what the Left thinks the world needs is more abortions. As Khiara Bridges has recorded, however, those suspicions get no support from Bill Clinton’s “safe, legal, and rare,” from Barack Obama’s “nobody’s pro-abortion,” or from Hillary Clinton’s trimmed down “safe and legal.”²⁴⁹

For Professor Sherry to call out abortion as “lamentable”—even while defending it as “necessary”²⁵⁰—should not be taken to insinuate that abortion is “shameful” or an action for which one must apologize.²⁵¹ To do what is necessary may be regrettable, but is the proper subject of neither shame nor apology, which are responses more suitable to Hollywood’s Winona Ryder stealing \$5,500 in clothes from a Beverly Hills Saks in 2001,²⁵² or to Donald Trump sexually battering journalist E. Jean Carroll in a New York City Bergdorf Goodman three decades ago, then defaming her in 2019 by denying it.²⁵³ We withdraw our disapproval of necessary actions because necessity entails choicelessness; or if there is choice, the choice has been foisted on us.²⁵⁴ It is

248. Suzanna Sherry, *Original Sin*, 84 NW. U. L. REV. 1215, 1216 n.9 (1990) (reviewing BORK, *supra* note 133).

249. Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State*, 121 COLUM. L. REV. 1017, 1047 nn.132–33 (2021) (reviewing DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019)).

250. See Sherry, *supra* note 248; Wolf, *supra* note 22, at 28 (calling abortion “a necessary evil”); see also CONNIT, *supra* note 74, at 150 (noting that at the time of *Roe*, “Americans seemed . . . to make a distinction between their personal dislike of abortion, their personal actions with regard to abortion, and their willingness to allow it to be legal”).

251. Within a discussion of the incontestably vulnerable and marginalized lives of Black women, reflected by their higher abortion rates, Professor Bridges does take it that way. Bridges, *supra* note 249, at 1048 (citations omitted).

252. See Daniel S. Levine, *Winona Ryder Opens Up About Leaving Hollywood After 2001 Shoplifting Arrest: “I Checked Out,”* PEOPLE (Aug. 30, 2024, at 21:29 ET), <https://people.com/winona-ryder-opens-up-about-leaving-hollywood-after-2001-shoplifting-arrest-i-checked-out-8704842>.

253. See Becky Sullivan et al., *A Jury Finds Trump Liable for Battery and Defamation in E. Jean Carroll Trial*, NPR (May 9, 2023, at 17:49 ET), <https://www.npr.org/2023/05/09/1174975870/trump-carroll-verdict>.

254. In defending the right to an abortion resulting from voluntary sex, Judith Jarvis Thomson voices a pregnant person’s lack of agency by noting that we do not blame a homeowner when a burglar enters a stuffy room through an open window (or

important to qualify that our withdrawal of disapproval of an action—on the basis that it could not have been otherwise—is not automatically to approve of the action.²⁵⁵ The distinction may seem fine, but what is just is not necessarily what is praiseworthy.

If not all abortions are the same, then one must take positions on whether to justify an abortion as necessary, excuse it (as we would someone who has wrongfully caused harm by mistake or accident), or in the most extreme cases, prohibit it. Rather than take on this burden of sitting in judgment of others—rather than confront this complication at the risk of inflicting irreversible harm on either a pregnant person or an incipient being—the distressing idea is copied and put off on the Other as follows.

1. Projection from the Right

The ALI model statute justified abortions in cases of rape, incest, fetal deformity, or profound threats to maternal health, including mental health.²⁵⁶ Unjustified abortions under the ALI were felonies—especially so after twenty-six weeks—but in no case were considered murder.²⁵⁷ By 1969, maternal mental health accounted for 93.7% of all abortions.²⁵⁸ The significance of this fact is that the justified abortions contemplated by the ALI were, as all justified acts must be, considered necessary: a lesser evil.

Again, who are we to say to a person seeking an abortion that we find her reasons not justified or excused (perhaps even if “positively indecent”), but outright prohibited? Scholars of reproductive justice have demonstrated the impossible circumstances that pregnant women

when “an innocent person . . . blunders or falls in”), or when a burglar gets past defective bars on the window. Thomson, *supra* note 6, at 58–59.

255. Cf. AUSTIN, *supra* note 242, at 181 n.1 (“Hence if somebody says he blames me for something, I may answer by giving a *justification*, so that he will cease to disapprove of what I did . . .”).

256. “Of the first eleven states adopting the A.L.I. provisions, only California chose to exclude the A.L.I.’s provision on fetal defects.” Rhoden, *supra* note 66.

257. MODEL PENAL CODE § 230.3 (A.L.I., Proposed Official Draft 1962) (“Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.”).

258. See GREENHOUSE & SIEGEL, *supra* note 79, at 106 (citation omitted).

in poverty face:²⁵⁹ some 42% of women who obtain abortions lack financial security.²⁶⁰ In light of that, who could interfere with a financially insecure woman's decision to end a pregnancy? Would we interfere because the pregnancy was not brought about by rape? That seems a calloused non-response to her plight. Or, in less obviously dire circumstances, can we just stand by and say nothing when the decision to abort is on grounds that denigrate not only the embryo/fetus, but also any realistic sense of what is necessary? These calls about how to respond to another's abortion present the distressing idea first that not all abortions are the same, and second that *we* are the ones who must distinguish the necessary/justified procedure from both the excused (even if indecent) and, in the most unusual cases, the illegal. Projection rescues us from having to accept responsibility for that response.

The Right projects the distressing idea that not all abortions are the same onto the Left, whom the Right suspects of demonstrating that idea by a permissive attitude towards intolerably weak bases to abort a pregnancy, sex-selection being a paradigmatic example. There *are* sex-selection abortions in the U.S.²⁶¹ It is the extent of the problem that is mysterious.²⁶² Given that women rarely announce their reasons for

259. See, e.g., Jill Wieber Lens, *Miscarriage, Stillbirth, and Reproductive Justice*, 98 WASH. U. L. REV. 1059, 1065–69 (2021) (and sources cited therein) (detailing examples of “reproductive oppression” of poor pregnant women and the efforts by reproductive justice advocates to correct that oppression).

260. See V. Noah Gimbel, *Fetal Tissue Research & Abortion: Conscription, Commodification, and the Future of Choice*, 40 HARV. J.L. & GENDER 229, 255 (2017) (“[Forty-two percent] of abortion patients in 2008 were poor . . .”).

261. See Sital Kalantry, *Sex Selection in the United States and India: A Contextualist Feminist Approach*, 18 UCLA J. INT'L. L. & FOREIGN AFFS. 61, 72–73 (2013) (“While sex selection abortions are common outside of the United States, the evidence reveals that female feticide is also occurring in the United States.”); Naryung Kim, *Breaking Free from Patriarchy: A Comparative Study of Sex Selection Abortions in Korea and the United States*, 17 UCLA PAC. BASIN L.J. 301, 307 (1999), <https://escholarship.org/uc/item/6nr439zx> [<https://doi.org/10.5070/P8172-3022125>] (“Researchers in the United States have also consistently found that, although most Americans strive for equal numbers of male and female children, sons are preferred as first-born children and as only children.”).

262. See Kim, *supra* note 261, at 308 & n.36 (describing the procedure as “relatively rare” in the U.S. while acknowledging a perhaps more permissive attitude in the works).

aborting,²⁶³ the only way to keep track of sex-selection abortions is by measuring birth ratios of boys to girls.²⁶⁴ Evidence supports that 38% of Americans “would approve the use of abortion for sex selection if a couple already had three children of the same sex, regardless of whether these were boys or girls.”²⁶⁵ The explanation of this high percentage is responders’ perception that the risks of making abortion too easy are outweighed by the risks of making it too hard.²⁶⁶ Evidence also supports that there may be as few as 100 sex-selection abortions yearly in the U.S.,²⁶⁷ in part because amniocentesis is generally not done until the second trimester, when a pregnant person’s risk-aversion toward genetic testing and toward abortion is higher than in the first.²⁶⁸ Rare

263. April L. Cherry, *A Feminist Understanding of Sex-Selective Abortion: Solely a Matter of Choice?*, 10 WIS. WOMEN’S L.J. 161, 164 (1995). Cherry elaborates on the reasons.

A woman can choose to abort the female fetus because of its sex for any of several reasons. There may be familial pressures for her to produce male children. She may consider the cultural denigration of women and girls; she knows that her daughter’s life will be difficult as a woman because of the social, economic, and political obstacles under patriarchy. Or she may have her own preference for male children, which is also culturally produced.

Id. at 217–18.

264. See Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 HARV. L. REV. F. 415, 425 (2021) (providing that in Asia, “the reason for the large demographic disparity in the male-female birth ratio is sex-selection abortion” (citation omitted)); Seema Mohapatra, *Global Legal Responses to Prenatal Gender Identification and Sex Selection*, 13 NEV. L.J. 690, 693 (2013) (“While sex-selective abortion statistics are not well tracked, the male-to-female ratios in many countries suggest sex-selective practices.” (citation omitted)); *id.* (“The normal male-to-female sex ratio should fall within a narrow scope of 104 to 107 boys to every 100 girls. When these ratios are skewed within a population, this often suggests the use of sex-selective abortions” (citation omitted)).

265. Dorothy C. Wertz, *International Perspectives on Ethics and Human Genetics*, 27 SUFFOLK U. L. REV. 1411, 1430 (1993).

266. See CONDIT, *supra* note 74, at 164 (citation omitted).

267. Cherry, *supra* note 263 (deriving from a 1988 survey).

268. *Id.* at 162 nn.3–4; Theresa M. Walker, Note, *California’s Parental Consent Statute: A Constitutional Challenge*, 40 HASTINGS L.J. 169, 193 (1988) (“For minors forced to obtain an abortion after the second trimester, the delay is even more significant. Second trimester abortions are more costly, are provided by fewer clinics, require greater skill to perform, and pose greater risks of uterine perforation, hemorrhage, and other complications.” (citations omitted)).

as it may be, sex-selection abortion is outlawed in some states,²⁶⁹ a result that Justice Clarence Thomas supports.²⁷⁰ Whether such procedures should be lawful poses a double-bind for the Left, for whom (1) patriarchy is promoted by son-preferences through a brutal mode of sex discrimination,²⁷¹ yet (2) the regulation of sex-selection abortion interferes with women's bear-or-beget decisions by questioning their reasons for terminating a pregnancy.²⁷² For the Right, sex-selection is a clear-and-high example of *Roe's* indulgence of "convenience, whim, or caprice"²⁷³ by treating autonomy as a god.²⁷⁴

Piqued by the suggestion that such a superficial basis for abortion might be elected by *any* woman, *all* abortions become equally abhorrent for the Right—even an abortion that originates in rape, which is not at all comparable to a sex-selection abortion. The Right has on occasion dismissed the predicament posed by rape-based pregnancies

269. Yvonne Lindgren, *The Fathers' Veto and Fatherhood as Property*, 101 N.C. L. REV. 81, 116 & n.202 (2022) ("Currently, eleven states ban abortion when the abortion is sought for reasons such as sex-selection . . .").

270. *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 587 U.S. 490, 493–512 (2019) (Thomas, J., concurring).

271. *See* Rebouché, *supra* note 18, at 543–44 (discussing proposed federal legislation regulating sex-selection).

272. *See* Maneesha Deckha, *(Not) Reproducing the Cultural, Racial and Embodied Other: A Feminist Response to Canada's Partial Ban on Sex Selection*, 16 UCLA WOMEN'S L.J. 1, 3 n.8 (2007) (discussing different perspectives on sex-selective abortion among feminists).

273. *Doe v. Bolton*, 410 U.S. 179, 221 (1973) (White, J., dissenting); GREENHOUSE & SIEGEL, *supra* note 79, at 229.

274. According to Michael Stokes Paulsen,

[t]his extreme consequence of the Court's abortion jurisprudence strikes most sensible people as monstrous: surely it cannot be right that abortion can be had solely for the reason that the child that otherwise would be born is a girl! (Or, equally, because he is a boy.) This moral intuition is almost universally shared and is indisputably justified on any of a number of grounds.

Michael Stokes Paulsen, *Five Provocative Pro-Life Proposals*, 35 QUINNIPIAC L. REV. 661, 691 (2017); *see also* John A. Robertson, *Abortion To Obtain Fetal Tissue for Transplant*, 27 SUFFOLK U. L. REV. 1359, 1385–86 (1993) ("Most ethicist commentators in the United States have assumed that such abortions are undesirable, if not immoral. Moreover, few physicians are willing to perform such abortions, even for immigrants from countries whose cultural norms support the selection of the sex of offspring.").

by calling legislation that would allow abortion in such cases “non-laws,” due to the rarity of such pregnancies.²⁷⁵ With justification, Harvard obstetrician Michael Greene calls the Right’s claim that rape is physiologically precluded from culminating in pregnancy “nuts.”²⁷⁶

By suspecting the worst of the Other—who would irresponsibly wipe out a life-in-the-making on a whim such as sex preference—the Right fends off the distressing idea that the reasons for abortion *do* matter by “copying” the idea and attributing it to the Left. (“*They are the ones making the judgments about which abortions to allow!*”) The result? The Right takes the position that the reasons *do not* matter: that all abortions are murder or akin to murder, regardless of fetal development. This is for the Right less distressing than ruling out sex-selection abortions, but ruling some others in. On what grounds might one make such calls, anyway? The example of sex-selection forces the hand of the Right: if the Left is so superficial as to even entertain such a right, then they cannot be trusted to choose which abortions to allow. If put in charge, the Left would allow too many “positively indecent” abortions. To correct the Left’s out-of-whack priorities, the Right adjudges the right to *any* abortion forfeited. All this by operation of the defense mechanism of projection.

The Right also projects onto the Left its suspicion that late abortions, if legal, would abound, ending up in the mind-bending event described by Thomson, whereby the mother, carrying a viable fetus, can “turn round and slit his throat.”²⁷⁷ To prevent such an outcome, the Right says “abortion is murder,”²⁷⁸ a position reinforced by state

275. See GREENHOUSE & SIEGEL, *supra* note 79, at 104–05.

276. See Blythe Bernhard & Tim Townsend, *Where Akin Got the Idea that Rape Victims Rarely Get Pregnant*, SEATTLE TIMES (Aug. 20, 2012, at 21:13 PT), <https://www.seattletimes.com/nation-world/where-akin-got-the-idea-that-rape-victims-rarely-get-pregnant/>; see also Martin, *supra* note 17 (noting 25,000 to 32,000 rapes result in conception annually).

277. Thomson, *supra* note 6, at 66.

278. See, e.g., Jean Rosenbluth, Note, *Abortion as Murder: Why Should Women Get Off? Using Scare Tactics to Preserve Choice*, 66 S. CAL. L. REV. 1237, 1247 (1993) (“Prolife forces have waged their campaign against abortion by basing their opposition to it on the syllogism that killing innocent human life is murder, fetal life is innocent human life, and therefore abortion is murder.”); Ernest Van den Haag, *Is There a Middle Ground?*, NAT’L REV., Dec. 22, 1989, at 31 (“A principled and intense minority of Americans think of abortion as murder.”); Paul V. Harrington, *Abortion*, 32 LINACRE Q. 339, 344 (1965) (“Abortion is murder particularly and precisely

statutes enjoining hospitals from throwing fetal remains of abortion in the garbage.²⁷⁹ Yet less than 1% of all abortions occur after twenty weeks,²⁸⁰ leaving one to wonder what is gained by the Left in defending such a right, absent an imminent threat to the mother's life. Recall that 30% of responders told Gallup they would outlaw *no* abortions. In actuality, Alaska, Colorado, the District of Columbia, New Mexico, New Jersey, Oregon, and Vermont *do* outlaw no abortions, invariant to gestation,²⁸¹ though finding a clinic to perform late abortions presents non-trivial barriers.²⁸² When not under the spell of projection, the Right is not off base that there may be too many abortions (over 1,000,000 in the U.S. in 2023),²⁸³ from too many women (30% will have at least one

because it fulfills in every respect the definition of murder—the willful, direct taking of the life of an innocent person without justifiable cause.”).

279. See, e.g., *Doe v. Rokita*, 54 F.4th 518, 519 (7th Cir. 2022) (upholding as constitutional Indiana statutes that require providers to dispose of fetal remains by cremation, burial, or placing them in custody of the mother).

280. Katherine Kortsmit et al., *Abortion Surveillance—United States, 2021*, CDC (Nov. 24, 2023), https://www.cdc.gov/mmwr/volumes/72/ss/ss7209a1.htm?s_cid=ss7209a1_w#T10_down (Table 10); Milan Markovic, *Charging Abortion*, 92 FORDHAM L. REV. 1519, 1554 n.263 (2024) (explaining that 89% of abortions take place in first trimester); Brownstein & Dau, *supra* note 189, at 699 (“[T]he vast majority of abortions . . . are performed during the first trimester of pregnancy . . .”); *id.* at 703 n.38 (“[V]ery few abortions occur in the third trimester.”); David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 20 n.109 (2023) (“Second trimester abortion is rare—only 6.2% of abortions occur in the second trimester. Third trimester abortions are extremely rare, accounting for less than 1% of abortions. But as abortion becomes more difficult to access, it is possible that the number of later abortions increase[s] and that some of these abortion seekers will self-manage with pills.”).

281. See Oriana González & Sabrina Moreno, *How Late in Pregnancy Each State Allows Abortions*, AXIOS (Dec. 15, 2023), <https://www.axios.com/2022/05/14/abortion-state-laws-bans-ro-supreme-court>.

282. Betsy Anne Sugar, Note, *Mixed-Up Origins: The Case for a Gestational Presumption in Embryo Mix-Ups*, 76 VAND. L. REV. 1521, 1551 n.255 (2023).

283. See Selena Simmons-Duffin, *Despite Bans in Some States, More Than a Million Abortions Were Provided in 2023*, NPR (Mar. 19, 2024, at 00:02 ET), <https://www.npr.org/sections/health-shots/2024/03/19/1238293143/abortion-data-how-many-us-2023>; Wolf, *supra* note 22, at 32 (“Fifty-seven percent of unintended pregnancies come about because the parents used no contraception at all.”); *id.* at 26 (explaining that abortion in the U.S. “ends more than a quarter of all pregnancies”).

by age forty-five),²⁸⁴ too many of whom endure more than one (25% of all abortions are not the patient's first).²⁸⁵ Still, those numbers are not evidence that all abortions are the same, a fact that the Right, due to projection, cannot bring itself to acknowledge.

By expecting the worst of the Left, the Right fends off responsibility for making judgments about abortions by pushing such judgments onto the Left for the subconscious purpose of criticizing those very judgments. But like the Left's, the Right's worries are not made up out of thin air; they instead owe to provocations both subtle and not so subtle.

First, a subtle provocation. In her book, *Decoding Abortion Rhetoric*, Celeste Condit traces the Right's advantages in abortion rhetoric not only to its haughty ideographs (Pro-Life, Anti-Abortion), but also to the Left's abandonment of its classless origins in favor of a platform suited better to well-to-do women than to the many, for whom poverty and autonomy were contradictory goods. In this regard, Condit's project is a Leftist critique of the Left, in the vein of George Orwell's Cold War masterpieces, *Animal Farm*²⁸⁶ and *1984*.²⁸⁷ As Condit tells it, the struggle for abortion rights began as a very 1960s conflict between labor and capital, i.e., between low-wage-earning women (who bore the brunt of reproductive burdens) and Christian capitalist men (whose reproductive goals were to be fruitful and multiply profit-generating producers and consumers).²⁸⁸ The classless struggle, however, soon became a contest between the bourgeoisie and their embryos/fetuses, refereed by physicians and the State.²⁸⁹ Second-wave feminists' fight against patriarchy thus became too tied to *laissez-faire*

284. Compare Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion*, 117 OBSTETRICS & GYNECOLOGY 1358, 1365 (2011) (explaining that in 2008, 30% of women were expected to have an abortion by age forty-five), with Mathilde Cohen, *The Law of Placenta*, 31 YALE J.L. & FEMINISM 337, 341 (2020) ("[N]early 1 in 4 women (23.7%) will have an abortion by age 45 . . .").

285. Kortsmit et al., *supra* note 280, at tbl. 9.

286. ANIMAL FARM, GEORGE ORWELL (Harcourt, Brace & Co. 1946) (1945).

287. 1984, GEORGE ORWELL (New Am. Libr. 1952) (1949).

288. CONDIT, *supra* note 74, at 63, 74 n.9.

289. See *id.* at 188, 194–95.

notions of autonomy,²⁹⁰ cutting out not only the poor, but also feminists for whom abortion was not a key to agency, but a public-relations scam.

For those feminists, abortion was a device to enrich obstetricians, 93% of whom were male,²⁹¹ and to liberate men—many of whom to this day adjudge birth control as a woman’s responsibility²⁹²—from the consequences of sex.²⁹³ Also within feminism was a critique of liberalized abortion access for its dependency on arguments that had a palpable maleness to them, given their emphasis on property (“my body”), violence (destruction of an incipient life), and exclusivity (banishing male opinions while women freely criticized the Vietnam War’s conscription of young men).²⁹⁴ On the brief in *Roe* for Women for the

290. See *id.*; see also Carol Mason, *Who’s Afraid of Virginia Dare? Confronting Anti-Abortion Terrorism After 9/11*, 6 U. PA. J. CONST. L. 796, 801–02 (2004) (“The radical feminist goal was not only to get the government ‘off our backs’ but also to obtain social justice in the form of a redistribution of economic and social power. . . . [T]here was more at stake than ‘stylish liberalism’ and reactionary libertarianism that sought rights for the individual.” (quoting Lucinda Cisler, *Unfinished Business: Birth Control and Women’s Liberation*, in *SISTERHOOD IS POWERFUL* 245, 245–46 (Robin Morgan ed., 1970))).

291. Now, only about 17% of current OB-GYN residents are men. See Soumya Karlamangla, *Male Doctors Are Disappearing From Gynecology. Not Everybody Is Thrilled About It*, L.A. TIMES (Mar. 7, 2018, at 03:00 PT), <https://www.latimes.com/health/la-me-male-gynos-20180307-htmstory.html>.

292. See Jennifer A. Reich & Claire D. Brindis, *Conceiving Risk and Responsibility: A Qualitative Examination of Men’s Experiences of Unintended Pregnancy and Abortion*, 5 INT’L J. MEN’S HEALTH 133, 140 (2006) (noting that in a study of men whose sexual partners had undergone an abortion, the majority stated that “pregnancy prevention is the primary responsibility of women”); see also Shari Motro, *Preglimony*, 63 STAN. L. REV. 647, 648 (2011). But cf. *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972) (“It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . .”).

293. See DANIEL K. WILLIAMS, *DEFENDERS OF THE UNBORN* 151 (2016); see also Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman’s Right to Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. WOMEN & L. 91, 116 (1997) (“Early feminist opposition to abortion recognized that abortion itself did not empower women, but rather allowed male relinquishment of responsibility for pregnancy.” (citation omitted)).

294. See Sidney Callahan, *Feminist as Anti-Abortionist*, in *BEFORE ROE V. WADE*, *supra* note 79, at 46, 46–49; Sidney Callahan, *The Impact of Religious Beliefs on Attitudes Toward Abortion*, in *DEFINING HUMAN LIFE* 279 (Margery Shaw & A. Edward Doudera eds., 1983).

Unborn, amici for defendant Dallas County D.A. Henry Wade argued that demand for abortion should not be seen as a call for more clinics, but as a symptom of the state's failure to support low-income women, for whom bearing a child is made impossible by an indifferent capitalist apparatus.²⁹⁵ A classless advancement of a woman's desire to make her own choices "pruned" into an ideographic Right to Choose that was anything but classless.²⁹⁶ With middle-class women speaking for *all* women, the fight was against state coercion, not poverty-based choicelessness perpetuated by *laissez-faire*.²⁹⁷ The Left's inadvertent provocation was to leave low-income women off the bus. And for the Right to tactically cast its attacks on abortion rights in feminist language in this way continues today.²⁹⁸

A less subtle provocation is embedded in the "hegemonic binary of 'baby' or 'clump of cells,'" ²⁹⁹ i.e., a binary of "zygote-embryonic-fetal personhood" versus a "morally insignificant lump of tissue."³⁰⁰ To say, as the Left is prone to, that abortion does not "end the existence of a morally significant entity,"³⁰¹ is provocative, perhaps purposely so. As responses to provocations tend to go, however, the Right's response

295. See generally Motion for Leave to Submit a Brief Amici Curiae Brief of Women for the Unborn et al. in Support of Appellees, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70–18), 1971 WL 134284 (Oct. 12, 1971) (arguing that the demand for abortion is a failure of the state to support low-income women).

296. See CONDIT, *supra* note 74, at 188.

297. *Id.* at 194–95.

298. See generally Tali R. Leinwand, *Strange Bedfellows: The Destigmatization of Anti-Abortion Reform*, 30 COLUM. J. GENDER & L. 529 (2015) (discussing *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015), and explaining how pro-life amici framed UPS driver Peggy Young's Supreme Court case against the company for failing to accommodate her pregnancy as a feminist endeavor).

299. Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, and Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1661 (2022) (citation omitted); cf. Joel Feinberg, *Abortion*, in MATTERS OF LIFE AND DEATH, 256, 290 (Tom Regan ed., 2d. ed. 1986) ("The one-celled speck of protoplasm, or small cluster of cells, of which we speak has none of the characteristics we normally have in mind when we speak of persons."); Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331, 363 (1995) ("The decision whether to consider a fetus a 'potential life' or a mere mass of protoplasm inevitably involves a metaphysical judgment about the meaning of life.").

300. Caitlin E. Borgmann, *The Meaning of "Life": Belief and Reason in the Abortion Debate*, 18 COLUM. J. GENDER & L. 551, 585 (2009).

301. See, e.g., Bridges, *supra* note 249, at 1048.

is likely an overreaction, a symptom of the defense mechanism of projection. While Nussbaum and Kahan skillfully defend the emotions as rational, they also remind us that the emotions can misfire through excessive attachment,³⁰² which we may infer fairly describes the Right's relation to, or conviction about, the moral significance of conception.

2. Projection from the Left

This same process of projection occurs on the Left, which fends off the distressing idea that not all abortions are the same by copying the idea and projecting it onto the Right. Having absorbed the Right's rhetoric about abortion-as-murder, the Left feels that to accommodate that characterization, women must accept motherhood through "painful childbirth"³⁰³ as punishment for acting on their libidinal urges. What the Left projects is the idea that the Right, left to make its own calls, might ban abortion even where there is an obvious lack of agency on the part of the pregnant person, as in the case of rape. To make sure that the most necessary abortions are not precluded, the Left must preserve the possibility of *all* abortions, no matter how indecent (sex-selection and late abortions included). This process of projection, which takes place subconsciously, defends against a distressing idea that would place us in the intolerable position of having to make calls on the moral differences between abortions. By taking to heart the Right's claim that abortion is murder, the Left imagines Thomson's desperate and frightened fourteen-year-old, impregnated by rape, getting shipped off to prison rather than being placed in a doctor's care. If the Right would deny a fourteen-year-old rape survivor access to do what is necessary, then in the eyes of the Left, the Right cannot be trusted to make *any* calls about the permissibility of abortion.

But what is the Right actually capable of? "Post-*Dobbs*," we know, "abortion regulations are left up to the states."³⁰⁴ Left to their devices, will states jail women as murderers for obtaining abortions?

302. See *supra* Part IV.

303. See Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 465 (2013).

304. Isabelle Ruiz, Note, *The Case for Trait-Specific Abortions in a Post-Dobbs World*, 2023 U. ILL. L. REV. 1839, 1850 (2023); see *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022) ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.").

So far that seems far-fetched.³⁰⁵ But what about abortion providers?³⁰⁶ If abortion really is murder, as 36.8% of those polled by Gallup once indicated,³⁰⁷ then the states would have no choice but to throw the book at providers, just as they would at “someone who hires a gunman to murder her child.”³⁰⁸ Or is it really, as *Dobbs* claims, open to the states to define murder any way they want?

That seems just as far-fetched. In every state, serious crimes against persons and their property—burglary, arson, rape, robbery, and kidnapping—are defined and punished similarly. No U.S. jurisdiction makes any of those offenses non-criminal, punishable as misdemeanors, or subject to proof other than by their traditional hornbook elements. Murder, defined as an intentional or extremely reckless killing of another,³⁰⁹ is in the same boat. Sentences for murder in the U.S. are the harshest in the world.³¹⁰ Only six states provide for a minimum

305. *But cf.* David S. Cohen, Greer Donley & Rachel Rebouché, *The Harshest Abortion Restrictions Are Yet to Come*, ATLANTIC (July 11, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/pro-life-legal-strategies-abortion/661517/> (anticipating state efforts to penalize “people seeking abortions and the people assisting them, not just providers”); Susan Frelich Appleton & Laura A. Rosenbury, *Reflections on “Personal Responsibility” After Covid and Dobbs: Doubling Down on Privacy*, 72 WASH. U. J.L. & POL’Y, 129, 150 (2023) (“[I]n the wake of *Dobbs*, some legislators advocate for departing from the traditional immunity accorded to the abortion patient and criminalizing her conduct . . .”).

306. *See, e.g.*, William J. Aceves, *The Problem with Dobbs and the Rule of Legality*, 111 GEO. L.J. ONLINE 75, 79 (2022) (“Through *Dobbs*, the Supreme Court has triggered a mass criminalization event in the United States, where millions of people may now be prosecuted for acts that were once . . . protected.”).

307. *See* RONALD DWORKIN, *LIFE’S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 13 (1993) (detailing a poll taken in 1991 on behalf of Americans United for Life).

308. Rosenbluth, *supra* note 278, at 1238 (citation omitted).

309. *See, e.g.*, MODEL PENAL CODE § 210.2(1)(a)-(b) (1962).

310. *See* Press Release, *New Analysis Shows U.S. Imposes Long Prison Sentences More Frequently than Other Nations*, COUNCIL ON CRIM. JUST. (Dec. 20, 2022, at 05:00 ET), <https://counciloncj.org/new-analysis-shows-u-s-imposes-long-prison-sentences-more-frequently-than-other-nations/>; Marvin E. Frankel & Leonard Orland, *A Conversation About Sentencing Commissions and Guidelines*, 64 U. COLO. L. REV. 655, 658 (1993) (“It was that time of lawless judicial discretion . . . when the U.S. won its place as the country with the harshest prison sentences in the world.”).

sentence for murder that is less than ten years: Arkansas,³¹¹ Illinois,³¹² Kansas,³¹³ Montana,³¹⁴ Texas,³¹⁵ and Virginia.³¹⁶ All six of those states provide for a maximum sentence well in excess of that.

Punishments for illegal abortions, however, are nowhere near as severe as those for murder. Only nineteen states impose abortion restrictions that take effect before fetal viability; of those, thirteen have total abortion bans: Alabama,³¹⁷ Arkansas,³¹⁸ Idaho,³¹⁹ Indiana,³²⁰

311. See ARK. CODE ANN. § 5-10-103(b) (West 2025) (second-degree murder is a Class A felony); ARK. CODE ANN. § 5-4-401(a)(2) (West 2025) (low term for a Class A felony is six years).

312. See 720 ILL. COMP. STAT. ANN. 5/9-2(d) (West 2026) (second-degree murder is a Class 1 felony); 730 ILL. COMP. STAT. ANN. 5/5-4.5-30(a) (West 2026) (low term for a Class 1 felony is four years).

313. See KAN. STAT. ANN. § 21-5403(b) (West 2025) (second-degree murder is a level 1 felony for intentional killing or a level 2 felony for reckless killing); KAN. STAT. ANN. § 21-6804 (West 2025) (low term for level 1 felony is twelve years and level 2 felony is nine years).

314. See MONT. CODE ANN. § 45-5-103(4) (West 2025) (low term for second-degree murder is two years).

315. See TEX. PENAL CODE ANN. § 19.02(d) (West 2025) (murder caused by “the immediate influence of sudden passion” is a second-degree felony); TEX. PENAL CODE ANN. § 12.33(a) (West 2025) (low term for second-degree felony is two years).

316. See VA. CODE ANN. § 18.2-32 (West 2026) (low term for second-degree murder is five years).

317. See ALA. CODE § 26-23H-6(a) (2026) (abortion is a Class A felony); ALA. CODE § 13A-5-6 (2026) (Class A felony is punishable by ten to ninety-nine years).

318. See ARK. CODE ANN. § 5-61-304(b) (West 2025) (total abortion ban maximum is ten years).

319. See IDAHO CODE ANN. § 18-622(1) (West 2023) (total abortion ban term is punishable by two to five years).

320. See IND. CODE ANN. § 16-34-2-7(a) (West 2025) (total abortion ban is level 5 felony); IND. CODE ANN. § 35-50-2-6 (West 2025) (level 5 felony is punishable by one to six years).

Kentucky,³²¹ Louisiana,³²² Mississippi,³²³ North Dakota,³²⁴ Oklahoma,³²⁵ South Dakota,³²⁶ Tennessee,³²⁷ Texas,³²⁸ and West Virginia.³²⁹ Three more—Florida,³³⁰ Georgia,³³¹ and Iowa³³²—ban abortion after six weeks. Yet for an illegal abortion at any stage of pregnancy, now some four years since *Dobbs*, only Alabama has a

321. See KY. REV. STAT. ANN. § 311.772(3)(b) (West 2025) (total abortion ban is a Class D felony); KY. REV. STAT. ANN. § 532.020(1)(a) (West 2025) (Class D felony is punishable by one to five years).

322. See LA. STAT. ANN. § 14:87.9(b)(1) (West 2025) (total abortion ban for prescribing abortion-inducing drugs to pregnant women is punishable by “not less than one nor more than five years”); LA. STAT. ANN. § 14:87.8(B) (2025) (late-term abortion is punishable by “not less than one year nor more than fifteen years”).

323. See MISS. CODE ANN. § 41-41-45(4) (West 2026) (total abortion ban is punishable by one to ten years).

324. N.D. CENT. CODE ANN. § 12.1-19.1-02 (West 2026) (total abortion ban punishable is a Class C felony); N.D. CENT. CODE ANN. § 12.1-32-01(4) (West 2026) (ban is punishable by a maximum of five years).

325. See OKLA. STAT. ANN. tit. 21, § 861 (West 2026) (total abortion ban is punishable as a Class D1 felony); OKLA. STAT. ANN. tit. 21, § 20N(A)(351)(B) (West 2026) (Class D1 felony is punishable by “not more than five (5) years and [one] shall serve at least twenty (20%) of the sentence imposed”).

326. See S.D. CODIFIED LAWS § 22-17-5.1 (2026) (total abortion ban punishable as a Class 6 felony); S.D. CODIFIED LAWS § 22-6-1(9) (2026) (Class 6 felony is punishable by two years).

327. See TENN. CODE ANN. § 39-15-213(b) (West 2026) (total abortion ban is punishable as a Class C felony); TENN. CODE ANN. § 40-35-111(b)(3) (West 2026) (Class C felony is punishable by three to fifteen years).

328. See TEX. HEALTH & SAFETY CODE ANN. §§ 170A.002(a), 170A.004(b) (West 2025) (total abortion ban is punishable as a first-degree felony); TEX. PENAL CODE ANN. § 12.32(a) (West 2025) (first-degree felony is punishable by five to ninety-nine years).

329. See W. VA. CODE ANN. § 61-2-8(a) (West 2026) (total abortion ban is punishable by three to ten years).

330. See FLA. STAT. ANN. § 390.0111(10)(a) (West 2023) (ban after six weeks is punishable as a third-degree felony); FLA. STAT. ANN. § 775.082(3)(e) (West 2025) (maximum term for third-degree felony is five years).

331. See GA. CODE ANN. § 16-12-141(b) (West 2025) (ban after a heartbeat is detected); GA. CODE ANN. § 16-12-140(b) (West 2025) (ban is punishable by one to ten years).

332. See IOWA CODE ANN. § 146E.2(2)(a) (West 2026) (ban after a heartbeat is detected); IOWA CODE ANN. § 146B.3 (West 2026) (no criminal penalties for abortion).

minimum sentence of as many as ten years.³³³ No other state's minimum sentence approaches Alabama's in length; in fact, only Texas³³⁴ and Louisiana³³⁵ impose minimums as long as five years against providers. As a frame of reference, the presumptive or middle term in California for first-degree robbery is six years,³³⁶ non-aggravated rape is six years,³³⁷ and the punishment for aggravated kidnapping is a life sentence.³³⁸

It is hard to absorb *Dobbs*' insinuation that whether to criminalize murder at all, or how to define murder, is *discretionary* on the part of legislatures. If abortion really is murder, then it is an especially cruel mode of murder at that. In *Life's Dominion*, Ronald Dworkin notes polling data where 60% of responders recognized a fetus' right to life, but only 14% would criminalize the taking of such life when the mother's life is not on the line.³³⁹ Dworkin understandably found the data "baffling."

No one can consistently hold that a fetus has a right not to be killed and at the same time hold it wrong for the government to protect that right The most basic responsibility of government . . . is to protect the interests

333. See ALA. CODE § 26-23H-6(a) (2026) (abortion is a Class A felony); ALA. CODE § 13A-5-6(a)(1) (2026) (low term for a Class A felony is ten years). Since *Dobbs*, Alabama has commenced more pregnancy-related prosecutions (192) than any other state. Only Oklahoma (112) comes even close. See *Pregnancy as a Crime: An Interim Update on the First Two Years After Dobbs*, PREGNANCY JUST. (Sep. 2025), <https://www.pregnancyjusticeus.org/wp-content/uploads/2025/09/Pregnancy-as-a-Crime-An-Interim-Update-on-the-First-Two-Years-After-Dobbs.pdf>.

334. See TEX. HEALTH & SAFETY CODE ANN. § 170A.004(b) (West 2025) (abortion is punishable as a first-degree felony); TEX. PENAL CODE ANN. § 12.32(a) (West 2025) (low term for first-degree felony is five years).

335. See LA. STAT. ANN. § 14:87.9(B)(1) (West 2025) (ban on prescribing abortion-inducing drugs to pregnant women is punishable by a five-year maximum); LA. STAT. ANN. § 14:87.8(B) (West 2025) (ban on late-term abortion is punishable by a one-year minimum).

336. See CAL. PENAL CODE § 213 (West 2026).

337. See CAL. PENAL CODE § 264(a) (West 2026).

338. See CAL. PENAL CODE § 209(a)–(b) (West 2026).

339. See DWORKIN, *supra* note 307, at 14.

of everyone in the community, particularly the interest of those who cannot protect themselves.³⁴⁰

If abortion is murder, then Paul Hill, who murdered Florida “abortionist” Dr. John Britton and his bodyguard James Barrett, should have been considered a hero by the Right.³⁴¹ In actuality, the day after Hill was executed, the *Tampa Bay Times* wrote that members of the Right preferred not “to be associated with a murderer.”³⁴² Because Britton had been performing thirty abortions each Friday for two decades since *Roe*, Hill could have prevented 30,000 murders if he had killed Britton on his first day of work. Abortion protesters’ refusal to get behind Hill for preventing that greater evil is therefore hard to decode.

The Right’s characterization of abortion as murder cannot stand with a leave-it-to-the-states mentality. To suggest that it can is traceable to a process of projection by which the Right, in overstating what an abortion is, has provoked the Left into taking an abortion for less than it is. The Left too has overreacted to the provocation, leading it to defend the rarest, most “indecent” modes of abortion so as to disable the Right from living up to the Left’s worst expectations. An overreaction on the Left’s part, yes; delusional, no. Like sex-selection abortions, it is the occurrence of late abortions—however rare—that the Right sees as an opening to “covertly” wipe out lawful abortion altogether through “incremental restrictions” on abortion in ways approved by at least 50% of the public.³⁴³ By legislatively attacking weak links within the pro-choice framework, such as late abortions and sex-selection, the Right “target[s] an unpopular procedure without explicitly linking its ban to the larger goal of limiting *all* abortion rights.”³⁴⁴

340. *Id.*

341. Leonora LaPeter & Candace Rondeaux, *Hill’s Last Words Preach Violence*, TAMPA BAY TIMES (Sep. 1, 2005), <https://www.tampabay.com/archive/2003/09/04/hill-s-last-words-preach-violence/>.

342. *Id.* This is not to say Hill had no supporters, about 40 of whom, many of them carrying posters showing pictures of aborted fetuses, gathered in a taped-off protest area set aside for them by prison officials. See Lise Fisher & Tim Lockette, *Hill Killed Abortion Doctor, Guard in 1994*, GAINESVILLE SUN (Sep. 4, 2003, at 00:42 ET), <https://www.gainesville.com/story/news/2003/09/04/hill-killed-abortion-doctor-guard-in-1994/31644391007/>. Dr. Barrett’s wife, June, was also shot by Hill, albeit non-fatally.

343. Leinwand, *supra* note 298, at 541–42.

344. *Id.* (emphasis added).

These projections, suffered by both sides, must not be taken as a claim that neither side genuinely believes what they are saying about autonomy, personhood, and murder. That those at the extremes buy into a myth is no cause to question their sincerity—their willingness to stand by their beliefs, even after they have faded³⁴⁵—but we *can* question the possibility of our forming a community with them for the time being.³⁴⁶

VI. CONCLUSION

Of abortion scholarship, Yale's Stephen Carter wrote that "one longs for something new, an idea that will shake things up, but as each new article or book comes out, one is left with the dreadful and yet unavoidable sense that everything has been said. Not only that, but most of it was said ten years ago."³⁴⁷ That was 1991, which means abortion scholarship's death date was 1981, some forty-five years ago. Yet according to Westlaw, 778 law-review articles have come out in the past four years with *Dobbs*, *Roe*, or abortion in the title. Professor Carter may be right, both that there's nothing left to say and that the final cause of abortion discourse is power, not the repair of ruptured relationships. This Article has pointed to a web of polarization, of passion, and of projection to explain a little-known fact: that half of Americans believe that all abortions are the same. My intention is to reveal something about abortion discourse, something that might be best understood by reference to the subconscious of abortion interlocutors. Ultimately, while "dogmatists require prodding: . . . history indeed

345. STANLEY CAVELL, *Music Discomposed, in* MUST WE MEAN WHAT WE SAY? 180, 211–12 (Cambridge Univ. Press 1976) ("The adolescent . . . has strong feelings, and perhaps some of them can be described as feelings of sincerity, which, perhaps, he attaches to the words in his poetry. Does all that make the words, his utterance in the poem, sincere? Will he, for example, *stand by them*, later, when *those* feelings are gone?").

346. Gudel, *supra* note 208, at 109–10. Gudel summarizes:

the conservative might still insist that fetuses are persons. Then what is the situation between us? Should we say that we are "right," and the conservative is "wrong?" But we have no standards to make that judgment. What is most accurate to say is that we do not form a community on the question of whether fetuses are persons, that here community has failed, relations between us have broken down.

Id.

347. See Carter, *supra* note 183, at 2747.

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suggests that it may sometimes be better to let sleeping dogmatists lie.”³⁴⁸ These are serious matters.

348. See J.L. AUSTIN, *The Meaning of a Word*, in PHILOSOPHICAL PAPERS, *supra* note 242, at 53, 75.