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PRIVATE CHOICES VS. PUBLIC VOICES:
THE HISTORY OF PLANNED PARENTHOOD IN HOUSTON

by

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A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
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ABSTRACT

Private Choices vs. Public Voices: The History of Planned Parenthood in Houston

by Maria H. Anderson

Over the past half century the name Planned Parenthood has become a household term. As its leadership has struggled to create and maintain its identity and to keep it financially afloat, the organization has evolved. This is the story of one local affiliate: Planned Parenthood of Houston and Southeast Texas.

Planned Parenthood of Houston had its origins in the philanthropy of Houston’s “white-gloved elite,” and in the poverty of the Great Depression. It also found support in the courts, which by the 1930s were beginning to re-define the law of obscenity (to exclude contraceptives) and by the 1960s to define the right of privacy as broad enough to encompass the right of marital privacy. These judicial decisions would be crucial precedents to the landmark abortion case, Roe v. Wade, which legalized the right of abortion.

Neither Planned Parenthood of Houston nor its parent organization, the Planned Parenthood Federation of America, evolved in a social or legal vacuum. The purpose of this study is to illuminate the history of one affiliate as it grew from a tiny clinic for the poor to a large, powerful urban organization with an eclectic clientele and a number of satellite clinics, an organization in the vanguard of reproductive rights and technology. It also attempts to place Planned Parenthood’s legal, institutional, and social history in the context of state and national public policies, and to illuminate ways that the innate
federalism of the Planned Parenthood organization, individual’s rights to privacy, and
government policies intersected and sometimes clashed.
ACKNOWLEDGMENTS

Harold Hyman generously shared his time and immense knowledge with me over a period of four years. With patience, kindness, and understanding he fostered the completion of this study. Any acknowledgment of the extent and quality of his instruction must be an understatement. Thanks are also due to Professors John Boles and Chandler Davidson for reading this dissertation and for offering numerous useful suggestions. To Fern Hyman, thanks must be given for providing an educated ear, a hard-to-find reference, and a compassionate shoulder whenever one was needed. And Professor Richard Tappa of Rice University earned my respect and gratitude by providing a role model for an Hispanic student to emulate and funding my graduate education.
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Chapter 1

“Pioneering” Birth Control in Texas:
The Maternal Health Center of Houston, 1930’s

A haggard woman with a tiny baby in her arms followed a social service worker out of the bare little home and stopped her timidly. It was in 1933—when the depression was at its worst.

“Wait a minute,” she begged. “Won’t you help me? You wouldn’t believe to look at me, but I’m just 33 years old. Look at these—10 of them”—she waved a discouraged arm toward children on the porch and within house [sic]. “The oldest is 15. I’m sick and tired, and we can’t afford to have any more children. You’re a woman—tell me what to do. I know I’ll die if I have to have another baby.”

The woman looked 50—her shoulders stooped and her face drawn with suffering. The little brood about her was unkempt and underfed. The wrinkled little mite in her arms looked a living skeleton. But lack of precedent and public prejudice held the other woman’s tongue in check. She dismissed the plea with evasive answers.

Ten months later the mother died in her eleventh pregnancy.

“That mother’s face haunts me yet,” said the former social service worker recently. “When she died I felt personally guilty. But the case made me see just how desperate was the need of hundreds of women in Houston for information of how to space their children so that both mother and children would have a reasonable chance at health and happiness.”

Houston Post (April 3, 1938)

In 1938 Houston Post reporter Bess Scott credited the introduction of family planning into Houston with taking women like Judy O’Grady out of the pit of poverty and ignorance and giving them a reasonable chance at health and happiness. “Largely because this tired mother died, Houston now has a maternal health center, affiliated with the Birth Control League of Texas and the American Birth Control League. The colonels’ ladies of Houston decided to face sure and stiff opposition and start a crusade in
behalf of the Judy O'Gradys who were not able to pay physicians' fees for knowledge that would give them a chance in the fight for survival of the fittest. "1"

In fact, in the beginning the colonels' ladies numbered only one, Agnese Carter Nelms, and a man, Dr. Judson L. Taylor, Nelms' brother-in-law. Nelms and Taylor opened the Maternal Health Center of Houston in February 1936 to serve indigent patients and staffed its one examination room as unpaid volunteers during the first crucial months. If Scott's account is a fictionalized one, it nevertheless tells the story of a number of Houston's poor women: of the first clinic established in Houston to help them control their fertility, of Houston's philanthropic community, and of the growing national organization offering health care and contraceptive knowledge to the needy. That organization was the American Birth Control League, later to become the Planned Parenthood Federation of America.

**Houston in the 1930s**

In 1936 the Bayou City was booming. The Houston metropolitan area was becoming an oil refining and processing center, as well as an oil tools and services city. Oil—its discovery, transportation, and processing—had become the basis of the largest industry in Texas, outstripping commercial cotton, and the Houston area was the site for much of this manufacturing, including oil refining and chemical facilities. Between 1920 and 1940 a series of technological innovations in refining facilitated an increase in the quantity and quality of gasoline extracted from crude oil. 2 After 1940

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1Bess Scott. "Mother of 11 Children Died and Houston's Maternal Health Center Was Born." Houston Post, April 3, 1938, Sec 2, p. 6. The story Scott tells has not been corroborated in any extant records. Nevertheless, it represents one of only a few news reports of the Maternal Health Center.

the Gulf Coast became a major refining region, with more than one-third of total U.S. refining capacity. Houston led all cities globally in the manufacture of oil tools, supplies, and well equipment. Pipelines carried oil and gas from Texas, Oklahoma, and Louisiana oil fields to Gulf Coast refineries and to tankers at the Port of Houston. Houston’s refineries were among the largest in the world. By the end of the Great Depression Houston was home to some twelve hundred oil companies and their attendant refineries, supply facilities, and office skyscrapers. A Fortune magazine article on Texas and its cities noted that “Without oil Houston would have been just another cotton town. Oil has transformed it into a concrete column soaring grotesquely from a productive substratum....Take oil away and Houston’s skyscrapers would be tenanted by ghosts.” A 1930 survey by the Houston Chamber of Commerce estimated that 62 percent of the city’s working population “more or less depended on oil-related industries.”

Grotesque though its skyscrapers may have been, Houston’s oil business helped to spare it from the worst effects of the Great Depression. The demand for oil continued to grow in spite of the great economic crisis. Between January 1932 and March 1933, the nadir of the depression, hundreds of companies opened for business in Houston, and a number of oil-related firms opened offices or transferred their headquarters there. By the mid-1930s Houstonians were proclaiming their city the “oil capital of the world,” and Houston had become the largest city in Texas.

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3Ibid., 62.
420 Fortune (December 1939), 87. Cited in Feagin, Free Enterprise City, 62.
5Feagin, Free Enterprise City, 61.
6The federal census of 1930 listed Houston’s population at 292,352 (Houston’s Chamber of Commerce Census figures, 1930). At the same time, cotton exports continued to expand Houston’s economy. Houston’s Anderson-Clayton company was the largest cotton brokerage company in the world (Will
Despite its dramatic economic growth, much of Houston’s public infrastructure of roads, sewers, and schools remained underdeveloped. Natural gas for houses and fire fighting equipment did not come to the city until the late 1920s, and the essential infrastructure was not expanded until the mid-1930s, with large-scale federal aid in the form of government subsidies. Houston’s business elite forged close ties with Texas officials and the federal government to construct major public buildings, roads, and utilities. Jesse Jones, a Houston banker, became head of the national Reconstruction Finance Corporation (RFC) in 1933, and money from the RFC, the National Recovery Administration (NRA), the Public Works Administration (PWA), and the Works Progress Administration (WPA) poured in to fund Houston’s road and sewer projects. Millions of federal dollars were provided for improvements to the ship channel. From 1932 to 1940, Houston’s improved infrastructure was built with millions in federal capital, and it grew quickly in wealth and resources.\(^7\)

Not all Houstonians benefited equally from Houston’s growing affluence and improving infrastructure. In 1930 Houston was rigidly segregated racially.\(^8\) Blacks made

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\(^8\) Feagan, *Free Enterprise City*, 63-64. I am also indebted to Steve Wilson for providing valuable insight into the history of Houston’s economy and infrastructure growth during these years, in his 1994-1995 seminar papers.

\(^8\) i.e., the city had extensive racial segregation in public accommodations, housing, jobs, and education, and segregation was legally enforced.
up 22 percent of Houston’s population but were concentrated in the Third Ward to the
south and east of downtown and in neighborhoods in the Fourth Ward to the west of
downtown. These black Houstonians were doing much of the city’s dirtiest and lowest-
wage work in construction and services. Their neighborhoods were characterized by
poor housing, poorly supported schools, and inferior public services. Black
unemployment and infant mortality rates were high. To be black in Houston in the 1930s
was generally to be indigent, without access to public services, and dependent upon a
routinely troubled mass transit (bus) system.9

If segregation remained strong in Houston, however, a growing humanitarianism
also existed. Leading women in Houston supported homes for the children of working
mothers, soup kitchens to feed the indigent, old folks homes, a humane society to
prevent cruelty to animals, and a Florence Crittenden home for the care of unwed
mothers. At the turn of the century the city and county financed free clinics and nursing
services for people with tuberculosis, and in 1919 founded a charity hospital.

Houstonians’ humanitarianism did not override the barriers of racial prejudice, but white
Houstonians paid willingly to support charities that mostly benefited blacks. In the words
of one historian, “it was a humanitarianism, or charity, kept decidedly at arm’s length.”10

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9Feagan, Free Enterprise City, 240-244. Hispanic immigration to Houston at this time was negligible: it did
not really begin until the late 1950s-early 1960s.
Boles notes that “white-gloved elite” southern women had been committed to community service since the
late nineteenth century, advocating health reform, city beautification projects, cleanliness standards for
dairies and markets, civic improvements, and regulatory reforms, and were apt at identifying urban
community ills, diagnosing solutions, and working to achieve political reform. Many of these women from
the social and economic elite also were suffragettes.
Health Care and Birth Control in the 1930s

In the 1930s the idea of preventive medicine, public health measures, and what is now called primary health care were distant concepts. There were no public family planning programs, no birth control clinics anywhere in the state, public or private, and no plans to provide such a service in any of Houston’s healthcare facilities. The city’s health care system had public and private sectors, selected according to the patient’s ability to pay, and was largely unavailable to the poor.

Birth control, in any event, was not publicly discussed. It was not then considered, as it later was, to be a key to the prevention of disease and death or as a public health measure to prevent the spread of epidemics; instead, it was a “dirty” word that conjured up images of sex and immorality. Although there was no Texas law against dispensing birth control or contraceptive advice in effect in 1936, traditions against contraception were rooted in federal obscenity laws, the church, the medical establishment, and the mores and cultural traditions of the state, and these served to deter public discussion and organized action. In cities like Houston, women who could afford to pay and had educated themselves about birth control could find private doctors to provide them with contraceptive care. These women, middle class by definition, developed informal networks of information about private doctors who could be relied on to keep their visits confidential. Poor women had fewer options. With little or nothing in the way of preventive health care or family planning available in public hospitals, and no sex education offered at any level in the state’s public schools, poor women did not often educate themselves about birth control or find private doctors willing to help. In sum, a
considerable difference existed in the availability and use of contraceptives between middle-class and lower-class women.

Beginnings

The Maternal Health Center of Houston\textsuperscript{11} opened in January 1936 without fanfare in a cottage owned by the Binz family of Houston and located in what is now Sam Houston Park. The staff consisted of physician Judson L. Taylor, his sister-in-law and founder of the center, Agnese Carter Nelms, and a nurse. There was an examining room downstairs and a board room upstairs where the Board of Directors, which numbered a respectable twenty-two, met. The clinic opened with a budget that is reported to have been less than $100 and was a totally volunteer operation. Patients came on a walk-in basis for Pap tests, to be fitted for diaphragms, to have pregnancy tests administered, and for information on child-spacing. Abortions were not performed.\textsuperscript{12}

The clinic was, in theory, racially segregated. Negro and Mexican women were scheduled for examinations on certain days of the week, but this rule did not seem to

\textsuperscript{11}The Maternal Health Center was renamed the Planned Parenthood Center of Houston (PPCH) in 1950, and then the Planned Parenthood of Houston and Southeast Texas in 1979. The name changes reflect transformations at both the national and local levels in the history of Planned Parenthood. I note it here to head off confusion because those associated with the organization in Houston over a long period of time use the different names freely in their reminiscences, without regard to the period to which they are referring, and those recollections are cited here.

\textsuperscript{12}The original Board of Directors included H.R. Cullen, Mrs. Will Clayton, Miss Rosalie Farish, Mrs. Greer Marechal, Mrs. David Picton, Jr., Lee Hager, Robert Dabney, Mrs. Otis Meredith, Mrs. Virgil Scott, Ewing Werlein, Lewis Fogel, Mrs. S.M. McAshan, Jr., Mrs. J.R. Susman, Mrs. William Walker, Mrs. I. Friedlander, Mrs. Sam Miller, Mrs. W. Aubrey Smith, Dr. Edgar Altenburg, Mrs. John Bullington, Mrs. Conway Brown, and Mrs. Mamie Greer Pyron. See “First Birth Control Clinic Of Maternal Health Center Will Be Held Next Tuesday,” The Houston Post, January 17, 1936. In Houston there was an informal network through which women of means could obtain abortions. One Ob-Gyn who practiced in Houston during the 1930s stated off the record that he knew of a Houston “firm” of physicians who performed abortions: he called them “Dr.’s Black, White, Brown, and Yellow.” Women desiring abortions, and who could afford the then huge fee of $900 to $1,500, were taken to a “downtown” building at night where the procedure was performed and were then sent home.
have been rigidly enforced. As one Board member recounted, if a white woman complained that she did not want to share the waiting room with Negro or Mexican women, she was given a special appointment. Few women complained. All of the services and supplies were provided free, or if a woman could afford it, for fifty cents. Clients learned of the Center by word of mouth.\textsuperscript{13}

The Center incorporated as a non-profit organization on February 20, 1936. The original Articles of Incorporation had no by-laws, and the corporation had no capital stock. Its purpose was simply “to establish and maintain a free medical clinic for the use and benefit of the mothers and prospective mothers of the City of Houston and to furnish to the mothers and prospective mothers of Houston free medical advice on maternal health, ...all of the corporation’s activities to be of a charitable nature...” Its primary place of business was to be the City of Houston. The corporation was to exist for fifty years. And its business was to be conducted by a Board of Directors composed of twenty-six people. Finally, the corporation’s goods and chattels were estimated at a value of $500. The document filled all of three pages.\textsuperscript{14}

Agnese Nelms was also instrumental in organizing the Birth Control League of Texas in 1936. Its membership consisted of nine affiliated locals: Dallas, Ft. Worth, Waco, Austin, San Antonio, San Angelo, El Paso, Corpus Christi, and Houston. Each organization incorporated and conducted its affairs independently, but all the affiliates shared information and expertise. All were volunteer non-profit organizations. This

\textsuperscript{13}See unpublished “History of Planned Parenthood of Houston” (author unknown, 40 pp., which lists briefly significant dates, events, and persons between 1936 and 1972). Norman Binz was married to the niece of Agnese Carter Nelms, who donated the cottage for the Maternal Health Center's use. See also Oral History Interview (OHI) with Susan Clayton McAshan, October 14, 1994.

\textsuperscript{14}Arts. I-VI. MHC Charter. 1-3.
combination of grass-roots leadership and local autonomy would become the standard for birth control clinics organized under the aegis of the American Birth Control League.\textsuperscript{15}

\textbf{The Woman Rebel}

Agnese Carter Nelms had come to Houston from Barnum, Texas. She was born August 4, 1889, the daughter of William Thomas Carter, a wealthy East Texas lumberman. The family moved to Houston at the turn of the century, where she made her début. She grew up in what was known as “the big Carter house” at the corner of Main and Gray streets and graduated from Houston High School. She traveled and lived in France and England, learned to speak French fluently, and dabbled in medieval history. She married Haywood Nelms in 1918. They built a spacious house on Sleepy Hollow in what would later become River Oaks. The Nelms’ had three children, Haywood Jr. in 1920, and twins, Nancy and Agnese in 1923. She was, as was noted by a Houston journalist, “free by inheritance and rearing to enjoy life pleasantly.”\textsuperscript{16}

But Nelms was aware of the problems of the poor. As a young woman involved in white-gloved social work in Houston, she saw that the largest numbers of children were being born to those least able to give them care and education. She was well-traveled, knew of the national birth control movement being spear-headed by Margaret Sanger, and became an advocate of its cause in Houston. She thought it a human

\textsuperscript{15}Unpublished “History of Planned Parenthood of Houston.” The Texas Birth Control League was organized as part of the larger national movement that began in the 1920s. Between 1916, when Margaret Sanger founded the first American birth control clinic in New York City, and the beginning of World War II, approximately seventy local clinics were established across the country. The American Birth Control League was incorporated in New York in 1922. See \textit{A Tradition of Choice: Planned Parenthood at 75} (New York: Planned Parenthood Federation of America, 1991), 98-99.
injustice that poor women should be denied the right of contraceptive choice that well-
to-do women enjoyed. "All mothers have the right to decide for themselves how many
children they want," she said, "and all children have the right to be born under conditions
which make for a strong, happy and useful citizen." But contraception took knowledge
and money. Those with money could limit their families; those without "were bringing
into the world more children than they could feed and clothe."17

Nelms took a conservative, no-nonsense stand on birth control. "Birth control,"
she said, "means just what the term implies—control of births. Child spacing is the
correct word. Our patients do not want to avoid motherhood, nor does the clinic advocate
such a thing. We merely want to help overtired mothers to space their children far
enough apart to give both mothers and children their chance at health and happiness. Our
work is solely for the mothers who cannot afford to pay private physicians for such
advice. The improved health of our patients and the happier homes that result from our
work are rich rewards for our efforts."18

Nor was Nelms afraid to speak out on the subjects of abortion and poverty. "We
are trying to do away with abortion," she stated emphatically in a 1936 interview with the
Houston Post. "It is estimated that there were 1,000,000 abortions in the United States
last year and 30,000 deaths as a result of them" And, she added.19

16OHI, Marguerite Johnston, December 29, 1994. See also Marguerite Johnston’s Houston: The Unknown
City, 1826-1946 (College Station: Texas A&M University Press, 1991), for references to the Nelms family.
And the Houston Chronicle, 13 August, 1967 (obituary).
17Scott, "Mother of 11 Children Died and Houston’s Maternal Health Center Was Born," Houston Post,
April 3, 1938.
18Ibid.
19"First Birth Control Clinic Of Maternal Health Center Will Be Held Next Tuesday." I am indebted to
Larissa Lindsay of Planned Parenthood of Houston for uncovering this article.
I was active in social service work about three years ago and was taking care of 16 families, many of whom had babies every nine months. The community had to take care of them. I became convinced that proper birth control methods were necessary. It is common knowledge that people of means can go to their doctors to obtain this information and the same information should be available to poor and indigent families. That is why the Maternal Health Center was established.

Nelms, like her brother-in-law Dr. Taylor, a prominent Houston surgeon, was a community leader who was able to gain the support of other prominent Houstonians in her cause. The first Board of Directors of the Maternal Health Center was a Who’s Who list that included Mrs. Will Clayton, Maurice and Susan McAshan, the Rev. J. Elmer Ferguson, Rosalie Farish, and Mrs. John Bullington. All of them were white; almost all were the wives of rich Houston businessmen and members of Houston’s “white-gloved elite”; and all were remarkably committed and generous. Board members solicited donors and supported the Center with their own resources. When Susan McAshan learned that many young mothers were unable to come to the Maternal Health Center because they could not afford the costs of travel and child-care, she personally underwrote the costs of every visitor to the clinic.

Despite the prestige of its Board members, the Maternal Health Center was a controversial cause that stirred opposition from Houston’s Roman Catholic churchmen.

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20 Johnston, Houston: The Unknown City. Will Clayton founded the Anderson Clayton Co., which would become the biggest cotton company in the world; Maurice McAshan was a prominent banker and Susan McAshan was Will Clayton’s daughter; Rosalie Farish was from a prominent oilfield equipment manufacturing family; and John Bullington was a prominent attorney. Many of the original twenty-six Board members were also members of the Bayou Club, Houston’s most prestigious country club.

21 Speech presented by Marguerite Johnston at Planned Parenthood of Houston’s 50th Gala celebration. February 2, 1986. McAshan had recommended the Maternal Health Center to a young mother and later asked how the visit had turned out. “They were so nice to me,” the young woman replied. “But I can’t afford it. By the time I have paid for a baby sitter with the children, bus fair and the supplies, I haven’t enough money to buy food for the two children I already have.”
and other conservatives on this issue. Nelms was called "a whore of Babylon" from one Catholic pulpit, and the Houston Chronicle, whose managing editor was staunchly Catholic, would not allow the Maternal Health Center to be mentioned in his news columns, not even a simple notice of meetings. Even the more liberal Houston Post was reluctant for years to publish editorials supporting the organization's annual fund drive. Nelms also battled the cynicism of those who believed that "These people won't come to your clinic. They WANT to have a lot of children." The Maternal Health Center survived because its leaders were secure in their positions in the community and because they could afford to fund the operation themselves.  

Throughout the 1930s, 40s and 50s, birth control remained a taboo subject, even though many women practiced it. Nelms and her volunteers found creative ways to reach women and make them aware of the services available at the Center. Maternal Health Center volunteers walked door-to-door in Houston, encouraging women to vote. While they talked to the women, they asked about their children and, if the opportunity presented itself, spoke about the Maternal Health Center. In this way, during the Center's first years, the movement to democratize birth control became intertwined with the women's suffrage movement and the more general political struggle for women's rights.

Louella Breedlove was an early volunteer recruited to the organization by Agnese Nelms to help spread the word. In an interview for the Planned Parenthood Newsletter in 1988, she described those early days. "Agnese and I would work the Heights a great

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22OHI, Marguerite Johnston, December 29, 1994; and Speech, February 2, 1986. The Chronicle did not print articles about the Maternal Health Center or its successor, Planned Parenthood of Houston, for a number of years. The Post did, after its editor, Oveta Hobby intervened. According to Margeurite Johnston, who was employed as a Post columnist and was present at meetings of the editorial board, one writer proposed an editorial about Planned Parenthood and was told, "We have never had Planned
deal, and in between we'd work for Planned Parenthood too, but you didn't discuss it. If you knocked on the door, and there was a woman there with children, you could always start talking about the children, asking how many she had and if she would like to have more. Many times she would say what else could she do. That would give us an opening to start telling something about Planned Parenthood, and word got around. By word of mouth, we got quite a few.”

Their strategy was impressively successful. Cynics had said that the poor would not come. So many came in the first three years that the Maternal Health Center outgrew its cottage. In 1939 Dr. James DeWolfe, rector of Houston's Christ Church, offered the Green Foundation property for the clinic's use, and the organization moved its operations to 1710 Capital Avenue, where it would occupy the facility rent-free for the next ten years.23

The Frontier Era of Birth Control

Houston’s Maternal Health Center and the Texas Birth Control League were founded during what historians refer to as the “Frontier Era,” or second phase of the birth control movement during which the gains made by the movement’s pioneers were consolidated and clinics were organized in urban centers throughout the U.S. The first phase, or “Pioneering Era,” began in 1912 when Margaret Sanger, a nurse on the lower east side of New York, decided that contraception was a basic need for the people she had been serving in these low-income areas. She as a young nurse had been called to the home of Sadie Sachs, a 28-year-old woman, who died from a self-induced abortion while

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Parenthood on the editorial page.” Oveta Hobby leaned forward from her presiding chair and said firmly. “Then it is high time we did.”

Sanger stood helplessly by. A few months earlier, she had helped the same woman recover from septicemia, or blood poisoning, the result of another abortion. With three children already, Sachs had made up her mind not to have another. She had pleaded with Sanger for some way to avoid another pregnancy. Sanger knew of no way, but approached a doctor for help. His advice to Sanger’s patient was to tell her husband to “sleep on the roof.”

Sanger became determined to find a way to make contraception available to all women, particularly the poor. She knew that family limitation by means of coitus interruptus or by use of condoms was common practice in middle-class families, and that, among the affluent, the birth rate was falling. She probably practiced birth control to limit her own family to three children. But she believed that these methods were not practical for women in the slums because working-class men were not enlightened or restrained enough to practice withdrawal, and condoms were expensive. A reliable, cheap, and readily available method under the woman’s control was what she believed was needed.

Sanger was fighting an uphill battle against Victorian taboos, legal restrictions, and religious opposition that said birth control and human sexuality should never be discussed. The federal and state “Comstock Laws” forbade the mailing or advertisement of contraceptives or information about contraceptives, abortion, or abortifacients. By 1912 these policies had made discovering such a method in America

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25The Comstock Law of 1873, named after its proponent, Anthony Comstock, was a federal statute passed for the purpose of restricting the circulation of “obscene” material by mail. Comstock was able to include materials about contraception and abortion its definition of obscene. He became an agent of the federal government with the absolute authority to censor the mails. His crusade succeeded by the late 1870’s in
almost impossible. The body of knowledge in print was not available to lay people, but only to physicians, and was not widely used. So she traveled to Paris to study recent developments and research in contraception. She looked into how families remained small there and found that French mothers passed on to their daughters information about tampons, suppositories, and douches and regarded their formulas as favorite recipes. French law contained no Comstock-like restrictions. Moreover, abortion was legal and performed by surgeons.26

Aside from questions of morality, many people during this period did not condone abortion because it was a dangerous procedure. The chief risks were infection and hemorrhage. Abortion was somewhat safer when performed by a qualified surgeon rather than by an unlicensed abortionist or midwife, but in the absence of antibiotics and sterile operating conditions, the patient was in any case at considerable risk. Sanger herself was opposed to abortions, and after returning from France never advocated it as a method of birth control.

When she came back from Europe in 1914 Sanger advocated instead birth control. She published a magazine, The Woman Rebel, in defiance of Comstock Laws. It provided information on contraception and openly discussed sexuality. The U.S. Post Office objected to the magazine from its beginning, declared it unmailable, and warned Sanger that she would face prosecution if she continued to disseminate it through the mails. Five months after the first printing, she was indicted for sending birth control propaganda through the mails in violation of New York’s Comstock statute and was

arrested, but she fled to England before the trial. She did not return to the United States until October 1915.27

During her enforced stay in Europe Sanger visited birth control clinics and learned how to fit diaphragms. When she returned to face trial in February 1917, the charges against her were dropped. Public opinion was with Sanger and Anthony Comstock had died; but the federal law he had championed and the state laws based on it were still in force.28

Meanwhile, in 1916, Sanger opened New York's first birth control clinic in Brownsville, a working-class suburb of Brooklyn. Her sister Ethel Byrne, a registered nurse, assisted her and another volunteer. They rented a tenement apartment and had handbills printed in English, Yiddish, and Italian. Yiddish and Italian newspapers also publicized the opening of the clinic. Women came from as far away as Massachusetts. But the New York vice squad shut the clinic down ten days later and arrested Sanger and her sister. Not until 1923 could a birth control clinic open and remain open.29

Despite legal and public harassment, the movement grew by 1922 to the point that Sanger founded the American Birth Control League. Sanger incorporated the League under the laws of the state of New York and involved herself in establishing a new, permanent clinic, which she euphemistically named the Clinical Research Bureau. She hired a full-time female physician, Dr. Dorothy Bocker. This time Sanger did no

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27 Ibid., 55.
28 Her indictment was quashed in 1916, before the trial, allegedly at the instance of President Woodrow Wilson, who was subjected to pressure from friends of the birth control movement. See "Planned Parenthood: An Historical Perspective," an unpublished paper from the files of Planned Parenthood of Houston (author and date unknown).
29 Ibid., 58-59.
advertising; patients learned of the clinic by word of mouth from other patients.\textsuperscript{30}

Sanger also engaged on a part-time basis, without pay, Dr. Hannah Stone, a pediatrician. Stone treated more than 1,600 women during her first year, documenting their cases carefully. She would become a major figure in the landmark case that challenged the Comstock laws, \textit{United States v. One Package}.\textsuperscript{31}

The American Birth Control League and the New York clinic served as a model for what could be done. Gradually a network of affiliates grew up in other parts of the nation. Sanger traveled the country encouraging the establishment of new affiliates and the renewal of some that were inactive. Her audience was typically white, upper- or middle-class women like Agnese Nelms. Their success in starting and maintaining clinics varied. State laws differed, the Catholic church was more influential in some areas than in others, and funding was sporadic. In nearly all the clinics, birth control laws were being circumvented in one way or another.\textsuperscript{32}

\textsuperscript{30}Ibid., 63-64.
\textsuperscript{31}86 F. 2d (1936), 737.
\textsuperscript{32}State laws varied from total freedom to total prohibition of contraceptive practices. Sixteen states -- Arkansas, Colorado, Delaware, Idaho, Indiana, Iowa, Kentucky, Minnesota, Missouri, Montana, Nevada, New Jersey, New York, Ohio, Oregon and Wyoming -- prohibited the sale and advertisement of contraceptives but exempted doctors, pharmacists or special licensees. Wisconsin banned the sale of contraceptives to minors, their sale from slot machines, and all advertisement of contraceptives. Five states -- Connecticut, Kansas, Massachusetts, Mississippi and Nebraska -- prohibited absolutely the sale and advertisement of contraceptives. Eight states -- Arizona, California, Hawaii, Louisiana, Maine, Michigan, Pennsylvania and Washington -- restricted only the advertisement of contraceptives. Fifteen states with restrictive legislation -- Arkansas, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Missouri, Montana, Nebraska, New York, Ohio, Oklahoma, Pennsylvania and Wyoming -- allowed advertisements in medical journals and textbooks. Twenty states -- Alabama, Alaska, Florida, Georgia, Illinois, Maryland, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia and West Virginia -- and the District of Columbia had no legislation at all. Of the five states whose statutes on their face prohibited absolutely the sale and advertisement of contraceptives, only in Massachusetts and Connecticut did the laws have any practical effect. In most states the authorities made no effort to enforce the laws; even in Massachusetts and Connecticut the law went unenforced except with respect to birth control clinics. The practical effect of the legislation against contraception in these two states was to prevent the operation of birth-control clinics. Yet, repeated efforts to modify the laws in the legislatures failed, and in Connecticut, the use of contraceptives was prohibited until 1965.
The Planned Parenthood League of Detroit was the first state league formed after that of New York, also in 1922, although the first Michigan clinic did not open until 1927. In 1923 Chicago was the first city to open a clinic offering birth control advice to married women; it operated under the auspices of the Illinois Birth Control League. But when the clinic’s board applied to the Chicago Department of Health for a license, the Commissioner of Health refused to issue one on the grounds that it was “against the public interest.” The board brought suit, and the case was heard in the Circuit Court of Cook County in November 1923. Judge Harry Fisher granted the board’s request, but the city appealed and the decision was reversed in a higher state court. The board then decided to abandon litigation and to open a “center” rather than a clinic in the offices of a Chicago physician. There was in Illinois no statute prohibiting the offering of birth control advice by a licensed physician in his or her office.33

A dozen Birth Control and Planned Parenthood leagues were founded between 1923 and 1929, mostly in the Northeast and in California.34 Many were tentative efforts limited to meetings at members’ homes where birth control was discussed with increasing frankness. The Syracuse chapter of the American Birth Control League, for example, did not open its first clinic until 1931 and served only thirty-three patients its first year. In New Jersey the Maternal League of Camden was billed as a “social club”; and when the league opened its first clinic in the early 1930s, its physician members refused to serve on

34Planned Parenthood of Connecticut, 1923 (New Haven); Syracuse Center, 1925; Planned Parenthood of Northeastern Pennsylvania, 1926; Planned Parenthood Association of Maryland (Baltimore) 1927; Planned Parenthood of Southeastern Pennsylvania, 1927 (Philadelphia); Planned Parenthood of Massachusetts, 1928 (Cambridge); Planned Parenthood/Greater Camden Area, 1928 (New Jersey); Planned Parenthood of Minnesota, 1928 (St. Paul); Planned Parenthood Association of Cincinnati, 1929 (Ohio); Planned Parenthood, Alameda/San Francisco, 1929 (California).
the board or to have their names listed in mailings. They also declined to attend board meetings.  

The Maternal Health Clinic of Cleveland first attempted to set up birth control clinics in the outpatient services of established hospitals, but its efforts failed. It was not until forty years later that hospitals in Cleveland would undertake this responsibility. The Motherhood Protection League of St. Paul, Minnesota, as it was then known, formed in 1928 but did not open a clinic until 1931 and limited itself to “educational purposes.” There was probably more going on inside the St. Paul clinic than its formal history admits, because, as its historian states, “the organization provided birth control services outside the law until 1965 when the Minnesota Legislature removed the state’s version of the restrictive Comstock Law.” Minnesota had no law restricting the sale or advertisement of contraceptives by doctors and pharmacists, and no law against giving birth control advice.  

The Cincinnati affiliate established its first Maternal Health Clinic in 1929 in the Cincinnati General Hospital but was forced to leave in 1931 “under pressure” from the Catholic Archbishop. At the urging of the Episcopal Bishop of Southern Ohio a new clinic was opened several months later at the Cincinnati Children’s Hospital. The Cincinnati experience is illustrative of the general religious lines that had been drawn by 1930 in the denominations of American churches. Until about 1930 the official teachings of religious organizations were virtually unanimous in opposition to artificial birth control. The story of Onan, a common inheritance of Jews and Christians, was interpreted

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35 "Planned Parenthood Beginnings: Affiliate Histories," at 64. and 93.
as a strict scriptural condemnation of the practice. The first religious proponents of birth control in the U.S. were Universalists, Unitarians, or adherents of Reformed Judaism. 38

The first official Protestant acceptance of contraception was announced in 1930 in a statement of the Lambeth Conference of the bishops of the Church of England. It recognized abstinence from sexual intercourse as the ordinary means of family limitation but allowed contraceptive means in cases in which abstinence was deemed impossible. "Careful and restrained" use of contraceptives was approved in 1931 by the Committee on Marriage of the Federal Council of Churches in the U.S. This established a precedent that was gradually followed by all the major Protestant denominations. Meanwhile, the Central Conference of American Rabbis (Reform) in 1930 and the Rabbinical Assembly of America (Conservative) in 1935 approved contraception for social and economic as well as health reasons. 39

The Roman Catholic Church, however, repeated its traditional position on birth control in Pope Pius XI's 1930 encyclical Casti connubii: "Any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to general life is an offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin." At the same time he upheld the

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38 The story of Onan can be found in Genesis, 38:7-10. Onan was commanded by God to marry his dead brother's wife and to "raise up seed to thy brother." But Onan "knew that the seed should not be his; and it came to pass, when he went in unto his brother's wife, that he spilled it on the ground, lest that he should give seed to his brother. And the thing which he did displeased the Lord: wherefore he slew him also." 39 4 New Catholic Encyclopedia (New York: McGraw Hill Book Company. 1967). 580-581.
legitimacy of periodic abstinence under certain circumstances as a means of child spacing and family limitation. 40

Planned Parenthood’s affiliate histories reflect considerable support from Protestant and Jewish ministers and rabbis and their denominational hospitals, and equal opposition from the Catholic Church. Ministers and rabbis were listed often among the founding members of the league’s affiliates, often in conjunction with the use of church resources and buildings in the establishment of clinics. In contrast, the Catholic Church and its leaders are mentioned only in relation to the closing of clinics and pressure exerted on public officials and the media. Marguerite Johnston of the Houston Post documented a similar conflict between Nelms and the Catholic Diocese of Houston-Galveston. “To the end of her days,” she noted, “Agnese Nelms used the pronoun WE to mean Planned Parenthood, and THEY to mean the Roman Catholic Church.” 41

The medical community in the U.S. was also slow to accept birth control as within its province. The momentum that produced the Comstock law of 1873 and led to its use as a model for similar legislation in many states had coincided with the establishment and entrenchment of the American Medical Association and the consolidation of the practice of medicine under its control. Influential physicians had been instrumental in Comstock’s battle to make birth control “obscene,” and the AMA had been key in the passage of state statutes quashing the practice of irregulars and outlawing abortion. Arguments for the practice of AMA-regulated birth control appeared sporadically in medical journals, beginning with one in the Michigan Medical News in

41Johnston, Speech at the 50th Gala Anniversary of Planned Parenthood of Houston, February 2, 1986.
1882. It was advocated before the AMA as early as 1912, in the presidential address of a leading pediatrician, Abraham Jacobi.\textsuperscript{42}

Beginning in 1922, the AMA was asked repeatedly by Margaret Sanger and the leaders of state birth control leagues to lend its support to those trying to change legislation to permit physicians to give contraceptive advice when they considered it to be medically necessary. The AMA’s gynecological branch passed a motion to this effect in 1925. By 1935 so much medical discussion was devoted to the topic that an AMA committee was appointed to study the problem. In 1937 the AMA House of Delegates recommended that (a) action should be taken by the Bureau of Legal Medicine and Legislation to make clear to physicians their legal rights to prescribe contraceptives, (b) the Council on Pharmacy and Chemistry and the Council of Physical Therapy should investigate the various contraceptive methods and publish their findings for the profession, (c) the Council on Medical Education and Hospitals should promote thorough instruction on fertility and sterility in medical schools, and (d) contraceptive advice should be given only in properly licensed agencies under medical control. The House of Delegates went further in 1938 and urged the amendment of all remaining legislation interfering with the prescription of contraceptives by physicians. The year 1937 is generally recognized as that in which the medical profession “endorsed” birth control.\textsuperscript{43}


Legal Acceptance

For years Margaret Sanger was involved in lobbying for federal legislation that would nullify the Comstock Law as it applied to regular medical practice. Her efforts were in vain until 1936. In that year the U.S. Circuit Court of Appeals, in *U.S. v. One Package*, rules that the U.S. Tariff Act of 1930, which contained Comstock language, could not be construed to forbid the importing of contraceptives for use by physicians in saving lives or promoting well-being.

The case had its origin in Sanger's interest in a new contraceptive device, a pessary, or diaphragm, designed by a Japanese physician. She ordered 120 of the diaphragms to be shipped from Tokyo to Dr. Hannah Stone, the American Birth Control League physician in New York. Since the federal Comstock law forbade the importing of contraceptive devices, the shipment was seized and confiscated by U.S. Customs agents, laying the basis for the case with the unlikely name of *U.S. v. One Package of Japanese Pessaries*. The case was argued for the League by attorney Morris Ernst in federal district court in New York.

On January 6, 1936, federal district Judge Grover Moskowitz declared that the government’s seizure of the pessaries stemmed from an “insupportably limited reading” of the Comstock statute. The government appealed. Ernst marshaled a great deal of evidence to argue the appeal before a three-judge panel of the federal district court. His brief presented the extensive findings of Hannah Stone and other doctors documenting the positive and broad impact of contraception on maternal health and well-being.45

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4486 F. 2d 737 (1936).
45Stone had documented more than 1,000 case histories of patients, showing not only the medical prescriptions they received, but also circumstances including low family income and poor living conditions.
In 1936 Judge Augustus Hand of the U.S. Court of Appeals upheld the lower court's ruling. Writing for the panel, he argued that if in the 1870s Congress had available the same clinical data on the dangers of pregnancy and the usefulness of contraception that were available in the 1930s, it would never have classified birth control as obscene. The purpose of the law, Judge Hand stated, "was not to prevent the import, sale or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of the patients."46 Since New York State allowed the use of contraceptives for medical purposes, and since federal law was not designed to stop all traffic in contraceptives, the devices could enter New York harbor legally.47

This was a radical departure from the past, and the court's dilemma in the case was underscored in a concurring opinion by Judge Learned Hand:

There seems to me substantial reason for saying that contraceptives were meant to be forbidden, whether or not prescribed by physicians, and that no lawful use of them was contemplated. Many people have changed their minds about such matters in sixty years, but the act forbids the same conduct now as then; a statute stands until public feeling gets enough momentum to change it, which may be long after a majority would repeal it, if a poll were taken. Nevertheless, I am not prepared to dissent.48

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46Ibid., at 739.
The court solved its dilemma by limiting the application of the *One Package* rule. It applied only to the importing of contraceptives from abroad by licensed physicians, and it had the force of law only in those states within the court’s jurisdiction. It did not touch state legislation against birth control. But because the court had acknowledged that birth control was not obscene and had medical and socioeconomic value, the ruling helped to erode the Comstock doctrine. The opinion also said a great deal about the social basis of legal change. The suit had been carefully planned by Sanger after repeated failures to influence Congress to alter the law. Sanger’s Birth Control League shrewdly decided instead to secure a judicial decision recognizing a physician’s exemption from the federal prohibition. In accepting the majority interpretation of the court, Learned Hand acknowledged both popular feeling and the court’s role in changing antiquated laws.49

**Contraceptive Choice Without Care**

The reality in the 1930s was that many women used birth control. The manufacture of contraceptives was big business, retailing through thousands of outlets. In 1936 the fifteen chief manufacturers of condoms were producing one-and-a-half million of them a day at an average price of a dollar a dozen. A survey in the South during 1932 showed condoms being sold in 376 kinds of places other than drug stores -- including gas stations, garages, restaurants, barber shops, news stands, and grocery stores. One survey showed about $25,000,000 spent on condoms in 1936; another

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48 *U.S. v. One Package*, 86 F. 2d 737 (1936), at 740.

49 From Comstockery Through Population Control,” 13.
showed over $400,000 spent on “feminine hygiene” products, or douches, in 1933 during the nadir of the Depression.50

Although federal laws prohibited the mailing of contraceptive information, euphemisms such as “feminine hygiene” made it possible to advertise products that might be useless or potentially dangerous. A major danger was from chemical douches which frequently caused irritations or infections. Lysol was such a product. There were also a variety of vaginal tablets and suppositories supposed to produce a shield across the cervix—mostly ineffective. Door-to-door peddlers offered diaphragms without fittings or instructions, and intrauterine devices (IUD) that were almost certain to be dangerous if inserted by oneself. Advertisements for these products were manipulative and brutal, and the ads often lied.51

Like the liquor manufacturers during Prohibition, the contraceptive industry boomed during its prohibition. Retail profits on condoms, diaphragms, and spermicidal jelly products were enormous and were produced by the largest pharmaceutical houses and druggists in the country. It was this increasing commercial success of birth control—despite its dangers—that contributed to its ultimate legalization.52

51Ibid., 318-319. One of the worst was an ad for Hygeen vaginal tablets. The ad claimed that the product had been tested by a group of physicians of the English Medical Society at Oxford University and found to be “FIRST...AMONG ALL THE PRODUCTS INVESTIGATED.” There was no English Medical Society and the test was a complete fabrication. The tablets in fact consisted of baking soda, tartaric acid, sand, starch, and a small amount of chlorine—not an effective spermicide at all.
52It should be noted that the manufacture of contraceptives was not federally prohibited, only their interstate mailing, but historians note that this “weaker prohibition” produced black-market conditions nonetheless. See Gordon, Woman’s Body, Woman’s Right, 319.
Contraceptive Care With Choice

The combined influences of Sanger’s feminist birth control movement, changes in the federal Comstock Law, increasing acceptance of contraception by the medical community, the commercialization of contraceptives, and changes in public attitudes brought on by the Great Depression led to an exponential growth in the number of Planned Parenthood affiliates during the 1930’s. The decade of the thirties is referred to accurately in Planned Parenthood histories as the “era of victory and consolidation.” Between 1930 and 1939 a total of fifty-one affiliates joined the American Birth Control League. In 1930 the South’s first birth control clinic was founded in Birmingham, Alabama, by pediatrician Clifford Lamar and obstetrician Lee Turlington. After just three days, opponents in the Catholic church had the clinic ousted from its original site in the Hillman Charity Hospital. It reopened almost immediately in the waiting room of a public health tuberculosis clinic, where family planning patients were seen in the afternoon. The effort drew support from the National Council of Jewish Women and the Episcopal Church, as well as, in the words of the affiliate’s historian, “the quiet consent of public health authorities who recognized the need.”

Despite the erosion of some opposition, all of the affiliate histories speak of humble beginnings and hard times. The Phoenix Mothers’ Health Clinic, which was founded by Mrs. Barry Goldwater and others in 1937, began its operations in a small house, one block from the local Catholic church, which it leased from the Scottish Rite Association for $25 a month. The staff consisted of one nurse whose salary was $50 a

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month plus a room in the house, but the clinic could not begin operations for almost a month because no one applied for the job.\textsuperscript{55}

The Los Angeles Mother's clinic, which had such a hopeful beginning in 1925 (by 1927 there was a family planning clinic in every county health center and the county was the primary provider of services), was deleted from the county health budget in 1939 and forced to recreate itself through private funding and volunteers. The reason for the loss of funding is not clear, but the Los Angeles Health department did not again assume partial responsibility until 1960 for family planning programs.\textsuperscript{56}

In Texas, affiliate histories outside Houston make no mention of opposition from local Catholic churches or of public harassment, although they probably faced some, as did Agnese Nelms in Houston. The Maternal Health Center of Waco, organized in 1939 and located in the Child Welfare quarters of the City Hall, was asked to move after only a year and was forced to purchase property and operate through donations thereafter. The reasons for its ouster are unclear. These were no fly-by-night operations, or quackeries set up to gouge the hapless poor. Like other ABCL affiliates, each Texas clinic had at least one supervisory physician and one or two nurses; the rest of the staff was made up of volunteers. The clinics offered services for free, or, if a woman could pay, for a few cents. All the affiliates incorporated as non-profit charitable agencies and depended upon donations for support.

\textsuperscript{56}"Planned Parenthood Beginnings: Affiliate Histories," 18-19.
The Texas Difference

The Texas Birth Control League, and Houston in particular, enjoyed some advantages not common in other states. Agnese Nelms contended with the same social and religious opposition to her organization as did other affiliate leaders in the state. But she seemed more fortunate in that Houston was a city with an unusual number of liberal philanthropists and Texas birth control laws were almost nonexistent. Legal historians have chronicled the spread of Comstock-like laws in the late nineteenth century and concluded that “more than one half of the states enacted obscenity legislation specifically dealing with contraceptives, while all but two already had obscenity laws which could be interpreted to encompass birth control.” 57 Texas is listed erroneously as one such state with no specific birth control prohibition, but as having an obscenity statute that included birth control. 58

Texas law during this period included two possible statutes. The Texas Revised Penal Code of 1928 contained in Chapter 7 under “Miscellaneous Offenses” two articles which dealt with indecent and immoral publications and pictures. Article 526 of the Code prohibited “Indecent publications and exposures,” by which was meant either lewd

57See Silverstein, “From Constitutional Comstockery Through Population Control,” 8-47; “Comment: The History and Future of the Legal Battle Over Birth Control,” 274-303; and Dienes, “The Progeny of Comstockery—Birth Control Laws Return to Court,” 1-129. See also fn. 31, supra. The two states which supposedly did not have Comstock statues or obscenity laws that encompassed birth control were New Mexico and a mystery state. No study ever made clear which two states had no such laws. One article in the 1964 Harvard Law Review (49:723-729) named New Mexico as the only state without such a law, and other studies were confused. The one article about state Comstock laws written before 1971, when Dienes published his comprehensive article, “The Progeny of Comstockery—Birth Control Laws Return to Court” in the American University Law Review, listed eighteen states as having no birth control laws. Texas is listed as one such state with no specific birth control prohibition, but as having an obscenity statute that included birth control.

58Dienes cited the Texas Revised Civil Statutes (1948), Art. 4504, as supposedly dealing with obscenity; but when investigated, Art. 4504 was a statute dealing with public health and the regulation medical practitioners such as dentists. No other historian pointed to a specific Texas statute modeled on the
photographs (including indecent exposure of a person), and Article 527 prohibited “Immoral publications, motion pictures, penny arcade machine pictures, and indecent objects.” In both statutes, such things “designed to corrupt the morals of youth” were the objects at which the law was aimed. A person violating Art. 526 of the Code could be fined up to $100; a person publishing or disseminating an immoral publication under Art. 527 could be punished by confinement in the county jail for up to six months and fined up to $1,000. Neither statute specified birth control information as being included in the state’s definition of obscene.

A review of all the cases appealed in Texas courts between 1840 and 1953 under the Obscenity statute revealed none that dealt with birth control. Several dealt with instances of indecent exposure and obscene exhibitions, usually photographs. Of the cases dealing with obscene publications, pictures, and articles, none described the obscene thing as having to do with birth control or abortion. Most were cases in which a person had been convicted for selling magazines or films containing obscene photographs or footage; one was a conviction in 1906 for using obscene language in the presence of guests at a boarding house.60

Neither the Texas Legislature nor the state courts were willing to make or enforce laws that prohibited women from using birth control. There was no law in 1936 prohibiting Agnese Nelms from opening the Maternal Health Center of Houston, or from dispensing birth control and contraceptive advice in it. Indeed, had she chosen to manufacture and sell birth control devices, or publish pamphlets about contraception, she

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Cornstock Law and none cited cases brought in Texas courts under its obscenity statute against birth control.

29A Texas Digest (1953), 64-66.

"Huffman v. State, 92 S.W. 419 (1906).
could have done so legally. She was only forbidden to mail them outside the state.

The pressures faced by the founder of the state's first birth control clinic were not legal but societal and religious. It would be many years before Nelms would be able to obtain public health or federal funding for the clinic. Catholic leaders did not reconcile themselves to the presence of a birth control clinic in Houston, and for many years they exerted pressure on the news media and government authorities to shut the center out of public thought and funding. The clinic relied instead upon the generosity of Houston's philanthropic community and volunteers to support its operations.

Still, it seems that Texans quietly condoned the existence of the Maternal Health Center and disregarded the obscenity laws that might have been used to bring pressure to bear on it. In this respect the Texas Planned Parenthood League fared better than did many of its sister affiliates in other states. Texas legislators, judges, and public health authorities remained pragmatic as the Great Depression made family limitation a necessity, and the Texas legislature, which had been willing to enact abortion statutes, proved unwilling to legislate what women did with regard to birth control. Whether out of practicality or neglect, it was a boon to the family planning movement in Texas. Texans, it seemed, had already seen their state "frontiered" and were willing by 1936 to leave the birth controllers to conquer the frontier of family planning.
Chapter 2

The *United States v. One Package* and the Status of Contraception

The rapid acceptance and diffusion of contraceptive knowledge in America during the 1930’s is a subject of great mystery. For the previous sixty years, the idea of birth control or voluntary control of reproduction by women had been under a cloud of moral and social taboos and legal prohibitions. The Comstock Law of 1873 had classified contraception with obscenity and made the dissemination of contraceptive knowledge a federal offense.¹ States had passed their own “Little Comstock Laws.”² Margaret Sanger, the founder of the American Birth Control League, was indicted in 1912 for merely publishing a paper on the sociological aspects of family planning and family limitation.³ There was little support for her ideas and her work. The law was against her; the Catholic Church was hostile, as was the medical profession; and there was little favorable public opinion.

Yet within a quarter of a century the practice of birth control became an accepted and integral part of American family life. The Comstock law was re-defined and re-

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¹ 17 Statute 599 (1873), 18 U.S.C., Section 334 (1927). The original federal law, upon which many state statutes were modeled, closed the U.S. mails to various types of obscene literature and articles, including contraceptives and literature about them; another section of the law sealed off the United States Customs from the importation of such information and articles (Statute 598). Also through its regulation of interstate commerce, Congress made common carriers, or commercial transportation, subject to a similar prohibition (29 Statute 512, 18 U.S.C., 1897).

² At the time of the *One Package* decision, eight states had limited statutory prohibitions (such as those on advertising), but sale of contraceptives was permitted; eight states had statutory prohibitions on sales but express exemption for licensed physicians; eight states had statutory prohibition on sales or use of contraceptives, but exemption for licensed physicians (by judicial or administrative action); twenty-four states had no statutory prohibition on the subject of contraception. See Appendix A, *Brief for Claimant-Appellee, U.S. v. One Package*, 86 F. 2d 737 (C.C.A. 2d, 1936), at 43. Yet in every state, contraceptives were readily available in drugstores and other retail outlets. See Alvah Sulloway, “The Legal and Political Aspects of Population Control in the United States,” *XXV Law and Contemporary Problems* (Summer 1960), 601.

interpreted so that it could no longer be a serious barrier to the dissemination of contraceptive and contraceptive information. The medical profession recognized the therapeutic and public health values of contraception and began to assume its share of responsibility in the area of family planning. And public opinion crystallized in support of contraceptive practices as an essential part of family planning.

The decision of the United States Circuit Court of Appeals for the Second Circuit in *U.S. v. One Package of Japanese Pessaries*⁴ gave birth control proponents their most significant legal achievement to date when it affirmed an earlier district court’s ruling against the government’s seizure of birth control devices that had been shipped from Japan to the American Birth Control League’s lead physician, Dr. Hannah Stone. Stone, Sanger and the American Birth Control League’s attorney, Morris Ernst, heralded the ruling as “the end of birth control laws,” and later called the decision “the successful termination of a 60-year struggle.” By holding that the federal Comstock statute could not be applied in ways that obstructed public health, the appellate decision—much like the New York ruling in Sanger’s case almost two decades earlier⁵—effectively meant that birth control could be prescribed and distributed in all instances where doctors believed that the avoidance of pregnancy would be beneficial to a woman’s health. The May 1937 issue of the *Columbia Law Review* observed that “it is difficult to escape the conclusion that the Comstock Act...has been almost emasculated by judicial nullification,” and a

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⁴86 F. 2d 737 (C.C.A. 2d, 1936).
⁵*People v. Sanger*, 222 N.Y. 192 (8 Jan 1918), 118 N.E. 637 (1918). The New York court created an exception in its state’s statute which permitted the prescription of contraceptives for the cure or prevention of “disease,” a word that the Court of Appeals broadly construed in 1918 to mean “an alteration of the state of the body...causing or threatening pain or sickness.” See Sulloway. “Legal and Political Aspects of Population Control in the United States.” 603.
commentator for the *New York Times* termed the decision "a striking illustration of the court adjusting a statute to changing public information and sentiment." 6

The *One Package* decision did not wipe the federal Comstock laws off the books, or the state laws modeled after them, but it did augur their collapse. Public opinion polling, which was just becoming reliable in the 1930's, appeared to support the court's, and Sanger's, interpretation. A clear consensus existed by 1936 among the American people that birth control information and supplies should be available to married women and couples who wanted them. 7 A *Fortune* magazine survey that year asked "Do you believe in the teaching and practice of birth control?," and 63 percent of the respondents replied yes. 8 When the *Ladies' Home Journal* asked women "Are you in favor of birth control?," 79 percent answered yes, including 51 percent of Catholic women surveyed. 9

One group that had been lagging significantly behind American public opinion, organized medicine, was prodded by the decision. The American Medical Association (AMA) had avoided any affirmative statement in support of birth control despite intensive efforts by its proponents to get the Association on record. In June of 1937, six months after the *One Package* decision, the AMA's legislative arm, its House of Delegates, formally adopted a committee report endorsing the dissemination and teaching

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of "the best methods" of birth control. A New York Times article called the action a
"landmark in the annals of American medicine," and printed extensive excerpts from the
committee's report in a front-page story. The report emphasized that the decision
reached in One Package also ought to control laws in states like Connecticut and
Massachusetts, where the statutes were the most harsh.

Although the statutes in force in the several states that
forbid the dissemination of information concerning
methods for the prevention of conception do not in express
terms exempt physicians from their operation, it seems fair
nevertheless to assume that the state courts, if called on to
construe them, will adopt lines of reasoning similar to those
followed in the case cited [One Package] and in other cases
decided by the United States courts, leaving physicians free
to give information concerning contraception when
required to meet the medical needs of patients.10

Sanger termed the AMA action "really a greater victory" than the One Package
decision itself and expressed her belief that all obstacles to the establishment of birth
control clinics throughout the United States had been removed. She and her colleagues
dissolved the National Committee on Federal Legislation for Birth Control (the lobbying
arm of the American Birth Control League) and declared victory.11

But the One Package decision did not end the troubles of the birth control
movement. Notable gains had been made by birth-control advocates by the 1930's in
attaining social support, but their constituency was mostly poor and uneducated women
(the greatest segment of the population denied access to birth control services). The

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11 Garrow, Liberty and Sexuality, 44. Garrow cites a report of the National Committee, "A New Day
Dawns," 41. See also Sanger, An Autobiography, 430. On June 3, 1937, however, the Salem Police
Department raided a birth control clinic being operated by the Birth Control League of Massachusetts.
seized the clinic's medical records and supplies and questioned patients. All three of the staff were charged
with distributing contraceptive devices.
leaders of the movement were still confronted by powerful foes. As Protestant support for the Comstock laws began to wane in the early twentieth century, organized Catholic influence replaced it.\footnote{Dienes, Law, Politics and Birth Control, 92.} Any attempt at legislative amendment or repeal of birth-control provisions had to overcome Catholic reprisal. This was clearly true in New York City, a city in which the Catholic Church was referred to as “The Powerhouse.” Church authorities had demonstrated their hostility to the movement on several occasions—for example, by seeking to suppress public meetings of local birth control societies in Albany and Syracuse. In New York City the secretary of the archdiocese directed the police in closing a public meeting of birth controllers at the town hall in 1931. When legislative hearings took place, a representative of the Church was always present to reiterate its opposition to any change in the laws. Similarly, in the national forum, Church spokesmen let legislators know the number of voters that they represented, and they were not above lobbying to make their presence felt.\footnote{Peter Fryer, The Birth Controllers (New York: Stein and Day, 1966), 213; Lawrence Lader, The Margaret Sanger Story (Garden City: Doubleday, 1955), 226-227; Sanger, An Autobiography, 411. On repression in other cities: and Sanger, “Church Control,” V Birth Control Review (December 1921), 3-5.} In the earlier stages of the birth control movement, medical societies, a variety of Protestant denominations, and probably the greater part of public opinion supported the Catholic Church’s position. As this support eroded, the real or imagined influence of the Church still held sway.\footnote{Dienes, Law, Politics and Birth Control, 92.}

However, it would be wrong to attribute all legislative unwillingness to amend the Comstock laws solely to fear of political reprisal from the Catholic Church. Legislators were also reflecting social and political realities as well as their own personal value systems when they cast their votes. The Congressional record is replete with the comments of Representatives who speak in moralistic terms about the dangers of birth
control and the sacred character of life. These ideologies influenced roll-calls, presumably more than did Catholic lobbyists. In 1930 birth control was only beginning to “arrive”; social norms had not been totally refashioned. Members of medical organizations, to which Congressmen turned for expert advice, were still skeptical about fertility control through “artificial” means. This was the environment to which legislators responded. Even as public feeling changed, legislators still tended to reflect the older dominant community morality that birth control would promote promiscuity and lead to the disintegration of the family. And, while many legislators probably sought and used contraceptives to limit their own families, they made a clear distinction between personal and public morality. Consequently, attempts to amend or repeal Comstock laws received little support in formal legal forums.

At the same time, the social context to which legislators responded in the 1930’s differed markedly from that which prevailed in the 1890’s or even the 1920’s. The social forces that had given impetus to the birth-control movement persisted and the law in action tended to reflect that changing reality. Comstock’s laws were only occasionally enforced, although these prosecutions kept alive a fear that inhibited many—including those in the medical profession—and hampered development of better contraceptive methods and their distribution, especially to the poor.

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15 See “The Doctors and Birth Control,” VII Birth Control Review (June 1923), 144-145.
16 Mary Ware Dennett, Birth Control Laws (New York: Frederick Hitchcock, 1926) for a discussion of Congressional debates on birth control laws in several states, including New York. One Congressman is said to have advised another (at 189): “Whatever you do, don’t get mixed up in any sex stuff. No man in politics can afford that.”
17 Dienes, Law, Politics and Birth Control, 103; “Legal and Political Aspects of Population Control,” 601; Anthony Blackshield, “Constitutionalism and Comstockery,” 14 Kansas Law Review (1966), 409; and “The Social and Legal Status of Contraception,” 221, which deserves quoting. “Despite the presence of these restrictive laws on the statute books of the land, there was until recently very little effort made to enforce them. Their chief effect was to cloak with an aura of sneakiness and suspicion a subject which was increasingly throughout the whole period coming medically of age.”
Beginning in 1930, pro-change forces led by Margaret Sanger launched an organized assault on Congress to amend federal laws. Perhaps reflecting her nursing background, perhaps out of a hope of arriving at some compromise with her legislative and Catholic opposition, she proposed a "doctor's exception" rather than an outright repeal of the federal legislation. In Sanger's bill, the medical profession was to be excluded from the prohibition in the statute.\(^{17}\)

Between 1930 and 1937 Sanger's organization made a number attempts to alter the law; all of them failed.\(^{18}\) By 1937 the movement was no longer a weakly organized group of idealistic female radicals without political expertise, it had grown rapidly in membership and was to a certain extent "being tolerated as a constructive instrument of morality."\(^{19}\) Its successes were visible across the country. Some fifty-five birth-control clinics in twenty-three cities and twelve states opened during the 1920's-1930's and prospects for further growth appeared bright.\(^{20}\) Equally improved opposition forces, however, countered the American Birth Control League's case with strongly stated religious arguments.\(^{21}\) Legislators could not be certain of the political repercussions of a


\(^{18}\) S. 4582. 71st Congress. 2d Session (1930); S. 4436. 72d Congress. 2d Session (1932); S. 1842. 73d Congress. 1st Session (1933); S. 600. 74th Congress. 1st Session (1935); H.R. 2000. 74th Congress. 1st Session (1935); H.R. 5600. 74th Congress. 1st Session (1935); S. 4000. 74th Congress. 2d Session (1936); H.R. 11330. 74th Congress. 2d Session (1936). Id., 104. fn. 1. Recommendations for legislative action in this series of attempts were made by the National Committee on Federal legislation for Birth Control, founded by Margaret Sanger in 1928.


\(^{21}\) As noted above, the Catholic Church by the 1930's stood as the primary obstacle to any alteration of the law. The papal encyclical, Casti Connubii was issued in 1930, opposing all forms of "artificial" birth control (Pope Pius XI). Catholics had a wide variety of social organizations united under the National Catholic Welfare Council, and the Catholic Bishops of the United States were always represented at Congressional hearings. See "N.C.C.M. Active in Fight against Birth Control." XV Catholic Action (March 1933); "N.C.W.C. Executives Again Protest Passage of Contraceptive Legislation by Congress." XVI Catholic Action (May 1935); "Opposition to Birth Control Bills Registered at Congressional
pro-birth control vote. The easiest way was to take no chances; as long as a bill never
left committee, most legislators could avoid responsibility. Only one of the eleven bills
presented by Sanger’s organization ever reached the floor of Congress, and even that was
returned to a committee where it died.  

Congressmen perhaps were comfortable with non-action, knowing that birth-
control laws were increasingly being ignored. Most individuals who wanted
contraceptives could get them. Only the poor and uneducated were being denied. One
scholar has maintained that birth-control restrictions were rapidly becoming symbolic by
the mid-1930’s and that the Catholic Church served only as “a symbolic expression of
negative public policy toward contraception.” Whatever the motivations of
Congressmen, legislative non-action was the reality. Margaret Sanger expressed the
belief that amending or repealing existing legislation was more difficult that passing new
legislation. But even as Congress was avoiding the issue, the courts were in the process
of creating a new judicial policy more consistent with changing social conditions.

In 1935, Sanger and the National Committee on Federal Legislation for Birth
Control decided to bring about a revision of Comstock laws through the Federal Courts.
The aim was to secure a judicial decision declaring the federal laws unconstitutional or
recognizing a “physician’s exemption” from the federal prohibitions. It was decided to
have a shipment of pessaries (diaphragms) sent from a physician in Japan to Doctor
Hannah Stone, the lead physician of the League, for potential use in her medical

Hearings,” XVII Catholic Action (June 1932); Charles A. McMahon, “The Meaning of Catholic Action:
XIV Catholic Action (January 1932). For a summary of Catholic medical and social arguments against
birth control, some of which were used in hearings, see Edward R. Moore. The Case Against Birth Control
(New York, 1931).
22Dienes, Law Politics and Birth Control, 106.
23Ibid., at 109.
practice.\textsuperscript{25} Stone, a respected gynecologist and a leader in the birth-control movement, was a natural choice to press the claim. To ensure official action, the League informed customs officials of the shipment’s arrival. When the government seized the package and filed a libel\textsuperscript{26} against the products, the organization had successfully staged its test case.

The League was ably represented by the New York firm of Greenbaum, Wolff & Ernst, and the case was argued by Morris Ernst. Ernst had represented Sanger and the League since 1918 and been instrumental in obtaining the decision in Sanger’s first successful case.\textsuperscript{27} In People v. Sanger the New York court had explicitly legalized the provision of birth control advice and devices by doctors in any and all situations where they were medically appropriate for a woman’s health, and Ernst naturally hoped to use this decision in pressing for a similar interpretation of the federal Comstock law. In his response to the government’s claim, Ernst maintained that the tariff provisions should either be interpreted to permit the importation of birth-control devices for legitimate medical purposes or that the statute should be declared unconstitutional. The chances of getting the law declared unconstitutional were slim. That Ernst attempted it was a reflection of his eccentric personality and style.

Morris Ernst was a champion of civil liberties who specialized in censorship cases. He saved Marie Stopes’s medical treatise on Married Love, James Joyce’s Ulysses, and Radclyffe Hall’s novel of lesbianism, The Well of Loneliness, from suppression. Of

\textsuperscript{24}Sanger, My Fight for Birth Control, 332.
\textsuperscript{25}See Lader, The Margaret Sanger Story, 301-304.
\textsuperscript{26}A “libel” in Admiralty Law is the initial pleading in a suit, corresponding to the declaration or petition in an action or proceeding at law. A “libel of information,” a subparagraph of libel in admiralty law, is a pleading asking for the seizure and condemnation of property, such as adulterated or misbranded drugs. See Ballentine’s Law Dictionary (Rochester: Lawyer’s Cooperative Publishing, 1969) 3d Edition, 732-733. The One Package case was tried as an admiralty case in the lower court because the package had been seized at the New York Harbor. See F.L. Maraist, Admiralty in a Nutshell (St. Paul: West Publishing Co., 1988) 2d Edition, 331-341. “Jurisdiction and Procedure in Maritime Claims.”
censorship of whatever sort, be it governmental, ecclesiastic, or secular, he was known to say, "If we try hard enough to look for dirt, everything begins to look dirty."28 As his biographers admiringly note, Ernst had risen from a shirt manufacturer studying law in the evenings at New York Law School to a place among the leading liberal lawyers of America.

But Ernst had no qualms about taking on straight commercial or corporate law work for clients able to pay respectable fees. His firm handled a considerable Wall Street practice, and he lived lavishly, with a home on Fifth Avenue, a farm in New Jersey, and a cottage on Nantucket Island where he and his family vacationed every summer for three months. Yet, while the other partners earned $100,000 annually, he earned "no more than $50,000," devoting much of his time to underdog clients and causes. He authored seven books, four of them on censorship, and all were well reviewed (although largely by Ernst's friends), and on one occasion, by Ernst himself under a pseudonym. None of them ever sold over a thousand copies. Ernst was fond of calling himself "Liggett's best customer," referring to the famous drugstore outlet for cut-rate editions. "You will find me there," he would say, "shortly after publication."

In 1932, then-Governor Franklin Roosevelt appointed him to a membership on the New York State Banking Board, where he displayed a flair for mathematics and public finance. He settled a taxi strike for New York's Mayor LaGuardia in 1934, drafted insurance and banking laws for the State, and advised innumerable federal, state and city

27 People v. Sanger, 118 N.W. 637 (1918).
28 My biography of Morris Ernst has been drawn from the Life profile written by Yale law professor Fred Rodell, "Morris Ernst: New York's Unlawyerlike Liberal Lawyer Is the Censor's Enemy, the President's Friend" (21 February 1944), 97-98, 100-107; and Marquis James, "Morris L. Ernst," Scribner's Magazine 104 (July 1938) 7-11, and 57-58.
officials, high and low, on both personal and governmental matters. Among his friends were a number of celebrities.

Though a Jew, Ernst was against Zionism. He helped organize the movement to save the Scottsboro boys from the rope, and refused admission to the American Bar Association because it would not admit Negroes. When the Association invited him to join, he wrote back asking whether colored attorneys were eligible for membership. In return he received an apology, which he treasured thereafter, stating that the Association hadn’t realized he was colored. According to everyone who knew him, he was a man who delighted in the unorthodox.

Ernst’s tactics in censorship cases, and other causes in the spectacular category, were equally eccentric. He relied on no courtroom tricks, such as “slick cross-examining” (practices he denounced). His specialty was making a public issue of the kind of case which had little, or no, popular support. In this way, a lot of his cases were won before they got to court. For example, the indictment in the 1929 censorship case against Mary Dennett Ware, who had been arrested for circulating a brochure called The Sex Side of Life, was technically defective—the wrong wording was used in it somewhere. Ernst could have attacked the indictment and possibly gotten it thrown out. Instead, he made the case a public issue, and won on that issue.29 In this way, he believed, his victories contributed something that was lasting.

Before Ernst, vice crusaders could scare booksellers into making guilty pleas and paying light fines by promising to get their cases over quickly, without publicity. Ernst

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29The brochure defined sexual intercourse as “man’s greatest pleasure.” Ernst showed that the pamphlet was held in esteem by doctors, clergymen, Y.W.C.A. officers; that it was used at Columbia University and sold at the Union Theological Seminary bookstore. The judge threw out this testimony and fined Mrs. Dennett $300. Ernst appealed, got his testimony in the record, and obtained Mrs. Dennett’s acquittal.
turned things around, saying, “Let’s have publicity and make it work for us.” In the suit against Radclyffe Hall’s *The Well of Loneliness*, Ernst asked the court for a postponement of the trial to familiarize himself with the book. The attorney for the New York Society for the Suppression of Vice, John S. Sumner, leaped to his feet, protesting. “All he wants is time to whoop this case up. All he wants is publicity.” “Come, come, Mr. Sumner,” Ernst answered. “You have given this case sufficient publicity for our purposes.” It must have been true, because Ernst won the case, and the book, an otherwise “dull affair,” sold 200,000 copies. Ernst maintained that, had Sumner let it alone, nothing the publishers could have done would have pushed sales above 3,000.

The *One Package* defense was built on the same principle as that of Ernst’s censorship cases. Relying on publicity and the popular support he was certain it would engender, Ernst hoped to win the court over and bring about change. A repeal of the Comstock laws was the desired result; a “doctor’s exemption” would do if repeal was not possible.

The argument for a flexible approach to the act had been given substantial support by prior court decisions. The ground for such a revision, for example, had been laid in a 1915 abortion case, *Bours v. United States*. In this case the court had employed a “rule of reasonable construction” to limit a sweeping prohibition on sending abortion information through the mails to those instances “inimical to life,” which did not include abortion intended to preserve life. Even though the statute appeared all-inclusive, a judicial exception was found:

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30229 Fed. 960 (7th Cir. 1915).
Though the letter of the statute would cover all acts of abortion, the rule of giving a reasonable construction in view of the disclosed national purpose would exclude those acts that are in the interest of national life. Therefore, a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate if such in truth is his real position.  

Related cases dealt with the obscenity standard for printed materials about contraception. In a series of recent cases dealing with imported publications, the courts had established that information about contraception did not per se make a work obscene; the contents would have to be judged by the general standards of obscenity. In all three cases, books dealing with birth control were admitted.  

But the primary impetus for change came from two cases dealing directly with the Comstock provisions on the dissemination of contraceptives. In *Young’s Rubber Co. v. C.I. Lee and Co.*, a 1930 trademark-infringement case, Judge Thomas Swan used his opinion to suggest the need for a re-examination of the federal law regarding contraception. The defense had questioned the legal efficacy of a trademark on contraceptives since their dissemination was against the law. In other words, the defense argued that if the trademark was being used in an unlawful business, it could not be considered a legal trademark. Swan argued that the courts had never held that the statutes barred proper medical writings, and further, that the dissemination of contraceptives was lawful in certain places. More important was his suggestion on the need for a re-evaluation of the legislative intent underlying the statute.

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31229 F. 2d 960, at 964 (1915).  
3343 F. 2d 103 (2d Cir. 1930).
Taken literally [Swann said], this language would seem to forbid the transportation by mail or common carrier of anything “adopted” in the sense of being suitable or fitted, for preventing contraception...even though the article might also be capable of legitimate uses and the sender in good faith supposed that it would be used only legitimately...The intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be ascribed to Congress...It would seem more reasonable to give the word “adopted” a more limited meaning than that above suggested, and to construe the whole phrase “designed, adopted or intended” as requiring an intent on the part of the sender that the article mailed...be used for illegal contraception or abortion or for indecent or immoral purposes.\footnote{45 F. 2d 103, at 108 (2d. Cir. 1930).}

In his opinion Judge Swan never mentioned earlier federal decisions which had sustained the sweeping prohibition of contraceptives. Instead, he drafted an approach for making the prohibition “more reasonable.”

His approach received a favorable hearing three years later in the Sixth Circuit in \textit{Davis v. United States}.\footnote{62 F. 2d 473 (6th Cir. 1933).} Here the court quoted at length from the \textit{Young’s Rubber} decision, “not as precedent, but because the soundness of its reasoning commends itself to us.” The lower court’s exclusion of evidence designed to show “good faith” and the absence of “unlawful intent” was held to be reversible error, and a new trial was ordered. The court made clear that “intent that the articles...were to be used for condemned purposes is a prerequisite to conviction.”\footnote{62 F. 2d, at 475.} However, since the court failed to say what constituted a condemned purpose, no standard for judgment was established.
All of the judicial input favorable to a "reasonable interpretation" of the Comstock Act was presented to the lower court in *One Package.* The case came to trial on January 6, 1936, in the United States District Court for the Southern District of New York, before Judge Grover Moscowitz. The United States of America, as libellant, and Proctor for the Libellant, the United States Attorney, Lamar Hardy, sought a decree directing the forfeiture, confiscation and destruction of the package containing the pessaries. Dr. Stone, Claimant, and Proctor for the Claimant, Morris Ernst, sought a dismissal of the libel and a decree directing the return of the pessaries. In a directed verdict Judge Moscowitz dismissed the libel, and the government appealed.

In his opinion, Judge Moscowitz cited the *Davis, Young's Rubber,* and *Bours* cases extensively, referring to their "reasonable construction" of the law to support his decision. Summing them up, he stated:

And so in the case at bar the same rationale requires that the instant statute be given a reasonable construction. Taken literally the language of the statute would seem to forbid the importation of any article for the prevention of conception even though the article might be capable of legitimate uses and the importer intended that it would be so used. Such a construction would prevent the importation by physicians of any article for the prevention of conception even though the physician desired to use it or prescribe it for the purpose of saving a human life. As the Circuit Court of Appeals for this Circuit stated in Youngs Rubber Corporation, Inc. v. C.I. Lee & Co Inc., supra, the intention to prevent such a proper medical use "is not lightly to be ascribed to Congress." The claimant having imported the libeled articles for experimental purposes to

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37 Brief for Appellee, *United States v. One Package,* 86 F. 2d 737 (2d Cir. 1936).
38 A directed verdict is a verdict ordered by the judge as a matter of law when he rules that the party with the burden of proof has failed to make a *prima facie* case. See *Black's Law Dictionary,* 1080. In this instance, both sides requested a directed verdict: the government did so on the grounds that Dr. Stone never denied having imported the pessaries in violation of Section 305 of the Tariff Act of 1930; Dr. Stone maintained that the government had failed to prove that she imported the pessaries for an unlawful purpose.
determine their reliability and usefulness as contraceptives to cure or prevent disease, a lawful purpose, it must be held that the libeled articles do not come within the condemnation of the statute and a decree must be entered for the claimant dismissing the libel and directing the return of the articles. 39

Again, Ernst presented all the evidence and asked for a liberal interpretation of the laws, this time before the United States Circuit Court of Appeals for the Second Circuit. 40

In a 55-page brief that included maps of the United States detailing state laws and the locations of birth-control clinics throughout the country, he argued for a “reasonable” interpretation of the Comstock statute and its corresponding Tariff Act, and a “doctor’s exemption” from the literal meaning of the law. He stressed that One Package was intended to be a “test case.”

This is a test case. The question is not whether a few dozen Japanese pessaries may rightfully come into the United States. It is whether a federal statute prevents the importation by physicians of articles which unanimous medical opinion regards as vital to life and health. The libellant contends that Section 305 [of the Tariff Act of 1930] precludes the importation of every article for the prevention of conception irrespective of purpose and of the hardship and loss of life such preclusion may entail. The claimant takes the position that it would be unthinkable to attribute to Congress a design to exclude articles concededly necessary to the well-being of the women of the United States, and that Section 305 prohibits the entry only of those articles which are intended for illegal contraception. 41

He also made clear that the case was not concerned with abortion, “abhorrent to some because it is said to involve the destruction of life, but with its antithesis, contraception, a

40 Brief for Appellee, United States v. One Package, 86 F. 2d 737 (2d Cir. 1936).
41 Ibid., at 3–4.
technique to avert the medical necessity for abortion in proper cases by preventing the inception of pregnancy."\(^{42}\)

Noting that statutes prohibiting or regulating the trade in intoxicating beverages were held inapplicable to the sale of liquor for \textit{bona fide} medical purposes,\(^{43}\) Ernst pointed to analogous state and federal decisions in which courts had consistently refused to apply broad prohibitions to the realm of medicine. Thus, a statute forbidding the advertisement of certain drugs was not seen as applying to circulars distributed by druggists to physicians, and a law prohibiting the distribution of contraceptives was held not to apply to a doctor who had prescribed a contraceptive for a patient whose physical condition, he believed in good faith, required it.\(^{44}\)

Ernst then examined the legislative history of the Comstock Act and the New York state statute that followed to show that the laws had been passed hastily and without debate. The Comstock act, passed in 1873, was introduced as "a bill for the suppression of trade in and circulation of obscene literature and articles of immoral use," on February 18, tabled without discussion, and re-introduced two days later for consideration during a ten-minute extension of the morning session. By February 20 the exemption for physicians, which had been in the original bill, had inexplicably been deleted. At no time was either the presence or the absence of the provision concerning doctors called to the attention of the Senate. The confusion that existed as to what differences there were

\(^{42}\text{Ibid.}, at 8.\\)
\(^{43}\text{Not only alcoholic preparations intended for the treatment of disease, but liquors used for sacramental purposes ("religious worship") were exempted.}\\
\(^{44}\text{See }\text{Commonwealth v. Dr. Clayman}(\text{unreported}),\text{ in which an indictment was preferred in Massachusetts, the District Court of Chelsea, against a physician for supplying a patient with a contraceptive. There was no opinion rendered, but the judge stated that since the evidence was that the patient had three children and looked anemic, and since the doctor testified that he thought it unwise for her to have any more children until she was built up physically, he found the defendant not guilty of violating the statutory provision. Brief for Appellee, }\text{United States v. One Package},\text{ at 25.}\\
between the two provisions was brought to the attention of the Senate by Senator Conkling, who said: "I suggest that it might just as well be regarded a agreed to as to be voted upon, for I think no Senator is able to get any intelligent idea of the substance of this amendment as contrasted with that which it is to take the place of." Nevertheless, on the next day, the Senate passed the Bill with no further discussion.

In the House, the bill was introduced as amended and again there was no discussion. One representative suggested that the Bill be referred to the Committee on the Judiciary, "for its provisions are extremely important, and they ought not to be passed in such hot haste," but he was not heeded. It was voted that the ordinary rules of the House be suspended, and the Bill was passed without any consideration whatever of its merits or provisions. It was, Ernst contended, "wholly clear...that the medical use of contraceptives was not even considered by the Legislature and that the Bill was not passed with any intent to forbid [medical] use."

Ernst was certain that Comstock himself had intended to exempt physicians from the provisions of his law. Citing a later interview in which Comstock was asked: "Do not these laws handicap physicians?" he replied:

They do not. No reputable physician has ever been prosecuted under these laws. A reputable doctor may tell his patient in his office what is necessary, and a druggist may sell on a doctor's written prescription drugs which he would not be allowed to sell otherwise.

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47Ibid., at 14.
48Ibid., at 15.
The historical record, he contended, was clear. It had been the purpose of Congress and of the sponsors and framers of the bill to prohibit only articles for immoral use. Not even the staunchest supporters of the law, he maintained, believed that articles intended for legitimate medical use fell within its prohibition.

Finally, Ernst took to task Section 305 of the Tariff Act, the offspring of the Comstock Law. Its wording, which was similar to that of its parent, was said to prohibit the importation only of those things which were capable of "harming the people of the United States if permitted freely to circulate -- e.g., ... treasonous documents and drawings, ... materials for unlawful abortion, lottery tickets." The classification of articles for the prevention of conception along with these, he insisted, "must be regarded as conclusive evidence that illegitimate contraception alone was intended." Most importantly, he contended, Section 305, which was distinguished by its intent to interdict objects "menacing to the public welfare," could not possibly extend to medical supplies necessary to preserve that welfare. He also pointed out that, despite the existence of Section 305, consignments of pessaries from Germany and England intended for scientific and medical uses had frequently been admitted into New York by Customs Authorities who did not view them as falling within the terms of the statute. 49

Ernst then reviewed the situations in which "medical necessity" might lead physicians to prescribe contraceptives to their patients. The presence of tuberculosis, heart disease, pelvic deformities, diabetes, insanity and epilepsy were cited as situations where there existed a "medical need" for contraception. He recalled the testimony of the government's expert witness, Dr. Bancroft, who had testified that in his practice he had
occasionally prescribed contraceptives similar to those labeled here, for the reasons cited above and “in order to prevent the birth of a child if there had been a child born to the same woman within a few months.” This testimony was cited to support that of the claimant’s witness, Dr. Holden, who had testified that he had found contraceptives to be necessary in the cases mentioned above, and to “prevent syphilis and gonorrhea through infection at the time of birth,” as well as in the case of kidney disease, goiter and “several other conditions.” Statements of well-known medical associations like the AMA were cited as endorsements of the principle of medically regulated contraception.

In support of a liberal reading of the federal law, Ernst pointed out that the New York law, like many other state laws regarding the regulation of contraceptives, contained an exception for physicians. Although the New York statute\(^{51}\) made it a misdemeanor to sell “articles for the prevention of conception,” physicians were allowed to prescribe contraceptives “for the cure or prevention of disease,” or if “the health or condition of the patient required it.” The exemption had subsequently been held to include nurses, druggists and manufacturers acting as sources of supply for physicians.\(^{52}\) The irony of the situation in which a federal law that had originated in New York prohibited the very thing allowed by the state law modeled on it, was made clear.

Next, Ernst contended, the general contemporary attitudes toward birth control had changed. “No group in the community, not even the federal government itself, views medically controlled contraception as “obscene” or conducive to immorality. No group opposes the underlying principle of birth control, or the dissemination of birth control

\(^{49}\)Ibid., at 17.
\(^{50}\)Ibid., at 22.
\(^{51}\)New York Penal Law. Section 1142. Ibid., at 25.
\(^{52}\)Ibid., at 26.
information. There is disagreement only as to the method to be used for family limitation.” Even the Catholic Church, he pointed out, advocated the rhythm method and recommended that it be employed “to avert the incidence of economic burdens, poverty, [and] unemployment which make it impossible for parents to give their children and themselves the food, clothing, housing, education and recreation they are entitled to as children of God.”

Furthermore, he noted, the topic of birth control was no longer taboo. Drug stores openly sold a great variety of contraceptive devices: jellies, condoms, vaginal tablets, caps, pessaries and syringes, as well as calendars and books to aid in ascertaining the “safe period.” The need for contraception “in proper cases” had been generally recognized by the community, and books dealing with the subject were circulated freely and widely read. Ernst also reminded the court that it had, six years earlier, unequivocally expressed the view that contraception, practiced under the direction of a physician, was legitimate. In the face of this overwhelming recognition by the medical profession, state and federal agents, the community, and the courts, he said, the court could hardly uphold the confiscation of articles “vital to public welfare” under the

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53Ibid., at 27.
54Ibid., at 28. The 1935 Sears & Roebuck Catalog contained an entire page devoted to what it called “feminine hygiene needs;” the 1939 catalog advertised two pages of contraceptives. See David L. Cohn’s The Good Old Days: A History of American Morals and Manners As Seen Through the Sears & Roebuck Catalogs, 1905 to the Present (New York: Simon & Schuster, 1940), 254-255. Cohn points out that, while the circulation of contraceptives was forbidden by federal statute, the use of them was not (except in Connecticut). “The result is that in most states contraceptive devices are illegal, and they are, therefore, bootlegged, opening the door to quacks of every kind and forcing the consumer to get the best article available, just as he used to buy the best Scotch he could get in the days of prohibition.” And, despite State laws, “throughout the states, contraceptive devices are openly sold in drugstores; boxes and bottles of them are piled up on counters and in shop windows as though they were talcum powder, and almost everywhere in the country the simplest form of contraceptive agent may be obtained in hotels and gasoline filling stations merely by dropping a coin in the slot of a vending machine. Laws or no laws, contraception has come to America.”
provision of a law “designed to suppress only objects inimical to that welfare.” With all this in mind, the libellant’s position must be seen as untenable.

Finally, Ernst offered the Court of Appeals constitutional justification to forge a new legal policy. Citing the due-process clause of the Fifth Amendment, he argued that the prohibition of contraceptive devices prescribed “for saving life” was tantamount to depriving Americans of life, liberty and health without due process of law; referring to the substantive restriction on the power of the national government contained in the Tenth Amendment, he argued that the federal government had unlawfully kept these life-saving devices from the public “by legislative fiat.” The power to “regulate,” he asserted, did not imply a power to “prohibit.” Congress had the power to destroy commerce in articles only if they were shown to be inherently harmful or vicious.56 Contraceptives had, he concluded, been proven essential to the public welfare rather than inimical to it.

The brief presented by Ernst on behalf of the Claimant-Appellee was thorough and convincing. In contrast, the Brief for Appellant was short and unoriginal. Containing only fifteen pages, it relied entirely on a literal interpretation of the law and the testimony of the government’s sole witness, Dr. Bancroft. Stubbornly holding that the Tariff Act of 1930 “meant what it said,” U.S. Attorney, Lamar Hardy reiterated the government’s position that the statute prohibited “all articles for the prevention of conception” and that, because the wording was clear and unambiguous, the statute must be considered “decisive.”

The words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for

56Brief for Appellee, United States v. One Package, at 37.
construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases.\textsuperscript{57}

Hardy also reiterated the history of the Comstock Law and the Tariff Act, but without looking closely at their legislative history. Noting only that the statutes had been lawfully passed by a duly elected Congress, and that despite several attempts to amend them the laws had remained unchanged, he concluded that Congress had intended the laws to remain on the books "without change and...unimpaired by exceptions."\textsuperscript{58}

Noting that the New York legislature, like a number of other state bodies, had enacted an exemption in Section 1145 of its Penal Law for physicians, Hardy stressed that "the exception in the state law was made by the Legislature and not by the judiciary." The courts, he added, "will not pass upon the wisdom of enacted legislative policy. Nor will the Courts supplant the Legislature as a guardian of morals."\textsuperscript{59} Finally, he attacked the decision of Judge Moscowitz in dismissing the libel in the lower court. "Judge Moscowitz, in dismissing the libel, based his decision on Youngs Rubber Corporation and Davis v. United States, and his opinion is almost completely made up of quotations from the two cases. Neither case is controlling here."\textsuperscript{60} He insisted, in other words, that the cases decided—even the one decided in the Second Circuit Court of Appeals by the same court members—did not sanction the importation of the prohibited contraceptives. Nothing was said of prevailing social attitudes or the role of courts as barometers of those popular values.

\textsuperscript{57}Brief for Appellant, United States v. One Package, at 6.
\textsuperscript{58}Ibid., at 7.
\textsuperscript{59}Ibid., at 11-12.
\textsuperscript{60}Ibid., at 13.
The case was decided December 2, 1936 by Judges Augustus Hand, Learned Hand, and J.W. Swan. In the court of appeals, the judges were confronted by the task of applying a nineteenth-century statute to twentieth-century society. They recognized that time had produced greater medical awareness of the dangers of conception and childbirth, a point stressed by Ernst. There was the precedent of *Davis v. United States*, Judge Swan’s decision in *Youngs Rubber Corporation*, and the *Bours v. United States* inclusion of intent in the abortion provision of the Comstock statute. Changes in society had placed birth control in a very different position from that it had occupied in 1873. There was the stumbling block of legislative non-action. If the law was to change, it appeared, it would require judicial action.

The judges of the Second Circuit were willing to take up the challenge of change. Using Ernst’s rule of reasonable construction, it held that the statute was intended to include

> only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be used. Its design, in our opinion, was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of their patients."61

Despite the fact that the statute appeared all-encompassing, without exception, that an exception for physicians was removed by Congress in enacting the Comstock bill, that an earlier court had rejected a similar challenge, and that Congress had consistently refused to insert an exemption into the statute, the Second Circuit nevertheless maintained that the law had been changed.
Judge Learned Hand, concurring, expressed his doubts concerning the court’s action, saying:

There seems to me substantial reason for saying that contraceptives were meant to be forbidden, whether or not prescribed by physicians, and that no lawful use of them was contemplated. Many people have changed their minds about such matters in sixty years, but the act forbids the same conduct now as then; a statute stands until public feeling gets enough momentum to change it, which may be long after a majority would repeal it, if a poll were taken. Nevertheless, I am not prepared to dissent.⁶²

But what was “obscene” and “immoral” in 1873 had changed, and the court was required to apply the obscenity statute and the prohibition of contraceptives to its new context. In 1936, a national survey had indicated that 71 percent of those questioned were in favor of birth control and 70 percent supported legislation to revise the federal statutes.⁶³ There was a greater awareness of the medical necessity for control of contraception by medical professionals. And there was a stronger social and medical acceptance of the practice itself. Further, the court had been informed of the legislative history essential to understanding the statute’s purpose as well as changes in the social situation. Under these circumstances, the court of the Second Circuit could hardly refuse its responsibility to bring the law into step with reality.

The court’s decision, then, was essentially a reaction to the changed social milieu. A newspaper noted at the time: “Judges, it develops, are capable of human understanding and are almost as sensitive as the rest of us to the changing winds of public

⁶¹86 F. 2d 737, at 739 (2d Cir. 1936).
⁶²86 F. 2d, at 740.
⁶³Dienes, Law, Politics and Birth Control, 113, fn. 28.
opinion. To watch the weather-cock change is to watch the making of social history. Maybe judges don’t read polls, but they read the signs of the times.”

The “liberal” construction in One Package yielded a limited restructuring of the law to permit a medical exemption to what had previously been a prohibitive norm. It did not contain the sweeping changes of Roe v. Wade, but it was an instance of real judicial creativity. It brought an end to Margaret Sanger’s National Committee on Federal Legislation for Birth Control and its legislative efforts to repeal the statutes. Since there was little fear that Congress might react negatively and reverse the judicial action, the committee disbanded. But the movement’s work had not ended. The decision still had to be implemented in order to give the new legal policy a “social reality.”

The government now had to show an “unlawful purpose” and an “illegal intent” to prevent the importation and mailing of contraceptives, or it could not be prevented. As one legal commentator has noted, the importance of this judicial creativity should not be underrated:

United States v. One Package and the peripheral cases...made a significant contribution to the progress of birth control in the United States. Before these decisions, physicians, even in the states that had no laws against contraception, could not lawfully obtain contraceptive supplies and information. The mail and common carriers engaged in intrastate carriers were closed to them. Publishers had no incentive to print textbooks and articles on the subject. Research was impeded. After these decisions, the door opened to a nationwide advance in the establishment of clinics, to widespread publicity about birth control, and to the active support of the medical profession.

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65Dienes, Law, Politics and Birth Control, 114.
What the legislature had been unwilling to do, the courts had done. Law had thereby been brought into line with a changing society.
Chapter 3

From Pioneering to Frontiering:
The Maternal Health Center of Houston, 1937-1940

Call the movement what you will—planned parenthood, family limitation, child spacing, birth control—it has arrived.

1939 Progress Report,
Planned Parenthood Committee of Texas

The emergence of the Maternal Health Center in Houston in the late 1930s as a viable organization coincided with a number of changes in American society that had crystallized in the course of the first three decades of the twentieth century. Social shifts were occurring across the country in a number of identifiable areas: rising individual expectations; increased urban in-migration; continued racial segregation; the fluid status of women; a large residual post-Depression poverty; the population explosion; and the corresponding rise of philanthropic agencies dedicated to stamping out society’s ills. In Texas, the birth control movement, the state’s Planned Parenthood League, and Houston’s Maternal Health Center emerged as philanthropists committed to the goal of ending unplanned pregnancy in the wake of this social change.

The turn of the century had produced, particularly in urban areas, a shift in middle-class views of family size. Those who had opted for smaller families were appalled at the state of maternal and child health among the poor, and from their ranks came the leaders of the birth control movement. The concerns of these middle-class reformers—mostly women—were directed primarily towards individual women and their families, but eventually were related to broader social goals. Foremost, the reformers viewed birth control as a direct means of improving the physical health of women and the
economic well-being of families. But they were also concerned with woman’s suffrage, free school lunches, immunization, public sanitation, and changes in the public school systems, so that their original, limited goals became part of more sweeping goals to better the lot of women.¹

The first priority of the movement’s pioneers in the early twentieth century was to create public credibility for the concept of birth control and to crack the “wall of silence” that surrounded it. So that the topic of contraception would be addressed with intelligence, Margaret Sanger’s American Birth Control League (ABCL) recruited socially and professionally unassailable volunteers who were willing to accept the “risks” of being associated with the birth control movement. These men and women formed committees, first in New York, then throughout the country, to develop and sustain effective public support.²

The reformers were aided by the broad social changes occurring around them. The 1910s were a time of cultural, political, and social ferment. While social critics lamented the demise of the traditional family, women in increasing numbers worked outside the home, principally in low-paid factory and sweatshop jobs. Intellectuals debated socialism while radical labor leaders demanded a shorter work week. Women marched for suffrage. In this climate, progressive thinkers inevitably began to question the late-nineteenth-century Comstock laws that stigmatized contraception as a form of

obscenity. Among those who spoke out publicly against “involuntary motherhood” were Emma Goldman, the socialist leader, and Mary Ware Dennett, a well-known suffragist. None was more single-minded than Margaret Sanger in the cause of birth control.

The end of World War I, one historian of Planned Parenthood has noted, “hammered the last nail in the coffin of Victorian ideals.” During the “roaring twenties,” the intellectual ferment that characterized the previous decade spread to an entire generation. Although it did not have the desired impact on the use of alcohol, Prohibition led to disrespect for laws that went against prevailing attitudes. Women won the vote, and this added to the sense of freedom and independence that many middle-class women felt.\(^3\)

Most women, though, continued to struggle against considerable burdens. Massive immigration swelled the populations of American cities with poor families who lived in crowded tenements in conditions that fostered disease and early death. Although the Comstock laws remained in force and conservative groups, including the medical profession, continued to oppose any “artificial” prevention of pregnancy, the sad circumstances of these families lent force and credibility to the arguments for legal contraception being expounded by birth controllers.\(^4\)

The stock market crash of 1929 ushered in the worst economic disaster of American history. In the early 1930s an estimated 25 percent of the labor force was unemployed. A million homeless people wandered the country and children starved by the thousands. The Great Depression contributed to driving Herbert Hoover out of office

and paved the way for Franklin Roosevelt’s New Deal. As massive social welfare
programs provided food, shelter, and health care to desperate people, a new commitment
to social justice took root in the American character. In this climate, the birth control
movement won adherents and clinic services flourished—although often in the face of
powerful minority opposition.⁵

The 1936 decision in *U.S. v. One Package of Japanese Pessaries*,⁶ which struck
down New York’s Comstock law and declared that birth control could no longer be
classified as “obscene,” ushered in a new era in which birth control became increasingly
accepted as having both medical and socioeconomic importance.⁷ Its importance was
underscored the following year when the American Medical Association for the first time
recognized contraception as a legitimate medical service and recommended its inclusion
in medical school curricula.⁸

**Changes on the National Level**

The *One Package* decision and the AMA’s acceptance of birth control as
“legitimate” paved the way for the beginning of the American Birth Control League’s
organizing process. Building upon the pioneer era of the nineteen-teens and twenties, the
ABCL’s leaders began to formally structure the field of family planning care. The
organization formed a National Medical Council on Birth Control to draft required

⁴Ibid., 15.
⁶86 F. 2d 737 (C.C.A. 2d, 1936).
⁷The *One Package* decision applied only to New York, Connecticut, and Vermont. It took nearly thirty
more years for the U.S. Supreme Court to find, in *Griswold v. Connecticut*, 382 U.S. 527 (1965), that
married couples throughout the country had a right to obtain contraceptives from licensed physicians. But
in the years following the *One Package* decision birth control ceased to be controversial and gradually
became an accepted fact of American public life.
minimum standards for the certification of birth control clinics and sought the opinions of leading academics on the various aspects of birth control. Out of this period emerged a growing concern for the provision of family planning services and a national voluntary organization devoted to meeting this new social need.\(^9\)

During the 1930s a cadre of committed men and women emerged across the nation. In each town where services were initiated, it was essential to have at least three “movers” backing the program: a doctor; a minister or rabbi, and a lay volunteer. Using this formula, birth controllers opened clinics throughout the country, recruiting dedicated volunteers and professionals to operate ongoing clinics. A major effort for the next twenty years would be directed towards establishing more local clinics and raising funds to support them. By the end of the decade, birth control services were being offered in most major and many medium-sized cities.\(^{10}\)

Affiliates of the American Birth Control League were autonomous, operated by local boards who had total control over their programs. But as birth control clinics served larger clientele in urban areas, these affiliates contributed a great deal to the total national effort to initiate and expand family planning services to rural areas. During the period 1935-1950 organizing continued; state leagues, supported by contributions from affiliates, developed in twelve states. Their roles differed from state to state, but each

\(^9\)National Medical Council on Birth Control. “Required Minimum Standards for Certification of Birth Control Clinics.” published September 1938 by the American Birth Control League. The standards were created and elucidated in articles by leading contemporary academics including C.E.A. Winslow of Yale University School of Medicine (“Birth Control as a Public Health Problem”), Frederick C. Holden, M.D. and Professor of Obstetrics and Gynecology, New York University (“Child Spacing”), and W.E.B. DuBois, Professor of Sociology, Atlanta University (“Negroes and Birth Control”), whose articles were reprinted in the Birth Control Review, January and May 1938.

\(^{10}\)121 Centers for Contraceptive Advice,” Birth Control Review (January 1933). After 1933 the Birth Control Review gave state-by-state progress reports, as new clinics opened and leagues formed. See, for example, the Birth Control Review, October 1936, March 1937, October 1937, and January, May, and December 1939.
league served primarily as a communications link, as a liaison with governmental and healthcare agencies, and as vehicles of professional education for physicians and social workers. State leagues also played an important lobbying role to obtain state, and later, federal funding for family planning programs.\textsuperscript{11}

In June 1937 the leaders of the American Birth Control League and birth control clinics throughout the country joined together to create a single national organization that they named the Birth Control Council of America, reflecting the league's rapid expansion. They called in an outside consultant, Kenneth Rose of the John Price Jones fund-raising and public relations agency of New York, to advise them on the next steps. In January 1939 the movement's leaders announced the formation of the Birth Control Federation of America, with Margaret Sanger as honorary president and Kenneth Rose as acting director.\textsuperscript{12}

**Frontiering in Houston, 1937-1940**

Soon after they opened the state's first birth control clinic, Agnese Nelms, Dr. Judson Taylor, and some of the "colonel's ladies" of Houston built the Maternal Health Center of Houston into a successful medical practice. In its first two years of existence, Bess Scott of the Houston Post reported in 1938, it had "given advice, information and aid to more than 1,500 women, in cooperation with a medical advisory board which lists some of the most distinguished names in the field of medicine." Clinic heads reported that the "safe" contraceptive methods taught to underprivileged mothers had proven to be


\textsuperscript{12}A Tradition of Choice: Planned Parenthood at 75 (New York: Planned Parenthood Federation of America, 1991), 31. In 1942, again reflecting tremendous growth, the Birth Control Federation became the Planned Parenthood Federation of America (PPFA).
99 percent effective. And, Scott added, “the clinic has been the means of restoring health to hundreds of mothers so that they can care for and enjoy the several children they already have. More than that, the work of the clinic has checked in definite manner the appalling toll in human life taken by the scourge of abortions.”

Still, there were many more women seeking contraception than the Maternal Health Center could serve, and many of the city’s poor were going without. Houston was not unusual in this respect. National reports estimated that between 50 and 75 percent of the twenty-seven million couples in the U.S. during the 1930s sought to space the births of their children; yet, of 4,200 general hospitals in the country, only seventy maintained clinics for this purpose. In the second half of the decade, one survey revealed, there were not more than 350 clinics in the entire country, including the American Birth Control League’s 121 clinics, and these did not reach more than 200,000 married women. Couples without access to reputable birth control clinics were forced to choose between hundreds of devices and “preparations” available for the uninformed purchaser through drug stores, cosmetic shops, gas stations, and door-to-door salesmen—a great many of them ineffective, some injurious. “Our citizens are being victimized,” the Houston Post’s editorial writer Bess Scott exclaimed, “by worthless remedies, as were the sufferers of cancer and tuberculosis, until public opinion awakened to their plight.” There was also a great disparity in the availability and use of contraceptives between middle-class and poor women. “Why should the medical help easily available to those who can go to a

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13Bess Scott, “Mother of 11 Children Died and Houston’s Maternal Health Center Was Born,” Houston Post, April 3, 1938, Section 2, page 6. No form of birth control available in the 1930s was 99% effective. Clinic reports likely reflected follow-up visits with women who had managed to space pregnancies or to prevent pregnancy successfully.
14Ibid.
private physician be virtually inaccessible to the millions who are probably in greater need but who can not afford to pay for the same advice?,” asked Scott rhetorically.\textsuperscript{15}

Illegal abortions, another societal scourge, were estimated to be as high as two million annually. In 1938 the American Academy of Medicine found that more than 17 percent of all maternal deaths in New York city in any given year were due to illegal abortions. The Texas Medical Association did not keep statistics of this sort, but many doctors who practiced in Houston during this time were well aware of the problems caused by illegal abortions and were anxious to endorse birth control programs. There were also more general reasons for encouraging birth control among the poor, which Scott noted frankly in the Post: “Delinquency and crime breed in overcrowded, unhappy homes where low moral standards prevail. If children are left motherless by reason of needlessly high maternal death rate, society suffers and the nation must absorb that burden.” Birth control was further seen as a way of stopping syphilis and other infectious diseases, which Scott deemed “the source of the evil.”\textsuperscript{16}

Nelms was equally concerned with the problems of abortion, sexually transmitted diseases, and child spacing, but she believed these could be cured only through properly conducted birth control clinics endorsed and operated by medical professionals. “There were two million abortions in the United States last year and 90 percent of them by married women overburdened with child bearing,” she said. “Many of these were self-induced and a great many of them resulted in death or human wreckage. It is known that 10 out of every 100 second pregnancies end in abortion, and 40 out of every 100 third pregnancies. It is safe to say that attempts at abortion are made for almost every

\textsuperscript{15}Ibid.
\textsuperscript{16}Ibid.
pregnancy after the third....the problem is not whether the size of families shall be
limited, but whether they shall be limited by humane and scientific methods or by crude
and dangerous methods."\textsuperscript{17}

Nelms was acutely aware of the disparity between rich and poor in obtaining
contraception. "As conditions are now, child spacing is a class privilege. Knowledge of
child spacing is available only to those who can afford to pay their doctor for it. All
women know that for the sake of their health and that of their children there should be a
year or more between pregnancies. But the woman who is compelled to do her own
washing, scrubbing and caring for many children are the ones who are denied this
privilege." It was this type of woman who was welcomed at Houston’s Maternal Health
Center, where, as Nelms put it, "she gets the same careful consideration as if she paid for
it."\textsuperscript{18}

It was through the unpaid professional care of doctors in Houston that this was
possible. By 1938, ten clinicians were giving free time to the Maternal Health Center,
and clinic volunteers had established a number of separate "clinics" serving different
segments of Houston’s population, although the same care and services were offered to
all. The only paid workers of the clinic were Maude Meredith, secretary to Nelms, Mrs.
R.B. Harris, a registered nurse, and Mrs. Alice Gregory, a registered nurse and social
worker. Mrs. Aubrey Smith served as the volunteer administrator of the "white clinic";
Mrs. Ben C. Belt supervised the "Mexican clinic"; and Dr. Thelma Patten was in charge

\textsuperscript{17}Ibid.
\textsuperscript{18}Ibid.
of the “Negro clinic.” Dr. Patten, the first black female Ob-Gyn in the state, served the Negro community at Planned Parenthood for more than twenty-five years.¹⁹

Not enough is known about the work of Dr. Patten among Houston’s Negro women during the 1930s, ’40s, and ’50s, but her very presence at the center is instructive. At a time when Houston’s white-gloved elite were wrestling with the problems of urban poverty and women’s healthcare for the lower classes, members of minority groups were taking on the responsibility for improving the lot of the minority community as well.

“The work of the clinic among Negro women owes much of its success to the interest of Dr. Thelma Patten,” said Nelms. “Dr. Patten has given unselfishly of her time and experience and skill to the women of her race who are not able to pay doctor’s fees. She has done a marvelous piece of work, bringing health and hope to 430 underprivileged women, bettering their home conditions, teaching them the meaning of personal hygiene and doing untold good in the prevention of social diseases.”²⁰ No doubt Patten did bring better health to thousands of Houston’s Negro poor during her twenty-five years of service. For many of the city’s poor blacks, her services represented the only primary healthcare they received.

Dr. Abner Berg, a Houston obstetrician who worked part-time at the Maternal Health Center from 1937 until 1941, is one of the few who remembers the pioneering work of Dr. Patten among Houston’s Negro poor. “I worked with her in the late ’30s and

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¹⁹Patten was born in Huntsville, Texas, received her medical degree from Howard University, completed an internship at Washington D.C.’s Freedmen’s Hospital, and began practicing medicine in Houston in 1924. She was admitted to the Harris County Society in 1955, the first Negro physician to gain membership. She was also a member of the City Health Board, the Texas State Tuberculosis Board, the Texas Medical Association, and the American Medical Association. Besides serving on the staff of the Maternal Health Center, she worked as an Ob-Gyn on the staffs of St. Elizabeth’s and Riverside hospitals. See Bess Scott’s Houston Post article, April 3, 1938; “Center Will Honor Dr. Thelma Patten, The Houston Press, January 29, 1963; and “Honored For Service.” undated photo with caption (publication unknown) from a Houston newspaper.
early '40s at Houston’s Negro Hospital in the Third Ward,” he said. “That was before desegregation. It was a two or three-story building—a horrible place. There were two black doctors—women—in Houston at this time, and that’s where they had their private practices, where they served only blacks. Everyone else in private practice at that time had two reception rooms, you see: one for black, one for white.”\textsuperscript{21} For Houston’s first Negro female obstetricians, “private practice” meant service to the city’s poorest, in conditions that could only be described as hellish. “This,” Dr. Berg added, “was probably the only work they could get.”\textsuperscript{22}

The center’s facilities were primitive but clean. Berg remembered the Binz cottage and its one-room facility wryly: “We had an old wooden kitchen table,” he said, “with a curtain around it, and a few bed sheets that I took home to my wife to be washed at the end of the night. The patients would undress from the waist down, and hop up onto the table to be examined.....they weren’t concerned with privacy; they just wanted help. I had a nurse attendant, but she wasn’t trained. So I examined the patients, fitted them with diaphragms, and gave them [contraceptive] jellies and sponges. I treated all different colors, white, black, Mexican, poor, just at different times. And none of my patients died, although some babies died.”\textsuperscript{23}

Berg also remembered how abortions were done in the “early days.” “I never had a conflict with the concept of abortion,” he said, “just abortions illegally done. I saw so may women infected, made sterile, and killed.....There was always an abortionist in the

\textsuperscript{20}Ibid.
\textsuperscript{21}OHI. November 4, 1994.
\textsuperscript{22}Another African-American employee of Planned Parenthood, Marie Julien Tekle, described her own experiences in the nursing profession as similar to Patten’s. Even in the 1960s, during desegregation, Tekle was unable to obtain a job in any medical facility except charity hospitals and free clinics, where she was
city who doctors referred [their private patients] to. People who could afford it had it
done privately. It was all hush-hush. Poor people went to back-alley abortionists. Some
of the old-time practitioners, when they couldn’t make a living...did abortions. I treated
many women with massive infections from botched abortions.”

**Putting Birth Control in Perspective**

In 1938 the *Ladies Home Journal*, a national woman’s magazine with a
readership of thirty-seven million, conducted a survey of thousands of women of “all
races and creeds” to find out what American women thought of birth control. The results,
briefly stated, were as follows:

American women believe in having children; 98
percent are glad they had children. Only one percent
believed in having only one child, and most of them
thought four children made an ideal family. American
women believe in birth control; 79 percent said “yes,”
without reservations.

American women believe that young married
children should not have a child until after the first year of
married life; that parents should not have more children
than they can care for properly; that birth control will
decrease the number of feeble minded children; and that
birth control will make for better health of women who
otherwise grow old prematurely under the burden of
bearing too many children.25

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24 *Ibid.* Berg did not reveal during his interview who these abortionists were. In response to a question
about the “firm” of abortionists he had mentioned, he replied: “Honey, that firm’s name was Dr’s. Brown,
Green, White, and Black.” “And,” he added dryly, “they charged $900-$1,500 per abortion, while
delivering babies paid $75-$150. There was no money in Ob-Gyn until after the discovery of sulfur drugs
and penicillin [to cure infections and venereal diseases]. Then things picked up.” Berg also told me that,
after 1973, he performed “lots of abortions” at Methodist Hospital, where he was a staff physician; there
the clientele were “all young white girls.” I am deeply indebted to Dr. Berg for the time he spent talking
with me in November 1994. When I interviewed him he was in considerable pain from the electronic
device that controlled the current to his two artificial hips, but he was still in his speech as lively as ever.
25 Henry F. Pringle, “What do the Women of America Think About Birth Control?,” reprint from the
*Ladies Home Journal* (1938). Interestingly, 51% of the Catholic women surveyed declared their belief in
The ravages of the Great Depression, rising concerns about public health problems, the suffrage movement, and official recognition by the legal and medical communities of birth control as a legitimate part of medical practice, the writer concluded, had by the end of the 1930s led to a growing public support for birth control.

It was, however, a recognition tempered at every level by conservative family values. No one in the leadership of the birth control movement, or at Houston’s Maternal Health Center for that matter, was advocating that women avoid motherhood. On the contrary, Houston’s birth controllers felt that “every mother and father owe it to the country to have as many children as the mother can safely bear and adequately rear.” This was the primary aim of what contemporary journalists approvingly termed “the child spacing movement.”

Ads for the Planned Parenthood League of Texas reflected a similar sort of thinking. A fund-raising brochure published late in 1939 opened with the headline:

OUR PROBLEMS: Are you concerned by needless misery, by the high cost of relief [welfare], by the lamentable record in Texas of maternal and infant mortality? Do you care that taxes are increasing for the care of the unemployed, the unemployable and the unfit?....that poverty and overcrowding play a large part in filling reformatories, jails, asylums and hospitals?....that homes are deserted by discouraged fathers who cannot

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“some remedy.” without specifying what natural or artificial method a woman might use, to address “the problems which arise when children come too soon or too often, or into homes where poverty blocks their chance for health and happiness.” The chief reason for favoring birth control was that “parents should not have more children than they can care for properly.” Pringle’s survey is also cited in Scott’s Houston Post article, April 3, 1938.


2The Birth Control League of Texas changed its name to the Planned Parenthood League of Texas during 1938-39, after the national organization changed its name from American Birth Control League to the Birth Control Federation of America.
support increasing families?...that a mother’s stamina for child raising is wasted by too frequent child bearing?...that young people of marriageable age feel they are entering a future of economic and social pessimism; and that an inability to foresee and plan for their children makes them hopeless?...If you do care, then you, of necessity, must be interested in Planned Parenthood and its development in our State.” [emphasis added]\(^{28}\)

From these reformers’ perspective, contraception was an important part of the cure for this catalogue of social ills. It was not a luxury but a necessity. Offering hope to young couples and to families was paramount. Most importantly, helping to provide contraceptives to the “marriageable” and the rural poor was a civic and moral duty.

The Texas League’s brochure also buttressed its case with a laundry-list of medical and welfare statistics.

**CONDITIONS IN TEXAS:** The infant death rate in Texas is sixty-five deaths per thousand live births, compared to the national rate of forty-eight. One out of every nine babies born in Texas dies the first year after birth. In Texas, seventeen percent of all reported births are attended by midwives or some friend of the family. In rural counties, eighty percent of all Negro births have no attendant physician. Texas has a large percentage of the nation’s abortions; one case reported eighteen abortions during ten years of married life. In 1939, the federal government spent a hundred million dollars in Texas, the fourth richest state in the Union, for various types of relief. One million people in Texas are dependent on some form of relief.\(^{29}\)

Texas might have its share of middle- and upper-class citizens, the ad made clear, but this was not the norm. In 1939, 55 percent of the state’s population lived in rural areas hit hardest by the depression. These were the areas most likely to suffer from the poverty

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\(^{28}\)Undated brochure (1939-1940) published by the Planned Parenthood Committee of Texas (Texas League).

\(^{29}\)Ibid.
and dependency noted above, yet these were the places least likely to have birth
control clinics. For reformers, the answer was clear:

We must help the rural mother, who, because she does not
have access to hospitals, needs help more than the city
mother. We must establish more clinics in the cities of the
State; we have only ten. We must assist the medical
profession in every possible, in their earnest desire to
improve health conditions in Texas. We must increase
public educational work both among laymen and
professional people, doctors, social workers and nurses.  

No one was left out. No one, the ad implied, should be. The answer was simple: money
for maternal health care.

FINANCIAL HELP NEEDED: We must have an adequate
budget to carry on the program. We have been operating
on a thousand dollars a year, whereas we should have
fifteen thousand to do an effective piece of work. Twenty-
five dollars will provide sixty mothers in a rural area with
contraceptive supplies for six months. One hundred dollars
will provide medical care and materials for sixty-two
patients in an urban birth control clinic for one year.  

Fundraising brochures such as this one did not merely reflect middle-class
thinking; they were telling signs that the birth control movement in Texas was coming of
age. By 1940 the Maternal Health Center of Houston and the Texas Family Planning
League were organizations firmly on their feet, increasingly backed by public opinion,
sponsored by leaders in the fields of medicine, business, and religion, and the law. Ten
clinics had been established in the state through which more than ten thousand mothers
had been provided donor-supported medical care. The movement had progressed from
its pioneering phase to that of frontiering. Reflecting its growing confidence, the

30Ibid.
31Ibid.
League's brochure concluded boldly: "Call the movement what you will—planned parenthood, family limitation, child spacing, birth control—it has arrived."\textsuperscript{32}
Chapter 4

Contraception, Abortion and the Catholic Church
1930-1973

"In the deliberate frustration of the marriage privilege, the Church sees an act *intrinsically evil*".¹

Few issues in this century have caused as much contention in the Roman Catholic Church as those of birth control and abortion. The Church’s position on these subjects has been a stumbling block for Catholics and non-Catholics alike. This in itself is nothing unusual. The Church is no stranger to controversy, and has never been afraid to embrace unpopular causes. In the centuries-long struggle against barbarism during the Middle Ages, Church authorities did not hesitate to use physical force to assert their policies. Nor have Church leaders shied away in their worldly dealings from using all the political force at their disposal to create a society based on Catholic principles. Many of these principles have been far from popular, such as the Church’s stands against Fascism, Communism, and racial inequality.

Yet, in most such conflicts, as in the question of abortion, there has been a clearly defined point of Catholic doctrine at issue. The scriptural and traditional foundation of the Church’s position on birth control is much harder to find. The birth control dilemma the Church faced in the twentieth century did not exist at the beginning of the century as a serious problem. The Church, consequently, was slow to create doctrine to deal with it. In addition, the problems birth control generated changed over time, as new technical developments altered its uses and effectiveness. Theological journals that dealt with these subjects, and the articles that appeared in them at an ever-increasing pace from
1930 onward, showed that Catholic moralists were not lacking in earnestness or conviction. But while their thinking on abortion was clear, they failed to provide a swift or easy solution to the problem of birth control. Theological debate on the subject only clouded the issue.²

For Church leaders in 1930, it was not an easy task to find the "traditional" answer to the new problem of birth control. Scripture and early tradition did not deal with the problem, and the view of marriage in both the Old and the New Testament did not necessarily exclude the use of contraception.³ Most theologians opposing birth control could agree on this. To support their position they referred rather to the clear stands that contemporary ecclesiastical authorities were taking on the subject, and that they had drawn from a centuries-old consensus among moral theologians and the natural law. In the tenth century Regino of Prum, Abbott of Prum in Lorraine, had written Si aliquis, which held, "If someone [Si aliquis] to satisfy his lust or in deliberate hatred does something to a man or woman so that no children be born of him or her, or gives them to drink, so that he cannot generate or she conceive, let it be held as homicide.⁴ Si aliquis was included in papal decretals (decrees on canon law) beginning in 1230 and remained part of the law of the Catholic Church until 1917. Similar condemnations of contraception followed. In 1230 the Dominican Raymond of Pennaforte, under the direction of Pope Gregory IX, compiled a collection of authoritative decrees that included

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²Church leaders are quick to point out that theological matters are not decided by a popular vote of Christians. The debates of "liberal" and "conservative" factions like those in politics, and free academic debate, are considered inappropriate in theology. The debates between theologians that did occur during the 1960s proved disastrous to the Church's cause. The laity began to form its own beliefs and developed a "pick and choose" attitude toward Catholic teaching.
a condemnation of abortion; in 1272 Richard de Middleton, an English Franciscan, incorporated birth control and murder; and in 1227-34 Pope Gregory IX's decretal *Si conditiones* declared null and void the marriages of those whose intention it was not to have children.

The problem of abortion was resolved in 1869 by Pius IX. In *Apostolicae Sedis Moderationi* he reviewed and revised the rule on excommunication, and continued the excommunication provided for those procuring an abortion *at any time* during pregnancy. Earlier some question existed about when the abortion of a fetus was considered homicide. Early Catholic thought had placed the time of "animation" of the fetus at 40 days for a male and 80 days for a female. An abortion performed before then was not considered a crime, because the fetus was not believed to have been ensouled. Pius IX did not concern himself with birth control, and the official directives from Rome during his reign showed no special concern to combat it. The cooperation of a woman with her spouse in using condoms was strictly forbidden, as was *coitus interruptus*. But there was no mention of other contraceptive devices. The Pope made no attempt to treat

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8 In Aristotle, *History of Animals*, 7.3. a fetus becomes human forty days after conception if it is male, ninety days after conception if it is female. In *Leviticus* 12:1-5, a woman must spend forty days in becoming purified if she has given birth to a boy, eighty days if she has given birth to a girl. Augustine (354-430) settled the matter at the forty-day period set by Aristotle for males, and the eighty-day period suggested by *Leviticus* for females, and this became Church doctrine. See Noonan, *Contraception*, 140.
9 Noonan, *Contraception*, 404. The condom, which prevented emission of male semen into the vagina, did not present a different question in principle from *coitus interruptus*. *Coitus interruptus* had been forbidden on the basis of the Old Testament story of Onan (Genesis 38:8-10): "Then Judah said to Onan, "Go to your brother's wife, perform your duty as brother-in-law, and raise up seed for your brother. Onan knew that the descendants would not be his own, so whenever he had relations with his brother's wife, he let the seed be lost on the ground, in order not to raise up seed for his brother. What he did displeased Yahweh, who killed him also."
it as a marital sin, and left the problem as to when birth control might morally be employed to the local episcopates.\textsuperscript{10}

The Church's arguments were less than coherent. While on the one hand it condemned contraception as homicide, on the other it asserted that only abortion \textit{after} formation, or animation, could be likened to murder. It soon became clear that the statements made by the magisterium\textsuperscript{11} on the subject were not infallible. And, although the moral principles it espoused about issues like premarital sex and promiscuity were as accepted in the twentieth century as they had been in the past, the situation to which they were applied had changed so much that they could no longer be considered applicable.

Nineteenth-century arguments against contraception were focused almost exclusively on \textit{coitus interruptus}. Theologians designated the act as "onanism" and denounced it as odious and ugly; the sin of Onan became a capsule form of argument. At the same time the Catholic clergy sought to instill in Christian spouses the belief that they did not have the right to control procreation. They insisted that children were sent by God, and made few concessions to the social realities that might justify the avoidance of pregnancy. If one had too many children, it had to be viewed as a cross to bear. This doctrine did produce curious twists, condemning, for example, male masturbation as a sort of homicide, but defending female masturbation if employed for the purpose of completing intercourse by producing the necessary seed.\textsuperscript{12} In continental Europe, \textit{coitus interruptus} remained for some time the most common way of practicing contraception. A vigorous attack on contraception began only in the last quarter of the nineteenth century, as birth control swept France and spread to England and America. In 1843 the

\textsuperscript{10}Ibid., 405.
\textsuperscript{11}The undisputed teaching authority associated with the Pope and papal statements.
vulcanization of rubber by the Goodyear Tire & Rubber Company led to the possibility of manufacturing inexpensive rubber condoms, and this form of contraceptive was increasingly distributed.\textsuperscript{13}

What Rome reacted against in the nineteenth century was neither a new technique of birth control nor a movement to promote it. Margaret Sanger had not come of age. Medical, scientific, and sociological backing had not yet been given to the birth control movement, and the authority of the Church was not disputed. What the Church encountered before 1900 was the widespread individual decision to limit births, as was evident in the falling birth rates of France, England, and America—including Catholics.\textsuperscript{14}

After 1900 the increasing momentum of the commercial promotion of birth control and the growth of an international birth control movement in countries with substantial numbers of Catholics caused the Church to organize in opposition to contraception and to create doctrine condemning it. The development reached its climax in 1930 in the encyclical \textit{Casti Connubii}.\textsuperscript{15}

\textit{Casti Connubii} (Of Chaste Spouses) represented the first papal statement specifically dealing with contraception. The immediate cause for the Pope’s encyclical was a reaction to the Lambeth Conference vote of August 15, 1930, which gave cautious approval to the use of contraception. Anglican bishops, in 1908 and 1920, had voted to condemn contraception. But after a decade in which the work of Marie Stopes and the

\textsuperscript{12}McLaren, \textit{A History of Contraception}, 149.
\textsuperscript{13}Robert Latou Dickinson and Louise Stevens Bryant, \textit{Control of Conception: An Illustrated Medical Manual} (Baltimore: The Williams & Wilkins Company, 1934), 64.
\textsuperscript{14}A study correlating birth rates and areas where a majority of the population remained practicing Catholics showed that, in the course of the century, the birth rate of the faithful had also declined. Religious conviction had acted as a brake, but not as an absolute barrier, to population decline. Such a result, of course, did not by itself demonstrate that the faithful were using contraceptives instead of practicing continence. But the reaction of the Church suggests that contraception was becoming the common form of control. Noonan, \textit{Contraception}, 391.
family planning movement had made a great impact on British social thinking, the Lambeth attendees reversed their position and decided that "where there is a clearly felt moral obligation to limit or avoid parenthood, the method must be decided on Christian principles." 16

The Anglican bishops' Lambeth position was met by strong a denunciation from the Catholic archbishop of Westminster, one echoed by American Catholic leaders. In the leading Catholic journal, America, Cardinal Francis Bourne declared that these bishops had forfeited any claim to be authorized arbiters of Christian morality. American Catholics repudiated the Lambeth Conference and condemned birth control as a "vile practice which degrades womanhood, promotes promiscuous licentiousness, destroys the family, undermines the State, and makes all Hell rejoice." 17 Doubtless, the cardinal and other American Catholic leaders were anxious that Rome support their vigorous stand.

The encyclical only reaffirmed the Church’s teaching on marriage, but with greater force and authority than ever before. The holiness of marriage, the Pope declared, was endangered by ignorance and by the false principles of a new and perverse morality. These depraved morals had even begun to spread among the faithful. The Pope spoke "to turn sheep from poisoned pastures." Marriage, he said, was a divine institution; all errors flowed from treating its laws as adjustable by human will. Divorce and “trial marriage”

16The resolution was adopted by a vote of 193 to 67 (46 not voting). The exact wording of the statement was: "Where there is a clearly felt moral obligation to limit or avoid parenthood, the method must be decided on Christian principles. The primary and obvious method is complete abstinence from intercourse (as far as may be necessary) in a life of discipline and self-control lived in the power of the Holy Spirit. Nevertheless in those cases where there is such a clearly-felt moral obligation to limit or avoid parenthood, and where there is a morally sound reason for avoiding complete abstinence, the conference agrees that other methods may be used, provided that this is done in the light of the same Christian principles. The Conference records its strong condemnation of the use of any methods of conception control from motives of selfishness, luxury, or mere convenience." (Resolution 15) cited in Noonan. Contraception, 409.
17Ibid., 424, citing the archbishop of Westminster. America (August 30, 1930), 100.
were denounced. The good of marriage was summarized in the ancient Augustinian formula: offspring, fidelity, sacrament.\textsuperscript{18} Offspring was the primary good. But Christian parents should understand that not only were they to propagate the human race, but “to bear offspring for the Church of Christ, to procreate saints and servants of God, that the people adhering to the worship of God and our Saviour should daily increase.”\textsuperscript{19}

Those who erred in their view of marriage believed that “the act of nature might be vitiated.” They acted either because they wanted pleasure without burden or because owing to their own situation or that of their wives or families they could not accept children. “But,” the Pope said:

Assuredly no reason, even the most serious, can make congruent with nature and decent what is intrinsically against nature. Since the act of the spouses is by its own nature ordered to the generation of offspring, those who, exercising it, deliberately deprive it of its natural force and power, act against nature and effect what is base and intrinsically indecent.\textsuperscript{20}

Scripture attested that God had punished this crime with death.

Referring to the Anglican bishops, the Pope said, “Certain persons have openly withdrawn from the Christian doctrine as it has been transmitted from the beginning and always faithfully kept.” Consequently,

The Catholic Church, to whom God himself has committed the integrity and decency of morals, now standing in this ruin of morals, raises her voice ... in sign of her divine

\textsuperscript{18}Augustine’s importance lay in his crystallizing the doctrine that would have enduring life in Christian thought: that marriage could be defended only if it produced offspring, fidelity and continence. He never mentioned mutual love. “Love” was viewed by Christians as a destructive passion and therefore dangerous in marriage. The church was more interested in assuring fidelity. Sex continued to symbolize the fall from grace, and man’s enslavement to lust. Marriage was good, but celibacy was better.

\textsuperscript{19}Ibid., 426, citing Casti Connubii (Pope Pius XI, 1930).

\textsuperscript{20}Casti Connubii (AAS 22:559), cited in id., 427.
mission, in order to keep the chastity of the nuptial bond free from this foul slip, and again promulgates: Any use whatever of marriage, in the exercise of which the act by human effort is deprived of its natural power of procreating life, violated the law of God and nature, and those who do such a thing are stained by a grave and mortal flaw. 21

By 1930 the condemnation encompassed not only “onanism,” or coitus interruptus and condoms, it included anything that might prevent the procreation of life, meaning diaphragms and douches. This was not stated explicitly in the encyclical but it was made clear in theologians’ subsequent definitions. 22

The encyclical on contraception possessed great authority. It stopped short of an ex cathedra 23 pronouncement. But it went far enough to impale the Church on the hook where it remains, rejecting all arguments for contraception, even where pregnancy threatened the life of the mother: “No reason can make congruent with nature what is intrinsically against nature.” 24

Over the centuries the Church had come to accept that sexual pleasure was part of God’s plan. It had moved away from the harsh Pauline “better to marry than to burn” view that marital intercourse for non-procreative reasons was a necessity to avoid temptation. Instead, it had come to see the sexual act as the medium of expression for the love of husband and wife, and therefore having a secondary function nearly as important as the first. This recognition raised moral problems which Church theologians tackled in Catholic journals. For instance, was it permissible for sterile couples to have intercourse?

21Ibid. (AAS 22:560), cited in ibid. 427.
22“Noxious physical and chemical devices,” for example, were named by theologians of the journal America, as falling within the condemnation of the encyclical (August 30, 1930). A year later, Father Edward Roberts Moore was more specific in his condemnation of “foreign bodies within the cervix, or...continual vaginal flushing using chemical elements.” The Commonweal (April 29, 1931). America and Commonweal are the leading Catholic journals, and consequently will be cited most often.
23Ex cathedra pronouncements, or those made “from the chair” of the Pope, are considered infallible.
American theologians said yes.\textsuperscript{25} How far should a wife go to resist a husband bent on contraception? To the same extent that she would resist rape, but not to the point where her life is threatened. Is sex in any non-procreative position condoned? Never.\textsuperscript{26}

After 1930, these types of questions were answered with \textit{Casti Connubii} in mind. American theologians welcomed its uncompromising language and reaffirmation of "what the Church has always and always will proclaim as the undiluted teaching of Christ."\textsuperscript{27} After 1930, as the birth control movement emerged from its infancy, it was confronted by the international organization of the Church. Mutual hostility prevailed. To the Pope, the bishops, and theologians, the birth controllers appeared to rationalize and encourage hedonism and irresponsibility, and to challenge the wisdom handed down from Christian antiquity. Evidence of the spread of this "paganism" was everywhere.

The growing commercialization of the contraceptive industry was noted in Catholic journals as early as 1931. "It is known that at present there are manufacturers making millions of contraceptive devices weekly even in states whose laws supposedly prohibit such a traffic. Huge profits are made by the drug stores bootlegging these devices. Every social worker, of course, is aware of the already vast extent to which they are used by unmarried boys and girls and men and women."\textsuperscript{28} The racist arguments of Eugenists, with whom Margaret Sanger had temporarily aligned herself during the Depression in order to gain support for her movement, was attacked: "Legalized contraception would be a long step on the road toward state clinics for abortion, [and] for

\textsuperscript{25} "Cardinal Hayes Speaks Out," \textit{The Commonweal} (December 20, 1935), 198.
\textsuperscript{26} \textit{Ibid.}, 198.
\textsuperscript{27} "The Pope and His Pamphlet," \textit{America} (March 7, 1931), 517.
\textsuperscript{28} \textit{The Commonweal} (March 4, 1931), 479.
compulsory sterilization of those declared unfit by fanatical eugenists..." Catholic theologians were also quick to point out that the Eugenic birth control revolution had backfired: contraception was being used most frequently among the upper and middle classes rather than by the poor, whose increase the movement had aimed to control.30

Church theologians also pointed out, correctly, that the legitimization of contraception by the Church would lead to its spread among the unmarried. "Christian churches are sharply divided as to the morality of contraception...and admit that the spreading of the knowledge of contraceptives may work serious evils outside of their recommended use by married couples. So far, the Federal Council [of Protestant churches] has only been concerned with contraception as used by married couples—married to each other of course is meant. But what about unmarried people?"31

Catholic intellectuals rightly contended that the wealthy, the very people promoting birth control among the working poor, were often the cause of the poor's misery. The large working-class families that the wealthy birth controllers and eugenists decried would not be consigned to poverty and squalor, theologians claimed, if the rich would pay them a living wage. One such critic wrote that:

The large laboring population is entirely dependent upon the factories for subsistence. Not infrequently it happens that the Welfare Association has to supplement the income of the head of the family, because his wages are altogether inadequate to support it. It is generally conceded that our wage scale is below standard, because the employers are thoroughly organized and will not allow a union of any kind to gain a foothold in their factories. The men are at the mercy of the employers, who cut wages to the bone.

30"The Birth Control Revolution," The Commonweal (April 1, 1931), 591.
31"The Birth Control Revolution," The Commonweal (April 1, 1931), 592.
when the labor supply is abundant. Unwilling to pay a living wage, these same employers are willing and generous contributors to the Welfare Association. When individual cases of near-starvation are brought to their attention the usual answer is: The man in question is unable to earn more than he is being paid. The case worker frankly admits, in private, that the fault often lies with employers, but she is unable to do anything about it.32

And another concluded that, “[t]here is nothing in the idea that poverty is the cause of misery and vice in the poor. The poverty of the poor is not a cause at all, but an effect of vice in the rich.” Catholic leaders could make a powerful argument against the leaders of the birth control movement and its eugenic philosophy, which encouraged a higher birth rate among the wealthy and contraception for the poor rather than a more just redistribution of wealth and a higher standard of living for all.

Throughout the Depression Catholic leaders sustained a dialogue in theological journals that echoed the themes of the immorality of birth control and the hypocrisy of the wealthy who endorsed it. Margaret Sanger became the focus of much of the Church’s hostility. In an impassioned article in The Commonweal, Father Michael Williams characterized Sanger as the “secular” prophet of a new religion: the religion of Birth Control. He also condemned the secular liberal press that had lionized her in its editorials and “turned the tide” in favor of the birth control movement:

Of course she has been compared to Joan of Arc; but that was bound to happen. Almost any girl or woman nowadays who becomes momentarily famous, or notorious, in promoting any sort of cause, promptly becomes the Joan of Arc of this, that or the other “crusade.” The editorial page of the New York Herald Tribune, whose devotion to Mrs. Sanger is even greater than its devotion to the Republican party—for while it will at times adversely

criticize President Hoover it never falters in its laudation Mrs. Sanger. Like Communism, the birth control revolution is at its center of action controlled and driven with immense force by a religious zeal. Birth control is a religion.  

In another fiery article in the Catholic journal America, Sanger and her attorney, Morris Ernst, were accused of attacking the Church for its stand on contraception and attempting "to isolate the Catholic Church in this struggle." Ever sensitive to anti-Catholic sentiment, Father Parsons took the American Birth Control League to task for "presenting Catholics as the sole religious body opposed to the movement, and of making us opposed to it on religious grounds." "Thus," he went on, "the Catholics are said to be the sole defenders of laws that eminent Protestant leaders once promoted." He also accused Sanger of misrepresenting the Catholic position on contraception to the world: 

In spite of much patient instruction and writing, these people do not yet know why we are opposed to birth control. They do not know that we hold birth control to be wrong for everybody, not merely for Catholics; that we base our argument not on authority, but on reason, which binds all men, not only Catholics; that we hold it is as wrong for a non-Catholic to practise [sic] it as for Catholics; that in seeking to keep on the rolls laws which were put there by Protestants we are not trying to preserve Catholics from ceasing to have children, but to protect all men from a shameful abuse; that the Pope condemns birth control not because he wants to do so, for some perverse and personal reason, but because he is compelled to do so on the evidence.

It is simply not true that Catholics are the only ones who oppose birth control. The list of its opponents goes all the way from the Editor of the Medical Times and Dr. Gerry Morgan, last year's President of the American Medical Association, and a host of doctors, to prominent members of the Lutheran, Baptist, Methodist, Presbyterian, and Episcopal Churches. Yet in the publicity of the

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movement it is stated: "The Roman Catholic Church is the only one opposed to the movement," though Mrs. Sanger in her book lists many non-Catholic opponents.\(^{36}\)

As Sanger and the birth control movement became better known and contraception gained acceptance, both social and legal, the voice of Catholic disapproval became louder. Articles written in Catholic journals refuted, often very convincingly, every argument presented by the Birth Control League in favor of contraception.\(^{37}\) Sanger was increasingly denounced as a politician who would say anything, however untrue, to advance her cause. By the end of the 1930s she was the enemy, the leader of a crusade against morality. There would be no reconciliation.

Bishop Byrne of Galveston was an ardent voice in support of the Roman Catholic position. In his "Regulations for Lent, 1936, In the Diocese of Galveston,"\(^{38}\) he ended with a warning to Catholics to be "on guard against an attempt to offer Birth Control to our poor and dependent." The prophet of birth control was mentioned specifically:

> When they undertake, 'neath a guise of helping, or of preventing, what they style, greater evil, to impart a knowledge of Sanger, or other like methods of defeating the laws of nature, we warn you that impurity, and disregard of conjugal chastity is not control, and must in the end bring curses, temporal and eternal. The practices offered do not control birth, they destroy it, they make it impossible. Our married people are not obliged to multiply the obligations of parenthood, but they may not sin or practice indecencies to avoid such.\(^{39}\)

\(^{36}\)Ibid., 429.

\(^{37}\)Father Robert Hitchcock took up "The Economic Argument for Birth Control," *America* (September 3, 1932), 519-522; the prolific Father Parsons attacked the misrepresentation of the Catholic position on the rhythm method in "Is This "Catholic" Birth Control?" *America* (February 25, 1933), 496-497; and Samuel Saloman rapped the "New Morality" of the birth controllers that "permits our young to experiment in sex, the while safeguarded by birth-control agents from certain undesired consequences." "Birth Control and the New Morality," *America* (July 20, 1935), 345-347.

\(^{38}\)"Regulations for Lent, 1936, In the Diocese of Galveston," Archives, Diocese of Galveston-Houston (Houston, Texas).

\(^{39}\)Ibid.
The teachings of the birth control movement were similarly denounced: "Back of the whole drab birth control movement is the damnable lie that is often spoken against you priests and sisters that celibacy and chastity are too difficult for flesh and blood. Now they dare tell married people that purity is impossible for them, that they can not restrain their passions, and so they would teach them sin."  

The Bishop left out no one in his sweeping condemnation of the advocates of birth control:

It is a shame to see men called "Reverend" giving their consent to this pagan vice, and it is sad to see Christian women lending their names to a movement that puts their fellow women back to be puppets of passion, from which Christian Gospel rescued them; and it is a disgusting spectacle to see physicians, skilled in all that makes for the cleanliness, healthfulness, and dignity of the human body, prostituting their calling to teach sensuality and unrestrained indulgence in fleshly pleasures. Mark these doctors, and keep them out of your homes and away from the bedsides of your sick. Their own medical societies have not approved this work in which they engage themselves.  

Finally, he made it clear that the teachings of the Church, if not infallible, were indisputable:

Catholic men and women, there is no room for your or my opinion in this matter. The Church teaches both of us, and her voice is the voice of her Divine Founder, Jesus Christ. Such birth control is dirt; it is indecency; it is detestable; it is mortal sin.  

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\(^{40}\) Ibid.  
\(^{41}\) Ibid.  
\(^{42}\) Ibid.
By the late 1930s the Catholic position on contraception was set in stone. There were apparently no voices of dissent anywhere in the Church, and because of its solidarity Church leaders were able to wield considerable political force in legislative bodies. In America, the National Catholic Welfare Council and the Catholic Bishops of the United States made their voices heard at every congressional hearing on birth control laws. Although vastly outnumbered, the Catholic body politic had such cohesion it succeeded in deterring lawmakers from casting pro-birth control votes. Church leaders were quick to seize upon political realities and shift their efforts to the legislative front, and were amazingly successful. Sanger and the American Birth Control League attempted eleven times between 1930 and 1936 to introduce bills in the House and Senate liberalizing birth control laws; all eleven failed.

Defeat on the judicial front in the *One Package* decision and the subsequent approval of birth control by the American Medical Association in 1937 dealt severe blows to the Catholic position. But, rather than signal defeat and change in Church doctrine, these shocks only made Church leaders and Catholic theologians more resolute. Rejecting the Second Circuit’s decision as “a manifestation of legalistic inadequacy

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43Thomas Dienes, *Law, Politics, and Birth Control* (Chicago: University of Illinois Press, 1972), 106. According to Dienes, “Even though the numerical membership of associations declaring for change in the law exceeded the Catholic opposition, they lacked cohesion, the vital determinant of access. It would be unlikely that these loosely aligned groups would take effective reprisals against an offending legislator, but legislators could not be certain of the political repercussions of a pro-birth control vote.” The Catholic population in the late 1930s was between 12 and 15 million; the Protestant population was well over 20 million. Eliot Ross, “The Catholic Birth Rate,” *The Commonweal* (June 10, 1937). 147-149.

44See unpublished paper, Maria Anderson, October 11, 1994, for a detailed account of the legislative efforts of the National Committee on Federal Legislation for Birth Control, the lobbying arm of the Birth Control League; page 6, fn 18.

45*U.S. v. Ore Package*, 86 F. 2d 737 (C.C.A. 2d, 1936). This decision created a judicial exception for medical professionals to the sweeping prohibition on abortion information and birth-control devices contained in the Comstock laws.
touching moral issues,"⁴⁶ and the AMA’s official approval as “but another manifestation of the pagan philosophy that dominates America,"⁴⁷ theologians reiterated the Church’s prohibition of the use of “chemical or mechanical methods of birth control” and vowed to continue the fight. But the tone of the articles was somber. The complacency and smugness which had characterized earlier Catholic writings had disappeared.

Catholic leaders could take the moral high ground and continue, despite the change in American laws and mores, to prohibit the use of contraceptives, but only at the risk of losing Church members. One Catholic theologian, Father Elliot Ross, had warned his colleagues in 1931 of the impending crisis: “The attitude of the Church on contraception may account for the loss of a good many born Catholics. Catholic doctrine concerning birth restriction tends to break down the allegiance of thousands whose shoulders are not exceptionally strong.”⁴⁸ Faced with a choice between surrendering its moral position and losing Church members whose beliefs had changed, Catholic leaders unrelentingly repeated the Church’s condemnation of contraception and threatened their members with excommunication if they disobeyed. In 1937 the Archbishop of St. Paul decreed that every Catholic in his archdiocese “relinquish membership or employment in any organization which advocated birth control, under

⁴⁷The Commonweal (June 25, 1937), 228.
⁴⁸“The Catholic Birth Rate,” The Commonweal (June 10, 1931), 149.
penalty of excommunication."49 And the volume of theological condemnations of contraception in the Catholic media doubled.50

At the same time, Church leaders began openly to endorse the "rhythm method," or sterile period51 which had been elaborated by an Austrian doctor, Hermann Knaus and a Japanese researcher, Kyusaku Ogino in 1929 and cautiously sanctioned by the Roman Catholic Church, in an attempt to hold and win back defecting Catholics. The "discovery" of the safe period had been made before, by a French physiologist, Felix Pouchet in 1845, but because of its unreliability had not made its way into widespread practice. Accordingly, Pius XI had made only a passing reference to couples who had intercourse "even though, through natural causes either of time or of certain defects, new life cannot thence result."52 Such intercourse, the Pope had held, was lawful, "provided always the intrinsic nature of that act is preserved, and accordingly its proper relation to the primary end." The primary end was, of course, procreation. There was nothing in the Pope's address dealing with the deliberate avoidance of births through such use in a systematic way.

The results of Ogino's and Knaus's research were published widely in Europe and America in the early 1930s. The method was publicized by doctors in America as an alternative to contraception; all of their publications were sanctioned by the dioceses in

49The archbishop's edict was reprinted in the New York Times and cited in The Commonweal (August 30, 1937), 426.
50I concluded this from a review of the Catholic Periodical Index. The number of articles indexed (1930-1978) that were concerned with birth control, abortion and Planned Parenthood more than doubled after 1940. After 1973, when abortion was legalized, birth control became a secondary concern and was infrequently the subject of theologians.
51According to these studies, ovulation occurred sixteen to twelve days before the anticipated first day of the next menstrual period. For a woman with a regular menstrual cycle it was possible to avoid intercourse, and pregnancy, at the time when fertilization of the ovum (egg) might occur. See Dickinson and Bryant, Control of Conception, 54-57.
52Noonan, Contraception, 442, citing Casti Connubii (AAS 22:561).
which they were published. From the cautions that soon followed, it became apparent that many priests and theologians were uncomfortable with the rhythm method and the moral problems it presented. To these men, the Church was lending its approbation to a method that made sterility almost certain. Worse, if successfully employed, the method might substantially decrease the Catholic population. Use of the sterile period by Catholic couples presented the Church with a difficult question: Could a couple deliberately seek to have intercourse on days when fertility was improbable? That is, could they do so without frustrating the purpose of sex, which was procreation.

It seemed clear that the use of the sterile period was only another form of birth control, a method whereby couples might seek the pleasure of intercourse without the consequence of pregnancy. Nevertheless, the American Church sanctioned its deliberate use by married couples "with a serious reason for avoiding offspring." Many American priests voiced their objections to the Church’s approval of rhythm, saying that the "heresy of the empty cradle" was now being promoted by the Church as its own method of achieving sterility, contrary to the primary end of marriage. Several bishops counseled restraint in the dissemination of the method.

Medical doubts, pastoral cautions, and general suspicion still surrounded the practice of rhythm two decades after it had been popularized. Most articles in Catholic journals continued to condemn contraception and Planned Parenthood and did not

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55 Before the official sanction of the Church, Father Parsons had voiced disapproval of the method as unreliable (but not as an interference with nature) in "Is This Catholic Birth Control?," *America* (February 25, 1933), 496-497. See Noonan, *Contraception*, 444-447 for a discussion of the various arguments against the rhythm method. Noonan cites a doctoral dissertation in 1942 at the Catholic University of America by a diocesan priest, Orville Griese, which reviewed the authorities and concluded that the Church neither
address the use of the sterile period as a legitimate form of birth-spacing for the
faithful. The emphasis of theological articles was on discrediting Margaret Sanger and
the Planned Parenthood organization. Catholic writers were quick to point out every
inflated claim and misrepresentation of Planned Parenthood's leaders, referred to birth
control as the "enemy of the West" and to the movement's leaders as "hucksters in
death."56

Little mention was made in Catholic journals of World War II. Bishop Byrne of
Galveston filled in the gap. In his "Regulations for Lent, 1940, 1941, and 1942," the
bishop decried the war that had "upset the world" as well as the "cold pagan birth
controllers and abortionists" who had added to the "religious desolation abroad." He also
condemned the "thousands of pharmacies that formerly sold remedies for the ills of...the
family, [and] now cater to the impurities and sensualities of men and women who want
no families."57 In a scathing article in the Houston Post, the bishop disparaged America's
loss of religion and Planned Parenthood's role in bringing it about. "But why is [Planned
Parenthood] growing? One half of the American people have no religion at all. There
are 17 million of children of school age who know nothing about God. Two wars have
broken down the morality of youth. The direction given, in some army camps to the

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56"Extravagant planned parenthood claims," America (March 8, 1947), 620, vilified Planned Parenthood's
"skulduggery" in claiming that it had surveyed 15,000 physicians throughout the nation and found them to
by "overwhelmingly in favor of birth control," when in fact only 3,381 of the physicians polled had
returned the questionnaire; another criticized Sanger for claiming, incorrectly, that Gandhi had sanctioned
birth control when, in fact, he had not. See "Mrs. Sanger retreats," Ave Maria, (November 9, 1940), 581.
Also, see Harold Gardiner, "Hucksters in Death," America (January 25, 1947), 462-464; and Gardiner.
"Enemy of the West -- Birth Control," America (August 9, 1947), 513-515.

57"Regulations for Lent, 1940, 1941 and 1942," Archives, Diocese of Galveston-Houston (Houston, Texas).
young soldiers, about purity, was only one of caution, "do not become diseased." No thought of sin, or of displeasing God. Parent-planning is just old-fashioned paganism."\(^{58}\)

Throughout the 1940s Catholic criticism focused on the problem of the growing Planned Parenthood organization, both at home and abroad. Margaret Sanger seemed to be everywhere, spreading the "religion" of birth control and making converts. The Catholic periodical *America* noted in 1950 that, thanks to Mrs. Sanger, birth control practices had found favor in Japan, Finland, Sweden and Iceland, Denmark, Great Britain, Australia, New Zealand, South Africa, Jamaica, Holland, Canada (except Quebec), India, and the Soviet Union. They were still forbidden by law in Italy, Spain, Norway, Ireland, Venezuela, Chile, Brazil, and Argentina, but in some the law was "a dead letter." Sanger's influence in all this was not to be underestimated. As one Catholic writer noted, she was so notorious she had been denied entrance to Italy by Mussolini himself.\(^ {59}\)

Despite the Catholic outcry, the situation for birth controllers in the 1950s was not that much improved. The Church remained a powerful foe, and the medical profession continued to play the role of moral guardian in the prescription of contraceptives. The Depression had spurred the establishment of birth-control clinics, but they still provided limited services and no new contraceptives were available. Most people depended on friends or acquaintances for information on birth control, not on doctors, who claimed there was little demand.\(^ {60}\) The post-war "baby boom" also appeared to prove wrong the birth controllers' argument that family size would decline as

\(^{58}\) "From Bishop Byrne," *The Houston Post*, Sunday, March 7, 1948.


health, education and economic circumstances improved. Church leaders lauded what they perceived to be a return to traditional values.

In 1951 Pope Pius XII spoke to the Italian Catholic Society of Midwives and chose the occasion to make the fullest statement on marriage since Casti Connubii. For the first time rhythm was referred to by Roman authority as a method open to all Christian couples. The Pope stated that rhythm, for a reason, could be used. To do so without "serious reason" would be a sin. But for medical, economic, and social reasons, he said, "it follows that observance of the sterile period can be licit." The papal statement indicated a new attitude in Catholic thinking. Not only did it approve rhythm, it recognized "economic" motives not restricted to severe poverty, and "social" motives that could include consideration of the world population (or at least the population of some troubled countries). It did not approve the use of "chemicals" or "appliances" in controlling birth, but it did finally recognize the legitimacy and need for some form of family planning.

This was as far as the Church would ever go in approving birth control. In 1960 the Food and Drug Administration approved in commercial form the first antiovulant pill for marketing in the United States. The means by which the pill was virtually 100 percent effective in preventing pregnancy were not entirely established. Catholic physicians, who tested the pill and defended its use as consistent with Catholic theology.

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61 America published a tongue-in-cheek article entitled "Four million new citizens," in January of 1954, commending the "bumper crop" of "new human beings" that had been born in that year and poking fun at those who had predicted a decline.
63 American Catholic leaders, safely past the Depression and viewing hopefully the post-war affluence that followed, did not embrace the Pope’s change in attitude. They continued to condemn all forms of birth control and family planning and to encourage uninhibited procreation. It seemed to work. In the July 23, 1949 issue of America, the Catholic Directory gave the number of U.S. Catholics as 27 million, a huge increase from the 12-15 million of the 1930s.
were hopeful that the Church would approve its use as an acceptable alternative to the rhythm method. In their opinion, no organ was mutilated, no natural process was damaged and no “appliances” were involved; the pill prevented ovulation rather than causing abortion.65 The American theological reaction, however, was unanimously condemnatory. Catholic writers described the prevention of ovulation as abortion, and denounced the pill as a barbaric form of infanticide.66

Medical uses of the pill in the treatment of endometriosis, excessive menstrual bleeding, and painful menstruation were recognized. If the direct intention was to cure a disease, its use was accepted by moralists without dispute. Pius XII addressed the subject of when the use of the pill was permitted in an address to a group of hematologists in 1958: “If a woman takes this medicine, not to prevent conception, but only on the advice of a doctor as a necessary remedy because of a disease of the uterus or the organism, she provokes an indirect sterilization, which is permitted according to the general principle of actions with a double effect.”67 The Pope recognized the need for a “doctor’s exception” to Catholic contraceptive doctrine, just as the judiciary had recognized the need for a physician’s exception to birth control laws in 1936.

Catholic theologians realized by this time that they were alone in their opposition to birth control: “Only Catholics hold firmly to the old ideas,” wrote one disillusioned

64 The effectiveness of the pill for human beings was first tested on a large scale in Puerto Rico in 1956.
65 Dr. John Rock was one of the first physicians to test the pill and the first defender of its use as consistent with Catholic theology. He later wrote a book, The Time Has Come (New York: Knopf, 1963), describing the testing process and effects of the pill and his belief that Catholics should accept it, which was immediately denounced by theologians. Richard Cushing, cardinal archbishop of Boston, issued a statement on April 30, 1963, rejecting Rock’s contention. See The Pilot, May 9, 1963 for cardinal Cushing’s statement; see also J. O’Brien, “Dr. Rock and Birth Control.” 11 Pastoral (September 1963), 5-9.
priest, who continued, “and they maintain that birth control is contrary to God’s plan for the reasonable use of sexual instincts.” As more reliable and safer types of contraceptives became available and more women employed them, the Catholic position against birth control hardened. Dissenting voices among theologians, however, were becoming more common. One anonymous commentary in Commonweal admitted the difficulty of the Church’s position: “Whatever the final value of the birth control debate of the past years, it has at least revealed that the traditional arguments put forward to support the decisions of the magisterium have little theological or philosophical strength. Even the most conservative theologians are now prone to rest their case on authority alone; very few are apt to offer “proofs” of the intrinsic validity of the position.”

Sessions of the Vatican Council in 1964 (Vatican II) were rocked when a succession of speakers, including several cardinals, rose to warn the Church of its “negative attitude towards human love” and also of the danger of binding Catholic consciences with contentious doctrines unsupported by the certainty of divine law. Many believed that reform was imminent, and that the traditional teaching against contraception would be abandoned. But something happened on the way to the revolution. In 1968, Pope Paul VI published the encyclical Humanae Vitae (on Human Life) and dashed these hopes. Using the same reasoning employed by Pius XI in Casti Connubii, he stated: “...the Church, calling men back to the observance of the norms of the natural law, as interpreted by her constant doctrine, teaches that each and every

68“Of Note,” The Commonweal (October 17, 1958), 75.
marriage act must remain open to the transmission of life.”72 For all intents and purposes, the revolution was over.

*Humanae Vitae* met with abundant protest from theologians and lay-Catholics.73 One Catholic writer described the reaction as a crisis in Church authority: “The waves of dissent keep rolling in, lapping at the Papal doorstep, and threatening to erode what is left of the feudal foundation of power.”74 The same article quoted an Italian physician who noted, wryly: “Right now, we are faced with a paradox in the person of Pope Paul. The educational and informational problems will remain difficult as long as he opposes reform. But the more noise he makes trying to defend the encyclical, the more people learn about contraception—especially the pill. Pope Paul is presently our chief pill-pusher.”

It was the beginning of a turbulent era in Catholicism. By 1965 Catholic journals in America were consumed by the larger question of abortion. Articles about birth control appeared less frequently and were mostly concerned with the link between birth control, enforced sterilization, and abortion (and between abortion and euthanasia). Abortion laws were liberalized and reformed across the states in the late 1960s and early 1970s; the pill had not turned out to be the “pharmaceutical fix” that women thought it would be.75 And birth control laws were simply being ignored. American Catholics had

73See “The Theologians’ Retort,” The Commonweal (August 23, 1968) 562, which rejected the Pope’s view on contraception and was signed by over 200 American Catholic theologians; and Bernard Haring, “The Encyclical Crisis,” The Commonweal (September 6, 1968), 588-594, which pointed out the lack of divine authority on which the encyclical, and the papal stand on contraception, was based. *Humanae Vitae* differs from *Casti Connubii* by no longer making the effort to base the teaching of the Church in this matter on Genesis 38. It no longer tries to base its proof on Scripture.” (at 592)
74Ibid., 44.
75It wasn’t the pill, but the tragic rash of deformities in the early 1960s caused by thalidomide (a sedative used by pregnant women) that sparked public fears about the side-effects of biochemicals. Along with the
begun to display a “pick and choose” attitude toward Church doctrine: abortion, still considered a mortal sin by most lay-Catholics, was a last resort; birth control was considered a matter of choice. Others simply turned their backs on the Pope and Catholicism and found other churches.

The Church was embattled. American Church leaders faced a dual crisis in authority in the *Griswold v. Connecticut* and the *Roe v. Wade* Supreme Court decisions. The first dealt with an 86-year old statute in Connecticut which made the use of contraceptives a crime. Estelle Griswold, Executive Director of the Planned Parenthood League of Connecticut, and Yale professor, Dr. Lee Buxton, Medical Director for the League, had opened a birth control clinic at New Haven in 1961, thereafter giving instruction on contraception at the clinic to married people. Their arrests and convictions followed under the Connecticut statute rendering criminally liable accessories to crimes. The crime to which they were judged accessories was violation of the state statute providing that “any person who *uses* any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less that fifty dollars or imprisoned not less than sixty days...” (italics added) Connecticut courts upheld the convictions.

The anti-use statute, however, had been unenforced for the better part of a century. Because its violation would ordinarily take place in bedrooms, it was obviously unenforceable. Contraception appeared to have been practiced no less in Connecticut

rubella epidemic of the 1960s, the thalidomide disaster provided ammunition for reformers advancing the “quality of life” argument to justify abortion.


*77* 381 US 479 (1965).

*78* 410 US 113 (1973).

*79* 381 US 479, at 483 (1965).
than elsewhere in the U.S., but efforts in the 1930s to set birth control clinics gave the statute a more public view. The clinics, by assisting and counseling in the illegal practices, brought the accessory statute into public focus. These events energized Planned Parenthood’s efforts in the Connecticut legislature to bring about repeal of the statute. The same statute was at the root of Catholic resistance to repeal. To both sides the statute represented a potent symbol of principle as well as legislative power.

Seven U.S. Supreme Court Justices agreed that the statute violated the right of marital privacy. In a majority opinion by Justice William O. Douglas, the state’s regulation was condemned as invading “the area of protected freedoms,” which included the “zone of privacy created by several fundamental constitutional guarantees.” In a concurring opinion, Justice Byron White (later one of the two dissenters in Roe) explained his conclusion that the Connecticut anti-contraceptive law failed to serve the purposes the state’s lawyers claimed for it—deterring illicit sexual relationships—and impermissibly deprived married persons of “liberty without due process of law.” The Supreme Court recognized in its decision that the right to privacy protected the right of a married couple to decide whether or not to use contraceptives.

Church leaders realized that the use of the courts for trial of the statute had shifted the focus from legislative policy, where the moral sentiments of Comstock still held sway, to the area of constitutionality, where they did not. They admitted defeat, but at the same time lambasted the majority’s use of due process “to invalidate any legislative act which the judges find irrational, unreasonable or offensive” and cursed the Court’s failure

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to uphold public morals. "Instead," one writer noted, "they concentrated upon a single point: marital privacy in the face of invasion thereof by the state."81

The Griswold decision did not wipe the subject of contraception from the pages of Catholic journals, but it changed the tone of theological argument. After 1965 the Church was on the defensive rather than the offensive. Theologians remained moralistic but their arguments sounded tinny and anachronistic. Journals chronicled instead the spread of birth control, the pill, Planned Parenthood and the international birth control movement, with a tone of condemnation and fatalism, but almost never wavering from the Catholic position and vowing to carry on the fight.

Another crushing blow to the Catholic position came in 1973, with the Supreme Court decision in Roe v. Wade. In it, the Court said that except in narrow circumstances, the Constitution does not permit the government to interfere with a woman’s right to choose abortion. Norma McCorvey, who called herself "Jane Roe," had brought a lawsuit challenging Texas’s abortion ban because she lacked the resources to travel to a place where a legal abortion might be obtained. Her case found its way to the Supreme Court, where it was decided that a woman’s right to decide whether to terminate her pregnancy was a fundamental right, part of the "right of privacy" the Court had recognized in Griswold v. Connecticut. Only a compelling reason would allow government to interfere with the exercise of that right. Justice Harry Blackmun delivered the opinion for himself and six other members of the Court, and spelled it out. During the first trimester of pregnancy, government may not interfere with a woman’s decision; during the second trimester government has the power to regulate abortion, but only in

81 William Ball, "The Court and Birth Control," The Commonweal (July 9, 1965), 490–493.
ways designed to protect the woman's health; during the third trimester the
government can regulate or prohibit abortion, unless it is necessary to save the life of the
mother.

The *Roe* decision invalidated the existing abortion legislation of every state and
prostrated the American Catholic Church. But not for long. As early as the 1930s
theologians and Church leaders had warned about the coming of lax abortion laws and
bemoaned the development of a totally secular, "pagan" America. They had seen the
*Griswold* and *Roe* decisions coming and had done a remarkable job in the legislatures to
keep change at bay, all the while predicting their own failure. Some Catholic writers
spoke of the disillusion of churchmen that followed the *Roe* decision:

> The fact of the matter is that the average American Catholic
simply did not believe that his government would ever do
anything opposed to the common good, to the perennial
dictates of the natural law. God and country would always
stand together. Faith and patriotic obedience, if not exactly
the same thing, were at least complementary virtues.

A peculiarly Catholic sort of civil religion has been
a fact of life in the United States for a long time. And it
will not die an easy death. Indeed, it is too desirable a
commodity to be willingly relinquished. But if the
Supreme Court has not killed Catholic civil religion, it has
at least struck it a serious blow. The Court's abortion
decision has not changed everything. But it has changed
something. The church and the state may yet bed down
together once more. But things will never be quite so cozy
again.\(^{82}\)

But others spoke of the coming "crusade" to be waged by Church leaders and "pro-lifers"
to overturn the abortion decision in the Catholic stronghold, the legislature:

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The bishops have a long-range perspective on a constitutional amendment [prohibiting abortion]. They realize that it will take years of hard work to obtain one, if one is ever obtained. Some pro-lifers seem to think they can achieve an amendment overnight by sheer brute force even though the popular support is not there. The bishops do not want to be associated with the onus of the hard-line pro-lifers’ defeats.\textsuperscript{83}

The term “pro-life” came into vogue in 1973 and was used as the rallying-cry of the Church thereafter. Catholic lobbying efforts became more organized, and the Church’s position on both contraception and abortion became more unyielding. If the Catholic leadership had been disillusioned, it had also grown up, albeit the hard way. Neither the Pope nor the majority of American theologians were going to change their minds about abortion or its handmaiden, contraception. And despite the increasing secularization of society and the defection of Catholics who were unable to reconcile themselves with the Pope’s position on birth control, Church leaders would never abandon their traditional stance that contraception and abortion were wrong.

And so it has gone. The “end of the illusion” for Catholic leaders has made them tougher political foes of birth controllers. The present Pope, John Paul II, has brought a combative approach to the old doctrine. He has made harsh statements about homosexuals and AIDS victims: homosexuals cannot be good Catholics, AIDS victims may not use condoms (“Love faithfully,” he has told them).\textsuperscript{84} Neither informed scholarship on human reproductive physiology and psychology nor intense and continuing criticism of the Church has swayed him. How could it? Unless the Vatican could persuade itself that human life did not begin until the fortieth day after conception, or that the fetus was not “alive” until its brain had begun to function (10 weeks after
conception, when nerve cells which will form the cerebral cortex first become interconnected), abortion could never be accepted as moral.

If Church doctrine had not irreversibly connected birth control with abortion, there would be no great difficulty in the Church’s changing its mind about contraception. American Catholics say that, since the Second Vatican Council’s reforms in 1964, they follow their consciences, not the Pope. They reject the teaching of *Humanae Vitae* which reaffirmed the Church’s ban on artificial contraception. Evidence suggests that American Catholics use contraception to the same extent as the rest of the population.86

Those who practice their Catholicism in the comfort of Western Europe or America can easily write off the Pope’s teachings. In the Catholic Third World the Church’s ban on artificial contraception is a force.87 Few women in these countries have the luxury of choosing between their consciences and the Pope because the Church controls many of the hospitals, as well as exerting a great deal of influence on their governments. Whatever the motives for denying women contraceptives, the penalty women pay is high. Half a million a year die in childbirth. Of these 99 percent, according to the World Health Organization, are in the least developed countries. There.

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83 Jim Castelli, “Anti-Abortion, the Bishops and the Crusaders.” *America* (May 22, 1976), 442-444. at 443.
85 Ibid., 47-48.
87 In Mexico, a Catholic country suffering from a runaway population, families of ten or more are still common. In Poland, which is 95% Catholic, the lack of family planning programs has resulted in an abortion rate of 60-70 for every 100 births. Argentina and the Philippines have no birth control programs, and their burgeoning populations are poverty-ridden as a result. Ireland, with Western Europe’s highest birth rate, is similarly beset by poverty and illegal abortion. See Maddox, *The Pope and Contraception*, 5-8.
child-birth and its complications are the leading cause of death among women of reproductive age.  

Nevertheless, no change is in sight. The Church remains a source of opposition to all forms of birth control and abortion, while Catholics struggle with choice. The counter-culture of the 1960s and 1970s has died. Society maintains a strange combination of hedonistic and puritanical impulses. Almost overnight, AIDS brought the sexual revolution to a worried halt. Laymen have increasing difficulty seeing a condom as inherently evil.

Even as the institutional church falters, the spiritual bond between Catholics and their faith is strong, as if they are waiting for the Catholic Church to catch up to them. But John Paul II has not wavered. In his book, *Crossing the Threshold of Hope*, he reaffirmed the teachings of *Humanae Vitae* as having “put into practice the words the Apostle Paul wrote to his disciple Timothy,” and compared his own situation to that of St. Paul:

> Proclaim the work; be persistent whether it is convenient or inconvenient.....For the time will come when people will not tolerate sound doctrine. (2 Tim 4:2-3) Unfortunately, don’t these words of the apostle seem to characterize the situation today?  

In another chapter, “The Defense of Every Life,” he renounced the practice of abortion and reiterated the Church’s stance that abortion is “a clear moral evil:”

> The legalization of the termination of pregnancy is none other than the authorization given to an adult, with the

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90Ibid., 172.
approval of an established law, to take the lives of children yet unborn and thus incapable of defending themselves. It is not possible to speak of the right to choose when a clear moral evil is involved, when what is at stake is the commandment *Do not kill*! 91

If Catholics are waiting for a liberal Pope who will legitimate contraception and remove it from the list of “moral evils” that accompany abortion, they are doomed to disappointment.

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Chapter 5

“Every Child A Wanted Child”:
Planned Parenthood of Houston in the 1940s

DEAR ABBY: I am desperate. My trouble is too many kids. At the age of 19 I married a widower with three small kids. I am 27 years old and have eight of my own. That makes eleven. Believe me, I am worn out. I have no mother or mother-in-law to help me. I feel like 60 instead of 27, Abby. The only rest I’ve had in eight years are the three days I spend in the hospital when I go to have a baby. Don’t tell me to go to the Planned Parenthood Center because my husband gets boiling mad every time I mention it. He has no religion so that is not the reason. I have no religion either. Please help me. I am not able to support myself, but if you tell me to leave him, I will. Signed, WORN OUT.

DEAR WORN: Stay with him only on the condition that he agrees to let you go to the Planned Parenthood Center for advice. If he refuses—separate roofs. He has to support you and the children anyway.¹

Throughout the decade of the 1940s, the Maternal Health Center of Houston continued its crusade to bring birth control to such women, who, “worn out” from haphazard and excessive child-bearing, wrote to Dear Abby. Many of Houston’s women, the organization’s leaders realized, still did not share in the American dream of a better, richer, and fuller life, with opportunity for each to attain to the fullest extent of her ability and to be recognized for what she was; hundreds of mothers, they believed, still died each year because they undertook pregnancy unfit or unready for it. Many were without the things that those in the birth control movement deemed basics: medical guidance, health care, and the contraceptives necessary to control their reproductive lives.

¹Houston Post, May 5, 1949.
During the 1940s Houston’s birth control organization continued to expand its capacity and services to meet the needs of Houston’s indigent women. Inherent in the organization’s philosophy was the concept that each child deserved the right to be born, as far as science and human means could provide, in good health and desired by its parents. For Agnese Nelms, and for those who supported the birth control movement and the Maternal Health Center, the planning of parenthood was seen not only as a basic “health measure” but a social imperative. For them, the American frontier was at an end. Urbanization was the prodigious follower of industrialization. The market for child labor, even on farms, was disappearing and falling into public disfavor. With medicine’s life-saving discoveries, Americans no longer saw heavy birth rates as necessary to maintain population. In these circumstances, unlimited family size could no longer be considered a casual act of Providence. From the standpoint of society, as well as the individual’s welfare, they believed, “too many” could be as anti-social as “too few.”

Despite often bitter religious opposition, the idea of planned birth won acceptance in Houston in an amazingly short time. While the Catholic Church continued to oppose the dissemination of contraceptives and the idea of educating men and women about sex, many prominent Protestant and Jewish clergymen spoke out for it, and the line of women outside the doors of the Maternal Health Center continued to grow. It was during this decade that the battle lines were drawn between those who believed that birth control was a way to eradicate, or lessen, women’s suffering, and thereby improve women’s lot, and those who believed that birth control was—for a number of reasons—a moral and social evil.
The Impact of World War II

World War II had a tremendous impact on the nation’s economic and cultural life, and on the lives of women. During the war, women enlisted in the “home front army,” taking over jobs in industry, agriculture, and the professions that had never before been open to them. With the future uncertain, many deferred having families until peacetime.

Meanwhile, popular wisdom claimed that the declining domestic birth rate had weakened the country internationally. Pro-natalists had opposed birth control from the start. They stepped up their rhetoric after the war ended, insisting that it was women’s duty to give up their jobs for men, stay home, and raise families. The Catholic Church and other groups used the argument to block the expansion of family planning services throughout the country.\(^2\)

One aspect of the post-World War II culture that particularly affected Planned Parenthood was a new image of femininity, an image that Betty Friedan would later call the “feminine mystique.” Brought to Americans by the mass media, schools, and the psychiatric and medical establishments, proponents of the mystique resurrected Victorian images of femininity. Men and women were encouraged to assume exaggerated sex roles and were told that to defy them could lead to unhappiness, neurosis, failure, and sickness. Women’s biological capacity for motherhood, these “experts” asserted, made it improper for them to attempt any other career. “A true woman,” according to apostles of the mystique, would be able to make an important and fulfilling contribution to civilization through her “homemaking” and her influence on her children and husband. The mystique

\(^2\)A Tradition of Choice: Planned Parenthood at 75 (New York: Planned Parenthood Federation of America, 1991), 34-35. Those who opposed contraception, other than members of the Catholic Church, were a diversified group without a central organization or logo.
helped create and sustain a pro-natalist climate in the country that peaked in the 1950s, retarding the progress of the birth control movement and the expansion of Planned Parenthood.\(^3\)

The mystique also had roots in economic need. After 1945, military demobilization presented serious unemployment potential unless women could be forced out of the industrial jobs they had held during the war. Many felt that "public" work by women had been a temporary, war-time expedient. The logic of the mystique helped to justify laying them off. This did not mean that women were driven out of the labor market, however. The proportion of women working for wages continued to rise in the 1940s and '50s; women were simply driven out of better-paying industrial jobs and forced to return to poorly-paid, non-unionized jobs in the service sector. Most of these were working-class women who took jobs out of economic necessity, not ideology. At the same time many educated women may have been dissuaded from seeking professional employment by a sense of duty to family and self.\(^4\)

Adapting to the pro-natalist climate, spokesmen for the Planned Parenthood Federation of America sought to convince the public that "planned parenthood" meant not smaller families but planned families, and therefore healthier children. It posed as apolitical, offering no over-all program for social change, but instead confined itself to a single issue and to its interpretation of that issue. Its efforts were more successful in some areas of the country than in others. As it had been from the beginning organizationally, the growing number of affiliate Planned Parenthood clinics continued to be autonomous. Each affiliate struggled with its own problems and raised the funds

needed to support local clinic operations, while the efforts of the national organization to propagandize on behalf of Planned Parenthood went on above, sometimes well-received at the local level and sometimes virulently opposed. Nationwide, the struggling affiliates of the 1940s were able to make only the slightest dent in the demand for birth control services, while thousands of women poured out their stories in letters pleading for help in towns and rural areas where no help was to be had.\textsuperscript{5}

**The Expansion of Birth Control Services in Houston**

During the 1940s Houston’s Maternal Health Center cemented its place in the community and in the national Planned Parenthood Federation and emerged as an organization dedicated to family planning. In 1942 the Birth Control Federation of America officially changed its name to the Planned Parenthood Federation of America. Following the lead of the national organization, the Houston Board voted to change its name also, and the Maternal Health Center became the Planned Parenthood Center of Houston. The name changes reflected both the quiet “coming out” of the national and local organizations and the reformation of the national organization into a federation of mutually supportive state and local “franchises.” The name “planned parenthood” was still seen by many as a euphemism for birth control, but it represented a forward step in the development of Planned Parenthood’s ideology and its battle for organizational consolidation.\textsuperscript{6}

The survival of Houston’s birth control movement seemed almost certain. Nelms and the medical and lay volunteer staff of the Planned Parenthood Health Center quietly

\textsuperscript{5}Ibid., 337; and *A Tradition of Choice*, 37.
continued to provide the city’s poor women with much-needed contraceptives and medical care. Memories of the Great Depression lent credence to the argument that contraceptives were both (socially) necessary and (morally) acceptable. The sheer magnitude of depression-decade unemployment and poverty had given the problem of “relief babies” an unprecedented urgency. Locally, Nelms’s deliberately conservative stands had made the idea of birth control acceptable. The Planned Parenthood Center’s services were ostensibly intended for married women, she maintained, although it turned away no one. More important, most of the women served by the center were poor, and the clinic itself was located at the edge of the city’s poorest neighborhoods. Last, its services were limited to relatively few women. In its place, demeanor, and size, Houston’s Planned Parenthood Center tried to be inoffensive.\footnote{“Planned Parenthood Beginnings” (New York: Planned Parenthood Federation of America).}

But this did not preclude opposition. In Houston, as everywhere, there co-existed a large supportive core and a small vocal fringe, one opposed to the idea of birth control in general and the Planned Parenthood Center in particular. Most middle-class people could agree that poor women needed some sort of “relief” from the dangers of uncontrolled child-bearing. Some harbored eugenist beliefs that the poor should not reproduce at all; many were concerned about welfare costs; a number, like Nelms, were philanthropists trying to address a social ill. Agreement broke down over whether birth control should be made available to all women regardless of their economic circumstances. Opponents of birth control argued that the middle classes were obligated\footnote{Gordon, Woman’s Body, Woman’s Right, 348-349. New Deal programs especially brought to the attention of white liberals and radicals the disproportionate poverty of blacks. For example, 1940 studies estimated that half the black population of the United States was undernourished; that blacks had an infant-mortality rate 60% higher than whites; and that tuberculosis and syphilis were five to six times more prevalent among
to reproduce, and that free access to birth control would encourage licentiousness among young men and women by relieving them of the "consequences" of sex:
pregnancy. Catholic leaders vehemently condemned the use of birth control by rich and poor alike. Poor women, on the other hand, did not waste much time debating about the morality or social utility of birth control; they continued to use it whenever it was made available.

Benefiting from the local approbation it enjoyed, the Planned Parenthood Center continued to grow. Because its case load increased, in 1939 the center moved its operations to 1710 Capitol Avenue, a small, two-story house owned by the Christ Episcopal Church. The house was offered by James de Wolf, then rector of the church. The Planned Parenthood Center would occupy this house rent-free for ten years.\(^8\)

Houston's Planned Parenthood Center grew during the 1940s as American women increasingly demanded birth control. In 1940 a Fortune magazine survey indicated that 84.9 percent of women of child-bearing age felt that birth control information should be available to them and to all women who wanted it. Doctors supported birth control overwhelmingly: 97 percent for health reasons, 86 percent for child-spacing, 79 percent for economic reasons, and 72 percent for "marital adjustment"—i.e., to give newly-married people time to "adjust" to the state of marriage before starting a family.\(^9\) Riding this high tide of approval, Nelms initiated a "Let the people know" campaign aimed at Houston's medical community. In conjunction with the center's Medical Advisory Board, she addressed a letter to one thousand members of the Harris County Medical

\(^8\)The house was actually owned by the charitable arm of Christ Episcopal, the Green Foundation.
\(^9\)The Fortune survey was cited in "Doctors in Survey for Birth Control," Houston Post, February 12, 1940.
Society, telling the doctors about the Fortune survey and Houston's Planned Parenthood Center and encouraging them to support the birth control movement at home.

"We hope you will want to help the clinic both morally and financially to continue this worth while program," her letter stated.10

It was the first of several political moves Nelms would make during the 1940s. With public and professional opinion reportedly in favor of contraceptive information and services, she began to expand the clinic's range of services to include counseling on marriage and parenthood and a community outreach program to address civic and church groups on the value of planned parenthood. Additionally, Nelms hired Flora Burghdorf, a registered nurse and the first clinic director at Planned Parenthood, and a full-time staff of three.11

At the same time, Nelms increased Board participation in the organization. From 1941 to 1949, the Board elected seven different presidents. Nelms continued to serve on the Board as a member, and again as president in 1947, but the official spokesperson for the organization changed almost annually. In 1944 the Board elected Robert Dabney president, its first male president since Judson Taylor in 1936. All Board members were volunteers.12

The volunteers still formed the core of Planned Parenthood's staff, and they were sometimes hard to recruit. One volunteer, Mrs. Paul "Grandma" Mills, described her work at the Planned Parenthood Center during the 1940s as an "unpopular undertaking"

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10 Undated letter signed by Agnese Nelms. The letter is typed, but includes hand-written comments by Nelms about the number of doctors in the Harris County Medical Society.
11 Unpublished History of Planned Parenthood (author and date unknown). One of the staff was a secretary; one might have been a social worker of some sort. It is probable that the workers maintained patient records, assisted medical staff with patients, and were not trained professionals.
that she performed because she believed in family planning. When she was a very young woman she had been impressed by a neighbor’s belief that “one should plan for quality and not quantity.” When the local Unitarian Church asked for volunteers to help at the Planned Parenthood clinic, she recalled, she was one of the two women who responded. The other volunteer was Helen Steele, former principal of Poe Elementary School, who acted as the desk receptionist. “The waiting room was downstairs,” she said, “examining room up. Interns gave free time, offering pap smears and contraceptive fittings.” Mills assisted the doctors two times a week, and reportedly made “liberal contributions” to the organization.13

The Houston Post, directed by Oveta Culp Hobby, wartime leader of the Women’s Army Corps and one of Houston’s most influential women, also played a crucial role in explaining Planned Parenthood’s purpose to the public and in dispelling the negative image of birth control spoken of by “Grandma” Mills. Hobby was the first editor in the city to allow stories about Planned Parenthood in her paper’s editorial pages, and the first to publish the clinics’ event notices. This did not happen overnight. In the late 1930s and early 1940s stories about the Maternal Health Center were rare; by the late forties, they were common.

Much of the increased news coverage Planned Parenthood received after 1946 was the work of Houston Post columnist Marguerite Johnston. Johnston was an unusually independent and enterprising southern woman. After taking her A.B. degree at Birmingham Southern College in 1938, she worked as a reporter from 1939 to 1944 for

12The Board Presidents were Mrs. W. Aubrey Smith (1941), Mrs. Raymond H. Goodrich (1942), Mr. Robert Dabney (1944), Mrs. Orville W. Rote (1945), Mrs. J. Marion West (1946), Agnes Carter Nelms (1947), and Mrs. Orville W. Rote (1948-1952).
13Unpublished History of Planned Parenthood.
the *Birmingham News*. In 1944 she moved to Washington, DC, where she worked as
the paper's Washington news correspondent and met Oveta Hobby, who was serving in
Roosevelt's cabinet as the head of the Women's Army Corps. She came to the *Post* as a
columnist in 1946 and remained, later as Assistant Editor of the editorial page, until
1985. During her thirty-seven years on the *Post* she wrote hundreds of articles about
Planned Parenthood, overpopulation, the educational needs of young people, and, in later
years, the problem of teen pregnancy.

Her presence at the *Post* made a tremendous difference to Planned Parenthood.
She covered Planned Parenthood's services and events in a way not seen since Bess
Scott's full-page article on the Maternal Health Center in 1938. And she upheld Planned
Parenthood "as a positive thing," commenting in her by-lines on the clinic's ability to
help couples plan their families in size and spacing as well as offer assistance to those
couples wishing to conceive. Other reporters would cover the "Planned Parenthood
beat," as Johnston called it; but she did it first. Over the years she remained one of
Planned Parenthood's strongest advocates.\(^\text{14}\)

Johnston's coverage of Planned Parenthood did much to dispel misunderstandings
about the real purpose of Planned Parenthood, but it also caused controversy. Once
stories about Planned Parenthood began to appear in the *Post's* editorial pages,
responsive letters to the editor began to arrive almost immediately. Some stories caused
more controversy than others, but almost none went without comment from its readers,
for and against. The publicity benefited Planned Parenthood. While its notoriety was a
double-edged sword because it brought both birth control's supporters and opponents into

\(^{14}\text{OH}1, \text{December 29, 1994.}\)
the limelight where their respective positions hardened, it brought the agency and the birth control movement into public debate in Houston for the first time and legitimized discussion of birth control.

In the 1940s Houstonians took part in civic debates in a way that would become rare. The sides of the pro- and anti-contraceptive debate were forcefully articulated. One particularly acrimonious debate, which went on for several months during 1948 over a short editorial entitled "Population Rampant," appeared in the February 27 edition of the Post. In the article the anonymous writer lent support to the assertion of Dr. C.O. McCormick, a professor of obstetrics at the University of Indiana, that "control of the birth rate is more important than control of the atomic bomb"—a claim that might seem ridiculous today but presaged what would become a widely-held concern about overpopulation that peaked in the 1960s and '70s. The editorial brought to readers’ attention the fact that the Planned Parenthood Federation of America and Houston’s Planned Parenthood Center were battling to "awaken the country to the need of intelligent planning of families," to laud the organizations for their efforts, and to encourage donations. Further to bring the point home, the author cited Professor McCormick and another influential writer, C. Lester Walker, whose February article in Harper's Magazine had stated: "Signs are now multiplying that the world may soon have a tragic population crisis on its hands." It caused a storm of protest.15

Everyone, it seemed, had an opinion one way or the other about overpopulation, birth control, and Planned Parenthood. Those who objected to birth control on moral grounds, the "fundamentalists," argued that birth control violated Scriptural teaching.

15Houston Post, February 27, 1948.
“parents’ moral obligations,” and “Christian home life.” Citing the New Testament teachings of Jesus (“suffer the little children to come unto me...” etc.) and asserting the “God-given right” to have children, one man lashed out at “selfish” adults who, he believed, “do not want to be parents,” and who shirked their “obligation” to give birth to children—lots of them.”\(^{16}\) Another woman denounced Planned Parenthood, which she said, “is against the Christian home life, the teachings of Christ, and His Gospel.” “We are sorry,” her letter concluded, that “one of our local papers spread this vile practice, a subject which should not be mentioned among us.”\(^{17}\) Opponents of contraception came from across the spectrum of religious belief. Their exhortations against worldliness and secularism presaged fundamentalist arguments that would resurface in the 1980’s debate about abortion.

Houston’s Catholics were the most strident in denouncing news coverage of the practice of birth control and the very existence of the Planned Parenthood Center. “We Catholics know,” the head of Houston’s Catholic Clerical Student Fund wrote, “that the practice of birth control is not only contrary to the law of God but to every natural law, and it is not within the province of any newspaper to insult us for our religious beliefs.”\(^{18}\) “Our entire membership is opposed to the movement of Planned Parenthood,” a Grand Regent of the Catholic Daughters of America (who was, incidentally, a man) wrote. “For this type literature to come into so many homes who still believe that marriage is a divine institution, established by God, Himself, the primary purpose of which is the procreation


\(^{17}\) Letter to the Editor, “Against Christian Home Life,” Houston Post, March 7, 1948.

of children, is offensive and nauseating.”¹⁹ For some Catholics, birth control was not only “un-Christian,” it was “un-American.”

As a Catholic, I resent very much your editorial advocating birth control. When any group of people try to go against the laws of God by trying to govern birth control, it’s high time that they were all gathered together and sent back to the USSR where anything goes.²⁰

No one was more vociferous than Bishop C.E. Byrne of the Galveston-Houston Diocese, who wrote:

Birth control, now called parent-planning, is not new. The prostitutes of all the centuries have practiced it. They must, or go out of business. There can be no baby cries in brothels....Many of Houston’s finest citizens are enlisted in a cause of immoral and disgraceful origin when they select the ways and means of a harlot to correct the ills, real or unfounded, in the decent home.²¹

Byrne, who was not afraid to put the harlot and the mother and father of birth control convictions all in the same bed, represented the orthodox Catholic position.

Equally vocal were those who approved of birth control and the work of Houston’s Planned Parenthood Center. Some men argued that birth control made good economic sense. “I would like to ask them [who oppose birth control] what to do when you are going to school and trying to raise a family besides,” wrote an Army veteran.

“My income is $90 a month. I pay $30 for rent, $11 for utilities, and everyone know [sic] how much food costs! This doesn’t leave very much for raising any more children,” he said. “I have one. If you can’t afford it I’m for birth control.” And, he added in response to the writer of the March 6 editorial linking birth control to communism, “If I

²⁰Letter to the Editor, “Against Birth Control,” Houston Post, March 6, 1940.
hadn't spent six years in the army fighting for democracy, I could have my education and be raising a family. I have no desire to see communism start in the United States and I definitely have no desire to go to Russia, as they suggested.  

Housewives penned letters that presaged later fiery battles over the question of choice. Most people who supported Planned Parenthood and believed that birth control should be made available to all women fell into a "common-sense" category. "Planned Parenthood is for those who want it, just as all other modern conveniences are," one woman wrote. "Would they [who oppose birth control] be willing to give up electricity with all its helpful uses, if their church were to say that candles were sacred and should be used instead of electricity? I think not. If they were ill, would they give up modern scientific discoveries in the field of medicine simply because their church was against it? No, I believe they would then be complaining because science had not discovered more new medicines to help cure them. Can't they see that Planned Parenthood is a convenience for the public to personally accept or refuse as each sees fit to do?" "I am just a housewife," she concluded, "but after reading the articles published in your paper on the subject of Planned Parenthood, I say more power to the Federation." Another summed up the pro-choice argument more bluntly:

In families so large there just isn't enough food and clothing to go around, you hear no talk against Planned Parenthood regardless of what their religion. And when proud men and women because of too large a family, have to accept charity, they can't help but feel thankful there is such a thing as Planned Parenthood.  

\footnote{Letter to the Editor. "From Bishop Byrne," Houston Post, March 7, 1948.}  
\footnote{Letter to the Editor. "Vet Can't Afford Kids," Houston Post, March 13, 1940.}  
\footnote{Letter to the Editor. "Free to Choose," Houston Post, March 13, 1948.}
The "editorial war" of 1948 came one year after the Planned Parenthood Center of Houston and the Federation launched a $2 million nationwide fundraising campaign—the first of its kind—and may have been one result of it. In 1947 Nelms had joined with leaders of the Federation to fulfill the dual goal of "educating the public" about Planned Parenthood and raising money to expand services throughout the nation. Houston's share of the $2 million, or the money it pledged to raise during the seven-week campaign, was $50,000. Half the money raised in Houston would go to support the local branch; $7,500 was for the Texas Planned Parenthood League; and $17,000 was to go to the Federation.\(^{25}\)

As Nelms lamented, the Planned Parenthood Center operated on a shoe-string budget, and without more donations, it could not expand services. The Houston clinic had increased its annual operating budget to $12,000 by 1947 through private donations. Since doctors and interns donated their time and skills to the Center, the clinic's main expenses were contraceptives, staff, and medical supplies. However, many of its donors were Board members and clinic volunteers, and the patient load continued to grow rapidly. "The current budget of $12,000 a year is wholly inadequate to carry on the program with those in low income brackets who need the service," she said, "and to expand into rural communities." By taking part in the nation-wide, Federation-sponsored fundraising drive, Nelms sought to broaden Planned Parenthood's donor base as well as increase the clinic's budget; surrendering half the proceeds to the Federation would be small price to pay if the campaign were a success.\(^{26}\)

\(^{25}\)"Houston Unit Will Assist Drive of Parenthood Clinics," Houston Post, January (?), 1947.
\(^{26}\)"Parenthood Clinic Campaign Opens." Houston Post, January (?), 1947. The patient load was over 3,000 in 1947; that number would increase to 4,600 in 1948.
The campaign opened in February 1947 with a nation-wide radio broadcast of addresses originating in the Federation's New York headquarters. At the local level, affiliates sponsored talks by prominent business people, educators, and ministers before civic groups, service clubs, women's groups, and congregations. All stressed the need for more clinical facilities and "a thorough educational campaign to inform the public as to how [Planned Parenthood] centers can help parents and research to aid mothers in rural communities who cannot visit the medical center as often as they should." More importantly, all carried the message of Planned Parenthood's three-fold services to a sparsely educated public: medical advice to married couples; medical advice to childless couples who wished to have children; and trained counsel to prepare couples for marriage and parenthood.²⁷ This was no radical social movement, the broadcasts stated plainly, but a philanthropic cause.

In Houston, Nelms again exploited the city's Who's Who to help in the local fundraising campaign: George R. Brown, Will Clayton, H.R. Cullen, W. T. Carter (Nelms's father), Lamar Fleming, Simon Sakowitz, Leopold Meyer, and Ben Taub, to name a few. Brown acted as head of the Planning Committee for the drive and was instrumental as its spokesperson in garnering the support of Houston's business community. Nelms headed up the "Women's Committee," made up of prominent Houstonians' wives.²⁸

The 1947 fundraising campaign also engendered a spirited correspondence between Jesse Jones, owner of the Houston Chronicle, and Nelms that deserves note. On February 10 Nelms wrote an angry letter to Jones asking that he reconsider, in light of the

²⁷Ibid.
²⁸Ibid.
national campaign, the Houston Chronicle's long-standing policy of refusing to print any notices about Planned Parenthood. Nelms let him know in no uncertain terms that she considered him personally responsible for the paper's editorial policy. "The editors of your paper are Catholic," she said, "and have refused, probably under pressure of the Catholic Bishop Byrne in Galveston, to give this campaign radio time and press notices. We do not ask the Catholics to accept our program—we merely ask them to 'live and let live.'" And, she added, "We feel sure that now this matter has been brought to your attention, you will want the policy of your paper to conform to fair newspaper procedure."29

Jones responded on February 22 with a cryptic note that promised nothing. "Dear Agnese," his letter began, "I suppose it is a coincidence that your letter of the 10th reached me during National Brotherhood Week." He then continued with a vague discussion of the number of Catholic employees on the Chronicle, the tenure of those in the editorial department, and a mention of enclosed clippings from the Chronicle that had supposedly been published. "For your information," he said in closing, "there is not enough newsprint available to print everything that the paper would like to print—news matter and advertising."30

Nelms's second letter of March 5 was equally cryptic. First, she pointed out, two of the three clippings Jones had sent were from other papers, the Post and the Press, and had not been printed in the Chronicle. And the story the Chronicle had printed, about the visit of a Planned Parenthood dignitary to Houston, had not mentioned the words "birth control;" when the editors had learned the nature of the story, moreover, they had refused

29Agnese Nelms and the Executive Board of Planned Parenthood to Jesse H. Jones, February 10, 1947.
to print anything else about the visit or about Planned Parenthood. Next, she stated flatly, Bishop Byrne had informed two doctors on Planned Parenthood’s medical advisory board that they would no longer be permitted to bring expectant-mother patients to St. Joseph’s Hospital “if they continued their affiliation” with Planned Parenthood and told the Board’s ministers that no Catholic would ever be permitted “at any time to sit on a program or platform with them, as long as they kept their places on our [Planned Parenthood’s] Board.” “It was supposed that Brotherhood week was intended to make for tolerance, she said dryly, “but as far as the Catholic mind goes there is none.”

Finally, she permitted herself a little dig at Jones himself. “We certainly do not question your right to employ Catholics as heads of your paper,” she said in closing. “We do, however, question the right that you as owner of the paper, a good Methodist, and whose Bishop, A. Frank Smith, Sr. is sponsoring this program, have allowed them to form the policy of intolerance for a movement which so many broad-minded Catholics espouse.”

Apparently the second letter worked. Perhaps Jones was a better Methodist than he was a newspaperman. On March 20 Nelms sent Jones a thank-you note which read: “I can’t tell you how delighted our board was to see this release in your paper and we are very grateful to you for having straightened out the situation. I hope you will read this literature and give us a big, big check!” On March 24 Planned Parenthood received a check for $250 from the Houston Endowment, the foundation that Jones and his wife Mary had established earlier. That amount would increase to $1,000 in 1948.

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31 Agnese Nelms to Jesse H. Jones, March 5, 1947.
32 Agnese Nelms to Jesse Jones, March 20, 1947.
33 Receipts stamped “paid” for checks received in 1947 and 1948 from the Houston Endowment to Planned Parenthood.
And so Nelms won the local battle of 1947 to bring Planned Parenthood's message to the public and to expand services to Houston's needy women. The fundraising drive was successful in meeting its goal, and by 1949, Planned Parenthood's annual fundraising event had become institutionalized. Influential Houstonians continued to serve as spokespeople for the organization and to garner the support of the business, ministerial, academic, and lay communities in the cause of birth control. Nelms guided their activities, but without this crucial support—both "morally" and financially—she could never have succeeded.\textsuperscript{34}

As the decade closed, Agnese Nelms was quoted as saying that "tremendous progress had been made in dispelling misunderstanding of the real meaning of Planned Parenthood—that all mothers have the right to decide for themselves how many children they want and that all children have the right to be born under conditions which make for a strong, happy and useful citizen."\textsuperscript{35} With records indicating that 9,000 women had received services at the Planned Parenthood Center during its thirteen years of existence, Nelms's claim to progress was justified.

\textsuperscript{34}"Planned Parenthood Association Collects $30,000 in Drive," Houston \textit{Chronicle}, March 29, 1947. By April, the entire $50,000 had been raised.\textsuperscript{35}Marguerite Johnston, "Planned Parenthood Has Program for Larger As Well as Smaller Families," Houston \textit{Post}, March 4, 1949.
Chapter 6

Abortion in Texas
1854-1973

Texas enacted its first abortion statute in 1854. Simple and concise, it headed the state’s amended list of “Offenses Against the Person” that included killing in self-defense, verbal and written threats, involuntary servitude, poisoning and the murder of a slave. The statute was tacked on to the 1848 Act Concerning Crimes and Punishments, and read:

“If any person, with the intent to procure the miscarriage of any woman being with child, unlawfully and maliciously shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or any means whatever, with like intent, every such offender, and every person counseling or aiding or abetting such offender, shall be punished by confinement to hard labor in the Penitentiary not exceeding ten years.”

The law primarily made it illegal for a person to perform an abortion or to give a woman something to cause her to miscarry. But it also made it illegal for anyone to encourage a woman to abort a child or to aid an abortionist. Under the first Texas statute such a person was equally guilty. The woman seeking or consenting to an abortion was not considered a principle or an accomplice in the crime; she was considered the victim even if she performed the abortion upon herself.

This early Texas law was enacted as part of a more general crime bill and was aimed at protecting women from unsafe practices: poisonous remedies and criminally

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1 Texas Laws 1854, c. 49, Sec. 1, in 3 Gammel, Laws of Texas, 1502 (1898).
2 Ibid.
3 This is stated repeatedly by Texas courts. See for example Watson v. State, 9 Tex. App., 237 (1880), at 238; Willingham v. State, 23 S.W. 424 (1894); Hunter v. State, 41 S.W. 602 (1897), at 603; Moore v. State, 40 S.W. 287 (1897), at 290; Shaw v. State, 165 S.W. 930 (1914), at 931; Fondren v. State, 169 S.W. 411 (1914): “A female who commits abortion on herself is regarded as the victim, and not the perpetrator, of a crime”; Gray v. State, 178 S.W. 337 (1915), at 341; and Hammett v. State, 209 S.W. 661 (1919).
incompetent practitioners. It was not primarily designed to make abortion a crime. 4

The Texas law, like all nineteenth-century state statutes enacted to prohibit the practice, was modeled on the English common law in its definition of illegal abortion. Under English common law abortion was not a crime until "quickening," or the moment when a woman first felt fetal movement. Quickening generally occurred near the midpoint of pregnancy, late in the fourth or early in the fifth month, though it could vary considerably from woman to woman. The common law did not formally recognize the existence of a fetus in criminal cases until it had quickened. After quickening the expulsion and destruction of a fetus without "due cause" was considered a crime because the fetus had showed some semblance of a separate existence: the ability to move. Abortion after that was a misdemeanor, or a minor crime. 5

The Texas law has been interpreted by historians as a law that restricted abortion after quickening, although the work "quick" never appears in it. There is nothing in the case law to indicate that Texas courts made such a distinction or that abortion was considered legal up to a certain point. The fact that there were no convictions under the original Texas statute may indicate that abortion before a certain time in the pregnancy was both accepted and legal. But there is no way to know for certain. 6


5See fn. 4, supra.

6Mohr, Abortion in America, 139.
Just four years later, in 1858, Texas law was amended and tightened considerably. Abortion was outlawed except by a regular physician to save the life of the mother. The penalty for performing an abortion or giving a woman something to cause her to abort was two to five years in prison; if the woman had not consented, though, the penalty was doubled. Other provisions stated that anyone who "furnished the means for procuring an abortion: was guilty as an accomplice; that the fine for attempting to perform an abortion—even if it failed—was $100 to $1,000; and that if a woman died because of an abortion or an attempted abortion, her death was considered murder.

Finally, the statute included an article that forbade any person from killing a child during birth that "would otherwise have been born alive." How someone might abort a child during childbirth was not specified, but the punishment was made clear. The penalty for killing the almost-born was imprisonment from five years to life.7

It was left unclear exactly when the exception applied. The 1858 law said only that it was legal to perform an abortion if it was "procured or attempted by medical advice for the purpose of saving the life of the mother."8 It did not say whether an abortion might be performed for the woman's mental health or economic survival. It did not make clear whether an abortion could be performed on a frail or sickly woman who might die if she continued a pregnancy or only on a woman who would surely die in a very short time without one. Doctors did not want to risk a prison sentence or sacrifice their medical licenses to test the interpretation of the statute. As a result, in order to

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7Paschal’s Laws of Texas. Arts. 2192-2197 (1866).
8Ibid., Art. 2197.
avoid the possibility of prosecution, almost no doctor would do an abortion under any circumstances.\(^9\)

The 1858 statute foreshadowed the tightening of abortion laws throughout the states that would take place between 1860 and 1880. Texas was not among the first states to enact an abortion law,\(^10\) but it was one of the few to prohibit as early as 1858 abortion at any time during a pregnancy for any reason except to save the life of the mother. Most states at that time had laws restricting abortion after quickening.\(^11\) Between 1840 and 1860 only three states besides Texas showed any inclination to diverge from the English common law. In 1840 Maine passed the first statute which clearly prohibited abortion at any stage of gestation.\(^12\) However, no prosecution under this statute reached the Maine Supreme Court until 1927.\(^13\) In 1850 the Pennsylvania Supreme Court was the first state supreme court to uphold a prosecution of a pre-quickening abortion, in *Mills v. Commonwealth*.\(^14\) Massachusetts prohibited all abortions after a state court acquitted an abortionist in a highly publicized murder case involving the victim of a botched abortion. In response to this acquittal the legislature passed a law in 1845 prohibiting the use of poisons and instruments to procure abortions, regardless of the stage of gestation.\(^15\) However, there were no convictions in any abortion trial in Massachusetts from 1849 through 1857.\(^16\) Texas similarly enacted one of the most restrictive abortion laws in the United States, one that would remain substantially

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\(^10\)At the time the Texas statutes were passed, 23 states and territories and the Kingdom of Hawaii had enacted abortion laws. *Roe v. Wade*, 410 U.S. 113 (1973), dissenting opinion of Justice Rehnquist.
\(^12\)*Ibid.*, 95.
\(^13\)*State v. Rodman*, 126 Me. 177(1927).
\(^14\)13 Pa. 631 (1850).
\(^15\)Mohr, *Abortion in America*, 120-121.
\(^16\)*Survey of Abortion Law.*, 95.
unchanged until 1973. Yet, it was not until 1874, sixteen years later, that a case arose in a Texas court of appeals out of a prosecution under the statute.

The absence of abortion prosecutions in many states under the earliest laws has been attributed by historians to a number of factors. First, abortion was during this period not a widespread problem. Most women who got abortions were attempting to avoid the stigma of bearing an illegitimate child. The relatively low number of abortions and the secret nature of the operation also helped to keep the practice out of the public view. Even when its use was known, the purpose for which it was employed was not seen as threatening to moral values provided it was accomplished prior to quickening.

Second, in the absence of case law, most states generally relied heavily on the English common law to decide abortion cases. State courts were thus hesitant to punish abortions performed prior to quickening because in English common law it was not a crime. Third, organized opposition to legalized abortion was nonexistent. The opposition from physicians, Puritans and other groups that would become a powerful social force in the 1870’s had not yet crystallized; there was no reason for legislators and judges to deviate from the common law. And fourth, a lack of medical sophistication prevented physicians from determining for certain whether a woman was pregnant before the fetus began to move. All the abortion statutes, Texas’ included, required that the

18State v. Elvira Rupe, 41 Tex., 33 (1874).
19Mohr, Abortion in America, 17. Mohr quotes John Beck’s Infanticide in Elements of Medical Jurisprudence (T. Beck, ed., 1835): “The practice of abortion was resorted to by unmarried females. who, through imprudence or misfortune, have become pregnant, to avoid disgrace which would attach to them from having a living child.” The use of abortion by married women, particularly by middle or upper-class Protestant women, became noted after 1840. Ibid., 46-47.
20Ibid., 50.
21Ibid., 16.
prosecution show intent—i.e., that the abortionist intended to procure an abortion rather than simply attempting to "clear unnatural obstruction of the menses." The latter was considered a proper medical procedure to restore the natural body purification system when it was blocked by a cancer-like growth or some other unnatural occurrence.\textsuperscript{23}

The sparse number of Texas abortion cases and the number of reversals on appeal reflect this early reluctance on the part of law enforcement officials to enforce strict abortion laws and of the courts to convict abortionists or their accomplices. The Texas abortion statute had been in existence sixteen years before \textit{State v. Elvira Rupe} was decided.\textsuperscript{24} Rupe was indicted under Art. 2196 of the Texas Penal Code for "unlawfully,...during the parturition [of her child], destroy the vitality and life of her child, then in a state of being born, and before the actual birth of said child, which child would otherwise have been born alive." This case is noteworthy because it is the only prosecution under this particular article and because it presents the sole Texas case in which a woman is indicted for aborting her own child. As noted before, the mother was generally not considered a principle in or accomplice to the abortion but rather as a victim.

The exact circumstances of the infant's death are not stated in the indictment or discussion of the case. There is no description of the manner in which the life of the fetus was destroyed, whether by violence or instrument, and no charge that the mother had done it maliciously or knowingly. It only seems clear that she acted alone. Rupe asked the lower court to quash the indictment because of its vagueness and her request was

\textsuperscript{22}Ibid., 3.
\textsuperscript{23}Ibid., 41.
granted. She was discharged and the State appealed. The higher court agreed a
second time with Rupe and the judgment was affirmed. It seems clear that the court was
reluctant to punish her for the death of her child because there was no precedent in the
common law to support such a decision. So while the Texas statute did not on the face of
it protect a mother from prosecution, the court in this instance was nevertheless unwilling
to sidestep the common law rule that did.

There would not be another case appealed under the Texas statute until 1880.
Watson v. State\textsuperscript{25} involved a young woman named Mattie Shook, who became pregnant
by a man named Watson while living with him and his family (perhaps as a servant).
Watson was a physician, and he told Mattie that he could give her a medicine that would
cause her to miscarry. Despite taking ergot, the strongest abortifacient then known, and
more often than the doctor had ordered, she failed to miscarry. Instead, she moved to
Tennessee and gave birth to the child. During her absence a note describing her
condition was sent to the doctor’s wife, supposedly from Mattie’s fiancé but actually
from Mattie herself, and this led to the court case. A lower court found Watson guilty of
“designedly” administering an abortifacient, a violation of Art. 2192 of the statute, but a
Texas appellate court reversed the conviction on technical grounds.\textsuperscript{26}

Legal historians point to a general tendency among state appellate courts to
display a “continuing tolerance” in abortion cases through the 1870s. While prosecutors
could point to a number of anti-abortion rulings dating from the 1850s, judges continued

\textsuperscript{25}11 Tex., 33 (1874).
\textsuperscript{26}9 Tex. App., 237 (1880).
\textsuperscript{26}The State’s primary witness was Mr. Shook, Mattie’s father, and the court found his testimony alone
insufficient to convict Watson. Since there was no witness besides Mattie Shook, Watson’s conviction was
reversed, though he never contested the fact that he had attempted to produce the abortion. The punishment
that had been assessed was a fine of $250.
to decide many technical points of law and virtually all of the crucial medical
questions that arose in abortion cases in favor of the accused. Consequently, convictions
in these cases remained difficult to obtain and prosecutions were infrequent. Texas
appears to have been no exception to this rule.

Historians are in general agreement that there was a movement between 1860-1880
in state legislatures to restrict the practice of abortion, and as to its causes. As James
Mohr notes in *Abortion in America*, between 1840 and 1880 the practice and use of
abortion in America began to change. For the first time in American history, a
significant number of married women began resorting to abortion to limit family size.
Mohr cites a Massachusetts study that offered statistics to show that, between 1840 and
1855, 20 percent of all fetuses were delivered dead. In 1868 two prominent physicians
conducted a similar study of the abortion rate in New York City and reached substantially
identical results.

Much of the increase in abortion has been attributed to the commercialization of the
abortion trade during this time. Many major newspapers contained advertisements for
the sale of abortifacients, instruments to procure self-induced abortions, and clinics that
provided surgical abortions. In 1871 an abortion clinic run by New York’s most
famous abortionist, Madame Restell, reportedly spent $60,000 on advertising.

27Mohr, *Abortion in America*, 230. Mohr cites Eugene Quay’s “Justifiable Abortion—Medical and legal
Foundations,” 49 *Georgetown Law Journal* (Spring 1961), 395-538, which gives a detailed accounting of
the case law and statutes in every state. Unfortunately, Quay cites no case law from Texas in his article.
28See fn. 4. *supra*.
29Mohr, *Abortion in America*, 41.
31“Survey of Abortion Law.” 97, fn. 144.
See also Mohr, *Abortion in America*, 50-65.
33Mohr, *Abortion in America*, 52.
As abortion became more prevalent and visible, especially among the middle classes, groups opposed to abortion began to form and gain support. The most important of these was the group of "regular" physicians working under the charter of the newly founded American Medical Association (AMA). In 1847 the AMA began a campaign, led by Dr. Horatio Robinson Storer, to organize physicians and lobby legislatures for more restrictive abortion laws.\textsuperscript{34}

The campaign to make abortion illegal became a major focus of the AMA for many reasons. First, all regular physicians were required to adhere to the Hippocratic oath, which prohibited performing or aiding in the procurement of an abortion. And, while a physician could not be barred from practicing for violating the oath, he could receive severe sanctions from his colleagues.\textsuperscript{35} Second and more importantly, the medical risks from the use of abortifacients and surgical abortions were at that time exceedingly high.\textsuperscript{36} Even considering the dangers from childbirth prior to the discovery of antiseptics, the medical risks of many of the abortion procedures were much higher.\textsuperscript{37} Third, physicians had come to realize that quickening was not a critical point in pregnancy. Scientific discovery had shown that gestation was a continuous process from inception and there was no basis for designating quickening as the critical stage.\textsuperscript{38}

Fourth, the regular physicians saw that the controversy could be used to force the "irregulars," or those not formally trained in recognized medical schools, from the

\textsuperscript{34}Ibid., 149-159.
\textsuperscript{35}Ibid., 35.
\textsuperscript{37}It was not until 1884 that the use of antiseptics in surgery was widely accepted. See Mohr, Abortion in America, 30-31.
\textsuperscript{38}Ibid., 36-37.
profession. Regular physicians had for many years considered the irregulars as a serious threat to public health, the standing of the medical profession and their livelihood. While the regulars struggled to enhance their status during the nineteenth century, the increasing acceptability of irregulars (whose treatments were often just as effective) was seen as a threat. A major reason the irregulars continued to flourish was probably that they were willing to perform abortions. Much of their practice consisted of those contraceptive and abortion services that regular physicians were loathe to provide. Mohr makes clear that the regulars felt that if they could prohibit abortion it would eliminate most of the irregulars' practice and make it financially impossible for them to continue.

Fifth, most of the regular physicians were white, Anglo-Saxon, Protestants who feared the ever-growing number of Catholics in America. Because abortions were much more frequent among Protestant than Catholic women, many physicians feared the development of a Catholic majority.

Strong support for the regular physicians' anti-abortion movement came from the Puritanical crusade against pornography led by Anthony Comstock. With the help of influential congressmen and lobbyists, Comstock became an agent of the federal government with the absolute authority to censor the mails. The federal law of 1873 that

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40 Mohr, Abortion in America, 37.
41 Ibid., 166-167. Much of the racist sentiment of the time was due to a middle-class belief in Eugenics, a social science based on Darwinian evolution. American eugenists saw their duty, as members of the better sociobiological class, to control the expanding numbers of the lesser, inadequate masses. Eugenic programs called for prohibitions on the marriage of alcoholics and the handicapped. Their aim was social control, to be achieved, if necessary, through birth control and sterilization. See Donald K. Pickens, Eugenics and the Progressives (Nashville: Vanderbilt University Press, 1968), 37-54.
42 The best account of Comstock's anti-abortion crusade is contained in Brodie's Contraception and Abortion in Nineteenth-Century America, 255-266.
bears his name was used to suppress not only allegedly obscene materials including information about contraceptives and abortion, but also the advertisement and distribution of abortifacients.\textsuperscript{43} His crusade led to the end of the commercialized abortion trade and led to the arrest of many major abortionists.

This influential anti-abortion movement began to affect legislation in the 1860's by causing many states to add to or revise their statutes in order to prohibit abortion at all stages of pregnancy. Pennsylvania and Connecticut led the way in 1860 with restrictive laws regarding abortion prior to quickening. During the Civil War, while the northern and southern states were occupied with more pressing concerns, the western territories of the United States were still actively developing their abortion laws. Abortion at any time during pregnancy was made a statutory offense in Colorado and Nevada in 1861, and in Arizona, Idaho, and Montana in 1864. In 1864 Oregon also revised its abortion law to prohibit abortions before quickening.\textsuperscript{44}

After the Civil War, many of the eastern states began to introduce more restrictive abortion laws. In 1869 New York outlawed abortion prior to quickening and included punishment for attempted abortion even if a woman was not pregnant. Only three years later the law was made even more restrictive, prohibiting the advertisement of abortifacients, the giving of advice or aid in procuring an abortion, and the voluntary assent of a woman to an abortion. In 1875 the law was revised to allow the confession of a dying woman to be used in an abortion trial.\textsuperscript{45} The evolution of New York's abortion law is illustrative of 31 states which, between 1860 and 1880, revised their laws on

\textsuperscript{43}The Comstock Act of 1873 was a federal statute passed for the purpose of restricting the circulation of obscene material by mail. Comstock was able to include materials about contraception and abortion in its definition of obscene.

abortion. By 1910 every state had strict anti-abortion laws except Kentucky, whose courts nevertheless declared abortions to be illegal. Most, like Texas, permitted abortions only if necessary to save the life of the mother. A few allowed abortions to protect the “health” or “safety” of the mother, although exactly when such therapeutic abortions could be performed was left to the courts to decide. And a few allowed for no exceptions at all, even if necessary to save a woman’s life. Again it was left to the courts to adopt judicial exceptions to these statutes.

There was, then, a general tendency among the states to enforce their abortion laws after 1880. But Texas does not seem to have followed this trend. In 1887, at a time when other state courts were upholding an increasing number of convictions for abortion, a Texas appellate court refused to uphold a conviction where an abortion was procured by violence and against the mother’s will. In Navarro v. State, Juan Navarro was convicted of “producing an abortion on his wife, by unlawful violence,” a violation of Art. 2192 of the Texas statute. Mr. Navarro, who was serving time in jail for a misdemeanor, became enraged during a visit by his wife because she had gone to see his lawyer on the previous day and not returned. When she appeared the next day he accused her of having an affair with his lawyer and “kicked her violently in the stomach.” He

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46 Ibid., 101.
47 Ibid., 101. For a detailed accounting of the evolution of all the states’ laws see Quay’s “Justifiable Abortion,” 395-538, especially Appendix 1 which contains the statutory material on abortion of all the states and territories.
49 Ibid., 103-104. Forty-two states had statutes similar to Texas; New Mexico, Colorado, Alabama, Maryland and the District of Columbia laws provided for exceptions in the gray area of women’s “health” and “safety;” Louisiana, Massachusetts, New Jersey and Pennsylvania had no statutory exceptions. The Massachusetts Supreme Court did not hold that therapeutic abortions were permissible if a woman’s life was in danger until 1944. The New Jersey Supreme Court did not allow such an exception to its statute until 1948.
506 S.W. 542 (1887).
afterwards expressed regret. His wife subsequently gave birth to two dead children
and an indictment was brought against him by the district attorney of Cameron County.

Juan Navarro was convicted in a lower court and sentenced to four years in the
penitentiary, but a Texas appellate court reversed his conviction for two interesting
reasons. First, Mrs. Navarro had testified as a non-expert witness that the assault had
caused the death of her children; her testimony was therefore found to be inadmissible.
Second, because Mrs. Navarro had been a “hostile” witness, unwilling to take part in the
prosecution or give evidence against her husband, the court found that intent on Mr.
Navarro’s part was missing. It justified its peculiar reasoning on the fact that Mrs.
Navarro had forgiven him.

Again in 1892 an appeals court in Texas reversed the conviction of a man found
guilty of attempting to produce an abortion under Art. 1292 of the abortion statute. In
Williams v. State, a man named Williams was charged with administering cotton-root
tea to his girlfriend, a woman known only as the prosecutrix, for the purpose of
producing an abortion. She took the tea in the prescribed dosages, but without effect.
Williams was subsequently charged with attempted abortion, convicted and fined $500,
and he appealed.

During the trial experts for the state testified that, while cotton-root tea was likely
to produce an abortion, it had not been given in strong enough doses in this case to
produce that effect. The court found that the means employed were thus “not calculated”
to produce an abortion—literally calculated, that is—avoided the more important
question of intent, and reversed the conviction.

5019 S.W. 897.
In 1894, however, a Texas court of appeals would uphold two convictions under Art. 2192 of its abortion statute. *Willingham v. State*\(^5\) was an appeal of a conviction for attempting to procure an abortion. Barton Willingham was convicted in Fisher county for giving Livie Brown calomel, an abortifacient, in amounts designed to “produce an abortion.” The attempt was unsuccessful; nevertheless, Willingham was indicted and convicted under Art. 2194 of the Texas statute, and he appealed. The appeals court affirmed his conviction, the first in Texas since the abortion law had been enacted.

In a similar case in the same county that year, the court affirmed the conviction of H.D. Cave for attempting to commit an abortion on yet another Miss Brown. Again the attempt was made, this time with unknown “drugs and medicines,” and again it was unsuccessful. Cave was convicted, fined an unspecified amount, and he appealed.

Once again the court found that, although the drugs and medicines had failed to produce the desired abortion on Brown and that it abhorred her “absolute depravity,” Cave had nevertheless shown an intent to induce one, and the conviction was upheld. The court seemed in upholding these convictions to be attempting to discourage frantic or calculating men from administering poisons to their hapless women. Here the punishments were fines, not imprisonment, and the court could easily afford to use some symbolic convictions to make a point. Perhaps the court was sympathetic with the plight of the family as well, since for whatever reason, the Miss Browns of Fisher County seemed to be under attack by their illicit lovers in 1894.

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\(^5\) 25 S.W. 424 (1894).
But in 1896 a Texas appeals court would refuse to uphold the conviction of a known male abortionist. In *King v. State*, William King had been found guilty of operating on a woman known only as the prosecutrix, and “producing an abortion” on her. His punishment, the harshest yet known in Texas, had been assessed at five years in the penitentiary, and he had appealed.

The court found for King on a technicality, despite testimony by the prosecutrix that “appellant killed the child, and came very near killing me,” despite the fact that he never denied performing the abortion and that the instruments of his trade had been found in a makeshift operating room in his home, and despite testimony that he had performed at least two other abortions. Because the woman involved had not aborted until eight or ten days after the operation the court found that “she could not positively know that appellant killed the child.” With this reversal a Texas appellate court demonstrated that it remained ambivalent about upholding a harsh conviction, even one of a non-physician, under its abortion law.

Nevertheless, in 1897 two convictions were upheld by other Texas appellate courts, one for attempted abortion and one for an actual abortion. The first case involved a fine for the lesser offense of attempted abortion. E.R. Hunter was convicted in Wilson County for “willfully and designedly attempting to produce an abortion on Florence Johnson.” He had given her ergot, a powerful abortifacient, without success. At trial, Hunter did not deny that he had had “carnal intercourse” with Johnson or that he had given her the drug, but only that he had not given her enough to do the trick. Perhaps depending on the 1892 decision in *Williams v. State*, Hunter mistakenly based his appeal

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52*34 S.W. 282 (1896).
on the fact that his attempt to abort the child had failed, rather than denying that he had ever intended to procure it. This defense proved weak, given the notoriety of ergot as an abortifacient, and his conviction was affirmed.

In a more serious case that year in Jack County, William Moore was convicted of abortion and sentenced to five years in the penitentiary, and he appealed.54 Moore had administered ergot to a woman named Mollie Smith in order to “bring about an abortion,” and when this did not succeed, had performed an abortion on her himself with a penstaff and another “metallic instrument.” Smith had assisted him in the operation. In an unusual indictment, Moore was charged with both attempting and performing an abortion, meaning that he could be fined and imprisoned. The jury found him guilty of the more serious crime of abortion.

In a lengthy opinion, the Texas Criminal Court of Appeals discounted each of Moore’s objections concerning his trial in the lower court and decidedly affirmed his conviction. But these cases would not usher in a period of strict enforcement and harsh sentences in the state. From the end of the nineteenth century to the middle of the twentieth there are almost as many cases in which convictions are reversed as those that are affirmed by Texas courts of appeals. Texas courts clearly did not follow the national trend after 1880 in enforcing its abortion statute, at least, not as strictly as its toughly worded law might have warranted.

While Texas maintained one of the most restrictive abortion laws in the country, enforcement was sporadic and unpredictable. Legal scholar Eva Rubin has noted, “Texas seems to have had the mixed purpose, when its statute was passed, of checking the

54Moore v. State, 40 S.W. 287 (1897).
number of abortions, promoting morality, and protecting the mother’s life and health.” Balancing these different interests, and protecting the men involved from imprisonment, seemed to have led to a number of reversals in the courts and a more general deviation from the original intent of the law.

A total of twenty-five abortion cases were appealed in Texas between 1900 and 1957. After 1957 no cases appear until the landmark Texas case of *Roe v. Wade*. These show some clear trends and offer some interesting revelations. After 1900 cases in which boyfriends administer drugs and medicines to induce abortions on their girlfriends are few. In fact there are only two. The first, decided in 1902, involved a certain Erwin Fretwell who was convicted in a lower court and fined $150 for attempting to procure an abortion on his lover, Lucy Godsey. Fretwell had given her ergot, but she took it in much smaller doses than he instructed and it had little effect. Nevertheless he was indicted under Art. 2194 of the Texas statute, convicted, and he appealed.

In a decision harking back to the 1892 case of *Williams v. State*, the court reversed Fretwell’s conviction on the grounds that the amount of ergot taken by Godsey had not been “calculated” to cause her to abort. The larger question of calculation—that is, Fretwell’s intent—was again overlooked.

The second case was not decided until 1917. Luther Hunter was convicted in Wise County for attempting to procure an abortion on a fifteen-year-old girl whom he had seduced, Emma Poore. He gave her cotton root tea and she took it as instructed, but

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55 *Abortion, Politics and the Courts*, 84.
56 410 U.S. 113 (1973).
57 19 S.W. 897 (1892).
58 196 S.W. 820 (1917).
it had no effect. He was subsequently indicted, found guilty, and fined $100, the lowest amount authorized by law, and he appealed. The appellate court affirmed his conviction.

The great majority of the convictions appealed between 1900 and 1957 were of regular physicians and "professional" abortionists. In the appeals of physicians, male abortionists and their male accomplices between 1900 and 1936, the Texas tendency to unpredictability continued, with seven cases being reversed on appeal, often on technicalities rather than merit, and four being affirmed. After 1936 every conviction of a male abortionist was affirmed and there were no cases involving regular physicians.\textsuperscript{59} Decisions in the appeals of female abortionists, on the other hand, were consistent from 1900 to 1957. Every conviction except one was affirmed.\textsuperscript{60}

\textit{Gray v. State}\textsuperscript{61} involved an appeal by a black woman who had been convicted in Dallas of performing an abortion on Sadie Moore. Gray was evidently an abortionist whose services had been enlisted by Moore for a cash payment of $10. Gray allegedly performed the abortion by inserting a catheter into the womb of Moore, the chosen method among abortionists.\textsuperscript{62} On appeal, Gray claimed that Moore had never been pregnant and that she had only attempted to "bring on her suppressed menses." It was

\begin{footnotes}
\item[59] It is not clear whether regular physicians stopped performing abortions after 1936, as Sarah Weddington claims, or that as surgical methods improved and fewer tragedies resulted from the operation, they were simply not caught or prosecuted for doing so.
\item[60] \textit{Reum v. State}, 90 S.W. 1109 (1905); \textit{Shaw v. State}, 165 S.W. 930 (1914); \textit{Pearson v. State}, 165 S.W. 2d. 725 (1942); \textit{Jarquin v. State}, 232 S.W. 2d. 736 (1950); \textit{Housman v. State}, 230 S.W. 2d. 541 (1950); \textit{Mayberry v. State}, 271 S.W. 2d. 635 (1954); \textit{Cortez v. State}, 275 S.W. 2d. 123 (1955); and \textit{Romero v. State}, 308 S.W. 2d. 49 (1957). By 1936, the majority of appeals were those of female abortionists.
\item[61] 178 S.W. 337 (1915).
\item[62] Catheters, or rubber tubes, were used to inject solutions into the uterus and "wash it out," or simply to irritate the uterine wall and precipitate labor. This would often lead to internal bleeding, which many women used as a reason to seek medical attention from a regular physician. Rural women often concocted their own brews, ranging from aloe, iron, savin, ergot of rye, rue, tansy, quinine, cotton root oil and pennyroyal (plant derivatives). See \textit{Abortion Handbook}, 80-85, and \textit{A History of Contraception}, 60-69.
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thus absolutely essential that the state show proof of Moore’s pregnancy in order to sustain its contention that Gray had operated with the “evil intention” of producing an abortion on her.

In its decision the court discussed the recorded testimony of the local sheriff. In his statement he had mentioned that he, along with “the other white people in the community, resented the fact that appellant had bought a place in their community and moved into it, not because she was a negro, but because she is a character.” The court did not say whether Moore was also a Negro. Ultimately, because the state could not produce absolute proof that Moore had been pregnant the conviction was reversed. This decision would be the only one in which the conviction of a female abortionist was overturned.

The appeals of male abortionists and regular physicians from 1900 to 1936 present a very different view. In these cases, even when tragedy resulted and women died from botched abortions, the courts were willing to reverse the convictions of the men who performed them or furnished the means to procure them. In the first such case,\(^{63}\) Dr. W.B. Jackson was convicted of murder in the second degree for performing a botched abortion, sentenced to seven years confinement in the penitentiary, and he appealed. Jackson had operated on May Carden with an unspecified instrument and caused her to abort. Unfortunately, he also caused her to hemorrhage and this resulted in her death two days later, in excruciating pain. In the court testimony, Carden’s dying declaration implicating Jackson as the abortionist was allowed, and this formed the basis of his appeal.

\(^{63}\)Jackson v. State, 115 S.W. 262 (1908).
Although the state of New York allowed the dying declarations of victims of abortion to be allowed as evidence,64 the Texas Court of Criminal Appeals disallowed Carden’s testimony because it had not, in the court’s opinion, been given voluntarily, but by “overpersuasion and duress” to the two physicians who attended her as she was dying. In a last-ditch effort Jackson also claimed that Carden had attempted to abort herself with a hatpin and caused her own death, that he had merely attended her that morning and had not performed the abortion himself. This “evidence,” though not presented at the original trial and having no corroboration, caused sufficient doubt in the court’s mind as to the doctor’s guilt and his conviction was overturned.

In a later case,65 one without tragedy, a physician named T. J. Earnest was convicted of performing an abortion on Lillie Hirt, sentenced to two years in the penitentiary, and he appealed. Hirt had had “illicit relations” with her boyfriend, a married man named Hammett, and had become pregnant. Hammett had taken her to see Earnest, who performed an operation on her and ended her pregnancy. In his appeal Earnest claimed that Hirt had never been pregnant, that he had operated on her “for gonorrhea [sic]” and to cure her of “suppressed menstruation.” The state failed to show that there had been a fetus, since all Hirt could testify to was “an effusion of blood” during the operation, and the conviction was overturned.

In an inexplicable decision just a year later, Hammett, the illicit lover, was convicted of procuring the very abortion on the same Lillie Hirt for which Earnest had been acquitted, and sentenced to five years in the penitentiary.66 He also appealed, but his conviction was affirmed. The appellate court found him guilty of “procuring the

64See fn. 44, supra. The New York law was enacted in 1875.
65Earnest v. State, 202 S.W. 739 (1918).
physician to perform the abortion on her,” even though the physician had been acquitted in that same court because the court believed there had been no abortion and that Hirt had never been pregnant. It would be difficult for the court to deny in this instance that it considered “regular” physicians to be above the law.

Another case involved the reversal of a denial for bail by a regular physician on trial for the homicide of a woman on whom he had performed a botched abortion.67 Dr. J.T. Vick had been charged with murder for performing an abortion on Rosa Touchstone, a married woman of 18, who had “become sick” after the operation and died the following week. In a habeus corpus proceeding the District Court of Wichita County denied him bail, and he appealed.

According to the evidence, Vick had attended Touchstone as she died, and her dying declaration to her husband was that Vick had “caused her condition” by “performing the operation upon her.” In an interesting reversal, the Court of Criminal Appeals granted his bail, concluding that because Vick was “a physician regularly called to attend women who were sick,” he had “a right to produce an abortion...if his acts were directed towards saving the life of the mother or the child.” Vick was freed on a bail of $2,500.

In a similarly tragic case,68 Hogden Crossett was convicted of procuring an abortion for his girlfriend, Rosa Stuart, an abortion which ended in her death, and sentenced to two years in the penitentiary. Crossett and Stuart had been childhood sweethearts. She discovered her pregnancy shortly after his departure to the State University in Austin, in February of 1919, and wrote to tell him of her condition. He sent her some pills he had

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67Ex Parte Vick, 292 S.W. 889 (1927).
bought in order to induce an abortion, and she took them in the prescribed doses, without effect. In May she left home, presumably to visit relatives in a town called Vernon. The next her family knew of her, her dead body was being shipped home from Austin for burial.

The evidence showed that Crossett and Stuart had checked into the Hancock hotel in Austin and called in a Dr. Litten, who performed the abortion. During the operation Litten punctured Stuart’s womb, causing an infection in her uterine cavity and resulting in her death about four days later. Interestingly enough, there was no mention made of a conviction of Litten and there was no companion case in any Texas court of appeals. Perhaps he could not be found to stand trial. It is possible that he was convicted and did not appeal, but not likely.

In its decision, the court found that, “however reprehensible he may have been in other particulars,” Crossett was “not shown to be a party to the criminal carelessness of the physician who caused the young lady’s death,” because he had not present in the room when the abortion was performed. It did not justify its peculiar reasoning or address the question of intent on Crossett’s part. It simply overturned his conviction.

These four cases were not the only ones between 1900 and 1936 in which the convictions of male abortionists were reversed for questionable reasons\(^6^8\) while the convictions of female abortionists in the same period were almost universally upheld. But they illustrate an important point. Only in the most extreme cases, it seemed, or

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\(^6^8\) *Crossett v. State*, 235 S.W. 599 (1927).

\(^6^9\) In *Durham v. State*, 76 S.W. 563 (1903), a male abortionist was convicted of performing an abortion on a woman named Lula Beaty, but his conviction was reversed because the court doubted the truthfulness of Ms. Beaty’s testimony; and in *Tonnahill v. State*, 208 S.W. 516 (1919), the conviction of an abortionist who had given “medicine” to a woman named Lena Ward, which she took (and subsequently aborted), was overturned because the abortionist had not been present when she swallowed it.
when a woman died as a result of an abortion, were regular physicians prosecuted under the Texas statute. If they were caught performing abortions, they could always claim that they had done so as a matter of medical necessity: to save the life of the mother. Judges in Texas courts, who were relatively untutored in obstetric medicine and whose decisions were full of laymen’s terms about “instruments,” “medicines” and “private parts,” were unlikely to challenge them. Women abortionists had no such legitimate legal defense, and were easier to prosecute if they were caught. So, while there was not one Texas case in which tragedy resulted from an abortion performed by a midwife or female abortionist, their convictions were always upheld. None of this reasoning explains why male abortionists, who were not regular physicians, were nevertheless often able to get their convictions overturned on appeal.

After 1936, nine of ten convictions of abortionists were affirmed. The case excerpted is interesting and deserves note. In Limicy v. State, John Limicy was convicted of committing an abortion by violence on his girlfriend, Lula May Howard. According to the court, Limicy and Howard were living together in “an illicit relationship,” and during her pregnancy, he attacked her “brutally” and caused her to abort by “striking, kicking, beating and violently using her person.” She subsequently miscarried, and the case was brought against him. In her testimony Howard contended that Limicy had attacked her with the intent to induce an abortion, a contention that he denied.

The court reversed Limicy’s conviction because it could find no intent in his actions to cause an abortion. Instead, it found the violence to be part of “the ordinary acts and

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70 185 S.W. 2d. 571 (1945).
circumstances common to such relationships among the colored people of that strata.”

It is doubtful that the court would have displayed such a blatant lack of sympathy for the victim or been as lenient with the appellant if these two people had been white. The court added in conclusion that “it appears to be a Negro fight in which both engaged and in which the woman got the worst of the battle.” Texas judges were not above racism in their decisions in 1945.

Texas courts, then, did not really tighten the judicial noose around convicted abortionists until the late 1930’s, long after strict enforcement had been the norm in many other states. Female abortionists incurred most of their wrath, but a few male abortionists and boyfriends received some as well. It is clear that the law was designed to penalize unlicensed practitioners of abortion. In practice, the penalties fell mostly upon women who performed illegal abortions; the men who practiced illegal abortion and regular physicians who performed them were often treated with clemency.

From the time of the Texas abortion statute’s passage in 1854, both law enforcement officials and appellate courts showed an unwillingness to enforce it. The few cases that did reach the appellate courts between 1854 and 1957--a total of thirty-four--came in spurts, with five- to nine-year gaps in between. From 1927 to 1936, for example, roughly the years of the Great Depression, there was not a single abortion case brought before an appellate court in Texas. And, after 1957, there would not be another abortion conviction appealed in a Texas court. Clearly, the enforcement of abortion laws in Texas was not a primary concern.

The courts also seemed to uphold or reverse convictions at will. A review of these thirty-four cases reveals no pattern in decision-making until 1936, after which abortion
convictions were almost universally upheld. Their only consistency came in the
affirmation of almost every conviction of a female abortionist (and most of these cases
were decided after 1936). The very fact that six of the ten cases appealed after 1936
involved female abortionists showed something of a concerted effort on the part of
authorities and the courts to “clean up” the medical profession and put these practitioners
out of business. Perhaps it worked, since there were no more cases appealed after 1957.

For a state as conservative as Texas to display such tolerance in what was
considered a moral matter is surprising. These decisions were certainly not the ones I
expected to find when I set out to explore the state’s case-history of illegal abortion, for
they tend to show that abortion was not considered a moral matter in this state, at least
not until long after the state’s anti-abortion statute had been passed. The decision in Roe
v. Wade is much more understandable in this light. If Texas law had not been founded
upon the strictly moral ground of the rights of the unborn, it could not be upheld by the
Supreme Court on that ground. It is clear from a reading of the original statute and of the
case-law that neither legislators nor the courts were balancing the life of the unborn
against the life of the mother and coming up with judgments in favor of the former.
Rather, cutting down on the number of abortions and protecting women’s lives and health
seemed to be the objective. Even after the law was tightened in 1858, the primary
objective was to stop the practice of abortion by unlicensed practitioners. These were the
only persons prosecuted under the statute.

Texas has a reputation for being a “maverick,” individualistic state, and this study
certainly supports that notion. Even where the law was clear, Texas courts refused to
enforce it against certain individuals, and made no excuses in their opinions for doing so.
It is clear that men were generally the persons considered individuals under the law
(an unfortunate circumstance for women and blacks) and at least in cases of abortion, the
courts did a good job of protecting them from serious punishment under an anti-abortion
statute designed to punish "others." Who the "others" were was ultimately made clear:
woman abortionists. Whether this was a circumstance repeated in other areas of the
law—e.g., divorce, property, and even criminal law—is a matter of conjecture.
Chapter 7

"Hush and Pretend."
Planned Parenthood in the Fifties

There are many reasons for contraceptive practices, starting with the horrifying realization that a healthy woman, taking no precautions, could possibly give birth to more than twenty children during her child-bearing period. Such a prospect, alone, would be enough to frighten any woman away from marriage. But every couple employs some means of birth control, even though it may be ineffective and provide only a false sense of security.¹

Few women in the 1950s were troubled enough by these thoughts to avoid marriage or pregnancy, and few physicians (officially) advised it. After World War II, America entered a “baby-boom” that drove the population to an all-time high and created a demographic revolution. Yet, as Americans prospered, they became more homogeneous; prosperity fostered complacency, and the rapidity of social change and the danger of nuclear annihilation frightened millions of Americans into adopting cautious, conservative attitudes. In politics, as well as in war, the public rejected extremism, both of the left and of the right. At the same time they were bombarded by news of a new war in Korea, the Cold War, and the demagoguery of Senator Joseph McCarthy of Wisconsin. Against this background of malaise, suspicion, and frustration, Americans became more and more conservative.²


Conformity, complacency, and the "feminine mystique" ruled middle-class America. According to the ideology of the mystique, made famous by Betty Friedan in her best-selling book, *The Feminine Mystique,* middle-class women were expected to be happy at home with their electric appliances and their "careers" of cooking, housekeeping, and baby-making. As one historian of Planned Parenthood has noted, the decade was a throwback to Victorian times—an era of "hush and pretend," as historian James Reed put it, when sex was not discussed in polite company. No one suffered more from these attitudes than the nation's poor women, who, because of Planned Parenthood, by this time generally knew what a diaphragm was but were often hard-pressed to obtain one. Illegal abortion remained the only resort for many women and was the cause of numerous injuries and deaths.  

At the same time, scholars and political leaders were becoming increasingly concerned that the world's population was growing "at an alarming rate" and that women and families in developing countries needed access to birth control if population growth were to be slowed. In 1952 concern over the impact of world population growth on living standards, particularly in developing countries, led to the founding of the Planned Parenthood Federation's Population Council. That same year Margaret Sanger emerged from retirement in Arizona to help found the International Planned Parenthood Federation (IPPF), the first worldwide league of autonomous, indigenous family planning organizations. The IPPF was established at a conference in Bombay, India, with Margaret Sanger in a prominent role and the Planned Parenthood Federation of America (PPFA) as a founding member. Despite the support for family planning agencies in a

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number of developing countries, for many years, the United Nations and the
American government declined to answer the requests of foreign governments for family
planning assistance.5

In 1950 the Planned Parenthood Federation named as its new national director
William Vogt, a man recognized for his expertise on international population. Vogt was
best known as author of the 1948 best-seller, Road to Survival, one of the first popular
books to bring ecological issues to the public’s attention. Disabled by polio since the age
of fourteen, he walked with a stick, “twisting himself painfully from side to side.” As
one director of a Planned Parenthood affiliate recalled about Vogt, “you had the feeling
that he had suffered and it made you listen to him.”6

To combat what the Federation’s leadership perceived as the repressive attitudes
of the time, and to increase the visibility of the birth control movement, Vogt launched an
aggressive public affairs program that included new publications on sexuality education,
cooperative efforts with affiliates, and a strong media campaign to put Planned
Parenthood’s mission and services before the public. At the same time affiliates sought
to gain acceptability by featuring less controversial services such as marriage counseling

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5. *Ibid.*, 45. On Margaret Sanger’s return “from exile” in the late 1940s to spearhead the founding of the
IPPF, see James Reed. *From Private Vice to Public Virtue: The Birth Control Movement and American
Society Since 1830* (New York: Basic Books, 1978), 289-293. Sanger had split with the Federation in the
eyear 1940s and retired to Arizona. David Kennedy, in his biography of Sanger, details her parting of the
ways with the national Planned Parenthood Federation: “She went home to Arizona and nursed her failing
husband, who died in 1943....She must have found it ironic, after all her pushing and pulling to keep the
movement going, that the new, businesslike Planned Parenthood Federation often found her and her
notoriety detrimental to the cause....By the end of the war, she was little more than a figurehead in the
American birth control movement. Her doggedly militant style now seemed more a liability than an asset.”
and infertility treatment. During his tenure the national organization survived and
grew, with an annual patient load that swelled from 46,000 in 1949 to 117,000 in 1959. 7

Despite the Federation's careful emphasis on "keeping husbands happy and
babies healthy," 80 percent of all patients came to Planned Parenthood's clinics for
contraceptive services, which in the 1950s still meant the diaphragm and jelly, condoms,
or contraceptive foam. Affiliates quietly served single and divorced women, although
most Planned Parenthood patients described themselves as married and the majority
already had children. Because family planning services remained inaccessible to most
women who needed them, Planned Parenthood affiliates employed staff and volunteers as
"field workers." They canvassed homes in rural areas and poor urban communities and
set up mobile clinics in a number of communities. In a pioneering project in New
Jersey's potato belt, for example, the state's Planned Parenthood League secured the
cooperation of a minister to offer weekly contraceptive services for migrant farm workers
in his church. Planned Parenthood of Detroit held "tea parties" in the city's housing
projects, where staff explained to tenants the safest and most effective methods of birth
control and how to get them. "The real problem was that people didn't know that
Planned Parenthood existed," said one of the Detroit organization's longtime activists.
"The ladies I talked to didn't know much about birth control. They thought you could
lose a diaphragm inside your body. At that time, the social services office would close a
case if a woman got pregnant, because they considered that evidence that she was

7Ibid., 47. See also Linda Gordon, Woman's Body, Woman's Right: Birth Control in America (New York: Penguin, 1990). 337-396, for a comprehensive history of the PPFA during the 1940s and 1950s.
providing an unsuitable environment for her children. But they wouldn’t help her to get birth control.”

Efforts to extend birth control to women in America and internationally were blocked by more than opposition and logistical limitations; they were hindered by the limitations of the available methods of contraception. Women in the 1950s were still using the methods of the 1920s, and as historian James Reed noted: “Contraceptive technology had not advanced since the perfection of the spring-loaded diaphragm in the 1920s.” Attempts to interest the medical community in intrauterine devices (IUDs) had failed. And interest in population control had focused on promoting already-known contraceptives rather than the invention of new more effective ones. As the need for more and better birth control methods became clear to everyone in the Planned Parenthood movement, Sanger and the PPFA began to advocate and to sponsor scientific research on new contraceptives. A turning point came in the 1950s when Katharine Dexter McCormick threw her support behind research to produce an oral contraceptive.

McCormick, heiress to the International Harvester fortune, was one of the first women graduates of the Massachusetts Institute of Technology, an ardent supporter of women’s rights, and a longtime friend of Margaret Sanger. In 1950, following the death of her husband, McCormick asked Sanger how she could use her inheritance to contribute to contraceptive research. Sanger took her in 1953 to visit the Worcester Foundation in Massachusetts, where research scientist Gregory Pincus was conducting experiments to produce an oral contraceptive based on synthetic progesterone. McCormick began contributing $150,000-180,000 a year to the research through PPFA’s research grant

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8Ibid., 49.
9Reed, From Private Vice to Public Virtue, 289-294.
program. She also funded the first clinical trials of the pill, which were conducted by Dr. John Rock, with patients in his private practice. Rock, a prominent Catholic gynecologist, had become well known for his book, *The Time Has Come*, in which he argued that the Catholic church should accept the oral contraceptive as a natural extension of the rhythm method.10

In 1956 the journal *Science* announced the success of Rock’s clinical trials, and four years later, the Food and Drug Administration (FDA) approved distribution of the Enovid contraceptive pill, manufactured by G.D. Searle and Company, a firm that had also supported Pincus’s research for a number of years. The “birth control pill” would prove to be far from perfect. But its effectiveness and ease of use offered women an unprecedented control over reproduction, for the first time allowing them to separate sex from procreation. As Sanger wrote McCormick in 1956, after the success of Rock’s clinical trials was announced in *Science*:

You must, indeed, feel a certain pride in your judgment. Gregory Pincus had practically no money for this work... Then you came along...and things began to happen....The conspiracy of silence has been broken.11

PPFA’s national director, Vogt was also moved to say:

If the United States had spent two billion dollars developing...a contraceptive, instead of the atom bomb, it would have contributed far more to our national security while, at the same time, it promoted a rising living standard for the entire world.12

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Houston in the 1950s

In the 1950s Houston’s port, petroleum, and petrochemical industries had qualified the city as a major economic center of the postwar period. As the decade began, the Houston economy was well into a postwar boom, fueled in part by the rising demand for petroleum products such as asphalt and plastics, by consumer spending, and by a significant flow of capital into real estate investments. Much of the demand came from consumers who, returning from the war “with money in their pockets,” sought to improve their lives with modern conveniences such as electricity, household appliances, air-conditioning, and new homes. After the austerity of the 1930s and 1940s, consumer spending reached an all-time high.13

At least as important to Houston’s economic growth was the growing military-industrial complex and its demand for oil-related products. As historian John Boles has noted, the end of World War II brought a downsizing of military forces, but the almost simultaneous outbreak of the Cold War soon guaranteed the continued advantage for the South of huge military expenditures. The modern petrochemical industry grew exponentially in Texas, fueled by America’s “love affair” with automobiles, improved economic conditions, and new roads. A growing number of truck, pipeline, and shipping companies sprang up in and near Houston’s oil and petrochemical complexes. There was continued growth in the number and size of oil tools and services, metal, and construction

13Joe R. Feagin, *Free Enterprise City: Houston in Political-Economic Perspective* (New Brunswick: Rutgers University Press, 1988), 70-71; and John B. Boles, *The South Through Time: A History of an American Region* (New Jersey: Prentice Hall, 1995), 454-455. Boles notes that the value added from industry tripled, and personal income more than doubled during the decade after WWII. The number of industrial workers also grew by more than 90 percent. Feagin also states that between 1940 and 1960, petrochemical and other chemical production in the Houston area went up 600 percent; Texas ranked second only to New Jersey in the total number of chemical plants.
companies. Indeed, according to historian Joe Feagin, by the late 1950s Houston was adding a new manufacturing plant every two weeks.\textsuperscript{14}

In the mid-1950s the growth in tonnage shipped through the Port of Houston leveled off, mostly as a result of the end of the War, and Houston dropped from second to fourth among U.S. ports. Local businessmen responded by seeking renewed government aid and by securing bond issues to expand port facilities, bringing Houston back to third place by 1960. At the same time, a major boom in residential and commercial construction fueled the economy. In the 1950s more than 99,000 new homes were built, creating more suburbs in the Houston metropolitan area. As in other cities, the boom was aided by massive infusions of federal funds for family housing, particularly the federal FHA and VA programs. The Houston real estate community was quick to take advantage of the new loan programs, and prospered. Also, local construction companies completed numerous commercial and office buildings in this period, creating new business centers outside the downtown area.\textsuperscript{15}

During the Eisenhower administration, another huge government project—the federal interstate highway system—again, justified for reasons of national defense—generated billions of dollars of construction jobs in the South, and linked it internally and to national markets. At the same time, the South’s isolation from the American mainstream was significantly removed by television, which became accessible in the

\textsuperscript{14}Boles, \textit{The South Through Time}, 455-456; and Feagin, \textit{Free Enterprise City}, 70-71.

early 1950s. People began flocking to the South for jobs and opportunities. By the end of the decade the city’s population was over 938,000.\textsuperscript{16}

As in the past, Houston’s black residents remained on the periphery of post-War development and shared only minimally in the city’s prosperity. The city remained rigidly segregated; Houston’s educated, white leadership was still unwilling to extend civil rights to its local black residents. Private deed restrictions were used to keep residential areas segregated, and Houston’s civic clubs excluded blacks. In 1953, the first black family to move into the Riverside area, an established white neighborhood in east Houston, was bombed. White residents also linked together to create “civic clubs” in east and southwest Houston to coordinate white opposition to racial integration in their neighborhoods. The white clubs received the backing of many in the business community. Houston’s leading businessmen poured money into the political campaigns of racial segregationists running for the city council and school board. In these years, the city continued its racial segregation policies in public accommodations, housing, jobs, and education. This rigid wall of economic and housing segregation, still legally enforced in Houston, led to the development of self-contained black communities with their own institutions—churches, schools, newspapers, parks, restaurants, movie theaters, and businesses. Strong black institutions were created, but the costs of segregation for the black community were high: poor housing, low-wage jobs, poorly supported schools, and inferior public services.\textsuperscript{17}

\textsuperscript{16}Boles, \textit{The South Through Time}, 455-456; and McComb, \textit{Houston: A History}, 145 and 169. To put the city’s population growth in perspective, compare Houston’s population of 1930, which was roughly 292,000, to that of 1960; by 1961, that number would be one million. The percentage of blacks in Houston’s metropolitan population remained constant at around 20 percent.

\textsuperscript{17}Feagin, \textit{Free Enterprise City}, 243-245. Beginning in the 1950s, a number of legal changes took place in Houston’s segregated public schools and accommodations. A series of NAACP-supported court suits
At the same time, black migration to Houston after World War II dramatically increased the size and number of the city’s black residential areas. The city’s black population more than doubled, from around 86,000 in 1940 to almost 200,000 by 1960. Older black communities in the Third, Fourth, and Fifth wards grew substantially, threatening to spill over into adjacent white neighborhoods. New black subdivisions sprang up to the north, south, and east of downtown. Over time, the geographic center of the black population shifted. Between 1940 and 1950, the heart of the black community moved northeast of downtown, to the Fifth Ward; and as new highway developments partially destroyed that community during the 1950s, the economic center of black Houston shifted back to the Third Ward. In addition, the economic and health conditions of blacks remained substandard. While millions in federal grant monies poured into the city, public services to black neighborhoods such as sewage treatment plants and lines, water lines, drainage systems, public transportation (buses), police services, and schools remained inadequate. Black neighborhoods often did not have paved streets, street lights, and sidewalks, and became inaccessible after heavy rains. This neglect forced black communities to create civic and community associations to improve their neighborhoods and to prod white businessmen into making improvements, which they did with some success; but on the whole, black neighborhoods were the last areas to receive attention from city government. Moreover, black unemployment climbed as more blacks seeking jobs migrated to Houston’s inner city. The black infant mortality rate was one-and-a-half times the rate for whites.

brought against white authorities forced the abolition of racial barriers at the municipal golf courses (1950), the public library (1953), city buses (1954), and public schools (1960). But Houston remained de facto segregated. Segregationists retained control of the city’s school board, and even after the 1954-55 Brown v. Board of Education decisions, the school board remained intransigent. Only in 1962 did a federal appeals court decision in New Orleans force the HISD to cease its overt resistance to desegregation. Even then, the
times higher than that for whites. In the decade of the fifties, the experience of the black community was still "one of uneven development within a city of growing wealth and resources."\textsuperscript{18}

**Breaking New Ground**

The leadership of Planned Parenthood of Houston entered the decade of the fifties determined to make headway. As post-war social changes occurred, the purpose of the clinic broadened but also became more defined. PPCH, along with the Planned Parenthood Federation of America (PPFA), set forth "to provide leadership for the universal acceptance of family planning as an essential element of responsible parenthood, stable family life and social harmony through education for family planning, the provision of the necessary services, and the promotion of research in the field of human reproduction."\textsuperscript{19} As part of its goal to provide necessary services and attain universal acceptance, the clinic name was changed to the Planned Parenthood Center of Houston (PPCH), and the clinic was relocated to a larger facility. Planned Parenthood's client base had continued to grow, and by 1950 the number of women in need of its services had once again sent Agnese Nelms and the Board and staff searching for larger quarters. Early in the year, clinic operations were moved to a building at 611 Calhoun Avenue (still on the periphery of downtown neighborhoods) with a three-year lease and plans for the construction of a clinic building designed especially for PPCH.\textsuperscript{20}

\textsuperscript{18}Feagin, *Free Enterprise City*, 245.
\textsuperscript{19}Planned Parenthood of Houston and Southeast Texas, Inc. brochure entitled, "Proud of Our Past: Planning the Future," date unknown.
\textsuperscript{20}Unpublished short History of Planned Parenthood of Houston (author and date unknown).
It was an ambitious move. After fourteen years of operation, Planned Parenthood remained a private, non-profit organization supported solely by individual donations and run almost entirely by volunteers, and its clientele continued to come from Houston’s lowest socio-economic sectors. As Nelms said mournfully, the agency had meager funds with which to reach its goal of providing necessary reproductive services to Houston’s poor women.

The real problem was achieving that elusive “universal acceptance,” which could then be parlayed into cash donations, something that Nelms and her influential cohorts had not yet been able to do. The majority of Americans accepted Planned Parenthood, and most people could agree privately that birth control was infinitely preferable to welfare. Yet, even though Nelms could boast in January 1950 that “the PPH Center [had] served more than 3,200 families from Harris County’s low income brackets,” and that Planned Parenthood had become legal and to a certain extent accepted in every state except Massachusetts and Connecticut, she could not say that the stigma attached to contraception and Planned Parenthood had disappeared. In 1950 PPCH was rejected for membership in the local United Fund, one of the city’s largest charities, without any stated reason, and Planned Parenthood’s Board was again faced with the prospect of organizing a fundraising campaign.21

Undaunted, the Board’s president, Mrs. Robert Straus, enlisted over one hundred volunteer workers, joined the Planned Parenthood Federation’s national fundraising campaign, and pledged to raise $25,000, 20 percent of which would go to the Federation “for research and coordination of national programs.” She then recruited Mrs. Herbert

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21Ibid.
Kempner of Galveston to direct the 1950 campaign. At the national level, the Federation enlisted as chairman of the 1950 campaign Mrs. Philip Pillsbury, wife of the Minneapolis Pillsbury Flour Company magnate and an outspoken advocate of birth control. "Planned Parenthood meets its strongest opposition from those ignorant of what it wants to accomplish," Pillsbury declared at the outset of the campaign.

In January 1950, a week before the national campaign was to begin, Pillsbury traveled to Houston to meet with Kempner and other local campaign leaders and to outline the Federation's official goals. PPFA and its affiliates were to provide four major services: to make child-spacing information available to every married woman who wanted it; to help childless couples have children; to cooperate with other agencies in providing marriage counseling services; and to help meet the world need for further research in the field of human reproduction. Contraceptives and, of course, abortions, were not mentioned.

Before the campaign had even begun, Pillsbury and Kempner were fighting a media battle in Houston with critics who accused the Planned Parenthood affiliate and the Federation of advocating free sex and "baby boycotts." Responding to the opposition, the chairwomen carefully outlined program goals to emphasize that Planned Parenthood's services were aimed at married women, that fertility services were a primary goal of the

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22 The Mrs. Kempner referred to in Planned Parenthood's records was Henrietta, or "Hennie," Kempner, wife of I.H. "Ike" Kempner, Jr., of the prominent Galveston cotton and banking family. See Harold M. Hyman, Oleander Odyssey: The Kempners of Galveston, Texas, 1854-1980s (College Station: Texas A&M University Press, 1990), 264-266. In 1950, the Federation's national fundraising campaign was in its fourth year and had met with continuing success. Affiliate participation in the national drives was crucial to that success, just as the nation-wide media campaigns of the Federation were critical to local fundraising efforts. This was the beginning of the "franchise" relationship that came to characterize the national Planned Parenthood organization. In the 1940s and 1950s, it was a reciprocal and mutually beneficial one: in the 1970s and later it would become a double-edged sword.


24 Ibid.
organization, and that child spacing, not prevention, was the main purpose of birth control advocates. Pre-campaign press releases were always defensive. "We don't want to keep people from having babies, and are not trying to discourage couples from having large families," Pillsbury insisted. "But we are trying to help those who want our help to have their children when the family is physically, economically and socially able to do so. There are couples who can have five children in 10 years and manage very well, but if they had their five children in five years, they would be in economic jeopardy and the mother's health would be undermined." And, she added prophetically, "The day will come when child spacing materials will be available in every public health unit." 25

The Houston Post covered Planned Parenthood's fundraising campaign and Pillsbury's visit to the city positively, with one especially timely article in its January 27 issue entitled "Planned Parenthood Center Plays Ever Expanding Role." The article noted, among other things, that over two hundred women a month visited the clinic "seeking help through the marriage counseling service, or medical help for childlessness, or information on child-spacing," that PPCH was the only clinic in the city offering free pelvic exams to detect cancer, and that doctors agreed that child spacing was "a necessary safeguard to the mother's health and a factor in reducing the rate of infant and maternal mortality." 26

The Houston Chronicle included bare-bones coverage of the fundraising drive in its January 27 edition, with a two-by-four-inch column noting the dates of the campaign

25Ibid. See also, "Proper Spacing of Babies, but No Boycott, Planned Parenthood Aim." The Houston Press, January 27, 1950: the article opens with the question: "Are children wanted in Houston? Certainly! Boycott babies? Never!" It continues with a quote from Pillsbury: "We want lots of healthy, happy, beloved children. Our chief concern is the proper spacing of youngsters to best suit the family—physically, financially and emotionally."
and mentioning its leadership. In contrast, the Houston Press marked the campaign with several articles about Pillsbury’s visit, along with the more acerbic commentary of its weekly columnist, Carl Victor Little.²⁷

Little was a Houston Press columnist who would plague Agnese Nelms and Planned Parenthood—in a humorous way—for the better part of the decade. Beginning in January 1950, just before the kick-off of the national fundraising campaign, he used his weekly column “By-the-Way” to publish a series of pieces about a fictitious organization of his own creation, the “UnPlanned Parenthood Association,” in the editorial section of the Press. Little, a staunch Baptist and resident of West University Place, used By-the-Way to lampoon Nelms, Pillsbury, and everyone involved with Planned Parenthood, as well as to voice his opposition to the ideas of child-spacing and parent-planning. His first column, which introduced the UPPA and was sub-titled “UnPlanned Parenthood Association Must Be Mobilized for Action,” announced the UPPA’s philosophy with pithy phrases like “ABRAHAM LINCOLN WAS AN UNSPACED AND UNPLANNED CHILD, WHAT ABOUT YOU?, and “THE MORE THE MERRIER.” Little, the self-appointed president of UPPA, referred to himself royally as “we” in all his columns and invited all those who opposed the ideas of child-spacing and Planned Parenthood to attend organizational meetings in the Sears parking lot, located on Main Street near downtown Houston.²⁸

²⁶ Houston Post, January 27, 1950. Marguerite Johnston was probably the author of this article, although it had no by-line.
Little obviously had a great deal of respect for Nelms, Pillsbury, and all the grand dames of Planned Parenthood, and throughout the editorial war he waged against the organization in the 1950s he remained a gentleman. His columns were boisterously entertaining, mocking both planned and unplanned parenthood, but never nasty. He knew Nelms and referred to her as a friend, even as he mocked her organization’s work. “Mrs. Nelms,” he said in a February column, “in addition to being a delightful and stimulating friend is also a philosopher, agrees with us that this is a large world and that there is room in it for both her planned group and our unplanned group.” He also made clear at the outset that the UnPlanned Parenthood philosophy was one of live-and-let-live:

It is not our aim at all to harm the Planned Parenthood Association. Although its philosophy of, shall we say life? is different from the philosophy of our UnPlanned Parenthood Association, we would be the last to deny that organization the right to exist and carry on its work. Certainly, in a city as large as Houston, and one growing larger every minute thanks to those of us who plan nothing but their un-expectancies, there is plenty of room for both organizations.29

When Pillsbury came to Houston in January 1950 to help organize local fundraising efforts, Little welcomed her as an “ideological enemy” and presented her with a garland of orchids and the “symbolic” keys to the city. After her pre-campaign speech before Houston’s philanthropic community, he praised her for rising above self-interest and espousing the cause of Planned Parenthood.

Coming from a family that does the largest flour manufacturing and marketing business in the world, it obviously would be to Mrs. Pillsbury’s advantage to join us and whoop it up for UnPlanned Parenthood. Because, of

course the more people there are, the more flour is consumed. But, no! Mrs. Pillsbury rises above selfishness and throws economic principles out of the clinic window.\textsuperscript{30}

He also invited her to the upcoming meeting of the UPPA in the Sears parking lot, which presumably she did not attend. "We are certain," he said after extending the invitation, "if our membership were exposed to [Mrs. Pillsbury] that it would be no time but what great big sprawling Houston would be so over-populated that we would have to annex two adjoining counties. People would be living five in a room all over Houston by 1952," he said gleefully. "And that's the way it should be." In closing, he promised to forward Pillsbury a certificate of "hereditary membership" in the UnPlanned Parenthood Association.\textsuperscript{31}

Despite his so-called ideological opposition to birth control, Little was always quick to defend Planned Parenthood's right to exist when more vitriolic foes voiced what he considered to be un-gentlemanly or mean-spirited opinions about its work. In 1951 he vetoed a plan to picket the upcoming meeting of Planned Parenthood's leadership in Houston, and when the leader of the Pasadena branch of UPPA called him an appeaser (for welcoming Pillsbury in 1950, and other national leaders in 1951, to the city), he blasted him for "flat-headedness." "We are a gentleman," he said, "a fine old Southern gentleman. Thus chivalry bids us welcome even an ideological enemy to Houston." And, he added, "As far as we know, we have never even authorized the formation of a Pasadena chapter of the UnPlanned Parenthood Association. We have, as a matter of policy, always refused permission to form groups outside the Houston city limits, holding that UnPlanned Parenthood was too good a thing for anyone but a bona fide or an

\textsuperscript{30}"By-the-Way.," the \textit{Houston Press}, January 26, 1950.
\textsuperscript{31}\textit{Ibid.}
annexed Houstonian." And, Little said in closing, "We'll have no more nonsense from you people out there [in Pasadena]. For your presumption in telling us how to run our organization we will mete out this punishment: We hope the Planned people raise their entire quota of $25,000 in their current drive." Little's brand of gentlemanly "opposition" would be remembered nostalgically in later years.32

With the temporary move of the clinic's operations to 611 Calhoun in 1950, plans were begun for the construction of a facility especially designed for Planned Parenthood's needs. In 1953 the Board purchased land for a new Planned Parenthood Center at 3512 Travis street, just southwest of the downtown area, and Architect Hugo Neuhaus, whose wife was a Board member, was commissioned to design the new building. The Houston Post published a picture of an elderly Agnese Nelms breaking ground at the new site in November 1953, and six months later published an article by Marguerite Johnston announcing the "new Planned Parenthood's Open House." The new facility housed a reception room, clinic, Board room, and offices, and was to be open for business during the day on Tuesdays and Wednesdays, and at night on Mondays and Thursdays.33

Nelms and the leadership of Planned Parenthood had run a quiet fundraising campaign from 1950 to 1953 in order to raise the $50,000 necessary for the new facility. The donors were honored without much fanfare at the opening-day ceremony, and included Mrs. Kempner, Lamar Fleming of Fleming Foods, and a number of other prominent Houston businessmen, physicians, and clergy. At the same time, Nelms and the Board hired the former state director of the Texas Planned Parenthood Association,

32Houston Post, November 14, 1953 and May 28, 1954.
Grace D. Buzzell, as the agency’s Executive Director and began a decade during which Planned Parenthood’s mission and organization would be both expanded and refined.34

Quiet though Planned Parenthood’s leaders may have been, the opening of the agency’s new facility did not escape the notice of the Houston Press’s “By-the-Way” columnist. Little, who titled his November 11 column “Enemies Doing Land Office Business,” chided Nelms for erecting “an ultra-modern, air-conditioned building” at 3512 Travis, when a wholesome, outdoor location like the Sears parking lot would have served Planned Parenthood just as well. “Apparently,” he said, “the present clinic of our ideological enemies at 611 Calhoun is inadequate.” “However,” he noted dryly, “if anyone believes we are the ilk of a Civic Leader and social scientist [Nelms] who would start a building campaign to house our UNPLANNED Parenthood Association just because our rivals decided to splurge, he is wrong.” Besides, he added, “it would be foolish to start a feud with the PLANNED people. For in fact, we have been imposing on the PLANNED Parenthood Association for years. We send aspiring members of our organization, who desire children but who have been unable to attain the distinction of motherhood, to the PLANNED Parenthood Clinic for consultation. For free. This keeps down the overhead of our organization.” Little was certainly right in that respect.

Twenty years after Planned Parenthood had opened it doors, women continued to be

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served at no charge unless they could afford the $1.50 fee for the exam, Pap tests, and supplies.\textsuperscript{35}

Throughout the decade Little poked fun at the white-gloved elite who ran Planned Parenthood and admonished them for their fund-raising teas and "ultra-modern" notions of child-planning; but he could not have helped admiring their persistence and their collective ability to get things done. Indeed, once "the colonel's ladies" of Houston had learned to join forces with those of the Federation and other local affiliates, they seemed unstoppable. They might, as Little put it, be graduates of "exclusive young ladies' seminaries" who led "the only-have-a-baby-when-you-can-afford-it" movement, but they knew how to get a fundraising job done and serve their clientele.

On occasion, Little was hard-pressed not to show his admiration. When, in 1954, the leaders of the now annual fundraising campaign decided to forego the kickoff dinner in order to save the money for clinic operations, Little noted the non-event with approval: "Mrs. Dillingham [a member of the PPCH Board] announced there would be no kickoff dinner, saying the money usually spent feeding squab to civic leaders, including us, at the Bayou Country Club would be spent to further the work of the clinic. We wonder whether the Ike recession is encroaching on the hallowed precincts of River Oaks," he added bombastically.\textsuperscript{36}

As the number of women seeking Planned Parenthood's services increased from over 4,000 in 1952 to 5,600 in 1953, and as the number of first-time visitors increased dramatically, the budget and the fundraising campaign remained static, at $25,000 annually. This meant that Planned Parenthood's staff and Board had to think of new

\textsuperscript{35}"By-the-Way." the \textit{Houston Press}, November 11, 1953; and unpublished History of Planned Parenthood of Houston.
ways to keep down expenses and to increase the agency's visibility and services without padding budgets. This was no simple task. Board members became ambassadors to the medical community, the religious community, and to local health and social welfare agencies, seeking voluntary effort in providing services to Houston's poor women; and they were amazingly successful. Throughout the decade, the number of staff at Planned Parenthood remained small, while volunteers made up the rest of the work force. Until roughly 1960, three staff members—Grace Buzzell, Executive Director, Margaret Peel, the nurse in charge, and Mary Lou Strong, the secretary-receptionist—and a growing number of volunteers provided all the medical and educational services at Planned Parenthood. Physicians from Methodist, Jeff Davis, and Hermann hospitals donated their time, and public health student nurses observed clinic operations (and helped in the clinic) as part of their training.37

In May 1953 Planned Parenthood of Houston sponsored its first annual meeting of the Planned Parenthood League of Texas and came into the national spotlight. Delegates from the affiliated centers of San Antonio, Dallas, Fort Worth, Austin, El Paso, San Angelo, Waco, Brownsville, and Houston attended, as well as speakers from the medical community and well-known clergy. Mrs. Pillsbury, who had since 1951 been named President of the Board of PPFA, and Mrs. Kempner of Galveston, again served as co-chairwomen of the event. The guest of honor was none other than Margaret Sanger, who gave the opening speech. For several weeks, Houston's Planned Parenthood was at the center of a flurry of media coverage. Stories about the annual meeting appeared daily in

37Unpublished History of Planned Parenthood of Houston. See also "Planned Parenthood Center Opens Friday," Houston Chronicle, May 23, 1954.
all the local papers, but especially in the Houston *Chronicle*, which gave the event extensive coverage.38

Once again Little of the Houston *Press* unrolled the red carpet for his ideological foes in his weekly columns and invited Planned Parenthood League leaders to attend UPPA meetings in the Sears parking lot. “There’s something admirable about a woman who cuts her husband’s corporate financial throat for a principle,” he noted again of Pillsbury. “We plan to borrow Glenn McCarthy’s red carpet for Mrs. Pillsbury—that is, if Mr. McCarthy can borrow it from Brothers McAdams and Mendel.” McCarthy owned the Shamrock Hotel where the League’s meeting was being held. Mendel was a comptroller in the McCarthy organization who oversaw the transfer of the Shamrock to the Hilton Hotels Corporation when McCarthy’s Oil and Gas Corp went into debt in 1955; evidently, McCarthy was already in financial trouble (due to decreases in Texas oil prorations early in the decade) in 1953.39

In November 1953, just as Nelms was breaking ground for Planned Parenthood’s new center on Travis street, Grace Buzzell, Executive Director of PPCH was hosting a luncheon for Lady Dhanvanthi Rama Rau of India during a meeting of the Texas Social Welfare Association in Mineral Wells, Texas. The meeting was held under the auspices of the Texas Planned Parenthood League and was designed to introduce Rau—the

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38The irony of this could not have been lost on Agnese Nelms, who had only several years before waged a letter-writing campaign with Jesse Jones, the *Chronicle*’s owner, just to get Planned Parenthood’s notices printed in that paper.

chairman of the International Planned Parenthood Federation and president of the Family Planning Association of India, and a leading figure in the women’s movement in India—to the state’s social services community. By 1953 Planned Parenthood of Houston was moving quickly into the vanguard of the birth control movement in America.40

Buzzell proved to be a strong leader with a knack for public speaking. In 1954 she took on Little and the Houston Press in a war of words about Planned Parenthood’s “swank new clinic” on Travis street. When Little, who had in his words, “trojan-horsed” his way into “the ultra-modern, streamlined, stainless-steeled, shatterless-glassed, perfumed-antiseptic” new building during the May 28 Open House and then challenged Buzzell with a comment about the opulence of the place, she replied steadily: “Our former Center at 611 Calhoun wasn’t good enough for us so we built this $50,000 building.” Then she continued: “So you UNPLANNED people are still holding your clinics in the Sears Lot in all kinds of weather. Too bad you UNPLANNED people can’t get indoors like we did years ago. Even though you aren’t on our side, it’s nice of you to drop around, anyway. Have a cup of coffee and a petit four in the lounge with me. I’ll pull the silk rope for the servitor.” Little’s report of the conversation was slightly exaggerated, no doubt. Nevertheless, it was clear that Buzzell was a woman to be reckoned with. She was also a woman in demand. In 1954 Buzzell officiated at an orientation course offered by the local Graduate Nurses Association and then at the Red Cross Nurse Enrollment Committee Meeting in May, and was asked to speak again at those meetings in December. Her speaking engagements soon multiplied into

Houston: A History, 136-137, for information about McCarthy Oil and Gas’s financial troubles in the fifties and Warner H. Mendel’s role as comptroller.
commitments to give talks before a number of professional, civic, and religious
groups in the community.  

Not everyone was delighted with the growth and expansion of Planned Parenthood. Besides Carl Victor Little there were some vocal critics whose letters were published in the OpEd pages of local newspapers following the opening of Planned Parenthood’s new building. One gentleman from LaPorte in particular was “dismayed” that Planned Parenthood had opened a new center in Houston because he believed it to be “an organization devoted to limiting the number and kind of citizens Houston will have in the next quarter century.” His argument intimated that Planned Parenthood was engaging in eugenic parent-planning, an idea that had shadowed Margaret Sanger and the birth control movement from the beginning. He also lauded China and India for having “successfully resisted planned parenthood,” and Alice Thanhouser, the Travis Center’s newly elected Board president, was stung into replying in the August 19 edition of the Houston Post: “The truth is that planned parenthood does not advocate fewer babies, but better babies. We believe that married couples should have children by choice rather than by chance. Our helping families to have children when they are wanted, when they can be afforded, and when they can be properly cared for, does nothing to limit the number of babies brought into the world, but does influence the kind of citizens they will grow up to be.” And, she added, “It so happens that India is one of the few nations whose government is today actively sponsoring family-planning clinics.”

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40“Indian Leader to Speak at Luncheon,” Houston Chronicle, November 17, 1953.
41Unpublished History of Planned Parenthood of Houston.
Opponents of Planned Parenthood and birth control believed that “family planning” was a euphemism for manipulation of the population—a way to keep the poor, minorities, and Catholics from having too many children and outnumbering middle-class whites. On the other hand, proponents of family planning saw it as Thanhouser did: a philanthropic organization funded by private donors in the interest of public health and welfare. These two visions would continue to clash, and become more irreconcilable, with time.

**Enter The Pill**

By 1955 the battle lines had been drawn between pro- and anti-birth control forces. They were entrenched that year with the announcement that the “birth control pill” was on the way. On October 11, 1954, the Ft. Worth *Star-Telegram* ran a story entitled “Birth Control Pill Called Years Away,” in which it declared that “a birth control pill to keep unwanted children out of the world still is years away, but the day will come when it is available.” The statement was attributed to the president of the Planned Parenthood Federation of America, Mrs. Robert M. Ferguson, whom the paper said had released to the press information about three research projects the Federation was sponsoring “in search of the pill.” Ferguson, the daughter of Federal Judge Learned Hand (who had helped decide the famous 1936 *One Package* case in which the U.S. Circuit Court of Appeals had declared that birth control could no longer be classified as obscene or in violation of Comstock laws), had made the announcement at the 1954 annual meeting of the Planned Parenthood League of Texas membership in Houston.
Controversy over the pill, within the ranks of Planned Parenthood and without, would continue for decades.\textsuperscript{43}

One influential voice speaking out against Enovid, the pill's trade name, was Dr. Allen Guttmacher, the head of Obstetrics and Gynecology at Mount Sinai Hospital in New York City and the chairman of the medical committee of the Planned Parenthood Federation. Guttmacher was concerned about the side-effects of the pill—nausea, headaches, and vomiting—in many of the patients to whom it had been administered. The research had been conducted chiefly among women in Puerto Rico. He was also concerned that when the pill had been administered to men, prisoners in a California prison, it had caused them to lose their sex desire and "sex power," or their ability to get an erection. This fear later proved to be inconsequential for women, but Guttmacher remained dissatisfied with Enovid. "The answer to the explosive population increase problem will be a pill," he said, "but not this one." Guttmacher also voiced his concerns in Houston at a meeting in the Jesse H. Jones Medical Library sponsored by the local Institute of Religion. During his talk a dozen Baptist ministers walked out in protest, saying later that they felt the program was inappropriate.\textsuperscript{44}

But the first giant steps toward an effective birth control pill had already been taken. The study had begun in March 1956 by Dr. Manuel Paniagua, medical director of the Puerto Rican Family Planning Association, in which 218 women were given Enovid. The women took the pills daily for twenty days each month and were then tested for

\textsuperscript{43}"Birth Control Pill Called Years Away," Ft. Worth \textit{Star-Telegram}, October 11, 1954. Ferguson was a graduate of Columbia University and had worked as a science teacher before accepting the presidency of PPFA. Her statement that the pill was years away was, in fact, accurate. The Pill did not become widely available in the US until the early 1960s.

\textsuperscript{44}Ron Moskowitz, "Temporary Sterility Pill Called a Failure," Houston \textit{Post}, November 19, 1957; "Planned Parenthood Official to Talk Here," Houston \textit{Post}, November 17, 1957; "Guttmacher to be
pregnancy. None became pregnant during the time they were taking the pill, but “a sizable number” of the women reported “various unfavorable reactions” to it, chiefly nausea, vomiting, and headaches. In its statement to the press, the Planned Parenthood Federation reported that “There appeared to be no question as to the effectiveness of the pill in preventing conception, but there was considerable doubt as to its possible long-range effect on the health of the women.”

There was considerable disagreement between those who believed that a safe, effective oral contraceptive would not be ready “for many years” and those who believed it was almost at hand. Gregory Pincus, one of the research scientists who developed Enovid, believed by 1958 that after one more year of testing the pill could be marketed. As historian James Reed noted, he saw no reason to continue testing indefinitely simply to satisfy “the qualms of officialdom.” Pincus believed that the progestin-estrogen pill suppressed ovulation, but in fact no one knew precisely why it did; nevertheless, by 1959 he was convinced that Enovid was safe for long-term use by normal women.

It was perhaps coincidence that two important announcements about the birth control pill were made in Houston, but they added to the controversy surrounding Planned Parenthood and alienated a segment of the local clergy that had previously been

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Speaker,” Houston Chronicle, November 16, 1957; and “Planned Parenthood Issue Stirs Pastors,” Houston Post, November 19, 1957.
45”Pills Effective in Birth Control,” Houston Post, October 19, 1957.
46Reed, From Private Vice to Public Virtue, 346-366, at 363-364. There were certainly some valid arguments against the pill. The original dosage was too strong, and was later reduced significantly; many healthy women ingested much larger doses of synthetic steroids than were necessary to prevent conception. Various investigations also linked the pill to deep-vein thrombosis (blood-clots that can be fatal if they lodge in the lung), increased risk of heart attack, hypertension, gall-bladder disease, liver tumors, and even depression. Concern about the pill’s safety reached a height after the Thalidomide scare of 1962, in which European women who had taken the powerful sedative to relieve morning sickness during their pregnancies gave birth to horribly deformed children. But in fact the number of women the pill affected negatively remained statistically quite small. More importantly, despite the claims made against the pill, women continued to request it.
supportive of its mission. Little of the Houston Press added his un-support to the developers of the pill in his usual fashion: "The more pills that the women of the Commonwealth of Massachusetts [where the pill was being developed] swallow—that is, if the pills work, which they probably won't—the fewer d_____ Yankees." 47

An Overcrowded World

At the same time, concerns in Houston and elsewhere about "population explosions igniting a new World War" were increasing apace. Beginning in 1955, a flood of articles appeared in Houston newspapers about the populations of developing nations and countries "where population was exceeding food supply." People began to worry that "the human race may be racing itself off the map" and that the "future world might be one of standing room only." Marguerite Johnston of the Houston Post penned a number of articles on the subject herself, urging Americans to support international family planning and raising awareness of the plight of women in developing countries. Also, a number of stories alerting Texans to the problems of "wetbacks," Puerto Ricans, and other "welfare tragedies" caused by a lack of public health services for the poor and immigrants appeared. In 1955 Dr. Abraham Stone, vice president of the Planned Parenthood Federation, traveled to Houston to speak about "Problems in World Population" and to exhort Houstonians to support family planning. 48

Amid the concerns about population explosions and diminishing resources, Planned Parenthood spokesmen met with a great deal of success when they conducted fundraising campaigns for local affiliates. Pillsbury continued to serve as the Federation’s ambassador in annual campaigns, and as local and national Planned Parenthood leaders repeated the message that the problem of overpopulation could be solved by birth control, people listened. Planned Parenthood’s fundraising campaigns were increasingly successful, and in 1956 the agency’s annual goal was raised to $30,000. At the same time, the number of women coming through the doors of the Travis street clinic continued to rise.49

In 1956 PPCH opened its first branch clinic in Jacinto City, Texas, a small city around ten miles east of Houston, as a “charity clinic” to meet the increased case load in the county. Physicians from the Travis center served the clinic from noon to 2:00 p.m. on the second and fourth Mondays of each month, and Executive Director Buzzell trained a Jacinto City volunteer to “offer medical advice on family planning.”50

The event went unnoticed by almost everyone, that is, everyone except Little of the Houston Press. In his weekly column, entitled “Planned Babyites Open Chain Store in Jacinto City,” Little expressed his shock and alarm at the expansion and called on the members of the UnPlanned Parenthood Association, which he had deactivated earlier in the year due to his bursitis and an ulcer, to reactivate the organization in a mass meeting

unknown (from Susan McAslan’s scrapbook collection on world population); on the population conference held in Houston see “Lecture Set on World Population,” Houston Chronicle, October 14, 1956; and “Talks on Parenthood,” Houston Post, October 14, 1956.
49Unpublished History of Planned Parenthood of Houston. The number of patients recorded in 1956 was over 4,000; in 1957, that number grew by more than 1,300; and in 1958, the number of patients was recorded at 6,415.
50“Jacinto Clinic Opens,” Houston Chronicle, September 5, 1956; “Jacinto City Parenthood Branch Open,” Houston Post, September 6, 1956; and “Jacinto City Opens Parenthood Clinic,” the Houston Press, August 30, 1956.
in the Sears parking lot. "A sort of armistice" between the PLANNED and UNPLANNED groups had existed before, he said;" but we fear that it's war to the finish now."

In fact, it was Little who was finished. In 1957, in a surprise turnaround, he backed the annual campaign to raise funds for the Planned Parenthood center and called on the UPPA membership in his column to help finance their ideological foe "to run the swank center and workshop at 3512 Travis." His defection to the planned side probably came as no surprise to those who had observed his un-secret meetings with Pillsbury in Houston in 1956, after which he reported "mixing with Pillsbury, of the Pillsbury cake mixes." In that column he had also hinted at a merger of the PLANNED and UNPLANNED groups when he noted, "we consider it good business to mingle with the PLANNED people, and in a way, consider the Center an annex of the Sears Parking Lot." The Sears parking lot was, in fact, not far from the Travis center.  

Little's "conversion" presaged the growing acceptance of Planned Parenthood in the fifties as it expanded, inexorably, along with the city's population. During the latter part of the 1950s community outreach activities became more visible as like-minded groups of clergy, civic, welfare, and youth organizations sought family planning programs and PPCH's services. In 1958 PPCH volunteers gave nine community talks to 270 people. Clinic staff counseled couples before and after marriage and provided literature and films on human reproduction as well as clergy referrals for premarital counseling. The decade ended with PPCH moving in the direction of patient recruitment, increased medical services, and enhanced community education in conjunction with

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51 August 28. 1956.
civic, religious, and social service groups. By the end of the decade, Planned Parenthood's basic organizational structure had been fixed and refined. Agnese Nelms retired from active participation in Board affairs and was named Chairman of Planned Parenthood's Advisory Board, an honorary group made up of former Board members. Her retirement represented a watershed in the history of Planned Parenthood of Houston. The pioneering era had passed.
Chapter 8

The Development of the Pill

I consider that the world and almost our civilization for the next twenty-five years, is going to depend upon a simple, cheap, safe contraceptive to be used in poverty stricken slums, jungles and among the most ignorant people. I believe that now, immediately there should be national sterilization for certain dysgenic types of our population who are being encouraged to breed and would die out were the government not feeding them.¹

Bernard Asbell has noted in his study of the birth control pill that Margaret Sanger’s statement, quoted above, probably “disconcerted” a number of those who revere her.² Though the results of her crusade to bring the Pill to women overburdened by childbearing were worthy, her method of gaining critical support for her work was sometimes less than noble. For the unfortunate women Sanger championed, efforts to expand reproductive choice were hindered by limited available methods of contraception. Women in the 1950s, both dysgenic—i.e., biologically defective or weak—and hearty, were still using the methods of the 1920s. People in the birth control movement sought more and better birth control options, improved reproductive health, and greater reproductive rights.³

In the 1940s and 1950s, Sanger followed closely scientific research on birth control and personally funded some of it, while the Planned Parenthood Federation of America (PPFA) made support for new birth control technology a major focus of its

²Ibid., 9.
advocacy efforts. The turning point in contraceptive research did not come, however, until Katharine Dexter McCormick (1875-1967) threw her financial support behind research to produce an oral contraceptive. ⁴

Heiress to the International Harvester fortune, McCormick was one of the first women graduates of the Massachusetts Institute of Technology. She was also a supporter of women’s rights and had known Sanger for a number of years. After the death of her husband in 1950, McCormick wrote to Sanger to ask how she could use her fortune to contribute to contraceptive research. In her letter she asked Sanger to address two questions that concerned her: 1) “Where you think the greatest need of financial support is today for the National Birth Control Movement?”; and 2) “What the present prospects are for further birth control research, and by research I mean contraceptive research.” Sanger responded quickly with the letter quoted above, and suggested a start-up research fund of twenty-five thousand dollars “definitely to be applied for contraceptive control.” Sanger also suggested that the money be divided among five or six universities “in this country, in England or in Germany.” ⁵

“The moment of conception” of the Pill, as Asbell puts it, was a 1951 dinner party in New York arranged by Sanger. Her guests were Dr. Abraham Stone, a gynecologist and activist in the birth control movement since the 1920s, and Dr. Gregory Pincus, a Massachusetts research scientist and the world’s foremost authority on the female

⁵McLaughlin, The Pill, John Rock, and the Church, 93-107; Reed, From Private Vice to Public Virtue, 335-339; Vaughan, The Pill on Trial, 24-28; and Asbell, The Pill, 9. Asbell, whose critique of Sanger is stinging, notes that Sanger might have suggested Germany as a research site, so soon after World War II.
component of fertility, the mammalian egg. Pincus directed a small, struggling, private research laboratory called the Worcester Foundation for Experimental Biology. At the dinner Sanger posed the question of what it would take to find the "perfect" answer to contraception—i.e., a safe oral contraceptive. Pincus speculated that the "perfect" answer probably lay in the "clever use of a hormone."6

Soon after the dinner, Sanger and McCormick visited him in his laboratory in Shrewsbury, Massachusetts. They asked Pincus to produce a physiological contraceptive, not just a physical barrier between sperm and ovum (such as a condom or diaphragm), that would be safe, available, and inexpensive. In return, Sanger and McCormick promised Pincus "adequate" funding for research materials, laboratory staff, and supplies. McCormick first pledged $40,000; soon after, she was contributing $150,000-$180,000 a year, funneled a portion of the money through PPFA's research grant program. At her death, her total investment exceeded two million dollars.7

because of that country's experience in sterilizing "undesirables." He also notes that Sanger was soon persuaded to drop sterilization of "dysgenic types" from her pronouncements.

"Margaret Sanger, My Fight for Birth Control (NY: Farrar and Rinehart, 1931); Margaret Sanger: An Autobiography (NY: Norton, 1938); and Loretta McLaughlin, "Dr. Rock and the Birth of the Pill," Yankee (September 1990), 72-77. Pincus had acquired fame as "America's Count Frankenstein" when a typographical error in a newspaper report of his rabbit experiments (fertilization in a test tube of the eggs of a rabbit) omitted a vital word: "Dr. Pincus said emphatically that he is [not] planning to carry it on to find out whether human babies can be made by test tube methods." Before Sanger and McCormick approached him in 1951, contraceptive research had not played a large role in his work. Pincus had been receiving small sums from the Planned Parenthood Federation to help in his study of the early development of mammalian eggs, but it was only a fraction of the amount he needed to develop a hormonal contraceptive. Ironically, Pincus was of Russian-Jewish ancestry. Etienne-Emile Baulieu, who invented the abortion pill RU-486, recalled his meeting with Pincus at a Paris conference: "We all crowded into the hall for a look...Pincus merely nodded his Einsteinian head. He was not tall, but he stood ramrod straight, hardly noticing anyone around him" See Asbell, The Pill, 8 and 59.

"A Tradition of Choice, 50; McLaughlin, The Pill, John Rock and the Church, 103-109; Reed, From Private Vice to Public Virtue, 311-375; Vaughan, The Pill on Trial, 19-35; and Asbell, The Pill, 12, and 59-60. McCormick was in her seventies in 1951. She continued to give money every year to the Worcester Foundation for the rest of her life, and left the foundation a million dollars in her will. As Asbell correctly points out, her money paid the way for the Pill. The Planned Parenthood Federation showed little interest in Pincus's research and angered Sanger by insisting on collecting 15% of McCormick's donations to pay for the Federation's own operating expenses (this was the Federation's share of all donations collected by affiliates).
Pincus and his assistant, research scientist Min Chueh Chang, began conducting experiments Sanger considered promising, attempting to produce an oral contraceptive based on synthetic progesterone. They looked back first at what was known and set out to duplicate and verify experiments that had been done eighteen years earlier by scientists at the University of Pennsylvania, who were the first to inject rabbits with synthetic progesterone—the “pregnancy” hormone—and who found that their ovulation halted. Chang also experimented with implanting sustained-release pellets of progesterone under the skin of female rabbits and found that he could inhibit ovulation for a long time (experiments that would become interesting forty years later to Norplant researchers). They were soon able to corroborate the earlier research. Progesterone could work as a contraceptive in small animals but it required huge doses.⁸

Then in 1952, at a scientific conference, Pincus ran into Harvard gynecologist and researcher, John Rock. Rock was working in Brookline, Massachusetts, only forty miles from Worcester, and he was also experimenting with new synthetic progesterones. His goal, however, was the opposite of Pincus’s. While Pincus was injecting progesterone into fertile subjects to prevent pregnancy, Rock was injecting progesterone and estrogen

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⁸Progesterone is a member of the progesterogens class of sex hormones. (The sex hormones are divided into three principal kinds: androgens, estrogens, and progesterogens. Androgens are the masculine hormones. Estrogens are feminine hormones, originating in the ovaries; they promote growth in the lining of the womb in preparation for pregnancy, and development of the breasts. The progesterogens, of which progesterone is the most influential, is formed in the ovaries upon release of a matured egg, at ovulation. If the egg becomes fertilized, progesterone and estrogen act together to maintain the pregnancy. These hormones also regulate the menstrual cycle in the nonpregnant female. What Pincus was trying to do then was to manufacture sex hormones to regulate ovulation. See Merriam Webster’s Medical Dictionary (Springfield, Massachusetts: Merriam Webster, Inc., 1993), 577. And see Angus McLaren, A History of Contraception: From Antiquity to the Present Day (London: Basil Blackwell, 1990), 240-241; and Reed, From Private Vice to Public Virtue, 317-366.)
into infertile subjects to help them become pregnant. And, while Pincus had limited his experimental subjects to rabbits, Rock was injecting women.9

Rock had developed a theory that the problem of some of his infertile patients might be an “underdeveloped” womb (or fallopian tube), and that administering doses of progesterone and estrogen, the “pregnancy” hormones, might encourage their organs to “mature.” By suspending ovulation for a few months with hormones, he believed, and deluding the female system into thinking it was pregnant, the system could rest, then “rebound” with greater fertility. He tried his “pseudo-pregnancy” experiments on eighty women, with overwhelming success. Within four months after Rock took each patient off the progesterone and estrogen shots, a number of the women conceived. The evidence of the “Rock rebound” effect was clear, although the reasons for it remained obscure. Rock had to be cautious about how he presented his research results, however. It was acceptable to mention the “blocking of conception” as an incidental side-effect of his infertility treatment, but not as its purpose. A Massachusetts law banning the dissemination of birth control information, based on nineteenth-century Comstock Laws, was still on the books, and he faced a jail sentence for prescribing or even describing any form of contraceptive.10

When he learned that Rock was already testing a chemical contraceptive on women and demonstrating that it worked, Pincus declared his intention to abandon his animal tests and to field-test the drug on a large scale to prove its safety and effectiveness. Rock, in turn, became interested in Pincus’s tests on animals using progesterone alone. Progesterone was known to produce fewer side effects than estrogen

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9See fn. 7, supra.
(e.g., morning sickness, nausea) and Rock believed it might be sufficient to prevent pregnancy in women, as it did in animals. Rock decided to try progesterone alone on a new group of infertile women. He planned to administer the progesterone for twenty-one successive days, then stop it for a week. This would allow for a normal menstrual flow, and control its regularity, which had been a problem for many of Rock’s patients.

Pincus still faced numerous obstacles: religious opposition, the unknown medical risks of long-term hormone use, in some states the legal risks, and in all states public antipathy to the idea of birth control. No matter where in the United States Pincus might locate his field tests, when they became known political harassment would almost surely force him to shut them down. More important, no matter how successful his clinical trials with women turned out, as long as the hormones had to be injected—and in large doses—he was far from producing the “perfect” contraceptive that Sanger and McCormick had commissioned him to create. Pincus became confident that the obstacles could be surmounted, however, when news circulated of the discovery of two new oral progesterone-based contraceptives. One was synthesized by Carl Djerassi of the Syntex pharmaceutical company, and the other by Frank Colton of G.D. Searle laboratories (which had also funded some of Pincus’s mammalian research); both had ostensibly been created as menstrual-cycle regulators, but for Pincus they were breakthroughs. The chemistry of the Pill had already been invented.

Pincus and Chang tested the two compounds on rabbits and rats to verify their effectiveness and safety before attempting a clinical trial on women. If the clinical trial, conducted on a small number of women and supervised by a medical doctor, was

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successful, a field trial could then be conducted that covered a large number of
volunteers who would take the drug and be monitored for its effectiveness, safety, and
side effects. Pincus needed a medical doctor of high reputation, preferably a
gynecologist, for the clinical trial. He considered two leaders of the birth control
movement, Abraham Stone and Alan Guttmacher, of the Planned Parenthood Federation
research institute, then decided against them. Both were Jews, and Pincus feared that anti-
Semitic bigotry might further discredit the already unpopular cause. He was especially
hesitant, one historian notes, because opposition to the trials would certainly come from
Roman Catholics and Protestant fundamentalists. In fact, the Worcester Foundation’s
1956 annual report avoided describing its work to control ovulation in animals; instead,
the report described experimental uses of steroids to help control menstruation.
Contraception was not mentioned. In the end, Pincus decided to link with John Rock.11

Sanger objected to Rock because he was a Roman Catholic, but McCormick, who
had known Rock for years, convinced Sanger that Rock was a “reformed Catholic”
whose position on contraception had nothing to do with his religion, but only with
medicine. He had been the only Catholic of fifteen among Boston’s leading physicians
who had signed a petition in 1931 to repeal Massachusetts’ anti-birth control law. In
1943 he had taken a public stand in favor of permitting Massachusetts physicians to give
advice on medical birth control, and after the restrictive Massachusetts law was repealed,
Rock had made it known that he was fitting his patients with diaphragms, which enraged
some Catholic physicians (who called for his excommunication). In 1949 he had co-
authored a book called Voluntary Parenthood, explaining birth control methods for the

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11 In proper clinical trials, half the subjects are given the new drug, and half a placebo. None of the subjects
knows which they are getting, nor should the researchers conducting the trials know.
general reader. In 1963 he worked with PPFA staff on another book, *The Time Has Come*, arguing that the Catholic church should accept the oral contraceptive as a natural extension of the rhythm method. Later he would say of his work in prescribing hormones as a form of birth control:

> At first it bothered me a little bit, but not very much. By that time I had done my work with human embryos. It was not difficult for me to think that those few little cells that would eventually, if properly cultivated, grow into an adult were not really human. They were much like all the other cells in the body, and so it seemed to me that until the *conceptus* acquired visible characteristics of a human, that it wasn’t human. The spiritual thinking didn’t bother me very much because I was dealing with tangibles and I wasn’t very spiritual anyway by that time. But it did bother me, and I talked it over with many church dignitaries, and fortunately I found some very able ones who more or less agreed with me, and they were very helpful.

Rock agreed to join Pincus in partnership and they decided to disguise their research as part of Rock’s original study of infertility. Of the two available hormones, they chose the one developed by Searle labs, which had been given the name Enovid. In 1954 Rock began his first tests of Enovid as a blocker of ovulation on fifty women volunteers, in the first human trial of an oral contraceptive. The clinical trial was funded by McCormick. The results were perfect. Not one of the fifty women ovulated. Pincus and Rock knew that they had identified an oral birth control pill.

Sanger, McCormick, and Pincus wanted to broadcast the news immediately, but Rock was cautious. To present research findings at a non-scientific meeting before publishing them in a medical journal would break the academic rules of research science.

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14 *A Tradition of Choice*, 51.
and endanger the good names of the scientists doing it. Worse, the idea of birth
control was regarded by many of their colleagues as immoral and medically unethical.
Rock was also certain that the Catholic church would condemn the findings and was
unwilling to face the opposition before he had enough data to defend his position.
Nevertheless, Pincus, anxious to claim the clinical trial as his own, planned to break the
news at the coming conference of the International Planned Parenthood League
scheduled for Tokyo in October 1955. He asked Rock to join him, but Rock refused,
saying that announcements were premature. At McCormick’s expense, Pincus, Chang,
and their wives sailed to Tokyo.

To his surprise, when Pincus reported the news that a birth control pill was almost
born before the 150 conferees at the Tokyo conference, his announcement was greeted
with skepticism and indifference. After all, the only thing new that Pincus had said was
that progestins worked when taken orally, rather than by injection. He also failed to
garnish the news coverage he wanted. He was unable to publish his findings in any
scientific journal and ultimately sent it to print in the Ladies’ Home Journal. Years later
he gave a speech in which he explained the events of 1955 and his ill-timed
announcement of the research data from the clinical trials:

I published these data in, believe it or not, the Ladies’
Home Journal! That was the first publication of the
chemical news of the Pill. I think there was reluctance to
accept scientific papers on this subject. It was a taboo, to
put it mildly, to interfere with fertility.16

Taboo or not, when Rock reported the same findings at a Canadian endocrinology
conference before an audience of scientists involved in hormone research he received

16See footnote 7, supra.
quite a different reaction. The significance of the clinical results were not lost on these medical experts. It was clear to the scientists viewing Rock’s findings that "antiovulation" had been achieved, and soon after the meeting, Enovid became the talk of the research world and the drug industry. By the end of 1956 Rock’s research findings had been published in the prestigious journal, *Science*.

The birth control pill was far from perfect, but its effectiveness, simplicity, and ease of use promised to extend to millions of women an unprecedented control over their reproduction. It would also for the first time allow them to separate the sexual act from procreation. As Sanger wrote McCormick in 1956 after the success of Rock’s clinical trials was announced in the journal, *Science*:

> You must, indeed, feel a certain pride in your judgment. Gregory Pincus had practically no money for this work and Dr. Stone and I did our best to get a few dollars for him. Then you came along with your fine interest and enthusiasm and your faith and things began to happen and at last the reports are now out in the outstanding scientific magazine. The conspiracy of silence has been broken.¹⁷

By 1956 Sanger and McCormick were becoming impatient. Pincus and Rock were still a long way from the “perfect contraceptive” the women had commissioned. In the clinical trials no woman had taken the new progestin for longer than a few months. It was yet to be determined that it was safe and effective for long periods of time. Tests had to be conducted over long periods of time and human error had to be accounted for. What if women did not take the Pill as instructed, discontinued use in the middle of a twenty-one day cycle and became pregnant? Would those children be born healthy? And who were the proper subjects for large-scale testing? Middle class women? Or poor

women, who might become the targets of eugenists bent on controlling the population? Finally, how could long-term testing be protected from religious and Victorian opposition? It soon became clear to Pincus and Rock that the tests had to be conducted outside the United States.

Pincus already had a place in mind. A Puerto Rican Medical School academic named Edris Rice-Wray, who was also medical director of the Puerto Rico Family Planning Association and director of the Public Health Department’s field-training center for nurses, had told Pincus she knew of a housing project in San Juan full of families with more babies than they could feed. Moreover, the superintendent of the project approved of family planning, which was unusual for an official in Catholic Puerto Rico where opposition to birth control was strident. And in 1937, a year after the One Package decision in the Second Circuit Court of Appeals in New York had invalidated several states’ Comstock Laws regarding the dissemination of birth control information, the Puerto Rican legislature had amended the laws so that distribution of information for the prevention of conception, which had previously been a felony, was no longer a crime. Puerto Rico seemed ripe for field testing.¹⁸

Rice-Wray and Pincus selected women to take the Pill who were mostly under forty and had children. The length of time for each trial was six months. Many participants did not take the pill as instructed, and became pregnant. But those who followed instructions did not. The participating women could not obtain supplies of the pill fast enough. They were choosing “between two evils”: birth control and the inability to support additional children. At one point during the test the Catholic Social Workers

¹⁷A Tradition of Choice, 51.
Guild aired a television program condemning the Pill as dangerous, and about ten percent of the volunteers dropped out of the field test. According to Rice-Wray, all of the dropouts became pregnant soon after, and the scheme backfired. After that, she and Pincus never had a problem enlisting volunteers. "They came flocking," said Rice-Wray, "not just the indigent population, but schoolteachers, the social workers themselves, everybody." 19

In December 1956, only months after the field tests had begun, Rice-Wray left Puerto Rico to take a job in Mexico with the World Health Organization. She provided Pincus with her data on 221 subject women and summarized her findings as follows: "Enovid gives one hundred percent protection against pregnancy in 10-milligram doses taken for twenty days of each month...However, it causes too many side reactions to be acceptable generally." Rice-Wray went on to specify: Twenty-nine women of the 221, had felt dizziness, twenty-six felt "sick," eighteen reported headaches, and seventeen experienced vomiting. Nine reported stomach pains, seven "felt weak," and one experienced diarrhea. Many reported more than one reaction.

Undaunted, Pincus pressed on with the field tests with Dr. Manuel Paniagua, Rice-Wray's replacement at the Family Planning Association. With Paniagua, Pincus conducted controlled experiments in which women who had complained of side effects were given placebos instead of the Pill. After several months the same percentage of women who had complained before, 17 percent, continued to report symptoms. Another group of women was then given Enovid tablets but not warned of its possible side effects; after several months only 6 percent reported any adverse side effects. More important,

18Reed, From Private Vice to Public Virtue, 56-66; Vaughan, The Pill on Trial, 37-57; McLaughlin, The Pill, John Rock, and the Church, 128-133; and Asbell, The Pill, 141-155.
Paniagua’s findings showed that after a few months of taking the Pill, all complaints declined.

In March 1957 Rice-Wray contacted Pincus after a trip to Haiti, asking him to extend the field trials there. She had found the situation in that poor, Catholic country desperate, and the desire for birth control by Haiti’s new Public Health officials great. Pincus responded immediately, made contact with doctors in Port-au-Prince, provided them with detailed research instructions and contraceptive supplies, and monitored the progress of the tests. Meanwhile in Mexico City, Rice-Wray had launched a new field trial of her own and reported a failure rate of only 0.6 per 100 women after six months of taking the Pill. By this time in Puerto Rico and Haiti combined, the Pincus team had closely followed 25,421 monthly cycles; the failure rate among them was 1.7 per 100 women. By 1958 the test program had extended from the original one hundred Puerto Rican women to a full field trial involving more than twenty thousand women in three countries. As the clinical trials expanded Pincus and Rice-Wray tested other companies’ new progestins in addition to Enovid.

In 1957 G.D. Searle Company had obtained Food and Drug Administration (FDA) approval for its progestin, Enovid. Walking a political tightrope, the FDA gave “limited” approval to the drug: the approval was limited to the “treatment of disorders.” Katharine McCormick, who had complained in the past that FDA approval was “as slow as molasses,” now applauded the agency’s decision to give limited approval. “Of course this use of the oral contraceptive for menstrual disorders,” she said, “is leading inevitably to its use against pregnancy.” Few in the drug industry, however, expected the FDA to

\[^{19}\text{ibid.}\]
approve Enovid for birth control, or even that consumers wanted them to. The expensive Pill would cost ten dollars a month. There were religious objections. And there were side effects. There were also, as noted earlier, in Massachusetts, Connecticut, and fifteen other states where Comstock laws were still in effect, legal issues. Disseminating information on birth control was punishable. In the late 1950s, after the FDA approved Enovid as a “gynecological medicine, seventeen states had laws limiting the sale, distribution, or advertising of contraceptives. Connecticut had the harshest law, which made it a crime “to use any drug, medicinal, article, or instrument for the purpose of preventing conception.” Nor did the irony escape notice that Massachusetts, where the Pill had been invented, had the next most restrictive anti-birth control laws: that state would be the last to repeal them, in March 1972. Under Massachusetts law, while it was not illegal to use contraceptives, it was a felony to “exhibit, sell, prescribe, provide, or give out information about them.”

Which apparently did not trouble Searle executives. Wall Street researchers had counted how many condoms were sold, extrapolated the numbers for oral contraceptives, and concluded that there was a fifty-million-dollar market for the new drug. No one watching Searle’s board of directors doubted that the manufacturing lines would soon be rolling. Nor did Pincus doubt that widespread oral contraception was at hand. Immediately after FDA approval was announced, he began exploring possible Mexican

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(i.e., cheap and reliable) sources of plant steroids, which were essential if Searle was
to market an affordable birth control pill.\textsuperscript{21}

Nor did expense, religious qualms, side effects, or prohibitive laws deter
American women. By late 1959, two years after its approval, a half-million women in
America alone were taking Enovid daily for “menstrual disorders.” It was only a matter
of time before the FDA would approve the drug for contraceptive use and drug
companies would openly market it for that purpose.\textsuperscript{22}

Before 1959 ended Searle filed an application with the FDA to license Enovid as
a contraceptive. The application was based on field trials with 897 women who had been
on the Pill for 10,427 cycles. If company executives expected protest when the news was
reported in the \textit{Saturday Evening Post} and \textit{Reader’s Digest}, they were mistaken. There
was none, and it soon became apparent that they had underestimated the receptivity of the
product.\textsuperscript{23}

In late December 1959 Rock and Searle’s medical research director, Dr. Irwin
Winter, appeared before an FDA panel in Washington, DC, for a hearing on their drug.
The hearing officer, Pasquale DeFelice, was a staff physician at Georgetown University
Medical Center and a part-time FDA reviewer. When Rock discovered that the “expert”
in charge of the Enovid application was a thirty-year-old, part-time, Catholic staff
physician he became livid, but there was little he could do. DeFelice proceeded with the
hearing, asking questions about the Pill’s possible relation to cancer, as well as probable

\textsuperscript{21}Djerassi, “The Making of the Pill,” 129.
\textsuperscript{22}After all, as Linda Gordon has pointed out, hadn’t Goodyear Rubber fattened itself by $150 million a year
marketing condoms (while concealing its name from the package)? And didn’t Johnson & Johnson make a
\textsuperscript{23}See fn. 20, supra.
moral and religious objections to it. Then the hearing was over. Five months later, on May 11, 1960, the Pill was formally approved.24

Searle soon got approval to reduce the progestin dosage to five milligrams, and further dosage reductions soon followed. New progestins were manufactured in the early 1960s that were effective at dosages of two milligrams or less. The estrogen content was also reduced. Within a few years several other pharmaceutical companies had entered the oral contraceptive market. In Germany Schering followed Searle’s Enovid almost immediately with its pill called Anovlar. In 1964 Syntex labs licensed both Ortho Pharmaceutical and Parke-Davis company to produce oral contraceptives, and by the mid-1960s, Syntex had gained the major share of the US market. But while the other companies were just entering the oral contraceptive market, Searle was earning millions. The company’s sales totaled $37 million in 1960, before FDA approval of the Pill; in 1965 sales increased to $89 million. As DeFelice, the young physician who had conducted the Enovid hearing, said dryly: “You know something: I was stupid. I should be a millionaire. I should have bought Searle stock but I didn’t. Somehow I thought I shouldn’t since I was the person who approved it. But I often wondered why I never got an award for okaying the Pill. It changed the whole economy of the United States.” 25

By the end of 1961 almost half a million American women were taking the Pill. In 1962 the figure had risen to 1.2 million, and in 1963, to 2.3 million. The American Population Council estimated in 1965 that one of every four married women under the age of forty-five had used or was using an oral contraceptive and that the actual users at that time numbered some 3.8 million. And in 1967 the Council postulated that 12.6

24]bid.
million women throughout the world were taking the Pill. By 1984 estimates ranged from 50 to 80 million women worldwide.\textsuperscript{26}

In the first five years after the FDA approved the Pill it became a staple in the lives of a majority of young American married women. Nationwide, of 320,000 Planned Parenthood clients, 150,000 were on the Pill. On the average, the younger the wife, the more likely she was to use the Pill. The more educated the woman the more likely she was to use it. Among non-Catholic married college graduates surveyed in 1966, 81 percent were Pill users. These women also reported having sex 39 percent more often than users of other kinds of contraceptives. Impoverished women who visited Planned Parenthood centers also chose the Pill more often than any other option when they found that they could get the pills at little or no cost. In five years the Pill had changed the relationship between family planning clinics and the women who, often in desperation, came to them.\textsuperscript{27}

The effects of the Pill on American culture and the women’s movement are more difficult to define. In 1968 the vice president of Pan American World Airways told the American Marketing Association that the development of the Pill had sparked ticket sales by delaying the family during the early marriage years and increasing disposable income and the desire to travel. It was also blamed by one American sociologist for being a major cause of divorce—a claim that remains unproved. In June 1990 the \textit{Ladies' Home Journal} celebrated the Pill’s thirtieth birthday and declared that the Pill had transformed women’s lives. “It’s easy to forget how truly liberating the Pill seemed to be in 1960,”

\textsuperscript{26}Ibid., 167-168.
the editorial read. "Nothing else in this century—perhaps not even winning the right
to vote—made such an immediate difference in women’s lives....It spurred sexual
frankness and experimentation. It allowed women to think seriously about careers
because they could postpone childbirth. And it sparked the feminist and pro-choice
movements. Once women felt they were in charge of their own bodies, they began to
question the authority of their husbands, their fathers, their bosses, their doctors and the
churches."  For these women, the first generation of oral contraceptive users, the Pill had
allowed them in a very real way to divorce the past. 28

Almost from the start, however, the Pill was assailed by its critics. Rumors of
serious side effects began to spread early on, at first scattered reports in newspapers, and
then in professional medical journals. Among the ten million American women using the
Pill (fifty million worldwide), many experienced nausea, water retention, weight, breast
tenderness, and far more serious maladies: deep-vein thrombosis (blood clots that can kill
if they lodge in the lung), heart disease and heart attacks, elevated blood pressure,
strokes, gallbladder disease, tumors of the liver, and depression. By the fall of 1961 the
Searle company had collected a file of 132 reports of thrombosis and embolism
(obstruction of blood vessels, especially by clots) in Pill users and eleven deaths due to
the same. No one was certain whether these cases were coincidental—i.e., normal in the
general population and merely coincident with Pill use—or caused by the Pill. There was
talk that the government might withdraw its approval of the Pill for contraceptive use. 29

28 Ladies’ Home Journal, June 1990. By 1980, the twentieth anniversary of the Pill, the age of its average
user had dropped steeply. It was now more likely to appear in the purse of the unmarried fifteen- to
twenty-four-year-old than of her older sister or mother. Unlike their baby boomer elders, the second
generation of pill users accepted the Pill as a rite of passage, like getting a driver’s license or a credit card.
29 Barbara Seaman, The Doctors’ Case Against the Pill (NY: Wyden, 1969), 241, 243, 151. Seaman made a
career out of criticizing the Pill and frightening women. She had some valid points, but little scientific
Within a year, in 1962, Norway halted sale of the Pill on the basis of an article in the *British Medical Journal* reporting that four Pill users had developed thrombosis, although no ill effects from the drug had been recorded in Norway. Soon after the Soviet Union banned the Pill. Dr. Boris Petrovsky, Minister of Health, justified his recommendation on the fact that there was not a single country in which oral contraceptives were regarded as absolutely safe. In the U.S. the FDA stood firm in its approval of the Pill, not convinced that the small of blood clot incidences outweighed the general benefits and satisfaction reported by Pill users. But under pressure from women’s health activists led by journalist Barbara Seaman, the FDA ordered manufacturers to insert in their pill packages a listing of known side effects, which the manufacturers had not done routinely before.

Evidence also mounted that the Pill was having some desirable side effects. One study, published in the Journal of the American Medical Association in 1962, offered evidence that the Pill provided important defenses against reproductive cancers. Nevertheless, lack of agreement in the medical community and uncertainty caused uneasiness in American women and generated lawsuits. In the first few years of Pill sales more than one hundred court claims were filed against its manufacturers.

Fears about the Pill were intensified in 1962 with the tragedies caused by another drug: thalidomide. In 1961, almost simultaneously with the FDA approval of the Pill, thalidomide, which was originally thought to be another “wonder drug” for women, was approved in Europe. It was a tranquilizer designed to alleviate the side effects (nausea and vomiting) of pregnancy. Within a year of its approval, however, the side effects

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knowledge or evidence to back them up. See also Reed, *From Private Vice to Public Virtue*, 358-366; and Djerassi. “The Making of the Pill,” 61-62, 120-137.
became known. Some ten thousand babies, five thousand in Germany alone, were born without hands, arms, feet, or legs. In the U.S. the FDA had delayed approving thalidomide and American women were for the most part spared the tragedy of "thalidomide babies." But it left them with a new awareness and a profound distrust of the side effects of new medicines.

Women were also annoyed by the fact that their doctors were not taking them seriously when they complained of side effects from the Pill. Frustrated that their complaints were brushed aside as "women's nervousness," women began to question doctors who replied to their concerns with "trust me." Nor did they believe the medical industry's blithe assurances that diseases linked to the Pill were not real. Their annoyance quickly translated itself into fears about the safety of the Pill, and anger that the American pharmaceutical industry might be experimenting on millions of healthy women.  

The problem with the Pill was that it was a new kind of drug. It was not designed to treat a disease but was intended to "treat" healthy women; it was also prescribed for long-term use. So even though the testing of the drug had in fact been elaborate and thorough and the number of women reporting side effects was small, the Pill generated a lot of opposition and fear. Indeed, the Pill's makers were continually lowering the dosages and making the Pill safer, as opposition to it became more virulent. In 1970 Wisconsin Senator Gaylord Nelson called a Senate hearing specifically about the Pill; it

30Ibid.
brought to light new facts but produced some scary headlines across that country about
strokes, cancer, and deaths "caused" by the Pill.31

Acknowledging the seriousness of the controversy, in 1969, the American College
of Obstetricians and Gynecologists held a "Great Debate" about the merits and risks of
the Pill. One of the Pill's most vocal critics, Dr. Hugh Davis of Johns Hopkins
University, gave the keynote address and caused quite a stir by saying that he had taken
his wife off the drug "to be on the safe side." He was also the opening witness before the
1970 Nelson hearing, where he declared: "Never in history have so many individuals
taken such potent drugs with so little information available as to actual and potential
hazards." Davis, whose IUD, the Dalkon Shield, was about to appear on the market, was
at the time unaware that a major embarrassment was about to befall him.32

The Pill remained the American contraceptive of choice even after the 1970 scare
but sales dropped by 20 percent. As long-term studies of the effects of the Pill on women
were undertaken in the U.S. and England, evidence continued to mount that the Pill did
not cause breast cancer or even increase a woman's risk of getting it if she had a family
history of the disease. As the seventies went on more and more women continued to
choose it because it continued to be the most reliable form of birth control. In 1969 there
were just over a million American "Pill" users. In 1976 there were more than three
million.

31"Pill May Cause Strokes" (Philadelphia Enquirer), "Pill and Cancer—What Medic Says" (San Francisco
32The invention turned out to be the misfortune of his life, and a tragedy for many women. The shield's
manufacturer, A.H. Robins Co., was forced in 1974 to disclose in letters to 120,000 doctors that septic
spontaneous abortions in midpregnancy had been suffered by thirty-six users of the Dalkon Shield,
resulting in four deaths. The tragedy for women turned into a harvest for personal-injury lawyers, who ran
full-page ads in newspapers across the country seeking users of the Shield. After a decade of scouring for
victims, the lawyers produced a total of 195,000 successful injury claims. A federal court ordered the
In the early 1980s, as the FDA reported that almost eleven million women were taking it, concerns over the safety of the Pill reappeared and became a central focus of the rising women's lib movement. The reason for the concern was that questions about the Pill's association with cancer remained. It was not certain whether women risked cervical cancer from Pill use or whether women who smoked were at an increased risk of developing cancers. Nor had the effects of the Pill on adolescents been determined.33

Drug manufacturers did make oral contraceptives considerably safer than the Pill of the sixties by decreasing the amounts of estrogen and progestin in the pills. But the risk of serious illness and death increased significantly for certain groups: women who smoked; women who were obese; women with underlying health problems such as diabetes, high blood pressure, or high cholesterol; women with a family history of heart attack, stroke, blood clots, liver disease, or cancer; and women who became pregnant while on the Pill risked birth defects in their children. Long-term tests continued to be skewed by data reflecting the effects of the high-dose Pills of the sixties, while studies on the more recent low-dose Pills were just getting underway. More important, as research became increasingly expensive, drug manufacturers became increasingly unwilling to undertake it, leaving such studies to the federal government.34

By 1990 it was clear that all sides of the Pill debate could lay claim to some truth. Many users were finding it satisfying, liberating, and safe, while substantial numbers were finding that its side effects outweighed its benefits. Even today the "perfect

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34Ibid.
contraceptive” commissioned by Sanger and McCormick remains elusive. The best scientists were able to achieve, it seems, was better, less risky drugs along the uncertain path to pregnancy-free sex.

Pincus died of a rare blood disease (myeloid metaplasia—a disease of the white blood cells) in August 1967, less than a year after Sanger and four months before McCormick. Although the Pill had made Searle enormously rich, Pincus never received a penny in royalties for his work. After his death, despite the urging of friends of the Pincus family, Searle paid only three hundred dollars per month in benefits to Pincus’s widow. In 1974, seven years after his death, Searle founded a $400,000 endowment for a professorship in reproductive studies in Pincus’s name at Harvard—which had turned Pincus down for tenure. This was perhaps more an irony than an injustice. Pincus had never invented anything: he had only adopted a new progestin compound developed by others and used it as a contraceptive pill.\textsuperscript{35}

\textsuperscript{35} Asbell, \textit{The Pill}, 317-319.
Chapter 9

Planned Parenthood and the Counter-Culture

The 1960s

We have passed a historic turning point in thinking about programs concerned with Planned Parenthood and population growth....The responsibility of the federal government in the area of family planning and world population problems has been clearly stated by the President on at least 20 occasions.¹

The 1960s were breakthrough years for the birth control movement and the Planned Parenthood Federation of America. Cultural changes that came during the decade created a tidal wave of legislative change in America, and Planned Parenthood was carried on that wave of change to a greater level of acceptance and support than ever before. At the same time, reproductive rights became a matter of political controversy when the federal government began to fund family planning programs domestically and abroad.²

Early in the decade the demands of African-Americans for social justice awakened the American conscience. Then the Vietnam War gave rise to massive protests as the new youth “counterculture” rebelled against the mores of an older generation. Women also began to protest the subservient roles handed down to them from the postwar generation. As Betty Friedan wrote in her best-selling novel *The Feminine Mystique*, “Sex is the only frontier open to women who have always lived within the confines of the feminine mystique.” The black civil rights movement and the women’s

movement gave impetus to the family planning movement as women began to claim a “right” to sexual equality and control over reproduction. Public discussion of reproductive rights—along with civil and equal rights—the population explosion, and new contraceptive technology led to a new frankness about sexuality and birth control and helped disperse knowledge of contraceptive methods.¹

Finally, as baby-boomers reached maturity, a population control movement emerged that sought to address problems of social stability, war, poverty, and economic development in the United States and developing countries. As the problems of developing societies such as India and Puerto Rico were increasingly linked to their burgeoning populations, advocates of population control looked to contraception as an immediate technical solution. A newly energized eugenics movement began to demand that the “native stock” of Americans be strengthened by limiting “deviant” populations (and thereby reduce the social evils of crime, prostitution, and illegitimacy) through birth control, sterilization, and immigration restrictions. This eugenics movement paralleled the birth control movement and remained a presence in modern family planning organizations.² By the end of the decade, birth control had been transformed from a radical feminist movement into a liberal movement for civil rights, sexual equality, and population control, with radical social ramifications.³

⁵Critchlow, “Birth Control, Population Control, and Family Planning,” 2. Critchlow’s evidence supports Linda Gordon’s argument in Woman’s Body, Woman’s Right, that the modern phase of the birth control
The transformation that characterized the family planning movement in the 1960s was symbolized by the Planned Parenthood Federations of America's selection of a dynamic new leader in 1962 for its national board. Alan F. Guttmacher, M.D., was a distinguished gynecologist and a prolific writer on the subject of sex and marriage whose outspoken advocacy of birth control dated back to the 1930s. The son of a rabbi and a social worker, Guttmacher tackled the problems of the Planned Parenthood Federation with an energy and down-to-earth style that captivated the media and gained grass-roots support wherever he went.

As a medical researcher, Guttmacher was an early champion of the intrauterine device (IUD), which was offered to patients in the U.S. and developing countries early in the 1960s. Along with the oral contraceptive, developed by Gregory Pincus at the behest of Margaret Sanger and introduced in 1961, these new forms of birth control prompted an upsurge in the client roles of Planned Parenthood organizations all over the country. By the end of the decade, the number of Planned Parenthood's patients had nearly tripled, to more than 345,000, and 90 percent of all patients were choosing either the pill or the IUD.

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6 The National Board is made up of one hundred PPFA members from all the states. The Board sets policy, standards (for medical, educational programs, etc.) and provides national publicity for the Federation's affiliates. The country is divided into seven regions, each with a director and a voluntary board that work with existing affiliates and promote new ones. The local affiliates such as Houston supply the national organization with funds and personnel. See Planned Parenthood of Houston, Minutes of the Board of Director's Meeting (hereafter cited as PPH, Minutes), May 20, 1969.


Breakthroughs in public policy succeeded Guttmacher's appointment, driven mostly by a new awareness of rapid population growth and fears of overpopulation. Prestigious organizations such as the Rockefeller and Ford Foundations established population "councils," research groups to study the worldwide population explosion and make policy recommendations to the President and Congress. Along with the Planned Parenthood Federation's research bureau and other research groups, these population councils were instrumental in changing American population policy in the 1960s, making a sharp break with the past. By 1965, historian James Reed tells us, "skillful lobbying among professional elites and the availability of apparently potent new contraceptive technologies had led to the acceptance of population control as a relatively non-controversial part of economic wisdom."9

A turning point in Congress came in 1963 with the first recorded vote in favor of family planning in the form of majority support for an amendment to the foreign aid bill to permit the use of funds for population research. In the spring of that year, President Kennedy authorized Secretary of State Dean Rusk to issue a memorandum to Aid for International Development (AID) missions stating that the United States would assist family planning programs. In the following year Congress, which had established the Office of Economic Opportunity (OEO) to conduct President Johnson's domestic War on

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9 Following World War II, population control advocates assumed a prominent place in family planning policy. John D. Rockefeller II, a key figure in the postwar movement, founded in 1952 the Population Council, a conference of scientists, demographers, social scientists, and birth control leaders sponsored by the National Academy of Sciences. The Population Council advocated and supported medical research in reproduction, and trained demographers and population experts who could be employed in developing nations in Asia and Africa. By 1957, the Ford Foundation had joined the Population Council and the Planned Parenthood Federation in lobbying American policymakers to pursue more activist public policies at home and abroad. These combined groups helped bring about radical changes in government population policy during the Kennedy and Johnson administrations. See Critchlow, "Birth Control, Population Control, and Family Planning," 8-11; and James Reed, "The Birth Control Movement Before Roe v.
Poverty, granted the first funds to support domestic family planning programs. The next year, when the Medicaid program passed Congress, it also permitted states to treat family planning as a reimbursable service.10

The first family planning funds under Johnson’s War on Poverty came to the Planned Parenthood affiliate in Corpus Christi in December 1964—a total of $8,000. Government officials anticipated negative reaction by community residents, primarily Roman Catholics, but low-income women came in large numbers to obtain services and no negative reaction occurred. After this “trial run,” the Office of Economic Opportunity soon declared family planning services to be “a high priority” and began making substantial funds available nationwide for these services. With the OEO funding a number of health departments, hospitals, and newly created community action agencies became service providers, and several additional Planned Parenthood affiliates were founded in Texas as well.11

This new policy orientation also extended to directives issued by the Department of Health, Education and Welfare (HEW) in 1966. HEW directives provided guidelines

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10 C. Thomas Dienes, Law, Politics, and Birth Control (Chicago: University of Illinois Press, 1972), 265-268. According to Dienes, the initial crack in the wall appeared in 1958, when the Draper Commission, appointed by President Eisenhower, issued its report on foreign aid containing a recommendation favoring increased governmental attention to birth control. Catholic reaction was clear and negative, and Eisenhower subsequently repudiated the policy. However, the widely publicized controversy had brought the issue out in the open. The Kennedy administration was more favorable to increased governmental activity in family planning, although its support of family planning programs and reproductive research was quiet and subtle. But it was during the Johnson administration that government intervention really began. Johnson clearly expressed his administration’s support for family planning: “We have a growing concern to foster the integrity of the family and the opportunity of each child. It is essential that all families have access to the information and services that will allow freedom to choose the number and spacing of their children within the dictates of individual conscience.” U.S. Congress, 1966 Hearings on Family Planning, 381. Medicaid, or Title XIX of the Social Security Act, became law in 1965 (PL-89-97, Social Security Amendments of 1965, 42 USC 1396, 1965).

and indicated the general approach of the Office of Economic Opportunity and other agencies engaged in providing subsidized services. Under HEW guidelines, Family Planning programs would be provided with federal support in order "to improve the health of the people, to strengthen the integrity of the family and to provide families the freedom of choice to determine the spacing of their children and the size of their families. Programs conducted or supported by the department shall guarantee the freedom from coercion or pressure of mind or conscience. There shall be freedom of choice or method so that individuals can choose in accordance with the dictates of their conscience."\textsuperscript{12}

In 1967 the administration pressed the population issue further. Johnson created the new position of Deputy Assistant Secretary for Population and Family Planning and appointed Katherine Brownell Oettinger, former head of the Children’s Bureau, as its head. That same year Congress passed the Foreign Assistance Act (1967), earmarking $35 million for family planning, and specifically allocated OEO funding for domestic family planning. At the same time, Congress passed the Social Security Amendments of 1967. Proposed by Congressman George Bush (R-Tex.), the act required that not less than 6 percent of total federal appropriations for Maternal and Child Health Services was to be spent on family planning services. States were not only required to make family planning available to adult recipients, they were allowed to grant family planning funds

\textsuperscript{12}Ibid., 267. Dienes cites a U.S. Department of Health Education and Welfare, \textit{Report on Family Planning} (September, 1966). See also Critchlow, "Birth Control, Population Control, and Family Planning." 11-12. Johnson pressed ahead with his program despite warnings from HEW Secretary Anthony Celebrezze that the publication of the regulations would "arouse widespread controversy." Catholic bishops did protest, but backed down after learning that HEW and OEO program grants excluded unmarried women or women not living with their husbands.
to private organizations including Planned Parenthood. The shift in federal policy that occurred in 1967 received widespread bipartisan support.\textsuperscript{13}

Guttmacher capitalized on the favorable climate in Washington by establishing the first Planned Parenthood office, complete with lobbyists, in the nation’s capital. Within a few years the office became an autonomous research institute, the Center for Family Planning Program Development, and after Guttmacher’s death in 1974 it was renamed the Alan Guttmacher Institute. Its scholarly research uncovered some sobering facts about the gap between the need for birth control among American women and the services available to them. In the mid-1960s the institute’s director, Frederick Jaffe, and his staff conducted research and found that across the nation, 4.5 million sexually active American women who needed and wanted to avoid pregnancy had no access to family planning services because they could not afford private care and no affordable source of services was close by.\textsuperscript{14}

The Planned Parenthood Federation made this finding the basis of a nationwide campaign, calling for a wider choice of services for women at all income levels, not just through Planned Parenthood affiliates, but at public and private hospitals, clinics, welfare offices and other health care facilities. The goal was to make access to family planning universal, and to give poor women the freedom from unwanted pregnancy that affluent and middle-class women had. By the end of the decade it seemed the goal was near


\textsuperscript{14} A Tradition of Choice: Planned Parenthood at 75, 58.
realization: Title X of the Public Health Service Act was signed into law by President Richard Nixon late in 1970, with considerable bipartisan support.15

Equally important, these policies were implemented at the state level. In 1963 only thirteen states offered some tax-supported family planning programs; by the middle of 1966 over forty states had acted (although the actual number of women served was minimal), and the number of publicly financed birth-control clinics increased from 400 to 700.16 Ironically, James Reed notes, while from 1966 onward the birthrate in the United States was below any recorded for the 1930s (at the height of the Great Depression), the public continued to hear “shrill demands” for even fewer children from baby-boomers competing for scarce jobs. From their point of view, America was still desperately overcrowded.17

By the mid-1960s the idea of birth control for married couples was no longer in conflict with American cultural mores. The redefinition of the population problem and changes in government policy had changed what people viewed as being in the public interest: “a private vice,” as James Reed tells us, “had become a public virtue.” The revolution in public policy concerning human reproduction had other, equally important

15Title X was the first federal legislation specifically designed to expand access to family planning services. In the following three years Congress authorized $382 million for family planning services including research, training, and education. The bill had been sponsored in Congress by then-Representative George Bush (Rep.-Tex.), and provided for universal access to family planning services, regardless of age, economic circumstances or place of residence. It also called for increased support for research into human reproduction, the development of new contraceptive technology and the creation of an Office of Population Affairs to guide and coordinated government population programs. See Dienes, Law, Politics, and Birth Control, 284-292; and Mondy, “Subsidized Family Planning Services in Texas,” 60. The provisions of Title X can be found in PL 91-572, Family Planning Service and Population Research Act of 1970, 42 USC 300, 1970. See also “Bush Presents Bill on Family Planning,” the Houston Post, May 22, 1969.

16Dienes, Law, Politics, and Birth Control, 267. Dienes cites a study by the Information Center on Population Problems, Public Health and Birth Control, Chapter I (no date).

legal ramifications. Beginning around 1965, there was a rapid expansion of the welfare state and of judicially dictated “entitlements,” or rights to public services.\(^{18}\)

In 1965 a case against Connecticut’s Comstock law brought by the Planned Parenthood League of Connecticut came before the Supreme Court. *Griswold v. Connecticut*\(^ {19}\) arose from the fact that, although contraceptives were prescribed and sold in most states, Connecticut’s 1879 Comstock statute still prevented women in that state from obtaining or using birth control. The Connecticut state legislature had repeatedly refused to change the law and the highest Connecticut court had upheld it on the grounds that women had a “workable alternative” to contraception—abstention from sex. As a result, the only way Planned Parenthood of Connecticut could provide services legally was to escort women over the state border to clinics in Rhode Island and New York.\(^ {20}\)

In 1961 Estelle Griswold, executive director of Planned Parenthood of Connecticut, decided with the support of her board of directors to challenge the law. In November of 1961 she and Dr. Charles Buxton, chairman of the Yale School of Medicine’s Department of Obstetrics and Gynecology, opened a birth control clinic in New Haven. They provided services to dozens of women before being arrested and charged with breaking the Connecticut Comstock statute.

In January 1962, in a non-jury trial, both Griswold and Buxton were found guilty and fined $100. Their convictions were affirmed one year later by a three-judge Appellate Court in a unanimous opinion and the defendants appealed to the Connecticut Supreme Court. The state supreme court, however, re-affirmed their convictions in April

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\(^ {18}\)Ibid., 44.
\(^ {19}\)381 U.S. 479 (1965).
1964, and Griswold and Buxton appealed their case to the United States Supreme Court.\(^{21}\)

The landmark case that resulted was decided by the Supreme Court in 1965. Justice William O. Douglas wrote for the majority in striking down the Connecticut statute and stated: "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together, for better or for worse, hopefully enduring and intimate to the degree of being sacred."

The state, Douglas concluded, was constitutionally barred from interfering with a married couple’s decision about childbearing and birth control.\(^{22}\)

The decision in Griswold was limited in that it gave only married women in Connecticut access to contraceptive services. But in a more general sense it identified a constitutional right of privacy that no state could violate and barred family planning opponents from imposing legal restrictions on access to services. Finally, it laid the ground for affording the right to safe and legal abortion.\(^{23}\)


\(^{22}\)Griswold v. Connecticut, 381 U.S. 479 (1965), at 481.

\(^{23}\)Unmarried people were not granted the same right until the Supreme Court’s 1972 decision in Eisenstadt v. Baird, 405 U.S. 438 (1972). In this case William Baird, a longtime advocate of birth control and abortion, was convicted in a Massachusetts court for giving an unmarried young woman a package of vaginal foam. Under Massachusetts law only married couples could purchase contraceptives and only from doctors or licensed druggists. The Supreme Court overthrew the statute because it discriminated between married and unmarried people, a violation of the equal protection clause of the 14th Amendment. In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court decision that legalized abortion, Justice Potter Stewart cited the Griswold and Eisenstadt decisions in his concurring opinion. The most comprehensive secondary discussion of these cases can be found in David J. Garrow’s Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade (New York: Macmillan, 1994), 196-269.
Houston in the 1960s

During the decade of the 1960s Houston began to emerge as part of what historian John Boles refers to as "the New South." Industrial growth, low energy prices, low wages and taxes, weak local and state governments, and weak labor unions allowed the economy to boom. Federal funds continued to flow south as they had during World War II, increasing as efforts to land on the moon and American involvement in Vietnam intensified. One major barrier to the South's entering the American mainstream—legal segregation—also began to be dismantled with the passing of the Civil Rights Act of 1964 and the Voting Rights Act of 1965. With the opening of the South came population growth, a corporate boom as national corporations moved to Houston, and greater tax revenues. With prosperity, Houstonians began to address some of the city's problems: poor schools, the lack of hospitals, and inadequate public health programs.²⁴

From the mid-sixties to the early 1970s the Texas economy grew about one-and-a-half times as fast as the national economy and Houston grew at a similarly expansive rate. Much of it was oil-related prosperity; by the 1960s Houston had evolved into the oil-technology distribution center for the world's oil industries. But Houston also prospered as a major retailing center, as energy profits and a burgeoning population created billions in retail sales. The city also diversified its labor force and industry during the decade. The Texas Medical Center became the largest employer in Houston. In

addition, two thousand new manufacturing plants opened in Texas and more than 100,000 jobs were created.\textsuperscript{25}

Waterborne commerce probably did more to stimulate the Houston economy than any other industry. In 1963 the Houston ship channel represented a $2.55 billion investment that employed about 11 percent of Houston’s labor force. It was serviced by six railroads, thirty-two truck line, and 180 steamship lines. During the sixties the Port Authority spent $140 million on improvements; the federal government had also spent about $68 million on the project by 1965. In 1962 the city opened the twelve-story World Trade Center at Texas and Crawford, east of downtown. The $3 million facility provided a focal point for port activity with offices for consuls, exporters, and freight forwarders. With the commencement of war, Houston’s shipbuilding industry flourished again.\textsuperscript{26}

The Houston petrochemical industry, which had grown exponentially after World War II, continued to grow. Chemical sales increased six times between 1940 and 1966 to $5 billion, and Texas became one of the largest chemical-producing states, second only to New Jersey. The industry employed 47,000 people and produced more than 50 percent of the materials for plastics and synthetic rubber in the United States. The natural gas industry also boomed. Demands for natural gas created giants such as Tenneco and Texas Eastern Transmission with billions in annual revenues; by 1966 there were ten major natural gas companies with headquarters in Houston, controlling over 83,000 miles of pipeline.

Railroads declined but were offset by improvements in air travel and highway facilities. The federal interstate highway system, funded during the Eisenhower administration, linked Houston internally and nationally to distant towns and markets.

Trucks and buses offered services not possible for the railroads. By the sixties there were nine bus lines connecting Houston with other cities, carrying thousands of passengers per day. By 1961, there were also 76,000 commercial trucks in Harris county, owned by 270 trucking companies. The construction of streets and improved city planning allowed the transit system to increase its passenger numbers. As Houston's population swelled and more private automobiles came into use, the city was forced to institute a system of traffic control—signal lights, one-way streets, and freeways—but by the 1960s the city had so spread out that public transit was becoming unprofitable and inconvenient. For many Houstonians, private automobiles became a necessity of life (587,000 autos were registered in 1964), and Houston began to experience unprecedented traffic jams and problems of air pollution.27

Public transportation in Houston remained in poor condition, neglected by the city council and carrying a declining number of passengers. In 1966 the company running Houston's bus lines fell in receivership, and another Florida-based company took over and maintained service. The bus system, however, remained in ill condition while officials and more affluent commuters expressed concern over the traffic problem. It lost money steadily, even after the election of Mayor Fred Hofheinz in the late sixties and the reclamation of the system by the city of Houston. Hofheinz nevertheless pushed the city

26David G. McComb, *Houston: A History* (Austin: University of Texas Press, 1981), 121-130. A 1975 study conducted by the University of Houston reported that one-third of the money generated by the city was port related.
toward the use of buses since Houston was too spread out for any other economical arrangement.\textsuperscript{28}

As Houston's population pushed past the one million mark, the city continued to grow in territorial size. In 1960 Houston moved to absorb fifty square miles around the future Intercontinental Airport and annexed Clear Lake. These were fortuitous moves. In 1961 Vice-President Lyndon B. Johnson, who was chairman of the National Space Committee, and James Webb of NASA announced the location of a new $60 million space center twenty-two miles southeast of Houston—now known as the Johnson Space Center. Within five years the Center was staffed by almost 5,000 personnel and had a payroll of $50 million.\textsuperscript{29}

In 1960 Houston entered the major leagues when K.S. "Bud" Adams successfully the Houston Oilers football team. Two years later, Houston acquired a baseball franchise, the Colt .45's (the name changed to the Astros in 1964). Of course, the teams needed an arena to play in, and in 1965, the Astrodome was completed—a $45 million, air-conditioned stadium funded by bond issues, the city and state, taxpayers, and the Houston Sports Association.\textsuperscript{30}

With population growth came another urban problem: crime. By the 1960s Houston had a high murder rate and an understaffed police force, a distinction it retained throughout the decade. In 1966, the city possessed on 1,342 policemen, less than one


\textsuperscript{29}McComb, \textit{Houston: A History}, 141-143. The selection of Houston for the space center was a choice piece of Texas politics. In 1961, Morgan Davis, president of Humble Oil, and George R. Brown, who was both a principal in Brown and Root and chairman of the Board of Trustees at Rice University, gave a 1,000-acre tract of land to Rice. Later that year, when the NASA inspection team visited Houston, Rice promised to donate the land to NASA for the location of the new space center. When Vice President Johnson made the announcement a month later, in September of 1961, he also announced that Rice would receive $192,000 in grants for research programs on space problems. Brown and Root became the major architectural and engineering contractor for the project, estimated at $125 million in 1962.
policeman per 1,000 Houstonians, and by 1967 Houston ranked fourth in the nation in the per capita murder rate, behind Cleveland, Dallas, and New Orleans. The highest crime rates were reported in ghettos, such as Houston’s Fifth Ward (and at Houston’s three thousand taverns). A 1961 study of crime conducted by Texas Southern University Professor Henry Allen Bullock noted the relationship between geography and homicide in Houston. Bullock found that 62 percent of the assailants were black, 61 percent of the victims were black, and most crimes occurred on the weekend. Blacks at the time made up only 19.5 percent of the population. The causes, according to Bullock, were uncontrolled, rapid expansion, segregation, drunkenness, and lenient juries. Juries, he said, were callous toward murder because it affected largely a politically impotent minority and because Houston’s conservative culture insisted on low taxes and a frontiersman’s philosophy of self-help for survival. And, while Houston spent more of its budget on police and fire protection than most other Texas cities, it still had the highest increase in crime. A murderer had a 1-in-5 chance of escaping punishment.31

Though Houstonians continued to ignore it, the problem of a lack of low-cost housing continued to exist. The Houston Economic Opportunity Organization reported in a detailed study of the Settegast area in northeast Houston—an area of 1,545 homes and 7,000 people, 99.9 percent black—that poor neighborhoods were characterized by open sewage ditches, houses in disrepair, unpaved streets, no city water, rats that outnumbered inhabitants, lack of indoor plumbing (many people still had outhouses), polluted wells, and water shortages. In 1967 the Houston Housing Authority operated only 2,500 low-cost housing units while 21,000 families lived in substandard housing. Nevertheless,

30McComb, Houston: A History. 186-188.
attempts to qualify for federal housing funds failed in 1969, and there was little change over the decade.\textsuperscript{32}

The Houston Independent School System, which completed desegregation in 1966-67 after many fits and starts, suffered significant decline during the decade as a result of "white flight." As the number of white students in HISD schools declined, the school system became a "black majority system," with more black students than white and Hispanic. The total number of students also declined by more than forty thousand over the next decade. Simultaneously, student test scores declined, falling below national averages throughout the 1970s.\textsuperscript{33}

Despite these problems, the official walls of segregation in Houston continued to crumble. In the spring of 1960 black student from Texas Southern University began a series of sit-ins at lunch counters in grocery stores, dime stores, and the City Hall cafeteria, to force equal service. Weingarten grocery executives closed their lunch counter, and the other refused to serve the black students; but Foley's chief executive Max Levine quietly desegregated the department stores' food service, followed later that year by City Hall. In 1962 U.S. Judge Joe Ingraham ordered desegregation of county parks, and Mayor Lewis Cutrer ended discrimination in all city-owned buildings. A year later Cutrer ordered city swimming pools open to everyone. Blacks also began to move outside neighborhoods like the Third Ward in search of better housing, causing white flight from areas south of downtown.\textsuperscript{34}

\textsuperscript{32}Feagin, \textit{Free Enterprise City}, 240-248; McComb, \textit{Houston: A History}, 162.
\textsuperscript{33}McComb, \textit{Houston: A History}, 168. Tests revealed in 1980 that one-third of HISD students failed the requirement of minimum basic skills.
At the same time, philanthropy greatly enhanced higher education and medical services in Houston. Huge gifts to the University of Houston from men like oil tycoon Hugh Roy Cullen, foundations such as the M.D. Anderson and Jones Foundations, along with state support, kept the city's university from failing before they could increase enrollment and earn tuition and fees sufficient to meet budgets. Monroe D. Anderson, one of the founders of Anderson, Clayton and Company, and his M.D. Anderson Foundation, essentially created the 200-acre Texas Medical Center, which would ultimately house institutions such as the Texas Children's Hospital, the new Hermann Hospital, Methodist Hospital, St. Luke's Episcopal Hospital, the Jesse H. Jones Medical Library, Ben Taub Hospital, Baylor College of Medicine, M.D. Anderson Hospital, a University of Texas Medical School, the University of Texas Dental School, and the University of Houston College of Nursing. These generous philanthropists could not guarantee good medical services for all of Houston's inhabitants, however. Tuberculosis remained a constant problem; an encephalitis epidemic struck in 1964, leaving thirty-two dead; and venereal disease continued to spread at an alarming rate.35

Health services for the poor continued to be inadequate. The city's charity hospitals, Jefferson Davis and Ben Taub, were poorly staffed, filth-ridden, and were incubators for disease. In 1957 babies at Jeff Davis began to die at the hospital under unusual circumstances, which later turned out to be staphylococcus infection caused by unsanitary, overcrowded conditions. The hospital subsequently lost its AMA accreditation; it would not regain it until 1961. Ben Taub, which opened its doors in 1963 ostensibly to ease overcrowding at Jeff Davis, was almost immediately beset with

the same difficulties. Social workers and hospital volunteers roundly criticized the
two hospitals for their filth, overcrowding, and poorly paid staffs. Hospital officials
dismissed their criticisms as excessive, but when city councilman Bill Elliott roamed Ben
Taub unnoticed in an orderly’s gown, he corroborated the description of conditions. 36

Despite the booming Houston economy and the growing affluence of many of its
residents, then, public services in Houston continued throughout the decade to be a major
problem. Particularly in inner-city areas, unpaved roads and aging streets, bad lighting,
inadequate water and sewer systems, and substandard police and fire services continued
to plague the area. Yet, as one local official noted, “this city doesn’t want to pay more
taxes, period!” 37 What he meant was, middle-class and wealthy Houstonians were
unwilling to pay more taxes for public services, especially charity services for the poor.
Consequently, the needs of Houston’s poor and minority populations were often unmet.
Health care, in particular, was sorely lacking for the city’s indigent and continued
throughout the decade to constitute one of its most glaring deficiencies. It was that
deficiency that Planned Parenthood of Houston sought to address for one important
minority segment of Houston’s poor: women.

36 McComb, Houston: A History, 178-182. One volunteer hospital worker, teacher and Quaker, Jan de
Hartog, described the conditions at Jeff Davis and Ben Taub in 1964 as follows: “When the wards get
really quiet at dead of night, they [the cockroaches] come out in search of food. That’s when the cursing
and thrashing starts. Patients who can’t defend themselves start to scream; the cockroaches try to get
underneath their bandages; they go for the blood, you see.” Jan de Hartog’s book, The Hospital, was
published in 1965. The central problem at the charity hospitals was lack of money. The city council,
county commissioners, the Harris County Medical Society, and the people of the city and county on several
occasions defeated measures to establish a hospital district with the power to tax. Ultimately, in November
1965, the hospital district was created and the problem was (temporarily) resolved.
37 Feagin, Free Enterprise City, 226.
Planned Parenthood of Houston and the Counter-Culture: 1960s

Planned Parenthood of Houston entered the sixties prepared to reap all the benefits of change. During the 1960s the accomplishments of the local affiliate matched and often surpassed those of the Federation. By 1964 the Houston affiliate was accepted in many quarters and was a positive force for change in the community. It served as the administrative head for nine other state affiliates, its regional policy-making body, and as leader in educational programs and clinical services, as well as a testing ground for new contraceptives. The center's director, Grace Buzzell, and the PPH Board of Directors had established specialized clergymen's, fundraising, medical advisory, volunteer and public relations committees and forged ties with city social services providers, public hospitals, and the Houston Independent School District (HISD), all of which clamored for Planned Parenthood's services. As Houston's philanthropists, civic leaders, and officials increasingly worried about the world population explosion and the burgeoning population of the Bayou City, they became more willing to support agencies like Planned Parenthood in their efforts to stop the cycle of poverty among poor white, black, and Hispanic women caused by large families and lack of education.

Changes in public attitudes and new, dependable contraceptive technology helped open the door to Planned Parenthood's expansion. With the advent of the birth control pill, the number of women seeking contraceptive services at Planned Parenthood increased dramatically. In August 1960 the Planned Parenthood Federation of America (PPFA) approved the contraceptive pill Enovid for distribution by the affiliates, and PPH began dispensing them to patients soon after. The Pill was offered only to women who
requested it, upon the recommendation of a staff physician. An explanation of the
Pill's function, availability, and national PPFA endorsement was given local newspaper
coverage, so that women were informed before their visits. The number of women
coming to Planned Parenthood for Pap-smears—cervical cancer tests—also increased
from a few hundred in previous years to over two thousand in 1961, as information about
women's health and Planned Parenthood's services was covered in local papers and
through PPH educational mailings.39

Inexpensive clinical services were the most important aspect of Planned
Parenthood's mission and the greatest contributor to its success. From the outset,
Planned Parenthood's founders had been determined to provide services to poor women
who could not afford private doctors or contraceptives, regardless of their ability to pay.
In order to do this they had subsidized the costs of the clinics themselves and sought
private donations to meet the bills for medical and contraceptive supplies. But as the
number of women seeking Planned Parenthood's services increased dramatically, and as
services expanded to include counseling and education, funding became a problem. The
board had to find ways to increase its base of financial support.

One of the ways Planned Parenthood's board combated increasing expenses was
to ally with pharmaceutical companies, to use their products in Planned Parenthood's
clinics in return for reduced prices on medical supplies. In 1964 Planned Parenthood
participated in a two-year clinical test of the Enovid and Enovid "E" birth control pills

381964 was the first year official minutes were kept.
39"Birth Control Pills Totally Effective, Dr. Tyler Says," the Houston Chronicle, March 3, 1962; "Sees End
of Birth Control Holy War," the Houston Post, February 1, 1961. The Post article is an interview of Cass
Canfield, President of PPFA and Chairman of Harper & Brothers Publishing Company in New York, on
the Pill. See also unpublished History of Planned Parenthood, which notes the beginning of Enovid
dispensing at PPH.
conducted by the Searle Laboratories. Planned Parenthood received $400 per month for participating in the test and a low-priced supply of the pills; these savings were passed on to the clinic’s patients.  

PPH formed a similar alliance with the Ortho Pharmaceutical Company to supply IUD’s and birth control pills at reduced cost to Planned Parenthood in return for on-site clinical studies. PPH began offering IUD’s to its patients in 1964, and by 1966 the IUD had become the favored method of birth control among Planned Parenthood’s doctors. In that year the 1 mg. Ovulin birth control pill became available and Planned Parenthood of Houston again conducted a clinical study with three hundred patients in exchange for cheaper pills. But as the variety of contraceptives increased and Planned Parenthood successfully introduced them to the women of Houston at reduced prices (or none), the number of women coming to the clinic for contraceptives doubled. One PPH board member noted, “a reduction in [the] price [of contraceptives] means an increase in caseload.”

At the same time, Planned Parenthood’s leaders sought alliances with Houston’s public hospitals and city welfare organizations to provide birth control information and contraceptive services to indigent women. In January 1964 the PPH Board of Directors wrote to Ben Taub seeking permission to initiate birth control services in its Ob-Gyn clinics and in those of Jefferson Davis Hospitals. On February 10 the administration of Ben Taub agreed, but only on the condition that the services were kept in strictly secret confidence. The program began March 2, with one nurse and four volunteers (two in

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42PPH, Minutes, February 21, 1966. The IUD offered at PPH was the Margulis coil, an Ortho product, which consisted of a tiny piece of plastic coil.
43PPH, Minutes, April 19, 1966. The 1 mg. Ovulin pill was also developed by the Ortho Pharmaceutical Company.
each of the hospital clinics). The volunteers provided women with birth control
information and encouraged women who had recently given birth to visit Planned
Parenthood for follow-up exams and contraceptives. One nurse traveled between these
two clinics and six others, doing the “field work,” or providing information, fitting
diaphragms and dispensing birth control pills and other contraceptive devices.45

The County Welfare Department was a more willing participant in Planned
Parenthood’s educational program. By March 1966 county social workers had made 250
referrals to Planned Parenthood and were dispensing birth control information to their
patrons during visits and consultations. Similar educational programs were set up at the
University of Houston, Texas Southern University and Baylor College of Medicine, to
introduce medical students and residents to Planned Parenthood’s services. More
community liaisons followed with Jewish Family Services, the Family Services Bureau
of Houston, the Red Cross, Harris County’s Probation Department, and numerous other
community organizations.46

The Planned Parenthood Board entered into these relationships in the hope that,
ultimately, the provision of services to poor women would be taken up by Houston’s
Public Health and Welfare departments, where they believed it belonged. Then, Board
members hoped, Planned Parenthood could shift its efforts to the loftier mission of
educating people about the need for population control and lobbying in public forums for
universal access to contraceptive services. Unfortunately, this didn’t happen. Even
though public hospitals, schools, jails, and health and welfare agencies called for

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44PPH, Minutes. April 13, 1964.
and November 28, 1966.
increased Planned Parenthood involvement in every community quarter and the number of referrals and new clients increased daily, no public agency offered to assist it with funds. From 1964 to 1968, Planned Parenthood was financially strapped.\footnote{The Board minutes are replete with the comments of worried members about shortfalls in income. See PPH, Minutes, February 10, 1964, March 9, 1964, April 6, 1964, April 13, 1964, June 1, 1964, the Reports of the Annual Meeting, January 1966, February 21, 1966, and especially September 6, 1966, and September 11, 1966, where a deficit of $7,000-7,500 per month (at a time when total expenditures for all clinical services and supplies were between $15,000 and $20,000 per month) was announced. The dependence on private donors was discussed in PPH, Minutes, November 6, 1966. And further budget difficulties were discussed in PPH, Minutes, February 12, 1968, March 11, 1968, April 29, 1968, October 21, 1968, and November 18, 1968.}

Promises of federal monies for indigent women from the Office of Economic Opportunity in 1964 and again with the Medicaid law of 1965 presented a double-edged sword for Planned Parenthood. First, promises of federal money came with strings attached. Congress tied Maternal Health Grants and reimbursement for family planning services under Title X of the Public Health Service Act (Family Planning Services and Population Research) to further expansion of Planned Parenthood’s services, such as breast exams and blood tests—services that Planned Parenthood had hoped would be provided by public health authorities and Houston’s Health, Education and Welfare Department. HEW in particular tried to force Planned Parenthood to expand its programs, especially in education and recruitment, to qualify for federal funds.\footnote{PPH, Minutes, March 11, 1968, and April 29, 1968.} Planned Parenthood found itself simultaneously in the hard-won position of “universal acceptance” at the federal level and increased involvement with government agencies, and the unwanted position of subjugation to the very agencies offering funding. This dilemma led Planned Parenthood’s Executive Director, Norman Fleishman, to state in 1968 that “Accepting funds from the Federal Government means regulations and supervision that create problems with existing practices. Present programs are good and
could suffer from bureaucratic supervision. Cooperation with the city has been possible so far but changes in their setup are beginning to the detriment of our program."

Second, the federal money never arrived. Despite PPH's promises to expand services with increased funding and repeated applications over several years for Maternal Health and Family Planning grants through county health agencies, no federal checks came. Yet the promise of federal money motivated Planned Parenthood's Board to open new clinics and expand services beyond its capacity to pay for them.

In order to meet its principal goal of providing low-cost contraceptive services to Houston's poor, Planned Parenthood's Board had to focus on fundraising. A sophisticated network of fundraising committees grew out of its efforts. Committees of women and men formed to solicit donations from their respective sexes. A Commerce and Industry Committee organized to solicit funds from local businessmen. A separate Foundation Committee centered its activities on grant-writing to secure grants from Houston foundations. The annual fundraising drive of one committee was timed to prevent overlap with the annual drive of another, yet fundraising seemed to go on all year. Discussion of ongoing campaigns appeared regularly in board minutes.

From 1964 to the end of 1966 the fund raisers achieved limited results. Donations were disappointingly stagnant and wealthy businessmen remained uninterested in the cause of indigent women. In 1964 contributions totaled $38,000, about enough money to run the agency for two months. In April a mass mailing that cost Planned Parenthood

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49PPH, Minutes, October 21, 1968. In 1969, federal funds had still not arrived, although Planned Parenthood had committed to expanding its programs. See PPH, Minutes, January 6, 1969.
$220 in postage resulted in donations of $115. The Houston affiliate was also affected by the Planned Parenthood Federation of America, which was soliciting money for itself through mass nationwide mailings and confusing donors. In March 1964 the Houston Board registered a formal complaint with the Federation objecting to its solicitation of local donors. The Board especially resented New York’s obfuscation, since it considered the annual dues it paid to the Federation to be more than enough. This would not be the only occasion on which the Houston affiliate would clash with the Federation over its fundraising activities or dues.52

Part of the problem was that Planned Parenthood was still a controversial cause. For all that PPH Board and staff kept low profiles and complied with hospitals’ and health clinics’ requirements in order to bring birth control information to low-income women through city health and welfare agencies, Planned Parenthood was nevertheless often looked at as “unfit for polite company” by many healthcare providers and those who opposed birth control. For these people, Planned Parenthood was unwelcome regardless of popular and official demands or the obvious need for its services, its conservative policies (for example, PPH accepted unmarried women under twenty-one years of age for “premarital medical examination and advise on birth control” only if an adult responsible for the girl accompanied her), and the opposition was sometimes influential in imposing its views. In 1962, when the Harris County Medical Society decided to hold its first annual Health Fair, the Society’s Exhibit Committee judged

50PPH, Minutes, June 27, 1966, October 31, 1966, and November 28, 1966, November 13, 1967, and especially September 6, 1967, where one Board member announced with hope that the long-awaited federal funds were still “on the way.”
51PPH, Minutes, April 13, 1964 and June 1, 1964. 
Planned Parenthood too controversial to take part in the fair, and its exhibit was banned. When PPH protested the move, Dr. David Wachsman, chairman of the Society's Advisory Committee, informed the board that "the committee felt the exhibit might not be in good taste because school children would be visiting the fair." An appeal to the medical society's president, Dr. Thomas Royce, for a hearing was refused.\footnote{"Group Protests Ban on Exhibit at Fair," the Houston Chronicle, February 2, 1962, "Planned Parenthood Center Protests Health Fair Exclusion," the Houston Press, February 2, 1962. The PPF exhibit would have included a statement about religious endorsement, a statement summarizing a Gallop Poll in its public approval, and a statement about overpopulation, but Houston's Medical Society was not prepared to accept even that.}

Without the support of generous individual donors, diligent volunteer workers, and allies in its public relations war, Planned Parenthood might not have survived. In 1962 PPH was still operating on an annual budget of $30,000, while serving more than 3,000 patients (at a cost of about $10 per family) each year. After the Pill was publicized, the need and demand for expanded Planned Parenthood services became even more pressing. In 1962 PPH's fundraising committee set its largest goal in history—$50,000—in order to meet the increased demand. Influential members of the community were solicited for donations at fundraising dinners addressed by nationally known speakers, and ultimately, because of their generosity, PPH was able to meet much of the increased demand during 1962-1965.\footnote{One former Board member characterized the Board's fundraising activities in the sixties as "low-key arm twisting." "It was very low key, and the people that were on the development committee just would contact their friends and it was just sort of personal arm twisting. It was done at parties, and so forth. If they were the least bit interested, they'd get a phone call within the week. We started by having dinner parties in private homes that people wanted to see and charging. Their tax dollars. That was our big thing."

Another key player in creating PPH's positive image was Marguerite Johnston, columnist with the Houston Post. Johnston had been writing articles favorable to Planned Parenthood since the 1940s, but in the sixties she increased her efforts to bring
the problems of welfare spending and overpopulation to the public. Throughout
PPH’s fundraising campaign in 1963-64, Johnston published articles rich in facts about
welfare spending in Harris County and the total number of indigent births each year.
Houstonians learned that “relief families” were fifty-six percent larger than average
families; that one child of every four born in Harris County was born into indigent
families; that 40 percent of all bed patients were receiving service in Houston’s charity
hospitals, Jeff Davis and Ben Taub; and that the State of Texas paid around $100,000 per
month to dependent children in Harris County on welfare. These statistics cast Planned
Parenthood’s $50,000 fundraising effort in a reasonable light and made its $10 annual
expenditure per family for contraceptive services seemed both conservative and
desirable. 55

PPH was also aided by increased public concerns about world overpopulation,
which peaked in the mid-1960s and received a great deal of press coverage. By 1963
even the conservative Houston Chronicle was reporting on “successful operations” by
PPH to introduce and distribute birth control pills and other contraceptives in the city’s
poverty areas, and joint PPH-government efforts “to control the population explosion.”
But it was the Post’s Marguerite Johnston who had gotten the bandwagon rolling. 56

To capitalize on the increased public interest in family planning, PPH established
a Speaker’s Bureau, staffed by ten volunteers who carried Planned Parenthood’s message
to civic club meetings, luncheons, churches, and other public forums. At the same time.

55See, for example, “Children of Indigent Make Ever-Large Support Load,” the Houston Post, February 26.
1963; and “That We Prefer Not To Know.” the Houston Post, October 3, 1963.
56“Pill Pushed in Poverty Pockets.” and “The Beginning of Joint Efforts To Control Population Explosion,”
the board joined national and international fundraising drives sponsored by the Planned Parenthood Federation's international division, PP-World Population, to underscore PPH's own efforts to control world population.57

Once the family planning wagon started rolling, it gained momentum. What this meant for Planned Parenthood was an increase in the number of patients seeking services, and higher annual fundraising goals. The year 1966 began well, with donations of $56,000 toward a goal of $70,000 by April, then picked up dramatically with a $20,000 donation by one of Planned Parenthood's most generous benefactors, Susan McAshan.58 Past Board presidents and staff say that, whenever Planned Parenthood could not make payroll, they called on her for help. One long-time staff member noted that "she always made sure the bills were paid." Fundraising Committee efforts also began to pay off. By the end of the year, the Board Treasurer reported that expenses had only slightly exceeded income, and there was money in the bank. By 1965, Board members expressed hope that PPH could double its budget in order to reach more low-income families by means of mobile units and neighborhood clinics.59

In 1967 Planned Parenthood received large grants from Houston's Law and Clayton Foundations, and its financial troubles began to ease. Then, in a surprise move, McAshan informed the board that she intended to underwrite the expenses of every visitor to the clinic. Earlier that year, McAshan had sent her maid to the clinic for consultation, but the would-be client was turned away because she couldn't afford even the minimum payment for the services she needed. When McAshan learned of the

57 Unpublished History of Planned Parenthood.
58 PPH, Minutes, March 21 and September 19, 1966. Interview with Peter Durkin, Executive Director of Planned Parenthood, November 2, 1994; and telephone conversation with Nina Susman, past Board President, November 4, 1994.
incident, she contacted the Board of directors and chastised its membership for failing
to live up to its own promise of providing services for all who needed them, regardless of
ability to pay. She then promised to underwrite the expenses of every visitor to the clinic
so that no one would ever again be turned away. Her generosity enabled Planned
Parenthood to return to its original fee structure of “50 cents-50 cents-50 cents:” fifty
cents for the medical examination, fifty cents for tests, and fifty cents for
contraceptives.  

Planned Parenthood also benefited from the political activism of then-
Representative George Bush (R-Texas), who from 1967 to 1969 was instrumental in
shaking loose federal funds from HEW for Planned Parenthood. He was greatly
interested in Planned Parenthood during those years and wrote supportive letters to the
heads of government agencies whenever the PPH Board requested it. He also brought a
discussion of family planning as part of welfare before the House Appropriations
Committee during its hearings on the Social Security bill. On several occasions Bush
spoke at the organization’s regional meetings and appeared at Planned Parenthood
functions to improve its community relations.

In 1969 Congressman Bush was again instrumental in obtaining the release of
funds for maternal and infant care from a federal grant promised Planned Parenthood by
the City Health Department. In that same year he attended the annual fundraising dinner
given in honor of Dr. Alan Guttmacher, the Executive Director of the Planned
Parenthood Federation, and established and chaired a new committee in Congress--the

59PPH, Minutes (Treasurer’s Report), November 30, 1966.
60PPH, Minutes, September 6, 1967; and OHI, Susan Clayton McAshan, October 23, 1994.
Republican Task Force on Earth Research and Population Control—through which he advocated family planning. He seemed to be everywhere promoting Planned Parenthood and the cause of birth control.⁶²

As fundraising and political support increased for family planning, Planned Parenthood’s leadership became more ambitious. From the middle of the decade onward, PPH was always advancing one step ahead of funding. The Board inevitably voted to initiate services and open new clinics before the money had been raised to pay for them. Beginning with services in Jeff Davis and Ben Taub hospitals, Planned Parenthood’s Board opened new clinics in North Houston, at the North MacGregor Public Health Center, the Riverside Clinic, the Casa De Amigos clinic for Hispanic women, the Ripley House, a community center for poor blacks that included day care and care for the elderly, new clinics at Lyons and Northside (made possible by donations of money and land from McAshan), and a new clinic at Mercy Hospital. At the same time, some worried Board members agitated for withdrawal from Jeff Davis, Ben Taub, and City health centers, in the hope that the city would be forced to continue these services “which are legitimate services of the Health Department.”⁶³

All this ambitious expansion caused tensions between Board members and staff, who were over-extended and lacked the funds to hire new personnel. During the 1965-1969 period, the firing or resignation of executive directors and resignations from the Board were common. Only the hardy survived.

Tensions first appeared in May 1967 when the Board asked for the resignation of Howard Patton, who had been Executive Director since 1965, because of his clashes with Board members and because of his “personal problems.” Patton objected and appealed to the Board to reinstate him, but Board members were adamant. He received two months severance pay and returned to New York.\(^{64}\)

Patton was not the only Executive Director to clash with the Board over policy. His successor, Norman Fleishman, accepted the job of Executive Director in July 1967. By September he was tackling the perennial problems of reaching low-income women, clinic and personnel policies, and legal matters pertaining to clinic programs. But by May of the following year, he was embroiled in a controversy with his staff and the Board that almost led to his resignation.\(^{65}\)

A complex struggle developed between Fleishman and the Medical Director, Fleishman and the Board, and Fleishman and his staff, over a certain Dr. Lilliewood. Lilliewood, a black physician, had refused to insert IUD’s in the manner prescribed by the Medical Director of Planned Parenthood. Several nurses had also reported “problems” with him at the clinic. The Medical Director had requested that Fleishman fire Lilliewood and Fleishman had told the Medical Director to do it himself; in the ensuing conflict, the Medical Director resigned.\(^{66}\)

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\(^{63}\)PPH, Minutes, January 17, 1966 (North Houston), September 19 and October 31, 1966 (Riverside), June 12, 1967 (Casa de Amigos), October 9, 1967 (Ripley House), February 20, 1968 (Lyons and Northside), and March 25, 1968 (Mercy Hospital). And PPH, Minutes, May 19, 1968.

\(^{64}\)Patton came to PPH in June 1965, after the retirement of Grace Buzzell, who had served as director of the Center for nearly fourteen years. Buzzell was evidently the glue that held Board and staff together, because for several years after her retirement, PPH was plagued with personnel problems. There are no surviving Board minutes from 1965, but the unpublished History of Planned Parenthood gives general details about Patton’s hiring and resignation. Interviews with former Board members yielded little additional information.

\(^{65}\)PPH, Minutes, July 1967 and September 11, 1967.

\(^{66}\)PPH, Minutes of the Executive Committee, May 13, 1968.
Fleishman defended Lilliewood before the Board and reported that he had been a great help to him in hiring personnel. When a new position for an educational director in the black community had opened, Fleishman noted, Lilliewood had suggested his wife. Fleishman had been impressed with her and had sent her to various clinics to learn about the organization, practically giving her the job before he had obtained the approval of the Board. When the staff learned that she was being hired, five members threatened to resign, and Board members were enraged.

Fleishman accepted responsibility for his mistake during the Executive Committee meeting and expressed his regret at the difficulties his actions had caused. But Board members were irate. The Medical Director had been allowed to resign, and the staff was up in arms. Fleishman’s “ability to work with the Board” was questioned, and he was castigated for failing to appreciate “the depth of feeling of the Board and staff regarding his actions.”

Fleishman defended himself, saying that his biggest problem was in working with a large group of people such as the Board, and that his haste in some matters had been necessary because of rapid changes in the program in all areas. He pointed out that PPH’s patient load had increased from 4,000 patients in 1963 to over 13,000 in 1967. He also defended his choice of Lilliefield’s wife to work with the black community, saying that minority groups should be better represented at Planned Parenthood. In an interesting aside he blamed the attitudes of staff members for the outcry against her and pointed out that at one time he had considered hiring a Mexican-American, and the staff

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67 Ibid., 4.
had again protested.\textsuperscript{68} The controversy ended and Fleishman remained Executive Director. But the problems he had encountered would resurface. In February 1969 he complained again of "the difficulty of securing executive material from minority groups."\textsuperscript{69} Racism, it seems, was always just beneath the surface.

In theory, the leaders of Planned Parenthood were at the vanguard of equal rights. Board members had voted to desegregate clinics in October 1964 and accomplished total desegregation by December of that year without incident. By 1965 black physicians and nurses treated white patients (except those who objected; they were rescheduled to see a white doctor) and white staff treated minorities. Black, Hispanic and white women attended clinics on the same days during the same hours, and were treated in the same rooms. But in practice, there were very few blacks or Hispanics on the Board or staff of Planned Parenthood. This could not all be blamed, as some blamed it, on the lack of executive-caliber minorities.\textsuperscript{70}

Planned Parenthood had enough problems with fundraising, federal funding, cooperation with local agencies, clinic expansion, staff, executive directors, and Board to keep it embroiled in controversy forever. But in 1969 abortion was added to the list and the stakes rose exponentially. Abortion issues surfaced, raised in the January 1969 Executive Committee meeting by Fleishman and the chairman of the Clergy Committee, Reverend Reese. For the first time, the Houston Board decided to take a stand on the controversial issue of abortion and sterilization.\textsuperscript{71}

\textsuperscript{68}Ibid., 3. The Board was quick to state that if any staff member wished to quit because of the race of a new employee, then that staff person should be replaced.
\textsuperscript{69}PPH, Minutes of the Executive Committee, February 18, 1969.
\textsuperscript{70}PPH, Minutes, October 5, October 19 and December 7, 1964; telephone conversation with Nina Susman, November 4, 1994.
\textsuperscript{71}PPH, Minutes of the Executive Committee Meeting, January 21, 1969.
The immediate cause for concern was a statement made by the Planned Parenthood Federation of America earlier in January 1969 calling for liberalized abortion laws throughout the country. Houstonians questioned where Planned Parenthood stood on the subject. Planned Parenthood’s Medical Director, Dr. John Moore, stated that he believed in therapeutic abortion; he was also Chairman of the Abortion Board at Methodist Hospital. At the time, Texas law allowed abortion only if the mother’s life was threatened. Fleishman realized that he had to exercise care in calling for liberalized laws, but he was also aware of the problems caused by Rubella, thalidomide, and pregnancies resulting from incest and rape.\(^2\)

The Board stated its policy on abortion and sterilization on May 29, 1969. Committee members used a press release from the American College of Obstetricians and Gynecologist in drawing up its statement. With regard to abortion, it stated, therapeutic abortions should be provided when continuation of a pregnancy threatened the life of the woman or would seriously impair her health; when pregnancy had resulted from rape or incest; or when pregnancy would likely result in the birth of a child with grave physical deformities or mental retardation. On sterilization, the Board ruled, *involuntary* sterilization should be performed only when a court of competent legal jurisdiction had ruled it necessary, for example, in the case of a mentally incompetent person. The Board did not make a press release on these opinions, but made them “freely available” to anyone who requested the information.\(^3\)

\(^2\)Ibid., 2. Abortion was not a new topic in 1969. As early as 1964, Dr. Alan Guttmacher, president of PPFA, had been calling for changes in abortion laws. And in 1966, the PPH Board had voted unanimously in favor of liberalization in abortion laws. See unpublished History of Planned Parenthood.

\(^3\)PPH, Minutes of the Policy and Expansion Committee Meeting, May 29, 1969.
In July 1969 the Board addressed the subject of abortion referral, again at the request of the Executive Director. In an Executive Committee meeting, Fleishman asked the Board to establish policy as to what action Planned Parenthood staff should take when they received requests for help from patients seeking abortions. Such requests had probably been coming for some time, but the problem of abortion had never been formally addressed. Nor did the Board debate it here. In response to Fleishman’s request, it simply adopted National policy: “As was voted by the National Board, it was agreed that the Houston Center should be able to refer such a patient to the Hospital District, Mental Health Center, or a private psychiatrist for an evaluating interview for the purpose of obtaining a legal abortion if circumstances should allow.” No one mentioned what had been done before the Board adopted this policy.74

This cautious stand on abortion was not surprising considering the makeup of the Board. In 1969 Planned Parenthood’s Board of directors was a conservative body dominated by wealthy philanthropists. Its members were more concerned with “keeping a low profile,” increasing public approval, and obtaining government assistance for its programs than with embracing controversial beliefs and risking that support. Privately, some Board members said that they were against abortion and didn’t want Planned Parenthood to perform them. Physicians on the Medical Committee were equally

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74Ibid., 1. There are numerous secondary sources that deal with illegal abortion and speculate (based upon oral accounts of individual women and studies conducted by family planning agencies) about how abortions were performed before legalization. Most agree that there were informal information networks, usually by word of mouth, to which women who wanted an abortion could turn. The range and quality of these services was varied, and depended mostly upon the price a woman could pay. One recent, excellent contribution to this literature is Kate Maloy’s and Maggie Jones Patterson’s, Birth or Abortion: Private Struggles in a Political World (New York: Plenum Press, 1992), which deals evenhandedly with evidence and oral testimonies and presents a comprehensive picture of illegal abortion throughout the nation.
cautious and perhaps as divided. As long as “abortion on demand” remained illegal, they were not going to endorse it.\(^{75}\)

The Houston clinic was already the subject of Catholic and conservative finger-pointing because it allowed single women access to clinic services and contraceptives. The Board had passed a “don’t ask, don’t tell” policy in November 1964 and discontinued the practice of asking patients their marital status. If a woman volunteered her marital status and she was single, policy was clear: “...unmarried women under 21 years of age, [should be] accepted for premarital medical examination and advised on birth control, [if they were] accompanied by an adult responsible for the girl; unwed mothers having had one pregnancy should be accepted if [they were] not able to get this service from any other source.” In May 1968 this policy was amended slightly to read: “Minors can be served...even if they have never been pregnant, with appropriate parental consent.”\(^{76}\)

In response to what it considered the morally lax policies of Planned Parenthood, the Catholic diocese of Galveston-Houston had opened its own family planning clinics in St. Joseph’s hospital, Houston, and St. Mary’s hospital in Galveston. The clinics began operations in January 1965, for Roman Catholic couples who faced moral, economic and physical problems because of “too frequent and uncontrolled births,” and the clinics were free and open to “all those who have serious and valid reasons for practicing rhythm.” The introduction of the Catholic alternative did not create much of a stir at the

\(^{75}\) I learned this from conversations with a number of Planned Parenthood’s founders at a luncheon October 27, 1994, held in my honor by Nina Susman. Susman, Phyllis Van Kerkbrook, Isabell Turner, Susan McAAslan, Hanni Orton, Selma Neumann and others, all long-time Board members and former Board presidents, all told me that they were against abortion before it was legalized, but afterwards, decided to provide them on request. Several of these women are still on the Board.
December PPH board meeting. Although PPH did not lack white or Hispanic patients, the majority of Planned Parenthood’s clients were black, and few were Catholic.\footnote{PPH, Minutes of the Executive Committee Meeting, November 23, 1964; PPH, Minutes of the Medical Advisory Committee Meeting, November 30, 1964; PPH, Minutes of the Medical Advisory Committee Meeting, May 9, 1968.}

In response to Catholic opposition, the Clergy Committee of Planned Parenthood’s Board became increasingly active. Protestant and Jewish clergy mailed questionnaires to hundreds of their brethren in Houston and held talks and meetings to inform them about the services being provided at Houston’s family planning clinics. Their efforts at first seemed ineffectual. For the first half of 1964 Clergy Committee reports in the Board minutes were depressing, reporting mass mailings without response. But in June the Committee mailed 1,250 more questionnaires and informative pamphlets to clergyman of every denomination, and followed up the letters with telephone calls. By December’s Board meeting the Committee was able to report “good” responses from dozens of clergymen, and also that “a fair number of clergymen have expressed a desire to serve on the [PPH] Clergy Committee.”\footnote{PPH, Minutes, December 7, 1964. Member Selma Neumann quoted for the Board an article that had appeared in the Houston Chronicle. Clinical statistics given for January-April 1964 showed that, of new patients, 333 were Negro, 227 were White and Latin American, and two were Other. Unfortunately, these types of racial breakdowns are rare in the early records of Planned Parenthood, and most of the people I interviewed said simply that the clientele was “mostly black” at the main clinic on Travis street during this period.}

In 1966 the Committee further expanded its activities, holding workshops at health centers, hospitals and community centers, and meeting with Hispanic and black community leaders to inform them about Planned Parenthood’s services and gain their support and cooperation. By 1969 the Clergy Committee had become a force to be reckoned with. Ministers from the poorest areas of Houston’s Fifth Ward had joined its
effort to bring contraception and maternal health services to blacks. Catholic priests were beginning to respond to the Committee’s questionnaires. And inroads were being made into the Hispanic community. In 1969 the Committee began to call for sex education in schools and liberalized abortion laws.79

The 1960s were a period of increased activism and reach in every area of Planned Parenthood’s organization. They were also years of upheaval. PPH was at the forefront of clinical research in contraceptive technology, and its pricing policy guaranteed it a place at the top of the PPFA affiliate list for number of patients served. By 1969 Houston was one of the largest affiliates in the country, in the vanguard of those forging ties with city, county, state, and federal health and welfare providers. Its fundraising apparatus had become successful at soliciting large donations and grants. And its Public Relations group had succeeded in gaining access to radio and television. Its Clergy Committee had done much to build a bridge between Planned Parenthood and the community’s religious leaders. As one Board member noted at a regional meeting, “Houston appeared to be in the forefront in most of the areas of activity discussed.”80

There was still at the end of the decade a very vocal opposition to Planned Parenthood in Houston, especially from the Catholic Church. There was also some ambivalence in the press. The Houston Chronicle published stories about the dangers of birth control and abortion, and limited its coverage of PPH.81 And ambivalence remained within Planned Parenthood’s Board and between Board and staff about abortion. But as

80PPH, Minutes, February 12, February 21, and April 25, 1966, and January 6, January 21, and June 17, 1969.
81Several articles deserve mention. “Abortionist Masquerades as ‘Doctor.”’ Houston Chronicle, June 17, 1964; “Birth Control and the Church,” Houston Chronicle, February 15, 1965; “Trip to Abortionist Ends in
an organization, PPH had arrived. It was no longer part of the counterculture but well
on its way to becoming part of mainstream public healthcare. And it had earned the
dubious distinction of every other agency providing health care to the poor under federal
and local auspices: it had become a bureaucracy.

Blindness.” Houston Chronicle, April 16, 1965; and “The Shady Practitioners of Abortion.” Houston
Chronicle, date unknown.
Chapter 10
The Right of Privacy: Warren, Brandeis, and the Creation of a Right

Nothing is better worthy of legal protection than private life, or, in other words, the right of every man to keep his affairs to himself, and to decide for himself to what extent they shall be the subject of public observation and discussion.
...
The press has no longer anything to fear from legal restriction of any kind, as regards its influence or material prosperity; while the community has a good deal to fear from what may be called excessive publicity, or rather from the loss by individuals of the right of privacy.¹

Nowhere in the United States Constitution, nor in any of the original state constitutions, does the phrase “right of privacy” appear. Scholars of early state and federal statutes and of early-nineteenth-century court decisions make no mention of such a right. Yet the author of a biography of Supreme Court Justice Louis Brandeis declares, “After all, concerns for privacy in part motivated the American Revolution; and there could be no doubt that protection of privacy was a central concern of the populace.” Another author on the subject of privacy maintains that, “It was fear of government intrusion and a determination to guard their privacy that led to the Bill of Rights.” As sweeping as these statements may seem, Justice William O. Douglas in the landmark decision involving privacy as a protected right, Griswold v. Connecticut, wrote in an opinion for a sharply divided Supreme Court: “We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.”²

²This paper draws upon the work of a number of legal historians who sought to pinpoint the origin of the right of privacy and also to define that right. Periodical articles include William L. Prosser, “Privacy,” 48 California Law Review (1960), 383-423; Thomas H. O’Connor, “The Right to Privacy in Historical
Not all legal scholars agree with these conclusions. Leonard Levy in *Origins of the Fifth Amendment* disputes those who attribute to the framers of the Bill of Rights any clearly defined notion of individual rights, much less a right of privacy. And a number of scholars claim that privacy as a right is a strictly twentieth-century phenomenon. The truth of the matter seems to lie somewhere in the middle.\(^3\)

In 1888 Thomas Cooley, in his famed *Treatise on Torts*, provided the most often quoted definition by succinctly describing privacy as “the right to be let alone.” But his definition proved to be too simple for scholars. Alan Westin complained in his book *Privacy and Freedom* that “few values so fundamental to society as privacy have been left so undefined in social theory or have been the subject of such vague and confused writing by social scientists.” Westin attempted to fill the void by defining privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others.” His broad definition

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was in turn criticized by other scholars for “confusing through oversimplification.”

Even Oscar Ruebhausen, who wrote the foreword to Westin’s book *Privacy and Freedom*, conceded that defining privacy had become “part philosophy, some semantics, and much pure passion.”

Numerous scholars point to an article written in the 1890 *Harvard Law Review* by Samuel Warren and Louis Brandeis as the first attempt at a “comprehensive” definition of the right of privacy. In “The Right to Privacy,” Warren and Brandeis developed the concept of privacy as a remedy for invasions of personal privacy by the press and helped bring it to acceptance as a right. Apparently irked by the *Saturday Evening Gazette’s* prying coverage of his wife’s lavish tastes in entertainment, Samuel Warren urged his law partner Louis Brandeis to join him in writing a treatise advocating the right of privacy in equity. Arguing that “the individual shall have full protection in person and in property is a principle as old as the common law...,” they admitted that early courts protected only “physical interference” but contended that the right to life eventually broadened to include “the right to enjoy life—the right to be let alone.” Now, they complained, “instantaneous photographs and newspaper enterprise have invaded the sacred precincts

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4 Thomas M. Cooley, *A Treatise on the Law of Torts*, 2d edition (Chicago: Callaghan, 1888), 29. Westin, *Privacy and Freedom*, 7; foreword by Oscar M. Ruebhausen, at p.x. Another of Westin’s critics was Louis Lusky, in “Invasion of Privacy: A Clarification of Concepts,” 72 *Columbia Law Review* (1972), 696. A few years prior to the publication of Westin’s book, the noted Constitutional historian William F. Beard had also decried the lack of a “comprehensive definition in law of the right of privacy.” Beard argued that Justice Douglas had over-defined the right by embracing “all rights of conscience among the various protected interest included in the right to privacy.” Beard further complicated the matter by offering in a scholarly article, “The Right to Privacy and American Law,” 31 *Law and Contemporary Problems* (1966), 254-255, another definition for the right. He divided it into three parts by the extent to which a person or a group of people interact with someone to (a) “obtain or make use of his ideas, writings, name, likeness, or other indicia of identity, or (b) obtain or reveal information about him or those for whom he is personally responsible, or (c) intrude physically or in more subtle ways into his life space and his chosen activities.” This definition was criticized by other scholars for contributing to “an amorphous concept” of the right. One author, Don Pember, in *Privacy and the Press* (Seattle: University of Washington Press, 1972), at pp. vii and ix, argued that privacy, “if such a right does indeed exist, is narrow and should be seen as a limiting force upon the government rather than controlling action between individuals.”
of private and domestic life...” Protection from this, “numerous mechanical devices.” and other “evils under consideration,” they urged, could be had not by proving injury as in property cases, but by appealing to the right of privacy. Relying heavily upon a single British case, *Prince Albert v. Strange*, the authors declared that “the existing law affords a principle which may be invoked to protect the privacy of the individual from invasion.” They concluded that “the common law has for a century and a half protected privacy in certain cases and to grant the further protection now suggested would be merely another application of an existing rule.”

The increased recognition of the right of privacy that followed the publication of their article brought praise for Warren and Brandeis as the originators of a new legal right. But court rulings supporting privacy as a right did exist before Warren and Brandeis published their article. As one scholar has noted, the Supreme Court has in fact “rarely vacillated in its stand upholding privacy as a protected right.” And, although occasionally inconsistent, “the state courts had wrestled with the question for decades prior to the Warren and Brandeis treatise.” While the Supreme Court had confined its nineteenth-century rulings on privacy to Fourth and Fifth Amendment questions, the state courts had dealt with it in equity.

In 1849 in a landmark British equity case, the case heavily relied upon by Warren and Brandeis, *Prince Albert* had pleaded that stolen etchings made by Queen Victoria and him should not be published without his and the Queen’s personal permission. The deciding judge specifically declared that “privacy is the right invaded” and issued the first injunction in Anglo-American jurisprudence protecting the right *per se*. In 1888 the

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British followed this precedent by issuing an injunction against selling a photograph declaring that if the person pictured objected to having the photograph exhibited or sold, property ownership of the photograph did not matter—that is, protection of privacy took precedence over property rights.\(^7\)

American courts followed suit. The New York Court of Equity, which had ruled in 1842 and again in 1848 that private letters could be published without permission if the plaintiff could not show that they were of literary value, quickly overruled itself in 1855 and enjoined the publication of letters “of no literary value” in order to protect the writer “against pain and humiliation.”\(^8\) In a Massachusetts case the state court refused to enjoin publication of a picture and an unauthorized biography of a man named George Corliss. But the court pointed out that Corliss as an inventor had chosen to become a public figure, “thus forfeiting rights which a private person would retain.”\(^9\)

Other states found a right of privacy in natural law. A Missouri court declared that privacy “is an old right, with a new name.” New Jersey ruled that privacy, “having its origin in natural law, is immutable and absolute, transcends the power of any authority

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\(^7\)Prince Albert v. Strange, 1 MacN. & G. 25 (1849), 41 Eng. Reprint 1171. And Pollard v. Photographic Co., 40 Ch. Div. 345 (1888). In Pollard, the plaintiff employed the defendant, a photographer, to take her photograph for a certain price. Later she discovered that her picture was being exhibited in the defendant’s shop window in the form of a Christmas card. She brought a bill for an injunction to restrain the defendant from exhibiting or selling the copies of her photograph. Cited in Basil W. Kacedan, “The Right of Privacy,” 12 Boston University Law Review (1932), 353-395, at 362-364.


\(^9\)Corliss v. E.W. Walker Co., 57 Fed. 434 (1892); cited in Prosser, “Privacy,” 385; Kacedan, “The Right of Privacy,” 383-384, and Gossweiler, “The Right of Privacy,” 7. A similar case involving the inventor Thomas Edison occurred in 1907. Edison sold a medicinal preparation to someone who then organized a corporation and began to manufacture the medicine and to advertise it by using Edison’s name, picture, and a forged certificate—of course, without his consent. When Edison went to court to restrain the use of his name and picture, the court issued an injunction on the ground of protecting the property rights of the plaintiff and added that there were limits to the right of privacy that a public figure could claim. See
to change or abolish it.” And judges in Indiana held that, in the absence of a state law on privacy, it was protected “by natural law and the Federal and Indiana Constitutions.” As Carl Gossweiler notes after documenting scores of state cases dealing with privacy, in none of these did the judges cite specific American or British tort cases in which privacy was protected prior to the 1840s. “It was simply assumed over time that privacy was a protected right.”

One of the first American cases to mention the right of marital privacy was that of *Grigsby v. Breckinridge*. In this case a woman named Virginia Hart had on her deathbed given a number of confidential letters which she had received during her first and second marriages to her daughter, her only child from her first marriage. Her second husband, who had written some of the letters, brought a bill to enjoin the publication of any of the letters and to have them returned to him. The court enjoined the publication of the letters written by the plaintiff, but dismissed the petition as to all the others. The opinion is interesting because of the court’s assertion that the relations between husband and wife are entitled to privacy: “If the wife has the right, regardless of his will to dispose of his letters to her...the confidence, delicacy, privacy, and, I may add, sacredness of the connubial relations, may be at [her] absolute disposal.”

After the Warren-Brandeis article was published in 1890, however, a number of state courts flatly rejected the idea of a right to privacy. In Georgia, the state court denied any right to privacy in civil law by stating flatly that “the civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological

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Similarly, in 1902, the trial division of the Supreme Court of New York granted damages to a girl whose picture had been used without permission in advertisements. The Appellate Court sustained the decision in Roberson v. Rochester Folding Box Co., but it was overturned by the Court of Appeals. The majority declared that Blackstone and Kent had never recognized, nor even mentioned, such a right and expressed concern that carrying the arguments for privacy to their extreme would mean that no news could be printed. Michigan courts had taken a similar stance in 1899. Refusing to award damages when a cigar company used a colonel’s picture on their boxes without his permission, the court concluded that “the so-called right of privacy has not as yet found an abiding place in our jurisprudence.”

Three years after the Roberson decision, in 1905, the supreme court of Georgia encountered a similar question in Pavesich v. New England Life Insurance Co., when the defendant’s insurance advertising made use of the plaintiff’s name and picture, as well as a “spurious testimonial” from him. With the example of Roberson before it, the Georgia court in turn rejected the Roberson decision, accepted the views of Warren and Brandeis, and recognized the existence of a distinct right of privacy. This became the leading case. For the next thirty years, William Prosser writes, “there was a continued dispute as to whether the right of privacy existed at all, as the courts elected to follow the Roberson or the Pavesich case.” But the tide was turning in favor of recognition, and the rejecting

\(^{13}\)Roberson v. Rochester Folding Box Co., 171 N.Y. 538, 64 N.E. 442 (1902); cited in Prosser, “Privacy,” 385; and Gossweiler, “The Right of Privacy,” 9. The defendant in this case had made use of a picture of a beautiful young woman without her consent to advertise flour, along with the caption, “The Flour of the Family.”
decisions began to be overruled. By 1960 the right of privacy, in one form or another, was declared to exist by the overwhelming majority of American courts.15

Almost a decade before the Warren-Brandeis article the Supreme Court had also ruled on privacy. In 1881, in the case of Kilbourn v. Thompson, the Court had ruled in favor of a man who had suffered arrest for contempt of Congress and jailed for forty-five days. Kilbourn had refused to answer questions posed to him by a subcommittee of the House of Representatives, in return for which he was arrested and charged with contempt. Upon his release he sued the Sergeant-at-Arms and the Congressional subcommittee. The Court held the Sergeant-at-Arms but not the committee liable. In its ruling the Court stated that the contempt power of Congress was not unlimited and that the Congress of the United States did not possess a “general power of making inquiry into the private affairs of the citizen.”16 Five years later, an importer forced to produce an invoice which the government then used against him in a smuggling trial, also appealed to the high court for redress. In Boyd v. United States, one of the First Supreme Court decisions to interpret the Fourth Amendment, the Court sternly criticized the government for its action in seizing the appellant’s private papers, declaring that “the principles laid down in this opinion affect the very essence of constitutional liberty and security...[T]hey

15Prosser, “Privacy,” 386. Prosser adds that “In nearly every jurisdiction the first decisions were understandably preoccupied with the question whether the right of privacy existed at all, and gave little or no consideration to what it would amount to if it did. It is only in recent years, and largely through the legal writers, that there has been any attempt to inquire what interests are we protecting, and against what conduct. Today, with something over three hundred cases in the books, the holes in the jigsaw puzzle have been largely filled in...” (at 388-389) Of course, Prosser was writing five years before Griswold created an entirely different kind of privacy right. Up to then, “legal writers” had confined their discussion of privacy to invasions of an individual’s solitude or private affairs, negative publicity, appropriation of an individual’s name or likeness, and public disclosure of embarrassing private facts about an individual.
apply to all invasions on the part of the government and its employees of the sanctity
of a man's home and the privacies of life."¹⁷

As one legal scholar has noted, both the praise and criticism of "The Right to
Privacy" proceeded on the assumption—by courts, commentators, and legal historians—that courts had not, prior to 1890, granted relief expressly for the invasion of a right of
privacy. But, he added, Warren and Brandeis deserve neither full credit nor blame for the
law's recognition of privacy as a protectable interest. They did not add a novel right to
the law but instead drew upon some of the established legal doctrines protecting personal
privacy to propose an extension of those remedies against the press. Readers of their
article in 1890, he concluded, would have recognized that the law already afforded many
explicit protections against other invasions of privacy. Not only the home, but
confidential communications and information about individuals were protected; and he
added: "The picture that emerges by 1890 is one of ample and explicit protection of
privacy in its own right."¹⁸

It does, however, seem that a real impetus was given to the development of the
law of privacy by the Warren-Brandeis article. Warren and Brandeis argued that
protection and recognition of the right of privacy was necessary, saying that while the
right had been protected in the past through legal fictions, neither those nor the present
remedies, like actions for libel or slander, were adequate to protect the personal rights of
a person against the wanton or malicious acts of another (where such acts were otherwise

¹⁷Boyd v. United States, 116 U.S. 630 (1886), at 632; cited in "The Right to Privacy in Nineteenth Century
America," 1897; Gossweiler, "The Right of Privacy," 12; and Leebron, "The Right to Privacy's Place in
the Intellectual History of Tort Law." 778. Boyd was heavily cited by the Court in 1961 in the decision of
Mapp v. Ohio. Surprisingly, Warren and Brandeis made no reference to this decision in their article.
¹⁸(author unknown) "The Right to Privacy in Nineteenth Century America," 94 Harvard Law Review
(1981), 1892-1910, at 1893-1894. For contemporary reviews of the Warren-Brandeis article that make this
lawful). They also pointed out that every person is entitled to decide whether something which is his should be given or sold to the public, and that his right of privacy may be lost only when he himself offers his property to the public. The existence of the right of privacy at common law, the principle which protected personal writings and other personal productions, not against theft and physical appropriation, but against publication, was in reality not the principle of private property but that of and "inviolate personality." 19

Warren and Brandeis also contended that the law of contract, trust or confidence, which might have offered sufficient protection to the right of privacy up to this time, was no longer adequate, since the latest advances in photography had made it possible to take someone's picture surreptitiously, and the theory of contract would not apply against a stranger. "We must therefore conclude," they wrote, "that the rights, so protected,...are not rights arising from contract or from special trust, but are rights as against the world: and, as above stated, the principle which has been applied to protect these rights is in reality not the principle of private property...The principle which protects personal writings and any other productions of the intellect or of the emotions, is the right of privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise." 20

At the same time, the authors did not advocate an unrestricted right of privacy. Recognizing that a person would have to give up some of his rights to the public, as part of living in society, they proposed the following five limitations on the right of privacy:

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19 The Right to Privacy, 51 Nation (1890), 496; 17 Life (1891), 4; and 9 Scribner's Magazine (1891), 261.
20 Ibid., 211, 213.
1. The right of privacy does not prohibit any publication of matter which is of public or general interest.

2. The right of privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel.

3. There can be no relief for the invasion of privacy by oral publication in the absence of special damage (i.e., no relief for slander—as opposed to libel—unless plaintiff can show “special damage” Warren and Brandeis believed that the damage which could be caused by “oral publication” would be so “trifling” as not to merit judicial relief).

4. The right of privacy ceases upon the publication of the facts by the individual, or with his consent.

5. The truth of the matter published or absence of malice does not afford a defense in an action for violation of the right of privacy.\(^{21}\)

In short, Ken Gormley notes, because there was nothing resembling an explicit notion of privacy in tort law in 1890, Warren and Brandeis pieced together a patchwork of cases to demonstrate that a “tort-like notion” of privacy had come of age in America through the evolution of the common law. And he adds, “what they did, in fact, was to serve as a catalyst for the evolution of the process themselves.”\(^{22}\)

\(^{21}\)Ibid., 214, 216, 217, 218.

\(^{22}\)Ken Gormley, “One Hundred Years of Privacy,” 1992 Wisconsin Law Review, 1335-1441, at 1345. Gormley follows the development of five different “species” of privacy law: (1) the privacy of Warren and Brandeis (tort privacy); (2) Fourth Amendment privacy; (3) First Amendment privacy; (4) fundamental decision privacy; and (5) state constitutional privacy. But in this paper I am only delving into two of these areas: tort privacy and Fourth Amendment privacy. I am only touching upon fundamental decision privacy in Griswold, because I would like to reserve that discussion for the second half of my privacy chapter. As Gormley demonstrates convincingly, each type of privacy law developed differently, and while these developments are all fascinating, I do not have time to discuss them in this paper.
One legal historian maintained that the inspiration for the article had been the unwanted publicity given the wedding of Warren's daughter shortly before the article was written. While this view has been discredited, another scholar writes that two other events of 1890 did play a role in motivating the article. One was the decision in June by the Supreme Court of New York in Manola v. Stevens, a case involving flash photographs taken of an actress appearing in a Broadway theater. The case was apparently regarded as sufficiently important and interesting to appear in the New York Times. Surreptitious photographs seem to have been matters of widespread concern, not a peculiar fascination of Warren and Brandeis. The other 1890 event apparently motivating the article was the appearance in July of an article by E.L. Godkin in Scribner's Magazine entitled "The Rights of the Citizen—To His Own Reputation." This was fourth in a series of articles entitled "The Rights of the Citizen." Godkin's article concluded with a discussion of privacy that invoked Coke's famous dictum "A man's house is his castle." But, while Warren and Brandeis acknowledged the contribution of Godkin's article, they did not note that Godkin had published the same argument in an essay published a decade earlier.23

The immediate reaction to the Warren-Brandeis article was mixed. The authors' argument that privacy had roots in common law did not receive immediate support. In

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23David W. Leebron, "The Right to Privacy’s Place in the Intellectual History of Tort Law," 41 Case Western Reserve Law Review (1991), 769-809, at 774-776. The case of Manola v. Stevens was not reported, although it was discussed by Warren and Brandeis ("The Right of Privacy," at 195). Godkin's articles can be found in 7 Scribner's Magazine (1890). His earlier article, "Libel and Its Legal Remedy," is quoted at the beginning of this paper and can be found in 12 Journal of Social Science (1880), 69. The late nineteenth century, it should be remembered, was the high point of "yellow journalism" in the U.S. Not only had newspapers adopted sensational new practices to sell papers on the street, but journalism as a profession had been completely overhauled in the 1870s. Newspapers were printed for the growing market of barely-educated, immigrant masses in the large cities. "Keyhole journalism" had led to increasing intrusions of the press and photographers into the privacy of the homes of people. The result of the upheaval in American journalism, as it relates to privacy, is apparent.
fact, another legal scholar, Herbert Hadley, quickly challenged the idea. Hadley argued that in cases other than those pertaining to secret letters, privacy had no protection in equity. He believed that Warren and Brandeis had misunderstood the authorities they cited, since equity protected only property rights and "the jurisdiction of courts of equity does not on principle recognize the right of privacy."

A subsequent article, published in 1898, confirmed Warren’s and Brandeis’ identification of privacy with "natural law jurisprudence." Thompson accepted the new tort in the form offered by Warren and Brandeis because he believed that privacy was "one of the rights of life, and that, in this sense, it is a natural or absolute right." Whatever one’s beliefs it cannot be argued that the Warren-Brandeis article had an effect upon the law and the legal profession. Before the end of the century the right to privacy had been discussed in a dozen law journals. Courts began to cite the article in decisions to endorse or reject the right.

At the same time, as one scholar has noted, four decades after Hadley had penned his article criticizing "The Right to Privacy," very few articles were taking up the subject of privacy. Some of those praised Warren’s and Brandeis’ originality and daring for having outlined a new field of jurisprudence, but none took the stand that privacy had enjoyed protection at common law or in courts of equity.

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26See "The Right to Privacy," 51 Nation (1890), 496; and "Point of View." 9 Scribner’s (1891), 261. For a discussion of the reaction in law journals see Leebron, "The Right to Privacy’s Place in the Intellectual History of Tort Law." 792.
27For a detailed discussion of these articles see Gossweiler, "The Right to Privacy." 24.
By the 1960s one legal scholar found “a curious nineteenth century quaintness about the grievance, an air of injured gentility” in Warren’s and Brandeis’ complaint that “the press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery.” In a 1966 symposium on the right of privacy, Harry Kalven ventured to wonder “if the tort is not an anachronism, a nineteenth century response to the mass press which is hardly in keeping with the more robust tastes or mores of today.”

This much can be said: A right of privacy did develop and gather more or less general acceptance, so that the first Restatement of Torts in 1939 vouched for its existence. Although the cases were a mixture of different types of privacy torts, which legal scholar Prosser later placed into categories, many of the early cases, both accepting and rejecting privacy, dealt with issues of newspapers, unscrupulous photographers, unauthorized advertisements, and the same types of informational privacy that initially sparked Warren and Brandeis to write their article.

Twenty-four years after the publication of the Warren-Brandeis article, with Brandeis now on the Supreme Court, the Court again spoke out against government invasion of privacy by setting an exclusionary rule on search and seizure. In Weeks v. United States the Court reversed the conviction of a man whose home had been entered, searched, and his private papers and belongings (even his candies) seized for use at his trial for illegal sale of lottery tickets through the mail. A marshal had entered the

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25Gormley, “One Hundred Years of Privacy.” 1355.
plaintiff's home without a search or arrest warrant, and the Court cited "invasion of the privacy of citizens" to reverse the conviction for prejudicial error.\textsuperscript{30}

The majority of the Court did not always champion the cause of privacy. In 1928 the conservative Taft Court addressed the question of privacy in its landmark decision, \textit{Olmstead v. United States}, and decided against explicit recognition of the right. In this case, the petitioner's argument against a government wiretap relied upon the Court's acceptance of privacy as a guaranteed right. The brief for the plaintiff argued that wiretapping would deprive him, and indeed all citizens of the country, of the personal security and enjoyment of the privacies of life guaranteed by the Constitution. Chief Justice Taft, speaking for the majority, disagreed with this argument, deciding instead that if privacy were to be protected as a right it should be done through the legislature rather than the courts. The Fourth Amendment, Taft concluded, should not be so broadly interpreted as to apply to telephone messages, since telephone "wire are not part of his house or office..." and since the plaintiff could not show "physical invasion of his house..."\textsuperscript{31}

Harking back to his "Right of Privacy" article, Justice Brandeis dissented, saying that "discovery and invention have made it possible for the government by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet." Joined by Justices Holmes, Butler, and Stone, he suggested his own, higher standard: "every unjustifiable intrusion by the government upon the privacy

\textsuperscript{30}\textit{Weeks v. United States}, 232 U.S. 390 (1914); cited in Gossweiler, "The Right of Privacy," 13. In 1920, though, the Court refused to apply a substantive interpretation to the right through the Fourteenth Amendment. A Minnesota law which forbade the teaching of pacifism was upheld, with Justice Brandeis as the lone dissenter. Brandeis spoke out against the applicability of the law towards teaching one's children, which in his view "invades the privacy and freedom of the home." See \textit{Gilbert v. Minnesota}, 254 U.S. 335 (1920).
of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”

The right of privacy would eventually receive a more favorable hearing. The appointment of Justice William O Douglas in 1939 brought an outspoken advocate of privacy to the Court. As one historian has noted, “no jurist including Brandeis has been so adamant in championing the cause for privacy.” In a number of opinions both dissenting and concurring he argued that the right of privacy was fundamental, inherent in British law, and protected by the First, Third, Fourth, Fifth, and Fourteenth Amendments. In McDonald v. United States, Douglas argued that search warrants were absolutely necessary because “the right of privacy was deemed too precious to entrust to the discrimination of those whose job is the detection of crime and the arrest of criminals.” And when the Court upheld a District of Columbia law that allowed radios to be turned on in public carriers, Douglas dissented strongly, saying

> The case comes down to the meaning of ‘liberty’ as used in the fifth amendment. Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom.

In 1961 he restated his belief when he declared, “this notion of privacy is not drawn from the blue. It emanates from the totality of the constitutional scheme under which we live.”

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31 Olmstead v. United States, 277 U.S. 445 (1928). At the same time, the Court left no doubt that intrusion into the plaintiff’s home would have evoked a different response.
32 Ibid., 473, 478.
33 335 U.S. 445 (1948), at 456.
In 1961, in the case of *Mapp v. Ohio*, a case cited in *Griswold*, the Supreme Court utilized the right of privacy to limit the search and seizure powers of policemen. Citing *Boyd* and reminding the state of the "sanctity of a man's home and the privacies of life," the Court held that the Fourth Amendment provides a "limitation upon federal encroachment of individual privacy." Not only is the exclusionary rule "an essential part of the right of privacy," the Court declared, but "the right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in a marked contrast to all other rights..."36

The Fourteenth Amendment restricts state action which would deny due process of law. In the past century the Supreme Court has defined due process of law to include fundamental rights—usually those outlined in the first eight Amendments to the Constitution. In 1965 the Court ruled conclusively in *Griswold v. Connecticut* that privacy, although not included in the Bill of Rights, was a fundamental right. The state of Connecticut had outlawed the sale and use of contraceptives. Upon challenge that the statute violated marital privacy, the Court in a 7-2 verdict struck down the law. It was here that Justice Douglas gave his opinion, joined by Clark, that "we deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system." The concurring opinion of Justices Goldberg, Warren, and Brennan placed privacy under the protection of the Ninth Amendment (those rights reserved to the people), finding that privacy fell within a "concept of liberty" which "protects those personal rights that are fundamental..." The three Justices also found that marital privacy could not be infringed being "a right so basic and fundamental and so deep-rooted in our
society..." Relying upon history as justification for their opinion they stipulated, "In
determining which rights are fundamental, judges...must look to the 'traditions and
conscience of our people' to determine whether a principle is so rooted...as to be ranked
as fundamental," and concluded, "applying these tests, the right of privacy is a
fundamental personal right." Justice Harlan joined with a separate concurring opinion
holding that the right of privacy is "implicit in the concept of ordered liberty," and calling
for "continued insistence upon respect for the teachings of history, solid recognition of
the basic values that underlie our society..." Justices Black and Stewart in separate
dissents found that although the Connecticut law was "uncommonly silly," privacy, "a
broad, abstract, and ambiguous concept," had "no basis in the Bill of Rights, in any other
part of the Constitution, or in any case ever before decided by this court." 37

By 1965 the majority of the Supreme Court had concluded that privacy should be
protected as a fundamental inherent right in two major areas: (1) unreasonable search and
seizure, especially of one's home or private papers; and (2) as a substantie right limiting
government interference in personal matters. 38 The trend in judicial decision making that
began in the 1880s when the Supreme Court began to link "the privacies of life" with
unreasonable searches and seizures expanded dramatically in the 1960s when the Court

36Mapp v. Ohio, 367 U.S. 651 (1961), at 656. This case is known primarily for its exclusionary rule on
evidence obtained without a proper search warrant, but the ruling was in fact based on the petitioner's right
of privacy.
38From the cases examined here, one might assume that judges reached their conclusions upon studying the
history of privacy in legal journals and/or monographs on the subject (since few cited early British or
American law/precedent/history in their rulings). But an historiographical examination of privacy proves
the opposite. Prior to 1959 I found that only one short book had been published in America on the subject.
Most of the journal articles on the topic were written after WWII, and the sparse number of these
demonstrates the lack of interest in this "fundamental" right. These scholars fell into three groups: (1)
those who argue that no such right exists; (2) those who maintain that the right has existed for centuries in
Anglo-American jurisprudence; and (3) those who believe that the right emanated from, or came about as a
result of the Warren and Brandeis article in 1890.
broadened both the scope and the origin of the right of privacy by joining it with “due process of law.” In *Mapp v. Ohio*, for example, the right of privacy became part of due process of law, which conveyed both substantive and procedural rights. The substantive right holds that without a specific and proper warrant officers of the government may not intrude into a man’s home for the gathering of evidence; the procedural right guarantees that any evidence obtained otherwise must be excluded from trial consideration. The Court in its *obiter dictum* based these decisions on historical arguments that man’s home was his castle since colonial times and that the sanctity of the man’s home found recognition and protection since the colonial era. Much of the impetus for the Court’s decisions came from its belief in the “right of privacy” which had by the 1960s been set into place—“jarred into existence,” as one scholar put it, by a precise set of historical facts in turn-of-the-century America—and to which Warren and Brandeis had given expression in their 1890 *Harvard Law Review* article.

While many scholars continue to applaud Warren and Brandeis for originating the right to privacy, one scholar, Carl Gossweiler maintains that it was Justice Douglas who revived interest in the origins of privacy, and the Supreme Court’s decision in *Mapp v. Ohio* that caused a flood of articles and books on the subject. Most, Gossweiler argues, accepted the Warren-Brandeis article as the beginning and *Mapp* as the end of the discussion on privacy. Even New York attorney Morris Ernst also prepared a book (without footnotes), Gossweiler notes, in which he stated that Warren and Brandeis gave “birth” to the right.39

After the Court decided *Griswold* in 1965, articles and books on the subject of privacy abounded. But Thomas Emerson, counsel for the appellants in *Griswold* and a Professor of Law at Yale University, denied relying on *stare decisis* and confessed that he had depended upon the Court to "enter unchartered waters" and to make "a bold innovation" in reaching its decision. Not concerned with the historical origins of privacy, he wrote, "The precise source of the right of privacy is not as important as the fact that six judges found such a right to exist."

Indeed, contemporary legal writers concurred with Emerson, arguing that "the disagreement of members of the majority as to the constitutional underpinning of the claim is less important than the fact that they agreed that a right to privacy had a constitutional basis and that the justification for the Connecticut act was inadequate." Equally important, by 1965 the state law ran counter to an increasing acceptance in American society of the principle of birth control and an increasing dislike of laws that threatened the intimacies of family life.

Clearly, the articles which appeared in law journals debating privacy as a right followed, and did not supersede, the court decisions on privacy. Warren and Brandeis were concerned only with one limited aspect of privacy—public disclosure in the press of truthful but private details about the individual which caused emotional upset to him—and their article was an attempt to bring recognition to a right already recognized by English and American courts (even though their evidence was apparently sparse). Indeed,

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immediately following their article, scholars began to question whether a much broader right ought to be recognized than the one Warren and Brandeis had sponsored.\textsuperscript{42}

Scholars continue to disagree over the birth date of privacy as a legal right. Gormley, the most recent contributor to the debate, believes that the right evolved from Warren and Brandeis’ notion (public disclosure of private details) in 1890 to that of the Supreme Court (marital privacy) in \textit{Griswold v. Connecticut}, and beyond. Whoever actually “gave birth” to the right of privacy, the Supreme Court certainly took it up beginning with the obiter dictum of \textit{Kilbourn v. Thompson} in 1881 and has provided the nation with a stream of decisions establishing legal protection against invasion of privacy, especially when such an invasion is attempted by agents cloaked with the power of government. Lawyers in the cases of \textit{Boyd, Weeks,} and \textit{Mapp} argued successfully that allowing the presentment of illegally obtained evidence at trial “made a mockery” of the right against unreasonable searches and seizures. The Court in \textit{Griswold} further limited the power of state governments to interfere with the people’s “right to be let alone.” In all of these cases the Court followed what a number of scholars have termed a “predilection towards activism.” Seeing the need for a right of privacy, the Justices looked to history to provide a rationale for a line of law needed to correct what they perceived to be obvious injustices. They molded history to suit personal value judgments, as one author has noted, and in the process created a right of privacy. In retrospect, while the claim of Warren and Brandeis that privacy was “forged in the slow fire of the centuries” finds only limited support in American case law, and was perhaps even a “misuse of history,” it was Warren and Brandeis who brought recognition to a

\textsuperscript{42}Especially Hadley, in “The Right to Privacy,” in 1894.
vaguely understood notion of privacy, and thus contributed to its acceptance and development in law.
Chapter 11
Abortion Comes to Planned Parenthood
1970-1973

The early 1970s were years when social protest reached a deafening pitch, the American military finally withdrew from Viet Nam, and the Watergate scandal caused the downfall of a President. It was also the beginning of what one historian has termed “the abortion era.”¹

On Christmas Eve 1970 President Richard Nixon signed the first federal legislation specifically designed to expand access to family planning services: Title X of the Public Health Service Act. The bill was sponsored in Congress by then-Representative George Bush (Rep-TX), Representative James Scheuer (Dem-NY) and Senator Joseph Tydings (Dem-MD), prompting Nixon to note that “this landmark legislation has strong bipartisan support.” He added, “I am confident that by working together—at federal, state and local levels—we can achieve the goal of providing adequate family planning services within the next five years to all those who want them but cannot afford them.”²

Title X marked a period of change in women’s reproductive rights. Its provisions included increased support for research into human reproduction, the development of new methods of birth control, and the creation of an Office of Population Affairs to guide and coordinate government population programs. With its passage came hope that Planned Parenthood would achieve its goal of universal access to family planning services, regardless of age, economic circumstance, or place of residence. Its most visible impact

was on low-income American women who, for the first time, gained access to services that middle-class women had. Within a few years, thousands of hospitals, public health clinics, neighborhood health centers, and women's clinics were offering family planning services that were accessible and affordable.³

The legislation also led to an expansion of services offered by Planned Parenthood affiliates, especially for low-income women and teens. Between 1970 and 1973 the number of Planned Parenthood's patients nationwide doubled. Most of the women were poor and had never before had access to health care. One out of every six of these patients had an income below the federal poverty level; one out of three was under twenty years of age.⁴

At the same time, affiliates launched ambitious programs in sex education, often in cooperation with public schools, neighborhood councils, youth organizations, and religious groups. Curricula were designed to reach children as young as nine and to help parents talk to their children about sex. As new research raised awareness of the extent of adolescent pregnancy and childbearing, Planned Parenthood made education and services for teens a major focus of concern. To attract teens to clinics, affiliates launched publicity campaigns and new community outreach programs.⁵

Negative publicity about the birth control pill and IUD during the 1970s led to a decline in the number of women choosing these methods and a rise in the number who

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³*Ibid.*, 64. The Planned Parenthood Federation of America (PPFA) estimates that by the end of the decade, the number of hospitals, public health facilities, and clinics providing these services was over 5,000 nationwide.
⁴*Ibid.*, 65. PPFA patient statistics show that between 1969 and 1979, the number of patients nationwide tripled, from 345,000 in 1969 to 1,165,000 in 1979.
sought voluntary sterilization. Many Planned Parenthood affiliates opened surgical units to provide outpatient vasectomy and mini-laparotomy services. Other new services offered in the early seventies were prenatal care, infertility treatment, and campaigns to attract males (especially teenage males) to services and involve them in family planning.\(^6\)

In 1971, at the request of the U.S. Agency for International Development (AID), the Planned Parenthood Federation of America created Family Planning International Assistance (FPIA), an international division to support family planning services in developing countries. Although AID’s initial request to the Federation was limited to asking for cooperation with the Church World Service organization in shipping contraceptives to mission hospitals, PPFA advised AID to fund a more comprehensive initiative including program development, training, and education so that programs could become locally controlled and self-supporting. The leadership of AID agreed and FPIA brought these innovations to international family planning. The program eventually included community-based (non-clinic) birth control distribution, in which villagers distributed contraceptives house-to-house, and cooperative efforts with labor unions, agricultural cooperatives, youth organizations, the Red Cross, and Catholic and Muslim organizations. By the end of the decade, FPIA had provided over $40 million in assistance to programs in more than one hundred countries in Asia, Africa, and Latin America.\(^7\)

Despite increased access to contraceptive services in the U.S. and abroad, maternal deaths from unsafe and illegal abortions continued to be a worldwide problem.

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\(^6\)A laparotomy involves surgical section, or cutting, of the woman’s abdominal wall in order to sterilize her or remove her ova (eggs). The procedure is now called laparoscopy, because a laparoscope is used to guide the surgical procedure within the abdomen.

\(^7\)A Tradition of Choice, 66-67.
Early birth-controllers like Margaret Sanger had opposed abortion because it led to the deaths of so many women, but it had since become a much safer and accepted procedure. In the U.S., lobbying of state legislatures to reform abortion laws had begun in 1959 after the American Law Institute (ALI) revised the abortion section of its Model Penal Code to allow for abortions in at least some cases (rape, incest, fetal deformity or grave risk to a woman’s mental or physical health). Pro-choice organizations like Planned Parenthood, whose leader Dr. Alan Guttmacher began calling for liberalized abortion laws in 1964, came together to lobby state legislatures to liberalize or repeal old abortion statutes: the National Abortion Rights Action League (NARAL, organized in 1969 as the National Association for the Repeal of Abortion Laws, renamed in 1973); Zero Population Growth (ZPG, 1968); and the National Organization for Women (NOW, 1968, which, like ZPG had many causes on its agenda but added abortion to the list as it came more to the fore). In 1967 state legislatures in California and Colorado passed laws conforming to the ALI model code. And in 1970 the New York state legislature passed the most progressive abortion law in the nation, permitting abortion for residents and non-residents of the state for any reason through the twenty-fourth week of pregnancy, provided it was performed by a licensed physician. By 1970 Hawaii, Alaska, and Washington had repealed their abortion laws, and twelve other states had liberalized theirs. 8

The first agency to respond to New York’s liberalized abortion law was the Planned Parenthood Center of Syracuse. The clinic began performing abortions on the first day that the law allowed, and within six months Planned Parenthood of New York City began providing abortions at its facility in the Bronx. Opposition, led at first by the Catholic church, organized at once. The clinics were picketed by anti-abortionists, mostly members of small, church-sponsored organizations that formed to lobby the state’s legislature for repeal of the new law. Planned Parenthood affiliates in turn organized a massive statewide educational effort to defeat attempts to overturn the law.\(^9\)

In 1973 the Supreme Court in *Roe v. Wade* and *Doe v. Bolton* considered Texas’ restrictive abortion statute and a “reform,” or liberalized Georgia statute against constitutional precedent, medical fact, and the record of safe and legal abortion compiled in those states with liberalized laws. By a 7-2 vote the Court ruled that states could no longer interfere with a woman’s decision, in consultation with her doctor, to have an abortion in the first three months of pregnancy. After the first trimester, some restrictions were permissible, but not if continued pregnancy threatened the woman’s health or life. In a subsequent decision, the Court went on to affirm *Roe*, striking down requirements that a woman obtain her husband’s consent for an abortion and that a teenager obtain her parents’ consent.\(^10\)

The decisions in *Roe* and *Doe* signaled a tremendous cultural shift in America. Whereas before 1973 the idea of abortion seemed to most people abhorrent, subsequent


polls revealed that most people favored it. The question would remain highly controversial, however, as the number of legal abortions climbed to one million annually, the number of young, unmarried women obtaining them increased at pace, hospitals divided on the issue, physicians expressed ambivalence, and the nationwide “Right to Life” movement, with its strong Catholic and conservative Protestant support, began to organize in opposition.

Houston in the 1970s

Houston began the decade of the seventies still reaping the benefits of the Post-WWII economic boom. Between the mid-1960s and the early 1970s the Texas economy grew about one-and-a-half times as fast as the national economy; from the 1970s to the early 1980s it grew about two-and-a-half times as fast. Between 1970 and 1980 Houston area employment grew at an equally impressive rate, about 5.4 percent a year (compared to 2.8 percent for the US as a whole). During the first oil recession of 1973-74, and in a subsequent recession in 1979, while employment fell in other Texas cities, Houston’s employment grew by 18 percent because of higher oil and gas prices. Throughout the decade, Houston remained the oil-technology distribution center for the world’s oil industries. Eleven of the twenty largest Texas firms were oil and gas companies, eight of which were headquartered in Houston. Virtually every major oil company had offices and plant facilities in the Houston area. And there were approximately four hundred major oil and gas companies in the metropolitan area, including geological firms, drilling contractors, supply companies, law firms, and other oil-related businesses. Downtown Houston was transformed during the decade as the central business district boomed. This

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oil-based prosperity and the city’s population growth led many observers to describe Houston as “depression-proof.”

Revenues generated by the Port of Houston also attested to Houston’s strong position in the world economy. The value of foreign trade through the port increased from $2.4 billion in 1970 to $23 billion in 1980, and Houston ranked as the second port in the U.S. for total cargo tonnage and foreign trade. An estimated 32,000 jobs were generated directly through port activities.

Severe crises in public services continued to plague the city, however. Shortages in police and fire personnel and major deficiencies in sewer, water, and street lighting facilities remained while the existing infrastructure continued to age. Continuous, haphazard urban development with more land covered by concrete surfaces increased the flood potential by forcing a quicker runoff, and sporadic storm flooding posed a constant threat to power lines, roads, and sewers. Black neighborhoods remained the last areas to receive attention from city government, while garbage dumps continued to proliferate in these areas. While the city’s business elite, unwilling to pay more taxes for improved city services, kept government operating expenditures to a minimum and taxes low, inadequate public capital investment contributed during the seventies to making Houston—particularly in inner-city areas—a traffic, garbage, wastewater, and sewage nightmare.

12Joe Feagin, Free Enterprise City: Houston in Political-Economic Perspective (New Brunswick: Rutgers, 1988), 76-85, and 96. And David McComb, Houston: A History (Austin: UT Press, 1981), 125, 135, and 145. The city’s population in 1930 was 292,000; in 1960, it had reached 938,000; and by 1980 it was 1,573,847. If the metropolitan population was added (those in Brazoria, Fort Bend, Liberty, and Montgomery counties), the population in 1980 was almost three million.
13Feagin, Free Enterprise City, 92-93.
14Feagin, Free Enterprise City, 226-239, and 246-247. And McComb, Houston: A History, 146. In July 1979, for example, tropical storm Claudette dumped twenty inches of rain on Houston, inundating the
The city’s bus system remained in poor condition while voters rejected a rapid transit authority plan that would have the power to tax vehicle emissions to pay for maintenance services. The city consequently took over the system shortly following the election of Mayor Fred Hofheinz.15

During the 1970s water and air pollution became a major concern. Though city officials established sewage treatment plants, little effort to clean streams or prevent pollution was made; consequently, the bayous became seriously contaminated. Buffalo Bayou water was found by Harris County pollution-control officers to be 80 percent sewage, and the Houston Ship Channel was labeled by an official of the Federal Water Quality Administration in 1970 as “one of the most polluted bodies of water in the nation.” Industrial and municipal pollution came under attack in the early seventies, and under pressure from the Texas Water Quality Board the city instituted a $200 million five-year plan to upgrade the sewage system. The Chamber of Commerce also created the Gulf Coast Waste Disposal Authority, issuing $500 million in bonds, to aid industry in eliminating industrial refuse from the channel.16

Air pollution was similarly problematic. The prevalence of industry, the number of cars, and the lack of laws combined to make Houston “stink.” In the 1970s the city, county, and federal agencies began to crack down on air pollution after the Environmental Protection Agency named Houston one of the most smog-ridden cities in the nation. The Houston Chamber of Commerce hired a research institute to study

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15McComb, Houston: A History, 126. Voters approved the establishment of the Metropolitan Transit Authority in 1978, with the power to collect a one-cent sales tax, and the bus company was subsequently overhauled. By this time, Houston’s traffic problems had become chronic.
16Ibid., 147-149.
Houston’s air problem and make recommendations as to its causes and treatment. The institute reported that industrial pollutants such as sulfur dioxide and hydrogen sulfide were part of the cause; the number of automobiles (creating ozone, or smog problems) was another. Still, little was accomplished during the decade because businessmen and drivers exhibited no desire to change their practices unless forced by government agencies and the courts.\textsuperscript{17}

Houston maintained a top-ranking murder rate and a low number of policemen. The city’s deadliest area was the north side ghetto, otherwise known as the Fifth Ward, a predominantly black area. During the 1970s public concerns were raised about the excesses of the Houston police with regard to members of the city’s minority communities. There were occasional investigations into alleged police brutality, allegations of the planting of evidence by police, and a questionable shoot-out involving police and a local militant black political group, but the situation did not really improve.\textsuperscript{18}

There was some residential desegregation in formerly all-white residential areas in the 1970s, as some of Houston’s middle- and upper-income black community moved out of the traditional inner city areas. But most black Houstonians remained in predominantly black areas, concentrated in the Fourth Ward and the eastern side of the city. The school system also remained de facto segregated, with 44 percent of the children in HISD schools black, and 32 percent Hispanic. Economic and health conditions in the black community continued to deteriorate. Black unemployment

\textsuperscript{17}\textit{Ibid.}, 148-152.
\textsuperscript{18}\textit{Ibid.}, 153-155.
remained more than double that of whites, and the black infant mortality rate was substantially higher than that of whites.\textsuperscript{19}

During the 1970s the Hispanic population grew tremendously, mostly as a result of the immigration of undocumented workers from Mexico and Central America. Many were temporary migrants who had come to Houston seeking work and to escape hard times in their own countries. By the early 1980s Houston’s immigration agency put the total Hispanic population in and around the city between 250,000 and 700,000. Many were citizens by birth, who had settled since the early decades of the twentieth century in Houston’s industrial areas: the Second Ward (east of downtown in the port-industrial area), and the Magnolia area southeast of the Second Ward near the ship channel. During the early decades of (legal) immigration, white real estate and governmental officials had channeled Mexican American families to these segregated residential areas, where they faced racial and language discrimination much like black Houstonians, and were essentially excluded from politics. As more undocumented workers poured into the city, these areas overflowed.\textsuperscript{20}

Like black neighborhoods, Hispanic areas experienced serious difficulties with water, sewage, and other utility services. They also became the locations for Houston’s garbage disposal facilities and freeway development projects. Moreover, the police services provided to Hispanic communities ranged from negligible to brutal; there were few minority officers on the force, even fewer Spanish-speaking ones, and by the late seventies police brutality against Mexicans gained legendary status. Even as major civil

\textsuperscript{19}Feagin, \textit{Free Enterprise City}, 244-245. These unemployment and infant mortality trends continued into the late 1980s. Exact figures on the infant mortality rate were: 17.2 deaths of children under one year of age for every 1,000 live births (black), vs. 12.3 deaths/1,000 (whites). See also McComb, \textit{Houston: A History}, 161-172.
rights litigation began to enfranchise the city’s black population, Houston’s Hispanics remained on the political periphery until much later.\textsuperscript{21}

By the end of the decade, the city’s Hispanic population had grown by 60 percent, but because many in the community could not vote (due to age or illegal status), this growth was not matched by major improvements in the political or economic condition of Hispanics. In fact, as the “illegal” immigrant population grew, conditions worsened. In 1975 the Texas legislature restricted free public education to citizens and legal aliens. Illegal aliens who wanted their children to go to school were charged $162 per month tuition. A group of parents challenged the tuition in U.S. District Court, and U.S. District Judge Woodrow Seals ruled that HISD had to provide free education for the seven to nine thousand illegal aliens who lived in the area. The decision was turned over on appeal but reinstated by a decision of the Supreme Court.\textsuperscript{22}

In 1978 political frustration in the Hispanic community took the form of militant protest. A crowd of 3,000 Mexican Americans rioted against the police in Houston’s Moody Park during what began as a Cinco de Mayo (May Fifth) celebration. Although the exact cause of the riot was unclear, historians agree that the riot started as a result of state and federal court decisions in the Joe Torres case.\textsuperscript{23}

In 1977 six Houston police officers arrested Joe Torres, a twenty-three-year-old Mexican American, for drunkenness. They beat him up and took him to jail, but a jail official refused to accept him and told the officers to take him to the hospital for treatment of his injuries. Instead, the policemen took Torres to Buffalo Bayou and

\textsuperscript{20}Feagin, *Free Enterprise City*, 253-256.
\textsuperscript{21}Ibid., 254-257. No Hispanic Houstonian served on the Houston city council, for example, until Ben Reyes was elected in 1979.
\textsuperscript{22}McComb, *Houston: A History*, 168-169.
pushed him seventeen feet off an embankment into the water (the police claimed he jumped). They threw his wallet in after him, and watched as he disappeared, allegedly behind a tree. The officers later claimed that they thought Torres had swum away, but, unfortunately, he drowned. A state court in Huntsville convicted the officers involved of a misdemeanor and fined them one dollar each. The decision triggered demonstrations in Mexican American neighborhoods, and a march on City Hall. When the officers were tried in federal court for violating the civil rights of Torres, they received nine-month sentences. A month after the decision, the riot at Moody Park ensued. Four hundred people were arrested, city officials quickly blamed the riot on “outside agitators,” and the problem went unresolved.24

Throughout the decade, minority issues and the resurgence of a number of urban problems continued to point to the conflict between low taxes and inferior city services, lack of regulatory agencies and the acceleration of decay, and the desire for cheap labor and problems of illegal immigration. These problems as they became crises were only just beginning to be addressed in the Bayou City during the 1970s.

**Planned Parenthood in the 1970s**

The leadership of Planned Parenthood of Houston hardly anticipated the *Roe* decision. Between 1970 and 1973 abortion was rarely discussed in the organizational minutes, and when it was, policy statements were brief. In September 1971 the new Executive Director, Richard Ferguson, raised the possibility of establishing an abortion clinic at Planned Parenthood. At the time, PPH policy was to refer patients wanting an abortion to Jeff-Davis and Ben Taub hospitals, where “therapeutic” abortions could be

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24Ibid., 154-155.
performed legally upon the recommendation of a board of physicians. But the issue was tabled. Board members wanted to consider the effects on fund-raising, the agency’s public image, and the opinion of the medical community before deliberating. In the 1972 minutes, abortion was not discussed at all.25

Board members had enough on their plates with the hiring and firing of Executive Directors. Between 1970 and 1973 Planned Parenthood had three Executive Directors. All had stormy relationships with the Board and all left amid a flood of acrimonious debate. The first, Norman Fleishman, left after three years. He was hired, it should be recalled, after the resignation of Howard Patton in May 1967. Patton had evidently alienated the board from the beginning and was fired after only two years when, according to agency records, his “personal problems” became grave. Fleishman ran afoul of the Board by making controversial hiring decisions without consulting the membership first. Finally, he secured another position with Planned Parenthood of Los Angeles and resigned his Houston office in April 1970.26

The second director, Robert Norris, was asked to resign by the president of the Board after only nine months. Norris, the Director of the Delaware League for Planned Parenthood, had come to Houston with high hopes in August 1970; his arrival had been announced by the Board with similar excitement. But by March 1971 he had been asked to resign. The president of the Board, Isabel Turner and the majority of the members felt, quite simply, that he was “incompetent.” Norris refused to resign, and instead, appealed

26Planned Parenthood of Houston, Minutes (hereafter PPH, Minutes) of the Executive Committee Meeting, September 14, 1971. Richard Ferguson had just assumed the duties of Executive Director on August 1. Apparently, the board felt his suggestion was premature. Therapeutic, or legal abortions, were defined as procedures performed in order to save the life and/or to preserve the health of the mother, or in cases of rape or incest.
to the local board and the national Planned Parenthood Federation (PPFA) to reinstate him.\textsuperscript{27}

At the April Executive Committee meeting the debate was heated. Norris had written a long, mournful letter to every Board member outlining his accomplishments and denying that he had failed in any way. He had also written letters to the Federation, asking for an independent review of the Houston affiliate. In the letters, he chided the Houston Board for failing to let him know until it was too late that it was displeased with him. He blamed the ill feelings toward him on the size of the Board and the fact that he had not established personal relationships with many of its members. Finally, he asked for a hearing: “If it is the consensus of the Board that I have failed, I would like the opportunity to hear specific charges and the opportunity for rebuttal.”\textsuperscript{28}

Committee members were divided along gender lines in their support for Norris: men for and women against. Board president Isabel Turner expressed the majority opinion and stated that Norris had been dismissed because 1) he had “no program or vision”; 2) he had “no fund raising ability”; 3) he had failed “to provide leadership or show initiative”; 4) he did not “relate to the needs of the community and does not inform the Board”; 5) he had “speaking limitations”; 6) he was “lacking in administrative ability”; and 7) he was “generally incompetent for our purposes at $20,000.” The $20,000 Turner referred to was Norris’s salary.\textsuperscript{29}

\textsuperscript{26} PPH, Minutes, April 27, 1970.
\textsuperscript{27} PPH, Minutes, June 22, 1970. See also (undated) letter to the Friends of Planned Parenthood by Isabel Turner, President of the board, announcing Norris’s arrival. And PPH, Minutes of the Executive Committee Meeting, April 12, 1971.
\textsuperscript{28} PPH, Minutes of the Executive Committee Meeting, April 12, 1971. And confidential letter written by Robert Norris to board members, March 25, 1971.
\textsuperscript{29} PPH, Minutes of the Executive Committee Meeting, April 12, 1971.
Turner also noted that Norris had lost the trust of the Board because he had written to the Federation to reinstate him without notifying local board executives, “for the purpose of preserving his professional career.” She stated further that the Board’s Personnel Committee had informed Norris of his shortcomings in January, and that he had “done nothing to change the situation.” Perhaps, she noted in closing, his problem was that “he could not work with women.”

In response, several male committee members defended Norris’s record and said that, at least from a financial standpoint, his record had been satisfactory. The chairman of the Clergy Committee, Reverend Deschner spoke of a reconciliation and asked for a cooling-off period. But the majority prevailed. Norris was asked to leave the room while the Executive Committee voted to terminate his employment. Finally, the Committee voted to give Norris the opportunity to “willingly resign without prejudice.”

In fairness to Norris, the problems Planned Parenthood faced were caused less by his incompetence than by the conflict between the Board’s expansionist policies and its outdated fee structure. Norris had inherited a staff that included only one full-time fundraiser and a number of overworked volunteers. At the same time, he was presented with Board commitments to expand clinical services, the assumption of a huge debt for a new clinic site and building, and an ever-increasing patient load. Yet, Planned Parenthood still operated on the old fee structure of “50 cents-50 cents-50 cents” for examinations, tests, and supplies, or at a loss of about $20 per patient, per visit.

Fundraising remained the agency’s top priority, but donations always fell short of expenses. The number of fundraising events that occurred each year was staggering.

30 Ibid.
Book sales, annual fundraising dinners, and even a fashion show at Neiman-Marcus supplemented the year-round efforts of the specialized fundraising committees. Board members, past and present, were asked to give generously and often. Susan McAshan, probably Planned Parenthood's greatest individual benefactor, gave liberal donations whenever asked, which was often. Grants from Houston's largest foundations came in ever-increasing amounts, but were often earmarked for specific purposes such as educational programs. The number of foundations contributing to Planned Parenthood increased exponentially during the decade. Foundation contributors included the Farish, Favot, Moody, and Johnson foundations, the Houston Endowment, M.D. Anderson, and the Parish Fund, to name only a few. Still, treasurers always reported deficits.\textsuperscript{31}

Money for clinical services and birth control supplies was always needed. Deals with pharmaceutical companies to conduct clinical studies in exchange for low-priced supplies had all but vanished. In 1970 there was only one new clinical study conducted at Planned Parenthood using new, low-dose birth control pills developed by the Ortho Pharmaceutical company. After that, none. At the same time, the Board voted to purchase property and erect a new and bigger facility in the downtown area, on Fannin street. In August 1970, just after Norris arrived, the Board borrowed $162,000 at 7 1/2 percent interest from the Capital National Bank and, again, launched fundraising drives to make the mortgage payments.\textsuperscript{32}

\textsuperscript{31}PPH, Minutes, March 23, April 27, May 12, May 25, August 27, June 8, June 22, August 11, August 27, September 28 and October 26, 1970; January 12, February 22, March 9, March 22, April 26, May 24, November 22 and December 14, 1971; January 12, February 29, April 11, May 9, May 22, August 8, September 11, September 25, November 13, November 27 and December 19, 1972; January 9, January 29, March 13, April 30, May 8, September 11 and December 11, 1973.

\textsuperscript{32}PPH, Minutes, January 26, February 23, April 27, May 12, July 14, August 11, August 27, September 28 and December 8 (when the loan agreement was signed), 1970.
Early in 1970 the board had also voted to establish a new vasectomy clinic. As usual, it moved swiftly and before funds had been raised to pay for it. In March the Board president, Isabel Turner, introduced a resolution that aimed at establishing a vasectomy clinic, which was approved. By the end of April, sufficient funds had been raised to open the clinic and arrangements were made with staff urologists at Baylor College of Medicine and St. Luke’s hospital to perform the surgeries. By June the first operations were completed and before year’s end, 230 vasectomies were performed. The clinic did a booming business among concerned young men. Between 1970 and 1971 over 1,300 vasectomies were performed and men were coming to Planned Parenthood for the operation at a rate of 20-25 per week.\textsuperscript{33}

A problem with the socially responsible young men who came to the clinic for vasectomies was that they often did not pay. The clinic operated at a constant deficit and, because of delinquent accounts, administrators were forced to institute a cash-up-front policy. The Board hired an attorney to pursue the delinquents, with some favorable results. But the clinic never operated at a profit during the first several years of its existence.\textsuperscript{34}

Despite this, the Board continued to call for expanded clinical services. Between 1970 and 1972 Board members voted to include VD screening, PAP smears, sickle cell and anemia testing in clinical services, and established a laparoscopy clinic for the voluntary sterilization of women. It also instituted an eight-week Nurse Practitioner

\textsuperscript{33}PPH, Minutes, March 23, 1970 (clinic proposed), April 27, 1970 (clinic costs estimated at $3,000 to furbish an operatory at Planned Parenthood), and June 8, 1970 (the first four operations were reported as completed on June 5); and PPH, Minutes, September 28, 1970; July 13, 1971; and April 30, 1973. Patient breakdowns showed that the average vasectomy patient was white, between 30-39 years of age, had 1-2 children, was lower-middle-class in income, and had a high school education.
training program. All these programs necessitated hiring staff, pay raises for existing staff, and more space.\textsuperscript{35}

At the same time, the Planned Parenthood Federation was raising affiliate dues and earning the animosity of Houston's Board members. Houston representatives to the National Board tried twice at annual meetings held in New York in 1971 and 1972 to change the dues structure, but without success. In 1970 the board paid 20 percent of all monies raised by the Houston affiliate to the Federation. In February 1971, due to what it termed its "pressing financial problems," the National Board informed affiliate members that it was considering a "new" fee structure. In June it notified affiliates that the basic dues structure of 20 percent would remain the same, with exemptions for federal monies but not foundation gifts. For the Houston affiliate, which had yet to receive federal monies and depended almost entirely on private donations and foundation grants, the decision to "tax" this particular source of income was devastating. Delegates to the national meeting in November attempted to gain exemptions for grants from \textit{local} foundations, but the resolution was tabled; as a result, PPH was forced to pay dues of $5,517.82 per quarter to the Federation in 1971 and more in 1972, an expense (in light of its ever-expanding commitments) it could ill afford. Board members at the national meeting questioned openly the benefits derived from membership in the Federation. In

\begin{footnotes}
\footnote{PPH, Minutes, (Executive Director's Report) September 14, 1971. By September 1971 the clinic reported $20,000 in delinquent accounts. The fee for the operation was $75 (PPH, Minutes of the Executive Committee Meeting, July 14, 1970).}

\footnote{PPH, Minutes, March 22, September 27, 1971; and March 14, May 9, 1972. It is possible that Board members believed that by increasing clinic capacity, expanding programs, and offering additional services, Planned Parenthood might become eligible for increased federal funding.}
\end{footnotes}
return for its money, one Houston delegate declared, the local affiliate received medical standards and bylaws from the Federation, not exactly a bonanza.\textsuperscript{36}

To add to Norris’s problems, a dissatisfied vasectomy patient sued Planned Parenthood for negligence in January 1971. The patient had had to return twice to Ben Taub following his vasectomy at Planned Parenthood, to “correct some bleeding.” He had asked Planned Parenthood to reimburse him for several thousand dollars in hospital expenses and missed work, but the Board had refused, stating simply that “there had been no negligence” in the performance of his surgery and that Planned Parenthood had “no obligation” to pay his subsequent medical bills. He sued. The case dragged on, adding to the pressure and to tensions between the Board and the Executive Director.\textsuperscript{37}

All the while, the patient load increased daily. In May 1970 a Board member reported that the patient load for all the clinics had exceeded 10,000 for the first five months of the year. In addition, 22,000 women had been referred to city and county clinics for birth control services.\textsuperscript{38} By February 1971 the Medical Director was again reporting overcrowded conditions in all twelve clinics and problems with “over-extended” staff.\textsuperscript{39} Board members suggested re-scheduling patients to ease the overcrowding but did not address the question of what to do about the hundreds of new patients who were coming to Planned Parenthood each month. It was at this critical

\textsuperscript{36}PPH, Minutes, May 25, 1970; February 22, June 8, July 13 and November 9, 1971.
\textsuperscript{37}PPH, Minutes of the Executive Committee Meeting, January 12, 1971. The patient sued PPH for $25,000, but settled out of court for $7,500 before the case reached a jury. PPH, Minutes, February 12, 1974.
\textsuperscript{38}PPH, Minutes of the Executive Committee Meeting, May 25, 1970. The reason for the huge upsurge in clients was college-age white women. By July 1970, the clinics were “serving 50% college girls as patients.” PPH, Minutes of the Executive Committee Meeting, July 14, 1971.
\textsuperscript{39}PPH, Minutes of the Executive Committee Meeting, February 9 and March 9, 1971. By 1972 the patient load had grown to 20,000, with 400 new patients per month. PPH, Minutes of the Executive Committee Meeting (Annual Patient Report for 1972).
juncture that the Board and staff looked to the Executive Director for direction, and were disappointed.

It is doubtful that Norris could have solved the problems of Planned Parenthood without taking drastic measures that would have led to serious confrontations with the Board. He was doubtless aware that his predecessor, Norman Fleishman, had lost his job for that very reason. Finding himself in a no-win situation, Norris vacillated, did nothing, and was fired.

Norris's successor, Richard Ferguson, wisely did what Norris had been unwilling or unable to do. He raised patient fees to cover expenses and insisted that city and county health agencies assume responsibility for the indigent. In June 1972 he presented the Board with a patient fee schedule based on medical expenses and designed to cover the net cost to the affiliate for services and supplies. He also proposed that patients who could not afford the fees be referred to city and county clinics, where they would be treated at reduced fees or at no charge. These clinics were the recipients of federal money for family planning and contraceptive services, and as Ferguson saw it, "had money to spare." The board agreed, and the new fee schedule was initiated in August.⁴⁰

By September, the patient load at Planned Parenthood had dropped by 50 percent. City and county health departments were forced to review and expand their family planning clinic facilities, and Planned Parenthood helped by monitoring these facilities. But Ferguson did not stop there. In a bold move, he made arrangements with strapped city healthcare providers to rent Planned Parenthood's clinic facilities to the city for night clinics. The new fee structure was so successful in raising revenues that, in January

⁴⁰PPH, Minutes, June 26, 1972.
1973, the board voted for fee reductions of 1/4 or 1/3, and called upon the Executive Director to come up with another fee structure.\textsuperscript{41}

For the first time, the Board found itself simultaneously in the position of having enough money to pay for quality services and satisfied with its Executive Director. Educational programs and efforts to reach Hispanics were increased, and the agency seemed closer than ever to its ultimate goal: providing educational services. Board members looked to the day Planned Parenthood could transfer the job of providing clinical services to Houston’s public health agencies, where they believed these services belonged, and pursue its goal of educating the public about the need for universally available contraception. Ferguson, who had led the agency across this budgetary Sinai, was praised often. In January 1973 the Board’s Personnel Committee reported the staff situation as “excellent.” In June the board expressed its confidence in Ferguson and its appreciation “for the outstanding job he has done.” In September, the Board voted him a substantial pay raise. He would earn it.\textsuperscript{42}

On January 22, 1973, the Supreme Court handed down its decisions in \textit{Roe} and \textit{Doe} and the Houston landscape changed again. On January 29 the Board and Executive Director called an emergency meeting of the Medical Advisory Committee and asked it to recommend a course of action. The Medical Advisory Committee met the following day. Its chairman, Dr. Blanchard Hollins, took charge and stated his opinion that Planned Parenthood’s responsibility was “to make this service available to the populace.” Local doctors, he said, could not be counted on to participate in the service, at least, not “for a

\textsuperscript{41}PPH, Minutes of the Executive Committee Meeting, September 11, and November 13, 1972, and January 9, 1973. And PPH, Minutes, September 25, 1972.
while.” Planned Parenthood would “make the initial breakthrough until attitudes changed somewhat.”

Other doctors on the committee were concerned less about making medical breakthroughs than the reaction Planned Parenthood might face from the public and medical community for performing abortions. One physician expressed concern that the clinic might become an “abortion mill.” Instead of opening such a place at Planned Parenthood, he suggested, the agency should set up a facility utilizing university or public hospitals: Baylor, Methodist, St. Luke’s, Ben Taub, Jeff-Davis or others. And, he said, the operation should be offered on a cost basis only.

Still others were concerned about the term of pregnancy. One obstetrician suggested a limit of ten weeks on abortions, and that the program operate in cooperation with local Ob-Gyns who would perform the surgeries. Planned Parenthood’s role would be to “inform the public.” Another voiced the hope that, if Planned Parenthood initially performed abortions, private physicians would become “more confident to take over” the practice. There was some discussion about this, with most in agreement.

Committee members finally agreed that abortions should be performed, that Planned Parenthood should offer abortion services until hospitals began to do so, and that a community Abortion Task Force should be established by Planned Parenthood to motivate City and County healthcare agencies to “accept their role within this needed

42PPH, Minutes, January 12, June 26, and September 25, 1973. The pay raise was prompted by the fact that Ferguson had been offered a job with Planned Parenthood of Dallas and the Board wanted to prevent his defection.
service area.” The committee also authorized a special budget extension for the executive director to purchase needed equipment and supplies.\(^{45}\)

The Federation also had provided the Houston affiliate with guidance on the abortion issue. A five-page list of “Recommended Standards for Abortion Services” from the PPFA National Medical Committee, as well as a five-page list of “Guidelines for Pregnancy and Abortion Counseling,” had been sent to each affiliate to ensure uniform standards in the operation of abortion clinics. Affiliates were encouraged to treat “any pregnant woman, regardless of age or marital status,” until such time as “the community itself meets the need.” They were also directed to provide services to low-income women “at a cost they can afford.” No mention was made of how affiliates were supposed to pay for these services.\(^{46}\)

Agency records make clear that Board members and physicians were willing to take these bold steps because they were certain that the city and county would, eventually, fund abortion services in public facilities and relieve Planned Parenthood of the burden. But they were sadly mistaken. Soon after the Board voted to accept the recommendations of the Medical Advisory Committee and began to look for a community base of support for its program, the city and county health departments informed the membership that no federal funds would be used for abortion. Both departments were funded by HEW, and it would take time, the city health director pointed out, to change the law. The county health director also expressed his desire that “Planned Parenthood move into this area,” since “it will probably be some time before


\(^{46}\)“Recommended Standards for Abortion Service” and “Guidelines for Pregnancy and Abortion Counseling.” attachments to the PPH, Minutes. February 13, 1973.
the County can provide this service.” Both directors encouraged Planned Parenthood
to shoulder the burden and the costs—financial and political—of becoming an abortion
provider, while avoiding the problematic issue themselves. At the same time they made
it clear that no abortion services would be offered at city or county clinical facilities.
With these statements, the defection was complete.47

Undaunted, the Board voted to fund the initial costs of abortion services and to
operate the clinic on a fee basis. An abortion would cost $145, and the procedure would
be performed by physicians at Planned Parenthood. The Medical Advisory Committee
moved quickly to establish medical policies and procedures for the abortion clinic and
liaison with other medical facilities. It secured emergency back-up from Ben Taub’s
Emergency Room director, Dr. Raymond Kaufman for patients that might develop “acute
complications:” In the event of an emergency at Planned Parenthood, a city-licensed
ambulance would transport the patient to Ben Taub’s emergency room for care; the
ambulance would operate on a “stand-by” basis on clinic days, and if an emergency
occurred, the Ob-Gyn resident on call at Ben Taub would render emergency medical
treatment. It also created a task force made up of Ob-Gyn directors from Houston
hospitals, medical schools, the directors of the city and county family planning programs,
and the president of the local Ob-Gyn Society, Dr. Jack Moore. Planned Parenthood’s
physicians were determined to drag the rest of Houston’s medical community and
healthcare agencies, kicking and screaming if necessary, into the abortion era.48

47PPH, Minutes, February 13, 1973. The City Health Director, Dr. C.A. Calhoun, and the County Health
Director, Dr. Francine Jensen, attended the February 13 Board meeting to offer their “advice,” and were
practically booed. Likewise, the Board of Directors of Baylor fully supported the clinic, but did not offer
its own facilities for abortion procedures.
Pregnancy termination services began at Planned Parenthood on March 20, 1973, less than two months after the historic Supreme Court decisions. By this time, thirty women were scheduled for abortions and over a thousand women had called to inquire about getting abortions. Within six weeks, 161 abortions had been performed and over two thousand women had called PPH to inquire about the procedure. By September, the number of abortions performed had risen to seven hundred. Planned Parenthood was once again in the vanguard of the birth control movement, but with a new clientele.49

Legal abortion brought young, middle-class white women to Planned Parenthood in growing numbers. The women coming to the clinic for abortions were overwhelmingly white (77 percent), under 21 years of age and unmarried (65 percent), and Protestant (65 percent). Almost half had no children (48 percent). Most had completed High School (73 percent) and a significant percentage were in college (41 percent). Most had weekly incomes of fifty dollars or less (71 percent). Yet all but 5 percent were able to pay the $145 fee. As had been the case with birth control in the past, the legalization of abortion was primarily to the advantage of those women who had resources, rather than the indigent. For a very short time public funds were available to help poor women secure abortions, but by the end of the 1970s this was no longer the case.50

50VPT Report, March 20 - May 1, 1973; “Female Patient Profile” in PPH, Minutes (April Patient Report) April 30, 1973; VPT Report, November 1973; and VPT Report, December 11, 1973. In fact, the age of patients decreased as the year went on. By the November report, 9% of the clinic’s patients were sixteen years old or younger. The $145 fee, it should be noted, was a bargain. It represented Planned Parenthood’s actual cost and was the cheapest in town (that fee has risen over the years as costs have increased, to $325 (up to 12 weeks; after that, the procedure is more complex and the fee rises correspondingly), but is still one of the lowest in Houston). The Board instituted the low fee in an attempt to set prices city-wide, to prevent hospitals and private clinics from charging huge fees for abortions. Before Planned Parenthood began its minimal price program, abortions in Houston ranged in price from $350-1,000. See Joan
Late in 1973 local hospitals and clinics began to establish pregnancy
termination clinics. Jeff-Davis hospital, the Reproductive Services clinic, Cullen
Women’s Center, and another “clinic on Westheimer” were reportedly among those
offering abortion services by September 1973. The clinic at Jeff-Davis was funded by
the county, which, despite a move by the Harris County Commissioner’s Court to block
it, found the money in its 1973-74 budget to fund the service. The Cullen Women’s
Center, a low-cost healthcare agency for the poor, probably received city funding as well.
The rest were private clinics. The cost of an abortion at these clinics ranged from $145 to
$400, which the Board considered reasonable. By the end of 1973 Ben Taub remained
the only public hospital that had not changed its by-laws to include voluntary pregnancy
termination; it continued to perform only therapeutic abortions. The establishment of
these facilities prompted Planned Parenthood’s Board to propose a phase-out of its own
Voluntary Pregnancy Termination (VPT) clinic, because, as one Board member stated,
“there are now adequate facilities in the community.” 51

Despite this seeming acceptance of abortion by the medical community and local
health agencies, clinics and hospitals that offered the procedure had to keep “a low
profile” in the community. Information was provided about abortion services to anyone
who inquired, but no advertising was done by PPH or area hospitals and clinics. Planned Parenthhood and other providers tried to downplay the negative connotation of abortion by
calling it “voluntary pregnancy termination,” or “VPT.” But as stories about abortion

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51“Harris County abortion clinic to open,” Houston Post, September 25, 1973. In an aggressive move, the
Harris County Commissioners Court tried to delete the $90,000 allocation for the clinic before its action
was declared illegal by County Attorney Joe Resweber. See also PPH, Minutes of the Executive

In Houston, the press was mostly positive. The Houston \textit{Chronicle} ran stories stressing the ease and safety of the abortions being performed at Planned Parenthood. But at the state and national levels the tide of protest had begun to rise, along with calls for anti-abortion legislation. Already Senator Jesse Helms (Rep-N.C.) had introduced an anti-abortion amendment to the Foreign Aid Bill prohibiting the use of US funds for abortion services, information about safe abortions, and scientific research on contraception, which had received a great deal of press. At the same time, Catholic forces were beginning to mobilize legislators behind an anti-abortion amendment to the Constitution.\footnote{“Antiabortion Amendment on Foreign Aid Bill Draws Fire,” Houston \textit{Chronicle}, December 6, 1973. “Could the Supreme Court ‘Abortion’ Decision Be Lost?” Planned Parenthood Federation of America, pamphlet dated April 1973.}

In Texas, state legislators began to introduce anti-abortion amendments in the House and Senate. Representative Van Dohlan was able to amend a House appropriations bill to state that “no hospital or physician receiving funds from that bill may elect to render abortion services, if the hospital decides not to offer the service.” State Senator Mengden introduced five anti-abortion bills designed to override the Supreme Court ruling in Texas. State legislators seemed determined to lag behind both public opinion
and the judiciary with regard to abortion. A full month after the *Roe* decision, the
Texas House formed a committee to “weigh the pros and cons of abortion.”\(^5\)

By 1974 Planned Parenthood’s leaders knew that anti-abortion forces had begun
to organize, and these forces had a dramatic effect on the way the agency did business.
Before abortion had come to Planned Parenthood, the agency had boldly manned the
front lines in its efforts to bring contraceptive services to Houston’s women. After its
VPT clinic opened, it quietly retreated from the front lines. It continued to deliver
vanguard services to its clientele, but from a position it considered safe given the
uncertain political climate. In this respect, Planned Parenthood’s leaders were far-
sighted. The opposition would only grow more virulent, and the low-profile, if not
defensive, position Planned Parenthood had assumed would ensure its political survival.

VOLUME II

Private Choices v. Public Voices:
The History of Planned Parenthood in Houston

by

Maria H. Anderson
Chapter 12

Constitutional Issues in *Roe v. Wade*

On January 22, 1973, the Supreme Court handed down its decision in the case of *Roe v. Wade*, announcing that the U.S. Constitution protects a woman’s right to decide whether to end a pregnancy. The constitutional questions the Court answered in *Roe* are still at the center of one of the most intense legal and political debates in American history; as late as 1992 a changing Supreme Court was again being asked to reconsider the issues.¹

The *Roe* case presented a challenge to a Texas statute, which had been substantially unchanged since 1854, that made it a crime to “procure and abortion” (i.e., to pay for one), except where it was “procured or attempted by medical advice for the purpose of saving the life of the mother.”² The Court’s decision was two years in coming. The case had been argued in 1971, and then, under a procedure used in only a few of the roughly 150 cases the Supreme Court hears each year, it was held over by the justices and argued a second time in 1972.³

The decision the Court reached in *Roe* was one that Eva Rubin, a noted legal scholar, has termed “an activist decision,” or one with enormous potential impact on public policy. Justice White, in dissent, characterized it as “an exercise in raw judicial power” that, “with no constitutional or legal justification, overrode the decisions made for people in the states by their state legislatures.” In one respect he was right. The *Roe* decision invalidated traditional state power to make abortion a criminal offense and

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forced a shift from an older set of accepted state policies on abortion to a legal position more in line with changing public opinion. Although the decision was framed in terms of traditional principles and precedents, these were being used to make new law. Behind the legal issues lay concerns about the need for population control, the changing status of women, and about illegitimacy, welfare costs, and child care, none of which were discussed openly. Yet the Court was clearly not indifferent to these underlying considerations. As Rubin has noted, in a number of cases the Court had come to act more like a legislative body than a judicial one, responding not to the claims of individuals seeking settlement of particular disputes, but to the demands of groups using the courts to promote their policy goals. The justices of the Supreme Court, she concluded, had by 1973 become "philosopher kings" deciding what would be good for the future.¹

Roe v. Wade had all the characteristics of just such a "public law" case. It was a class action suit and represented the interests of many women, not just those of the principal parties. It used declaratory judgment procedures that allowed challenges to a criminal law (Texas' abortion statute) without the risk of criminal penalties for the challengers. And it sought court orders enjoining the further enforcement of the law should it be held unconstitutional. A number of groups and interests were represented, both in the case itself and by amici curiae briefs. Three parties represented the interests involved: a pregnant woman, a couple wanting to prevent pregnancy but wanting access to abortion as a last resort, and a physician being prosecuted for performing abortions. The list of amici included thirty-six reform organization—church, medical, university, public health, legal, welfare, and women's and population-control groups (including

Planned Parenthood). The anti-abortion side included seven groups, a number of individuals, and the attorneys general for five states. The case was not concerned primarily with the individual litigants; they were symbolic rather than real parties (“Jane Doe” was no longer even pregnant by the time the decision was handed down). It was concerned instead with major public policy issues. In the same way, the decision was framed in legal terms and tied into the legal and constitutional traditions of the country, but was in many ways legislative. In addition to negating the existing laws in more than thirty states, it laid out guidelines for future state legislation.  

At the time, the Court was criticized for its basically legislative approach and for deciding the case too broadly and addressing issues that were not before it. But in retrospect, the Court was wise in trying to set as precisely as possible the limits within which new state abortion legislation should stay; any other course would have invited more litigation. More importantly, in its decision the Court adjusted the law to the changing needs of society. When the abortion laws had been written in the late nineteenth century, they reflected the concerns, outlook, and the state of medical knowledge of those times. The physicians’ crusade against abortion had succeeded in changing public perceptions and public opinion, and replacing tolerance of abortion with a moralistic demand for rigid control. In the 1960s and 1970s, new groups had begun to attack the rigidity of the nineteenth-century laws, and public opinion was shifting back toward tolerance and acceptance.

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*Ibid*, 62-63. Class action suits allow people “similarly situated” to litigate a single case on behalf of all members of the class, rather than requiring each individual to bring a separate lawsuit. Declaratory judgments are explanatory judgments, designed to clear up laws that are uncertain or doubtful. They are sought where a plaintiff is in doubt as to his legal rights and status in a particular case, and petitions the court to determine what they are. Once the court has issued a declaratory judgment, its decision is binding. See *Black’s Law Dictionary* (St. Paul: West Publishing Co., 1981), 170, 283-284.
In March 1970, Jane Roe, a pregnant woman, sought a declaratory judgment that the Texas abortion law was unconstitutional because it denied her access to a safe, legal abortion performed by a competent physician. She challenged it under the First, Fourth, Fifth, Ninth, and Fourteenth amendments, maintaining that it infringed her fundamental rights and personal liberty. Two other cases were argued with the Roe case. Dr. Hallford, a physician, claimed that Texas’ law injured him, since he had been arrested for violating the abortion statute that, he claimed, kept him from prescribing the proper treatment for many of his patients. In the third case, a married couple challenged the law on the grounds that the wife had a medical condition that would endanger her life if she became pregnant, and the law would not allow her a legal abortion under safe conditions. The three cases were heard together in a federal District Court in Texas. The suits presented three aspects of the abortion problem: the Texas laws was being challenged by a pregnant single woman, a childless couple where the wife’s health would be threatened by a pregnancy, and a licensed, practicing physician.

The cases presented a wide range of abortion issues, and one interesting problem. Jane Roe’s initial suit was filed in March 1970, when she was already several weeks pregnant. Her pregnancy would not have lasted past December, but her case did not reach the Supreme Court until 1971 and was not finally resolved until 1973, at which time her case was moot. However, by this time, it seemed important to have a definitive Supreme Court ruling on abortion. So the Court ruled that abortion cases could be treated as an exception to the general rule that “an actual controversy must exist at the appellate stages of a case, and not simply at the date the action was initiated.” Although a
particular pregnancy might be over by the time the case reached an appellate court, the justices reasoned, pregnancy was a condition "likely to be repeated."  

In Federal District Court, Jane Roe’s attorney, Sarah Weddington, had asked the court to do two things: first, to declare that the Texas law against abortion was unconstitutional on its face, that is, as one could see by merely reading it; and second, to enjoin, or stop, the enforcement of the statute. She based her suit on the grounds that the Texas statute was vague and uncertain (on its face), that it was unconstitutionally broad and infringed upon her client’s right to safe and adequate medical advice about the decision of whether to carry a pregnancy to term, upon the fundamental right of all women to choose whether to bear children, and upon her client’s right to privacy in the physician-patient relationship. She also argued that the statute infringed upon her client’s right to life in violation of the due-process clause of the Fourteenth amendment, that it violated the First amendment prohibition against laws respecting an establishment of religion, and that on its face it denied her client the equal protection of the laws.

In presenting her case, Weddington engaged in “alternative pleading,” giving the court several reasons to set aside the Texas law rather than just one. First she argued, there was a fundamental area of personal privacy secured by the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth amendments, and the Texas abortion statute violated that

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7Rubin, Abortion Politics and the Courts, 68. The lower court’s decision can be found in Roe v. Wade, 314 F. Supp. 1217 (N.D. Texas 1970).
8Brief for Appellants, Landmark Briefs, 128. The idea that abortion should be declared a fundamental right was the crux of Weddington’s case. The Supreme court has distinguished certain rights or liberties as “fundamental.” These rights, for example, the right to free speech, can be abridged by the government only when it is demonstrably necessary to achieve a compelling objective. If the Court decides to treat a right as fundamental, that right becomes very difficult to abridge; and an abridgment of a fundamental right is almost never upheld. See Tribe, Abortion: Clash of Absolutes, 10-11.
individual right of privacy. Second, she argued that the statute was vague and that doctors, who risked criminal prosecution if they performed abortions for any reason, could not read the statute and tell what was and what was not against the law; a criminal statute must say specifically what conduct is illegal, she asserted, or it must be stricken as "vague."  

The general right of privacy Weddington referred to had been established in case law, and Weddington hoped to convince the court to extend those privacy rights to include abortion. The First amendment protects the right of association; one of its aspects, Weddington argued, was the right of free association between a doctor and a patient, and Texas' anti-abortion law interfered with that right. Under the Texas statute, doctors did not feel free to advise their patients about abortion or to perform them when requested by patients, even when the doctors agreed it was justified. In another line of argument, Weddington reminded the court that the Fourth amendment guarantees the right of persons "to be let alone," or not to be subjected to unjustifiable intrusion by the government upon their privacy; the Texas statute, she argued, by forcing a woman to carry to full term an embryo (regardless of her wishes, her health, her circumstances, her finances, her family or her future) was an invasion of her right to privacy and her right to be let alone.  

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9Sarah Weddington, A Question of Choice (New York: Putnam 1992). 54-55. The right of privacy argument came from the Supreme Court’s decision in Griswold v. Connecticut, 381 U.S. 471 (1965), a birth control case in which the Court found that a couple’s right to privacy was supported in the language of the Ninth Amendment. The Court also held in Griswold that the due-process clause of the Fourteenth amendment protected personal rights and liberties from impairment by the states. The right to privacy is one of the "penumbras" of the Bill of Rights; it is an implied rather than a stated right which flows from those guarantees that help give it life and substance.  

10Motion and Brief of New Women Lawyers, Women’s Health and Abortion Project, and National Abortion Action Coalition as Amici Curiae, Landmark Decisions, 681-696.
The Fifth Amendment states that no person shall be “deprived of life, liberty, or property, without due process of law.” But, Weddington asserted, the law had never treated the fetus as a person, and a fetus did not have the legal rights of a person. And the Eighth Amendment prohibits “cruel and unusual punishment.” Under the Texas abortion statute, she maintained, women were being subjected to excessive punishment by being forced to carry to term unwanted children.

The Ninth Amendment states that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” The Supreme Court in Griswold v. Connecticut had held that a couple’s right to privacy in matters of birth control was supported by the language of that amendment; and, Weddington argued, so was a woman’s decision whether to choose abortion. Finally, the Fourteenth Amendment guarantees that the states cannot “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” The Texas statute, Weddington held, violated the due process clause of the amendment, which protects from state action the right to privacy, including a woman’s right to terminate pregnancy.11

Henry Wade, District Attorney of Dallas, had argued on behalf of Texas that there was no right to abortion in the Constitution, especially not in the First Amendment, and that the state had a “compelling interest” in protecting the fetus, “in whatever stage [of life] it may be in.” The state’s position was that a fetus was a person from the moment of conception, and was therefore entitled to protection under the Fifth and the Fourteenth Amendments. Wade also emphasized the state’s right to make decisions, and concluded

11Brief for Appellants, Landmark Decisions, 57-227.
that “the state’s position will be, and is, that the right of the child to life is superior to that of a woman’s right to privacy.” Wade’s argument ended the hearing.\textsuperscript{12}

The district court had declared the Texas abortion law unconstitutional, noting that its provisions were so vague doctors could not tell when an abortion was legal or illegal. It found that the Texas law must be declared unconstitutional because it deprived single women and married couples of their right, secured by the Ninth Amendment, to choose not to have children. The court’s opinion noted that “freedom to choose in the matter of abortions has been accorded the status of a ‘fundamental’ right in every case” the court knew of where the question had been raised. “The burden is on the defendant,” the judges wrote, “to demonstrate to the satisfaction of the court that the infringement [by the Texas abortion law] is necessary to support a compelling state interest,” and concluded: “The defendant has failed to meet this burden.”\textsuperscript{13}

At the same time, the Federal District Court refused to issue an injunction ordering the District Attorney not to prosecute doctors for performing abortions, or to stop enforcement of the Texas abortion statute. The court said it assumed Wade would abide by its declaration that the law was unconstitutional. But Wade announced immediately after the court’s decision to the Dallas press that he would continue to prosecute and would also appeal the decision. This had the effect of making the plaintiff’s victory a theoretical rather than a practical one.

\textsuperscript{12}Henry Wade, an interesting character, was described by the \textit{Dallas Morning News} (August 1, 1985) as a man who “drawls.” “He drops the endings from words and say ‘cain’t.’ He chews cigars and spits tobacco juice. He plays a rough game of dominoes and prefers not to travel further than Forney.” He also had, according to the newspaper report, a “ruddy face, white hair and bulging waistline.” But, according to Sarah Weddington, appearances were deceiving. Many thought of him as one of the most effective professional law enforcement men in the country. He served as District Attorney for a total of thirty-five years and sent twenty-nine people to death row, more than half of whom were eventually executed. He prosecuted Jack Ruby for the shooting of Lee Harvey Oswald and was involved in many other famous cases. See her comments in \textit{A Question of Choice}, 56-57.
It also allowed the case to reach the Supreme Court in record time. Normally, an initial federal court decision must be appealed to a circuit court before an appeal to the Supreme Court. Accordingly, Wedington planned her appeal to the Fifth Circuit Court of Appeals, but she also appealed directly to the Supreme Court, since it was procedurally possible to go straight to the High Court if a lower federal court had declared a state law unconstitutional yet local authorities continued to enforce the law.\(^\text{14}\)

In May 1971, just after President Nixon had ordered the U.S. military to end the practice of abortions in military hospitals, the Supreme Court agreed to hear arguments during October in the matter of *Roe v. Wade*. Lawyers' briefs were prepared on both sides, and a number of *amicus* briefs were submitted in support of or opposition to a woman's right to abortion. Wedington's 145-page brief was largely devoted to procedural matters—the standing of the appellants—and to emphasizing the breadth of medical support for legalized abortion. The constitutional privacy argument began on page ninety-one. The brief cited the Court’s 1923 decision in *Griswold v. Connecticut*, among others, in contending that the absence of any explicit constitutional enumeration of a privacy right "is no impediment to the existence of the right," and a passage from a 1905 Supreme Court ruling, *Jacobson v. Massachusetts*, in arguing that "The right to seek and receive medical care for the protection of health and well-being is a fundamental personal liberty." The brief also reached beyond constitutional arguments to remind the justices that "Certainly the members of this Court know from personal experience the emotional and financial expenditures parenthood demands," and argued briefly in closing against the arguments Texas might make in defense of its statute. Only a brief footnote

\(^{13}\)Summary of the Arguments in *Roe v. Wade*, *Landmark Briefs*, 57-65.
on page 123 directly rebutted a common argument made by abortion opponents:

"Section 1 of the Fourteenth Amendment...refers to 'All persons born or naturalized in the United States....' There are no cases which hold that fetuses are protected by the Fourteenth Amendment."\(^\text{15}\)

According to Weddington, her brief was designed only to "touch on major aspects of abortion, and other groups would file amicus curiae briefs expanding on them."

Our brief would mention the medical aspects of abortion, and then medical groups would file one strictly about medical details. We would mention the legal aspects, and law professors and lawyers would file a brief further delineating legal considerations. We would mention the impact of pregnancy on women, and women's organizations and individual women would furnish a supplementary brief. The same strategy was worked out for religious, psychiatric, and other aspects of abortion. We wanted the Court to be aware of the breadth of support for changing the laws.\(^\text{16}\)

Of the seven other favorable amicus briefs submitted to the Court, the two most significant were those prepared by Harriet Pilpel on behalf of the Planned Parenthood Federation of America, and one by attorney Nancy Stearns on behalf of a number of women's groups. Pilpel's brief stressed that "the right to abortion must be viewed as a corollary of the right to fertility which was recognized in Griswold" and stating that there is a "fundamental constitutional right under the Ninth and Fourteenth Amendments to choose whether or not to bear a child." The PPFA brief also contended that "the right of a woman to choose whether or not to bear a child is an aspect of her right to privacy and liberty." It was, in fact, quite repetitive, stressing again and again the right to privacy in

\(^\text{13}Ibid., 63.\) The Fifth Circuit subsequently agreed to postpone consideration of Weddington's appeal until after the Supreme Court accepted or rejected Roe.

\(^\text{15}Brief for Appellants, Landmark Decisions, 57-226.\)
Griswold: "...from the right to practice contraception and thus control fertility"
flowed "the right to control conception...The right to contraception implicitly includes the
right to choose whether or not to become a parent."\textsuperscript{17}

Stearns's brief focused more upon the realities of pregnancy than precedent.
"Carrying, giving birth to, and raising an unwanted child can be one of the most painful
and long-lasting punishments that a person can endure," Stearns stated, and "statutes
which condemn women to share their bodies with another organism against their will"
should be declared unconstitutional. A similar point was made in a shorter brief filed by
Carol Ryan on behalf of the American College of Obstetrics and Gynecology: "The
freedom to be the master of her own body, and thus her own fate, is as fundamental a
right as a woman can possess."\textsuperscript{18}

One brief, submitted by Joan Bradford on behalf of several women's and pro-
abortion groups, argued that laws restricting abortion violated the Thirteenth Amendment
by imposing on pregnant women involuntary servitude "without due conviction for a
crime." Under the Thirteenth Amendment, Bradford said, a woman had the right to
freedom from the involuntary servitude of pregnancy and childbearing unless she was
convicted of a crime. The only time the state was permitted to impose involuntary
service upon its citizens was for military service, jury duty, tax reporting, and involuntary

\textsuperscript{16}Weddington, \textit{A Question of Choice}," 90.
\textsuperscript{17}Motion and Brief of Planned Parenthood Federation of America and American Association of Planned
Parenthood Physicians as \textit{Amici Curiae, Landmark Briefs, 681-742.}
\textsuperscript{18}Nancy Stearns, Motion and Brief of New Women Lawyers, Women's Health and Abortion Project, and
National Abortion Action Coalition as \textit{Amici Curiae, Landmark Briefs, 563-638}; and Carol Ryan, Brief of
the American College of Obstetricians and Gynecologists, the American Psychiatric Association, \textit{et al., as
Amici Curiae, Landmark Briefs, 317-350.}
commitment or hospitalization. Bradford’s brief was an extreme example of alternative pleading.\(^{19}\)

Wade’s 58-page brief on behalf of Texas was more straightforward. Much of it dealt with fetal rights, fetal development during pregnancy, and the medical complications of abortion; it also contained ten photographs of fetuses in different stages of development. The rest of the argument was devoted to maintaining that “the fetus is a human being” and “the right to life of the unborn child is superior to the right of privacy of the mother.” Taking on the Griswold precedent, Wade noted that “Prevention of abortion does not entail...state interference with the right of marital intercourse, nor does enforcement of the statute requiring [sic] invasions of the conjugal bedroom.” The best of the six amicus briefs filed on behalf of the appellee, by Alfred Scanlan for the National Right to Life Committee, made the same point more simply: “The Texas...abortion statutes do not affect the sexual relationships of husband and wife.”\(^{20}\)

Oral arguments were heard December 13, 1971. Weddington spoke first, going over the history of the case and establishing several points about the impact of pregnancy on women’s lives, while the justices kept interrupting. She stressed that legal abortion in early pregnancy was eight times safer than carrying a pregnancy to term. She then made the personal side of her case: “A pregnancy to a woman is perhaps one of the most determinative aspects of her life. It disrupts her body, it disrupts her education, it disrupts her employment, and it often disrupts her entire family life. Because of the impact on the woman, this certainly, in as far as there are any rights which are fundamental, is a matter

\(^{19}\text{Motion and Brief of Organizations and Named Women as Amici Curiae, Landmark Briefs, 639-680.}\)
\(^{20}\text{Brief for Appellee, Landmark Decisions, 227-294; and Motion and Brief of the National Right to Life Committee as Amicus Curiae, Landmark Briefs, 489-562. The other amicus briefs filed to support the State}
which is of such fundamental and basic concern to the woman involved that she should be allowed to make the choice as to whether to continue or to terminate her pregnancy." 21

The Court 22 then asked her to direct her argument to the constitutional questions involved. Weddington referred to the Ninth Amendment and cited a new historical article by Professor Cyril Means which documented that as of 1791, when the Ninth Amendment was ratified, no common law prohibition against abortion existed in America. Then she took up the Griswold decision, and acknowledged that since "it appears that the members of the Court in that case were obviously divided as to the specific constitutional framework of the right which they held to exist....I'm a little reluctant to aspire to a wisdom that the Court did not." "I do feel," she continued, "that the Ninth Amendment is an appropriate place for the freedom to rest. I think the Fourteenth Amendment is equally an appropriate place, under the right of persons to life, liberty, and the pursuit of happiness" (a phrase that actually appears in the Declaration of Independence, and not in the Fourteenth Amendment!). "I think," Weddington went on, "in as far as liberty is meaningful, that liberty to these women would mean liberty from being forced to continue the unwanted pregnancy." 23

The Court asked Weddington is she was relying "simply on the due process clause of the Fourteenth Amendment." She answered that "We had originally brought the suit alleging both the due process clause, equal protection clause, the Ninth Amendment, and a variety of others." "And anything else that might obtain," the Court

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22 The transcript of the hearing does not indicate the names of justices who asked questions.
interjected. “Yeah, right,” replied Wedington. She repeatedly cited the Ninth and
Fourteenth Amendments and stated that “I think one of the purposes of the Constitution
was to guarantee to the individual the right to determined the course of their own lives.”

When the Court asked whether the state had a proper interest in protecting the
fetus during at least some stages of pregnancy, Wedington tried to elude the issue. She
pointed out instead that the Texas statute made no such distinction in prohibiting all
abortions except those necessary to save the mother’s life. But when pressed on the
matter, she conceded that “Obviously I have a much more difficult time saying that the
state has no interest in late pregnancy.” Why is that, the Court asked her. “I think it’s
more the emotional response to a late pregnancy, rather than it is any constitutional”
consideration,” she answered. She then noted that the Constitution “attaches protection
to the person at the time of birth” and not before, and went on to explain how a federal
court injunction against the state statute was the only legal remedy open to Texas women,
since Texas law included no declaratory judgment process and women could not be
charged as criminal defendants under the state abortion laws. Then her thirty minutes
were over.25

Jay Floyd from the Texas Attorney General’s office argued on behalf of the State.
He began his presentation with an inappropriate comment that fell flat: “It’s an old joke,
but when a man argues against two beautiful ladies like this, they are going to have the
last word.” He then moved on to assert that Jane Roe’s claim was moot because she was
no longer pregnant. The Court immediately challenged the suggestion of mootness by
noting that Roe was a class action, but Floyd was persistent until the Court asked “what

23Oral Argument, 788-790.
24Ibid., 788.
procedure would you suggest for any pregnant female in the state of Texas ever to get any judicial consideration of this constitutional claim?” Floyd responded, “I do not believe it can be done. I think she makes her choice prior to the time she becomes pregnant.” The Court responded, “Maybe she makes her choice when she decides to live in Texas.” As laughter filled the courtroom, Floyd asked, “May I proceed?” and added, “There is no restriction on moving.”

Floyd’s presentation was hesitant. He readily admitted that he had “no idea” as to whether the protection of the fetus was the original, nineteenth-century intent of the Texas statute, and he was unable to give an answer when the Court pressed him to explain what state interests presently underlay the law. Pushed to identify precisely when fetal life commenced, he conceded that “there are unanswerable questions in this field,” which drew more laughter from the audience. Then the Court asked why Texas’s abortion law included no exception for women who had been raped: “Such a woman wouldn’t have had a choice, would she?” But by the time Floyd attempted to articulate a response, his thirty minutes had expired.27

The Supreme Court wrangled over making a decision in Roe until September 1972, then notified the attorneys that the oral reargument of the case would take place October 11, 1972. According to Weddington, she received a note from the High Court that said simply: “This case is restored to the calendar for reargument.” At the bottom it read: “Mr. Justice Douglas dissents.” Evidently, Chief Justice Warren Burger and Justice William Douglas disagreed over the opinion the Court would reach—Burger did not think the Texas abortion statute was vague or unconstitutional but Douglas thought it

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25 Ibid., 789-796.  
26 Ibid., 796-798.
was both—and Burger forced the rehearing. In any case, arguing the same case twice
before the Supreme Court is very unusual. When a case is set for reargument, the Court
generally asks the attorneys to address a specific issue or issues. In this instance, the
justices gave the lawyers no idea what they were interested in hearing.28

One rumor was that the Court wanted all nine Justices to participate in the
decision. Only seven had been on the bench in December 1971; now Nixon appointees
William Rehnquist and Lewis Powell had been confirmed and there were nine. Another
story was that Nixon, who was opposed to abortion, did not want the Court to decide the
case while he was running for his second term as president. Yet another rumor was the
Justice Blackmun, the justice with the best background in medical-legal issues (he had
been counsel to the Mayo Clinic before joining the bench), who had been appointed by
Chief Justice Burger to write the opinion, had asked for more time. The rumor also
added that Douglas was dissenting the reargument probably because Burger had
designated Blackmun to write the opinion. By Court custom, if the chief justice is on the
majority side during the post-argument conference, the he designated the justice who will
write the opinion. If the chief justice is not on the majority side, as was rumored in this
case, then the justice with seniority on the majority side makes that designation. The
rumor was that Douglas, the senior justice on the majority side was upset when Burger
appointed Blackmun, since it contravened tradition. (Later in their book The Brethren,
Bob Woodward and Scott Armstrong confirmed that rumor.) There was also media

27 Ibid., 804-806.
speculation that the Court had been 5-2 in favor of overturning the Texas abortion statute, but that Burger was in dissent and used his position to force a reargument.29

Weddington submitted a second, seventeen-page brief on behalf of the appellants. In it she reported that since the district court had not granted injunctive relief and so had refused to tell the district attorney not to prosecute doctors who performed abortions, Texas physicians were still refusing to perform them. During the last nine months of 1971, the brief stated, a total of 1,658 women from Texas had gone to New York for abortions. The brief also mentioned that the American Bar Association House of Delegates had approved a Uniform Abortion Act, which would allow termination of pregnancy up to twenty weeks; abortion was also allowed thereafter for reasons such as rape, incest, fetal deformity, and endangerment of the mental or physical health of the woman. And it cited a report of the Rockefeller Commission on Population Growth and the American Future, which had recommended that the matter of abortion be left to the conscience of the individual concerned, and several recently decided cases supporting appellants' positions on standing and the substantive issues.30

Another section of the brief stressed, yet again, the fact that Texas had never treated the fetus as having the rights and dignity of a person. It cited an 1889 decision which held that in order to obtain a murder conviction, the State must prove "that the child was born alive." It mentioned that under the rules of the Texas Welfare Department, a needy pregnant woman could not get welfare payments for her unborn child; that a federal court in Pennsylvania had held that the embryo or fetus is not a person or citizen within the meaning of the Fourteenth Amendment or the Civil Rights

30Supplemental Brief for Appellants, Landmark Briefs, 295-315.
Act; and that a New York State court had concluded that the Constitution does not confer or require legal personality for the unborn. The brief ended by repeating that the Texas statute was vague and placed on the doctor an unconstitutional burden of proof, namely, that the abortion performed was within the exception to the Texas abortion statute. 31

Oral arguments in the case of Roe v. Wade began again on October 11, 1972. Again Weddington spoke first. This time, she was able to deliver almost half of her presentation without encountering any substantial questioning from the bench. She summarized the prior history of the case, noted some abortion safety statistics presented in Harriet Pilpel’s amicus brief on behalf of Planned Parenthood, reiterated the importance of Griswold, and cited the recent decisions by federal courts. The Court broke in to ask again whether Weddington would draw any distinction between the first and ninth month of gestation, and Weddington twice evaded the question by stating that the Texas statute did not. Then the Court asked Weddington whether she placed more reliance upon her vagueness challenge or upon her Ninth Amendment claim, and when she refused to choose one over the other, asked whether she had any comment on the Hippocratic oath. Recovering quickly, Weddington replied that the Hippocratic oath did not speak to the question of constitutional rights and was not “pertinent to the argument we were making.” 32

Finally, the Court asked Weddington a hypothetical question: “if it were established that an unborn fetus is a person [under the Fourteenth Amendment],...you

32Oral Argument, October 11, 1972, Landmark Briefs, 807-816.
would have almost an impossible case here, would you not?” Weddington admitted frankly that “I would have a very difficult case.” The Court then inquired as to whether Weddington thought Texas could constitutionally declare that fetuses were persons “after the third month of gestation,” and she answered, “I do not believe that the state legislature can determine the meaning of the federal Constitution. It is up to this Court to make that determination.” Then her thirty minutes were up.33

The argument on behalf of Texas this time was presented by the state’s Assistant Attorney General, Robert Flowers. Flowers began straightforwardly by declaring that “it is the position of the state of Texas that upon conception we have a human being, a person within the concept of the Constitution.” The Court then inquired how one could know that a fetus was indeed a person, and Flowers answered that it was a question for legislatures to resolve. The Court then asked whether Flowers knew of any court which had held that a fetus was a person, and when Flowers conceded that he did not but nonetheless tried to hold his ground, a Court member pointed out that the Fourteenth Amendment explicitly spoke of persons as being “born or naturalized.” Flowers tried to move on, but when he cited the eighteenth-century English commentator William Blackstone, the Court asked, “was it not true that in Blackstone’s time abortion was not a felony?” Flowers agreed, and sought to shift the discussion to the framers of the US Constitution, but the Court continued to press him to acknowledge “that the medical profession itself is not in agreement as to when life begins.” Again Flowers conceded.34

Flowers was finally able to return to his basic point that Texas did view fetuses as constitutional persons, and the Court immediately asked whether there was “any medical

33bid., 816-817.
34ibid., 818-820.
testimony of any kind that says that a fetus is a person at the time of conception.”

Flowers cited an opinion from two years earlier in an Illinois abortion case, but a question from the Court established that even that opinion had not spoken to “the moment of conception.” During his last few minutes of argument, the Court asked Flowers several historical questions about the nineteenth-century origins of the Texas law; Flowers admitted that he did not know what motives had underlain the enactment of the statute, and a member of the Court interjected: “They were enacted to protect the health and lives of pregnant women because of the danger of operative procedures generally around that time?” Flowers agreed, and his thirty minutes expired.  

The Court announced its decision on January 22, 1973. By a vote of seven to two, the Texas anti-abortion statute had been ruled unconstitutional as violating the constitutional right of privacy. Justices Blackmun, who wrote the opinion, Brennan, Burger, Douglas, Marshall, Powell, and Stewart had voted for the Roe opinion. Justices White and Rehnquist had written dissents. Abortion was no longer illegal. Governor Dolph Briscoe responded tersely to the decision: “I am today asking the attorney general for his evaluation of this ruling and for the alternatives open to Texas as a result of the Supreme Court's decision.” Lieutenant Governor Bill Hobby said, “It is my opinion that the best solution is one in which the state is neutral on the subject of abortion. I believe the medical profession of Texas will respond to the decision and will treat abortion as a medical matter in a responsible way.”

The syllabus of the decision made several main points. First, the Court held that the termination of Jane Roe’s pregnancy did not cancel her status as an appropriate

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35bid., 821-829.
plaintiff. Under strict mootness principles, hers would be a situation “capable of repetition, yet evading review.” Second, the Texas statute violated the due process clause of the Fourteenth Amendment, which protects from state action the right to privacy (contained in the Ninth), including a woman’s qualified right to terminate her pregnancy. The state, however, had a legitimate interest in protecting both the pregnant woman’s health and the potentiality of human life.\textsuperscript{37}

The majority opinion first noted the sensitive nature of the subject:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.\textsuperscript{38}

Blackmun next reviewed the Texas statute, the facts about the plaintiffs, and procedurally how the case had arrived at the Supreme Court. He examined and refuted the state’s claims that the case was moot since Jane Roe was not pregnant when her cases reached the Supreme Court. He then reviewed the history of abortion, including ancient attitudes, the Hippocratic oath, common law, English statutory law, American law, and the history of the position of the American Medical Association, the American Public Health Association, and the American Bar Association. He reexamined the reasons advanced to explain historically the enactment of criminal abortion laws and to justify their existence. First, he noted, “it has been argued occasionally that these laws were the


\textsuperscript{38}Ibid., 4.
product of a Victorian social concern to discourage illicit sexual conduct.” But the state had not advanced that argument. A second reason concerned abortion as a medical procedure. Abortion was no longer the very dangerous procedure it once was; appellants and various amici, he noted, “refer to medical data indicating that abortion in early pregnancy...is now relatively safe.” A third reason, he said, was “the State’s interest—some phrase it in terms of duty—in protecting prenatal life.” But here Blackmun commented that those challenging the anti-abortion statute had “sharply disputed” that such was a reason for the statute’s being passed, and he noted a lack of any legislative history to support that argument.39

Blackmun then turned to the constitutional issue of privacy:

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back as far as 1891, the Court has recognized that a right of personal privacy...does exist under the Constitution. In varying contexts the Court or individual Justices have indeed found at least the roots of that right in the First Amendment...in the Fourth and Fifth Amendments...in the penumbras of the Bill of Rights...in the Ninth Amendment...or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment. These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty”...are included in this guarantee of personal privacy.

This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.40

39Ibid., 5-38.
40Ibid., 39-41.
But, Blackmun noted, appellants had argued that a woman’s right to choose abortion was absolute, and “with this we do not agree.” Some state regulations would be appropriate for safeguarding health and protecting “potential life.” “At some point in pregnancy,” the majority said, “these respective interests become sufficiently compelling to sustain regulation of...the abortion decision.” Regulations could be justified by a “compelling state interest,” but had to be “narrowly drawn to express only the legitimate state interests at stake.” Here the Court seemed to be setting limits on the lengths states could go to in restricting abortion, but as would be seen after Roe, a number of states lost no time in enacting abortion restrictions, making it more time-consuming, more expensive, and more difficult to obtain.41

Next in the opinion was a lengthy section about the interest the state had advocated, that of preserving “unborn life” and explaining that the state had not treated the fetus as a person in legal ways. Blackmun outlined concepts about “when life begins” that had held sway in various groups over time. The Roman Catholic Church, for example, had come to its position that life begins at conception relatively recently in history. He then pointed out that areas of law, other than criminal abortions laws, had “been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth.” Tort law, for instance, did not involve prenatal injuries, and rights of inheritance were contingent upon live birth. He concluded

41Ibid., 42-44.
simply: "In short, the unborn have never been recognized in the law as persons in the whole sense."42

The Court could have stopped there. It had declared that there was a constitutional right of privacy, that a woman’s right to choose abortion was a fundamental right, that the state of Texas had no compelling reason to prohibit abortion to the extent that it had, and that Texas’s abortion law was unconstitutional. Nevertheless, it added what is called dictum. This advisory language is not strictly part of an opinion; it merely suggests what the Court’s response would be to issues not specifically before it.43

In the last few pages of its opinion, the Court outlined a scheme for state regulation and procedures a state might implement if it chose to act. These suggestions were based on a trimester approach to pregnancy. During the first trimester, the abortion decision must be left to the medical judgment of the pregnant woman’s physician. After that, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. And during the third trimester (after viability, or the time after which a fetus might be expected to survive outside its mother’s womb), the state, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the woman.44

None of the amicus briefs had suggested anything about a trimester approach to pregnancy. Neither the state’s brief nor Weddington’s brief had contained anything

42Ibid., 44-50.
about it. And nothing had been said about it during oral argument. In 1981 Woodward and Armstrong’s *The Brethren* related that Blackmun had spent time in the Mayo Clinic’s library researching pregnancy, and the trimester approach of opinion had evolved from his research there and discussions with clinic staff.\(^{45}\)

Chief Justice Warren Burger’s concurring opinion noted that he was “somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion.” But he did not think the Court had exceeded the scope of “judicial notice,” or consideration of matters so commonly known that they need no proof, accepted in other contexts. Burger noted further that “Plainly, the Court today rejects any claim that the Constitution requires abortion on demand.”\(^{46}\)

Justice Douglas’s concurring opinion amplified what he considered the meaning of the term “liberty” used in the Fourteenth Amendment. It included “the freedom of choice in the basic decision of one’s life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children.” In essence, he said, those who opposed abortion placed the entire value on the fetus and none on the woman,” and this was unconstitutional.\(^{47}\) Justice Stewart’s concurring opinion hinted that the Court should not have discussed the trimester approach, since “such legislation is not before us.”\(^{48}\)

Justice White had written a dissent, which Rehnquist joined; Rehnquist had also written his own dissent. White’s tone was antagonistic:

\(^{44}\) 410 U.S. 113, at 50-54 (1973).
\(^{45}\) *Weddington, A Question of Choice*, 162.
With all due respect, I dissent. I find nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers, and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes....The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life...which she carries. 49

Rehnquist’s dissent took a different track. He first pointed out that the Court was saying that a state could impose very few restrictions in the first trimester. But he then raised the question of whether Jane Roe had been in the first trimester when the suit was filed. Then he went on to say that even if the plaintiff had standing to litigate the issue, abortion was not a “private” operation “in the ordinary usage of that word.” Rehnquist added that the Court should have used a test of whether the state legislation had a “rational relation to a valid state objective,” not whether the state had a compelling reason to regulate, as the majority had ruled. The first test would, of course, make it much easier for the state to win. 50

It was clear the Court sensed that anti-abortion activists would immediately begin efforts to pass state regulations, and were trying to avoid endless future litigation by giving some idea of what the Court would consider within and outside state authority. It was also clear that the two dissenters felt strongly about their positions. But the decision was seven to two; it was a strong and lucid one that established a fundamental right of privacy extending to the abortion issue. Roe would now become part of established case law, and future courts would be bound by its words and provisions.

49 Ibid., 107 (Justice White dissenting) (1973).
The ruling affected the laws in forty-four states, many with statutes similar to Texas's. There were follow-up actions in many state legislatures and courts after the *Roe* decision. In many of those states the laws were declared unconstitutional by state or federal courts or by opinion of the state attorney general. Some state legislatures passed new statutes; other legislatures, as in Texas, did not pass any new regulations until years later. Expanding access to abortion after the *Roe* decision did not go smoothly. *Roe* had changed the way the legal battles would be fought, but it had not ensured that abortion services would be made available to women. The Supreme Court decision had been Round One.
Chapter 13
Redefining Mission:
Planned Parenthood 1974–1976

The abortion era began quietly in Houston. Between 1973 and 1976 Planned Parenthood enjoyed several years of relative calm during which it provided abortion services to thousands of poor and middle-class women without incident. Following the Supreme Court’s decision in Roe v. Wade, the agency established its Voluntary Pregnancy Termination (VPT) clinic. Local public hospitals, healthcare agencies, and private clinics soon followed suit. Within a year, there were a dozen abortion clinics in Houston, all operating under the watchful eye of Planned Parenthood’s Medical Advisory Committee. Federal funding for family planning services under Social Services block grants Title IV-A (HEW), Title XIX (Medicaid), and Title XX (HEW) finally arrived, offering poor women access to safe, subsidized abortions. Planned Parenthood of Houston successfully operated its VPT and birth control clinics on a cash basis, and with a considerable amount of professional and public approbation. In the mid-seventies its leaders could rightfully claim that abortion had become “safe and legal at last.”

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1Roe v. Wade, 410 U.S. 113 (1973). Title IV-A of the Social Security Act was HEW funded, through local welfare agencies, and reimbursed Planned Parenthood retroactively for providing birth control services to indigent women. It became Title XX of the Social Security Act (PL 93-647, Social Security Amendments of 1974, 42 USC 1397(a), 1974) in October 1975, after the Act was amended. After 1975, Title XX provided grants from the federal government to states, and was administered through the Texas Department of Human Resources. Grants were for use in family planning and protective services, daycare for the poor, and programs for the aged and disabled. Title X of the Public Health Service Act (PL 91-572, Family Planning Service and Population Research Act of 1970, 42 USC 300, 1970), provided funding for family planning programs, including medical and social services, training, and research. Until 1982 it was administered directly from the federal government to healthcare providers, rather than through state welfare agencies. Title X eligibility and program requirements were so complex that Planned Parenthood of Houston chose not to apply for this type of funding until 1993. Title XIX of the Social Security Act (PL 89-97, Social Security Amendments of 1965, 42 USC 1396, 1965), or Medicaid, provided reimbursements for contraceptive (and for a short time abortion) services to indigent women. See Lewis Monda, “Subsidized Family Planning Services in Texas,” 78 Texas Medicine (November 1982). A Tradition of Choice: Planned Parenthood at 75 (New York: Planned Parenthood Federation of America, 1991), 62.
Yet, though abortion was safe and legal, it was never accepted as morally right by religious “right-to-life” activists who zealously sought its repudiation. The *Roe* decision mobilized right-to-lifers and brought their organizations into vocal, political opposition. These organizations sought first to overturn the decision legalizing abortion, and when this failed, to restrict access to abortion. They did this in part by seeking to limit federal funding for abortions through Medicaid.

Medicaid, formally known as Title XIX of the Social Security Act, had been enacted under President Lyndon B. Johnson in 1965 to establish a medical assistance program for the indigent. All states that wished to participate in the program were invited to do so. Under the terms of the program, the federal government agreed to reimburse states for certain medical expenses. The program distinguished between two groups of needy people: The “categorically needy,” which included “persons with dependent children, the aged, blind, and disabled,” and the “medically needy.” States that participated in the program were required to give Medicaid coverage to the first group but they were not required to do so for the second group. Within both categories, states had some freedom as to what medical services and procedures they chose to include in their coverage.²

Medicaid was part of Johnson’s Great Society program. Liberals hailed it as a step toward helping the poor and conservatives derided it as a step toward socialized medicine. Medicaid quickly came to be the main source of medical help for the poor. Some states developed modest Medicaid programs while others, like Massachusetts, had plans providing funds for such operations as surgery to correct bowed legs, to fix noses,

and other forms of cosmetic surgery. Ironically, the latitude provided by Title XIX, by which states themselves determined what procedures were included in Medicaid’s coverage, was later to provide the single most important opportunity for anti-abortionists to restrict the access of poor women to federally funded abortions.³

For a short time, from 1973 to 1976, Planned Parenthood of Houston had access to Title XIX funds to provide abortions for indigent women. It also received reimbursements for other contraceptive services from state welfare agencies through Title IV-A, and later, Title XX programs administered through HEW. In this way, Planned Parenthood was able to provide subsidized abortions to poor women, to expand services, and to attain a certain degree of financial stability.

Federal and state funding brought black and Hispanic women to the clinics for subsidized abortions. Between 1973 and 1976 the number of abortions performed at Planned Parenthood’s Voluntary Pregnancy Termination (VPT) clinic remained static, at about one hundred per month, but the number of black and Hispanic women getting abortions increased dramatically. Soon after the agency began receiving Title IV-A and Title XIX reimbursements, the percentage of PPH’s minority clients rose to 25 percent. By January 1974 the percentage of white clients had dropped from over 90 percent to 72 percent, and that of blacks had risen from almost nothing to 20 percent; the percentage of Hispanic clients, who had previously not come to the clinic for abortions, rose from 0 percent to 5 percent.⁴

³Ibid., 85.
⁴PPH, Minutes, January 31, 1974. Beginning in 1973, the Board minutes included a Monthly Patient Report which listed statistics such as educational level, race, age, weekly income, religion, marital status, number of children, birth control method (before and after pregnancy), and geographical distribution.
With the change in ethnicity came some disturbing changes in the profile of the abortion patient. Up to January 1974, the “average” woman seeking an abortion at PPH had been 18-24 years old, white, single, had no children but wanted them in the future, had twelve or more years of education (41 percent were in college), and earned around fifty dollars a week. By February 1974, a number of the clinic’s abortion clients were under seventeen years of age, and in subsequent monthly patient reports this number would increase (of the 115 abortions performed on women in February 1974, for example, 10 were performed on girls under the age of seventeen). Weekly income for these patients had also dropped below fifty dollars per week. Minority women coming to the clinic had significantly less education. And the number of women coming to Planned Parenthood for second or third abortions, “repeaters,” had risen from just a few to 15 percent. Federal funding also brought more Catholic women to the VPT clinic. By February 1974 the percentage of Catholic abortion clients increased to 30 percent. After that, and for the remainder of the period ending in 1976, the percentage dropped and Catholic women made up between 20-25 percent of the clinic’s abortion patients. The ethnic and religious makeup of VPT patients now approximated that of the clinic’s birth control clientele.

Planned Parenthood’s Board of directors quickly learned that federal funding meant an increase in patient loads, an increase in deficit spending, and a possible decrease in the quality of patient care. In a pilot study conducted in January 1974 after

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5 PPH, Minutes (Monthly Patient Report), February 28, 1974. And Memorandum from Billie Broch (Board member) to Richard Ferguson (Executive Director), April 2, 1974, “VPT—First Year Report.”
6 PPH, Minutes (Monthly Patient Report), February 28, 1974. See also Patient Reports in March (18% Catholic), May (29% Catholic), June (20% Catholic), September (27% Catholic), and October (31% Catholic) of 1974: January (16% Catholic), February (23% Catholic), May (29% Catholic), June (20% Catholic).
federal funding for PPH from Medicaid and Title IV-A had been approved, the
Board’s Medical Advisory Committee reported a projected increase in the annual patient
load of 4,000-5,000 women. Most of these would be women seeking contraception rather
than abortion, but the demand for abortion was expected to increase significantly as
well. 7

In order to provide services to these additional patients without increasing staff,
the committee recommended that clinic hours be expanded, to a 7:00 A.M. to 7:00 P.M.
schedule, “excluding only Sunday.” Clinic staff would be divided into two teams:
Teams A and B. Each team would consist of an R.N., a Lab Nurse, Procedure Room
workers, two L.V.N.s, two aides, a front desk clerk, a follow-up nurse, and a nurse
practitioner. Each team would be assigned to work a 36-hour work schedule, either
Monday, Tuesday, Wednesday, or Thursday, Friday, Saturday. Team members would
work twelve-hour days, but would have four-day weekends. A survey was conducted by
staff to see if there was any objection to the new schedule, and the committee found that
they were “100% for this trial program.”

Staff members were ingenious in their schemes to increase efficiency and
maintain the quality of patient care despite inadequate funding and ever-increasing
patient loads. They were also adroit at finding ways to make it easier for women to pay
for these services, especially those like abortion, which could only be performed through
the first eight weeks of pregnancy. Medical staff and Board members were aware that the
effectiveness of Planned Parenthood’s services was tied to prompt delivery rather than

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Catholic), September (27% Catholic), and October (31% Catholic) of 1975; and February (24% Catholic),
March (32% Catholic) and October (17% Catholic) of 1976.
prompt payment, but without payment the clinic would fold. In March 1974 Planned Parenthood began accepting MasterCard and BankAmericard.  

As a result of careful planning, staff shuffling, and the arrival of government funding, during 1974 Planned Parenthood found itself operating at a profit. Monthly Board minutes included financial statements on each of the three clinics—VPT, Vasectomy, and the Women’s Birth Control Clinic—and the statements were encouraging. In January and February 1974 all three clinics showed small fund balances, or reserves; in March, as Title IV-A and Title XIX funds began coming in, the balances grew, especially for the VPT clinic. For the remainder of the year, as the patient load of medically indigent women grew, clinic reserves increased apace. Financial reports listed monthly reimbursements from the state and federal government averaging $25,000 for the first four months, $50-60,000 for the following two months, and payments of $80-100,000 during the last few months of the year. Each month the treasurer reported operating cash balances and an increased patient load, both “due to Title IV-A and XIX.”

In June the Board voted to open two new branch clinics in Walker and Brazos counties. The clinics were to provide examinations, testing services (pregnancy, VD, ...
sickle-cell, PAP tests, etc.), and contraceptives to women in rural and remote areas who were not being served by Planned Parenthood’s urban clinics or by public hospitals. They were not to provide abortions but were only to act as a referral service for pregnant women. The clinics opened in 1975 and were an immediate success. The Walker County clinic, which began operating in January 1975, was soon serving over a hundred new patients each month. The Brazos County clinic, which opened in June of the same year, was also receiving one hundred new clients each month within its first two months. Reflecting their suburban locations, the clientele of both clinics was overwhelmingly white.10

The Board also voted to open these suburban clinics in the hope that the patient load at the main clinic on Fannin would ease. Instead, it increased dramatically. With Title IV-A and Title XIX funding, the number of clients coming to Planned Parenthood’s main clinic grew by 500-600 new patients each month, 100-200 more than it had anticipated. To ease the load, clinic staff referred more patients to local health care agencies and public hospitals. But more women kept coming. In October 1974 the Executive Director, Richard Ferguson, reported to the board that there were 70,000 women in Houston “in need of low cost contraceptive services; the city is serving 28,000; the county 5,000; and Planned Parenthood 12,000; with 25,000 still in need of services.” By November 1975 so many of these medically needy women had come to Planned

10PPH. Minutes, June 4, 1974. For both new clinics, white clientele made up over 90% of the total number of new patients each month. Blacks made up almost all the rest (8-9%), while Mexicans made up 1% or less of the total. See Monthly Patient Reports in PFH. Minutes, January-December 1975.
Parenthood that the clinic was losing $12 per patient and was operating at a loss for the year of $78,410. "Welfare billing," as it was called, was no longer enough.\(^\text{11}\)

The Executive Director always emphasized fundraising, and development staff solicited large grants annually from Houston's leading donors such as the Houston Endowment and the Brown Foundation. The PPH Auxiliary also held special events and book sales, and Board and staff were asked to give generously. But even as donations increased, expenses grew faster. In 1974 fundraising efforts netted $127,000; in 1975, $183,000; and in 1976 $196,000. At the same time, budgets grew from $921,000 in 1974 to $1.2 million in 1975 and $1.3 million in 1976. By the end of 1976, Planned Parenthood was operating at a deficit of $124,000. Paradoxically, while the agency could not have survived without federal and state funding, it was that funding, and with it, its blanket requirement to treat the medically indigent, that helped put Planned Parenthood back into the "red."\(^\text{12}\)

The huge increase in patient loads and expanded services brought with it other problems: clinic overcrowding, patient complaints, and lawsuits. Though the monthly number of patients grew dramatically, the available space at Planned Parenthood's clinics remained the same. Patients began to complain of long waits, overcrowding, "messy" clinics, testy staff, and unfriendly doctors. One VPT clinic patient complained that she had been "able to hear the lady next door scream," presumably during an abortion procedure. Staff directors developed a patient questionnaire and attempted to improve

\(^{11}\)PPH, Minutes, October 8, 1974. Memorandum from Dick Ralph, Treasurer to the Executive Committee, November 3, 1975.

services, but they were fighting an uphill battle. When it accepted federal funding,
the agency also accepted the hardships encountered by all public hospitals and welfare-
subsidized healthcare agencies: overcrowding, understaffing, and a basic inability to
control patient loads.\textsuperscript{13}

The indigent, however, rarely sued. In 1970 Planned Parenthood was sued by a
vasectomy patient who developed complications after the procedure. The man sued
Planned Parenthood for $25,000, but PPH's insurance attorney, Kenneth Tekell, settled
the case in 1974 for $7,500 before it reached a jury. Just as the first case was settled, a
second suit was filed against Planned Parenthood by yet another vasectomy patient. This
patient also developed "complications" after the procedure, although these were not
specified in agency records. Then in 1976, a female patient filed suit for unknown
reasons. Not surprisingly, in October of that year the Medical Advisory Committee
reported a rise in the cost of malpractice insurance of 18.8 percent.\textsuperscript{14}

The Houston affiliate's problems were indicative of widespread budgetary crises
throughout the Planned Parenthood Federation, and its administrative center, PPFA in
New York City, had financial problems of its own. In May 1974 Houston's liaison to the
National Board reported that the Federation was in "serious financial trouble." Nine
months later she reported that the Federation was contemplating moving its
administrative offices from New York to Houston in order to reduce expenses. After
February 1975 the subject was never mentioned again; instead, the national organization

\textsuperscript{13}Clinical staff developed patient questionnaires which were summarized and attached to monthly Board
minutes. The first Monthly Patient Report appeared in the PPH, Minutes, March 1976. The comment

\textsuperscript{14}PPH, Minutes, February 12, 1974, January 13, 1976, and October 5, 1976. The procedure used in the
1970s to perform vasectomies involved using a scalpel to slice into the scrotum, pulling out the vas tube (or
"vas deferens," which carries sperm to the ejaculatory duct), then sewing it up. The chief risks from this
increased affiliate dues. In 1974 PPH paid over $15,000 in dues to the Federation; in 1975 and 1976 those dues had increased to over $20,000.\textsuperscript{15}

In 1976 the Houston Board and its Medical Advisory Committee began taking steps to ease the financial strain, clinic overcrowding, and to reduce the problems of patient complaints and lawsuits. In November 1975 the chairman of the Advisory Committee, Dr. Peter Thompson, recommended an across-the-board fee increase for all clinics: a flat fee of $15 dollars for all birth control examinations; additional charges for contraceptives; a flat fee of $100 dollars for vasectomies; and a fee of $160 for abortions. These modest fee increases were expected to generate $125,000 in revenues in 1976, the same amount as the 1975 deficit. The Board approved the motion, and the fee increases took effect in January 1976, with mixed results. Patient loads decreased by 10 percent, which did ease overcrowding. But revenues from “cash” clients decreased as well. In addition, changes in the federal requirements for reimbursement under Title XX, making them more stringent, led to further decreases in revenues. By September, the Treasurer reported a net decrease in clinic revenues of almost $30,000. The number of new patients each month, however, remained high, at over four hundred per month.\textsuperscript{16}

\textsuperscript{13}PPH, Minutes, May 7, 1974, February 11, 1975; Statement of Functional Expenses for the year ended December 31, 1974; and Proposed Budget for 1976.

\textsuperscript{14}The price for birth control exams had previously been $12; for vasectomies, $75; and for abortion, $145. The price of contraceptives remained the same (IUD, $10; diaphragm, $1; and Pill, 75 cents). Letter from Dr. Peter K. Thompson, Chairman Medical Advisory Committee to Dr. Blanchard T. Hollins, Chairman Board of Directors, November 17, 1975. Title XX funding began in October 1975 (see PPH, Minutes, October 14, 1975), but eligibility requirements changed in 1976 so that fewer women qualified for contraceptive services and abortions under its rules. Since PPH could not offer abortion services to women who did not qualify under the federal requirements for reimbursement, the number of Title XX patients dropped off sharply. The patients were referred instead to City and County agencies. The rules changed again in September 1976, easing the restrictions, and the Title XX patient load increased accordingly. PPH, Minutes of the Executive Committee Meeting, September 14, 1976, and PPH, Minutes (Treasurer’s Report), September 14, 1976.

surgery were infection, blood clotting (or hematoma), both of which caused swelling and pain and required medication, and bruising. There were and are no permanent or fatal side effects associated with vasectomy.
The Medical Advisory Committee also recommended that the Board vote to close the Vasectomy clinic at PPH and transfer its operations to Baylor College of Medicine. The clinic operated at a loss because vasectomy patients often failed to pay for their operations, and vasectomy patients were also more prone to sue if complications resulted. Some Board members expressed concern that Baylor would charge higher fees for the procedure, but the committee chairman pointed out that Baylor had federal funding under Title XX and that a sliding scale of charges had been instituted there. Start-up costs would also be minimal, he said, because Baylor had agreed to purchase Planned Parenthood’s equipment “at a fair market price.”

In another bold move, the committee advised the Board to end abortion services and “phase out VPT by the first of 1977.” The committee had completed a cost-benefit study of the abortion clinic and concluded that Planned Parenthood would save $50,000 a year if it ceased performing abortions. In keeping with its mission of providing educational and referral services to all, the committee recommended that Planned Parenthood “continue to do pregnancy confirmations and refer pregnant patients to other agencies.” Since vasectomy and abortion programs at other healthcare facilities were being increasingly subsidized by the federal government, Board chairman Dr. Blanchard Hollins argued that elimination of these programs at PPH would not pose a significant hardship to patients. He also reminded the Board that Planned Parenthood had always

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17PPH, Minutes of the Medical Advisory Committee Meeting, August 31, 1976, and PPH, Minutes, October 12, 1976. See also “Dr. Leader to Direct Baylor Population Unit,” Houston Post, December 16, 1975. Dr. Abel Leader, the former medical director and Board chairman of PPH, was hired by Baylor to direct the Baylor Population Program, which was established to study “the effects of burgeoning world populations and diminishing resources,” and to perform clinical research and sterilization procedures.
intended to phase out its VPT clinic as soon as city and county health care agencies
"were meeting the whole need."¹⁸

Massive losses in future revenues rather than current shortfalls were what worried
Board members. The summer months of 1976 had witnessed a new “right to life”
Congressional initiative to add an amendment prohibiting any Title XIX (Medicaid)
funding of abortions to the House appropriations bill for the upcoming fiscal year.
Illinois Republican Henry J. Hyde first successfully offered such a rider on the House
floor in late June, but the Senate, by a wide margin, refused then and again in late August
to accept the House-passed ban. By mid-September the disagreement had been referred
to a conference committee for a second time, and the deadlock was finally broken only
when members from both houses agreed to endorse a slight weakening of the proviso so
that abortions “where the life of the mother would be endangered” by an ongoing
pregnancy would be excepted from the funding cutoff. Both the House and Senate
ratified that compromise and passed the bill into law.¹⁹

The day of the vote, the ACLU and other abortion access proponents filed suit
against the provision in federal court in New York, and on 1 October, when the Hyde
Amendment was to take effect, District Judge John F. Dooling, Jr., enjoined any
enforcement of the new prohibition until the challengers’ case could be heard. Three
weeks later Dooling issued a full decision upholding the merits of the ACLU’s challenge,

¹⁸PPH, Minutes, October 12, 1976; and Policy Statement of the Board Chairman on Pregnancy Termination
Services, February 13, 1973. In the 1973 policy statement, the Board approved a five-phase program for
VPT designed “to meet the immediate need for quality abortion services at low cost” (phases I-IV), and
then to “transfer the services to community medical systems” (phase V).
¹⁹David Garrow. Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade (New York:
and the US Supreme Court refused to issue an interim stay of Dooling’s injunction while the government pursued a direct appeal. 20

The problem with the Hyde Amendment for pro-abortionists was that it eliminated several categories of pregnancies—women with health disorders such as cancer or heart disease which would be seriously aggravated by a pregnancy, or those in whom an unwanted pregnancy might trigger severe mental disturbances—which would normally fall under the designation of “medically necessary” procedures (which, under the language of Title XIX, healthcare agencies were obligated to fund). For agencies like Planned Parenthood, which were treating ever-increasing numbers of the medically needy and receiving unprecedented amounts of federal funding, a cutoff of abortion funds would mean cutting off services to these needy women and significant losses in revenues.

The national abortion tussle sent an unmistakable signal to PPH’s Board that some sort of a federal funding limitation on Medicaid abortion payments was going to pass. With it would almost certainly come state limitations and the loss of revenues to family planning agencies. Planned Parenthood could not afford to lose government funding without cutting drastically its services to indigent women. So, even as Executive Director Richard Ferguson was predicting that the matter “would be in the courts for several months with the result of a ruling against the Amendment,” more skeptical board members voted to phase out the VPT clinic by the beginning of 1977. 21

Also behind the Board’s decision was its original goal of becoming an educational agency that also offered birth control services to women. Without the costly political and

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21 PPH, Minutes, October 12, 1976.
financial burdens of abortion and vasectomy services. Board members reasoned, staff needs would be reduced and space would be freed, thus allowing the expansion of birth control services. Planned Parenthood's financial picture would improve, and a greater amount of its money could be used for education. The current trend of decrease in net reserves would also be brought to a halt.

As early as January 1974 Ferguson had expressed concern about possible changes in the Texas constitution and asked the Medical Advisory Committee to study VPT clinic operations and recommend continuance or discontinuance of abortion services. Ferguson was worried that an anti-abortion amendment like the ones being introduced on the floor of Congress might be written into the Texas constitution. He was also concerned about the services being rendered to VPT patients and called for a comprehensive survey of the facility. At the time, the Board had voted to adhere to the VPT clinic's original charter, to continue abortion services "until the community is adequately served." The reason for its decision was that abortion patients were not being served adequately at Jeff Davis hospital. Patients who supposedly did not meet the eligibility requirements for abortions under Jeff Davis's rules were being turned away or referred to Planned Parenthood as Medicaid patients. Because Planned Parenthood received Medicaid funding, the Board concluded, it had to continue providing VPT services to meet this need.22

In November 1974 the Medical Advisory Committee again blasted administrators at Jeff Davis hospital for their "lack of support" in providing abortion services to needy women. One committee member reported that only twenty to forty patients were being served each month at Jeff Davis, which had a larger facility than Planned Parenthood,

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because its eligibility rules had been structured so that few women could qualify. In
response, the Board voted to expand abortion services at Planned Parenthood, providing
VPT five days a week, to meet the needs of patients who were not being served at Jeff
Davis. 23

As long as federal monies kept coming and clinics were operating in the black, the Board was willing to continue approving the provision of abortion services to the
growing number of Medicaid and welfare patients. No mention was made in 1975 of
closing the VPT clinic, and this was tied directly to Title IV-A, Title XIX and Title XX
receipts. As long as the staff did not mutiny and continued to find ingenious ways to
cope with the patient load, the Board continued to vote to keep the clinic open. When
overcrowding became a real problem, the Board simply voted to raise fees.

Not until the drop in Title XX funding late in 1975 and the 10 percent drop in
cash customers in 1976 (after patient fees were increased) did the Board reconsider
closing the VPT clinic. With Medicaid and Title XX patients making up 20 to 30 percent
of the clinic’s clientele, and with increasing shortfalls in operating budgets, the threat of
more federal funding cuts was enough to persuade the Board to vote in favor of closing.
As many Board members privately feared, it was only a matter of time before the
Supreme Court lifted the injunction on the Hyde Amendment and federal funds to
reimburse clinics for performing abortions on indigent women were withheld. In October
1976 the Board voted to phase out the VPT clinic and transfer another albatross, the
vasectomy clinic, to Baylor. With these decisions it hoped to mitigate the high-cost
problems of malpractice insurance and lawsuits, mitigate the problem of clinic

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23 PPH, Minutes of the Medical Advisory Committee Meeting, November 24, 1974. Before PPH expanded
its abortion clinic to five days a week, abortions were performed two days a week.
overcrowding, and preclude the Medicaid disaster promised by passage of the Hyde Amendment.\textsuperscript{24}

The press soon picked up the story and articles appeared in November dailies about the closings of the vasectomy and VPT clinics. The Houston \textit{Post} ran a story that attributed the closings to “the proliferation of other agencies and programs now providing these services.” The University of Houston publication, \textit{The Daily Cougar}, accounted for the termination of services as the result of “the accessibility of other excellent facilities such as Reproductive Services and the overcrowding of the Planned Parenthood clinics.” Neither article mentioned whether services at these other facilities were accessible to the poor.\textsuperscript{25}

As 1976 came to an end, Planned Parenthood’s Board redefined the agency’s mission: it was now to be an educational agency and referral service in the areas of birth control, abortion, and sterilization and a dispenser of contraceptives--its original ideal. It was not to be merely a clinic delivering socialized services to the “medically needy.” That, the Board believed, was a job for Houston’s Hospital District and other public healthcare facilities. Planned Parenthood was neither equipped nor funded for the volume-based medicine it had been trying to practice. Instead, the Board declared, the agency would return to the higher ground of fee-based services and grant-supported educational programs, for which a limited amount of federal funding would still be available. Above all, it would avoid the problem faced by all government-subsidized public hospitals delivering mass-based services. It would retain control.

\textsuperscript{24}PHH, Minutes, October 12, 1976.
At the December board meeting, Ferguson mourned the fact that “family planning is slipping in priority in the Federal Government.” While Planned Parenthood had kept a low profile in the community, anti-abortion groups had become more vocal. While Planned Parenthood lacked a public advocate in state and federal governments, anti-abortion groups had formed lobbies, exercised their new-found political muscle, and obtained passage of the Hyde Amendment. As Ferguson put it, “a strong public advocacy and an effective voice in Washington are essential to prevent this [slipping in priority].” His comments seemed a bit belated, since the Hyde Amendment had already passed.26

In retrospect, while the Board’s vote to close the abortion clinic in 1976 seemed a partial surrender to anti-abortion sentiment, in more substantial part it was a reaction to problems that government policies and federal funding had helped to create. Planned Parenthood had tried to provide large-scale government-subsidized birth control and abortion services to the indigent and failed. There were too many women needing those services and government funding was never enough. By redefining its mission, the board rescued Planned Parenthood from impending medical and financial disaster and gave the agency a chance to return to its original purpose: providing birth control information and contraceptives to all who wanted it. Whether Planned Parenthood could remain firm in its resolve in the face of rising anti-abortion activism remained to be seen.

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26PPH, Minutes, December 14, 1976.
Chapter 14

The "Welfare" Cases of 1977:
The Supreme Court and Medicaid-Funded Abortions

[T]he problem that...justice confronts in America, today and for the next decades, is poverty—hydraheaded, hundred-handed poverty—poverty has even come to be the ugliest facet of racism. The courts very plainly have no means, material or intellectual, for effecting that major allocation of all our resources, that total restructuring of all our priorities, that change in our values and even in our perceptions of the world, which the conquest of poverty will require. Nobody can do it but Congress...Reliance on Congress is almost hopeless. But reliance on the courts is entirely so.¹

In 1977 public funding of abortions became the subject of intense litigation. At the center of the nearly forty federal court opinions dealing with the funding issue was the crucial question of whether the Constitution, or federal law, required local, state, or federal governmental agencies to pay for abortions for indigent women. It is now certain that the answer to that question is no. But it took years of litigation to establish that, and in the end there were still loopholes in the form of unresolved technical issues that left open the possibility of more litigation. The question of funding also produced sharp conflicts among the federal judges and Supreme Court Justices who decided these cases.

On June 20, 1977, anti-abortionists claimed victory when the Supreme Court announced its decisions in Beal v. Doe, Maher v. Roe and Poelker v. Doe.² In Beal and Maher, the Court held that neither the Constitution nor the Social Security Act required

states to provide Medicaid funds for nontherapeutic, or elective abortions. In *Poelker* it decided that municipalities were not constitutionally obliged to provide or even to permit such abortions in their public hospitals. The Supreme Court decisions were quickly echoed in the federal legislature when the Senate joined the House of Representatives in voting to restrict sharply the use of Medicaid funds to provide abortions for indigent women. Since both President Jimmy Carter and Secretary of Health, Education, and Welfare (HEW) Joseph Califano had gone on record as opposing publicly funded abortions, all three branches of the federal government for the first time since abortion had been legalized presented a united front.

The Medicaid funding, or “welfare” cases as they came to be known, were all initiated between 1974 and 1975 by either abortion clinics, physicians who performed abortions, indigent women who desired free abortions, or some combination of the three groups. Their suits attempted to strike down government regulations (mostly state laws or state welfare or health agency rules) that restricted the types of abortions eligible for government funding. The plaintiffs’ challenges were based on three different lines of reasoning. First, they argued that abortion funding restrictions violated federal statutes, namely, Title XIX of the Social Security Act, or Medicaid. Second, they contended that abortion funding restrictions were unconstitutional under the *Roe* doctrine of abortion

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1In general, an abortion is considered “medically necessary” or “therapeutic” if based on a physician’s best clinical judgment that (1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health; or (2) The fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect; or (3) The pregnancy resulted from forcible or statutory rape. The term “health” has been interpreted to include psychological as well as physical well-being; physicians ultimately determine whether an abortion will be therapeutic. See Frank Susman, “*Roe v. Wade* and *Doe v. Bolton* Revisited in 1976 and 1977—Reviewed?; Revived?; Revested?; Reversed? Or Revoked?” *22 Saint Louis University Law Journal*, 581-595 (1978).

privacy. And third, they claimed that abortion funding restrictions were in violation of the equal protection clause of the Fourteenth Amendment.5

When Medicaid began providing federal reimbursements to participating states for various categories of medical expenses for indigent and needy individuals, the District of Columbia and forty-nine of the fifty states immediately began participating in the program. Because Medicaid was established by federal law, programs adopted in the participating states had to conform to the requirements of the law to be eligible for federal reimbursement. Title XIX described five general categories of mandatory medical coverage, and participating states were required to establish “reasonable standards...for determining...the extent of medical assistance under the plan which...are consistent with the objectives of [Title XIX].”6

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See also New York Times, June 30, 1977, at 1, col. 1. For statements by President Carter and HEW Secretary Califano, see the New York Times, June 26, 1977, Section 1, at 22, col.6.

5Title XIX of the Social Security Act, 42 USC 1396, 1965, was enacted in 1965 as part of Lyndon Johnson’s “War on Poverty,” to provide federal reimbursements to healthcare providers who treated the indigent. In 1972, in an effort to reduce welfare dependency, the Act was amended to included family planning services, and in fact mandated state welfare departments to offer voluntary family planning services to all applicants for and recipients of Aid to Families with Dependent Children (AFDC). See Lewis W. Mondy, “Subsidized Family Planning Services in Texas,” 78 Texas Medicine (1982), 58-62, at 59. The right of privacy in Roe was recognized as a fundamental enumerated right falling within the concept of liberty guaranteed by the Fourteenth Amendment. In Roe the Court concluded that the “right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty...or...in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” 410 U.S. 113, at 152-153 (1973). The expression “right of privacy” was introduced in 1890 with the publication of Samuel Warren and Louis Brandeis’ famous article, “The Right to Privacy,” 4 Harvard Law Review, 193ff. (1890). Since that time the Supreme Court has recognized the right of privacy as “implicit” in the First Amendment, in the right of free association (See Gibson v. Florida Legislative Investigating Commission, 372 U.S. 539 (1963)); the Fourth Amendment, which protects individuals from having their houses searched without a warrant (See Mapp v. Ohio, 367 U.S. 643 (1961)); the Fifth Amendment, in the self-incrimination clause, which allows individuals to resist making statements that invade their right to lead private lives (See Tehan v. U.S., 382 U.S. 406 (1966)); and in the Ninth Amendment, in which the right of privacy is protected as one of the “rights not listed” in the Constitution (See Griswold v. Connecticut, 381 U.S. 479 (1965)). For a discussion of the privacy issue see Alan J. Sheffler, “Indigent Women and Abortion: Limitation of the Right of Privacy in Maher v. Roe,” 13 Tulsa Law Journal, 287-303 (1977). The equal protection clause of the Fourteenth Amendment reads, “No state may deny any person, under its government, equal protection of the law.” 42 USC, Section 1396a (1976). The general categories of medical treatment are (1) inpatient hospital services (except for patients with tuberculosis or mental diseases), (2) outpatient hospital services, (3) other laboratory and X-ray services, (4) skilled nursing facility services, screening and diagnostic services, and
Title XIX also established two groups of needy persons: the "categorically" needy, which included welfare recipients with dependent children and the aged, blind, and disabled; and the "medically" needy, which included other needy persons not on welfare but for whom meeting the cost of medical care would have been financially impossible. Participating states were not required to extend Medicaid coverage to the "medically" needy, although they were free to do so at their own expense.  

When abortion was legalized, most states adopted restrictions on the type of abortions which would be covered under their local welfare or Medicaid programs. Most provided that the states would pay for therapeutic, or medically necessary abortions for indigent women, but would not pay for nontherapeutic, or elective abortions. Since a large number of the women seeking abortions were indigent, Medicaid coverage was a matter of real concern for not only these women but for the abortion clinics that would lose a substantial number of their customers if the government would not pay for their abortions. As the states adopted laws restricting Medicaid funding, a number of abortion providers initiated suits asking federal courts to force local Medicaid administrators to subsidize all abortions. The plaintiffs in the law suits argued that discrimination in providing medical services violated Title XIX of the Social Security Act and was therefore illegal under federal law. A regulation adopted by HEW forbade states participating in the Medicaid program to discriminate in providing medical services on

family planning services and supplies (including services for sexually active minors), and (5) physicians' services provided in hospitals, clinics, homes or other facilities.

7Ibid. See also Beal v. Doe, 97 S. Ct. 2366, at 2368 (1977).
the basis of "diagnosis, type of illness, or condition." Abortion clinics argued, and some courts agreed, that this regulation prohibited abortion funding restrictions. 8

Not all courts were convinced by this argument. On careful consideration, many determined that states that distinguished between therapeutic and nontherapeutic abortions did not discriminate on the basis of diagnosis or condition but discriminated on the basis of the degree of medical necessity for the treatment. The states' refusal to pay for nontherapeutic abortions, in their view, was simply a refusal to subsidize a non-necessary form of medical treatment.

Despite the holes in arguments for overturning abortion funding restrictions, the overwhelming majority of federal courts considering the matter declared abortion funding restrictions to be illegal, and ordered states to subsidize all abortions. 9 During the fiscal year 1973-1974, $50 million in federal funds were expended to subsidize 250,000 abortions. 10 By 1976 HEW was spending about $50 million a year to fund annually about 300,000 abortions, two-thirds of which were elective. 11

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8Lynn D. Wardle and Mary Anne Q. Wood, A Lawyer Looks at Abortion (Provo, Utah: Brigham Young University Press, 1982), 55-56. For instance, one court that invalidated an abortion funding restriction concluded: "Since...Pennsylvania pays for full-term deliveries and also for therapeutic abortions, it is plain that the state has determined...that pregnancy is a condition for which medical treatment is "necessary" within the meaning of Title XIX...We, therefore, conclude that once the state has decided to finance full-term delivery and therapeutic abortion as methods for the treatment of pregnancy, it cannot decline to finance not-therapeutic abortions without violating the requirements of Title XIX." See Doe v. Beal, 523 F. 2d 611, at 621-622 (3d Cir. 1975).

9Wardle and Wood, A Lawyer Looks at Abortion, 56-57. During the period 1974-1976, five circuits held that states were under a duty to provide funding or make facilities available for abortions. See Doe v. Beal, 523 F. 2d 611 (3d Cir. 1975), Doe v. Poelker, 515 F. 2d 541 (8th Cir. 1975), Wulff v. Singleton, 508 F. 2d 1211 (8th Cir. 1975), Friendship Medical Center, Ltd. v. Chicago Board of Health, 505 F. 2d 1141 (7th Cir. 1974), Doe v. Hale Hospital, 500 F. 2d 144 (1st Cir. 1974), and Doe v. Rose, 499 F. 2d 1112 (10th Cir. 1974). Two other circuits refused to hold that funding was required by the Social Security Act. See Roe v. Norton, 522 F. 2d 928 (2d Cir. 1975), and Roe v. Ferguson, 515 F. 2d 279 (6th Cir. 1975). For a discussion of these cases see David T. Hardy, "Privacy and Public Funding: Maher v. Roe as the Interaction of Roe v. Wade and Dandridge v. Williams," 18 Arizona Law Review, 903-938 (1976).

10Hardy, "Privacy and Public Funding," 904, fn15.

11John T. Noonan, Jr., A Private Choice: Abortion in America in the Seventies (New York: The Free Press, A Division of Macmillan, 1979), 105 fn6. Noonan cites the Congressional Record, 123 (June 17, 1977): h.6084 (Congressman Hyde). The reason that overall spending did not increase while the number of
In 1976 Henry Hyde, a Republican Congressman from Illinois, attached a rider to the Appropriations Act for the Department of Labor and HEW cutting off Medicaid funding for abortions for the next fiscal year. His rider, which become known as the Hyde Amendment, was passed in June by the House, rejected by the Senate, and sent to a conference committee, where it stalled. Hanging over the debate was the concern of many Congressmen that the Hyde Amendment would be declared unconstitutional. Legislators were aware of federal court decisions concerning Medicaid, which tended to require public funding of abortions by the states. It was not evident in 1976 that the Supreme Court would reverse this trend, or would treat Congress differently than the states.\footnote{Neal Devins, \textit{Federal Abortion Politics: A Documentary History} (New York: Garland, 1995), 13-73. On the introduction of the first Hyde Amendment, see 122 Cong. Rec. 20410-12 (1976); on the attempt by Senator Packwood to strike Hyde Amendment language, see 122 Cong. Rec. 20879 (1976); for the debate on financial consequences of abortion funding, see 122 Cong. Rec. 27672-80 (1976).}

In September 1976 the conference committee amended the appropriations bill to prohibit the use of federal funds for abortion unless “the life of the mother would be endangered if the fetus were carried to term,” and this softer version passed both houses. The act was vetoed by President Ford, but the veto was overridden and on October 1, the Hyde Amendment became law.\footnote{Neal Devins, \textit{Federal Abortion Politics: A Documentary History} (New York: Garland, 1995), 13-73. On the introduction of the first Hyde Amendment, see 122 Cong. Rec. 20410-12 (1976); on the attempt by Senator Packwood to strike Hyde Amendment language, see 122 Cong. Rec. 20879 (1976); for the debate on financial consequences of abortion funding, see 122 Cong. Rec. 27672-80 (1976).}

Pro-abortionists immediately turned to the courts to win back judicially what they had lost legislatively. On October 22 enforcement of the Hyde Amendment was enjoined nationally by U.S. District Court Judge John Dooling of the Eastern District of New York.
on the grounds that it effectively deprived poor women of the right to an abortion.¹⁴ Judge Dooling did not make a final ruling but gave an opinion that the plaintiffs would probably prevail on the ground that the amendment would be held unconstitutional. He ordered a trial on the merits of Planned Parenthood’s case, and issued an order requiring the Secretary of HEW not to carry out the Hyde Amendment but “to provide reimbursement...to all Medicaid-eligible women by certified Medicaid-providers.”¹⁵ At the same time, he made his injunction binding on the Secretary of HEW throughout the United States, and for ten months succeeded in halting the operation of the Hyde Amendment nationwide.

In February 1977, with the Carter Administration in office, the government appealed Judge Dooling’s injunction to the Supreme Court. Meanwhile, appropriation time for fiscal 1977-1978 came round. Again, Henry Hyde offered his amendment. Throughout the summer, a proposed version of the Hyde Amendment was held up in a House-Senate conference committee. The Senate held out for funding “medically necessary” abortions, while the House stood firm in its opposition to any coverage except where the mother’s life was clearly endangered. Various compromises between the two standards failed to achieve acceptance. Twice the pending fiscal crisis of HEW and the Labor Departments’ appropriations and payroll expiration forced Congress to pass continuing resolutions (to provide temporary funding). Both the October and November stopgap measures held funding for fiscal year 1977 levels and retained the “life endangered only” standard.

¹² 42 USC, 1396 (September 30, 1976).
¹³ *McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976). The suit was brought by Planned Parenthood on behalf of a patient, Cora McRae, against Secretary Mathews of HEW.
Finally, on December 7, 1977, the impasse was overcome with the adoption of an abortion amendment to the HEW-Labor appropriations bill for 1978. The continuing resolution providing temporary funding ended September 30, 1978. Though neither abortion funding supporters nor foes regarded the final policy as a victory, it was slightly less restrictive than the initial "life endangerment" limit. The additional coverage in the new clause extended to serious and long-lasting physical health damage to the mother and contained limited provisions for victims of rape and incest.\textsuperscript{16} For many Congressmen, the question of Medicaid funding for abortions was not seen as simply an abortion issue. It also touched on emerging public sentiments against "big federal government," resentment toward welfare recipients, and concern that society had grown morally lax. Many politicians felt they could not afford to be seen as "soft" on these issues.\textsuperscript{17}

Hyde introduced his amendment for the second time on Friday, June 17, 1977. On Monday, June 20, the Supreme Court ruled on the three related abortion cases from Pennsylvania, Connecticut, and Missouri: \textit{Beal v. Doe, Maher v. Roe,} and \textit{Poelker v. Doe}.\textsuperscript{18} The first of the three Medicaid cases to come before the Court was \textit{Beal v. Doe}, a Pennsylvania case brought by an indigent woman named Ann Doe. Under the Pennsylvania Medicaid Act, Doe was eligible to participate in the program, but when she sought to have an abortion that was nontherapeutic, the state refused to pay. Claiming


that she had been denied equal protection—since the state law allowed funding for all
the costs associated with childbirth and therapeutic abortions—she brought suit against
the state. The Pennsylvania Medicaid plan excluded only financial assistance for
nontherapeutic abortions, and Doe also claimed that this particular exemption violated the
meaning of Title XIX.

A three-judge District Court in Beal found that Pennsylvania’s Medicaid plan did
not violate the purpose of Title XIX but held that Pennsylvania’s restrictions on elective
abortions had denied Doe equal protection of the law under the Fourteenth Amendment.
Accordingly, the court granted a judgment that the Pennsylvania exclusion was
unconstitutional, but only as applied during the first trimester of pregnancy, and the
state appealed.

The United States Court of Appeals for the Third Circuit, sitting en banc, reversed
the District Court’s decision on the statutory issue of whether funding exemptions
violated Title XIX, noting that Medicaid regulations prohibited participating states from
requiring a physician’s certificate of medical necessity as a condition for funding
abortions during both the first and second trimesters of pregnancy, something which the
Pennsylvania law did require. Since it had reversed the lower court’s decision on the
statutory issue, the Court of Appeals did not reach a decision on the constitutional issue
of whether Pennsylvania’s law denied Doe equal protection under the Fourteenth
Amendment. The state appealed again, this time to the Supreme Court.

15Doe v. Wohlgemuth, 376 F.Supp. 173 (1974). The District Court was of the view that the regulation
created “an unlawful distinction between indigent women who choose to carry their pregnancies to birth,
and indigent women who choose to terminate their pregnancies by abortion.” 376 F. Supp. at 191.
20Doe v. Beal, 523 F. 2d 611 (3d Cir. 1975).
The Supreme Court did not agree with the Court of Appeals that an indigent woman had the right to choose a federally-funded elective abortion. Because the Court of Appeals had not addressed the issue of equal protection, the high court in writing its decision did not touch upon the constitutional question either.21

The Court reasoned, first, that Title XIX of the Social Security Act did not require the funding of nontherapeutic abortions as a condition of participation in the Medicaid program established by that Act; second, that nothing in the language of Title XIX required a participating state to fund every medical procedure falling within the delineated categories of medical care. Each state, the Court determined, was given broad discretion to determine the extent of medical assistance that was “reasonable” and “consistent with the objectives” of Title XIX; third, that although serious statutory questions might be presented if state Medicaid plans did not cover necessary medical treatment, it was not inconsistent with the Act’s goals to refuse to fund unnecessary (though perhaps desirable) medical services[emphasis added]; fourth, that the state had a strong interest in encouraging normal childbirth “throughout the course of a woman’s pregnancy,” and fifth, that when Congress passed Title XIX nontherapeutic abortions were illegal in most states, a fact which undermined the contention that Congress intended to require rather than permit participating states to fund such abortions. Moreover, the Department of Health, Education, and Welfare, the agency that administers Title XIX, had taken the position that the Title allowed, but did not mandate, funding for such abortions.22

21As a matter of deference a higher court will not resolve issues the lower court has not ruled on. This is a procedural formality, not a substantive comment on the merits of an argument. See Barbara Milbauer. The Law Giveth (New York: Athenaeum. 1983), 181.
In sum, whether the Pennsylvania regulation was "reasonable" might be open
to question, but, since the states had been given broad latitude under Medicaid
regulations in deciding what to fund, under this construction alone it was legal for
Pennsylvania to choose not to fund elective abortions.

Justice Powell, who wrote the opinion for the six-member majority in *Beal*,

stated:

We do not agree that the exclusion of nontherapeutic abortions from Medicaid coverage is unreasonable under Title XIX. As we acknowledged in *Roe v. Wade*, 410 U.S. 113 (1973), the State has a valid and important interest in encouraging childbirth. We expressly recognized in *Roe* the "important and legitimate interest [of the state] in protecting the potentiality of human life. That interest alone does not, at least until approximately the third trimester, become sufficiently compelling to justify unduly burdensome state interference with the woman's constitutionally protected privacy interest. But it is a significant state interest existing throughout the course of the woman's pregnancy. Respondents point to nothing in either the language or the legislative history of Title XIX that suggests that it is unreasonable for a participating State to further this...interest in encouraging normal childbirth."\(^\text{23}\)

Justices Brennan, Marshall, and Blackmun dissented, the three writing a single

opinion and Justice Marshall writing a second dissent of his own. In their joint statement

the three Justices took issue with the Court's decision to avoid the equal protection

question:

If Pennsylvania is not obligated to fund medical services rendered in performing elective abortions because they are not "necessary" within the meaning of Section 1396 [of the Social Security Act], it must follow that Pennsylvania also would not violate the statute if it refused to fund medical services for "therapeutic" abortions or live births. For if the availability of therapeutic abortions and live births

\(^{23}\text{Ibid.}, 446.$
makes elective abortions "unnecessary," the converse must also be true. This highlights the violence done the congressional mandate by today's decision. If the State must pay the costs of therapeutic abortions and of live births as constituting medically necessary responses to the condition of pregnancy, it must, under the command of Section 1396, also pay the costs of elective abortions; the procedures in each case constitute necessary medical treatment for the condition of pregnancy.24

The second case, *Maher v. Roe*, forced the Justices to face the equal protection argument they had managed to sidestep in *Beal*. The case was brought in Connecticut by two indigent women, both of whom wanted abortions but neither of whom could claim to want them on grounds of medical necessity. Connecticut law required anyone seeking a Medicaid-funded abortion to present a physician's certificate stating that the reason for the abortion was one of medical necessity. Mary Poe, a sixteen-year-old student who had gotten an abortion in a Connecticut hospital, was later denied reimbursement for the procedure by the Department of Social Services because she failed to obtain a certificate of medical necessity. Susan Roe, an unwed mother of three children, was unable to get an abortion because she also could not obtain such a certificate. The women filed an equal protection claim against the Connecticut Welfare Department. The suit was filed in Federal District Court as a class action by Poe, Roe, and the class of pregnant women they represented.

Justice Powell again summarized the question before the Court:

In *Beal v. Doe*,....we hold today that Title XIX of the Social Security Act does not require the funding of nontherapeutic abortions as a condition of participation in the joint federal-state Medicaid program established by that statute. In this case, as a result of our decision in *Beal*, we must decide whether the Constitution requires a participating state to

pay for nontherapeutic abortions when it pays for childbirth.\textsuperscript{25}

Powell referred in his last sentence to the equal protection argument. That is, if the state funded childbirth, described in \textit{Roe} as simply an alternative way of dealing with pregnancy, then was the denial of funding for that alternative choice a denial of equal protection for those women who wanted an abortion rather than childbirth?

In his opinion, Powell traced the lengthy journey the case had traveled through the lower courts. During the first trial, Connecticut had argued that its regulations regarding nontherapeutic abortions were permissible under Title XIX. The Federal District Court of Connecticut in that case had decided that not only did Title XIX permit such abortions to be funded, but that the statute \textit{required} that they be funded, and the state had appealed.\textsuperscript{26} In the second round of litigation, the Second Circuit Court of Appeals had held that while Title XIX allowed payments for elective abortions, it did \textit{not} require the state to pay for these services. The appellate court stated that it would be wrong to construe the statute as including a requirement which was not present in its language and which Congress did not intend to include, and remanded the cases to the District Court to reconsider the constitutional issues raised.\textsuperscript{27}

A three-judge District Court had then been convened in order to hear the constitutional issues raised in the complaint. Again the lower court held the Connecticut regulation invalid on the ground that the equal protection clause of the Fourteenth Amendment prohibited the exclusion of nontherapeutic abortions from a state welfare program that generally subsidized those medical expenses associated with pregnancy and

\textsuperscript{25}Ibid., 466.
\textsuperscript{27}\textit{Roe} v. \textit{Norton}, 522 F. 2d 928 (2d Cir. 1975).
childbirth. The court found implicit in Roe the view that "abortion and childbirth, when stripped of the sensitive moral arguments surrounding the abortion controversy, are simply two alternative medical methods dealing with pregnancy."²⁸

The District Court’s reasoning was open to easy parody. As one anti-abortion scholar noted soon after the Medicaid cases were decided: "Stripped of the sensitive moral arguments surrounding them, embezzlement and the cashing of a check are simply two alternative ways of withdrawing money from a bank. Stripped of the sensitive moral arguments surrounding them, prostitution and marital intercourse are simply two alternative methods of satisfying the sexual instinct."²⁹

In its decision, the Supreme Court held that the equal protection clause did not require a state participating in the Medicaid program to pay those expenses associated with elective abortions merely because it had chosen to bear the expenses incident to childbirth. Furthermore, the Court upheld provisions of the Connecticut law requiring prior written consent by the woman and prior authorization by the Department of Social Services for abortions.³⁰ Justice Powell explained the Court’s reasoning:

This case involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our [other] cases. Nor does the fact that the impact of the regulation falls upon those who cannot pay lead to a different conclusion. In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis...Accordingly, the central question in this case is whether the regulation

“impinges upon a fundamental right explicitly or implicitly protected by the Constitution.” The District Court read our decision in Roe v. Wade, and the subsequent cases applying it, as establishing a fundamental right to abortion and therefore concluded that nothing less than a compelling state interest would justify Connecticut’s different treatment of abortion and childbirth. We think the District Court misconceived the nature and scope of the fundamental right recognized in Roe.\textsuperscript{31}

Justice Powell then turned to consideration of the constitutional question.

Reviewing the Court’s decision in Roe, he noted that what had been at issue there was a criminal statute which imposed severe penalties on physicians who performed abortions, thereby making those abortions that were performed both unsafe and limited in availability. The Court had held there that only a compelling state interest could overcome such an abridgment of constitutional freedom to exercise fundamental rights and that no such interest was found in Roe. Powell then discussed the Maher decision in light of Roe:

\ldots the right in Roe v. Wade can be understood only by considering both the woman’s interest and the nature of the State’s interference with it. Roe did not declare an unqualified “constitutional right to an abortion,” as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. It implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds.\textsuperscript{32}

Implicit in the Court’s decision was the idea that a lack of funding for abortions did not constitute a heavy burden on indigent women. The distinction between rich and poor, while a reality, found no expression in the law. Opponents of the decision argued

\textsuperscript{31}432 U.S. 464, at 471 (1977).
that withholding funding threatened to trap poor women in a reproductive prison where the only choice available was that between sterilization and childbirth, not between abortion and childbirth. The Court, they maintained, also did not consider the logical outcome of its decision, that a policy preferring "normal childbirth" over abortion in a situation that effected only poor women would result in endless generations of poor women, poor children, and predetermined economic imprisonment for a large number of women--especially minority women, who became pregnant and received abortions nearly twice as often as whites.33

The decision in Maher took Beal one step further. In Beal the Supreme Court had decided that Title XIX itself did not require the funding of elective abortions as a condition of participation in the program. In Maher the Court decided that neither did the Constitution require the state to fund nontherapeutic abortions even though it paid for childbirth. In both cases, the Court rejected the strict scrutiny test, which the lower federal courts and state courts had applied in reaching their decisions. The lower courts had done so in light of Roe v. Wade, which stated that the right to choose to have an abortion free from unwarranted state interference was a fundamental right. The word fundamental was a signal to the judges in these cases to apply strict scrutiny to the statute or regulation in question, and to determine whether there was a compelling state interest that could withstand such scrutiny. No lower court had found that restrictions for elective abortions could survive the strict scrutiny test. In fact, the lower court in Maher had said:

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The state may not justify its refusal to pay for one type of expense arising from pregnancy on the basis that it morally opposes such an expenditure of money. To sanction such a justification would be to permit discrimination against those seeking to exercise a constitutional right on the basis that the state simply does not approve of the exercise of that right.\textsuperscript{34}

The Supreme Court, however, saw it differently. As one legal scholar noted, "This time blind justice squinted to make sure it would see only the narrowest aspect of the issue."\textsuperscript{35} By looking only at the issue of equal protection as a distinction between funding childbirth and funding elective abortions, critics of the Court's decisions argued, it could ignore the crucial question of whether abortion was a fundamental right (which this very same Court had stated plainly in \textit{Roe}). Instead the Court distinguished \textit{ Maher} from \textit{Roe} by saying:

The Connecticut regulation before us is different in kind from the laws invalidated in our previous abortion decisions. The Connecticut regulation places no obstacles—absolute or otherwise—in the pregnant woman's path to an abortion. An indigent woman who desires an abortion suffers no disadvantage as a consequence of Connecticut's decision to fund childbirth; she continues as before to be dependent on private sources for the service she desires. The State may have made childbirth a more attractive alternative, thereby influencing the woman's decision, but it has imposed no restriction on access to abortions that was not already there. The indigence that may make it difficult—and in some cases, perhaps impossible—for some women to have abortions is neither created nor in any way affected by the Connecticut regulation. We conclude that the Connecticut regulation does not impinge upon the fundamental right recognized in \textit{Roe}.\textsuperscript{36}

\textsuperscript{35}\textit{Milbauer, The Law Giveth}, 198.
The Court insisted in this case that it was not unsympathetic to the plight of the indigent woman who desired abortions, but concluded: “when an issue involves policy choices as sensitive as those implicated by public funding of non-therapeutic abortions, the appropriate forum for their resolution in a democracy is in the legislature.”\(^{37}\)

It was hard for critics of the Court to imagine what could be more unduly burdensome to indigent women in the exercise of their right of abortion than not allowing it to be exercised. Opponents of the decisions also objected to the Court’s apparent endorsement of Medicaid programs that paid for childbirth while refusing to pay for abortions. For the Court to say in Roe that a woman has the right during the first trimester of pregnancy to choose whether or not to have an abortion, and then to say, as it did in \textit{Maher}, that the state has the authority to make a value judgment favoring childbirth over that fundamental right—so that the value judgment would prevail over that right in the most restrictive way possible for indigent women—seemed to opponents a flagrantly political decision.

The dissent in \textit{Maher}, written by Justice Brennan and joined by Marshall and Blackmun, scathingly viewed the Connecticut regulation:

A distressing insensitivity to the plight of impoverished pregnant women is inherent in the Court’s analysis. The stark reality for too many, not just “some,” indigent pregnant women is that indigency makes access to competent licensed physicians not merely “difficult” but “impossible.”...This disparity in funding by the State clearly operates to coerce indigent pregnant women to bear children they would not otherwise choose to have, and just as clearly, this coercion can only operate upon the poor, who are uniquely the victims of this form of financial pressure...\(^{38}\)

\(^{37}\)\textit{Ibid.}, 479–480.
\(^{38}\)\textit{Ibid.}, 483–490.
Laurence Tribe referred to the Supreme Court decisions in *Beal* and *Maher* as offering "minimum government protection" and lacking in "human sense." He also characterized the Burger Court as having "a declining commitment to economic justice" and noted that "such a judicial philosophy must not be permitted to obscure the continuing relevance of economic inequality to issues of personal liberty when restrictive laws take their greatest toll upon the poor." He did not comment on the Court's third decision of June 20, in *Poelker v. Doe*, which went yet another step toward restricting women's right to an abortion.

*Poelker* was the last of the trilogy of funding cases in 1977. This time the issue was whether the municipal hospitals of Saint Louis, Missouri, could refuse to perform nontherapeutic abortions. The city-owned hospitals had a long-standing policy against nontherapeutic abortions, but under the term of John Poelker, the mayor of Saint Louis, an official directive was issued forbidding elective abortions, or any abortions except those performed to prevent grave physiological injury or to preserve the life of the mother. Mayor Poelker was not only against public funding of abortion but had run for office on an anti-abortion platform. Also, the staff of one of the city's hospitals was largely made up of Catholics who were there because of the hospital's liaison with the Saint Louis School of Medicine, a Jesuit institution.

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36Ibid., 931 fn. 68.
Jane Doe, an indigent pregnant woman, had sought unsuccessfully to obtain a nontherapeutic abortion at Starkloff Hospital, one of two city-owned public hospitals in St. Louis. She subsequently brought a class action suit in Federal District Court against the Mayor of St. Louis and the Director of Health and Hospitals, alleging that the refusal by Starkloff Hospital to provide the abortion violated her constitutional right to equal protection. Although the District Court ruled against Doe at trial, the Court of Appeals for the Eighth Circuit reversed the decision in an opinion that accepted both her factual and legal arguments. The Court of Appeals concluded that Doe’s inability to obtain an abortion had resulted from a combination of the policy directive by the Mayor and the long-standing staffing practice at Starkloff Hospital. Relying heavily on Roe, it held that the city’s policy and the hospital’s staffing practice had denied the “constitutional rights of indigent pregnant women...long after those rights had been clearly enunciated” in Roe. The court found for Doe on equal protection grounds, finding that the provision of publicly financed hospital services for childbirth but not for elective abortions constituted “invidious discrimination,” and the city appealed its case to the Supreme Court.42

Having already decided Beal and Maher, the Court had little left to contemplate in Poelker:

For the reasons set forth in our opinion in Maher, we find no constitutional violation by the city of St. Louis in electing, as a policy choice, not to provide publicly financed hospital services for nontherapeutic abortions.43

Again, the dissenters, Brennan, Blackmun, and Marshall, took issue with the decision:

\[42\text{Doe v Poelker, 515 F. 2d 541 (8th Cir. 1975).}\]
\[43\text{Poelker v. Doe, 432 U.S. 519, at 521 (1977).}\]
A number of difficulties lie beneath the surface of the Court’s holding. Public hospitals that do not permit the performance of elective abortions will frequently have physicians on their staffs who would willingly perform them. This may operate in some communities significantly to reduce the number of physicians who are both willing and able to perform abortions in a hospital setting. The Court’s holding will also pose difficulties in small communities where the public hospital is the only nearby health care facility. If such a public hospital is closed to abortions, any woman—rich or poor—will be seriously inconvenienced; and for some women—particularly poor women—the unavailability of abortions in the public hospital will be an insuperable obstacle. Indeed, a recent survey suggests that the decision in this case will be felt most strongly in rural areas, where the public hospital will in all likelihood be closed to elective abortions, and where there will not be sufficient demand to support a separate abortion clinic.44

Justice Marshall, in his separate dissent, which encompassed all three cases—

*Beal, Maher,* and *Poelker*—was even more scornful of the majority’s opinion.

It is all too obvious that the governmental actions in these cases, ostensibly taken to “encourage” women to carry pregnancies to term, are in reality intended to impose a moral viewpoint that no state may constitutionally enforce...The impact of the regulations here falls tragically upon those among us least able to help or defend themselves. As the Court well knows, these regulations inevitably will have the practical effect of preventing nearly all poor women from obtaining safe and legal abortions...The enactments challenged here brutally coerce poor women to bear children whom society will scorn for every day of their lives.

I am appalled at the ethical bankruptcy of those who preach a “right to life” that means, under present social policies, a bare existence in utter misery for so many poor women and their children.45

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The dissenters found the majority opinion in the Missouri case (Poelker) especially distressing, for here the Court sanctioned the activity of a "presumed majority in electing as mayor one whom the record shows campaigned on the issue of closing public hospitals to non-therapeutic abortions," and "punitive imposed upon a needy minority its own concepts of the socially desirable, the publicly acceptable, and the morally sound with a touch of the devil-take-the-hindmost." "This is not the kind of theory for which our Constitution stands," concluded Justice Blackmun.

Immediately following the June 20 decisions, the Supreme Court on petition instructed Judge Dooling of Brooklyn to reconsider his ruling and lift his national injunction in light of its latest pronouncements. On August 4, 1977, Judge Dooling lifted his order and less than an hour later, Secretary Califano of HEW, who like the President personally opposed abortion, announced that virtually all federal funds for abortions would be cut off. The states themselves, or their counties, would have to come up with the funds to pay for abortions not covered by the "life endangered" standard of the Hyde Amendment.46

In December 1977 the House and Senate finally agreed upon the therapeutic standard a pregnant, indigent woman would have to meet before she qualified for a federally-funded Medicaid abortion: "severe and long-lasting physical health damage" if her pregnancy was carried to term.47 Time magazine noted the passage of this second Hyde Amendment by saying that "people who believe that abortion is every woman's right are in retreat."48

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46Garrow, Liberty and Sexuality, 629.
47Ibid., 631.
48Time, 19 December 1977, 12-13. In 1979 Congress approved another Hyde Amendment, adopting even more narrowly restrictive language for fiscal year 1980 than had been applied in either of the two previous
Reaction within the legal scholar community was mixed. Scholars who agreed with the Court's 1977 decisions pointed out that the Supreme Court had reminded the public that *Roe v. Wade* had not established the right to abortion as absolute: "At some point the state interests as to protection of health, medical standards, and prenatal life, become dominant." For those who opposed the welfare funding decisions, the Court had allowed state legislators and local officials to shift the grounds from the stage of pregnancy (which was the basis of *Roe*) to funding decisions. In this way, state and local officials were able to reassert themselves by shifting the issue to an arena—participation in state grant-in-aid programs—in which they enjoyed considerable latitude. Funding, in the opposition view, became the point at which legislatures too could begin to proscribe non-therapeutic abortions. This development, reinforced by the Supreme Court's decisions in *Beal, Maher,* and *Poelker,* cleared the way for implementing the 1976 Congressional provision restricting federal abortion funding and shifted the battleground between pro- and anti-abortion forces from the federal courts to state and local decision-makers.

Because there was no national reporting system and no common state reporting system at the time, it is difficult to calculate exactly how many women were affected by the 1977 decisions. One survey of state welfare and Medicaid agencies, as well as a large random sample of abortion providers like Planned Parenthood, reported that between 261,000 and 274,000 poor women had obtained abortions paid for in part by the federal-state programs in 1976; the abortion rate in 1976 was also three times higher among the

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poor than the non-poor.\textsuperscript{50} A survey conducted by the Guttmacher Institute further noted, "the average cost of an abortion in the U.S., $280, is $42 higher than the average monthly welfare payment for an entire family for food, clothing, shelter and all other necessities."\textsuperscript{51}

Independent of the funding question, it was clear that the 1977 Supreme Court decisions would reinforce the pattern of differential access to contraceptive and abortion services that had prevailed before Roe. Before abortion had become legal, only wealthy women had had access to reliable birth control and safe abortions. With Roe these services had become available to middle-class women. For a short time after Roe, Medicaid had made the same services available to poor women, but the Hyde Amendment and state funding restrictions, with the Supreme Court's stamp of approval, put an end to this.

State reactions to the Supreme Court's decisions were mixed. Thirty-five states eventually decided to stop all funding for abortions except when a woman's life was endangered.\textsuperscript{52} Three states continued funding "medically necessary" (therapeutic) abortions.\textsuperscript{53} And twelve states and the District of Columbia opted to assume the financial burden and continue to provide full Medicaid coverage for elective (non-therapeutic)

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\textsuperscript{50}Alan Guttmacher Institute survey cited in Richard Lincoln, et al., "The Court, the Congress and the President: Turning Back the Clock on the Pregnant Poor," 9 Family Planning Perspectives (September/October 1977), 210. The Guttmacher Institute is the research arm of the Planned Parenthood Federation of America.

\textsuperscript{51}Lincoln, "The Court, the Congress and the President," 210-211.

\textsuperscript{52}Alabama, Arizona, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont and Wyoming.

\textsuperscript{53}Idaho, New York and Pennsylvania.
abortion funding as soon as possible after the Hyde Amendment went into effect were considerably less urbanized than those continuing payment. Five of the seven most heavily urbanized states, but only one (West Virginia) of the seven least urbanized, opted initially to continue abortion support.

In the South, where 53 percent of the population opposed legalization of abortion and only 39 percent favored it, twelve of the thirteen states swiftly cut off state support for abortion, except for life endangerment; Virginia joined their ranks in November. Ten of twelve Midwestern states discontinued Medicaid support (Michigan and Wisconsin continued to provide it). In the other two regions, general population support was much greater and a higher proportion of states continued to pay: six of twelve states in the East (plus the District of Columbia), and seven of thirteen states in the West, including Alaska and Hawaii, assumed the federal share and continued full coverage or provided for medically necessary abortions. 55

The importance of federal funding was particularly evident in the South, where all states opting to cut off abortion funding ranked lower than 32nd among the states in median family income. The federal share of the Medicaid state-federal public assistance programs in these states was much larger in order to even out some of the state differences in benefits. As a result, state welfare programs in southern states were highly dependent on the federal dollar. Even if public opinion supported Medicaid funded


55 Ibid., 170-171. West Virginia is an interesting exception to the urban-nonurban rule. Physicians and legislators in the state were reported to take a dim view of abortion, but in fact, few abortions were being performed in West Virginia. One state official estimated only a little over 100 abortions a year during 1976 and 1977.
aborted in the South—a remote possibility given other religious and social factors—it was unlikely that these states could come up with the funds to run the programs.\textsuperscript{56}

The Hyde Amendments were very effective. By 1979 few abortions were being paid for with federal funds. Secretary Joseph Califano of HEW told a House subcommittee in March, 1979, that only 2,421 abortions had been paid for by Medicaid in 1978.\textsuperscript{57} In his statement Califano told the House Committee that 1,857 of the abortions involved the life of the mother; 385, physical health damage; and 61 were cases of rape or incest. Some states continued to use their own funds to pay for abortions for low-income women even though federal matching money was not available.\textsuperscript{58}

The welfare funding decisions were only one of three developments that shaped the abortion issue in 1977. The Congressional attempt to cut off all but "medically necessary" abortions with the Hyde Amendment was first, the Supreme Court's funding decisions came second, and the states' reactions were third. Without the Court's endorsement of the Hyde Amendment, however, it is likely that the decisions of lower federal courts invalidating the amendment as unconstitutional would have held sway, and that funding for both therapeutic and elective abortions under Medicaid would have continued.

By 1977 both the Supreme Court and Congress had become sensitized to public pressures on the abortion issue. Congressmen had begun to feel the presence of strongly organized Right-to-Life forces in their districts, and many House members were

\textsuperscript{56}Ibid., 171-172.
\textsuperscript{57}Washington Post, 8 March 1979.
Catholics. In the Senate, which had fewer Catholics and longer terms, anti-abortion sentiment was less evident. The Supreme Court was also very sensitive to changes in the direction of political winds. By 1977 abortion had become as much a political as a legal matter and the Court was reluctant to thrust itself into a confrontation with Congress on such a politically explosive subject. It is debatable, as the Court's critics maintain, that the Supreme Court "misused the law to the detriment of the whole of society when it chose to impose its own traditional moral values on the abortion funding decisions of 1977." It is more apt to say that the "traditionalists" of the Court outnumbered and won out over the "liberals" in a battle in which both claimed the legal and moral high ground. The Court would probably have overturned a statute clearly designed to abridge the right to choose an abortion, but it was unwilling to demand that Congress use tax money to subsidize such controversial services. In short, the political climate in 1977 was better suited to judicial restraint than to judicial activism.
Chapter 15

Planned Parenthood Enters the Anti-Abortion Era: 1977-1983

Nineteen seventy-six was a crucial year for Planned Parenthood. Nationwide, the Catholic Church and other opposition groups applied pressure to state legislatures and Congress to deny women the right to legal abortion. Late in 1976 abortion opponents pushed through Congress the first version of the Hyde Amendment, barring the use of Medicaid funds to pay for abortion in all circumstances except when a woman’s life was endangered or she was the victim of rape or incest. In June 1977 the Supreme Court upheld the constitutionality of the Hyde Amendment in a series of decisions that came to be known as the “welfare” cases, and by the end of the year Medicaid funding for abortion was almost completely cut off. The opponents of abortion took these decisions as their mandate to put Planned Parenthood out of business. Throughout the country, picketers and “sidewalk counselors” began efforts to physically stop women from entering clinics, and a wave of arson attacks and bombings began.¹

Then, in 1980, Ronald Reagan became president. A period began of cutbacks in basic services for the poor, disabled, and elderly. The Reagan administration entered

¹The first version of the Hyde Amendment was passed in September 1976, but was enjoined nationally in federal district court on October 1, just before it was to take effect. The ensuing legal battle between anti-abortion and pro-choice advocates led to the 1977 Supreme Court decisions in Beal v. Doe, 432 U.S. 438 (1977), Maher v. Roe, 432 U.S. 464 (1977), and Poelker v. Doe, 432 U.S. 519 (1977). In these cases, the Supreme Court held that neither the Constitution nor the Social Security Act requires states to provide Medicaid funds for nontherapeutic, or elective abortion (Beal and Maher), and that municipalities are not obliged to perform abortions in their public hospitals (Poelker). The injunction against the Hyde Amendment was subsequently lifted in August 1977, and federal funds were cut off in October by the Carter Administration’s Secretary of HEW, Joseph Califano. See David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade (New York: Macmillan, 1994), 626-631, for details of the Congressional debate. The wave of violence against Planned Parenthood clinics which began in 1976 is detailed in A Tradition of Choice: Planned Parenthood at 75 (New York: Planned Parenthood Federation of America, Inc., 1991), 72-93.
office indebted to the New Right, a loose coalition of right-wing and extremist groups that formed in the late 1970s and whose agendas bore a striking resemblance to the anti-vice movement of Anthony Comstock a century earlier. The chief common ground of those in the New Right’s coalition was opposition to abortion. The president, as the leader of the New Right, repudiating principles he had earlier held as governor of California, actively sought to curtail and restrict access to family planning services and to eliminate the right to safe, legal abortion guaranteed in Roe v. Wade.²

Withdrawal of government support put pressure on nonprofit organizations like Planned Parenthood to curtail services, including access to reproductive health care for those most in need: the poor and the young. For a short time, Planned Parenthood quietly retreated from the front lines of the abortion battle, emphasizing education and contraception in order to retain its claim to federal funding. Then in 1978, the Planned Parenthood Federation of America (PPFA) chose a new president, Faye Wattleton, former executive director of the Planned Parenthood Association of Ohio. At thirty-five, the youngest person, the first African-American, and the first woman since Margaret Sanger to lead Planned Parenthood, Wattleton took office determined to push women’s rights back to the forefront. Under her leadership, PPFA policy was tailored to providing informed, comprehensive, age-appropriate sex education and contraceptive services to all women and to combating unwanted pregnancy and abortion. Public opinion polls showed that the majority of Americans supported accessible family planning services and

safe and legal abortion. Over the next decade, Wattleton became one of the nation’s
most vocal and aggressive advocates of reproductive rights.³

Wattleton moved quickly to reorganize the structure of the national organization,
to establish a strong lobbying presence in Washington, to mobilize grass-roots support
through a nationwide “public impact” campaign, to launch an aggressive program of
litigation in federal and state courts, and to implement a nationwide advertising program.
Within a few years, the media came to acknowledge her as a forceful spokesperson who
had repositioned Planned Parenthood as a leader in the fight for reproductive freedom.⁴

Planned Parenthood affiliates reinforced these national efforts to maintain and
expand reproductive services in their states and communities. Affiliates lobbied state
legislatures, sponsored symposia and other community forums, educated policy-makers
and the media, advertised, filed lawsuits, and forged coalitions with other community
groups, and fought the rising tide of opposition and violence against clinics.
Occasionally, affiliates used humor to exploit their harassers: one initiated a “Pledge-A-
Picket” campaign and raised thousands of dollars by asking donors to pledge a specific
amount for each anti-abortion picket showing up at a clinic on a given day. These
determined initiatives proved key to the defeat of New Right efforts to cut off funding for
federal family planning programs. While funding for family planning services under
Medicaid, Title XX, and Title X declined, the programs remained a vital source of family

³*Tradition of Choice*, 73. See also “About Faye Wattleton.” *News: Planned Parenthood World
Population* (undated), a one-page fact-sheet sent by PPFA to all the affiliates.
⁴*Time* magazine editorial (1978), which referred to Wattleton’s leadership style in admiring terms: “she
took off the white gloves and became one of the nation’s most vocal and aggressive advocates of
reproductive rights.” See also *Tradition of Choice*, 77.
planning services and other reproductive health care for millions of low-income women and teens each year.\(^5\)

Planned Parenthood also led the successful grass-roots organizing effort to defeat the Reagan administration’s “squeal rule,” an attempt to discourage teens from seeking contraceptive services at federally funded clinics by mandating parental notification when teens received prescriptions for birth control. In the summer of 1983 the Supreme Court threw out the rule, upholding the decisions of two lower federal courts that had denounced the administration’s argument in its favor as “fatuous” and “mere sophistry.” The Reagan administration was blocked, temporarily at least, from imposing its anti-choice policies.\(^6\)

**Planned Parenthood of Houston, 1977-1983**

Like the national Board, the board of Houston’s Planned Parenthood retreated quietly from the reproductive front line during 1976-77. Local policy statements emphasized the idea of a woman’s “right to privacy” rather than her “right to choice,” a less inflammatory maxim. In October 1976, as the legislative and legal battles over the Hyde Amendment were being waged, Houston’s Board of Directors voted to phase out the Voluntary Pregnancy Termination (VPT) clinic by the beginning of 1977.\(^7\) Between 20 and 30 percent of the abortion clinic’s patients were Medicaid and Title XX recipients, and for these women the threat of federal funding cuts—as well as the closure of Planned

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\(^5\) *A Tradition of Choice*, 79.

\(^6\) *A Tradition of Choice*, 79. In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983) and *Planned Parenthood, Kansas City, Missouri v. Ashcroft*, 462 U.S. 476 (1983), the Supreme Court struck down several restrictive state and local statutes requiring waiting periods for abortions, written or informed consent by the woman, hospitalization for second trimester abortions, notice to the supposed father or the women’s parents or guardian before an abortion, and parental consent for minors, and defined the limits of state authority to restrict abortions and contraceptives.

\(^7\) PPH, Minutes, October 12, 1976.
Parenthood's abortion clinic—promised real hardship. From the Board's perspective, the dramatic increase in patient loads brought about by federal funding had led to clinic overcrowding, a drop in the quality of services, and an increase in lawsuits against the agency. Board members were skeptical that the courts would rule against the Hyde Amendment and were unwilling to sacrifice all of the agency's federal funding by continuing to provide abortion services. Some were against abortion and wanted to return to the original agency charter of providing women comprehensive health-care education and contraceptives.

While the Board tried to retreat to the safer (and federally funded) ground of educational and contraceptive services, the plight of the clinic's teenage clientele was becoming an important issue. In 1977 the problems of teen pregnancy and venereal disease reached what the board's Medical Advisory Committee considered epidemic proportions. Teens were making up an ever-increasing percentage of Planned Parenthood's clientele and were swelling the new patient rolls by 25 percent. They were also getting pregnant and contracting sexually transmitted diseases at an alarming rate.8

But under Texas law it was illegal to treat minors in Planned Parenthood clinics. Any physician treating a minor could be charged with assault and battery, or face a civil suit for medical malpractice; and Planned Parenthood could be charged as an agency with

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8Monthly Patient Reports, 1977, and PPH, Minutes, April 12, 1977. It is difficult to give exact percentages, but the trend is clear. Between 1973 and 1976, while federal funding was still available for abortions, less than 8% of the VPT's clients were under 17 years of age; in 1977, when that funding was no longer available (and when the overall patient load had dropped 10% due to many patients' inability to pay), the percentage rose to 10% or more. Before 1977, the VD rate for teens under the age of 17 was negligible; during 1977 the number rose dramatically, and doctors became alarmed. See Monthly Patient Reports for 1977. The exact number of teenagers testing positive for STDs each month isn't given, but the overall number of women testing positive rose almost every month and doctors attributed the rise in Board discussions to the rise in teen sexual activity. See PPH, Minutes, January 11, 1977, and February 8, 1977, for examples of such discussions.
contributing to the delinquency of a minor. The Board’s concern was understandable given the large increase in teen-age clients. But Texas affiliates had been openly serving minors for some time, as the board’s Public Affairs chairperson, Phyllis Van Kerrebrook pointed out, and no one had ever been successfully prosecuted in the state of Texas for doing so. As Executive Director Dick Ferguson noted, the affiliate was well insured against malpractice suits.

Nevertheless, in an overabundance of caution, the Board called a special meeting of the Medical Advisory Committee and asked it to recommend whether to terminate services to minors at all local Planned Parenthood clinics. The meeting was held January 25, and the committee took an equally cautious stand. Noting that the provision of services to minors without parental consent might “put the attending physician at legal risk in two ways: (1) civil action regarding malpractice; and (2) criminal action such as assault and battery,” the committee chairman, Dr. Peter Thompson, recommended that the Houston Board obtain approval from the Planned Parenthood Federation, and further, that “National Planned Parenthood should provide, in writing, a review of the legal and malpractice support which they will provide.” At a minimum, Thompson felt, such support should include “complete malpractice coverage in any malpractice suit, and funds for legal defense in case of criminal action.”

All this was looked into, and on February 8 the Board voted to continue providing contraceptive services to minors and to change Planned Parenthood’s policy to state:

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9 PPH, Minutes of the Executive Committee Meeting, January 11, 1977; and PPH, Minutes. February 8, 1977.
10 PPH, Minutes of the Executive Committee, January 11, 1977.
11 Memorandum to the Board of Directors, dated February 4, 1977, from Peter K. Thompson, M.D., Chairman of the Medical Advisory Committee. Other members of the Committee were Dr. Blanchard Hollins, Dick Ferguson, the Executive Director, and John Wyly, a non-physician Board member.
"Planned Parenthood Centers shall serve anyone who comes in and is in need of our service." The majority of Board members considered the legal risks low, and after assurances from the Federation's legal advisor, Harriet Pilphel, that the affiliate would be financed by the Federation's legal defense fund (the Edelin Fund) in the event of such a lawsuit, the motion was seconded and carried.12

The Supreme Court had decided the year before, in Planned Parenthood of Central Missouri v. Danforth, that states could not impose a "blanket requirement of parental consent" on unmarried, unemancipated women under eighteen who wanted to get abortions or use contraceptives, since "the right to privacy in connection with decisions affecting procreation extends to minors as well as adults."13 Texas simply had not changed its law to reflect the Supreme Court's decision, and there was no indication that new legislation was necessary (as noted, no one had ever sued successfully in such a case). Given all this, Planned Parenthood's Board seemed uncharacteristically fainthearted in its deliberations. But in the uncertain political and judicial climate, its caution may have been warranted.

The Board's general concern with potential lawsuits was merited. In 1977 Planned Parenthood was involved as respondent in ten civil lawsuits, the largest number in its history. The lawsuits became so numerous that a legal advisor was called in and Legal Activity Reports were given at each Board meeting. Patients sued for a variety of reasons: complications arising from vasectomies, failed vasectomies, complications from

12PPH, Minutes, February 8, 1977.
13428 U.S. 52 (1976). In Danforth the Court approached the question of parental consent and notification requirements still very much in the spirit of Roe v. Wade, but made clear that it was endorsing procreative rights, not sexual rights, for minors. In the cases of minors the Court's decisions were always fraught with ambiguity, allowing some restrictions and disallowing others. In July 1979 the Supreme Court reaffirmed
hysterectomies, and mis-diagnosed cancer; one patient sued over an “inaccurate IUD x-ray.” These suits dragged on for years, and while none involved teens or services to teens, the potential was there, and the pressure was considerable.

The teen problem remained a matter of concern for Planned Parenthood’s physicians and Board, but it never overshadowed the problem of finances. When it closed the VPT clinic, Planned Parenthood lost a valuable asset. The agency still received large grants of state monies under Title XX, but it paid much of this funding to other clinics in referral fees. Even after it closed its own abortion clinic, Planned Parenthood still offered pregnancy confirmation, counseling, and referral services to its patients; but when it referred patients to other abortion clinics, the state funding went with them. Title XX funds were also used in other clinics at a higher cost per patient, since most other clinics charged more for abortions than Planned Parenthood. Added to this problem was the fact that the number of new patients, in particular cash customers, coming to Planned Parenthood clinics for birth control did not increase as expected. By November 1977 the Treasurer was reporting a decrease in clinic reserves of $118,000 for the year. With only $32,000 left in its reserve account, the Board once again considered raising patient fees.\footnote{PPH. Minutes of the Executive Committee Meeting, November 8, 1977. Planned Parenthood also provided thousands of dollars each month in “No fee” services to indigent women, which it had to recoup from paying patients. It is not clear what happened to Title XIX (Medicaid) reimbursements in 1977. No receipts of Title XIX monies were reported by the Treasurer in 1977; only Title XX receipts were reported. Presumably, indigent women still eligible in 1977 for Medicaid-reimbursed abortions were going to other clinics, since Planned Parenthood had closed its VPT clinic. Birth control and family planning services were still provided for under Title XX, and that is where Planned Parenthood received most of its state and federal monies.}
Some Board members and physicians at Planned Parenthood felt that the VPT clinic should be reopened to provide low-cost pregnancy termination services to women currently being "overcharged" at other abortion clinics, as well as free services for those who could not obtain Medicaid funding. To these staff and Board members, spending Title XX monies to send women to outside agencies for abortions "when we could do them here at a lower cost would, we think, be a violation of trust." The idea of public trust was most important to Board member Van Kerrebrook, who stated pointedly in an ad hoc report to the membership:

As you well know, taxpayer funding of abortion is in a very tenuous position. The worst could happen. If it does we must be in a position to offer early VPT's at the lowest possible cost and able to absorb the expense of some. This assumes we really believe that abortion should be available to the poor.

Van Kerrebrook and those who agreed with her were fighting an uphill battle against more conservative Board and medical staff members. The medical director, Dr. Carl Levinson, also a member of the committee charged with the decision to close the VPT clinic, and a number of others felt that Planned Parenthood should take the safer and less radical step of opening a "Surgi-Center," or mini-operatory, at the already established Doctor's Center in Houston, and perform abortions there rather than on the premises of Planned Parenthood. While conceding the need for Planned Parenthood to reinstate VPT services in some fashion, Levinson argued that the Doctor's Center had "excellent emergency back-up, and...anesthesia available for those cases where it is indicated or desired." Also, he noted, performing surgical procedures in a surgical center located elsewhere would "free space for the development of enlarged birth control
programs.” Finally, he said, the surgi-center would add “a touch of class” to Planned Parenthood’s operations: “It is time for Planned Parenthood Center of Houston to stop doing everything on the proverbial shoestring. The Surgi-Center is a unique concept providing multi-purpose services... It will add an element of respectability. It will be more appealing for medical personnel.”18

Van Kerrebrook and others were unsympathetic with doctors who were more concerned with having a classy place to work than with ensuring an affordable choice to women in need. A battle ensued between the two groups, and at the July Executive Committee meeting, two opposing plans were presented for the reinstatement of a VPT clinic. Levinson presented his plan for a Surgi-Center at the Doctor’s Center, with abortions to be performed there and Planned Parenthood billed sixty dollars per patient for the service. The advantages of his plan were that “later” abortions—abortions after ten weeks—could be performed at the Doctor’s Center, it had better emergency back-up and anesthesia services, and “a more sophisticated, classy set-up.” Van Kerrebrook presented her plan for re-establishing services at Planned Parenthood just as it had been done before. The advantage of her plan was its cost-effectiveness: of the sixty dollars paid to the Doctor’s Center, forty dollars would be saved by doing the procedure at Planned Parenthood. This, Van Kerrebrook added, could be used to offset the cost of services for those who could not pay.19

The Committee voted 6-3 to adopt Van Kerrebrook’s plan and to resume voluntary pregnancy termination services at Planned Parenthood. The clinic was

17Ibid., 2.
18Findings of the Ad Hoc Committee on the Surgi-Center, July 6, 1977.
19PPH, Minutes of the Executive Committee Meeting, July 12, 1977.
reopened November 14, 1977, soon after the Supreme Court had upheld the ban on Medicaid-funded abortions and federal funding for abortions had been cut off. Reflecting the loss of federal funding, the clinic was operated on a cash basis. The fee for an abortion was $160, payable in advance, and fee deferments were available for only a small number of the neediest women. Abortions were done Monday-Friday, for women up to ten weeks pregnant; women more than ten weeks pregnant were referred elsewhere. Within eighteen days ninety-seven abortions had been performed. Almost all the women paid cash, and of those deferred, only $1,129 in fees remained outstanding (0.7%). Once again VPT represented a “positive cash flow” for Planned Parenthood. 20

At the same time, the board established a VPT Loan Fund for women who were not able to pay cash but who were able to make payments for their abortions. The money for the fund was to come from special donations and a ten percent contribution of all surplus funds from the VPT program. It is not clear how money was solicited for the fund (presumably through fundraising), but these efforts were very successful. By January 1978 there was $15,000 available for low-interest loans and forty-five women had applied for them.21

As a second step to increase clinic reserve funds and return Planned Parenthood to financial stability, the Board voted early in 1978 to introduce a new sliding-fee-scale for birth control patients. The number of women receiving “No-fee” services, or services at no cost, was increasing each month, and higher charges were needed to offset those losses. Board members considered fee-hikes a last resort and were concerned about a possible drop in the overall number of cash patients. But, unlike previous fee increases.

this one caused no ripples. The new fee scale took effect in May 1978, with no
decrease in the patient load.\textsuperscript{22}

In many ways, June 1978 was a pivotal month for Planned Parenthood. By June,
the VPT clinic had again become a cash-maker, the problem of how to fund abortions for
poor women had been solved with the VPT Loan Fund, and clinic reserve funds had risen
again from a low of $30,000 in November 1977 to $60,000. Incoming Title XX funds had
increased 311 percent, since Planned Parenthood was no longer referring large numbers
of patients to other clinics. Almost all the branch clinics were reporting monthly
increases in patient loads, and the main clinic at Fannin was serving over four hundred
new women each month. In June the Board voted to change the agency’s name to
Planned Parenthood of Houston and Southeast Texas, to reflect its sprawling branch
structure and growth.\textsuperscript{23}

Then on June 2 Dick Ferguson resigned as Executive Director and the Board was
faced with the worrisome prospect of finding someone to replace him. Ferguson had
served seven years as Executive Director, far longer than his four predecessors, and had
come to Planned Parenthood at a time of rapid growth and financial instability. He had
provided leadership and direction during the abortion funding crisis, and the Board had
praised his efforts often. In his letter of resignation, Ferguson cited “personal and family
reasons” for his departure and gave generous notice: he would continue to serve as
Executive Director through October 31. Less than two weeks later, he modified his

\textsuperscript{22}pph, Minutes of the Executive Committee Meeting, January 10, 1978.
\textsuperscript{23}pph, Minutes of the Executive Committee, June 3, 1978. Monthly Treasurer’s Reports indicated that in
1977 and 1978 over $200,000 in “No-fee” services were provided to needy patients each year; the entire
budget for these years was between $1 and 1.2 million, so $200,000 was a significant amount.
\textsuperscript{23}Report of the Treasurer to the Board of Directors, May 31, 1978 (on clinic reserves); Memo from Diris
Hicks, Director of Fiscal Services to Susan Hess, Assistant Executive Director, Re: Patient Service/Sliding
departure date to August 19. The board, while accepting his resignation "with
regret," had declined to keep him on for four months and asked that he follow Personnel
Policy and leave in two months.\textsuperscript{24}

The Board’s president, Dr. Jack Crawford, appointed a search committee to find
an Executive Director and nominated Susan Hess, a registered nurse and Assistant
Executive Director, for the position of Acting Executive Director, to be compensated at
the rate of $500 per month for the period of her extra duties. The motion was seconded
and carried, and Planned Parenthood had its third female executive, albeit a temporary
one.\textsuperscript{25}

Ferguson did leave Planned Parenthood with regret, but in his final report to the
Executive Committee on August 8 he noted several serious problems with the Board and
offered suggestions for improving Board-staff relations that suggested there had been
more than "personal reasons" for his resignation. In his report he asked the Board to
establish "solid measurable goals and objectives" for the next Executive Director in the
form of Five Year Plans, and to clarify its own role, which he felt was "ill defined." He
also urged the Board to "have a retreat with the management staff" to accomplish the
goal-setting and role-definition it "urgently" needed. Rather than ordering the staff about
in inappropriate ways, he said, Board members needed "to clearly understand how they
can best serve the organization and how they can best assist the staff."[emphasis added]
He ended his report with a quote from a staff nurse:

\textsuperscript{24}Fee Scale, dated July 25, 1978 (summary of patient volume and cash flow); and PPH, Minutes of the
Executive Committee Meeting, June 3, 1978. For patient statistics see Monthly Patient Reports.
\textsuperscript{25}Letters of resignation dated June 2, 1978 and June 19, 1978, from Richard A. Ferguson to the Board of
Directors. See also PPH, Minutes of the Executive Committee Meeting June 13, 1978.
\textsuperscript{26}PPH, Minutes of the Executive Committee Meeting, August 8, 1978. The first female executive was, of
course, Agnese Nelms. The second was Grace Buzzell.
When the Board of Directors are as sensitive to the staff as they want the staff to be to the patients, then we'll have the real working partnership we need.26

His criticisms echoed those of past Executive Directors and lent them credibility.

Despite its history of personnel problems, the Board received 162 applications for the position of executive director. Eight candidates were interviewed and in September, the chairperson of the nominating committee recommended that the Board vote to employ Richard E. Taylor as executive director at an annual salary of $32,000. The motion was seconded and carried, and Planned Parenthood had its new executive.27

Taylor, or “R.E.” as he came to be known, joined Planned Parenthood’s staff on October 16, leaving the position of Executive Director of Houston’s Girl Scouts organization. He had a reputation for being a high-energy person with a “can do” attitude, and he began to make changes immediately.28 He reorganized the staff, eliminating several unnecessary administrative positions, lengthened clinical staff’s work-week from thirty-three to thirty-seven-and-a-half hours, changed supply procedures, began renovations on the Fannin clinic to include repairs, paint, and new carpet, and did what Richard Ferguson advised: he began the process of clarifying Planned Parenthood’s public image, purpose, goals, and Board and staff roles in achieving them. In doing so, his secretary noted, he “incurred the displeasure of a lot of the staff.”29

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27PPH, Minutes, September 12, 1978.
28Personal information about R.E. Taylor was given by Jane Rae, Planned Parenthood’s Director of Board and Executive Affairs. Rae came to Planned Parenthood with Taylor from the Girl Scouts organization where she had been Business Manager. She acted as Taylor’s Executive Secretary and then as Executive Assistant to his successor, Peter Durkin, who became Executive Director in 1983. OHI. January 22, 1995.
29Ibid. According to Rae, Taylor eliminated duplicate organizations such as the Branch Advisory Councils, and the positions of the two Assistant Executive Directors. He later recreated the position of Assistant Executive Director, but with new duties, and appointed Susan Hess, who had served as interim Executive
He may have been abrasive, but his style seemed to work. In 1978 Houston was the fifth largest affiliate in the country, having served 31,499 patients during the year; that number would grow by almost 30 percent during Taylor's first year, and continue to climb in the years following. In 1978 Planned Parenthood's total budget was around $1.2 million; that figure would increase by half a million during his first year and triple during his tenure while at the same time, cuts in federal funding and the anti-abortion crusade began in earnest. Reorganizing and running a rapidly expanding agency, putting out administrative and budgetary fires, fundraising, dodging political slings and arrows, and pleasing a factious board were all full-time jobs. The executive directorship of Houston's Planned Parenthood was no place for the timid.  

Taylor's reorganization of clinical staff and the expanded work week did bear important fruit. By February 1979 over one hundred new patients were being seen each week (bringing the total to over five hundred), yet the average waiting time for patients had dropped from over two hours to less than half an hour. Clinic supply problems had been solved by new supply procedures, and the staff had begun a public relations blitz: videos on VD, contraceptives, and abortion were commissioned and shown on two major network stations in Houston; public relations personnel and staff physicians appeared on television and radio talk shows to discuss Planned Parenthood's services; news articles detailing clinic services appeared in the Post and Chronicle; and public relations staff arranged campus lectures to educate college students about reproductive health. Taylor

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Director. See Executive Director's Reports to the Board, January 9, 1979, February 13, 1979, and March 21, 1979.

30Report on the First 100 Affiliates by Patient Load: 1978. Denver was first, with 45,000 patients; Baltimore, New York and Milwaukee were second, third and fourth, respectively.

31Executive Director's Report, February 13, 1979.
also discussed new grants with HEW executives for the expansion of Planned Parenthood’s services into suburban and rural areas.\textsuperscript{32}

Taylor’s aggressive campaign to increase government funding bore fruit. A study of affiliate income for 1979 showed that PPH’s income from government grants and contracts increased from just over 30 percent of the agency’s total budget in 1978 to 49 percent just a year later. Regular fundraising efforts were also more productive, increasing in 1978 to 19 percent of total income from 13 percent the year before. At the same time, income from patients dropped significantly: in 1977, over 38 percent of agency income was derived from paying clients; by 1978 that number had dropped to 30 percent. While the increase in federal funding was welcome, the practical result was that Planned Parenthood became more dependent on the federal dollar than ever.\textsuperscript{33}

Monthly patient reports noted steadily rising numbers of women coming to Planned Parenthood clinics, not only for contraceptives and abortions, but for health screening, blood tests, and premarital serology and counseling. By year’s end the total number of patients had risen to over 42,000, an almost 30 percent increase, clinical physicians had performed over 2,000 abortions, and over $400,000 in “No-fee” services had been dispensed to the indigent. Equally important, six of the ten lawsuits in which Planned Parenthood had been involved were resolved. Business was booming, especially among teens.\textsuperscript{34}

\textsuperscript{32}Executive Director’s Report, March 21, 1979.
\textsuperscript{34}See Monthly Patient Reports, Treasurer’s Reports, and Legal Activity Reports for 1979. The decrease in the number of lawsuits may have had nothing to do with Taylor’s leadership. But since they were resolved so quickly at the beginning of his tenure, it is possible that he played some part in their resolution. It is impossible to know without legal records, but Board records do not indicate that any cases went to court. so most of them probably ended in settlement.
By the late 1970s, teen pregnancy had become a matter of great public concern. Much of that concern seemed to focus on the welfare costs to taxpayers that were accruing from the growing numbers of teen-aged mothers ending up "on the dole." Articles in major newspapers about the "teen pregnancy-welfare problem" dotted the nation. Citing a new study conducted by the Stanford Research Institute, the Washington Post reported that "teen-age pregnancies cost the American taxpayers about $8.3 billion a year in welfare and related outlays." The study estimated that 600,000 babies were born each year to teens, most of whom ended up on welfare. The Los Angeles Times, quoting a Congressional task force study, reported that "illegitimate births among teen-agers in the United States have more than doubled in numbers since 1960, swelling welfare rolls because only ten percent of the out-of-wedlock children are being offered for adoption compared with 90 percent a decade ago." And the Houston Post, citing a report by the House Select Committee on Population, reported that "unmarried teen-agers...are producing thousands of babies and boosting welfare costs as a result." The Post also noted that "fewer than one-third of sexually active teen-agers regularly use contraception, despite all the publicity."35

Monthly patient reports during 1979 at PPH indicated that 11 percent of the clinic's total contraceptive clientele were "minors." VPT clinic reports showed that the number of teen-agers under the age of seventeen fluctuated between 8 and 10 percent. Patient profiles, which encompassed both groups, contraceptive and abortion patients, showed that 70 percent of the clinics' total patients were single, 72 percent were between

eighteen and twenty-four years of age, and 41 percent were students—numbers which, in fact, had remained fairly constant. Around one-third of the patients surveyed were teen-agers, but this was exactly the age group Planned Parenthood intended to target. Staff members may have been alarmed at the increasing number of teen pregnancies, but they were delighted with the additional number of teen patients in the contraceptive clinics.\footnote{Patient Statistics Summary, December 1979.}

Throughout 1980, the patient load continued to grow. Monthly Patient Reports showed that 1,200-1,500 patients per month were coming through the Fannin clinic's doors, and hundreds more through the doors of branch clinics; physicians were performing between 200 and 270 abortions per month; and “No-fee” services to the poor averaged $30,000-$40,000 monthly. Yet, while the Treasurer continued to report monthly increases in clinic reserve funds and Title XX contracts for 1980-81 were at an all-time high ($864,634), Board members were concerned about the costs of the increasing numbers of indigent patients. In August the Board voted to initiate yet another new fee structure, which took effect immediately, and the second fee hike took its toll. The patient load continued to grow at a rate of 10 percent, increasing as city and county clinics ran out of federal monies to treat the poor, but this was much less than the 30 percent growth of the year before.\footnote{PPH, Minutes of the Executive Committee Meeting, August 27, 1980.}

One major concern was that fundraising goals were not being met. Each year fundraising goals were set in projected budgets, and each year the goal was modestly increased, but donations always fell short. Fund raisers were tireless in their efforts to raise money, holding book sales, dinners, and other special celebrity events, and in grant-
writing to Houston’s largest foundations. Their efforts were successful, but not enough. In 1979 fundraising goals were set at $250,000, but only $228,000 of this was actually raised. Campaign reports noted sad showings among Board and staff members, who were giving almost nothing. These amounts increased in the early 1980s, but fundraising never netted more than $300,000 in any given year, while budgets grew yearly with double-digit inflation.

At the same time, national dues were skyrocketing. In 1979 the Houston affiliate paid $36,137 in dues to the Federation; by 1980 that amount had risen to $48,906. By August of 1981 Houston had already paid $38,000 in dues and had been assessed by National for thousands more. Board members, already angry about what they considered excessive payments to their parent organization, began debating the merits of remaining in the Federation. They questioned where and how Houston’s dues were being spent and what the affiliate was getting in return for its money. By November 1981 several Board members had formally proposed leaving the Federation. 39

Board members were concerned in large part because they did not know how the Federation was spending their money. The Houston affiliate was not consulted about large expenditures voted by the national board and in general had “no knowledge of the scope and functions of PPFA to justify their large budget.” The Houston affiliate also wanted the Federation to implement a system of weighted voting on the national board. Houston was one of the largest affiliates in the country (it had risen to fourth largest in patient load nationally by 1981) and paid one of the biggest shares of the Federation’s

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38 In 1978 fundraising efforts netted $231,000, but in 1979 only $228,000, indicating the hit-and-miss nature of donations. See PPH, Minutes (Campaign Report), January 9, 1979, and December 19, 1979. Half the money donated in 1979 came from foundations.
membership dues, but was still entitled to only one vote at national and regional meetings. The Houston Board wanted more of a say in what the Planned Parenthood Federation did, and how those dues were spent.\footnote{PPH, Minutes of the Executive Committee Meeting, September 23, 1981, PPH, Minutes, September 28, 1981, and PPH, Minutes, November 18, 1981.}

In November 1981 the Federation angered the PPH Board further by assessing the affiliate's 1981-82 dues at $57,000. Board members again expressed their concern that the affiliate remit such a large amount of money without additional representation or consultation regarding its use. They were not impressed with the November 18 memorandum from PPFA President Faye Wattleton justifying the Federation's overall budget increase of $300,000 for 1982. The $300,000 increase, which had been approved by the national board, would bring the Federation's budget to $2.1 million, an amount Houston's board considered excessive. Much of the Federation budget was to be spent on public service advertisements and lobbying campaigns, while affiliates were concerned with purchasing contraceptives and providing health-care services to their patients. From the local vantage point, the two budgets were not seen as equally deserving. Consequently, the PPH Board voted to establish an Ad Hoc Committee to study the question of whether to remain in the Federation.\footnote{PPH, Minutes, September 23, 1981.}

Meanwhile, Houston continued to make big dues payments to the Federation throughout 1982 and 1983, objecting loudly all the while. Dues for 1982 totaled more than $54,000, and rose to almost $60,000 for 1983. Each year discussions were held about leaving the Federation, and each year Houston's delegates to the national convention argued for weighted voting and lower assessments, but each year nothing was
done. Despite Ad Hoc committee reports enumerating the affiliate's grievances, both
sides knew that the benefits of remaining in the Federation still outweighed the costs.
PPH Board members were reluctant to give up the Federation-subsidized malpractice
insurance, technical assistance, and bulk-rate supplies that membership ensured. Nor did
they wish to forego the public relations benefits that accrued from being part of a national
franchise with considerable national recognition. By the end of 1983 Board minutes
contained little talk of secession. Ultimately, threats to leave were more expressions of
frustration than of real intent.\textsuperscript{42}

PPH staff and Board members had enough on their agendas without adding the
problem of Federation membership to the list. In June 1981 Jeff Davis hospital shut
down its pregnancy termination clinic and Planned Parenthood was forced to increase the
capacity of its own VPT clinic in order to meet the need. In October the Board also voted
to extend the time an abortion could be performed from ten weeks to twelve, to meet the
need of women who had previously been receiving later-term abortions at Jeff Davis.
Not surprisingly, the number of VPT patients rose significantly.\textsuperscript{43}

Then, early in 1982, the Board voted again to increase clinic capacity and to open
a new birth control clinic in a predominantly Hispanic area of Houston. Harking back to
its expansionist past, Board members voted in June to take out a $300,000 loan to expand
the Fannin clinic, and began negotiations with the Harris County Hospital District to open

\textsuperscript{41}PPH, Minutes, November 18, 1981. See also Memorandum from PPFA to the Houston Board, November
18, 1981.

\textsuperscript{42}PPH, Minutes, August 31, 1982, and PPH, Minutes, August 31, 1983 for dues figures. See also PPH,
leaving the Federation. See also Ad Hoc Committee Regarding Status of Remaining in the Federation,”
May 26, 1982. In fact, dues were not a huge percentage of budgets, which totaled $2.1 million in 1982 and
$2.6 million in 1983. It was the idea of giving up all that money to the Federation without acquiring more
influence in return that rankled board members.

\textsuperscript{43}PPH, Minutes, June 24, 1981, October 21, 1981, and November 18, 1981.
a birth control clinic in the Casa de Amigos community health center in Northeast Houston. In November 1983 the Hospital District tentatively agreed to the opening of the clinic, but only on the condition that Planned Parenthood staff would not make abortion referrals to patients. Unwilling to miss this chance to reach the Hispanic community, and after more than a year of painfully slow negotiations, the PPH Board agreed to the condition and voted to fund the new facility.  

In 1982 the threat of new anti-abortion legislation had raised its head in the form of the Hatch Amendment. In February, Republican Senator Orrin Hatch of Utah proposed to the Senate Subcommittee on the Constitution a Constitutional amendment that would give states the authority to regulate or to ban all abortions, thereby removing abortion from the jurisdiction of the Supreme Court. Senator Hatch's amendment was approved by the subcommittee, which he chaired, and sent to the full Judiciary committee, which approved and reported it to the Senate.  

Ultimately, the Hatch amendment was defeated because it was unacceptable to anti-abortion hard-liners. While it would permit anti-abortion legislation, there was no guarantee that all of the states would enact prohibitions against abortion. After ten hours

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44See Memorandum to the Board of Directors, dated January 19, 1983, recommending the opening of the clinic after a committee study. PPH, Minutes, January 26, 1983. June 8, 1983. October 26, 1983. Memorandum to the Board dated November 9, 1983 on the problems with establishing the clinic at Casa, and PPH, Minutes, November 30, 1983, accepting the Hospital District's conditions and appointing Sharon Ensslen Director of the clinic.

45Senator Hatch's amendment (S. J. Res. 3, 98th Congress, 1st Session), read: "A right to abortion is not secured by this Constitution. The Congress and the several States shall have concurrent power to restrict and prohibit abortion: Provided, That a provision a law of a State which is more restrictive than a conflicting provision of a law of Congress shall govern." [emphasis added] On the suggestion of Senator Eagleton (D-MO) the second sentence of the amendment was dropped, and the final vote was taken on a version containing only the first ten words. See Eva Rubin, Abortion Politics and the Courts (New York: Greenwood Press, 1987), 157-158.
of debate on the Senate floor it was defeated forty-nine to fifty, eighteen votes short of the two-thirds vote needed.\textsuperscript{46}

A year before, Senator Jesse Helms and Congressman Hyde had introduced “Human Life” bills in both houses of Congress. Each bill had two provisions. The first section contained a declaration that human life began at conception and that fetuses were “persons” protected by the Fourteenth Amendment. The second section banned federal District Courts and Courts of Appeals from hearing cases that challenged any of the new state abortion statutes.\textsuperscript{47}

Congressmen and legal scholars had immediately expressed doubts about the constitutionality of both provisions. As it turned out, there was not much legislative support for either Human Life bill or for the idea of protecting anti-abortion legislation from litigation by “court-stripping,” or repealing federal court jurisdiction over abortion cases. Despite several days of hearings on the question of when life begins, the Senate took no further action on the legislation.\textsuperscript{48}

Still, these persistent attempts to pass anti-abortion laws kept the Boards and staff of Planned Parenthood affiliates on edge. The Houston affiliate, more dependent on federal dollars than ever, operated under what it perceived as a constant threat of federal and state funding cuts aimed at restricting family planning services. Mention was made often at board meetings of the fear that Title XX funding \textit{might} be cut, for whatever reason. But in fact, no big cuts came. Planned Parenthood entered 1983 more financially stable than ever, and more concerned about making “image audits” than about finances.\textsuperscript{49}

\textsuperscript{46}Ibid., 158.
\textsuperscript{47}CQ Almanac, 1981, 425-427.
\textsuperscript{48}Rubin, Abortion Politics and the Courts, 160-161.
\textsuperscript{49}PPH, Minutes, November 30, 1982.
A more immediate threat than the budget ax was the threat of violence. Late in 1983 Planned Parenthood began receiving bomb threats, and the presence of aggressive picketers from the Right-To-Life movement increased. At the November 30 Board meeting, which was held at Houston’s Temple Emanuel due to a bomb threat, the Board voted to install the agency’s first alarm system and to hire a security guard. The Board also discussed making contact with local police and the FBI to see what precautions Planned Parenthood might take to protect its property and staff. The era of violence had begun.\

A new era of agency leadership was also in the making. The Board met in November without its Executive Director. On September 28, 1983, Board Chairman, John Welch, President, Hanni Orton, and Personnel Committee chair, Walter Walne summoned Executive Director Taylor to the home of Welch and asked him to resign. The Executive Committee called for his resignation on the basis of “at least five” allegations to the Board president of serious breaches of appropriate conduct by Taylor. The Committee also charged that agency “morale was poor, with several resignations pending,” and that staff directors were often “unable to have access...or to communicate” with Taylor when his leadership was needed. The Committee then offered Taylor three months pay in lieu of notice and asked him to leave immediately.\

Yet at the September 28 meeting Taylor was also told that he had “done a fabulous job in building up the agency, increasing patient growth, bringing the agency from a six figure agency to a proposed budget of over $3.3 million dollars (for 1984), and had given it a most favorable and stable financial position.” The agency now had a fund

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50 PPH, Minutes, November 30, 1983.
51 Confidential letter from R.E. Taylor to the Members of the Board of Directors, September 28, 1983.
Two new clinics had opened, one at then-suburban Greenspoint and one in the city central Casa de Amigos, and the Ft. Bend clinic in then ex-exurban Richmond, which had been in danger of failing due to a lack of patients, had been relocated and expanded. In sum, Taylor had been no slouch. But, the Committee asserted, he had made bad personal choices, demoralized his staff, and lost the confidence and respect of the Board.

Taylor told the Committee he did not wish to resign. But his critics were adamant. They stressed “how distasteful” to all parties any drawn-out confrontation on this issue would likely be and how dim Taylor’s chances for success were if he appealed to the National board. No procedure regarding appeals from a local to the National board existed in the Personnel Policy manual. So far as was generally, in Planned Parenthood’s history only one Director of a local had made such an appeal, and it had failed.

These intersecting pressures and concerns shaped a compromise. Taylor would resign, but on the condition that only he would offer reasons both within the organization and to the wider public. Agreement occurring, he resigned the next day. As it had done five years earlier, the Board appointed an interim Director and began another search.53

Planned Parenthood ended 1983 slightly adrift. Solvent, yet always under the budget ax; strong, yet embattled; acknowledged in the community, but in some ways only as “a necessary evil;” legal, but not safe from legislatures or the radical fringe, the agency’s leaders had always to be wary. For a while after Taylor’s resignation, the Board maintained a holding pattern in which no new initiatives were suggested and no bold steps were taken. The recent imbroglio had to be overcome, and the choice of the next

52PPH. Minutes (Treasurer’s Report), September 30, 1983.
Executive Director was crucial. Reagan had been re-elected and a new fiscal
nervousness had taken hold.

Still, Board members were philosophical. Agency business had to be dealt with,
and clinical services had to go on. The same group of needy, often poor and sometimes
desperate women were lined up at Planned Parenthood’s doors waiting to be served, and
even the most contentious member agreed with one member’s maxim: “They are our
patients and have no place else to go.”\textsuperscript{54}

\textsuperscript{53}Taylor became an independent consultant after he left Planned Parenthood, and remained in Houston until his death in a car accident in 1989.
\textsuperscript{54}PPH, Minutes. April 16, 1980.
Chapter 16

The Era of Violence Begins:
1984-1987

I contend that there was a building frustration with the Reagan administration’s lack of effectiveness in countering Roe and Doe. As the frustration grew, more activist elements came to the fore...Reagan’s apparent sympathy for the anti-abortion movement led to rising hopes for change, which were effectively dashed, the classic condition for an increase in violence.¹

The abortion-rights conflict continued to escalate during the 1980s. In 1984 politics and elections were transformed by the organizing of political Right-to-Life and pro-choice forces. Abortion and the rights of the fetus became a rallying point for conservative voters. Single-issue election campaigning on abortion became common as abortion and right-to-life concerns were introduced into political campaigns for local, state, and federal offices. Pro- and anti-abortion political action committees emerged on the electoral scene. A vast increase in law-making activity occurred on abortion, fertility, and other related topics in state legislatures, and litigation began to test the constitutionality of the new laws and the limits of the Supreme Court’s decision in Roe v. Wade. Congress became a forum for the debate over abortion, family planning, and teenage pregnancy as anti-abortionists attacked federal programs funding medical services and family planning. Anti-abortion Congressmen introduced bills directed at cutting subsidized maternal health, child care, child abuse and pregnancy prevention, and family planning services. Throughout the Reagan administration, the battle over abortion

and the Supreme Court’s decision in *Roe* caused changes across a broad spectrum of activities: political, governmental, medical, social, religious, moral, and organizational.\(^2\)

Hostile responses to the decision in *Roe* took many forms. Congressmen at both the federal and state levels introduced dozens of proposals during Congressional sessions for constitutional amendments related to abortion and the “right to life” of the fetus. At the federal level, “court-stripping” bills appeared as well as plans to influence the judicial process by recruiting judges opposed to abortion. Abortion turned up as a policy issue in presidential position papers; it became a plank in the platform of each political party and was included as a topic in Ronald Reagan’s 1984 State of the Union Address. Religious participation in political campaigns and the statements of religious leaders on political matters became commonplace. Anti-abortion marches and the picketing of abortion clinics continued, and the bombing and burning of abortion clinics by anti-abortion extremists began. At the same time, some courts began to make decisions granting fetuses rights separate from and in conflict with those of their mothers in such areas as medical treatment and prenatal care. In 1984, for the first time since the 1973 decision in *Roe v. Wade*, a national survey conducted by Planned Parenthood showed that the number of abortions was declining.\(^3\)


\(^3\)For the reprinted political statements of religious leaders see *Commonweal* and *America*, the leading Catholic journals. One notable example: New York’s Roman Catholic archbishop, John Cardinal O’Connor, announced during the 1984 presidential race: “I don’t see how Catholics in good conscience can vote for a candidate who explicitly supports abortion.” (reprinted in the *New York Times*, 20 January, 1984). For a catalogue of the violence against abortion clinics see Blanchard, *The Anti-Abortion Movement*
As anti-abortion activists exhausted legislative and judicial channels in trying to combat abortion, they began to intensify their physical attacks on Planned Parenthood clinics and other abortion facilities. Anonymous terrorists bombed Planned Parenthood clinics in Norfolk and Annapolis before the 1984 Democratic National Convention, and soon after the re-election of President Reagan, a new wave of anti-abortion attacks against clinics occurred across the country. On December 30, 1984, federal agents charged a twenty-one-year-old man with carrying out four bombings of clinics in Pensacola, Florida, and early in 1985 they arrested three additional collaborators. After a man representing the “Army of God” claimed responsibility for an explosion at a Washington, D.C. clinic in 1985, President Reagan publicly denounced the ongoing attacks. Several weeks later, self-appointed lay minister Michael Bray and two other men were charged with placing bombs at seven Washington-area clinics where abortions were performed. Pro-choice organizations reacted angrily when federal law enforcement officials insisted that there was no evidence that the terrorist attacks represented any sort of even loose-knit conspiracy.⁴

In October 1984 Supreme Court Justice Harry Blackmun, author of the opinion in *Roe v. Wade*, received a death threat, and security was tightened in the Supreme Court building after an anti-abortion protester interrupted oral arguments in the Court’s central chamber. In February 1985 a shot was fired into Justice Blackmun’s apartment in Arlington, Virginia, and Justice William Powell, also a member of the *Roe* majority,

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received an anonymous death threat. In December 1986 bomb and arson attacks against abortion clinics occurred in five states.⁴

In 1985 some favorable attention was drawn to the right-to-life cause by a film, *The Silent Scream*, which professed to portray fetal pain and was narrated by former National Abortion Rights Action League (NARAL) activist Bernie Nathanson, who had turned anti-abortion crusader. But terrorist violence against clinics remained the principal anti-abortion tactic. In March 1985 a Congressional subcommittee had opened hearings on the subject. One of the first witnesses was Joseph Scheidler, president of the Pro-Life Action League and author of a handbook entitled *Closed: 99 Ways to Stop Abortion*. Scheidler acknowledged in his testimony before the committee only that he was “aware of attacks against abortion facilities” and told the subcommittee that he very much understood “the moral outrage at the waste of human life that prompts this response.” “Some have condemned the destruction of abortion facilities,” he stated, but “the Pro-Life Action League and others refuse to condemn it because we refuse to cast the abortionists in the role of victim when they are, in fact, victimizers.” Scheidler admitted that “nonviolent direct action to end abortion is preferable to bombing abortion chambers,” but he warned that if these methods were unsuccessful, “the violence of abortion will inevitably be opposed by other means.” Six weeks later, the two principal Pensacola bombers were convicted and sentenced to ten years in prison, and in mid-May

Michael Bray was found guilty of masterminding the Washington-area bombings and also received a ten-year sentence.⁶

Although extreme anti-abortionists were irreconcilable, the majority of public opinion was pro-choice. There was little change in the polls between 1973 and 1987. Most Americans favored abortions in some cases, for example, when the life or health of the mother was in danger. Support fell off sharply for abortions for personal reasons, but a Louis-Harris poll conducted for Ms. magazine in 1984 showed that about 65 percent of men and 60 percent of women were opposed to a Constitutional amendment prohibiting abortion. Beneath the cautious general consensus were many unresolved, controversial issues, most of which were related to the morality of abortion and the ideal of the family, and new abortion technologies. But even as the conflict moved from legislatures to courts and back again, the constitutional language of liberty and privacy expressed in Roe prevailed.⁷

At the same time, the escalation of the anti-abortion movement in the 1980s helped to unify pro-choice women's rights organizations. As noted feminist Linda Gordon stated, "from these conflicts emerged a women's health movement of substantial influence." Initially elated by its victory in Roe v. Wade, Gordon argues, then demoralized by the mobilization of anti-abortion forces, the women's movement did not

begin to recover until well into the decade. As it regrouped and reorganized, it
became a more effective, national political force.\(^8\)

Also during the 1980s, new reproductive issues entered politics, all strongly
influenced by the abortion conflict and engendering responses from both birth-control
advocates and foes. Foremost was the high incidence of unmarried, indigent teenage
mothers, a problem intensified by the conservatism of the decade, economic recession,
and public resentment against the costs of welfare. The “teenage pregnancy” issue
produced political debates not only about how access to contraception should be
encouraged or discouraged but also about the morality or supposed immorality of teenage
sexual behavior.\(^9\)

Second, the introduction of new reproductive technologies during the 1980s, such
as *in vitro* fertilization, the abortion pill (RU-486), and new reproductive arrangements
such as surrogacy, became issues. Like the older issue of birth control, they raised
questions about the extent of state and/or medical regulation of reproduction and about
sexual and family morality. Third, the AIDS epidemic raised questions about sexual
behavior and contraceptive use. In the 1980s social conservatives, along with opponents
of abortion and of unconventional sexual behavior and birth control methods, were on the
offensive. So too were feminists, pro-abortionists, and family planning providers. The
unprecedented nature of AIDS, new reproductive technologies, and the problem of
increased teen-age births divided both sides. Superimposed on all of this was the wave of
violence against abortion providers.

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\(^8\) *Woman's Body, Woman's Right*, 447.

\(^9\) Hyman Rodman, Susan Lewis, and Saralyn Griffith first called government attention to the problem of
teen pregnancy in 1984 in their public policy study, *The Sexual Rights of Adolescents: Competence,
Houston in the 1980s

Houston’s oil and gas economy had buttressed the city against serious economic decline during the Great Depression and all postwar recessions—that is, until the mid-1980s. As late as 1982, most assessments of the Houston and of Texas’s economy were optimistic, with the Texas oil industry leading the nation in active drilling rigs, wells completed, crude oil production, number of oil refineries, and proven gas reserves. But the sagging price of a barrel of oil which brought the U.S. consumer cheaper gas and reduced inflation had, by the mid-eighties, brought the Texas economy to its knees. The U.S. recession which began in 1981 did not hit Houston until 1982-83, after which economic activity declined and unemployment rose sharply. Once the recession did hit, it hit with a vengeance. Industrial production in Houston declined more rapidly than the national average. The number of drilling rigs in Texas decreased significantly, and brought hard times to Houston’s oil production, tools, and supply companies. When OPEC began to reduce oil prices in the late 1970s, one historian has concluded, “Houston was probably the metropolitan area most directly affected by investment and production shifts in the world oil market.”

Declining oil prices and cutbacks in oil production were exacerbated by the strength of the American dollar in international markets. Between 1981 and 1985 the price of oil fell 32 percent, but the dollar increased by 56 percent relative to other major currencies, which had a more damaging effect on the Houston and Texas economy than did the drop in the price of oil. Houston exporters of machinery and agricultural products were hard hit by the high dollar. The oil tolls and supply industry saw major setbacks,
with the number of employees dropping 46 percent in 1982-83 alone; the number of oil-field workers in Texas also dropped by half a million between 1982 and 1984.\(^\text{11}\)

At the same time, Texas oil reserves were only half what they had been in 1952. New reserves were expensive to discover, and competition from overseas refineries (and a drop in the demand for refined products) was growing. In 1982 the U.S. had the world’s largest refining capacity, about eighteen million barrels per day, but the situation was changing. Construction of numerous large-capacity (built for export) refineries had been started in Third World areas, including the Middle East and Asia, while much less new capacity had been built in the U.S. As American auto makers were forced by government to improve the gasoline mileage per gallon on cars, the demand for gasoline dropped from 7.4 million barrels a day in 1978 to 6.5 million barrels in 1982, leading to a considerable over-capacity in refining. In the early eighties many U.S. oil refineries were closed, followed by more later in the decade. Simultaneously, oil mergers and mega-company buyouts caused further layoffs of employees in the Houston area. Companies like Chevron and Mobil lost thousands of jobs. A similar decline in demand and over capacity in the world’s petrochemical industry led to layoffs, but because of Houston’s dominance in that industry the impact of competition and overproduction was less devastating.\(^\text{12}\)

Every business sector in Houston was hit hard by the recession. Building permits and new construction dropped by two-thirds between 1982 and 1987, and many


\(^\text{11}\)Feagin, *Free Enterprise City*, 98. By the 1980s Houston was so well integrated into the world market that its severe economic recession was rooted in economic decisions of the international oil cartel and the export problems caused by the high American dollar. When the price of oil increased during 1987, selected sectors of the Houston economy recovered to some extent.
residential and commercial properties were repossessed after default on mortgage payments, setting foreclosure records. Over-investment in residential subdivisions led to abandoned new homes and apartment complexes, and home-owners who had overextended themselves lost their homes as they found themselves unemployed. The average number of bankruptcy filings increased fourfold, with oil, real estate, and retailing businesses suffering the most. Dozens of banks failed, the largest number since the great Depression. In September 1987 the FDIC announced the $1 billion bailout of the First City Bankcorporation, the second largest bank rescue in FDIC history. Firms that survived underwent major corporate restructurings.\textsuperscript{13}

The city had grown rapidly until the mid-1980s. By 1980 the incorporated city of Houston had nearly 1.6 million people, and by 1983 Houston had surpassed Philadelphia to become the fourth largest city in the nation, with a metropolitan population of nearly three million. By 1984 there were 3.4 million people and 1.9 million workers in the Houston area. The growth, however, was very uneven. The resident population declined significantly in the downtown business district, and there was also a population decrease in the central city area within the Loop 610. Beyond Loop 610 there were large population increases. By 1980 most of Houston’s population resided outside the central city area.\textsuperscript{14} During the U.S. recession of 1981-82, a number of people migrated to Texas from other parts of the country in search of jobs. But in 1983-84 the recession hit and suddenly the state had too many people looking for work, both natives and recent immigrants. By early 1983 there were several camps of the unemployed in the Houston area; on the banks of the San Jacinto River, about thirty miles from downtown Houston.

\textsuperscript{12}\textit{Ibid.}, 99-102.
\textsuperscript{13}\textit{Ibid.}, 102-105. and 188.
several hundred people formed a “Tramp Camp” of unemployed poor. The scale of the job loss in Houston was massive. Manufacturing jobs dropped by 160,000, 100,000 energy-related industrial jobs were lost, and the unemployment rate rose to 9.7 percent by 1986. Throughout the decade, only jobs in the low-wage service sector continued to grow. Many unemployed migrants were forced to return north. In 1982 there was a net immigration of 417,000 people entering Texas; by 1986 this had dropped to fewer than 5,000 people (in the case of Houston, there was an actual loss of population).\textsuperscript{15}

Local government reacted by supporting projects designed to make Houston more competitive in the world economy. In 1983 voters were asked to approve millions in taxpayer-supported bonds for the George R. Brown convention center. The center, which opened in the fall of 1987, was projected by business proponents to draw 700,000 new visitors and $430 million in expenditures annually to the Houston area. But actual bookings in 1987 were less: 129,000 visitors and expenditures of $57 million. Worse, the bonds were sold at variable rates rather than at safer fixed rates, and many feared that if interest rates ever increased dramatically the government might default on the bonds. In addition, hotel occupancy tax revenues, a source for paying the bonds, were always below initially projected levels.\textsuperscript{16}

Recession in the Houston economy was exacerbated by losses in available local capital for financing new projects. In the 1980s big East Coast banks became ever more dominant in Texas banking through mergers with the largest Texas banks. By the early 1980s, Texas banks had become attractive targets for buyouts. Texas’s four largest

\textsuperscript{14}\emph{Ibid.}, 10.
\textsuperscript{15}\emph{Ibid.}, 11. By the late 1980s the outmigration had slowed to the point that the city’s population stabilized, and then began to grow slowly.
\textsuperscript{16}\emph{Ibid.}, 84.
bankholding companies were among the nation’s twenty-five largest banks and
Houston ranked as the seventh major banking city, with $23.5 billion in bank deposits.
But the city was becoming less prominent in the national and international financial
scene, as other financial institutions outstripped it in deposits and investments. In the
mid-1980s the Texas Commerce Bank, Jesse Jones’s creation, merged with the Chemical
Bank. Banking experts predicted that this and other banking mergers would bring new
capital to the city, since the large New York banks were better capitalized. But in fact,
the eastern banks, which were internationally oriented, moved capital out of Houston and
into overseas loans and financing.\textsuperscript{17}

The recession also hit the port of Houston hard, in part because it was centered in
the sectors of oil and agriculture, and in part because port facilities were substantially
more in private hands than was the case for other ports. Waterborne commerce handled
at the Port of Houston declined seven per cent from 1980 to 1981, twenty-five per cent
from 1981 to 1982, and twenty-three per cent in the following year. Trade rebounded in
the first half of 1984, up forty-five per cent over 1983, dropped off in 1984-86, then
increased a little in 1987. Agricultural exports improved by 1986-87, with the decline in
the value of the dollar. Cotton continued to prosper. Even as the oil crisis continued, the
Port of Houston shipped large amounts of cotton overseas—an estimated 1.2 million
bales in 1986-87, double that of 1985. This represented a fifth of all U.S. cotton exports.
Sugar exports also remained high; Imperial Sugar’s Sugar Land refinery was in the late
1980s one of the largest, most prosperous, and most technologically advanced in the
country.\textsuperscript{18}

\textsuperscript{17}Ibid., 92-94.
\textsuperscript{18}Ibid., 94-96.
Foreign-based corporate operations with offices in Houston downsized severely during the decade. Houston’s top trading partners included countries in Latin America, the Middle East, Asia, and Europe. At least 450 Houston companies engaged in international operations and about 600 international companies had operations in Houston before the recession, and the loss of much of their business added to the city’s economic hardships. Asia remained an important trading partner for Houston, even after the downturn, especially mainland China. In 1983 Pennzoil, Sun Oil, and several smaller Houston-based companies agreed to explore for oil along China’s coast. By 1984 Houston’s M.W. Kellogg Company was operating a number of ammonia, urea, and fertilizer plants in China, with an investment of one billion dollars.\(^{19}\)

Houston’s high-tech sectors fared better. By the 1980s NASA’s Johnson Space Center facility employed 10,000 people and half a billion in federal dollars was being spent in the Houston area. In the mid-eighties the facility was assigned the eight billion dollar space station project, which ensured a military-industrial presence in the city for years to come. One of the diversification goals of the business leadership in Houston was to secure a larger portion of the national defense budget for the city, and with the acquisition of the space station project that goal was realized. A number of small high-tech companies also sprang up around NASA, working on commercial applications of space such as satellite technology and commercial space vehicles.\(^{20}\)

By the mid-1980s, Compaq Computer had become another Houston success story. In 1983, the first year after introducing its new personal computer, it had earned $111 million in sales. The company continued to manufacture a significant number of

\(^{19}\)Ibid., 94.  
\(^{20}\)Ibid., 95.
computers until the early 1990s, when the recession in the computer business forced downsizing and layoffs.\textsuperscript{21}

As the recession intensified, Houston's medical treatment facilities and related medical technology firms became increasingly significant to the local economy. By 1984, the Texas Medical Center covered 235 acres with twenty-nine hospitals and research institutions, and had become a major national medical facility with specialties in cancer and heart ailments and in biomedical engineering. In the midst of a badly sagging economy, the Medical Center represented a boon. The economic impact of the Center has been estimated at $1.5 billion annually, probably more than for military-space-industrial facilities. Indeed, one 1987 story on the Medical Center noted that construction cranes had disappeared from the city except for at the Medical Center, where $1.5 billion in construction was planned for the late 1980s.\textsuperscript{22}

Public services were of course neglected, due to budget deficits. In the 1980s Houston suffered from garbage, water-treatment and sewage crises, flooding problems, and traffic and air congestion. The City of Houston and Harris County government debt was at record levels in the 1980s; by 1987 the combined city-county debt was reported to be the highest in the nation and Houston's general fund balance had dropped to -$43 million. Cutbacks in city services and increases in local fees—especially in water and sewage rates—were annual measures. Still, budget cuts and increased local property taxes failed to balance budgets, and in 1987 Mayor Cathy Whitmire and the City Council

\textsuperscript{21}Ibid., 96.
\textsuperscript{22}Ibid., 96.
were forced to lay off a number of city employees and cut back city services further; particularly serious were reductions in police personnel and patrols for the city.\textsuperscript{23}

The economic and health conditions of Houston’s minority communities deteriorated apace. In the mid-1980s, three-quarters of black Houstonians in predominantly black. Most of the black population remained concentrated in the Fourth Ward and in a broad belt on the eastern side of the city. The school system also remained de facto segregated: forty-four per cent of the children were black and thirty-two per cent Hispanic. In the summer of 1985 black unemployment had climbed to 12.3 per cent in the metropolitan area, compared to 9.7 per cent for Hispanics and 5.6 per cent for the non-minority population. The black infant mortality rate was 17.2 deaths of children under one year of age for every one thousand live births, while the white rate was 12.3.\textsuperscript{24}

For many decades minority residential areas had had poor public services, including inadequate sewer lines, water lines, poor storm drainage, inadequate street and facility maintenance, and police patrols, and black (and later Hispanic) neighborhoods had been the last to receive attention from city government. Furthermore, most of Houston’s minorities living near the central business district depended on the chronically troubled mass transit (bus) system. During the decade of the eighties their already neglected neighborhoods were service-starved.

The economic recession and tightening immigration laws had a significant impact on Houston’s Hispanic population as well. That population, which had grown rapidly during the 1970s, continued to expand even as Hispanics faced increasing discrimination in housing, employment, education, and the law. In the 1980s the number of

\textsuperscript{23}\textit{Ibid.}, 235-236.
\textsuperscript{24}\textit{Ibid.}, 240-245.
undocumented Central American immigrants grew rapidly, almost to the level of Mexican migrants. By the late 1980s Houston’s immigration agency estimated that there 100,000 Salvadorans, 30,000 Guatemalans, and 10,000 Hondurans, Nicaraguans, and Costa Ricans in Houston. At the time there were already at least 250,000 Hispanics in the city and another 150,000 outside the city limits. These were, of course, conservative figures, and most experts believed the Hispanic population to be closer to 700,000, which ranked Houston as one of the largest Hispanic communities in the U.S.\textsuperscript{25}

Hispanic areas, which were centered mostly in the Second Ward, east of downtown, and in industrial port areas near the ship channel, also experienced serious difficulties with water, sewage, and other utility and city services. Like black communities, Hispanic neighborhoods were also confronted with Houston’s garbage disposal facilities in their backyards, and suffered from highway and freeway developments that tore their communities apart. The Houston police, which had developed a reputation for brutality against Mexican Americans, continued to provide inadequate services in Hispanic areas. Despite the election of Ben Reyes, a Mexican-American, to the Houston City Council, Hispanics continued to have little voice in local politics. The language barrier which limited their political participation also contributed to poor educational services for the Hispanic community. In the 1970s, bilingual education was initiated in a number of Texas schools, but by the 1980s growing antipathy to bilingual education and increasing hostility toward the Hispanic population led to cutbacks in public services and calls in the state legislature and Congress to make English the official language of Texas and the U.S.\textsuperscript{26}

\textsuperscript{25}\textit{Ibid.}, 253-254.

\textsuperscript{26}\textit{Ibid.}, 255-259.
The decade of recession was especially hard on the city's poor white and minority workers, who were faced with high unemployment in what was already a low-income service sector. Living just above the poverty line even in good times, these workers found during the eighties that there little in the way of governmental programs to provide a safety net in hard times. The city, county, and state of Texas had almost nothing in the way of programs for the unemployed, and able-bodied unemployed men did not qualify for federally-funded welfare programs. Unemployed (husbandless) mothers qualified for less than $200 per month in basic welfare assistance. Not surprisingly, the city's homeless population grew during the decade to over 15,000, not counting those who were long-term residents in local shelters and missions.²⁷

**Planned Parenthood of Houston, 1984-1987**

Like most family planning agencies, Planned Parenthood of Houston and its branch clinics entered 1984 warily and concerned about safety. A number of Planned Parenthood clinics in other states had been bombed, set on fire, or threatened, and the Houston affiliate had experienced arson attempts and bomb threats. Security was a topic of discussion at almost every Board meeting, as measures were proposed to ensure the safety of Board members, staff, volunteers, and clients. The Fannin clinic, which housed the administrative offices and the only abortion facility for the Houston group of clinics, was initially the main target of harassment. But, as time went on, Planned Parenthood clinics throughout the state became targets.

Bomb threats and harassment by picketers began at the Fannin clinic late in 1983, and occurred regularly afterwards. By January 1984 the Board and staff had conducted a
long-term security study and determined that Planned Parenthood's main clinic was especially vulnerable to attack. Board members expressed immediate concern for the exposed position of the Education Department, which was just inside the entrance and open to the public. When there was no person at the reception desk, one member noted, "anyone could enter without notice."28

Board members discussed counter-measures to prevent anti-abortion demonstrators from entering the clinic and to discourage them from trying. But most of its recommendations were weak, limited by budget considerations and the need to make the clinic accessible to clients. Locked doors with buzzers, for example, were useless when the receptionist inside the clinic could not see the people on the other side in order to know whether to let them in. And it was difficult to spot an anti-abortionist or dangerous person on sight, especially in a group, since they came in both sexes and did not usually identify themselves before entering. Once inside, such a person could cause a disturbance or do considerable damage, as there was no one except staff to stop him. And the problem remained of protecting clients, staff, and Board members from harassment as they walked from the parking lot to the building. The matter of bomb threats was even more disconcerting. Board members held a meeting early in 1984 with the Houston Police Department’s Bomb Squad representative, and watched a film presentation on building evacuation procedures; but other than establishing an emergency plan, nothing could be done about the random telephone threats themselves.

On January 22, 1984, the eleventh anniversary of the 1973 Roe v. Wade decision, members of the anti-abortion Right-to-Life group staged a noisy rally outside the Fannin

27Ibid., 259-261.
28PPH, Minutes of the Executive Committee Meeting, January 11, 1984.
clinic and picketed the building for two days, frightening patients and staff. Not surprisingly, the patient load at the Fannin clinic dropped sharply, particularly in the abortion clinic. In January and February the number of patients coming to Planned Parenthood for birth control increased slightly, while the number of abortion clients in the Voluntary Pregnancy Termination Clinic (VPT) decreased by 13 percent. Anti-abortionists claimed victory in the local press.29

In January 1984 the Board appointed Peter Durkin as the new executive director and the battle lines were re-drawn. Durkin came to the directorship from the ranks of Planned Parenthood’s volunteers. He had served for several years as the head of the Ft. Bend County Branch Advisory Council and was employed as Director of Youth Services for the Harris County Child Protective Services Agency. He assumed the position of executive director on February 20, and immediately hired two off-duty policemen to patrol the building and secure it against the growing threat from “daily picketers.” He also had staff members act as escorts for patients and as building perimeter guards. A month later the two officers were “relieved” from their duty at Planned Parenthood by the Houston Police Chief, in accordance with the department’s policy “not to appear to take sides in controversial matters within a community.” Undaunted, Durkin called for Board members and volunteers to serve as members of security and escort teams: they would patrol the perimeter of the Fannin clinic, escort patients from the parking lot into the building, and deter anti-abortion extremists from entering.30

29PPH, Minutes, Monthly Patient Reports, January and February, 1984. The seven percent increase in birth control clientele recorded in the reports was less than half that recorded for 1983. See also Houston Post, March 25, 1984, p. 1.
The staff members performing these duties were quickly fatigued. When clinic directors reported a 20 percent reduction in the work being accomplished due to the disruption, Durkin called on supporters of Planned Parenthood to step in and free the staff to serve patients. The volunteer escort teams were surprisingly effective, and although there were altercations between team members and picketers, no one was physically hurt. As one volunteer organizer, Barbara Calfee, noted dryly, security and escort teams succeeded through sheer determination.\(^{31}\)

Further to protect patients, Durkin had a door installed on the side of the building for VPT clinic patients, and a six-foot high chain-link fence erected around the building. To protect volunteers and Board members, he had staff members draft a Security Standing Operating Procedures (SOP) manual to reduce the risk of someone being hurt. There was little else he could do, given the agency’s limited resources. When demonstrators began using bullhorns and loudspeakers to disrupt clinic operations and intimidate patients, he called the police.\(^{32}\)

Volunteer patrol staff were under considerable stress from what staff characterized as “constant verbal abuse” by right-to-lifers, and by April a number had threatened to resign. To prevent staff defections, Durkin appointed a Security Committee made up of Board members. Its first recommendation to the Board was that Planned Parenthood hire a private security guard and an off-duty sheriff to patrol the clinic grounds during business hours, to relieve volunteers and deter protesters. In the meantime the harassment continued. In October Planned Parenthood’s legal advisor, Janet Mortenson, attended a workshop at the American Civil Liberties Union (ACLU) to

\(^{31}\)OHJ, Barbara Calfee, January 30, 1995.
discuss strategies to reduce the threat of violence from anti-abortion demonstrators and "reproductive terrorists" who were fire-bombing Planned Parenthood clinics. A local television station also featured a discussion on clinic violence with Durkin that aired on October 20.33

By the end of the year, the price tag on security had risen considerably. Board, staff, and volunteers were frazzled and the agency had spent over $20,000 on security systems, including the chain-link fence and guards. At the November Board meeting, the chairperson of the Building and Grounds Committee, Jack Fitch, expressed concern about the high costs involved in maintaining the abortion clinic—especially the threat of bombing and the picketing of the Fannin clinic—and asked the Board to consider closing the VPT clinic. The year of violence against family planning clinics had taken its toll.34

In January 1985 the Board declared its intention to "take the offensive" against anti-abortionists and instituted new measures to combat the threat of clinic violence. Funds were allocated for smoke alarms, security cameras, and a "Halon Fire System," a special fire-proof room inside the building in which agency records were housed, to increase the security of the property and personnel. The Board also called for an aggressive advertising and public relations campaign to combat anti-abortionists' appeals to public opinion. Planned Parenthood teamed with local news organizations to deliver educational messages to the public about the number of abortions actually being performed at the VPT clinic, birth control, teen pregnancy, child abuse, and the range of

32PPH, Minutes, April 11, 1984, and Executive Director's Report, April 24, 1984. See also OHI, Peter Durkin, March 1, 1995.
33PPH, Minutes, April 11 and October 24, 1984. And OHI, Peter Durkin, March 1, 1995. Durkin reported that there were nineteen Planned Parenthood fire-bombings in 1984, up from four the previous year. Nationwide, the number of clinic arsons and bombings had increased from two in 1983 to thirty in 1984. See Blanchard, The Anti-Abortion Movement and the Rise of the Religious Right, 55 (Table 1).
Planned Parenthood’s services. Both the Houston Post and Chronicle donated ad space, as did Houston’s Free Press. Durkin and Communications staff also enlisted large local businesses to run public service ads about Planned Parenthood. Foley’s department store in Houston sponsored one such ad in the Post in November, detailing the work of Planned Parenthood’s volunteers and commending them for their service, and suffered the consequences. Anti-abortion groups targeted the department store chain and called for a boycott of its stores. Thousands of “Boycott Foley’s” flyers were sent out to a number of pro-life groups, and at least one Foley’s store was picketed.  

Despite the opposition, PPH continued to expand services. In January 1985 the Board approved funding for a new clinic in southeast Houston, and during August and September for new clinics in Dickinson, Galveston, and Tyler, as well as the expansion of Planned Parenthood of Lufkin. The opening of the clinic in Tyler and the expansion in Lufkin were met with protests and picketers, but the clinics stayed open and attracted patients. Local newspapers in the two cities reported the events disparagingly. An article in the Tyler Courier-Times entitled “Planned Parenthood Resolution” reported that the clinic had opened “in spite of...a City Council resolution opposing it,” and the Lufkin Daily News characterized the expansion of its existing clinic as “imminent.” The tone of the articles was not one of welcoming for much-needed medical services for women, but one of fatalism, as if these towns were facing the arrival of killer bees.

Throughout the decade the violence and harassment continued. In February 1986 an anti-abortion group in Houston named Life Advocates attempted to purchase the

34PPH, Minutes, November 28, 1984.
35PPH, Minutes, January 9, January 23, and December 4, 1985.
36PPH, Minutes, January 9, August 8, September 12, and September 25, 1985.
building across the street from Planned Parenthood on Fannin in order to establish a “Problem Pregnancy Clinic” of its own and to offer anti-abortion counseling and referral services. The group made a $150,000 offer for the building, and Planned Parenthood was forced to make a counter-offer in order to prevent the sale. Life Advocates then put in its own counter-bid, increasing the amount of the total cash down payment, and Planned Parenthood countered again. Fortunately, a Los Angeles real estate speculator became interested in the property, made an even better offer, and the potential financial crisis for Planned Parenthood was averted.38

The reverse they suffered in the real estate skirmish only made Houston’s prolifers more determined. Late in 1986, as Planned Parenthood branches continued to emerge in the area and anti-abortion legislation was defeated at both the state and national levels, anti-abortionists began a more aggressive campaign of “direct action” against Houston clinics and PPH staff. In September, another anti-abortion group called the Pro-Life Action Network (PLAN) sent a mass mailing to all the box holders of Simonton, Texas, where Executive Director Durkin lived, denouncing him as the director of an “abortuary” and asking the residents of Simonton to call him at home to express their disapproval. Durkin’s home telephone number was provided at the bottom of the letter, along with the caveat: “Parents.....Take Heed!” The letter also offered statistics on how many “unborn babies” were being “killed” at Planned Parenthood each year (allegedly 2,500) and claimed that “a third of their fees come from such killings!” The statistics were only partially accurate: the number of abortions performed was correct,

38PPH, Minutes. February 26, March 13, April 10, 1986.
but abortion fees in fact only accounted for 12 percent of revenues in 1986; that figure would drop to 11 percent in 1987.³⁹

Earlier that month, security teams had reported that protesters were becoming more numerous, more hostile, and louder. Hostilities peaked in 1986 with a visit to Houston by Joe Scheidler, leader of the Pro-Life Action Network (PLAN) and author of *Closed: 99 Ways to Stop Abortion.* During Scheidler's visit, anti-abortion groups rotated crews of as many as sixty of their members for continuous coverage of Planned Parenthood clinics throughout the city, and bullhorns and loudspeakers were used. The noise became so disruptive that the Board had a sound system installed in all the administrative offices and clinics of the main clinic at Fannin. When the clamor became unbearable, staff members simply turned up the music.⁴⁰

At the end of the month, members of PLAN physically "invaded" Planned Parenthood's West Loop clinic. Calling themselves "rescuers," chanting anti-abortion slogans, and shouting epithets at patients, they stormed the building and attempted to invade the clinic's operating rooms where, they mistakenly alleged, pregnancy terminations were taking place. Prevented from entering the operatories, the protesters staged a sit-in in the clinic waiting room and chained and padlocked the front door to prevent anyone from entering or leaving. There they vowed to "escalate" both the intensity and the number of clinic invasions in their campaign to "shut down all providers" of abortions. Police were called, the protesters were arrested and no one was

³⁹PPH, Minutes, September 24, 1986; Executive Director's Report, September 24, 1986; and "Parent Alert," undated letter to the residents of Simonton, Texas from the Committee to End Abortion Violence. For clinic figures, see Executive Summary to the 86/87 Operating Budget (this summary was usually published in September for the next fiscal year, which began in October). Abortion fees in 1986 netted $360,000 of the total $3,121,864 annual revenues. See also OHI, Peter Durkin, March 1, 1995.
hurt; but the experience surprised Planned Parenthood’s executives, who had not anticipated an attack on a small branch clinic and had been unprepared to counter it.\footnote{Undated “Alert” letter from the Board to the staff, Board, and friends of Planned Parenthood. Since abortions were performed only at the Fannin clinic, it is clear that pro-lifers had simply picked an easy target to invade.}

On January 21, 1987, the U.S. Supreme Court let stand a ruling that barred anti-abortion protesters from picketing in front of abortion clinics, and the battle lines were redrawn. The Court, citing a lack of jurisdiction, rejected arguments by demonstrators in Spokane, Washington, that their free-speech rights had been violated by the lower court’s ruling. In June 1986 the Washington supreme court had ruled that picketing directly in front of the entrance to the Sixth Avenue Medical Building in Spokane interfered with the right of women to have an abortion. The state court held that the presence of the demonstrators could have “a coercive impact” on women and force them to go elsewhere, and added: “Continued harassment of physicians as they enter their lawful place of business may cause them to refuse to perform legal abortions for women.” The state supreme court also barred the demonstrators from shouting such words as “murderers” and “killers” at the picket site around the corner from the building when children were present, stating: “A child who arrives in his doctor’s office upset and fearful of his doctor cannot be expected to respond in a manner which maximizes the doctor’s ability to provide needed health care....Where a child is concerned,...the cost is unacceptable.” With this ruling the reign of annoyance was ended, even if the threat of violence was not.\footnote{Undated “Alert” letter from the Board to the staff, Board, and friends of Planned Parenthood. Since abortions were performed only at the Fannin clinic, it is clear that pro-lifers had simply picked an easy target to invade.}

Throughout 1987 no mention was made of clinic violence in Board meetings and no further security measures were taken. Instead, Board and staff were concerned with
dwindling revenues, which had suffered from the federal budget ax and decreases in patient loads while expenses had increased dramatically. Between 1985 and 1987 Planned Parenthood's financial situation took a sharp turn for the worse. Expenses suddenly outstripped revenues and unexpected large expenditures led to the depletion of cash reserves. Once again, PPH records indicated that the agency's fiscal security was imperiled.

Early in 1985 Planned Parenthood clinics experienced funding problems with the state's Title XX program. In January the Texas Department of Human Resources (TDHR), the dispenser of Title XX funds, created a "revised co-payment schedule," a new listing of the rates at which TDHR would reimburse participating clinics for providing family planning services covered under Title XX. Under the revised schedule, rates of reimbursement and ceilings for total annual expenditures were set, so that while an agency could continue to bill TDHR for covered services, once the annual ceiling had been reached the bills would not be paid. After January 1985 Planned Parenthood found itself in the awkward position by July or August of each year of having large amounts of "lapsed funds," reimbursements for which it had billed TDHR and to which it was entitled, but which it had no hope of collecting because the state simply stopped making co-payments after the annual limit had been reached. By August 1985 Planned Parenthood had experienced an overall decrease in Title XX revenues of 32 percent.43

The agency also experienced decreases in patient loads, especially at the main clinic on Fannin. As the picketing and harassment of Planned Parenthood clinics by anti-abortion groups increased, and as the potential for violence grew, patients stayed away.

The VPT clinic at Fannin suffered most, as frightened and embarrassed young women avoided the "walk across the line of judgment," but birth control clientele fell off as well. Security and escort teams helped, but they weren't enough. The number of abortions fell 11 percent in 1984, almost 20 percent during the first months of 1985, increased slightly as the year went on to around 8 percent below the previous year, and stagnated at a few percentage points below the 1983 level in 1986 and 1987. The number of contraceptive patients continued to increase, but at much slower rates than before. The net result was a stagnation in patient loads and a loss of patient revenues.45

At the same time, malpractice insurance, licensing fees, payrolls, and the cost of security systems spiraled upward. In February 1985 the Board voted to raise patient fees by 10 percent and to recruit more Medicaid patients, for whom federally administered Title XIX monies were still available. But it did not halt plans for new clinics in southwest Houston, Galveston, Dickinson, and Tyler. In an interesting budget twist, federal funds for opening new clinics had become available, while funds for existing clinics had been frozen.46

In January 1986 the Gramm-Rudman Act took effect and federal funding for family planning services decreased. The act was aimed at balancing the federal budget and reducing the federal deficit. It mandated automatic spending cuts and deficit

43PPH, Minutes February 27, 1985. The dollar amount of the decrease was $464,739.
44Pat Morgan, "A Walk Across the Line of Judgment," Playgirl (August 1986). Morgan, a young woman from Houston, wrote the article in Playgirl to describe her experiences as a volunteer escort at the Fannin VPT clinic. As part of an escort team at Planned Parenthood that helped women across picket lines, she and her fellow volunteers had a number of memorable experiences, including having demonstrators show her pictures of distorted bloody fetuses, and shouting "You're going to burn in hell, baby-killers! God knows your name, we know your name. Things happen to baby-killers!"
46PPH, Minutes, August 8, September 25, October 10, and December 4 (10% fee increase), 1985; and January 20, 1986.
payments over a five-year period (with the deficit to be "paid" by 1991). In 1986 Gramm-Rudman cuts in federal grants to the states resulted in a 21 percent loss of Title XX revenues to PPH. Cuts mandated for 1987 produced even larger losses. As a result, smaller clinics like the ones at Greenspoint and College Station were forced to offer services on a cash-fee basis only.⁴⁷

Changes in state licensing requirements during 1986 also increased Planned Parenthood's expenses. In March the Texas Department of Health's Abortion Division, the licensing agency for Planned Parenthood's VPT clinic, instituted a new $1,000 annual "licensing fee" and instructed the agency to carry out another $6,000 in "renovations"—improvements without which the VPT clinic could not operate legally. As the regulatory environment became stricter and risk management more costly, the portion of annual budgets going to non-patient expenses increased dramatically. This meant that there was less money available to provide free or reduced-cost services such as testing and contraceptive supplies to poor patients, while the number of those new patients continued to rise. In another alarming development, malpractice insurance jumped 55 percent at the end of 1985, from $50,000 to $77,000.⁴⁸

In mid-1986 the treasurer reported budget deficits of $70,000 for 1985/86 and projected deficits for 1986/87 of more than $70,000. PPH still had several hundred thousand dollars in cash reserves but might use up $200,000 of that in 1986/87 if Title XX cuts were implemented as expected. Board members and the executive director were nervous, since it would take only one big expenditure to destroy the agency's financial safety net. The 1986 scare over the purchase of the building across the street illustrated

⁴⁷Executive Summary, 86/87 Budget (October, 1986).
such a situation. If the Los Angeles real-estate investor had not appeared and Planned Parenthood had been forced to outbid the Life Advocates group for the purchase of the Architectural Antiques building, clinic reserves would have been depleted. The lessons of this bidding war were not lost on Board and staff.⁴⁹

To forestall a crisis, the executive director moved quickly to increase Planned Parenthood’s income. Acknowledging that expenses and patients loads were rising and that federal and state monies under Title XX programs were unavoidably shrinking, Durkin focused instead on cost control and funding sources that might still be enhanced: Title XIX, or Medicaid funding; fundraising; and patient fees. In 1986 he instituted a salary freeze and a “revenue enhancement” program designed to provide patients with the best service at the lowest possible cost. Staff directors were asked to find ways to hold down spending in their departments. Then Durkin looked at Medicaid. Surprisingly, Medicaid funding was still plentiful under the Gramm-Rudman rule, but patients eligible for the program had not been actively recruited. As early as 1985 Durkin had proposed that the agency enroll as many Medicaid-eligible patients as possible and institute “aggressive collection” of Title XIX billings. After the $70,000 deficit reported in 1985/86, the Board concurred.⁵⁰

Durkin also proposed a new sliding-fee scale by age group for the clinic’s birth control clientele. In theory, younger women, who had less money and were a higher-risk group for pregnancy and venereal disease, would pay less, and older women, who were more likely to practice birth control responsibly regardless of the cost and were a lower-

⁴⁹PPH, Minutes, January 5 (Malpractice rates), March 13, March 19 (Treasurer’s Report), and April 23, 1986. See also, OHI, Louise Bateman, Deputy Executive Director, Medical Services, February 3, 1995. ⁵⁰PPH, Minutes, Treasurer’s Monthly Reports, Jan.-Dec. 1986, and PPH, Minutes, February 26, 1986. Also, Executive Summary, 86/87 Budget (October 1986), and Annual Reports, 1985 and 1986.
risk group, would pay more. Indigent women would be covered by Medicaid.

Durkin also gave clinic counselors more discretion in assigning women, young and old, to a place on the payment scale. Clinic staff had complained that young women often came to Planned Parenthood dressed in designer jeans and expensive jewelry and then claimed to be indigent. For those patients who obviously had the resources to pay for their birth control supplies, counselors were instructed to request that they do so.51

Finally, Durkin and his staff focused on fundraising. Capitalizing on the public’s dislike of the violence against clinics and its generally pro-choice views and on the public’s growing concern with Welfare costs and the teen pregnancy problem, Planned Parenthood’s fund-raisers appealed to thousands of “closet” supporters, those who might be sitting sympathetically on the sidelines of the abortion debate waiting for a reason to get involved. Mass mailings were sent, at an annual cost of more than $10,000; these raised far more than they cost and increased the donor base by hundreds. No fundraising event was too small. Volunteers held garage and book sales, raising several thousand dollars. Board members held fundraising dinners and staged star-studded, gala events, netting thousands more. Development staff concentrated on grant-writing to large foundations, and were successful in securing a number of $10,000-30,000 grants and large special gifts. Monies were solicited in many instances on a project basis, for specific educational programs for example, so that donors who might be uncomfortable with the idea of funding abortions could fund educational programs directly, thereby avoiding conflicts of principle.52

51PPH, Minutes, June 11, 1986.
At the same time, communications department personnel began a public relations campaign to improve Planned Parenthood’s image. Durkin and staff held “open houses” at the Fannin clinic, to which the supporters of Planned Parenthood, judges, legislators, political candidates, and the media were invited. Staff were coached in advance on the agency’s official policy stands and asked to give tours of the clinic’s facilities. All of the PR seemed to work. News articles with a favorable view of Planned Parenthood increased significantly in 1986 and 1987, and the open houses became a gathering place for aspiring politicians.53

Fundraising efforts were also successful. In 1983 the fundraising total was $268,692; in 1984 that figure had risen to over $367,000 and increased to more than $424,000 in 1985. By the end of the fiscal year in 1986, fund-raisers had raised $457,940 and were setting goals for 1987 of half a million dollars. Also, by 1987 the donor base had increased from fewer than 900 individuals, foundations and corporations, to more than 1,500. Foundations still provided the bulk of grants (57 percent), but individual gifts were increasing in size; between 1984 and 1987 the average individual gift was around $30 to $60. Adversity had some advantages.54

53 A sampling of the news articles includes, “Anti-abortion protest ends in arrests of 18,” Houston Post, September 21, 1986; “Officer’s sympathetic actions at abortion clinic protest studied,” Houston Chronicle, September 23, 1986; “Abortion Groups Square Off,” Houston City Magazine, October 1986; “Abortion...Some Ethical Considerations (Regardless of how you feel on this subject...),” The Texas Episcopal Churchman, October 1986; “Planned Parenthood opens new offices,” Herald Coaster, Ft. Bend, August 21, 1986; “Planned Parenthood eager for expansion,” The Free Press, Diboll, Texas, July 24, 1986; “Family planning efforts necessary,” Houston Post (undated); “No law is actually going to stop abortions,” Houston Post, July 16, 1986; “Time to tell the kids about the birds, bees? Here’s how,” Houston Post, September 21, 1986; “Agency makes family planning more accessible for the needy,” Houston Post, July 27, 1986; “After 50 years, Planned parenthood still growing,” Houston Post (undated); and “TV can teach sexual responsibility,” Houston Post, January 4, 1987. See also (undated) Memoranda/instructions to all staff for Open Houses. The instruction sheets were brief, usually one page, and listed policy statements about the agency’s stands on issues such as serving minors and providing abortions.

54 PPH, Minutes (Treasurer’s Reports), September, 1984, September, 1985, September 23, 1986; and Annual Reports for 1985 and 1986.
The combination of rigorous cost control, aggressive Medicaid billing, increased patient fees, and fundraising had a remarkable effect on Planned Parenthood's financial health. In January 1987 the Treasurer reported that, despite cuts in government funding and slower patient growth, patient fees and contribution had risen so much that Planned Parenthood had closed out its 1986 calendar year with a $180,000 surplus. The feeling of impending crisis so prevalent in 1986 had evaporated.55

Throughout 1987 the Board continued its aggressive policy of expansion. In January it appointed a Low Income Patient Services (LIPS) task force to study the feasibility of "mobile clinics," or clinics on wheels to serve low-income and disabled patients who might not be able to get to Planned Parenthood. In March it approved funding for a new clinic in Southwest Houston, a predominantly Hispanic area; the clinic opened June 1. Also in March the Board voted to begin anonymous HIV testing and appointed another task force to establish policy guidelines for a range of AIDS services: AIDS education, anonymous testing, and "random" HIV testing of Planned Parenthood's patient population. In August the Board voted to hire a full-time medical director and to expand abortion services at the Fannin clinic. By September the executive director was again reporting that the Fannin clinic had a problem with "overcrowding."56

As a reward for its perseverance, the agency received two major boosts in April and May of 1987. In April the Clayton Fund, headed by two of Planned Parenthood's biggest supporters, Susan and Maurice McAshan, donated $195,000 to fund the Southwest clinic during its first five months of operations. Then in May the McAshans established an Endowment Fund for Planned Parenthood in the amount of $50,000, which

they pledged to double if the agency raised matching funds. The endowment was intended to provide Planned Parenthood with future capital, not only to augment operating budgets but also to preclude the kind of desperate financial situation the agency had experienced in 1986.57

In the end, aggressiveness seemed the best formula. The Board and staff of Planned Parenthood entered 1988 “mad as hell,” unwilling to “take it” anymore. The violence and harassment against family planning organizations had succeeded only in making them angry and more determined to fight back. At the same time it had forced the agency to change tactics and to move away from its quiet position of support for “women’s right to privacy,” back to more open support of “women’s right to choose.” By 1988 Planned Parenthood had returned to the vanguard of the women’s reproductive rights movement—perhaps not by choice but out of necessity. It had done so successfully, partly through the generosity of “closet” supporters, but mostly because, in the end, the women who wanted birth control and abortions kept coming and were willing to pay.

57 PPH, Minutes, April 22, May 14, 1987.
Chapter 17
From Roe to Webster:
The Supreme Court and Abortion, 1989

In 1989 the sixteen-year era of judicial protection of legal abortion rights that began with the Supreme Court's 1973 decision in Roe v. Wade ended with the Court's five-to-four decision upholding state regulation of abortion, in the case of Webster v. Reproductive Health Services. With the Webster decision a woman's right to decide for herself whether to terminate her pregnancy was again subject to regulation, and possibly even prohibition, by elected representatives. After 1989 the right to abortion was in a real sense "up for grabs." And as the 1990s began the controversy over the question of abortion rights continued to grow.²

Between 1973 and 1989 the Supreme Court largely protected abortion rights against state efforts to limit them. Although abortion rights advocates did not always win, particularly in the area of abortion funding, they usually prevailed. For example, pro-choice forces lost on the general question of whether parental consent or notification requirements violated Roe, but they succeeded in obtaining judicial bypass guidelines for those laws. In general the Court protected the physician's medical judgment and the doctor-patient relationship from state intrusion, particularly during the first trimester.³

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³In Bellotti v. Baird, 433 U.S. 622 (1979), the Court declared that a competent minor's privacy interests under Roe outweighed the state's general interest in protecting her welfare and parental authority, and that every minor must have an opportunity to seek judicial approval for an abortion without first notifying or consulting her parents. In two similar cases decided in 1983, City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983), and Planned Parenthood Association of Kansas City, Mo., Inc., v. Ashcroft, 462 U.S. 476 (1983), the Court used the Bellotti standard to invalidate statutes that did not include a judicial bypass procedure for a minor mature enough to make the abortion decision herself. Spouses consent and notice requirements have never survived Constitutional scrutiny. In Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), the Court ruled that the state may not
The years after *Roe* were also a time of struggle between those who were convinced that abortion should never have been proclaimed a right at all and those who believed that abortion should remain a judicially declared legal right. Constitutional scholar Laurence Tribe argues that when the legal status of abortion was taken from the political arena by the Court’s 1973 decision, the public playing field was left largely to those who believed most strongly that abortion was wrong “absolutely,” that it was immoral to let each woman choose for herself, and that the law should be changed to make it possible for abortion to be criminalized again. The debate, he says, was controlled by those willing to wage a political campaign to transform the federal judiciary. Since it was judges who had read abortion rights into the Constitution, abortion opponents believed, it should be judges who read abortion back out of it.

During the 1980s anti-abortionists, with the support of the Reagan Administration, urged the passage of a constitutional amendment that would effectively prohibit abortion, or at least return the question to the state legislatures; but anti-abortion Congressmen lacked the political consensus required to enact such an amendment and the movement faltered. As Supreme Court justices retired, however, a second opportunity arose for the Reagan Administration to challenge *Roe* by seating new judges who would interpret the

derelative to abortion rights in a different way. In a series of cases culminating in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986), the Court struck down state laws requiring that a woman seeking an abortion be given detailed descriptions of fetal development and informed of physical and psychological risks associated with abortion, held that government cannot impose a fixed waiting period on a consenting woman who seeks and abortion, struck down reporting requirements that would make available to the public detailed information about the woman, the physician, and the circumstances of the abortion, and requirements that physicians exercise “due care” to preserve the life of a viable fetus if it posed any additional risk to the pregnant woman’s health. Interestingly, Richard Thornburgh, then governor of Pennsylvania, was subsequently appointed attorney general of the United States under President Reagan, a position which he retained in the Bush Administration. For a discussion of post-*Roe* cases, see Laurence Tribe, *Abortion: The Clash of Absolutes* (New York: W.W. Norton & Company, 1990), and Donald Judges. *Hard Choices, Lost Voices* (Chicago: Ivan R. Dee, Inc., 1993).
Constitution as not protecting abortion rights. The ultimate goal was to capture a majority on the Supreme Court to overrule Roe.4

During his eight years in office Reagan appointed more than half the members of the federal bench and three new Supreme Court justices, replacing three of the members of Roe's seven to two majority. In 1981, when Justice Potter Stewart retired, Reagan appointed Sandra Day O'Connor to fill Stewart's seat. When Chief Justice Burger retired in 1986 Reagan elevated the Court's most staunchly conservative justice, William Rehnquist, to fill his seat and appointed Judge Antonin Scalia to fill Rehnquist's chair. And when Justice Lewis Powell retired in 1987 Reagan nominated Anthony Kennedy to fill his seat. After Justice Kennedy was sworn in there remained on the Court only four justices who had previously expressed their commitment to the constitutional protection of abortion rights: Roe's author, Justice Harry Blackmun, and Justices William Brennan, Thurgood Marshall, and John Paul Stevens.5

As the Court's composition changed its commitment to Roe became less certain.

The Court reached a turning point in 1989 in the landmark decision of Webster v. Reproductive Health Services. The Webster case presented an abortion clinic's challenge to a Missouri abortion law that included a restriction on the performance of abortions in public institutions, even when the woman would be paying her own bill, a preamble that declared that "the life of each human being begins at conception," and a regulatory requirement that a number of tests of fetal viability be performed when a woman seeking

4tribe, Abortion: Clash of Absolutes, 17.
5Ibid., 17-21. Reagan first nominated Robert Bork for Powell's seat in 1987, but after a massive nationwide campaign by his opponents, he was not confirmed in the Senate. The President then nominated Douglas Ginsburg, but his name was withdrawn when conservative support for him evaporated after revelations that he had smoked marijuana while a law professor at Harvard. Reagan then nominated, and the Senate confirmed, Anthony Kennedy.
an abortion was believed to be twenty weeks pregnant. Missouri’s Attorney General, William Webster, and the Bush Administration both urged the Court to hear the Webster case as an occasion to reconsider its decision in Roe.\(^6\)

The Webster case began in 1987 as a class-action lawsuit brought against the state’s Attorney General by Reproductive Health Services, a non-profit gynecological clinic in St. Louis, Planned Parenthood of Kansas City, several physicians at the University of Missouri School of Medicine, and a registered nurse and social worker at Truman Medical Center in Kansas City. The plaintiffs brought suit against the state on their own behalf and also as representatives of the entire class consisting of facilities, Missouri’s licensed physicians and other health care professional offering abortion counseling and services, and pregnant females. The case was argued by Frank Susman of Susman, Schermer, Rimmel & Parker of St. Louis, and Roger K. Evans, counsel for the Planned Parenthood Federation of America in New York. The plaintiffs sought an injunction against the state to prevent its enforcement of Missouri’s restrictive abortion law.\(^7\)

In the United States District Court for the Western District of Missouri, Chief Judge Scott Wright declared the entire statute unconstitutional and permanently enjoined its enforcement, and the state appealed. In July 1988 the Eighth Circuit Court of Appeals affirmed the lower court’s judgment in part and reversed it in part. In both courts, the section of the statute requiring abortions to be performed after sixteen weeks in hospitals,

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\(^6\)Webster v. Reproductive Health Services, 851 F. 2d 1071 (8th Cir., 1988). The Missouri Abortion statute can be found in Missouri Revised Statutes, Section 188.029. The Act was passed by the Missouri General Assembly on April 23, 1986, signed into law by Governor Ashcroft on June 26, 1986, and was to become effective on August 13, 1986. On July 14, Reproductive Health Services filed suit, and the Federal District Court issued a temporary injunction until arguments could be heard. The full trial on the merits was heard December 15-18, 1986.
the section which declared that life began at conception, and the prohibition on the
use of public facilities, funds, or employees for abortions "not necessary to save the
mother's life" (when no public monies were expended) were declared unconstitutional.
At the same time the Court of Appeals reversed the lower court's ruling that the statute's
provision against using public funds for performing or assisting in abortions not
necessary to save the life of the mother did not violate the Eighth Amendment rights of
pregnant prison inmates. Both judgments represented resounding victories for abortion
providers and for pregnant women seeking to terminate their pregnancies safely.\(^8\)

Webster waited until George Bush had won the presidential election to appeal the
decision to the Supreme Court, no doubt to ensure the incoming administration's support.
But what made the timing of the \textit{Webster} case so critical was the change in the make-up
of the Supreme Court. This would be the first public test of the positions of Justices
Scalia, Kennedy, and O'Connor on the question of abortion since they had become
members of the Court. While Justice Scalia had expressed opposition to \textit{Roe} before his
appointment, Justice Kennedy's position on the case was unknown. Justice O'Connor
had scrupulously avoided joining any opinion expressly calling for \textit{Roe}'s reversal; the
depth of her opposition to \textit{Roe} was unknown. With only four sure votes to reaffirm \textit{Roe},
the tenuous nature of the constitutional right to choose abortion was clear, as Laurence
Tribe noted, "to anyone who could count."\(^9\)

In the between \textit{Roe} and \textit{Webster} the pattern of litigation before the Supreme Court
had become predictable: Anti-abortion legislatures would enact restrictions, each one
less stringent than those previously invalidated, and these would be challenged, and in

\(^{7}\textit{Reproductive Health Services v. Webster}, 662 F. Supp. 407 (W.D. Mo. 1987).\)
\(^{8}\textit{Reproductive Health Services v. Webster}, 851 F.2d 1071 (8th Cir. 1988).\)
most cases, invalidated. The only real exception to this rule were holdings in which
the Court upheld state decisions to provide needy women with money or public services
to cover the expense of childbirth but not to fund the less expensive choice of abortion.
In 1977 the Court upheld a number of state regulations that denied Medicaid funding for
“non-therapeutic” abortions, or abortions not necessary to protect the life or health of the
woman.\textsuperscript{10} The Court in these cases distinguished between \textit{direct} interference with a
woman’s right to choose abortion and the \textit{indirect} deterrence of the choice resulting from
government’s decision not to pay for poor women’s abortions. The question of public
funding remained a battleground in the abortion dispute after 1976, but until the decision
in \textit{Webster}, one could safely predict that direct restrictions on abortion would be
overturned.

The \textit{Webster} case changed this. Just two days after the 1988 election outgoing
Solicitor General Charles Fried asked the Supreme Court to hear Missouri’s appeal of the
circuit court’s decision that had voided the state’s anti-abortion restrictions. Fried’s
petition also noted that the case could provide an opportunity for the Court to reconsider
\textit{Roe} and at a private conference on January 6, 1989, four justices—White, Rehnquist,
Stevens, and O’Connor—voted in favor of accepting the appeal. Three days later the
action was publicly announced and both journalists and interested litigators began laying
odds on what the newly constituted Court would do with \textit{Roe}.\textsuperscript{11}

In late February Missouri Attorney General Webster and the Solicitor General
filed briefs defending the state’s regulations and attacking \textit{Roe}. The Reagan

\textsuperscript{9} Tribe, \textit{Abortion: The Clash of Absolutes}, 20.
Administration’s brief contended outright that “Roe v. Wade unduly restricts the proper sphere of legislative authority in this area and should be overruled.” It also asserted that the abortion controversy had, “in substantial measure, been a product of the decision itself” and the “unworkable framework” Roe had created. Missouri’s brief declared that “the trimester approach established in Roe v. Wade is inherently flawed because the point of viability is arbitrary and the State has a compelling interest in protecting life through all stages of pregnancy.” Webster further maintained that “The textual, doctrinal, and historical basis for Roe v. Wade is flawed and is a source of such instability in the law that the Court should reconsider the decision, and on reconsideration abandon it and adopt the rational basis test for reviewing abortion regulations.”

“Criticism regarding the legitimacy of the right declared to be fundamental in Roe continues unabated,” Webster stressed, and “...constitutes a forceful basis for rejecting the philosophical underpinnings of Roe.” 12

The brief for Reproductive Health Services, St. Louis’s oldest and most established abortion clinic, reminded the Court that “Roe was a logical and necessary outgrowth of the long line of cases preceding it which recognized a fundamental right to privacy in matters of child-bearing and family life.” Ten days after it was filed a huge pro-choice march drew more than 300,000 participants to the nation’s capital, and while public opinion polls continued to show that 60 percent of Americans favored leaving an


12William Bryson et al., “Brief for the United States as Amicus Curiae Supporting Appellants,” Webster v. Reproductive Health Services, #88-605, 23 February 1989, pp. 1, 5-6, 12; William Webster et al., “Brief for Appellants,” Webster v. Reproductive Health Services, #88-605, 23 February 1989, pp. 9, 14, 17; Under the “rational basis test,” an appellate court will not second-guess the legislature as to the wisdom or rationality of a particular statute if there is a rational basis for its enactment, and if the challenged law bears a reasonable relationship to the attainment of some legitimate governmental objective. This test doesn’t
abortion decision to a woman and her doctor, only a slight majority said they
supported Roe unconditionally and opposed laws that would make abortions harder to
obtain. Altogether seventy-eight amicus briefs were filed in Webster, including one
highly publicized defense of Roe submitted on behalf of 281 historians. A majority of the
amicus filings, however, sided with Missouri, and six days before oral arguments before
the Court Attorney General Webster tendered a final reply brief in which he sought to
underscore how “the fact that abortion involves the purposeful termination of a potential
human life takes it altogether outside the bounds of the right to privacy.”

The Missouri Statute presented a number of problems for the High Court, but
most of the controversy surrounded the portion of the statute that required testing for fetal
viability. Fetal viability is the point in a pregnancy at which the fetus can survive outside
the womb. The Missouri statute stated that a physician could not perform an abortion on
a woman whom he believed to be twenty weeks or more pregnant unless he first
performed tests to determine “if the unborn child was viable.” The problem was that one
of the tests required by the statute, that for testing the “lung maturity of the unborn child,”
was unsafe. According to the brief of the American Medical Association, amniocentesis,
the only currently available procedure for testing fetal lung capacity, was “contrary to

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13Roger Evans et al., “Brief for Appellees,” Webster v. Reproductive Health Services, #88-605, 30 March
1989, 2; Sylvia Law et al., “Brief of 281 American Historians as Amicus Curiae Supporting Appellees,”
Webster v. Reproductive Health Services, #88-605, 30 March 1989, 1-31; Webster et al., “Appellants’
Reply Brief,” Webster v. Reproductive Health Services, #88-605, 20 April 1989, 5. All of the trial
documents can be found in Roy M. Mersky and Gary R. Hartman, A Documentary History of the Legal
Aspects of Abortion in the United States: Webster v. Reproductive Health Services (Littelton, CO: Fred B.
Rothman and Co., 1990), 8 vols. On public opinion in the late 1980s see Garrow, Liberty and Sexuality,
accepted medical practice until 28-30 weeks of gestation, and imposes significant health risks for both the pregnant woman and the fetus."^{14}

If the statute were read to require that specific test at a time in a woman’s pregnancy when it posed significant health risks to her (without even being useful in determining whether her fetus was viable) then it would be struck down, since it served no rational purpose at all. On the other hand, if the Missouri statute were construed to require only those tests that would actually be helpful in determining fetal viability, those for determining gestational age (last menstrual period or ultrasound) and weight (sonogram), which were generally seen as most reliable, it would be upheld. Because the government was recognized by Roe to have a compelling interest in ensuring that no abortions were performed after viability, except to preserve the woman’s life or health, the regulation, read in this way, did not conflict with Roe.\textsuperscript{15}

\textsuperscript{14}Missouri Revised Statutes, Section 188.029; Webster, 851 F. 2d 1071 n.5 (8th Cir., 1988). The statute required that before performing an abortion on a woman twenty or more weeks pregnant, the doctor "shall first determine if the unborn child is viable using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar circumstances." The statute then went on to require: "In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings in the medical record of the mother." (492 U.S., at 513, plurality opinion). Given the apparently mandatory nature of the statute’s language—"the physician shall perform"—the court of appeals had interpreted the statute as requiring doctors to perform tests to find gestational age, fetal weight, and lung maturity. In fact, according to the AMA brief, all of the tests available to determine viability were unreliable. Amniocentesis was useless until well after twenty weeks of pregnancy: determination of fetal weight \textit{in utero}, which was done by sonogram, was "often not necessary or even useful in determining viability"; the date of the woman’s last menstrual period, which was usually used to determine gestational age, could not be used reliably in women with irregular menstruation; and even ultrasound, a more accurate version of the sonogram, provided "only a range of ages and may incorrectly date a pregnancy by as much as three weeks. The AMA concluded that "viability is a complicated medical determination to be made by an individual physician in light of the circumstances of an individual pregnancy. There is no set of tests that is always necessary or even indicated." See Mersky and Hartman. A Documentary History, vol. 5, 40–43.

\textsuperscript{15}At the time of Webster, there was a roughly four-week margin of error in determining a fetus’s actual gestational age. This is no longer the case, since ultra-sound has become highly accurate and a fetus’s age can be determined within two days. Texas law reflects the change in technology, and now requires measurement of the fetus using ultra-sound to determine viability. If a fetus is larger than the diameter allowed by law, abortion is no longer an option. OHI, Dr. Jerry Edwards, June 21, 1995.
On April 26 attorneys presented oral arguments before the Court. Former Solicitor General Charles Fried represented the Bush Administration and Frank Susman again acted as lead attorney for Reproductive Health Services. Fried presented the government’s case first, arguing that Roe should be overruled because “abortion is different” from the intimate, familial decisions to which the Court had given constitutional protection in other privacy rulings—in particular, its 1965 ruling in Griswold v. Connecticut. According to historian David Garrow, the highlight of Fried’s argument came when Justice Kennedy grilled him on the scope of the right to privacy guaranteed in Griswold. Justice Kennedy asked Fried if he believed that the Griswold decision was correct. Fried said yes, but that it had guaranteed a right of marital privacy. Justice Kennedy then asked whether Griswold stood for “a right to determine whether to procreate,” and Fried hesitated, answering that it did not. When Kennedy pressed for an answer as to what right Griswold did represent, Fried faltered, finally replying, “The right not have the state intrude into, in a very violent way, into the details...inquire into the details of marital intimacy.” It was a lackluster performance. When he replaced Fried at the podium Susman argued that there “no longer exists any bright line between the fundamental right that was established in Griswold and the fundamental right that was established in Roe.” Susman’s presentation was short, lasting about ten minutes.¹⁶

Six days later Chief Justice Rehnquist delivered a fragmented majority opinion. The Court upheld Missouri’s regulation but no single opinion was endorsed by a majority

¹⁶Griswold v. Connecticut was the landmark birth control case brought against the state of Connecticut by Estelle Griswold, Director of Planned Parenthood of Connecticut, which challenged the state’s law prohibiting the use of contraceptives. The Supreme Court found in this case that the law was unconstitutional because married people had a “right to privacy” that extended to the use of contraception. 381 U.S. 479 (1965). The lawyers’ arguments are found in Transcript of Oral Argument, Webster v.
of the Justices. Rehnquist, in an opinion joined by Justice White, the other Roe

dissentor, and by Justice Kennedy, first construed the statute to require only those tests to
determine fetal viability warranted by a doctor’s “reasonable and professional skill and
judgment” in the circumstances—whatever those might be. Therefore, he concluded, the
statute need not automatically be struck down. He then pointed out that the tests,
designed to protect fetal life and not the life or health of the pregnant woman, added to
the cost of abortion. This added cost would be forbidden by Roe if it were deliberately
imposed on a second-trimester abortion (during which time abortion was still legal).
Because some of the viability tests required by Missouri would turn out to have been
conducted during the second trimester, in cases where the fetus’s actual gestational age
was less than initially estimated by the doctor, the Missouri statute conflicted with the
framework set out in Roe v. Wade.\textsuperscript{17} In other words, either the viability testing provision
or the trimester framework set out in Roe had to be abandoned. The three Justices had
their opportunity to attack Roe.\textsuperscript{18}

Rehnquist also concluded that the government had an interest in protecting
“potential human life,” not just after viability but throughout pregnancy, and that that
interest was sufficient to permit Missouri’s statutory interference with the exercise of the
abortion right. He did not test the strength of the state’s reasons for wanting to limit
access to abortion. Instead, he described a woman’s right to decide whether to terminate
her pregnancy as a mere “liberty interest,” (one protected by the Due Process clause) a
right that constitutional scholar Laurence Tribe has described as “no different from her

\textsuperscript{17}Garrow’s narration of the oral arguments before the Supreme Court can be found in Liberty and Sexuality, 674-676.
\textsuperscript{18}Tribe, Abortion: The Clash of Absolutes, 22-23.
‘right’ to drive a car, or open a store, or work as a dentist.” Finally, the Chief Justice insisted, *Webster* “affords us no occasion to revisit the holding of *Roe*, and so ‘we leave it undisturbed.’” Rather, he said, “we modify and narrow *Roe* and succeeding cases” by upholding the Missouri regulations.\(^ {19} \)

Justice Scalia went further. In a fiery opinion he suggested that instead of just gutting *Roe*’s central guarantee—the fundamental right to abortion during the first trimester of pregnancy, and limited right during the second—reducing it to a special “liberty interest” and then gutting that interest, as he understood the majority to be doing, he would expressly overrule *Roe v. Wade*. “I think that should be done, but [I] would do it more explicitly.” With Scalia’s concurrence four Justices voted to uphold the Missouri regulation essentially on the ground that the right to decide whether to terminate a pregnancy merited no special protection from government.\(^ {20} \)

Four other Justices defended the fundamental right to choose abortion recognized in *Roe*. Justices Brennan and Marshall joined an opinion written by Justice Blackmun voting to strike down most of the Missouri regulation because it unnecessarily interfered with the trimester framework of *Roe*. “For my own part, I remain convinced, as six other Members of the Court 16 years ago were convinced, that the *Roe* framework, and the viability standard in particular, fairly, sensibly, and effectively functions to safeguard the constitutional liberties of pregnant women while recognizing and accommodating the State’s interest in potential human life.” In a separate dissent Justice Stevens argued that the viability testing provision was unconstitutionally burdensome and would be indefensible even if there were no special protection for the abortion right. He also noted


that the majority had "strained" to construe *Roe* in such a way as to reach the question
of whether *Roe* should be overruled.21

The swing vote lay with Justice O'Connor. For her, a regulation imposed on an
otherwise lawful abortion was unconstitutional if it imposed what she described as an
"undue burden" on a woman's abortion decision. In her view, the Missouri regulation
requiring viability testing did not "unduly" burden a woman's choice because it delayed
the abortion by only two days. O'Connor then voted to uphold the regulation without
concluding that *Roe* should be overruled.22

When the *Webster* decision was announced it was apparent to both pro-choice and
pro-life observers that the Court had upheld a substantial practical infringement on the
right to abortion. The framework of *Roe* remained technically undisturbed yet it was
clear to everyone that *Roe* was not what it had been. Furthermore, the Supreme Court
had retained the option to reconsider the existence of the right to abortion. *Webster* was
also in the view of abortion advocates an invitation to state legislators to see just how far
they could go to regulate abortion before Justice O'Connor would find the burden on the
abortion right "undue." After years of striking down state restrictions on abortion, the
Court had finally upheld one.

Right-to-Life groups welcomed the announcement of *Webster* as a landmark
victory while many pro-choice activists mourned, believing that *Roe* 's funeral was at
hand. Abortion rights lawyers, however, took note of the tone of Justice O'Connor's
concurrency and contended that it was "less hostile to *Roe* " than her previous abortion

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opinions had been. For arguments in future abortion cases, they noted, O'Connor would be "the real audience," since she was "in the position single-handedly to decide the future of abortion rights."\[23\]

After Webster, state legislators set out to test the Court's new limits. As the political battle over abortion was taken to the streets, in demonstrations, it also found its way onto the floor of the state legislatures. Some state law enforcement officials, in Louisiana for example, sought permission to enforce old nineteenth-century abortion statutes that Roe had nullified. Florida's Governor, Bob Martinez, called a legislative session to consider new anti-abortion measures. A Gallup Poll completed just after the Supreme Court's decision showed that 53 percent of Americans disagreed with Webster, but right-to-life proponents were undeterred. When their attempts to revive old laws were unsuccessful legislators sought specific new legislation that would restrict access to abortion for minors.\[24\]

The Webster case was not the only one that suggested the constitutional tide had turned in favor of state regulation of abortion. On the same day that the Supreme Court decided Webster it accepted two abortion appeals from Minnesota and Ohio for argument during its upcoming 1989-1990 term: Hodgson v. Minnesota and Ohio v. Akron Center

\[23\]492 U.S. 490, at 522-531. After Webster, Justice O'Connor's "undue burden" test became the standard against which state abortion regulations were measured. As long as the Court could find in abortion regulations no "undue burden," they would be upheld. Tribe, Abortion: The Clash of Absolutes, 23-24.


Garrow, Liberty and Sexuality, 678-681. Garrow also contends that Webster's signal that states could now restrict abortion access was a greater stimulus to pro-choice supporters than to right-to-lifers, and by the end of 1989 it was clear that Webster had given abortion rights advocates a "considerable political boost." In October, Governor Martinez's legislative attempt in Florida went down in an embarrassing (nationally publicized) defeat; and in Virginia and New Jersey, two pro-choice Democrats--Douglas Wilder and Jim Florio--won resounding victories against two anti-abortion Republicans in the states' gubernatorial races. See also Jane Wishner, ed., Abortion and the States: Political Change and Future Regulation (American Bar Association, 1993).
When the Court convened on November 29, 1989, it heard arguments in the two cases, both of which dealt with the more limited issues of parental notification and consent with regard to pregnant teenagers. *Hodgson*, whose lead plaintiff was physician Jane Hodgson, had successfully challenged a state statute requiring advance notice to both parents of any pregnant teenager’s request for an abortion, but the Eighth Circuit Court of Appeals had reversed the district court’s decision. Hodgson’s attorney then petitioned for Supreme Court review. In the Ohio case, the state sought the High Court’s review after the Sixth Circuit Court of Appeals affirmed a lower court’s invalidation of its notification law.26

Unlike *Webster*, viability was not at issue in *Hodgson* or *Akron*. Nevertheless, it took the Court seven months to reach its decisions in the two cases. On June 25, 1990, the rulings were announced: a five-justice majority upheld the notification portion of Minnesota’s law and a six-justice majority upheld Ohio’s law, but in the Minnesota case the Court provided young women with a “judicial bypass” option so that a minor might still obtain an abortion with a judge’s approval if both parents could not be reached for consent or would not give it. At the same time the majority struck down the portion of Minnesota’s law that required notification of both parents, regardless of “whether or not both wish[ed] to be notified or [had] ... responsibility for the upbringing of the child.”

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26 *Hodgson v. Minnesota*, 648 F.Supp. 756 (D.C. Minn. 1988), held that the statute was unconstitutional, and the State appealed to the Eighth Circuit Court of Appeals, 833 F.2d 1452 (8th Cir. 1988); the appeals court, sitting en banc, voted 7 to 3 to reverse and remand. *Akron v. Ohio*, 633 F.Supp. 1123 (N.D. Ohio 1988), held that Ohio’s abortion restriction was unconstitutional, and the state appealed. In *Ohio v. Akron*, 854 F.2d 852 (6th Cir. 1988), the Court of Appeals for the Sixth Circuit affirmed the lower court’s ruling.
since it did not "reasonably further any legitimate state purpose, and [was] unconstitutional."\textsuperscript{27}

Writing for the majority in \textit{Hodgson}, Justice Stevens, joined by Justices Brennan, Marshall, Blackmun and O'Connor, upheld the constitutionality of Minnesota's 48-hour waiting period (during which the minor had to notify a parent or obtain a judicial bypass), maintaining that it did not result in an "unreasonable delay" in the decision to choose abortion, stressing that "\textit{Roe} remains the law of the land," and that the court's ruling "reaffirms the vitality of \textit{Roe}," although it was difficult for many observers to see just how it had done that. In a separate opinion in which he concurred in part and dissented in part Justice Scalia reiterated his view that "the Constitution contains no right to abortion" and that "the court should end its disruptive intrusion into this field as soon as possible." Justice Kennedy also filed an opinion concurring in part and dissenting in part in which Chief Justice Rehnquist and Justices White and Scalia joined. Their opinion was more moderate than Justice Scalia's but found Minnesota's entire three-part statute—including the two-parent notification standard—to be constitutional.\textsuperscript{28}

Writing for the majority in \textit{Akron}, Justice Kennedy declared Ohio's abortion statute to be constitutional. Since Ohio's law required notification of only "one of the minor's parents" and provided for judicial bypass the Court did not take issue with any part of it and simply reversed the Sixth Circuit Court's judgment. Kennedy was joined by the Chief Justice, and Justices White, Stevens, O'Connor, and Scalia. Justice Blackmun filed a dissenting opinion in which Justices Brennan and Marshall joined.\textsuperscript{29}

\textsuperscript{27}\textit{Hodgson}, 110 S.Ct. 2926, at 2927 (1990).
\textsuperscript{28}\textit{Ibid.}, 2928-2960 (majority opinion), 2960-2961 (Scalia), and 1961-2971 (Kennedy).
\textsuperscript{29}\textit{Akron}, 110 S.Ct. 2972, at 2972-2984 (majority opinion), 2984 (Scalia), 2984-2995 (Blackmun)
The dissenting Justices took issue with Ohio's judicial bypass provision, which they called "a tortuous maze." Under Ohio's law a minor had to meet several requirements before she could obtain a court-approved abortion, each of which might involve days of delay. First, she had to demonstrate by "clear and convincing evidence" of (1) her "maturity," or competence to make the abortion decision, and (2) that one of her parents had engaged in a pattern of physical, sexual, or emotional abuse against her; or (3) that notice to a parent was not in her best interest. Depending on her response to the first requirement she then had to fill out a number of forms and meet with state employees to review them. Since, in the worst-case scenario, the time required to obtain a judicial bypass might be twenty-two days, during which the health risks of adolescent abortion rose dramatically, Blackmun held that this "heightened standard of proof unduly burdens a minor's right to seek an abortion." As in the Hodgson case the dissenters did not take issue with the notification requirement or the idea of judicial bypass but only with the length of time such notification or bypass procedures might require.

When the decisions in Hodgson and Akron were announced they went almost unnoticed. Most abortion news during that time centered on the nomination of a new Supreme Court Justice. On July 20, 1990, Justice Brennan, a thirty-four year veteran of the Court, announced his retirement at the age of eighty-four. Three days later President Bush nominated a "little-known, fifty-year-old federal circuit judge from New Hampshire," David Souter, to fill his seat. Efforts to discover just how Souter felt about abortion were ineffectual. During his confirmation hearings before the Senate Judiciary Committee Souter declined to address the status of Roe v. Wade, but said that "the due process clause of the Fourteenth Amendment does recognize and does protect an
unenumerated right of privacy.” Evidently, if the Constitution could be vague, then so could he. Still, Souter impressed the committee “as a thoughtful moderate,” and on October 2 the full Senate unanimously confirmed him as the newest and most junior member of the Court.\textsuperscript{30}

There was still one abortion-related case on the court’s 1990-1991 docket: \textit{Rust v. Sullivan}.\textsuperscript{31} This case was a challenge to the “gag rule” that the U.S. Department of Health and Human Services had imposed in 1988 on all medical organizations that received federal funds under Title X of the Public Health Service Act of 1970. Under the gag rule doctors and health workers were prohibited from in any way counseling or referring patients with regard to abortion. The rule had been challenged that year in three Federal District courts by the Planned Parenthood Federation of America on behalf of family planning clinics and by doctors who administered Title X funds, then appealed in three separate Circuit Courts. The Second Circuit Court of Appeals had upheld the regulation just before the two other Circuit Courts, the First and the Tenth, had found it unconstitutional. In May 1990 seven Justices agreed that the Supreme Court should review the Second Circuit’s decision.\textsuperscript{32}

Oral arguments were presented before the Court on October 30, with the newly seated Justice Souter present. Professor Laurence Tribe of Harvard University presented


\textsuperscript{32}Title X of the Public Health Service Act (PL91-572, Family Planning Service and Population Research Act of 1970, 42 USC 300 (1970)), is the only federal legislation which relates solely to family planning, including medical and social services, training, and research. The funds are allocated to the states, then granted to different state agencies that provide contraceptive services to low-income patients. See Lewis Mondy, “Subsidized Family Planning Services in Texas,” \textit{78 Texas Medicine} (November 1982), 58-62. For the lower court decisions leading up to \textit{Rust}, see \textit{New York v. Bowen}, 690 F. Supp. 1261 (S.D.N.Y. 1988) and 889 F.2d. 401 (2d Cir. 1989); \textit{Massachusetts v. Secretary of Health and Human Services}, 899 F.2d 53.
the case for the petitioners and Solicitor General Kenneth Starr represented the respondent, the Secretary of Health and Human Services, Louis Sullivan. The petitioners made two central arguments. First, that the withholding of information about abortion was not authorized by the Public Health Service Act, which had been passed by Congress to encourage family planning; and second, that the rule abridged freedom of speech under the First Amendment. The Act specifically forbade the expenditure of funds for abortion, Tribe argued, but this did not mean that doctors and nurses could not tell their patients about abortion or even mention that abortion was an available option if contraception failed. This, Tribe concluded, amounted to censorship, and furthermore, violated a woman's right to choose abortion, a right guaranteed in Roe.

The Court rejected these contentions. Chief Justice Rehnquist wrote the majority opinion, whose central idea was that when the government pays for a program it can make the rules governing the program. Rehnquist agreed that under Roe v. Wade there was a constitutionally protected right to choose an abortion. But that did not mean, the Chief Justice wrote, that the government had to subsidize the right. Rehnquist also asserted that the federal government was "exercising the authority it possessed under Maher," one of the earlier abortion funding cases, and had "merely chosen to fund one activity to the exclusion of the other." "The difficulty that a woman encounters when a Title X project does not provide abortion counseling or referral," he said, "leaves her in no different position than she would have been if the government had not enacted Title X." Finally, the majority insisted, the gag rule regulations "do not significantly impinge upon the doctor-patient relationship. Nothing in them requires a doctor to represent as

(1st Cir. 1990); and Planned Parenthood Federation of America v. Sullivan, 913 F.2d 1492 (10th Cir. 1990).
his own any opinion that he does not in fact hold.” A physician, the majority contended, “is always free to make clear that advice regarding abortion is simply beyond the scope of the program.”

Justice Blackmun’s dissenting opinion, in which Justices Marshall, O’Connor, and Stevens joined, strongly disagreed with the Chief Justice. Blackmun did not agree that government could make suppression of free speech a condition for getting federal funds: “Until today, the Court never has upheld viewpoint-based suppression of speech simply because that suppression was a condition upon the acceptance of public funds.” He also noted that he believed the government was using its muscle to keep women from making a decision that the Constitution protected, namely, the decision to choose an abortion. “Under essentially the same rationale, the majority upholds direct regulation of dialogue between a pregnant woman and her physician when that regulation has both the purpose and the effect of manipulating her decision as to the continuance of her pregnancy.” Finally, he said, “This is a course nearly as noxious as overruling Roe directly, for if a right is found to be unenforceable, even against flagrant attempts by government to circumvent it, then it ceases to be a right at all. This, I fear, may be the effect of today’s decision.”

In a separate dissent Justice Stevens argued that the Public Health Service Act did not authorize the government to forbid abortion counseling, but only said that it could not pay for abortion services. “The statute contains no suggestion that Congress intended to authorize the suppression or censorship of any information by any Government employee or by any grant recipient.” Justice O’Connor, in yet another separate dissent, noted

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34 Ibid., at 1778-1780, and 1786.
simply that “neither the language nor the history [of the Act] compels the Secretary’s interpretation, and ...the interpretation raises serious First Amendment concerns.” The *Rust* decision represented her first disagreement with the majority in an abortion case since coming to the Court.\(^{35}\)

With the Court’s decisions in *Webster*, *Hodgson*, and *Akron*, women choosing second-trimester abortions and teenagers seeking abortions found themselves facing a host of restrictions on access to the service. With the decision in *Rust* low-income women who sought services under Title X for health care and family planning (like those who had previously been denied subsidized abortions under the Hyde Amendment) were further restricted. In 1991 about 4,000 clinics received federal funding under the Public Health Service Act. Most of them served low-income and minority women.\(^{36}\) For these women, and for minors, abortion was still legal after 1991 but not readily available.

Planned Parenthood and the pro-choice majority in the United States responded to what they believed were increasing attacks against reproductive rights by accelerating the activism of pro-choice organizations across the nation. In April 1989, in anticipation of the Court’s ruling in the *Webster* case, an estimated half-million marchers created the largest pro-choice demonstration in history in Washington, D.C. In November, after the ruling, a nationally coordinated day of rallies drew an unprecedented two million Americans who participated in more than 1,000 pro-choice events. And in 1991, after the “gag rule” decision, a campaign led by the Planned Parenthood Federation prompted the U.S. Congress to consider legislation that would affirm the long-standing practice of Title X-funded clinics to counsel pregnant women about all their legal options. Meanwhile,

\(^{35}\)Ibid., at 1787 (Stevens) and 1788 (O’Connor).
the patient load at Planned Parenthood’s clinics continued to grow. In 1989 1.7 million women came to Planned Parenthood for contraceptive services—a forty-five percent increase over the previous decade.37

From the prospective of low-income women and minors, the Supreme Court decisions in 1989-1990 were doubly discouraging. Not only did the majority of the Court sanction new regulations that made obtaining a safe and legal abortion more difficult, it weakened the abortion right guaranteed in Roe by allowing the state to regulate abortion in the second trimester to protect fetal life rather than maternal health. And, although there was no opinion joined by five Justices on the issue, a majority in effect voted against Roe’s trimester framework.

The Webster, Hodgson, and Akron cases indicated a clear shift in the Court’s thinking away from the broad rights guaranteed in Roe. At the same time, they reflected indecision on the part of the majority as to where the Court should go with regard to abortion rights. Several Justices, lacking the votes to overrule Roe, seemed prepared to chip away at it piece by piece, while the rest of the Court seemed undecided as to how far backward it would move. In the process, historians have noted, the Court failed to provide a clear replacement standard for testing the constitutionality of abortion regulations, leaving the status of abortion rights in an uncertain state. Instead, the Court helped pave the way for a redefinition of Roe using the “undue burden” standard, a standard that in 1989, perhaps deliberately, remained unclear.

37A Tradition of Choice: Planned Parenthood at 75 (New York: Planned Parenthood Federation of America, 1991), 82. Donations to Planned Parenthood at the national level also increased dramatically.
Chapter 18

In the Line of Fire:

Despite the attacks on reproductive rights and abortion clinics that marked the 1980s, the decade was one in which the Planned Parenthood Federation and its affiliates reached new levels of strength and popular support. As Faye Wattleton, president of the Federation, noted:

As we persevered in our efforts to prevent the need for abortion through greater access to contraception and educational services, we also helped to preserve the right of all American women to safe and legal abortion, a necessary element of reproductive choice. The ongoing support of the majority of Americans will ensure our continued success.¹

Both the stakes and the odds were high. The anti-abortion policies of the Reagan and Bush Administrations led to a loss of funding for many international family planning agencies, including Planned Parenthood's international division, FP1A. A conservative Supreme Court increasingly upheld restrictive federal and state laws on access to abortion, in particular the 1991 "gag rule" that barred staff in Title X-funded clinics from giving pregnant women information about abortion. At the same time, pro-choice activists accelerated their activities. Pro-abortion advocates staged rallies and demonstrations across the country, including a 1989 march on Washington after the 1989 Webster v. Reproductive Health Services decision that attracted half a million participants. Donations to the Planned Parenthood Federation and its affiliates from those concerned about new abortion restrictions and cuts in federal and state family
planning funds increased dramatically. In 1991, after the "gag rule" decision, a lobbying campaign led by Planned Parenthood spurred the U.S. Congress to consider legislation that would affirm the obligation and long-standing practice of Title X-funded clinics to counsel pregnant women about all their legal options.²

Essential to Planned Parenthood's existence and continued public support was its mission as a service provider. From its inception, the organization had provided low-cost reproductive healthcare services to women and had expanded those services to meet increasing demands. As a result, Planned Parenthood grew and thrived throughout the 1980s. In 1989 some 1.6 million people participated in sex education sessions led by Planned Parenthood staff and volunteers in a number of community settings: schools, hospitals, homes, community centers, county fairs, and prisons. Another 1.7 million came to Planned Parenthood affiliates for contraceptive services—a 45 percent increase over the previous decade.³

Affiliates showed resourcefulness in attracting new populations to clinics. Planned Parenthood of Oklahoma City offered "straight talk" programs in which trained "sexuality educators" mediated discussions among adolescents and parents. Idaho's Planned Parenthood held mother-daughter workshops to promote responsible decision-making by teens. Planned Parenthood of Milwaukee organized a "life options coalition" of community groups concerned with reducing the rate of teen pregnancy in the state.

² A Tradition of Choice, 81. Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989), upheld restrictions on the performance of abortions in public institutions, and testing for "fetal viability" for abortions performed at twenty weeks. The "gag rule" decision is found in Rust v. Sullivan, 111 S. Ct. 1759 (1991), in which the Supreme Court upheld a U.S. Department of Health and Human Services policy which forbade doctors and health workers in Title X-funded family planning clinics from counseling or referring patients with regard to abortion, even when patients requested the information.
³ A Tradition of Choice, 82.
Florida affiliates showed filmstrips on family planning in English, Spanish, and Creole as part of a refugee resettlement program. And the Planned Parenthood Center of Austin helped organize efforts to make rap videos on pregnancy prevention and safe sex for the city's teen-aged Latino gang members.\(^4\)

As public confidence in Planned Parenthood continued to grow, the range of services people received increased apace. By the late 1980s most affiliates provided testing and treatment for sexually transmitted diseases (STDs) in both women and men, HIV testing and counseling, ultrasound, abortions up to sixteen weeks of pregnancy, colposcopy for early treatment of dysplasia (inflamed or irregular cells inside the cervix) to prevent cervical cancer, male and female sterilization, infertility treatment and counseling, mid-life services, including estrogen replacement therapy, and prenatal care. These services were provided in addition to Planned Parenthood's primary ones: gynecological care, birth control, and abortion.

In a move that proved to be both cost-effective and successful, affiliates in the late 1980s expanded their use of nurse practitioners and physician's assistants to provide nonsurgical services. While physicians continued to supervise medical care and perform surgeries, by the end of the decade nurse practitioners were providing about 75 percent of all direct patient care offered at Planned Parenthood affiliates. The shift to using nurse practitioners also allowed affiliates to serve more patients at a lower cost, thereby increasing patient and federal revenues while holding down expenses. The move also won the approval of clients and health professionals and served as a model for public health care agencies and other clinics.\(^5\)

\(^4\)ibid., 82-83.
\(^5\)ibid., 84.
Despite the continued violence against family planning and abortion clinics, more affiliates began providing abortion services. During the decade, the number of affiliates offering abortions increased by 32 percent. Dr. Kenneth Edelin of the National Board explained the increase in this way: "More and more affiliates want to offer abortion services because they have a real commitment to this issue. This is the line that has been drawn in the sand. We recognize that if the opposition is successful in outlawing abortion, they will come after contraception next." And despite its increasing visibility on controversial issues, Planned Parenthood endured as one of the most respected non-profit organizations in the country. In a 1989 Gallup poll, 82 percent of American had a favorable opinion of Planned Parenthood, with only two non-profits—the American Cancer Society and the League of Women Voters—rated higher.6

As the 1990s began, technological advances including ultrasound, the abortion pill (RU-486), the five-year Norplant contraceptive device, and laser surgery changed the field of family planning services, opening the door to even more effective birth control and new controversy over its use. At the same time, the old problems of unwanted pregnancy, venereal disease, AIDS, and poverty continued to afflict millions both in the U.S. and abroad. The recession of the 1980s added to the misfortune of those who made up the majority of the poor: women and children. For them, access to subsidized healthcare services like those provided by Planned Parenthood remained crucial. Recognizing this, the leadership and roughly 180 affiliate members of the Planned Parenthood Federation determined to expand and make every effort to ensure that access to family planning services remained an unquestioned right.
By the 1990s the demand for Planned Parenthood's services had increased significantly. American women in 1991 were still experiencing more than three million unintended pregnancies each year, nearly half of which were ending in abortions. Teenagers accounted for almost one million of these unintended pregnancies. In response, Planned Parenthood committed itself to a broad range of new programs. Chief among its priorities was education, the promotion of open and responsible discussions of sexuality in homes, schools, communities, and the media. These goals were expensive, and as opponents of family planning continued their attempts to curtail or eliminate Title X funding, the principal source of affordable family planning services in the U.S., the Planned Parenthood Federation lobbied to ensure its survival and affiliates looked for other sources of revenues. From a funding perspective, the 1980s ended and the 1990s began in a climate that was discouraging to family planning providers in general and to Planned Parenthood and its affiliates in particular.\(^7\)

**Planned Parenthood of Houston, 1988-1991**

Like its parent organization, the PPFA, Planned Parenthood of Houston found itself in the late 1980s and early 1990s "in the line of fire." Its Board and executive director had taken a position of open resistance to violent anti-abortionists, and of aggressive expansion of clinics and clinical services—despite federal budget cuts. But the pressure on the agency continued to mount. As Planned Parenthood's visibility

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\(^{6}\)Ibid., 85-85. The total number of clinics providing abortions, however, remained small. Only a quarter of PPFA's 182 affiliates were providing pregnancy termination services by the end of 1988. The number has increased slowly since.

\(^{7}\)Title X of the Public Health Service Act (PL91-572, Family Planning Service and Population Research Act of 1970, 42 USC 300, 1970), is the only federal legislation that relates solely to family planning, including medical and social services, training, and research. In Texas, these funds are granted by the Texas Department of Health, which contracts with provider agencies for contraceptive services. See Lewis Mondy. "Subsidized Family Planning Services in Texas," 78 Texas Medicine (November 1982), 60.
increased, both in the community and in political and judicial spheres, so did the controversy surrounding it. Recognition at every level proved to be a double-edged sword. And, though the feeling of impending financial crisis that had prevailed in the early eighties lessened considerably and public support was at a height, Planned Parenthood entered 1988 more dependent than ever on the kindness of donors and the budgetary whims of national and state legislatures.

The year 1987 had been one of aggressive expansion during which PPH had begun offering anonymous HIV testing services, opened four new clinics and expanded facilities at two others, hired a full-time medical director, expanded abortion services in its VPT clinic, initiated a new patient fee structure, and begun energetic public relations and fundraising campaigns to improve Planned Parenthood’s image and to bring in new clients and revenues. Under Executive Director Peter Durkin’s leadership, the agency’s staff undertook an equally aggressive program of cost control and an overhaul of the billing system. By the end of the year, staff members had succeeded in offsetting cuts in government funding and dwindling patient revenues with dramatically increased donations, Title XIX (Medicaid) billings, and cash receipts. Planned Parenthood entered 1988, to all appearances, more stable and determined to survive than ever.

But while Planned Parenthood continued to expand services and serve more clients in 1988, it remained adrift on the “same Title XX boat” it had been sailing since the early 1980s, in a funding cycle that “lapsed” several months before the end of each fiscal year and ceased paying claims even as it required member clinics to continue providing services. 8 Each year, revenues from other areas such as fundraising and patient

8Title XX of the Social Security Act (PL97-35, Omnibus Budget Reconciliation Act of 1981, 42 USC 502(a), 1981), is the social services component of the Social Security Act and functions much as Title XIX.
fees were used to cover the shortfall, and each year Durkin pressed state agencies for larger Title XX grants. His efforts did not net a 9 percent increase in funds from the Texas Department of Human Resources (TDHR) for fiscal year 1988, but this increase was coupled with new state requirements that nullified its value. In February 1988 TDHR dropped the Teen Co-pay requirement, the rule that required teens to pay for part of the services they received to member clinics, and Planned Parenthood lost approximately $90,000 in revenues it was no longer allowed to collect. The year 1988 seemed to be a worse one for Title XX funding than before; most of PPH’s clinics had gone to a “cash and carry” fee basis by May 11.⁹

At the same time, the patient load (and hence revenues) remained stagnant at around 63,000 visits for the year. The vast majority of the visits were for contraceptive services, subsidized—except when they lapsed—by Title XX funds. The number of abortion clients also stagnated, in large measure due to anti-abortion activism, even as loan procedures for abortions were liberalized, leading to decreases in another source of revenue. Finally, Planned Parenthood’s investment income dropped precipitously during 1988, after the October 1987 crash of the stock market and the lowering of interest rates on investment income.¹⁰

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⁹Executive Director’s Report, January 27, 1988; and PPH, Minutes, February 24 and May 11, 1988. The real loss in revenues from Teen Co-pay is unclear, since Treasurer’s had previously reported that teens didn’t pay and that their co-payments were “uncollectable” anyway. Still, Durkin reported it as a $90,000 loss.

¹⁰Executive Director’s Report, September 28, 1988; and PPH, Minutes, October 26, September 28, and December 28, 1988. The actual client statistics for 1988 were: 60,569 family planning visits, 2,051 abortions, 91 prenatal visits, and 105 HIV tests. Also, the “cash and carry” policy was in effect at every clinic except the Casa de Amigos, where PPH continued to serve primarily Hispanic clients who had “zero resources.” See Executive Director’s report, January 27, 1988.
In January Durkin reported that the Federation was also in a “heap of [financial] trouble” and had projected a $4 million loss for the fiscal year due to federal budget cuts in international family planning programs. Faye Wattleton, PPFA’s president, called a special meeting of the national board to discuss “budget cutting alternatives,” which for the affiliates translated into cuts in programs that benefited them: advertising, legal defense, and Federation-funded regional offices. Still, the Federation did not call for an increase in affiliates’ “Fair Share” dues, which would have increased the financial pressure on the Houston affiliate considerably.11

Yet, just when the financial picture appeared bleakest, money seemed to appear to fill the local Planned Parenthood’s needs. Fundraising was on the decline in 1988, and except for a generous donation of $175,000 from the McAshan Trust late in the fiscal year, the development staff would have fallen far short of its $500,000 goal. At the end of the year, Planned Parenthood also received an $88,000 grant from the Texas Department of Human Resources to fund and expand its AIDS testing and counseling services, and by the end of the year the treasurer was again reporting a small budget surplus.12 At the year’s end, Executive Director Durkin was concerned less about Planned Parenthood’s survival as an agency than about its philosophy concerning abortion. In his speech to the membership in November 1988, Durkin chastised affiliate board members for what he called their “lack of commitment...to safe and legal abortion.” Citing a speech given earlier that year by Anne Saunier, PPFA Chairperson, at the national meeting in St. Louis, Durkin said:

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Let's first look at the service side of this situation. Right now, 48 of 182 affiliates, in my view a measly 26 percent, are providing abortion services. When I talk with affiliate boards on this issue, it seems the presumption is that we don't do abortions, or if there aren't any abortion services within 200 miles, we might consider it, reluctantly.\(^{13}\)

But, Durkin said, this reluctance to provide abortion services was merely "a symptom of a far more serious problem—that is, our [Board] volunteers still have considerable difficulty with this issue. They are very, very soft on the issue, a few really don't support abortion at all and many are in a constant state of denial regarding abortion." This denial, in his view, had led to the use of euphemisms like "pro-choice" instead of "pro-abortion" by those in the Planned Parenthood ranks who still had not accepted abortion as a fundamental right. "Why do we keep saying," Durkin asked, "I'm not pro-abortion, I'm pro-choice? The reason is that we have not yet accepted that abortion is a part of fundamental reproductive health care services and a right that we absolutely must defend." For those who could not wholeheartedly support Planned Parenthood's philosophy and mission, Durkin offered another quote from Saunier's speech in closing:

"Then you may come to a situation where some people have to make a decision. You may have some board members who are on the wrong board, who may need to go somewhere else; because if board members can't embrace the fundamental correctness of legal and safe abortions, I submit to you they are in the wrong organization."\(^{14}\)

It is not clear why Durkin chose this particular moment to throw down the gauntlet and challenge Board members to make a choice. Earlier in the year, in response to a new hospital district policy which stated that physicians in Harris County hospitals would

\(^{13}\)Speech to Membership. November 1988, by Peter Durkin, Executive Director.

\(^{14}\)Ibid., 2.
perform abortions on low-income women only when the mother's life was threatened.

Durkin had formed an Abortion Task Force of Board members and charged it with making recommendations to the Board concerning late (second trimester) abortions and a liberalized loan policy to pay for them. The task force had recommended in March that Planned Parenthood expand its Voluntary Pregnancy Termination (VPT) services to offer abortions up to only fourteen weeks, which was still within the Federation’s definition of a first-trimester abortion, but to assist in second-trimester abortions with loans (which would presumably be performed at other clinics offering late abortions). It is possible that Durkin had hoped for a more liberal recommendation and was frustrated by the reluctance he saw in Board members to expand abortion services as far as the law allowed.¹⁵

Ten months later, after the Webster decision was handed down and public hospitals had begun instituting more restrictive policies on the performance of abortions, Durkin again addressed Board members with his concerns about the abortion issue and Planned Parenthood’s role in providing the service, this time more strongly. "What are we afraid of?" he asked, echoing the words of the PPFA’s Chairperson Saunier, who had asked members of the national board the same question. "As an overall organization," he said flatly, "we have weak struggling affiliates offering few services with restrictive Boards that are literally afraid." Planned Parenthood affiliates should be developing growth plans in patient services, education, and fundraising, he argued, and

¹⁵PPH, Minutes, February 10, March 9, and March 23, 1988. The two-page policy statement of the Harris County Hospital District, entitled “Harris County Hospital District Policy Regarding Abortions,” concerned abortions for low-income and Medicaid recipients and was attached to the PPH, Minutes, March 9, 1988. The pertinent part of the statement read: “An abortion may be performed that will result in the termination of the life of the child only to save the life of the mother.” It also stated that no less than two physicians--
adopting “aggressive strategies” with “reasonable risk taking” to achieve them.

Instead, he said, Planned Parenthood had failed to do this and had come to be known among abortion providers as an organization with a “million dollar name” and a “hundred dollar management.”16

Planned Parenthood affiliates were not the only organizations showing apprehension in the face of anti-abortion activism. In February 1989 Houston’s Right-to-Life group filed suit against the Klein Independent School District (ISD), and then against Houston, Katy, Spring Branch, and Friendswood ISDs, for allowing outside speakers into the public schools to make family planning presentations to those students considered “at risk” for unintended pregnancies and disease. The Right-to-Lifers sought to bar these speakers from all of Houston’s public schools. Planned Parenthood was not named in the suit, but during the course of the lawsuit, the plaintiff’s lawyers deposed PPH staff members to provide input as to the level of the agency’s participation in the various school districts’ programs. By April, Planned Parenthood had spent $13,000 in legal fees to defend itself in a suit in which it was not a defendant. PPH’s attorneys finally asked the court to bar the plaintiffs from taking any more depositions from staff and to seal the records in the Klein ISD litigation.17

In a move that distressed Planned Parenthood and the remaining school districts in the suit, Klein ISD settled out of court with the Right-to-Life group and agreed to several restrictions on its program for outside presentations by family planning organizations. The key points of the agreement included: (1) an agreement that Klein ISD would make

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the treating obstetrician and another physician who was not an obstetrician—were to certify that the procedure was being performed in order to save the mother’s life.

16Executive Director’s Report, September 27, 1989.
17PPH, Minutes, February 21, March 8, and March 21, 1989.
available to its high school students literature supplied by Right-to-Life advocates regarding fetal development, complications of abortion, and alternatives to abortion. Such literature would be made available on a voluntary basis in school counselors’ offices, school clinics, health clinics, or other similar locations, and reasonable notice of the availability of the literature was to be given to students by Klein ISD; and (2) an agreement that if pro-abortion or “pro-choice” representatives or organizations were allowed to make educational presentations to students at Klein schools, designated representatives of the Right-to-Life organization would be allowed equal access to present a contrary viewpoint. Planned Parenthood’s leaders were understandably concerned that its volunteers would be “chilled out” of the districts over fears of controversy.18

While it was being assailed on the one side by Right-to-Life advocates, Planned Parenthood was also being physically attacked by the members of another anti-abortion group, Operation Rescue, whose members were harassing clients at the Fannin clinic and staging “invasions” of Houston-area clinics that they alleged were providing abortions. In October 1988 the leader of Houston’s Operation Rescue group (Rescue America), Don Treshman, was arrested and charged with criminal trespassing at the Fannin VPT clinic. Then in April 1989, on Good Friday, the Fannin clinic was invaded by a number of Operation Rescue members; two were arrested, charged with criminal trespassing, and were sentenced to ninety days in jail (to be served on weekends) and assessed $500 fines.19

18Executive Director’s Report, March 21, 1989.
19PPH, Minutes, October 26, 1988, March 29, April 24, and September 27, 1989.
Also in April, as PPH’s air conditioning units were being sabotaged by unknown assailants, Durkin learned that the commercial airline USAir was offering discount fares to Operation Rescue members to facilitate their travel to national anti-abortion events and that Domino’s Pizza had become a major contributor to anti-abortion foundations. Just two months later, Board members learned that the national Christian Action Council, headquartered in Falls Church, Virginia, had obtained a list of corporate donors to the Planned Parenthood Federation and was calling for a national boycott by Christians of all the corporations on the list. The four-page list included many of America’s top corporations: American Express, AT&T, Bristol-Myers, Chase Manhattan, British Petroleum, Citicorp, Dayton Hudson, Eastman Kodak, Enron, Federated Department Stores, Gannett Company, General Mills, Heinz, Honeywell, J.C. Penney, Morgan Guaranty Trust, Pillsbury, Rockwell International, Scott Paper, Union Pacific, Winn-Dixie, and Xerox. It is doubtful that anti-abortionists were willing to be inconvenienced to that extent, or that the newsletter sent to the Christian Action Council’s membership would do much harm to the Federation’s corporate support. But in Houston, where corporate support remained elusive and companies had been wary of Planned Parenthood’s solicitations, the idea of a corporate boycott was more alarming.\textsuperscript{20}

Violence against Planned Parenthood’s VPT clinic, the focus of local anti-abortion crusaders, escalated in 1990. In February, anti-abortionists sprayed what Durkin called a “foul-smelling liquid chemical” through the front door of the Fannin clinic. No-one was injured, but the executive director proposed the construction of an outside gate to enhance security and prevent similar incidents in the future. Then in June the Pro-Life
Action Network (PLAN) scheduled a three day anti-abortion conference to take place in Houston from July 9 to 11. In response, Planned Parenthood staff trained one hundred volunteer escorts, contacted the Houston Police Department and FBI for security assistance, and obtained an injunction in federal court prohibiting PLAN members from trespassing on Planned Parenthood's grounds. As a result of careful planning, Durkin noted after, violence was avoided.  

Anti-abortion harassment continued throughout 1991, although it was not always directed against Planned Parenthood clinics and it was not always violent. On January 8 more unknown assailants smashed the windows of the Fannin clinic, and on the anniversary of Roe v. Wade (January 22), right-to-lifers formed a "Life Chain" around Houston's Medical Center. In April an anti-abortion group picketed the Reverend Catherine McKelvey's church to protest her taking a position on the Planned Parenthood Board's Clergy Committee. And in September, Treshman of Rescue America obtained a copy of Planned Parenthood's confidential donor list and sent an anti-abortion mailing to everyone on it. The mailing included a letter referring to the addressees as "past contributors to Planned Parenthood," a condemnation of Margaret Sanger, denunciations of sex education and abortion services, and pictures of late-term fetuses. The switchboard at Planned Parenthood lit up with calls from angry donors.

When he learned of it, Planned Parenthood's Executive Director sent Treshman an angry letter demanding that the donor information be returned to Planned Parenthood.

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20PPH, Minutes, March 30, April 12, April 26 (see also Executive Director's Report, April 26), and June 6, 1989. And, "A Brief on Public Policy: Corporate Supporters of Planned Parenthood." February 1989, a newsletter published by the Christian Action Council, Falls Church, Virginia.
21PPH, Minutes, February 28, June 27, and September 27, 1990. In September, a drunk driver drove through the front window of the Greenspoint clinic causing $7,000 in damage, but it was not clear that his intention was to damage a Planned Parenthood facility.
and that no further mailings be sent to the agency’s donors. Treshman replied, feigning surprise, calling Durkin's charges “unsubstantiated,” denying that he had ever possessed a donor list, and accusing Planned Parenthood’s staff and volunteers (many of whom were donors and had received the letter from Rescue America) of slander and libel. But, he added, “all of the facts mentioned in our letter are fully substantiated...as you are aware.”

At a special meeting of the Board’s executive committee, members speculated that the donor list had been lifted by a new volunteer, one who had been “planted” at Planned Parenthood for the specific purpose of obtaining confidential information and passing it on to Operation Rescue. At the time, PPH volunteers handled donor mailings, and the lists were distributed to them at Volunteer Committee meetings to be taken home and used to address envelopes. An Operation Rescue spy, the executive committee concluded, had infiltrated Planned Parenthood.

A closer investigation by Planned Parenthood’s deputy executive director, Judy Reiner, revealed that Operation Rescue members had gone through Planned Parenthood’s trash, found check stubs from donors, and used them to construct a donor list. After the incident, Planned Parenthood purchased a shredder and Durkin instituted a policy of shredding all documents that contained names or any potentially useful information.

The executive committee also discussed possible legal action against Treshman and his organization. There were several options, all of which had consequences that might be good or bad for Planned Parenthood. PPH could take out an ad in the

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23 Executive Director’s Report, January 10, 1991; PPH, Minutes, April 3, 1991; and Correspondence dated September 20 (Durkin to Treshman) and September 21, 1991 (Treshman to Durkin).
24 Ibid.
newspaper to denounce the incident and reassure donors, seek an injunction to have the list returned and preclude its use in the future by Treshman or Rescue America, seek criminal charges against Rescue America (for larceny, slander, conspiracy to shut Planned Parenthood down), but each of these measures involved risk and might result in negative publicity for Planned Parenthood, a loss in court, or a loss of donations and the privacy of the agency’s clientele. As Board members were aware, Treshman had considerable resources to fund a counter suit and would rather go to jail than reveal how he had gotten the list. Furthermore, a lawsuit might garnish publicity for Treshman and his group and would open the door for Treshman’s lawyers to enter Planned Parenthood’s offices and question staff regarding the security of its files. Worse, Board members speculated, if a Republican-appointed federal judge (especially one with ambition for a higher Federal position) was assigned the case, a court case could end badly for Planned Parenthood. Ultimately, the Board decided to do nothing because any measure Planned Parenthood might take would only give the Rescue America organization publicity and the opportunity to respond. It might also upset Planned Parenthood’s clients, who at that point were not aware of the incident.26

But even as things were heating up for Planned Parenthood with abortion restrictions on the judicial front and harassment in the local community, the Texas legislature was offering the agency support and hope. Just after the Webster decision in July 1989, the school district lawsuits, the invasion of the Fannin clinic and the destruction of its air conditioning system, and the newsletter to Planned Parenthood’s corporate donors by the Christian Action Council, Executive Director Durkin reassured

the Board that "our [Texas'] political climate is more favorable. State funding for
family planning has been increased and our services are viewed as a future cost saver.
The Webster decision has awakened a sleeping giant that has given even the most zealous
anti-abortion candidate reason to pause."

Durkin had reason for optimism. In June TDHR granted $7.1 million in
additional funds for family planning programs, which meant that for the first time
Planned Parenthood would not be without Title XX funding during the summer months.
Also in June, only a month after the Webster case had been heard in the Supreme Court,
the Texas Legislature declined to take action on several bills to restrict abortion access.
and governor Clements signed into law (HB 1777) a bill making it a crime to trespass at
medical facilities and significantly increasing the penalties for damaging medical
facilities. Pragmatic concerns with welfare costs, teenage pregnancy, and diseases like
AIDS apparently outweighed strictly moral concerns regarding abortion and teen sex.²⁷

In October 1989, also in response to the Webster decision, the Planned
Parenthood Federation established a separate corporation, the Planned Parenthood Action
Fund (PPAF), to act as its lobbying arm on behalf of all family planning providers. This
lobbying arm was to do electoral work such as issue-based candidate polls and phone
voter canvassing--all restricted activities for non-profit organizations such as Planned
Parenthood. The PPAF was to be governed by a nine-member board with Faye Wattleton
as president, and Dr. Ken Edelin of the Federation's National Medical Board as Chair.
As the PPFA's official lobbying arm, the PPAF would be able to do things that the

²⁷The actions of the Texas legislature and governor were significant, given the restrictive laws introduced
after Webster in other states. Louisiana, for example, had sought to reinstate a pre-Roe abortion statute, and
Florida had sought to impose a number of new abortion restrictions; Minnesota and Ohio followed suit.
Also, the US Department of Health and Human Services had imposed its "gag rule."
Federation could not, namely, make direct candidate endorsements and independent expenditures such as contributions. In this way, Federation leaders hoped, Planned Parenthood would now be heard in political forums, and with the same force as the anti-abortion lobbies.\textsuperscript{28}

The first order of business for the PPAF was to lobby for a new constitutional amendment to protect reproductive rights. The National board felt that, since it could no longer depend on the Supreme Court to protect those rights, and since the battle was already being waged in the separate state legislatures, the Federation must do something to ensure that the rights guaranteed in \textit{Roe} were not eviscerated and then overturned. The Federation’s declaration of intent read simply:

\begin{quote}
Now therefore be it resolved that the PPFA is committed to securing a constitutional amendment and to pursuing such other courses of action as may be appropriate and necessary to ensure for all Americans the fundamental right to exercise reproductive decisions.\textsuperscript{29}
\end{quote}

The statement also expressed its disapproval of the legislative and judicial systems that PPFA believed had failed women and forced abortion providers into the fray, noting that the Federation took this action because “...we can no longer rely on legislation and judicial decisions to give uniform protection to fundamental reproductive rights.”\textsuperscript{30}

Early in 1991 the Federation proposed a second measure, a “Fund for the Future” that would be developed over five years to provide seed money for new clinics. The idea of the fund was received with approval, since many newly formed affiliates had experienced financial crises and had found that there was no Federation source of assistance. In the past, these troubled affiliates had relied on the informal mechanism of

\footnotesize{\textsuperscript{28}Executive Director’s Report. October 25, 1989. \\
\textsuperscript{29}Ibid.}
asking other affiliates in the same geographic area for donations, but this system was not reliable since so many affiliates were financially strapped and the money donated was rarely enough. The new fund would, it was hoped, eliminate the problems of troubled clinics and allow for the establishment of new clinics in under served areas.31

The Federation’s proposal did not come cheap. The fund of $10 million was to be raised by contributions from affiliates and “joint fundraising” efforts with the Federation, something which had caused the Houston affiliate considerable consternation in the past. Houston’s contribution to the total would be $11,000 a year for five years, or a total of $55,000. And, while the South had the fewest family planning clinics of any region of the country and stood to benefit the most from such a fund, this was a considerable amount of money. Combined with joint fund-raising efforts that might lessen the number and dollar amount of donations made directly to Houston’s Planned Parenthood, the Fund for the Future might prove to be as costly to the local affiliate as beneficial. Nevertheless, Executive Director Durkin gave the idea his full support.32

A few weeks later, however, the Board of PPH expressed its dissatisfaction with the calculation of Fair Share, or annual dues to the Federation, and proposed a renewed effort to bring about change in Federation policy. Board members felt that there should be a minimum dues payment for smaller affiliates and a maximum for larger ones, an amount not to exceed, say, one percent of an affiliate’s operating budget. This was nothing new; Houston’s Board had been unhappy with the dues situation for years. But as its budget grew (to $6.5 million in 1991, for example), the amount of money passing to the Federation as Houston’s “fair share” was watched with growing resentment. Board

30Ibid.
members were further annoyed with the Federation’s voting structure, which allotted three votes to each affiliate, regardless of size. In order to change the way in which Fair Share dues were calculated, the majority of the smaller affiliates would have to vote themselves an increase in dues—an unlikely occurrence at best. Without the votes to bring about change, Houston had watched its dues increase dramatically. In 1991 PPH was assessed almost $86,000 in national dues. Needless to say, a 1 percent cap on dues would reduce its payment considerably.33

The Federation had funded some beneficial programs for affiliates, such as subsidized malpractice insurance, legal assistance, national advertising and lobbying services, and bulk-rate supply of contraceptives. But often the programs that affiliates considered crucial had to be initiated and funded by the affiliates themselves. One such program particularly involved the Houston affiliate: the CAPS Program, or Consortium of Abortion Providers. In 1989 a group of affiliate executive directors and volunteers initiated the program independently, obtained a grant from an anonymous foundation, and formed a steering committee which in 1990 selected Houston as the administrative center of the project. At the beginning of 1990 the steering committee designated funding for a CAPS Coordinator whose job it would be to work with affiliates throughout the country and to initiate abortion services wherever they were needed. Many clinics were not providing abortions because of the expense involved in refurbishing clinics and operatories and because they did not know how to initiate services. To meet this need, the CAPS Coordinator arrived with blueprints and funding.34

32 Ibid.
33 PPH, Minutes, May 15, 1991; and Cash Forecast, October 11, 1991. Dues were $74,357 in 1990, which represented a 9.3% increase over 1989; so the 17% increase to $86,000 in 1991 was even more alarming.
34 OHI, Barbara Calfee, CAPS Coordinator, January 30, 1995.
The program was an immediate success. By the end of 1991 the CAPS Project Coordinator, Barbara Calfee, had obtained board approval for abortion services at sixteen affiliates and assisted in the opening of eight new abortion facilities. Calfee’s first year’s effort brought the total percentage of affiliates providing abortions from 30 percent up to 36 percent—a statistic that belied earlier statements by the PPFA chairperson and Houston’s executive director that Planned Parenthood affiliates were “frightened of abortion.”

It was not that Houston’s Board was unwilling to contribute to the support of the national organization; it was simply that Houston needed the money it was sending to the Federation to expand its own facilities and services, and to pay its ever-increasing bills. As early as 1989 Durkin had reported that Planned Parenthood had “outgrown” its facility on Fannin and had reached “critical mass” in the number of patients it could serve. Three new clinics, one in Wharton, and two in Houston—the Stet tegast and Martin Luther King clinics—were opened during 1989-1990 to ease the patient load at Fannin, and the Southwest clinic was expanded, but the number of women who were referred to other Planned Parenthood or Harris County clinics, or simply went unserved, continued to grow. At the same time, security expenses including the $10,000 buzzer system installed in 1989 to secure the front doors of the Fannin clinic, and malpractice insurance, which had climbed to $80,000 per year by 1991, continued to drain the agency’s resources.

Nevertheless, Houston’s Board and executive director worked up the courage to vote for the expansion of the Fannin clinic in mid-1990, an undertaking estimated at $1.6-

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35PPH, Minutes, January 12 and September 1, 1990; and FY 1989/90 Summary, September 1990.
1.8 million. First, Planned Parenthood purchased the lot adjacent to the clinic on the corner of Fannin and Berry, at a cost of $118,000. Then it began a campaign to fill the New Building Fund it had created with donations. This was no small undertaking, considering that the total amount raised in 1990 from all campaign sources (foundations, book sales, special events, etc.) was $908,000. Undaunted, the Board and Executive Director set a fundraising goal of $3 million for 1991, and the development staff began the process of grant-writing, this time for big dollars.37

Once again, Planned Parenthood received the unstinting support of its most generous donors, Susan and Maurice McAshan. In June 1990 the McAshans donated $750,000 to the New Building Fund and promised additional matching funds of $150,000 for every $50,000 raised by Planned Parenthood. With one extraordinary gift, the dreamed-of new building became a reality.38

Not all of Planned Parenthood’s fundraising efforts bore fruit. Early in 1991 the Houston Endowment, one of the agency’s biggest supporters, rejected Planned Parenthood’s request for a $950,000 grant for the Building Fund, and Durkin announced that plans for the new building would have to be scaled down. But by April 1991, $1,438,640 had been raised for the new building and $181,000 more had been pledged. Board members, who had not given generously in the past, outdid themselves and contributed over $144,000. Advisory Board members were similarly generous, contributing over $92,000. Even beleaguered staff, whose pay raises had been frozen in

38PPH, Minutes, June 27, 1990. The $3 million figure broke down simply: almost $2 million for the new building, $500,000 for a building endowment, and $300,000 for medical equipment, furniture and “contingencies.” See also Executive Director’s Report, April 22, 1991.
1991, gave $5,000. Then in November, the McAshans made yet another
unanticipated contribution of $200,000 to the regular operating budget, and confidence
that the $3 million goal would somehow be reached was restored.39

Yet, by the end of 1991, all the blizzard of activity had colored Durkin worried.40 Despite the smashing success of the new building campaign, the successful opening of
three new clinics in the Houston area and the expansion of another, continued public
support, the support of the Texas Legislature and Department of Human Resources,
increased donations, increased awareness of AIDS and teen pregnancy—all of which
pointed to a greater acceptance of the need for family planning agencies in general and
Planned Parenthood in particular—Durkin was concerned. From his vantage point,
federal and state funding was always in doubt, and Planned Parenthood remained
dependent on the donations of individuals and foundations, a source that in his view
might dry up at any time. A disaster of even modest proportions could wipe out the
agency’s cash reserves. But beyond that, there remained a vocal core of people opposed
to all that Planned Parenthood stood for and who were determined to put the agency out
of business.

By the end of 1991 Durkin realized that Planned Parenthood was engaged in a
ceaseless struggle with those who were determined to end abortion and reimpose old
restrictions on women’s reproductive rights. The “clash of absolutes,” as Professor
Laurence Tribe of Harvard Law School had christened it, had begun.

39Executive Director’s Report, April 3, 1991; Campaign Progress Report, April 3, 1991; and PPH, Minutes.
Chapter 19

The Supreme Court and Abortion, 1992:
*Planned Parenthood of Southeastern Pennsylvania v. Casey*

In its 1992 decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a deeply divided Supreme Court reaffirmed the position it had taken almost two decades before in *Roe*, that a woman’s access to abortion prior to fetal viability is protected by the Constitution. In its opinion the Court granted states latitude to limit that access, but only to the extent that restrictions did not constitute an “undue burden,” or a substantial obstacle to access. At the same time, the Court rejected *Roe*’s trimester framework for balancing the interests of the woman and the state and upheld Pennsylvania’s informed consent, parental consent, and abortion counseling requirements. It redefined the central principle of *Roe* as guaranteeing women a “liberty interest” in rather than a “fundamental right” to abortion under the Fourteenth Amendment. And it replaced *Roe*’s analysis with an “undue burden” standard, declaring that state regulations which did not present a “substantial obstacle” to a woman’s right to choose were valid.

After the *Casey* decision the abortion controversy moved substantially back to the states. States could decide whether to fund abortions for poor women and whether to intervene in the decision of a minor to have an abortion; they could regulate the use of public facilities for abortion as well as require physicians to perform specified tests to determine viability before performing an abortion; and they could require a waiting period from the time a woman requested an abortion to when she might have the procedure. Finally, states could require parental consent for minors seeking abortions.¹ After the decision was

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¹*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992). In the view of pro-choice advocates, the erosion of abortion rights by the Supreme Court began in 1977 with its welfare funding decisions.
announced, Kate Michelman, president of the National Abortion Rights Action League (NARAL), declared: "George Bush’s Court has left Roe v. Wade an empty shell that is one Justice Thomas away from being destroyed," and the National Organization for Women’s president, Patricia Ireland stated flatly, "Roe is dead."

The makeup of the Court had indeed changed since Roe, as had its decisions regarding abortion rights, and its critics were correct in characterizing it as "conservative." Between 1973, when Roe v. Wade was decided, and July 1989, when the Webster decision was handed down, the former liberal 7-2 Supreme Court majority had become a 5-4 conservative majority. After Webster two more conservatives, Associate Justices David Souter and Clarence Thomas, had been added, creating, by 1992, a 7-2 conservative majority.²

In seeking to define for the public the meaning of Casey, each side put its own spin on the decision. Anti-abortion activists were outraged by the Court’s Casey decision. Operation Rescue’s founder, Randall Terry, attacked the decision and angrily denounced Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter for voting with Harry

Blackmun and John Paul Stevens to uphold Roe. "Three Reagan/Bush appointees stabbed the pro-life movement in the back," he stormed. The White House expressed President George Bush's agreement with the Casey decision, reaffirming his opposition to "abortion in all cases except rape or incest or where the life of the mother is at stake." And Pennsylvania's governor, Robert Casey, who had defended his state's abortion restrictions and asked the Supreme Court to overrule Roe, declared: "The decision, while not overturning Roe, clearly returns to the people the power to regulate abortion in reasonable ways, so as to protect maternal health and reduce the number of abortions in our country." In the war of words being waged through the media in the aftermath of the Casey decision, Norma McCorvey, the woman Americans had come to know as Jane Roe, was the most succinct. "Roe is still the law of the land for women of wealth," she stated boldly, but the Court has "issued teenagers, indigent women and rural women their own death warrant. They have become Jane Roe."3

Like the Dred Scott decision in 1857, in which an equally fragmented Supreme Court attempted to settle the question of slavery but ultimately fanned the flaming controversy surrounding it, Casey was a cafeteria of contention, for the Court was sharply divided in its holding. The five opinions handed down by the Justices totaled 184 pages, and were complex, revealing, as two political scientists have noted, "competing judicial philosophies and approaches to constitutional interpretation, precedent, and the Court's role in politics." Casey, Barbara Hinkson-Craig and David O'Brien argued, fragmented the Court in surprising ways. A 5-4 majority reaffirmed Roe's "central holding," and rejected laws that would "unduly burden" access to abortion or ban abortion early in pregnancy. Four

Justices—Chief Justice Rehnquist and Justices Scalia, Thomas, and White—voted expressly to overturn Roe. Only Justice Blackmun voted to strike all of Pennsylvania’s restrictions. Justice Stevens voted to uphold the informed consent and reporting requirements but to invalidate the provisions for abortion counseling, the twenty-four-hour waiting period, and spousal notification. Justices O’Connor, Kennedy, and Souter jointly decided to uphold Pennsylvania’s regulations except for the requirements for spousal notification and reporting and public disclosure of spousal notification. Legal scholars noted that the decision in Casey represented a deliberate political compromise within the Court that was destined neither to please activists on either side nor to lay the controversy to rest.4

Those who were familiar with the earlier (1989) decision, Webster v. Reproductive Health Services, were not surprised.5 In it the Court had upheld several provisions of a Missouri law restricting abortion. In the aftermath of that decision, pro-abortionists had voiced many of the same fatalistic predictions that followed Casey about the “death” of Roe, while anti-abortionists had criticized the decision for not going far enough to restrict abortion. In reality, it was less an outright killing than a chipping away at the edges of Roe.

The Webster decision effectively transferred authority over access to abortion services to state legislatures. After Webster, pro- and anti-abortion lobbying efforts shifted to

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state political campaigns. In the months following the decision almost forty bills aimed
at restricting access to abortion, or banning it outright, were introduced in state legislatures
around the country. Many anti-abortion lobbies called for special sessions of state
legislatures to deal with the abortion issue. Abortion quickly became a central topic in
several state elections, affecting the gubernatorial races in California, Virginia, and New
Jersey and the contest for mayor of New York City.

This enhanced state political environment was one of the hallmarks of what some
historians have labeled the “new” politics of abortion. The “old” politics of abortion, which
had been characterized by a liberal Supreme Court and an abortion-rights coalition that was
often on the defensive, began in 1973 with the Roe decision and ended in 1989 with Webster.
In 1989, in anticipation of that decision, abortion-rights activists changed their tactics to
become both more active and confrontational, while after Webster right-to-life groups
stepped up their activity. During 1991 and 1992 “fetal-rights” groups such as Operation
Rescue escalated the level of abortion clinic violence.\(^6\)

In many states the Webster decision created a political climate that favored the
enactment of state “right-to-life” agendas. A number of states enacted laws restricting
abortion. Then, in 1992, two developments—the Supreme Court’s Casey decision to uphold
the constitutionality of Roe and the election of William Jefferson Clinton, a pro-choice
Democrat, as President—changed the political landscape again. In Casey, the Court’s
narrow 5-4 vote to uphold Roe was an unexpected upset for the still-incumbent Bush
administration and fetal-rights forces who had seen the lawsuit as the first opportunity for the


\(^{6}\) See Marilyn A. Yale, “Abortion, Elections, and the Media,” and Susan E. Howell and Robert T. Sims,
“Abortion Attitudes and the Louisiana Governor’s Election,” in Malcolm Goggin, ed., Understanding the New
Politics of Abortion, 134-153 and 154-162, respectively.
newly constituted Court to overturn it. After the *Casey* decision and Clinton’s
inauguration pro-life and pro-choice forces were at a legal stalemate.\(^7\)

The *Casey* decision surprised pro-choice forces as well. They had been preparing for
the overturn of *Roe* since the 1989 *Webster* decision and the 1991 decision in *Rust v.
Sullivan*, which upheld the Bush Administration’s so-called “gag rule.”\(^8\) As the issues raised
in *Rust* were wending their way through the courts, and state legislatures began reacting to
the Court’s apparent signal in *Webster* that five justices were now prepared to scrap *Roe*, two
of the justices who had dissented in *Webster*, Brennan and Marshall, retired, to be replaced
by Bush appointees Souter and Thomas. Souter’s vote in *Rust* made him appear to be the
sixth anti-abortion vote on the Court. Thomas, not a likely supporter of *Roe*, had claimed
during his 1991 Senate confirmation hearings that he had never discussed *Roe v. Wade*. If
Souter, O’Connor, and Thomas joined Rehnquist, White, Scalia, and Kennedy, the majority
in *Webster* who had argued for abandoning “the key elements of the *Roe* framework,” anti-
abortion conservatives might gain a 7-2 majority—more than enough votes to abandon *Roe v.
Wade*.

The territory of Guam became the first legislature to respond to the apparent *Webster*
invitation to contravene *Roe*. In March 1990 Guam’s governor signed into law a prohibition

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\(^7\) Two *post-Casey* decisions underscored the point that the Court would probably refuse to overturn *Roe*. The
abortion; the lower court held that the statute was unconstitutional because it clashed directly with *Roe*, and the
Supreme Court let the decision stand. In March 1993 the Supreme Court ratified the implicit message of the
*Guam* case by declining to hear the appeal of the invalidation of Louisiana’s abortion prohibition (there were no
dissents on the Court to this refusal), in *Edwards v. Sejourner*, 61 U.S.L. W. 3615 (1993). For a discussion of
these cases, see Leslie Friedman Goldstein, *Contemporary Cases in Women’s Rights* (Madison: The University

\(^8\) 111 S.Ct. 1759 (1991). *Rust* challenged the US Department of Health and Human Services’ rule, imposed in
1988 on all medical organizations receiving federal funding under Title X of the Public Health Service Act of
1970. Under the “gag rule,” doctors and health care workers were prohibited from in any way counseling or
referring patients with regard to abortion. The rule was challenged by the Planned Parenthood Federation in
1989, and found unconstitutional in several lower courts; but the Supreme Court upheld it as constitutional in
on all abortion, unless two doctors confirmed that the pregnancy threatened a woman’s life or posed grave risk to her health. In January 1991 Utah banned all abortions except when the circumstances involved grave danger to the woman’s physical health, grave defect in the fetus, or rape or incest (for rape or incest the abortion had to be performed during the first twenty weeks of pregnancy). In June 1991 Louisiana banned all abortions except those needed to save a woman’s life or to end a pregnancy that was the product of a rape reported to the police. The time limit for rape or incest victims to procure the abortion was the first thirteen weeks of pregnancy. Federal district judges declared each of these laws void on the grounds that Roe v. Wade had not yet been formally overruled and was still the law of the land. In each instance the several sponsoring governments appealed the decision.9 But before any appeals reached the Supreme Court it handed down its 1992 Casey decision.

The Casey decision did not require a reconsideration of Roe. The statute in question contained a variety of abortion restrictions but no sweeping prohibitions. But as in the Rust case, the Solicitor General specifically requested that Roe be overruled and the Justices decided to respond to that request.

At issue in Casey was a Pennsylvania statute that required women to undergo counseling, give their informed consent (sign a form that would be turned over by abortion providers to state authorities and open to the public), and then wait twenty-four hours before obtaining an abortion. The law also required spousal and parental notification. In 1989, following the Webster decision, Pennsylvania had amended its abortion law to include more restrictions on access to abortion. Its new restrictions were not as severe as those passed by

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9See fn. 7, supra.
Utah, Louisiana, or the Territory of Guam, but they aimed at forcing the Court to uphold more restrictive conditions than those set in *Webster* and even to reverse *Roe*.\(^{10}\)

Immediately several abortion clinics joined Planned Parenthood of Southeastern Pennsylvania and its physician in challenging the constitutionality of the requirements under the due process clause of the Fourteenth Amendment. Federal district judge Daniel Huyett, a Republican and Nixon appointee, struck down the informed consent, parental consent, spousal notification, and reporting requirements, along with the provision for public disclosure of the doctors' reports, but upheld the other regulations. Both Planned Parenthood and the governor of Pennsylvania, Robert Casey, appealed to the federal Court of Appeals for the Third Circuit.\(^{11}\)

A three-judge panel reversed most of Huyett's ruling. Judges Collins Seitz and Walter K. Stapleton upheld four of the restrictions: those requiring that the woman (1) be informed by the doctor about fetal development and abortion procedures; (2) give consent, or if a minor, obtain parental consent; (3) wait at least twenty-four hours after giving consent

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\(^{10}\)Specifically, the five principal restrictions enacted by Pennsylvania provided for the following: (1) abortion counseling and a woman's informed consent, (2) a twenty-four hour waiting period after giving informed consent, (3) parental consent for unmarried women under the age of eighteen (or a judge) before having an abortion, (4) spousal notification (even when the husband was not the father), and (5) reporting and public disclosure requirements, requiring doctors to report to state authorities on each abortion performed and to supply copies of the woman's informed consent—to be open to the public. In fact, several of the restrictions in Pennsylvania's law were almost identical to those struck down in an earlier Pennsylvania case, *Thornburgh v. American College of Obstetricians and Gynecologists* 476 U.S. 747 (1986). In *Thornburgh*, the Court struck down state laws requiring that a woman seeking an abortion be given detailed descriptions of fetal development, informed of particular physical and psychological risks associated with abortion, and reminded of the availability of assistance from the father or from social service agencies should she decide to give birth. The Court had also held that government cannot impose a fixed waiting period on a consenting woman who seeks an abortion, in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). *Thornburgh* had also split the Court 5-4, but the Court's composition had changed significantly since then (President Reagan had named Rehnquist to Chief Justice and named Scalia and Kennedy. They were followed by Bush's appointments of Souter and Thomas). By the time oral arguments were heard in *Casey*, the only member remaining on the bench who had voted with the majority in *Roe* was its author, Justice Blackmun. See Laurence Tribe, *Abortion: The Clash of Absolutes* (New York: W.W. Norton & Co., 1990), 14-16, 20. See also Garrow, *Liberty and Sexuality*, 689-704.

before obtaining an abortion; and (4) the provisions imposing reporting requirements on
doctors and clinics performing abortions. These restrictions, the judges concluded, did not
constitute an “undue burden” to a woman seeking an abortion.12

Judge Stapleton also emphasized that Webster had “substantially undercut” support
for a woman’s “fundamental right” to obtain an abortion. In Webster, he noted, only four
Justices had recognized a woman’s fundamental right to abortion, while four others had
voted to uphold restrictions that passed the rational basis test. Justice O’Connor, who had the
controlling vote, had used her undue burden analysis, invalidating some provisions of the
Missouri law and validating others. Stapleton therefore felt justified in upholding those parts
of Pennsylvania’s law that he believed neither constituted an undue burden nor failed the
rational-basis test.

At the same time, Seitz and Stapleton found that the spousal notification provision
unduly burdened a woman by exposing her to potential spousal abuse, violence, and
economic duress at the hands of a husband. The third judge on the panel, Samuel A. Alito, a
Bush appointee, strongly disagreed. Spousal notification was neither an undue burden nor
unreasonable, he argued, and he observed, “We have no authority to overrule that legislative
judgment even if we deem it unwise or worse.”13 Planned Parenthood appealed again, this
time to the Supreme Court. Subsequently, Pennsylvania’s attorney general, Ernest Preate,

12The “undue burden” test was formulated by Justice O’Connor in Akron v. Ohio, 110 S.Ct. 2972 (1990). In
that case, the Court upheld Ohio’s abortion notification statute because it did not put an undue burden on
women seeking abortions. Using the undue burden standard, strict scrutiny applies only when a law unduly
burdens a woman; otherwise, restrictions merely need to meet the rational basis test. After O’Connor had used
the undue burden analysis in Akron and Webster, her test became the standard.
13Planned Parenthood of Southeastern Pennsylvania v. Casey, 947 F.2d 682, at 726 (J. Alito, concurring and
dissenting opinions).
appealed, asking the Court to "end the current uncertainty in the law of abortion" and to overrule Roe. The Solicitor General presented an amicus brief on behalf of Pennsylvania.\textsuperscript{14}

Both Preate and Kenneth Starr, the Bush Administration's Solicitor General, encouraged the Court in their briefs to reject the view that women have a "fundamental right" to abortion and to apply the "strict scrutiny" test when reviewing restrictions on abortion. "Roe v. Wade was wrongly decided," Starr wrote, "and should be overruled." Instead, they asked the Court to apply the less rigorous "rational basis" test that the majority of the Court had endorsed in Webster. Based upon that standard, they argued, all of Pennsylvania's restrictions were constitutional.\textsuperscript{15}

For Planned Parenthood's lead attorney, Kathryn Kolbert, the major goal was to convince the Court of the importance of stare decisis. Amicus briefs submitted on behalf of Planned Parenthood contained many of the same medical, historical, socioeconomic, and constitutional arguments and counter arguments made in Webster, but most touched on stare decisis.\textsuperscript{16}

The Court heard oral arguments in Casey on April 23, 1992. Planned Parenthood's attorney argued that if Pennsylvania's law were upheld, Roe would be essentially overturned, regardless of what the Court said. She hardly addressed the provisions of Pennsylvania's

\textsuperscript{14}Hinkson-Craig and O'Brien, Abortion and American Politics, 329-330. Both sides were supported by a number of organizations and individuals who joined in amici briefs. Pennsylvania was supported in briefs from University Faculty for Life, Feminists for Life of America, Catholics United for Life, the US Catholic Conference, the National Legal Foundation, the Knights of Columbus, the National Right to Life, and the State of Utah, among others. Planned Parenthood's allies included 250 American Historians, the American Psychological Association, the Alan Guttmacher Institute (PPFA's research institute), the NAACP Legal Defense and Education Fund, the City of New York, fourteen states and the District of Columbia.

\textsuperscript{15}Ibid., 333. Kenneth Starr's quote can be found in Brief for the United States as Amicus Curiae Supporting Respondents in Planned Parenthood of Southeastern Pennsylvania v. Casey (October term, 1991), 8.

\textsuperscript{16}For an examination of the briefs see Rosemary Erickson, "Social Science and the Law: How the Supreme Court has Used Social Science in Deciding the Important Women's Issues of Abortion and Sex Discrimination (unpublished dissertation, The American University, 1994), 167-179. Erickson concludes, however, that although the use of social science by the Court has increased over time, the Court gives far more weight to prior cases in coming to its decisions.
law, stressing instead the importance of the Court’s standard of review and women’s expectations about their constitutional right to choose. When Justice O’Connor asked Kolbert whether she planned to address the specifics of Pennsylvania’s law Kolbert repeated her argument against the use of the rational basis test with regard to abortion. And when Justice Kennedy suggested that if the Court sustained Pennsylvania’s law, its decision would not necessarily undercut all of the holding of Roe, Kolbert replied: “If this court were to change the standard of strict scrutiny, which has been the central core of that holding,...that will undercut the holdings of this court and effectively overrule Roe v. Wade.”

Preate defended Pennsylvania’s law solely on the basis of Justice O’Connor’s “undue burden” test. When O’Connor expressed doubt that the spousal notification requirement in Pennsylvania’s law would pass muster under the undue burden standard, Preate simply declared, “there is no undue burden in our statute, anywhere in our statute.”

Solicitor General Starr presented the Bush Administration’s case in support of Pennsylvania’s law. He endured tough questions from the Justices about whether a fetus is a person within the meaning of the Fourteenth Amendment. When Justices Stevers and O’Connor pressed Starr for an answer, he replied, “We do not have a position on that question.” With some prompting from Justice Scalia, Starr managed to restate his argument that states have the right to take a position on the question of whether fetuses are persons when the Constitution is silent on the issue. And when Starr wandered from this argument, Scalia cut him off to make the point himself: “All Roe says is that the Constitution does not

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17 Abortion and American Politics, 334-335.
18 Ibid., 335.
protect the fetus under the Fourteenth Amendment. It does not say that a state may not choose to do so.”

Justice Stevens then asked Starr whether the use of the rational basis test would allow states to prohibit abortions entirely. Starr hedged. Stevens said sarcastically: “Rational basis under analysis: there’s an interest in preserving fetal life at all times during pregnancy. It’s rational, under your view. Ergo, it follows that a total prohibition, protected by criminal penalties, would be rational, it would meet your standard.”

Four months later, a fragmented Court announced its holding. O’Connor, Kennedy, and Souter filed the joint opinion for the Court; the remaining six justices filed opinions in part concurring in and dissenting from the ruling. The central point of the sixty-page “majority” opinion was this:

After considering the fundamental constitutional questions resolved by Roe, principles of institutional integrity, and the rule of stare decisis, we are led to conclude this: the essential holding of Roe v. Wade should be retained and once again reaffirmed.

But the majority then went on to reject or significantly redefine much of what Roe stood for.

...Roe’s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman’s life or health. An third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child. These principles do not contradict one another; and we adhere to each.

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19Ibid., 335-336.  
20Ibid., 336-337.  
21Goldstein, Contemporary Cases in Women’s Rights, 99 (reprint of the opinions in the Casey decision).  
22Ibid., 100.
Besides rejecting *Roe*’s trimester framework for balancing the interests of the woman and the state, the majority overturned its ruling in *Akron v. Ohio*, which had previously struck down informed consent, parental consent, and abortion counseling requirements. Moreover, the Justices no longer recognized *Roe* as guaranteeing women a “fundamental right” of abortion. Instead, the majority redefined the central principle of *Roe* as guaranteeing women a “liberty interest” under the Fourteenth Amendment, “to choose to terminate or continue her pregnancy before viability.” Finally, it replaced *Roe*’s analysis with an “undue burden” standard, saying: “What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which...express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the women’s exercise of the right to choose. [They are] valid if they do not constitute an undue burden.”

O’Connor, Kennedy, and Souter redrew the line at viability, the point in a woman’s pregnancy at which the fetus can survive outside of the womb. The Court recognized that medical technology had changed the point in pregnancy at which a fetus might be viable. “The woman’s right terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce...”

Justices Stevens and Blackmun agreed with part of the majority’s opinion and disagreed with some. They underscored the fact that only five justices had recognized a woman’s constitutional right to choose abortion and emphasized the precariousness of what remained of *Roe*. The balance in *Casey* clearly shifted, they stated, to allowing states to impose more conditions on the availability of abortions, particularly after the first trimester.

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But it had not tipped far enough for Justices Rehnquist, Scalia, Thomas, and White, who attacked the majority's opinion as "standardless" and spoke scathingly of its treatment of stare decisis. Their bitterness at the refusal to overturn Roe was unmistakable:

Roe v. Wade stands as a sort of judicial Potemkin Village [Rehnquist asserted], which may be pointed out to passers by as a monument to the importance of adhering to precedent. But behind the facade, an entirely new method of analysis, without any roots in constitutional law, is imported to decide the constitutionality of state laws regulating abortion. Neither stare decisis nor "legitimacy" are truly served by such an effort.\(^{24}\)

For the moment, the Court had achieved a compromise. A bare majority was unwilling to uphold unduly restrictive regulations such as spousal notification and bans on abortion prior to viability. At the same time, Casey invited more state regulation of abortion, particularly with respect to counseling, informed and parental consent, and waiting periods for women seeking abortions. It would be left to the lower federal courts to define what constituted an "undue burden" to obtaining an abortion. Sarah Weddington, the attorney who argued Roe before the Supreme Court in 1973, characterized the decision in Casey as "patronizing" to women. "The only surgery that you have to, by law, wait twenty-four hours for," she observed, "is abortion—as if women don't think about it before they get to the clinic."\(^{25}\)

Probably the Casey decision combined with Clinton's election impeded the right-to-life agenda, especially the efforts to reverse Roe. At the same time, these events acted as

\(^{24}\)Ibid., 144 (Chief Justice Rehnquist, dissenting opinion).
\(^{25}\)Craig and O'Brien, Abortion and American Politics, 326. The decision reached in Casey mirrored opinion polls. Following the Webster decision in 1989, support for legalized abortion had grown. But ambivalence existed as well: apparently the vast majority of Americans supported legalized abortion while also favoring restrictions. The day after Casey was announced, a USA Today/CNN/Gallup poll reported that eighty-two percent of the public supported legalized abortion with some or no restrictions; thirty-four percent supported unrestricted access to abortion; forty-eight percent favored some restrictions; and thirteen percent though
catalysts to mobilize both pro- and anti-abortion forces, as *Roe* had served as the stimulus for the right-to-life movement in the 1970s. By 1992, the increasing threat from anti-abortion conservatives and from violent anti-abortionists helped create a pro-choice movement that was stronger and better organized than ever before. On the one hand pro-abortionists faced a moderately conservative public mood, a conservative Supreme Court and national and state legislatures, tougher state abortion laws, and a cadre of committed activists who seemed bent on changing abortion policy through violence. On the other hand abortion rights activists had seen their cause advanced by the Clinton election, *Casey*s reaffirmation of *Roe*, and the appointment of Janet Reno as Attorney General. Partly in response to escalating clinic violence, Reno cited in her confirmation hearings her intention to protect vigorously the right of access to abortion clinics. But the compromise the Court had reached augured change and a renewed wave of litigation. Both pro- and anti-abortion activists knew that the Justices’ future decisions with regard to abortion would rest upon the composition of the Court. Depending on political climate, the strength of the contending forces, and the legislative and legal challenges posed, the decision in *Casey* would affect each state differently. “Really, what this all means is full employment for reproductive lawyers,” said Kathryn Kolbert after the decision in *Casey* was announced. In hindsight, her comment was astute. Much of what states would do in the future would be directed at defining the limits of the “undue burden” principle, as states enacted abortion restrictions that picked away at the margins of the right guaranteed in *Roe* rather than launching a frontal assault.

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Chapter 20

From Threatening to Clearing Skies: Planned Parenthood 1992-1995

Scene: America 1992, Under Threatening Skies. Battered by the Reagan/Bush administrations’ gag rule, repeated bad rulings from the US Supreme Court, escalating clinic harassment, repressive ballot initiatives and the gloomy possibility of four more years under an anti-choice administration, Planned Parenthood faces increasingly menacing challenges. The only way to prevail over these challenges is to win the long-term, high-stakes political struggle over reproductive health care services and rights for all Americans.

Scene: America 2000, Under clearing skies. Inspired by continuing favorable opinion polls, public outrage at clinic protest tactics, key 1992 and 1996 victories by pro-choice candidates and the unswerving faith of the people we serve, Planned Parenthood enters the 21st Century stronger, more powerful and more effective than ever before.¹

In 1992 birth controllers watched warily as conservative administrations, conservative legislatures, and an increasingly vocal anti-abortion, anti-Planned Parenthood minority attempted to chip away at women’s reproductive rights and to narrow women’s reproductive choices. The conservative backlash of the eighties had left Planned Parenthood’s leadership and the staffs of the nation’s birth control clinics uncertain about the future of Planned Parenthood in particular and reproductive rights in general. And, as the nineties began, with no change in sight, Planned Parenthood’s leadership felt that the organization was doomed to a marginal existence beneath threatening political skies.

Pro-choice activists had reason to despair. In 1990, Americans had fewer birth control options than did people in many European countries and even some developing

countries. Decades after the start of the birth control revolution, the only reversible method for men remained the condom--making it difficult for men to share responsibility for contraception. During the Reagan and Bush administrations, government support and funding for contraceptive research, one of the cornerstone provisions of Title X (federally-funded family planning), diminished. The prohibitive costs of researching and developing new contraceptives, combined with the fear of defending against expensive lawsuits even for methods that had been proven safe in clinical trials, led private industry to withdraw from the field. Finally, the vocal opposition of the anti-abortion movement contributed to a climate discouraging to the introduction of new methods.²

By 1995 much of this would change. Taking the offensive, the national Planned Parenthood Federation campaigned for new birth control methods, to make contraceptive research and development a national priority, to encourage public funding and incentives for the development of new technology, and to expedite the process by which new methods were introduced to the public. As the opponents of Planned Parenthood became more vocal and violent. Planned Parenthood committed itself with renewed energy to eliminating barriers to reproductive choice. Its lobbying arm, the Planned Parenthood Action Fund, urged Congress to translate public support for safe, legal abortion and unrestricted access to family planning services into law and to halt anti-abortion groups' efforts to undercut freedom of choice.³

On both the legislative and judicial fronts, it seemed an uphill battle. By 1992, when the Casey decision was handed down, the Supreme Court had acquired a conservative

³Ibid., 92-93. Americans were moderate in 1992, preferring access to contraceptive services to the two extremes of unrestricted access to abortion (abortion on demand) and making abortion illegal in all circumstances. See Malcolm Goggin, editor, Understanding the New Politics of Abortion (Newbury Park, California: Sage, 1993), 2-6.
majority that no longer held to the primary tenets of Roe. After Casey, which narrowly upheld a woman’s right to abortion but allowed for a number of state restrictions on that right, pro-abortion activists watched nervously as states began to enact legislation like Pennsylvania’s, restricting access to abortion. Then in 1992, the election of a pro-choice Democrat, William Jefferson Clinton, as President, brought new hope to abortion supporters. Legally, pro-life and pro-choice forces were at a stalemate, but the election of Clinton changed the political landscape in favor of future pro-abortion appointments to the High Court.4

In its Casey decision, the Court had achieved what both pro- and anti-abortion activists hoped would be a temporary compromise. A bare majority had been unwilling to uphold unduly restrictive regulations such as spousal notification and bans on abortion prior to viability. At the same time, Casey invited more state regulation of abortion, particularly with respect to counseling, informed and parental consent, and waiting periods for women seeking abortions. It was left to the lower federal courts to untangle what constituted an “undue burden” to obtaining an abortion.5

Two days after the Court issued its decision in Casey, a twenty-nine-year-old pregnant woman, Leona Benten, was arrested at John F. Kennedy International Airport for bringing RU-486, commonly known as the “abortion pill,” into the United States. Benten

4In Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992), the Supreme Court rejected Roe’s trimester framework for balancing the interests of the woman and the state and upheld Pennsylvania’s informed consent, parental consent, and abortion counseling requirements. Furthermore, the Court no longer recognized Roe as guaranteeing women a “fundamental right” of abortion. Instead, the majority redefined the central principle of Roe as guaranteeing women a “liberty interest” under the Fourteenth Amendment, “to choose to terminate or continue her pregnancy before viability.” Finally, it replaced Roe’s analysis with an “undue burden” standard, saying that state regulations which did not present a “substantial obstacle” to a woman’s right to choose were valid. For a detailed discussion of the changes on the Supreme Court during the Reagan, Bush, and Clinton administrations, see David Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade (New York: Macmillan, 1994), 600-704.
had been recruited by officers of the San Francisco Medical Society, who had notified the U.S. Customs Service that she was bringing the French-made abortion pills into the country. Steve Heilig, the medical society’s director, later explained that Benten had been selected because she fit the clinical profile for the drug: she was in the early stages of pregnancy, a non-smoker, and was not hypertensive. She was also brave, a prerequisite for the woman the society intended to make into the next Jane Roe.6

The plan for the legal challenge originated with Lawrence Lader, president of the Abortion Rights Mobilization group in New York. Lader had been in the forefront of the pro-choice struggle since the 1960s, when he successfully challenged state restrictions on the use of contraceptives. He and other doctors had grown frustrated in their efforts to test RU-486 and to win approval for its use from the U.S. Food and Drug Administration (FDA). The manufacturer, Roussel Uclaf, declined to test and market the pill in the U.S. because of the threat of boycotts by anti-abortion groups. The reason for the controversy was that RU-486 was not a contraceptive, like the newly released Norplant (an implant that lasts up to five years), but an abortifacient that caused miscarriage. It was designed to be taken as soon as a pregnancy was confirmed, followed forty-eight hours later by another pill containing the hormone prostaglandin, which enhanced the pill’s effect and reduced the risk of hemorrhaging. At the time Benten brought it through U.S. Customs, RU-486 was already available by prescription in England, France, and Sweden.7

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6Craig and O’Brien, Abortion and American Politics, 356-357.
Many on the pro-choice side looked to developments like RU-486 to provide a solution to the abortion controversy, but this seemed unlikely. The use of the pill was limited to the first nine weeks of pregnancy, required monitoring by doctors, and was not recommended for women over thirty-five or those who smoked. It was also not 100 percent effective. Still, anti-abortion leaders strongly opposed it because they believed it made procuring an abortion easier than ever—a contention that pro-abortion physicians disputed. “A lot of people think you can keep a bottle of [RU-486] in your cabinet at home,” emphasized Lisa Kaeser of the PPFA’s Alan Guttmacher Institute, “and that is not the case.”

The FDA, however, deterred Roussel Uclaf from introducing RU-486 into the United States by changing its policy on the import of unapproved drugs. The agency, which has the authority to approve the use of new drugs, foods, and cosmetics after reviewing tests for reliability and safety, may also prevent the import of unapproved drugs. The controversy over RU-486 began in 1989 when the Bush administration’s FDA modified its policy on the import of unapproved drugs to exclude RU-486. The new guidelines allowed certain unapproved drugs, such as those for the treatment of AIDS and cancer, to be brought into the country for “personal use,” but after protests from anti-abortion groups, the FDA announced that RU-486 was not among the eligible drugs. Lader and the San Francisco Medical Society then went about creating their test case to challenge the policy.

In U.S. District Court, Judge Charles Sifton held that the FDA had illegally seized Benten’s pills (which were for her personal use) and ordered the pills returned to Benten. The Bush administration immediately appealed Sifton’s order, and a three-judge panel for the Court of Appeals for the Second Circuit stayed the order. Benten, Lader, and the San

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Francisco Medical Society applied for a stay from the Supreme Court; but, with Justices Blackmun and Stevens dissenting, the Rehnquist Court denied a stay and declined to review the case.\(^9\)

Benten’s arrest within days of the Supreme Court’s ruling in *Casey* was coincidental, but it was a sign that the struggle over abortion would take more unexpected twists and turns. More important was the 1992 election of Clinton as president. On January 20, 1993, Clinton moved into the White House and made good on his campaign promises to rescind the “gag rule,” lift the ban on funding for fetal tissue research, ask the FDA to reconsider approving the importation of RU-486, and lift the ban on abortion services in military hospitals. At the same time, Democratic Congressmen made efforts to pass the Freedom of Choice Act and promised to promote bills that would prevent fetal-rights groups like Operation Rescue from shutting down abortion clinics.\(^11\)

The *Casey* decision and the election of Clinton thwarted the right-to-life agenda, especially in its efforts to reverse *Roe*. At the same time, these events acted as catalysts to mobilize pro- and anti-abortion forces, just as *Roe* had served as the stimulus for the right-to-life movement in the 1970s. By 1992 the increasing threat from anti-abortion conservatives and from violent anti-abortionists had helped create a pro-choice movement that was stronger and more organized than ever before. And, while on the one hand pro-abortionists faced a moderately conservative public mood, a conservative Supreme Court and national and state legislatures, tougher state abortion laws, and a cadre of committed activists who seemed bent

\(^10\)Ibid.
\(^11\)Goggin, *Understanding the New Politics of Abortion*, 288-289. The Freedom of Choice Act was intended to be a national abortion law that guaranteed the protection of a woman’s right to choose abortion in the event that the Supreme Court overturned *Roe v. Wade*. The pro-abortion case was argued by Professor Laurence Tribe of Harvard Law School (see *Hearing of the House Judiciary Subcommittee* on the Freedom of Choice Act (HR25).
on changing abortion policy through violence, on the other hand, they had seen their
cause advanced by the Clinton victory, *Casey's* reaffirmation of *Roe*, and the appointment of
Janet Reno as attorney general. Partly in response to escalating clinic violence, Reno cited in
her confirmation hearings her intention to protect vigorously the right of access to abortion
clinics.12

**Planned Parenthood of Houston, 1992-1995**

As on the national level, the local political and judicial tides were turning for
Houston's Planned Parenthood. After the *Webster* decision in 1989, in which the Supreme
Court had upheld various provisions of a Missouri law restricting abortion, and again after
the Court's 1992 decision in *Casey*, Planned Parenthood's public support and donor base had
increased substantially. Despite the introduction of anti-abortion bills in the Texas
legislature each year, no restrictive laws were passed. And each fiscal year, federal and state
grants for family planning services and Medicaid, administered by the Texas Department of
Human Services (TDHS), continued unabated.

As Planned Parenthood's Board and staff became more aggressive in fundraising,
lobbying, and in countering anti-abortion efforts to harass and intimidate the agency's staff
and clientele, they found support in almost every quarter. There was a small, vocal minority
of those who were unalterably opposed to Planned Parenthood, but for the most part Texans
were pro-choice. In this climate of public support, it was difficult for anti-abortionists to
drum up the political support necessary to enact anti-abortion laws in the state legislature.

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March 5, 1992). The initiative lost steam in the summer of 1992 and was never brought before the 102nd
Congress.

More importantly, as violence escalated against abortion clinics and clinical staff by pro-
life extremists, so did public disapproval of the anti-abortion movement and its methods.

Planned Parenthood’s Board and executive director, Peter Durkin continued to vote to
expand clinical services to meet client needs. In 1991 the Board voted to renovate the main
clinic at Fannin—at a cost of $1.8 million—and by June 1993 the remodeled building had
become a reality. Also in September 1991 the Board elected to hire a full-time medical
director, Dr. Jerry Edwards, and to expand abortion services at the Fannin clinic. Early in
1992, despite large deficits in Title XX funding (due to “lapsed” or uncollectable funds), the
Board voted to open two new birth control clinics in the Houston area: one at FM1960 in
north Houston, and one in the Bear Creek (northwest Houston) area.\(^{13}\)

As Planned Parenthood secured its place in the community, the opposition became
more vocal. In January 1992 Randall Terry, leader of the militant anti-abortion group
Operation Rescue, declared his intention “to close every abortion clinic in Houston during
the Republican [National] Convention,” which was scheduled to be held in Houston during
the week of August 17-21. Terry and his group had been staging “invasions” of Houston
clinics since the mid-1980s and had been arrested for trespassing on Planned Parenthood’s
property on more than one occasion. The group’s tactic was to surround an abortion clinic
and “counsel” or prevent clients from entering. During the Republican Convention, the
group planned to shut down abortion clinic operations and “rescue” women from abortions
by blocking their access to the clinic’s walkways and doors. Planned Parenthood’s Fannin

\(^{13}\)PPH, Minutes, January 15, April 24, and June 24, 1995. The financial situation in January 1992 was so bad
(because of $868,000 in lapsed Title XX funds) that, without a $190,000 cash donation from Maurice and Susan
McAchan, Durkin would have been forced to dip into the agency’s reserve fund to meet the payroll. Similarly,
the FM1960 clinic would not have been opened without funding from the Houston Women’s Foundation and
the Northwoods Presbyterian Church.
clinic, which housed the Southeast Texas affiliate’s only abortion facility, was the group’s main target.\textsuperscript{14}

After Terry declared his group’s intentions, the Board and staff of Planned Parenthood began planning for what became known as “clinic defense”: security preparations and defensive strategies to meet the anti-abortion threat, ensure access to clinics, and protect clients and staff. Again, preparations were made to train volunteer escorts and Security Teams, to make contact with local law enforcement officials, and to alert the media.\textsuperscript{15}

During the January Board meeting, Neal Manne, an attorney with the Houston law firm of Susman Godfrey, offered Planned Parenthood his services to provide assistance in handling Operation Rescue and the “post-Roe litigation” the agency was anticipating after \textit{Planned Parenthood v. Casey}. No one in January 1992 supposed that the Supreme Court would reaffirm \textit{Roe v. Wade}; on the contrary, many expected the Court to overturn \textit{Roe} and return the decision whether to make abortion illegal back to the states. In that event, Planned Parenthood planned to present a test case in a Texas court, either by getting an abortion provider arrested (through the criminal process), or by asking the court to look at the Texas constitution to determine if a right to privacy was in effect (through the civil process).\textsuperscript{16}

Manne offered his services to Planned Parenthood on a \textit{pro bono} basis, and the offer was accepted. Manne also offered to coordinate a group of lawyers and legal assistants from the community to assist him in Planned Parenthood’s legal defense. Altogether, thirty-five

\textsuperscript{14}PPH, Minutes, January 24, 1992. Operation Rescue was known for its hard-line techniques such as members chaining themselves together in front of clinics and posing as pregnant clients to disrupt activities inside clinics. See Laura Keeton’s article, “Area abortion-rights activists work out clinic defense tactics,” Houston \textit{Chronicle}, July 27, 1992, 9A and 13A.

\textsuperscript{15}PPH, Minutes, January 24, 1992.

\textsuperscript{16}ibid., 4. When \textit{Roe} became law it replaced the Texas statute which criminalized abortion; however, that law was never repealed. No one knew whether it would automatically be in force if \textit{Roe} were overturned, or if the Texas legislature would enact new legislation outlawing abortion.
attorneys offered their services *pro bono* to Planned Parenthood to assist the agency in initiating post- *Roe* litigation and defending itself against anti-abortion harassment.  

Before the Board voted, Durkin made it clear to Board members that there could be no turning back with regard to abortion services. Planned Parenthood of Houston had been one of the first affiliates to provide abortion services after *Roe v. Wade* in 1973, he reminded them, and it must now, “in the face of the deterioration of *Roe*, be the first to take action” to preserve that right. “[The year] 1973 was our finest hour,” he emphasized, “and, with cooperation and perseverance, we can again be first to lead the way at this historic time.”  

Board members did not need much persuasion. They accepted Manne’s services and decided that his first act as *pro bono* counsel to Planned Parenthood would be to seek a temporary restraining order in state court against Operation Rescue and its sister organization, Rescue America, to prevent the groups from disrupting clinic operations during the Republican National Convention and to seek monetary damages if necessary. Planned Parenthood’s leadership wanted to make clear that it was prepared to take the offensive.  

By June, Planned Parenthood seemed prepared for war. Over three hundred volunteers had been trained in “Fannin clinic defense,” and hundreds more were trained in “city wide defense” to defend other abortion facilities and affiliate clinics. Its legal team, led by Manne, had filed an application in Harris County’s 190th District Court for a temporary restraining order and a temporary injunction to keep protesters from obstructing entrances to the Fannin clinic or harassing clients and staff. And “cooperative arrangements” had been

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17 OHL, Peter Durkin, Executive Director of Planned Parenthood of Houston, March 27, 1995 (Part II).
18 PPH, Minutes, January 24, 1992.
made with the Houston Police Department and the District Attorney’s office in the event of conflagration.\textsuperscript{19}

On August 5, two weeks before the start of the Republican Convention, State District Judge Eileen O’Neill held a hearing on Planned Parenthood’s request for a restraining order. In its suit, Planned Parenthood claimed that Operation Rescue had stated in writing that it planned to blockade the Fannin clinic and that the Houston operation would be one of its largest “rescues” in history. Because of the anticipated police manpower shortage during the convention, it was unlikely that laws prohibiting the defendants’ conduct would be sufficient to maintain public order and protect the constitutional rights of Planned Parenthood and its patients. Planned Parenthood therefore sought a court order preventing abortion protesters from trespassing on affiliate properties, harassing staff and patients, or demonstrating within one hundred feet of the clinic. PPH’s attorney Manne also asked that anyone violating the court order be fined up to $10,000 per day for the first violation and double that for each successive violation.\textsuperscript{20}

Lawyers for Operation Rescue argued that creating such “protest-free” zones would deprive them of their First Amendment right to free speech, while Operation Rescue spokeswoman Wendy Wright made it clear that even if Planned Parenthood were successful in obtaining the court order, it was unlikely that protesters would abide by it. “We’ve had injunctions all over the place,” Wright stated. “They have never stopped us before and they never will. Our injunction is from God to rescue those who are unjustly sentenced to death.”

\textsuperscript{19}PPH, Minutes, June 24, 1992.
\textsuperscript{20}Jane Harper, “Abortion clinics file lawsuits.” Houston Post, August 5, 1992, 10A. Planned Parenthood attached to its lawsuit several Operation Rescue and Rescue America newsletters and fliers in which the organization had encouraged volunteers to come to Houston for their convention demonstrations. In the fliers, volunteers were provided with a toll-free number to call for information and were offered discount airline and
At the same time, she made it clear that Operation Rescue would not *tell* volunteers to violate the law; "...but it won’t stop them either," she added. "We ask our people to follow their conscience."  

Similar injunctions had been granted in Baton Rouge, Louisiana; Buffalo, New York; and Wichita, Kansas; against Operation Rescue and other anti-abortion protesters. In 1991 Wichita had been the scene of Operation Rescue’s six-week "Summer of Mercy;" where despite a court injunction, the six weeks of protest by anti-abortionists had cost local police, the county, and the U.S. Marshal’s Service more than $850,000 in overtime and other law enforcement costs. The police had finally persuaded Wichita’s clinics to shut down in order to quell the protest. In Baton Rouge a judge ordered police to erect a large chain-link fence around the Delta Women’s Clinic to keep protesters twenty-five feet away; the fence cost taxpayers $8,000. And in Buffalo, where abortion-rights advocates had succeeded in obtaining an order restricting demonstrators from protesting within one hundred feet of its clinic access routes, two weeks of anti-abortion demonstrations cost the police and taxpayers $800,000.  

The day of the hearing, state Attorney General Dan Morales threw his weight behind Planned Parenthood and asked Judge O’Neill to expand the restraining order to include all abortion clinics and doctors who performed abortions in Harris County. Morales sent two aides to Houston to assist Planned Parenthood’s legal team in obtaining the order, and the group spent the day arguing for a woman’s right to choose abortion without interference. In

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hotel rates. Planned activities listed on the information sheets included rallies, demonstrations outside the convention, and daily “rescues” at abortion clinics.


22 Raquel Roberts, “Protests over abortion may cost Houston,” *Houston Post*, August 12, 1995, 13A. In 1992, Planned Parenthood of Houston was undergoing major renovations and had no fence; the door to the abortion clinic also opened directly onto the sidewalk.
a faxed statement, Morales made it clear that he would defend women’s right to privacy in making the abortion decision: “Abortion is a very personal issue for the women of Texas, and they should have the right to make that decision free of outside interference.” He also made it plain that Operation Rescue’s militant tactics would not be tolerated in Houston. “There are proper methods and venues for expressing one’s opinions,” he stated. “Violence and other illegal methods should not be tolerated.”

On August 7 Judge O’Neill issued a temporary restraining order, which went into effect immediately and was to remain in effect until a hearing on Planned Parenthood’s request for a permanent injunction could be held. The order prohibited protesters from coming within one hundred feet of eleven Houston area abortion clinics, including Planned Parenthood, and twenty-five feet from patients and staff entering and leaving the clinics. It also protected the homes of nine clinic doctors and clinic administrators by requiring protesters to keep their demonstrations 1,000 feet from their homes and any loudspeaker equipment 2,500 feet away, and provided for stiff fines for violators, ranging from $250 to $10,000 for first offenses and double that for subsequent offenses. Pro-choice advocates hailed the judge’s decision as an effective way to protect clinic patients and staff members while not violating the First Amendment rights of abortion opponents. “They still have the right to free speech,” PPH’s Executive Director declared, “they still have their right to assemble. They’ll just have to keep their distance.” National abortion-rights activists went further in their assessment of Judge O’Neill’s decision. “Operation Rescue became Operation Fizzle in New York City [during the Democratic convention],” said Katherine

\[23\] Jennifer Liebrum, “Area abortion clinics backed,” Houston Chronicle, August 6, 1992, 1A and 15A.
Spiller, national coordinator of the Feminist Majority Foundation. "Houston could be the
tfinal blow, the fatal blow to Operation Rescue."24

Beginning on August 11, a week before the start of the Republican Convention, more
than four thousand men and women reportedly circled thirty Houston-area clinics to shield
patients and staff members from the anti-abortion activists expected to surround them. The
volunteers, who had trained for weeks in "clinic defense," met at secret locations at 3:30
A.M. each morning and were directed to various clinics where protesters were expected. On
the scene by 5 A.M., they linked arms and legs, forming human corridors for women to pass
through.25

Clinic defenders got an early taste of confrontation on August 10 when several dozen
anti-abortion activists gathered outside Planned Parenthood’s Fannin clinic. The protesters
destroyed copies of Judge O’Neill’s order requiring them to keep their distance from the
clinic and began chanting anti-abortion slogans at staff and patients. Planned Parenthood
staff promptly responded by drawing lines one hundred feet beyond the perimeter of the
building and marking it "Injunction line—do not cross."26

Within one day seven Operation Rescue members had been summoned to appear
before Judge O’Neill for allegedly violating the order to stay away from Planned Parenthood,
when they kneeled and prayed in front of the Fannin clinic. The Reverend Patrick Mahoney,
an Operation Rescue spokesman, had led six other protesters in a public show of defiance to
O’Neill’s order; the group had shredded copies of the order and prayed about sixty feet in
front of the clinic. The six protesters ordered to court with Mahoney were the Reverend

24Jane Harper. “Abortion protesters must keep distance from clinics, court rules,” Houston Post, August 7,
1992, 1A and 17A.
25Jennifer Liebrum. “Clinic defenders form shield to fend off abortion protests,” Houston Chronicle, August 11.
1992, 8A.
"Flip" Benham, Operation Rescue director for the Dallas-Ft. Worth area; Jeff White, director of the California Operation rescue chapter; spokesman Joe Slovenec; national media coordinator Bob Jewitt; the Reverend Ed Martin, executive director of Rescue America; and Rescue America spokeswoman Wendy Wright. Four of the seven were eventually jailed after refusing to pay $500 fines or to make promises to obey the court order they had violated.27

While the four Operation Rescue leaders remained in the Harris County Jail, police arrested four more anti-abortion activists on August 13 after they violated the court’s order not to demonstrate within one-hundred feet of the Fannin clinic. Then on August 16, seven more Operation Rescue activists were arrested on charges of blocking the Almeda clinic’s doors. Slovenec and White, two of the first seven activists who had not been jailed after their initial arrest (Planned Parenthood had dropped the charges against them), were among the second seven. This time Planned Parenthood’s attorney, Manne, presented the court with videotapes to show that Slovenec and White had violated the order by crossing police lines at the Fannin clinic.28

On August 17, the first day of the G.O.P. National Convention, police arrested forty anti-abortion protesters in front of Planned Parenthood’s West Loop clinic during the group’s “inaugural protest.” The protesters hailed from several pro-life groups: Rescue America,

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26Andrea D. Greene, "No-protest zones set for clinics," Houston Chronicle, August 7, 1992, 1A and 16A.
27Debbie House and Raequel Roberts, “Abortion fight back in court,” Houston Post, August 12, 1992, 1A and 11A; and Jane Harper and Debbie Housel, “Anti-abortion protesters face 6-month terms,” Houston Post, August 13, 1992, 1A and 30A. The four jailed were Reverend Mahoney, Reverend Benham, Wendy Wright, and Bob Jewitt. They surrendered themselves twelve hours after Judge O’Neill found them in contempt, to serve their terms rather than pay the fines or promise not to demonstrate; they also appealed O’Neill’s decision to the Texas Supreme Court.
28Melanie Markley, “Police arrest man in one of two protests at area abortion clinics,” Houston Chronicle, August 16, 1992. A related picture in the Chronicle on August 15 reported in the caption that anti-abortion activists were “diving” in front of clients and clinic defenders, and “laying at their feet” in order to prevent them from going into the clinic.
Operation Rescue, and the Lambs of Christ, and were led by Lambs of Christ leader Reverend Norman Weslin. According to local news accounts, the protesters rushed clinic defenders at the front and back entrances of the clinic, trampling several of them in the process, then locked arms and sat on the pavement in front of the doors. Shouting "Where are the police?," the defenders waited until Houston police officers arrived several minutes later, cordoned off the area and began loading the "limp" protesters, including Weslin, onto a police bus. Just as the situation seemed under control, an additional contingent from Lambs of Christ threw itself down on the pavement in front of the departing police caravan, as officers reportedly "watched in disbelief."29

Throughout the week of the G.O.P. convention, the abortion protests continued. Bands of anti-abortionists canvassed the city with "sit-and-run" tactics at area clinics, pushing police to the brink of arrest, and on occasion, over. By the end of the week, 113 activists had been sent to the Harris County jail for violating Judge O’Neill’s restraining order. Most posted bond, but several chose to serve their time, generally no more than ten days, rather than post bond or pay fines. Over 900 volunteers had logged in 16,000 hours of service in clinic defense. On August 22, two days after the Republican Convention had ended, the Houston Chronicle awarded the prize for "the most endurance" to both sides of the abortion issue. Meanwhile, an appellate court had refused to hear Rescue America’s appeal of O’Neill’s order for the jailing of its four leaders. Rescue America’s attorney then asked a federal district court to hear the case, just as a week-long hearing to turn the temporary order into a permanent injunction began in Judge O’Neill’s court.30

29Raequel Roberts and Debbie Housel, "Police arrest 40 anti-abortion protesters at clinic," Houston, Post, August 18, 1992, 4C.
30Jennifer Liebrum, “Protest tide crested lower than feared,” Houston Chronicle, August 22, 1992, 1A and 37A. Randall Terry, founder of Operation Rescue, and Joseph Slovenec were jailed on August 27, the last arrests of
In an unexpected move, the Texas Supreme Court ordered the release of Operation Rescue’s executive director, Keith Tucci, one of the seven anti-abortion leaders jailed for violating O’Neill’s order at the West Loop clinic. In its August 27 order the court placed the burden of proof on the state to justify his detention and gave attorneys on both sides time to submit their responses. The remaining protesters were also released on bond, and they immediately filed lawsuits against Planned Parenthood for malicious prosecution, false imprisonment, and violation of their First Amendment rights.31

On September 10 Planned Parenthood was reminded that anti-abortion activists hadn’t left town or given up when two stink bombs were thrown at the Fannin clinic. Shortly after the Republican convention, Planned Parenthood was also the subject of an acid attack in which protesters climbed onto the roof at night, drilled holes down through the ceiling, and poured in butyric acid, which spread noxious fumes through the building and made it uninhabitable for days. In general, anti-abortion activity in the state peaked during this period in 1992. Staff members of at least four Texas clinics received death threats and workers at two clinics were stalked. Six clinics in the state were blockaded, three were hit with “chemical” attacks, and several reported arson attempts.32

At the September 23 Board meeting, Neal Manne reported on the legal situation and the status of Planned Parenthood’s suit to obtain a permanent injunction against local anti-abortion activists. Depending on the ruling of the Texas Supreme Court in the case of Reverend Tucci, the Operation Rescue director jailed for violating the restraining order

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31Ruth Piller, “Two anti-abortion activists ordered jailed,” Houston Chronicle, August 27, 1992, 21A and 26A. The two received six-month sentences.
32Ruth Piller, “Court orders release of abortion protester,” Houston Chronicle, August 28, 1992; and a related news note in the Chronicle, September 5, 1992, 34A.
during the Republican Convention, Planned Parenthood would continue to pursue the injunction or drop its suit entirely.\textsuperscript{33}

The Texas Supreme Court’s decision in \textit{Ex parte Tucci}, handed down late in June, 1993, was hailed as a victory by both sides. Walking a tightrope between abortion and free speech rights, the court ruled 7-2 that Judge O’Neill’s 1992 court order prohibiting anti-abortion protests within one hundred feet of abortion clinics had violated Tucci’s constitutional rights to free speech. In the majority opinion, Justice Lloyd Doggett stated that a woman’s right to an abortion was constitutionally protected but said access to the clinics could have been protected by a less expansive order; the one-hundred-foot “speech-free” zone around each clinic, the court noted, was inappropriate because it took in public streets and sidewalks. The court did not declare O’Neill’s order unconstitutional, but it invalidated the one-hundred-foot buffer zone because it was too wide.\textsuperscript{34}

Both Operation Rescue and Rescue America claimed victory. Anti-abortionists celebrated the fact that the one-hundred-foot buffer zone had been invalidated. But attorneys for abortion clinics pointed out that the decision had stopped short of declaring free speech inviolable: “[The court] rejected Rescue America’s big argument that you can never restrict speech. The court...rejected that flatly, saying, ‘Oh yes you can, you just have to have evidence that it’s the least restrictive measure.’” More importantly, pro-choice advocates noted, the opinion had recognized a woman’s right to choose whether to have an abortion. “It sounds like they have recognized a right to abortion under the Texas Constitution,” Manne said.\textsuperscript{35}

\textsuperscript{33}PPH, Minutes, September 23, 1992.
\textsuperscript{34}857 S.W. 2D 1,6 Tx. (1993).
\textsuperscript{35}Bill Hensel, Jr., “Abortion ruling by high court,” Houston Post, July 1, 1993, 1A and 16A; and Clay Robison and Lisa Teachey, “Court: Ban violation of free speech,” Houston \textit{Chronicle}, July 1, 1993, 1A and 31A.
Despite the harassment and violence of 1992, Planned Parenthood found itself in 1993 on political high ground. Philanthropic support for the affiliate had grown by almost 50 percent. PPH was expanding services rapidly: colposcopy services for the early detection of cervical cancer had been introduced at the Fannin clinic; the FM 1960 clinic in northwest Houston had opened for business; and in November, Planned Parenthood had begun serving women with the HIV infection at the Harris County Hospital District’s Thomas Street Clinic. The annual patient load had grown to 72,000, despite the protests and renovations. Judge O’Neill’s temporary injunction against anti-abortion protesters remained in place (with a modified buffer zone of thirty-five feet), and the agency’s chances for obtaining a permanent injunction were good. The attorney general of Texas had joined forces with Planned Parenthood in its battle against militant anti-abortionists. And, in what amounted to a public relations coup, Governor Anne Richards had honored the affiliate after the Republican Convention with a reception at the Governor’s mansion.36

In January 1993 Durkin reported that the fiscal year 1991-1992 had been Planned Parenthood’s “best year ever.” The agency had a $1.7 million surplus, the McAshans, PPH’s most generous benefactors, had donated an additional $400,000 to the operating budget, and state and federal legislatures had allocated the agency increases in both Title XIX (Medicaid) and XX (family planning) funding for the coming fiscal year. By March an “unexpected” reimbursement by the Texas Department of Human Services (TDHS) of $260,000 for lapsed funds had increased Planned Parenthood’s reserves substantially, and PPH’s medical director, Dr. Jerry Edwards, proposed that the abortion clinic expand services once again, to provide abortions up to twenty weeks. In August the Board voted to make the agency’s first

request to the Texas Department of Health for Title X funds, for a teen clinic. And in a
decision that would prove as controversial as farsighted, the Board also voted in August to
submit a request to the Population Research Council that the Fannin clinic be used as a trial
site for the clinical testing of RU-486, the abortion pill.37

Still, Durkin reminded everyone in his monthly report to the Board, all of this was an
“opportunity” and not a “guarantee” of Planned Parenthood’s future. Even the advent of a
pro-choice president and governor did not mean that Planned Parenthood’s future was secure.
Violence and harassment against clinics and staff continued. In January 1993 a new group of
“anti-choice zealots” leased space in the building across the street from Planned Parenthood’s
main clinic on Fannin and anti-choice protests caused the owner of the Bear Creek clinic to
withdraw from his lease with the agency. In June, Planned Parenthood returned to court for
another temporary restraining order on behalf of eight medical staff (including Dr. Edwards)
to stop the picketing of their homes and the harassment of their families by anti-abortion
groups.38

In the Texas legislature, as well, Representative Florence Shapiro (R-Plano) had
introduced a bill to incorporate Casey provisions into Texas law. Her Parental Notification
Bill included a provision requiring physicians to personally notify the parents of a minor
seeking an abortion forty-eight hours prior to the procedure. Planned Parenthood
immediately began lobbying state legislators to defeat the bill, and after the May 1993

37PPH, Minutes, January 18, January 20 (Financial Statement), March 31, June 23, August 24, and September
22, 1993. Title X funds were requested after President Clinton rescinded the “gag rule” in January 1993. The
testing of RU-486 began at PPH, one of several sites selected nationwide, in January 1995, and is still
underway. Preliminary results have not been published.
38Executive Director’s Report, January 20, 1993; and PPH, Minutes June 17, 1993. In March 1993, Dr. David
Gunn, a forty-seven-year-old Ob-Gyn who performed abortions in Alabama, Georgia, and Florida, was shot in
the back three times and killed outside an abortion clinic in Pensacola, Florida by Michael Griffin, a thirty-one-
year-old right to life activist and member of Rescue America. With Dr. Gunn’s death, much of the pro-choice-
session had ended, Durkin was able to report that “no restrictions on the current provision
of abortion services” had passed. Indeed, while the legislature had voted to keep family
planning funding at its 1993 level through fiscal year 1994 (Durkin had expected cuts) and
had failed to incorporate penalties for blocking clinic access into the penal code, it had
passed an anti-stalking bill that would prove to be a significant tool against militant anti-
abortionists. After the May legislative session, Durkin seemed more like a worried father
than an embattled clinic director.\footnote{Executive Director’s Report, June 23, 1993; and Planned Parenthood’s Legislative Update, March 28, 1995. A
newsletter produced by PPH’s Public Affairs Director, Rebecca White. Shapiro’s bill was reintroduced in the
1995 legislative session, but did not reach the floor of the House for debate. OHI, Rebecca White, July 13.
1995.}

The opposition seemed unsinkable, but so did Planned Parenthood. In December
1993, under the leadership of a new Federation president, Pamela Maraldo, Planned
Parenthood’s Board and staff decided to brave a legal minefield and initiate a Medicaid
lawsuit against the state of Texas, challenging the state’s denial of Title XIX funds for
abortions. The cost to Planned Parenthood, even without lawyer’s fees, would be between
$15-50,000.\footnote{PPH, Minutes, December 20, 1993.}

Then, early in 1994, President Clinton reinstated Medicaid reimbursements for
abortion for victims of rape and incest, and PPH staff became more hopeful that restrictions
on Medicaid funding would soon be invalidated. Similar lawsuits had been won in six states,
most recently in West Virginia, while only two had been lost: those in Pennsylvania and
Michigan. Like the plaintiffs in suits that had been won, Planned Parenthood planned to file

optimism over Clinton’s reversal of the gag rule and PPH’s victory in court during the Republican National
Convention dissipated.
suit on the grounds of the right to privacy, equal protection, and freedom of worship.

Again, the agency would be represented *pro bono* by attorney Neal Manne.\(^{41}\)

In March 1994 Planned Parenthood went to trial in its suit against Operation Rescue and other anti-abortion protesters, seeking damages in a civil conspiracy suit against the groups and their leaders over protests during the 1992 Republican National Convention. Included in the suit was Planned Parenthood's request for a permanent injunction against the groups. The trial, which had been postponed on two previous occasions, was expected to last eight days and would be heard by a jury, with Judge O'Neill presiding. Regardless of the decision, it was clear that the case would be appealed to and ultimately decided by the Texas Supreme Court.\(^{42}\)

Testimony began on March 21 in the case of *Planned Parenthood of Houston and Southeast Texas, et al. v. Operation Rescue, et al.*\(^ {43}\) For the plaintiffs, Manne alleged that the defendants were part of a nationwide conspiracy to disrupt and shut down family planning clinics across the United States and had actually engaged in a civil conspiracy to interfere with the business of Planned Parenthood and nine other clinics in Houston. He also charged that members of Operation Rescue and Rescue America had violated the privacy and property rights of eight physicians who were among the plaintiffs. Attorneys for the defense, Richard Schmude, Cactus Jack Cagle, and James Pinedo, argued that their clients were not

\(^{41}\)PPH, Minutes, January 26, 1994. After President Clinton reinstated Medicaid reimbursements for victims of rape and incest, the lawsuit was never filed. OHI, Judy Reiner, Deputy Executive Director, June 12, 1995.

\(^{42}\)PPH, Minutes, January 26, 1994.

\(^{43}\)The trial was held in the 190th Judicial District Court of Harris County, Texas, Judge Eileen O'Neill presiding. The verdict was handed down in May 1994.
part of a conspiracy and had simply been exercising their First Amendment right to free speech.⁴⁴

After a six-week trial and more than a week of deliberations, the jury found that the thirteen defendants, including Operation Rescue, The Lambs of Christ, Rescue America, and their leaders, had conspired to disrupt the clinics’ business and had violated the property and privacy rights of the doctors. The jury ordered the defendants to pay $204,000 in damages to Planned Parenthood to cover its actual costs for the security precautions it had taken when the blockades began. It also assessed $1.01 million in punitive damages against protesters who had blocked abortion clinics during the 1992 Republican Convention.⁴⁵

The size of the award, which was slightly higher than the $1 million sought by Planned Parenthood, was as striking as the precedent it set. The case represented the first time that a commercial conspiracy statute had been used to levy an award against the anti-abortion movement, and it was by far the largest award ever assessed against abortion protesters. The ruling delighted pro-choice advocates and stunned abortion opponents. “Our breath has been taken away,” said Reverend Flip Benham, the Dallas-based director of Operation Rescue. “Planned Parenthood was given a judgment for $1 million because we preached the Gospel on a public sidewalk across the street from an abortion mill.” But, said

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⁴⁴Brenda Sapino. Note on Planned Parenthood of Houston v. Operation Rescue, Texas Lawyer (May 16, 1994). Planned Parenthood filed suit based on a section of Texas commercial law that the Pennzoil Company had used several years earlier to win a $10.5 billion judgment against Texaco, Inc. (which eventually paid $3 billion in the case). The law prohibits purposeful disruption of a business’s operations. Planned Parenthood’s case was based solely on state law: claims of disruption of the clinics’ business, invasion of privacy, and conspiracies to commit those violations, rather than on federal laws such as anti-racketeering statutes.

⁴⁵Punitive damages are intended to punish wrongdoers for unusually harmful behavior and to make an example of them to others; they are not tied to the amount of actual harm done. The jury awarded $350,000 in punitive damages against the Dallas-based Operation Rescue (National), and $150,000 against Tucci, its director, $355,000 against Houston’s Rescue America and $155,000 against its executive director, Treshman. Jurors found those four defendants had acted with actual malice.
Manne, attorney for Planned Parenthood, "When you block doors, when you block patients from entering a building, that's not preaching and praying."

The verdict put anti-abortion protesters on notice that, if they joined in illegal efforts to shut down clinics, clinics had a new way to seek civil damages and jurors were increasingly willing to award them. It also cleared the way for a permanent injunction against anti-abortion protest in Houston. After the May verdict, Judge O'Neill scheduled another hearing for August to consider making the temporary injunction permanent and to hear additional evidence on specific restrictions to protect abortion clinics. The jury's award came a week after the Supreme Court heard oral arguments in a Florida case in which abortion protesters were challenging the constitutionality of a permanent injunction that created a buffer zone around a clinic and its workers' homes. Abortion opponents in the Florida case were also claiming that the injunction restricted their right to free speech. O'Neill planned to wait for the Supreme Court's ruling before issuing a permanent injunction.

The Supreme Court's ruling in the Florida case, Madsen v. Women's Health Center, was issued on June 30, 1994. Judy Madsen, the key petitioner in the case, said she had been "targeted" by the buffer zone and injunctions in Florida even though she claimed to have participated only in peaceful, lawful protests. The injunction at issue had been created by a Florida court after abortion clinic disruption became marked, and although Madsen had not been accused of being part of any disruption, she had been allied with those who

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demonstrated. The court order prohibited anti-abortion protesters from coming within thirty-six feet of the Women’s Health Center, from entering clinic property, blocking or obstructing entrances to the property, or picketing and demonstrating. Within three hundred feet of the clinic, the injunction barred the same people from approaching anyone seeking services. It also created a three-hundred-foot buffer zone around the residences of clinic staff.49

In its opinion, the Supreme Court held that the Florida injunction had gone too far in protecting the rights of the clinic and its staff. Just as the Texas Supreme Court had done in 1993, it stopped short of declaring the injunction unconstitutional (i.e., in violation of the protesters’ First Amendment rights) and ruled instead that the Florida court had overstepped the “narrow” boundaries necessary to accomplish its “pin-pointed” objective. The Court held that Florida’s interest in ensuring law and order was sufficient to justify “an appropriately tailored injunction.” However, it added, the thirty-six foot buffer zone on the north and west sides of the clinic (which fell on private property), the blanket ban on observable images (e.g., pictures of fetuses), and the three-hundred-foot buffer zone around staff residences “sweep more broadly than is necessary” and “burden more speech than is necessary” to accomplish that objective. The Florida court, in other words, had to modify its order to pass the Supreme Court’s more difficult standard for reviewing the constitutionality of injunctions under the First Amendment.50

50Before Madsen, courts had applied a three-part test to make this determination: whether the injunction or ordinance was “content-neutral,” not based on viewpoint; whether it was “narrowly tailored” and served a significant government interest; and whether the protesters had ample alternative channels in which to communicate their message. After Madsen, injunctions had to be reviewed under the new standard, which required that the challenged provisions of the injunction “burden no more speech than necessary to serve a significant government interest.” See Memorandum from the NAF Legal Clearinghouse, July 8, 1994, Re: Recent Supreme Court Cases of Importance to NAF Members.
The Supreme Court did uphold two extremely important aspects of the injunction being challenged: the use of a thirty-six foot buffer zone in front of an abortion clinic and the use of noise restrictions. Accordingly, during the August hearing in Houston’s 190th District Court, lawyers for Planned Parenthood argued once again before Judge O’Neill that zones of twenty to thirty feet should be imposed around abortion clinics permanently to prevent the ongoing threat from protesters.51

Attorneys for the defendants argued that the threat from anti-abortionists had passed after the 1992 convention ended and that the protesters who had converged on Houston abortion clinics had “departed.” Larry Crane urged O’Neill to turn down the request for a permanent order, arguing that the plaintiffs had other means of preventing or punishing protesters who damaged property, such as the recently enacted Freedom of Access to Clinic Entrances (FACES) legislation. Indeed, at the urging of President Clinton and Senator Ted Kennedy (D-MA), both houses of Congress in May 1994 had passed the FACES legislation, making it a federal crime to block access to abortion clinics; as the Madsen case was being heard in the Supreme Court, it lay on Clinton’s desk, awaiting his signature.52

But the FACES law did not specify limits for legal protest; neither had the Madsen decision. On December 5 Judge O’Neill made the injunction permanent and established standing rules for anti-abortion protest in Houston. O’Neill’s order set buffer zones between fifteen and thirty-two feet around nine Houston women’s clinics, and thirteen feet from doctors’ yards. It also prohibited protesters from picketing within the zones, blocking clinic

entrances or harassing people entering or leaving the facilities, and limited picketing at any site to forty-five minutes per day. Violators could be fined up to $500.⁵³

In the same order, O’Neill, who had run for re-election and been defeated in the GOP landslide in November’s elections, affirmed the $1.01 million damage award against the anti-abortion groups that had picketed during the 1992 Republican National Convention. In her last official act, she ordered the appeal of the case transferred to the 333rd Judicial District Court of Harris County. Judge Richard Bianchi subsequently signed in 1995 the amended judgment and permanent injunction.⁵⁴

Throughout 1994 and 1995, Planned Parenthood’s Board and staff acted aggressively to expand clinical services and to increase government funding and support for new programs. In January 1994 the Board voted to reinstate vasectomy services at Planned Parenthood’s Fannin clinic and to seek federal grant monies under Title V for an experimental Primary Care program. As talk of healthcare reform consumed headlines, Planned Parenthood’s leaders realized that the agency would have to expand services in order to remain competitive in the changing healthcare services market. If the reform of the health care system being proposed by President Clinton and debated in Congress were to pass, Planned Parenthood might have to make the change from a niche provider of reproductive services into a primary healthcare provider, or risk losing its contracts to bigger Health

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⁵⁴O’Neill was unseated by attorney John Devine, an abortion opponent who was supported by Houston’s anti-abortion groups. After her defeat, the defendants filed suit in federal court alleging civil rights violations by the city, the state, and local abortion clinics, protested the transfer of the appeal, and in January of 1995, filed a motion for a new trial. The motion was subsequently denied.
Maintenance Organizations. In this worst-case scenario, under a new national health care system Planned Parenthood would have to "reinvent" itself or be put out of business.\textsuperscript{55}

In May, Planned Parenthood received a $283,000 Primary Care grant from the Texas Department of Health to begin an experimental program in its Houston clinics, and change seemed imminent. By September, Planned Parenthood had opened yet another clinic, this one in Stafford, Texas, and had made plans to instate mid-life services at affiliate clinics (again reflecting healthcare reform). Also in September, Board members learned that Planned Parenthood of Houston had been chosen, along with the Johns Hopkins medical school in Baltimore and another facility in Los Angeles, to begin confidential testing of misoprostol, the RU-486 abortion pill, beginning in 1995. It seemed that the birth control revolution would have to go forward.\textsuperscript{56}

As 1995 began, Planned Parenthood of Houston had assumed a permanent place in the vanguard of the birth control movement. It had led the struggle in Texas to protect women's right to safe, legal, and unrestricted abortion services. Among Planned Parenthood affiliates it had become a leader in clinic expansion and clinical testing of new birth control methods. More importantly, it had helped lead the way in reversing a national trend, from one that discouraged the introduction of new birth control methods for men and women to one that encouraged their development. When the courts and legislatures finally came into step with Planned Parenthood, the result was more reproductive freedom for women.

By 1995 the skies had cleared, somewhat, although the threat of more clouds had not. For the moment, the rights guaranteed in Roe seemed secure. For a few years at least, there would be a pro-choice president, governor, and public. But there was still a virulent, and

increasingly violent, anti-abortion movement. There was still the danger that the Republican congressional landslide of November 1994 might translate into new state restrictions on abortion or new cuts in funding for family planning providers. One never knew. The best the leaders of Planned Parenthood could hope for, as they professionalized and improved the agency's business and fundraising apparatus and entrenched it deeper into the community, seemed to be a stalemate.
Chapter 21

The Next Horizon in Abortion Technology: RU-486, Methotrexate, and Early Abortion

In 1990 Harvard Law School professor and noted Constitutional scholar Laurence Tribe wrote, "The wide availability of RU-486 could bring truly revolutionary results. A large percentage of surgical abortions are now sought early in pregnancy, at a time when RU-486 might be effective. Fully half of all abortions in the United States currently take place within the first eight weeks of pregnancy." But, he added as a caveat:¹

Neither RU-486 nor any other abortifacient pill really solves, or even circumvents, the problem of abortion. Although the fact that these abortifacients can be effective at an earlier stage of pregnancy than can either the vacuum aspiration or suction techniques may make them less objectionable to some than these currently-used methods of abortion, those who oppose abortion from the moment of conception may well oppose it just as vehemently when it is performed with a simple pill. Indeed, some opponents of letting women choose for themselves whether or not to end a pregnancy find upsetting the way in which they believe a drug like RU-486 might both conceal from the woman the reality of what she is destroying and withhold from the public its current methods of exerting control over that choice.

In the early heyday of RU-486, amidst speculation that the drug would revolutionize the reproductive world and re-privatize abortion, Tribe was anticipating a new kind of reproductive freedom for women, one that has not come to be. What he and other RU-486 supporters hoped was that, with chemical rather than surgical abortion, the act of terminating

pregnancies would become truly private—one controlled by a woman alone, or, perhaps, by a woman and her pharmacist.²

The most important aspect of privacy in Tribe’s paradigm was making abortion an essentially self-administered procedure that could be performed safely and completely outside of a clinic or a hospital. But it has not been realized. If it had, if RU-486 or Methotrexate had been drugs a woman could safely give herself, Tribe wrote, the “traditional publicly regulated nexus, the doctor-patient relationship, would virtually vanish.” Instead, he suggested, a pharmacist-consumer relationship would have arisen through which the public might exercise a more limited “oversight.” And more important in Tribe’s view, “many of the arguments, and to some extent the laws, about abortion would be made largely irrelevant by a widely available abortion pill.”³

What Tribe meant—and many pro-abortion activists hoped—was that chemical abortion could end the debate over abortion. With drugs like RU-486 pregnancies could be terminated at a very early stage, well within the trimester framework established by Roe v. Wade and possibly even before the pregnancies could be confirmed with any certainty. Chemical termination of pregnancy might then be seen as different (and perhaps less objectionable for those who oppose it) from surgical abortion. Moreover, if the abortion procedure were not really a surgical procedure at all, pregnancies could also be terminated in private, away from state-regulated clinics and the scrutiny of anti-abortionists. They could

²Lader, RU-486: The Pill That Could End the Abortion Wars and Why American Women Don’t Have It, written in 1991, is full of references to the new-found privacy that women would gain by using RU-486 in the sanctity of their private physicians’ offices or at home. Baulieu, The Abortion Pill, written in 1990, is equally enthusiastic about the possibilities for increased privacy with RU-486. By 1995, in A Private Matter, Lader is more cautious, arguing that RU-486 is bound to bring about more privacy for women because it would be impossible for anti-abortionists to picket every medical office in the country.
also be terminated, safely, whether abortion were legal or not. Then the Constitutional question of whether abortion should be legal would be moot.\footnote{Pro-choice supporters of RU-486 and drugs like it argue that, if RU-486 is used before implantation (the sixth or seventh day after the fertilization of egg by sperm, when the fertilized egg makes contact with the bed of the uterus and "implants" itself), there is no abortion; RU-486 and the class of drugs that prevent pregnancy during the interval between fertilization and implantation could then be classed as "interceptives," rather than contraceptives or abortifacients, and placed outside the abortion debate. However, prevention of pregnancy before implantation, euphemistically referred to as "interception," raises a new array of medical and ethical concerns. For many people, the critical point in human development is implantation rather than fertilization. In this view, implantation is crucial because it marks the point at which it can be determined with empirical certainty that a new human entity with a unique genetic identity exists (a fertilized egg has a 50-50% chance of surviving until implantation). Those who see implantation as the decisive stage believe that an "interceptive" that acts before implantation resembles a contraceptive rather than an abortifacient because the interruption takes place before a pregnancy can be confirmed. In the opposite view, fertilization is the critical point at which life begins. For these people, life is a continuum without distinct phases or clear divisions; therefore, there is no clear boundary between contraception, "interception," and abortion. New technology used in the treatment of infertility has focused attention on the interval between fertilization and implantation. The Ethics Committee of the American Fertility Society refers to the first fourteen days after conception as the "preembryonic stage" (see "Ethical Considerations of the New Reproductive Technologies," 46 Fertility and Sterility, Suppl. 1, 1986). But this acknowledgment is double-edged. Physicians considering the ethical issues posed by in vitro fertilization (IVF) generally agree that, after fertilization, the "conceptus" is entitled to increased "respect" compared with other cells in the human body. At the same time, most nonreligious bodies such as physicians groups and medical societies stop short of a firm definition as to when meaningful human life begins.}

Instead, the new chemistry has forced a re-definition of the Constitutional questions surrounding abortion. Rather than lay the troubling issues of privacy, the abortion right, and the trimester framework established in Roe v. Wade to rest, the prospect of chemical abortion has necessitated a re-examination of those issues. The new contraceptive technologies have not lessened the debate but have brought heightened attention to it and caused a new and in some ways even more vitriolic debate about the morality of their use.

**Bringing RU-486 to the United States**

The tangled history of RU-486 in this country gives testimony to the difficulties of putting any new drug on the market. RU-486 has been plagued from the beginning by political and religious opposition, logistical and legal red tape, and misfortune.
In France, where the drug was developed and first tested, opposition from groups like “Operation Sauvetage” (Operation Rescue) was sporadic and brief. RU-486 fell under the same French law that regulated surgical abortion; it was sold only under strict controls, in authorized family planning center pharmacies, and every box was accounted for. No black market developed, and doctors did not try to circumvent established procedures for administering the drug. French research scientist and physician Etienne-Emile Baulieu, who led the research team that developed RU-486 and supervised the clinical trials in France, attributed the lack of opposition to two things: French doctors were not afraid to use it, and the drug could be used only up to the seventh week of pregnancy.5

British doctors began clinical testing of RU-486 shortly after the French trials. Because the demand for the drug by British women was so high, anti-abortion groups were unsuccessful in their attempts to boycott it. British approval also affected Ireland, since thousands of women each year traveled to England for abortions. While the British trials were ongoing, the Chinese government began requesting supplies of the drug for clinical testing, and when the manufacturer, Roussel-Uclaf, hesitated (in order to wait for testing in France and England to be completed), the Chinese obtained a few of the pills, synthesized the drug in their own laboratories, and began testing it themselves.6

In most of Europe abortion was legal; in Belgium, King Baudouin, a Catholic, abdicated his throne for a single day so that the parliament could pass an abortion law he would not have to oppose. Sweden led the Scandinavian countries in testing and approving RU-486 in 1990. In 1991 the Spanish Health Ministry requested the Roussel company to

5Baulieu, The Abortion Pill, 89. Anti-abortion groups in France did try to have RU-486 banned in the courts, but French judicial authorities ruled against them.
conduct trials there, and Portugal followed suit. Bitter controversy over the pill broke out in Italy. The Vatican exerted pressure against trials despite very liberal abortion laws and a population 70 percent in favor of abortion, and the importation of the drug stalled. West Germany severely restricted abortion, forcing women to travel to East Germany or to Holland for the procedure. When the Austrian Ministry of Health asked for RU-486 trials, the German-Catholic president of Roussel-Uclaf's parent company, Hoechst, flatly refused.7

In Latin American countries, because of Catholic opposition, RU-486 trials were barred. Abortion in these countries has been tolerated but performed illegally. In the Soviet Union, where abortion had been legal since the October Revolution and was a major means of birth control, RU-486 was much sought after. In Japan, where birth control depends mostly on condoms and abortions and where no restrictive laws exist, doctors showed great interest. Elsewhere in Eastern Europe, the reception of RU-486 was mixed. Hungarians were quick to sign on for clinical trials, but the Polish government, mostly Catholic, dragged its feet. In India, Bangladesh, and Indonesia, bureaucratic difficulties (along with varying degrees of moral, social, or religious resistance) stalled the importation of the drug and the testing process. Islamic countries were divided on the drug. Despite official backing, opposition from religious fundamentalists stalled the process. In Australia, strong protest by anti-abortion groups caused the government to reject having clinical trials there.8

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6Ibid., 104-116. For the story on Chinese testing, see Lader, A Private Matter, 115-162. Lader and his group in the US, Abortion Rights Mobilization (ARM), later convinced a Chinese scientist to bring some of the pills in his pocket through US Customs so that ARM could begin manufacturing them in America (p. 130).
7Lader's RU-486, and Baulieu's The Abortion Pill, both detail the journey of RU-486 around the world. The German case is most interesting because anti-abortion laws there dated back to the 1871 Prussian Code. Under Paragraph 218 of the German Reich Penal Code, a woman guilty of abortion could be imprisoned for five years, and the abortionist was liable to a life sentence. Hitler stiffened these penalties even further, but allowed abortions for Jews. Under the current Paragraph 218, both doctor and patient can be jailed if an abortion is not sanctioned by two specialists as socially and medically necessary.
Similarly, in the United States, anti-abortion pressure became so great that RU-486 was kept out, not at first by American authorities, but because Roussel-Uclaf (under pressure from Hoechst) sought no license to export it. Threats from American anti-abortion groups to boycott the company's other products caused the pharmaceutical giant to retreat. Pressures grew from anti-abortion congressional representatives, especially Robert Dornan of California, who labeled RU-486 "the death pill" and claimed that "the taking of a pre-born life will be as easy and as trivial as taking aspirin." President Bush opposed abortion. A year after RU-486 had become available in France (1988), the US Food and Drug Administration (FDA) banned the importation of RU-486 for personal use. In its ruling the FDA forbade the use of RU-486 for anything other than clinical testing in "projects related to breast cancer, lymphoma, glaucoma, Cushing's syndrome, and contraceptives." That same year, Dr. Baulieu, who had led the research team that created RU-486, received America's most prestigious medical award, the Lasker Prize. After accepting the award, Baulieu, who was not a veteran of American politics, stressed the point that RU-486 is a matter of private choice.9

No one should be permitted to intrude on a woman's decision to terminate a pregnancy. That right of privacy has been upheld by the U.S. Supreme Court. In a system defined by the U.S. Constitution, such moral judgments can only be forced upon others by elected legislators. If a medical procedure is legal, and people want to use it, objectors can only object.

While anti-abortionists celebrated their victory in keeping RU-486 out of America, pro-abortionists hoped that the wide-scale testing of the pill in countries favoring its use

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would help eventually to spread it throughout the world. Another pro-abortion group, Lawrence Lader’s Abortion Rights Mobilization (ARM), decided to set up laboratory facilities in the U.S. and to produce the drug themselves using an un-patented Chinese copy. Lader convinced a Chinese scientist to bring some of the pills through U.S. Customs in his pockets, without declaring them. ARM scientists later tested the pills, found them to be exact replicas of RU-486, and began creating the circumstances for a test case similar to that of *U.S. v. One Package of Japanese Pessaries.*

In July 1992, while ARM struggled to equip and to fund its laboratory, Leona Benten, a pregnant American woman returned from Europe with a prescription for RU-486. Customs officials seized the pills when Benten (accompanied by Lader) arrived at JFK Airport, and initiated the first direct challenge to the FDA import ban. Despite a lower court ruling in favor of Benten’s right to RU-486, the Supreme Court refused to order Customs to return the RU-486 to Benten and refused to order the FDA to overturn the import ban.

The first major break for RU-486 came in November 1992, with the election of William Jefferson Clinton as President. During his campaign, he had pledged his support for bringing RU-486 to the U.S. After his election, the Feminist Majority Foundation immediately issued a letter to Roussel-Uclaf, the maker of RU-486, that the political obstacles to RU-486 in America were effectively removed. In December 1992 FDA

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10 *86 F.2d 737 (C.C.A. 2d, 1936).* In the *One Package* case, Margaret Sanger, American Birth Control League physician Hannah Stone, and attorney Morris Ernst, ordered a package of diaphragms, or pessaries, and had them mailed from a physician in Japan to Dr. Stone, for use in her medical practice. At the time, it was illegal to mail contraceptives through the U.S. mail. The government seized the pessaries, filed charges against Stone and the ABCL, and the test case was staged. Lader details the ARM movement to bring RU-486 to the US in *A Private Matter.*

Commissioner David Kessler wrote to Roussel-Uclaf encouraging the company to submit an application to license RU-486 in the U.S.\textsuperscript{12}

In January 1993 Clinton issued an executive order instructing the FDA to re-evaluate the RU-486 import ban and directed the Secretary of Health and Human Services, Donna Shalala, to “assess initiatives...[to] promote the testing, licensing, and manufacturing of RU-486 and other antiprogestins.” A month later, Lader announced that ARM would begin testing the Chinese clone of RU-486 in America.\textsuperscript{13}

Despite a supportive American president and pressure from ARM to bring RU-486 to the U.S. (or risk losing its patent to the makers of the Chinese clone), Roussel-Uclaf did not assign its U.S. patent rights for RU-486 until May 1994. On May 16 the company donated those rights to the Population Council, a non-profit research group in New York, with the stipulation that it no longer be called RU-486 but instead would be referred to by its scientific name, mifepristone. The Population Council in turn agreed to conduct clinical trials, to find a manufacturer for the drug, and to win FDA approval for mifepristone and the new manufacturer.\textsuperscript{14}

From 1995 to 1996 the Population Council sponsored testing at a number of abortion facilities including the Planned Parenthood of Houston clinic. It was among five Planned Parenthood Federation member organizations to participate in the study. Other testing sites included the Feminist Women’s Health Center in Atlanta. A number of university and research centers also applied to the Population Council to become testing sites. These were


\textsuperscript{13}Philip Hilts, “Group will help speed RU-486 pill,” Houston Chronicle, March 14, 1996, p. 14A.

approved, given the protocol for conducting the tests, and acted in cooperation with the other research sites to complete the trials. By the end of 1995, 2,100 women had completed the clinical testing. The Population Council submitted the results of the clinical trials and a New Drug Application to the FDA, and in July 1996 an FDA Advisory Committee held hearings to decide whether to recommend the use of mifepristone as a method of abortion in the United States.\textsuperscript{15}

After an eight-hour hearing, the FDA Advisory Committee on Reproductive Health Drugs determined that mifepristone was safe and effective. This was an important step in the approval process, although final approval could take from six to twelve months. The Population Council subsequently awarded manufacturing and distribution rights of the drug to the company Advances in Health Technology, headed by Dr. Susan Allen.\textsuperscript{16}

In a surprise move, after the Population Council had concluded its clinical trials, Lader’s Abortion Rights Mobilization group announced its intention to conduct clinical trials with its own copy of the pill, “to help speed the drug to market in the United States.” Lader’s group, plagued by financial troubles and technical difficulties described in detail in his \textit{A Private Matter}, had evidently tired of waiting for the Population Council to gain approval for RU-486. The Population Council, which held the patent on RU-486, responded by announcing simply that “the tests were unnecessary,” and added: “We can get this drug to market on our own. In fact, we are nearly there.”\textsuperscript{17}

\textsuperscript{15}FMF \textit{Newsletter}. OHI, Dr. Jerry Edwards, March 7, 1996.
\textsuperscript{16}FMF \textit{Newsletter}.
\textsuperscript{17}Hilts, “Group will help speed RU-486 pill.” By law, any group can copy a patented drug as long as the copy is used for research and not for commercial sale. In \textit{A Private Matter}, published in 1995 just before the Population Council tests were completed, Lader states: “We never did start testing the Chinese pill on women since our contacts at the FDA implied that they would have a lot more faith in our own copy of the pill than the Chinese version.” (at 143) There is no evidence that the Lader trials were ever completed.
On September 18, 1996, the FDA “conditionally” approved mifepristone for use in the United States. The agency announced that it was withholding final approval until the drug’s U.S. sponsor, the Population Council, provided additional information about manufacturing and labeling. This was not uncommon, and did not indicate hesitancy by the government to approve the drug. The Population Council had kept manufacturing information shrouded in secrecy. It had announced that the drug would be distributed by the non-profit company Advances in Health Technology, but its U.S. manufacturer had remained anonymous.\textsuperscript{18}

Only two months after RU-486 received the FDA’s conditional approval, its proponents suffered a serious setback. Joseph Pike, the businessman licensed to raise money for the drug’s distribution, confessed that he had concealed his prior convictions for fraud and forgery from the Population Council. In November 1996 a California investment company, the Giant Group, filed a lawsuit in Los Angeles saying that the license to manufacture and distribute mifepristone in the United States was held by a convicted criminal. In its suit the company accused Pike of “fraud, breach of fiduciary duty, fraudulent concealment, breach of contract and unfair business practices.”\textsuperscript{19}

What Pike had done, the complainants asserted, was sell the Giant Group a 26 percent interest in the entity that would make and sell mifepristone, for $6 million. At the time, Pike had expressed concern about anti-abortion harassment and refused to tell Giant Group executives the name of the company manufacturing the drug. The group invested in Pike’s “entity” anyway. As part of the deal, the suit alleged, Pike agreed not to sell more than an

additional $4 million worth of limited partnerships to others. But Pike subsequently attempted to sell more than 100 percent of the entity he was marketing. "We have confirmed reports that he’s already sold 70% and now we hear that he’s trying to sell 80% to someone else," Giant Group attorneys said. According to the lawsuit, Pike was a disbarred lawyer who was convicted of forgery in North Carolina and who was serving eighteen months' probation on a two-year suspended prison sentence.20

In response to the lawsuit, Sandra Waldman, spokeswoman for the Population Council, announced that "Advances in Health Technology is our licensee and Pike’s operation is the sublicensee." She added that the Council had given Pike a deadline "within days" to sell his controlling interest to an acceptable party, that the Council had been dealing with Pike for more than a decade, and that it had only learned of his legal troubles in July.21

In February 1997 the Population Council, Advances in Health Technology, and the mifepristone project’s existing investor group, announced that they were forming a new company, Advances for Choice, to complete the introduction of the product in the US. The functions to have been performed by Advances in Health Technology were to be merged into the new AFC company, and some members of AHT’s board were to be seated on the new board. AFC would have responsibility for distributing mifepristone and for development of the drug for use in treating other medical problems. The new AFC CEO was Jack Van Hulst, a businessman with twenty-nine years experience in the pharmaceutical industry. Van Hulst agreed to work on a marketing and distribution system for mifepristone and to collaborate with the Council to provide the manufacturing and labeling information requested by the FDA in its September 1996 approval letter. The announcement marked the conclusion of

20Ibid.
litigation between the Council and Advances in Health Technology and Joseph Pike. According to a Population Council News Release, under the settlement, Pike sold a "substantial portion of his equity" to the existing investor group. Pike also agreed to play "no present or future role with respect to the management of the new company, the representation of the product in the United States or abroad, or the mifepristone project." In exchange he retained a modest, although passive, equity interest.  

Just as things began to look promising for the Population Council, the web of mifepristone litigation continued to grow more tangled. In June 1997 the Hungarian company that had agreed to manufacture mifepristone for marketing in the US, backed out. On May 9 Danco Laboratories, Ltd., the would-be distributor of the pill, accused the Hungarian firm, Gedeon Richter, of breach of contract by pulling out of the project. In its lawsuit against Gedeon Richter, Danco Labs stated that Gedeon Richter’s decision to cease production of mifepristone could be "a major and potentially ruinous setback" for efforts to sell it in the United States, since Gedeon was the sole company that was to make the drug for the American market. Danco also alleged that finding a new manufacturer could push the production date back several years. In an interview with the New York Times, Population Council spokeswoman Sandra Waldman declined to describe the nature of the dispute between the Council and the manufacturer.  

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22Ibid.
The court action against Gedeon Richter is the latest evidence of problems in what one reporter called "the star-crossed project launched in 1994." The introduction of RU-486 into the U.S. and its widespread availability to American women—the situation originally envisioned by its proponents—may have been delayed for years. This time, it is not the opponents of abortion who have caused the delay but the ordinary scourges of business: corruption and greed.

The fight over RU-486 helped prepare the way for the acceptance of new contraceptive technologies, including Methotrexate and early abortion. Because of the intense debate over RU-486, women were made aware of their contraceptive options through the media in ways they never would have been aware beforehand. For example, "RU-486 discussions" on the internet are now common. Possibly because of its delay, a cheaper method—Methotrexate—is now being used that might have been ignored if RU-486 had been readily available. And finally, the fight over RU-486 showed again that few new drugs are "miracle" drugs. Most present incremental improvements over old drugs or, as in the case of mifepristone and Methotrexate, other options with equal numbers of benefits and risks. The real revolution in abortion, early surgical abortion, is just beginning to happen.

**Chemical Abortion Comes to Planned Parenthood**

In January 1995 Planned Parenthood of Houston began testing RU-486, or mifepristone, to induce abortions in women five-to-nine weeks pregnant. The drug, known commonly as "the French abortion pill," was used in conjunction with another synthetic hormone, prostaglandin, which causes contractions and leads to the expulsion of the gestational sac from the uterus. RU-486 blocks a hormone—progesterone—that is essential for the early development of the gestational sac. Progesterone is more or less the glue that
holds the tissue in the early gestational sac and allows it to stay attached to the wall of the uterus. RU-486 block progesterone reception, and the gestational sac comes “unglued.” Prostaglandin then pushes it out. The much-publicized tests took place in Planned Parenthood’s Houston abortion clinic over a period of seven months. At the same time, similar clinical tests were being conducted at a number of other Planned Parenthood sites, universities, and clinics across the country, involving approximately 2,100 women.24

Planned Parenthood of Houston selected approximately 150 women—three groups of 40-50 women at different stages of pregnancy—for the clinical trial. All were nine weeks pregnant or less, young, healthy, non-smokers. During their first visit to Planned Parenthood, each woman underwent a physical exam and a pregnancy test (or ultrasound), completed a medical history, and gave an informed consent. If no “contra-indications” surfaced such as smoking, asthma, high blood pressure, or obesity, which could make the drug deadly to them, each received the RU-486 pills. At a second visit two days later, each woman received a dose of prostaglandin, usually misoprostol, to initiate uterine contractions and complete the procedure. Most aborted during the four-hour waiting period at the clinic, but about 20 percent aborted later, over the next two or three days. A third visit about two weeks later determined whether the tissue had passed or a surgical abortion was necessary to complete the procedure. For the women further along in their pregnancies, RU-486 was 90 percent

24 OHI, Dr. Jerry Edwards, Medical Director, Planned Parenthood of Houston, March 7, 1996. Lawrence Lader. A Private Matter: RU-486 and the Abortion Crisis (New York: Prometheus Books, 1995), 225-241. The chemical name of RU-486 is mifepristone. There are several types of prostoglandins. The most commonly used is misoprostol, which is manufactured by the Searle Company in the US under the trade name Cytotec (as a treatment for ulcers). One prominent anti-abortionist has labeled this combination of chemicals “the abortion cocktail.” See Bernard Nathanson, “The Abortion Cocktail,” 59 First Things (January 1996), 23-26.
effective; in women who used RU-486 very early in their pregnancies, the drug was 95 percent effective.25

In Houston tests no serious side effects manifested themselves; no patients were transported to Ben Taub hospital for emergency treatment, and none needed a blood transfusion. Those still pregnant after taking the drug underwent a surgical abortion. According to Dr. Jerry Edwards, Medical Director of PPH and the physician who supervised clinical testing, some patients dropped their blood count “fairly significantly,” but not enough to cause them to become unstable or to require emergency medical care. Even more important, all of the women in the study returned for follow-up treatment and the final exam. At the same time, Dr. Edwards conceded, the women who went through the process were “self-selected to really like it.” That is, they were a small group of women who were “very concerned about issues of control and bodily integrity” and apprehensive of surgical abortion. A number of them had had surgical abortions in the past and felt that RU-486 was a less invasive procedure.26

For this group of people, it was really a great thing that they were able to have an abortion without having the surgical procedure. And it was very important to them that even though they would be sweating and vomiting and cramping and everything, once they passed the tissue, they were very happy, they were pleased that they had done it this way.

The successful testing of RU-486 at Planned Parenthood of Houston marked a new era for the agency in the delivery of contraceptive services to women. The rocky history of the drug in the U.S. paralleled that of PPH in general and its abortion clinic in particular.

25OHI, Dr. Jerry Edwards. March 7, 1996. One group of women, or “cell,” was nine weeks pregnant, one eight weeks, and the third was seven weeks and below.
Like most Planned Parenthood clinics, PPH had been the target of violence, harassment, and congressional funding battles at both the state and national level. With the inauguration of a Democratic Presidential Administration in 1992, however, the pressure had eased. When the Clinton Administration in January 1993 lifted the ban imposed in 1989 by the Bush Administration on the importation of RU-486 from France, reproductive rights advocates took it as a sign that the time for securing those rights permanently had come. For them, RU-486 promised both a new-found freedom for women and a way to achieve it via a new technology.27

In reality, RU-486 (and, with it, prostaglandin) was not the revolutionary drug its supporters and detractors had made it out to be. It was a more time-consuming procedure, required a greater commitment on the part of the woman to complete, and was more expensive than surgical abortion. PPH’s Director of Medical Services noted that:

> I guess the bottom line here is this would be a more expensive procedure. It’s much more medical personnel time for the screening process, much you know, at least two examinations under the best of conditions, the least intrusive of conditions. The way we did it, it took a lot of time, because ...the way we did it the patients stayed for four hours afterwards. That takes a lot of medical time for the nurses to monitor that. A lot of bathroom time. We would have to probably add bathrooms if we were going to do that on a regular basis, so it’s not going to be a less expensive method of abortion.......I’m talking about just medical cost outside of the drug cost......I think it’s always going to be a niche market. You know, it takes a much greater commitment on the patient’s part to go through much more discomfort, much more scary stuff, not being at home, much

26OHJ. Dr. Jerry Edwards, March 7, 1996. Critics of RU-486 argue that it is NOT a less invasive procedure since the woman must undergo a vaginal ultrasound before receiving the drug. See Nathanson, "The Abortion Cocktail." 4.
more time, like multiple days of coming into the doctor’s office....It’s going to be the women to whom it’s very, very important to them not to have a surgical procedure.

Those praising RU-486 usually down-played the drug’s side effects (cramping, bleeding, nausea, vomiting, and diarrhea) and to overstate its ease of use. Those who opposed it were more apt to overstate the side effects and downplay the benefits.28

Doctors were also more quietly testing another chemical method for abortion: an anti-cancer drug called Methotrexate. Used in conjunction with a prostaglandin (usually misoprostol), in much the same way as RU-486, Methotrexate was found in clinical testing to be at least 96 percent effective during the first sixty-three days of pregnancy. In 1995 The New England Journal of Medicine published the results of a study of 178 women showing that the two-drug combination was 96 percent effective. A second study found that 98 of 100 women competed abortions with the Methotrexate-misoprostol combination.29

The procedure with Methotrexate is similar to the one using RU-486, although it is administered by an intramuscular injection instead of a pill. Women in the trials received an

28Facts Sheets published by the National Abortion Federation, the Feminist Majority Foundation, Marie Stopes International, the National Abortion Rights Action League, the California Abortion Rights Action League, Medical Students for Choice, and the Feminist Majority’s Newsletter, which are pro-choice, and those published by the National Right to Life Committee, Right to Life of Michigan, the Catholic Church, Human Life International, First Things, and other anti-abortion groups, are diametrically opposed. Each presents the facts differently to support its view, or simply skews the percentages to prove its point. The truth seems to lie in the middle. Associated Press (AP) writer Connie Cass, writing for U.S. News and World Report online (9/18/96), described the process most succinctly: “To induce an abortion, the pregnancy-ending pill is followed two days later by another pill that causes strong uterine contractions to expel the fetus. The process can be painful and cause bleeding. It must be monitored closely, requiring three separate doctor exams for safety.” The Cable News Network’s (CNN) Healthwatch online (July 19, 1996) similarly reported FDA findings regarding the drug, saying: “Studies showed that the drug caused an abortion 95.5% of the time with few complications. The pill, however, does have drawbacks and the [FDA] committee said women must use RU-486 with caution. The drug requires three separate doctor exams, it’s painful to use and can cause extensive bleeding, the [FDA] panel said.” See also The Population Council of New York, Release, October 27, 1994, at 3. The Population Council was the entity that conducted tests on RU-486 in the United States. And see Diane Gianelli, “RU-486 Effective, Not Problem-Free,” American Medical News, April 12, 1993, at 25.

injection of Methotrexate, followed by the self-administration of misoprostol in pill or suppository form a week later. With Methotrexate, however, the precise time of abortion was harder to specify; the expulsion of the tissue sometimes took days or weeks, and often a second dose of prostaglandin was necessary. The side effects women experienced with Methotrexate were similar to those who used RU-486. Again, as with RU-486, those still pregnant underwent a surgical abortion.30

Methotrexate attacks (among other things) the fast-growing cells of the trophoblast, the tissue surrounding the embryo that eventually gives rise to the placenta. Deprived of its “life support system,” the tissue dissolves and the pregnancy is terminated. Misoprostol, the same prostaglandin that is used in conjunction with RU-486, causes the expulsion of the embryo.31

A significant aspect of the trials was the fact that Methotrexate was already on the market and FDA-approved for other purposes: in low doses as a treatment for arthritis, psoriasis, and ectopic pregnancy, and in higher doses as a cancer treatment. Before it could be used as an abortifacient in anything other than clinical trials, however, someone had to apply to the FDA for a “supplemental indication” approval, which is generally considered easier to obtain than a new drug approval. Methotrexate was also very cheap--five dollars per dose compare to two hundred dollars for RU-486. But while the Methotrexate procedure was the only known chemical abortion method for effectively terminating ectopic pregnancy, researchers generally believed that RU-486 offered several advantages over Methotrexate.

30Mitchell D. Creinin and Jerry Edwards, “Early Abortion: Surgical and Medical Options,” 20 Current Problems in Obstetrics, Gynecology and Fertility (January 1997), 1-32. “A major drawback...is that approximately one third of women who use Methotrexate and misoprostol for abortion will need to wait 3 to 4 weeks for the pregnancy to pass. Still, the regimen has been very acceptable to those women who have used it.” (at 28)
31See fn. 6, supra.
The termination of pregnancy with RU-486 occurred more quickly and over 200,000 women in Europe had already successfully used the mifepristone regimen.\textsuperscript{32}

The main drawback to chemical, or "medical" abortion using either RU-486 or Methotrexate is that it does not work as well as surgical abortion, which has a failure rate of only 1 percent. If a woman is still pregnant after undergoing a chemical abortion, she must have a surgical abortion to complete the procedure. Clearly, this can be costly as well as emotionally draining. And if a woman changes her mind after taking RU-486 or Methotrexate and decides to continue her pregnancy (since without prostaglandin a large number do not abort), the fetus can be gravely damaged. Dr. Edwards stated in his "Suggested Guidelines for Methotrexate/Misoprostol Abortion" that:\textsuperscript{33}

A medical abortion is \textit{not} a means to make abortion an easier decision for a woman uncertain about whether to continue the pregnancy. Once a woman is \textit{sure} that she desires an abortion, then counseling can focus on the methodological options; this discussion should include the risks, benefits, and side effects of both medical and surgical abortion. It is important to emphasize the necessity of follow-up and number of visits for a medical abortion. Bleeding will be much heavier than with menses (and potentially with severe cramping) and is best described to patients as comparable to a miscarriage. Even more important is to emphasize that medical abortion, whether it involves regimens with mifepristone or Methotrexate, does not work as well as surgical abortion, which has a failure rate of approximately 1\%. [emphasis added]

More importantly, Edwards notes in conclusion:

\textsuperscript{32}See Baulieu, \textit{The Abortion Pill}, and Lader, \textit{RU-486}, for information on the European trials and clinical testing. On Methotrexate, see Mitchell D. Creinin, M.D., "Methotrexate For Abortion at 42 Days Gestation," 48 \textit{Contraception} (December 1993), at 519; and Creinin and Edwards, "Early Abortion." See also OHI, Dr. Jerry Edwards, March 7, 1996. Edwards had used Methotrexate in his own practice for ectopic pregnancies before the Hausknecht and Schaff studies, and it is reasonable to assume that a number of other physicians have used it as well. The value of the clinical trials was that they provided a protocol--accepted methodology--for using the drugs that included dosage, pre- and post- treatment exams, and listed contra-indications (i.e., indicated which women should NOT use the drug).
It must be emphasized to the patient before she begins a medical abortion that the agents being used to effect the abortion can cause anomalies in an ongoing pregnancy. Thus she must be certain of her decision to have an abortion and be willing to have a surgical abortion should the medications not cause expulsion and the pregnancy still be viable.

While chemical or "medical" abortion had proven to be a safe and effective alternative to surgical abortion, and was very popular in France, where more than 60 percent of patients had chosen mifepristone/prostaglandin abortion rather than a suction curettage procedure, it was neither as simple, quick, nor reliable as surgical abortion (and with RU-486, not even as cheap). It was simply an alternative for women who objected strongly to surgical abortion or who might not otherwise have access to surgical abortion where they lived—an additional choice on a limited spectrum of choice.

Making the Contraceptive Revolution

For doctors like Edwards of Houston’s Planned Parenthood, chemical abortion did not become a panacea for the controversy surrounding abortion. Edwards, in particular, did not put all of his hope in the RU-486 or Methotrexate bottle, although he, like many private physicians, indicated that he would perform medical abortions as part of his practice.34 From January 1994 through July 1996, Edwards performed almost 3,000 "early surgical abortions"—abortions performed at six weeks or less gestation—using a manual vacuum syringe. Until then, most surgical abortions were performed after the sixth or seventh week

34 OfHl, Dr. Jerry Edwards, March 7, 1996. A 1995 survey of U.S. ob/gyn physicians done by the Henry J. Kaiser Family Foundation found that one-third of those who said they did not perform surgical abortions would be likely to prescribe mifepristone if it became available in the U.S. This possibility, along with that of additional family physicians and internists as providers, would increase reproductive options for women. See “Update on RU-486,” Medical Students For Choice Newsletter, February 24, 1997; and “RU-486 Wins Global Praise From
of pregnancy and required an electrical vacuum pump. Doctors did not perform earlier surgical abortions because they were considered too risky; they believed there was a high probably that the pregnancy would continue or that fetal tissue would be left behind, making a second abortion procedure necessary to complete the process.\textsuperscript{35}

New technologies had emerged, however, to allow women access to abortion very early in pregnancy and to ensure that the procedure had worked. In his clinical trial, Edwards used high-sensitivity urine pregnancy tests and vaginal ultrasound examinations to confirm pregnancies and gestational age and was able to offer women access to surgical abortion as soon as their pregnancy tests were positive. Ultimately, Edwards developed the standard protocol for the procedure and published the results of his work in the journal \textit{Current Problems in Obstetrics, Gynecology and Fertility}.\textsuperscript{36}

Between January 1994 and July 1996, Edwards performed 2,399 procedures on women six weeks pregnant or less. After administering a high-sensitivity urine test and confirming the pregnancy, he used vaginal ultrasound to confirm gestational age. He then performed the suction aspiration procedure (under local anesthetic) with a manual vacuum syringe. Immediately after the procedure he examined the “products of conception” for the gestational sac. If one was identified, the patient came for a follow-up exam in three weeks, taking a second high-sensitivity urine test to confirm that she was no longer pregnant. If no gestational sac was seen in the products of conception, a blood test called a beta-hCG (human chorionic gonadotropin) was administered to test for hormones present during pregnancy. Patients with high levels of the hormone, which indicated that they were still pregnant, were

\textsuperscript{35} Creinin and Edwards, “Early Abortion,” 6-7. The electrical vacuum pump is a relatively large, expensive piece of equipment. The manual vacuum syringe is cheap and can be carried in a briefcase.
treated for ectopic pregnancy or administered a number of beta-hCG tests over a period of days to determine if the hormone had diminished or another abortion procedure was necessary. In Edwards’ study, 93.7 percent of the patients had complete abortions with the manual vacuum syringe; only three women required a second procedure. The gestational sac was identified in the curettage specimen of all but 125 (5.2 percent) of the patients, meaning that only 125 of 2,399 needed follow-up treatment to ensure that their pregnancy had ended. Fourteen of these women were treated for ectopic pregnancies.\(^{37}\)

Although abortion opponents have not condemned his method, Edwards’ early abortion method is more “revolutionary” than either RU-486 or Methotrexate. It is less time-consuming, highly effective, needs less technical/surgical knowledge to perform, and is cheaper. The manual vacuum syringe consists of a few plastic pieces that are inexpensive to produce. Early pregnancy tests are widely available for around fifteen dollars. As Edwards noted, “The handheld syringe is inexpensive and easy to assemble and use...[and]...an instructional video for the use of the manual vacuum syringe is available for $55 through Planned Parenthood of Houston...” Equally important, “For early procedures one application of the syringe is sufficient, but the process can be repeated if the uterus has not been emptied in a single pass.”\(^{38}\) What better alternative than a safe, effective, inexpensive, low-technology way to terminate pregnancies, and one that can be repeated at very little additional cost if it fails the first time? In the making of the contraceptive revolution, the least publicized, least-touted, and technologically simplest method may be the most radical.

\(^{37}\) Ibid.  
\(^{38}\) Ibid.
The Relationship of the New Technologies to Existing Law

The movement toward less restrictive abortion laws in the United States reached its peak in the Supreme Court’s 1973 decision in *Roe v. Wade*. In *Roe*, the Court declared unconstitutional a Texas abortion statute that prohibited abortion except to save the life of the mother. The Court reasoned that the right of privacy includes the decision of a woman whether to terminate her pregnancy. The woman’s right to privacy as elucidated in *Roe* is not absolute, however. It is subject to state interests in maternal compelling throughout the first trimester of pregnancy. Its interest in potential life health and in the potential life of the fetus. The state’s interest in maternal health is becomes compelling at the point at which the fetus becomes viable, or able to survive outside the womb. Even after viability, a woman can obtain an abortion in some circumstances, because a state cannot prohibit an abortion that is necessary to preserve the life and health of the mother. In *Roe* the Court also declared that a fetus is not a person within the meaning of the Fourteenth Amendment and refused to decide the question of when life begins. *Roe* was affirmed in subsequent decisions, but a more conservative Court has since 1989 rendered opinions that suggest far-reaching changes may occur, particularly with respect to state-mandated restrictions on access to abortion.39

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39 *Roe v. Wade*, 410 U.S. 113 (1973). For a comprehensive history of post-*Roe* abortion cases see Mary Ann Glendon, *Abortion and Divorce in Western Law* (Cambridge: Harvard University Press, 1987). The right of reproductive privacy had its origins in *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which the Court invalidated a Connecticut statute that prohibited the use of contraceptives, holding that the statute violated the Constitutional right to marital privacy. The Court expanded that right in 1972 when it invalidated a law prohibiting the distribution of contraceptives to unmarried people, holding that the Constitutional right to privacy extends to the reproductive decisions of both married and unmarried people, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In 1973, the Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that the fundamental right to privacy extends to a woman’s decision whether to have an abortion and that any governmental interference with that right is subject to strict judicial scrutiny. The Court recognized two compelling state interests sufficient to justify restrictions on a woman’s right to chose. States may regulate the abortion procedure after the first trimester of pregnancy in ways necessary to promote women’s health. After the point of fetal viability—approximately 24-28 weeks—a state may, to protect the potential life of the fetus, prohibit abortions not necessary to preserve the woman’s life or health. Only three years later, the Court upheld provisions of a Missouri law that required abortion facilities to keep confidential records (available only to health officials), that required women to sign a consent form prior to having an abortion, and that redefined viability as “that
At the same time, public attitudes about abortion have changed little in the years since *Roe*. Abortion remains a subject of enormous controversy, but most Americans (more than 85 percent in some surveys) approve of abortion in some circumstances. Generally, public support for abortion depends on when during pregnancy an abortion is performed. That support is highest when a women’s health is in jeopardy. It falls precipitously when a pregnancy is further along, or when the woman’s reasons for wanting an abortion are perceived as “selfish.” In general, one pollster observed: 40

The American people support abortion for hard reasons, such as risk to a mother’s life, risk to her physical health, the risk of a genetically defective child, and pregnancy resulting from rape or incest, but oppose it for soft reasons, such as being

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40 Approximately twenty percent of Americans would forbid abortion under any circumstances except to save the mother’s life. About twenty-five per cent support the position as defined in *Roe v. Wade*. Everyone else is in between, approving of abortion in some circumstances but not in others. These are the people one author refers to as the broad middle group that is “reluctantly pro-choice.” Despite the existence of the middle group, it is the two extremes that have set the tone for abortion discussions. The middle group has not been heard in public debates or discussions of abortion. The distaste many people feel toward “soft” types of abortions and the increased visibility of those who oppose it may have served as a disincentive for the middle group to speak out. See Mary Ann Lamanna’s “Social Sciences and Ethical Issues: The Policy Implications of Poll Data on Abortion,” in S. Callahan and D. Callahan, eds., *Abortion: Understanding Differences* (New York: Plenum Press, 1984).
unmarried or a teenager, not being able to support a child, or simply not wanting a child.

For many people, attitudes about abortion and contraception are linked. Some who oppose abortion also have attitudes about women, work, and the family that are threatened by the easy availability and widespread use of contraception. Studies undertaken by historians underscore the fact that because pro-life and pro-choice advocates disagree about a host of issues related to women, work, sex, and family, they are often at odds not only on the question of abortion but also on the subject of contraception. American courts have had to mediate between the two extremes.  

As the political climate has turned in favor of abortion restrictions, and judicial and scholarly criticism of the Supreme Court’s decision in Roe has mounted, feminist legal historians have attempted to reconceptualize the abortion right in a “sex equality” framework, rather than in terms of a right to privacy. Feminist legal theorist Eva Siegel in her article, “Abortion as a Sex Equality Right: Its Basis in Feminist Theory,” notes that: “The abortion right is generally discussed as a negative liberty, a right of privacy, a right to be let alone.” She compares this mode of speaking about the abortion right with the framework the Supreme Court adopted in Roe v. Wade, and finds that they share important features. The Court’s decision in Roe does not consider the abortion right as an issue of equality for women, she argues. Indeed, the Court’s opinion is generally oblivious to such concerns, and in fact, Roe defines the abortion right in such a way as to make it difficult to speak about abortion in sex equality terms. Siegel draws upon feminist legal and social theory to develop

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an argument in support of an abortion right based upon sex equality. It is clear from her discussion that pro-abortion arguments based upon the right of privacy will no longer do.\textsuperscript{42}

Feminist legal historians have also argued persuasively that the right of privacy envisaged in \textit{Roe} is cast in medical terminology, rather than in legal terms such as "equal protection." \textit{Roe} recognizes that a woman has a privacy right to make decisions about abortion, but describes this right in medical terms: it is a right to be exercised under the guidance of a physician. \textit{Roe} also allows the state to regulate a woman's abortion decision in order to protect potential life: "The pregnant woman cannot be isolated in her privacy. She carries an embryo, and later a fetus, if one accepts the medical definition of the developing young in the human uterus. See Dorland's \textit{Medical Illustrated Dictionary}....The situation is therefore inherently different from [all other privacy precedents]. Again, the opinion derives the state's interest in protecting potential life from a "purely medical definition of pregnancy."\textsuperscript{43}

\textit{Roe} reconciled the conflict between a woman's right to make decisions about abortion and the state's prerogative to regulate those decisions by means of its trimester framework. As the pregnancy advances, a woman's privacy interest in making the abortion decision wanes while the state's interest in regulating the decision grows—a situation that in the feminist view has been fraught with difficulty. For feminists legal scholars, then, \textit{Roe} represented an enormous victory "for the moment," in result, if not in reasoning, for the feminist movement.

Yet, the feminist legal argument that *Roe* protected women’s right to make the abortion decision as a right of privacy not equality has problems of its own, problems that feminist scholars readily acknowledge. When *Roe* was decided in 1973, the Supreme Court had yet to interpret the “equal protection” clause of the Fourteenth Amendment to require government adherence to principles of sex equality. Even now, *Roe* cannot be easily incorporated into the Constitutional sex discrimination tradition that has developed since the case was decided. As Siegel concedes, the modern equal protection tradition defines equality as a relation of similarity and discrimination as “an illegitimate act of differentiation.” *Roe*, however, analyzes abortion restriction in physiological terms. Considered from that standpoint, no man is similarly situated to the pregnant woman facing abortion restrictions; hence, state actions restricting a woman’s abortion choice do not seem to present a problem of sex discrimination. Feminist legal scholars have not adequately addressed this problem.  

By the 1980s *Roe* was engulfed in legal and political controversy, and the decision appeared vulnerable to reversal. An administration openly hostile to *Roe* was elected and announced its determination to select Supreme Court Justices from the growing body of jurists and scholars who questioned the Constitutional basis of the privacy right on which *Roe* rested. As criticism of the decision mounted, feminist legal academics began to seek alternative Constitutional foundations for the abortion right. Some seized upon a new paradigm, one that repudiated equality theory (i.e., issues of similarity and difference) and focused instead on issues of hierarchy and subordination. In one of the first major articles to expound upon hierarchy-subordination theory, feminist legal scholar Sylvia Law argued that because women’s capacity to bear children represented a real and significant biological

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44Siegel, “Abortion as a Sex Equality Right,” 58.
difference between the sexes, reproductive regulation should be evaluated under an “anti-
subordination” framework. In Law’s paradigm, if the regulation in question contributes to
the maintenance of an underclass or a deprived position because of gender status, it is
unconstitutional. This new paradigm, feminist scholars agreed, would facilitate equal

Feminist legal scholars universally condemn the Court’s conceptualization of the
abortion question as one concerning women’s bodies, not women’s societal roles. “That
women are the object of abortion-restrictive regulation is considered to be a matter of
physiological necessity: women are where the embryo/fetus is.” When women are removed
from the center of the reproductive debate, feminist scholars argue, the fetus can be presented
as if it is an autonomous life form, and the process of human development can be depicted as
if it scarcely involves women at all. Privacy for women in making reproductive decisions is
then out of the question. To illustrate how “gender-based” judgments can be expressed in
physiological terms, feminist legal theorists always return to Roe. In Roe, the Court held that
the state has an interest in protecting potential life that becomes compelling at the point of
fetal viability, when this interest is strong enough to support state action prohibiting abortion
(p. 163). The weakness of the Court’s reasoning, in their eyes, lies in its reliance upon the
trimester framework and its underlying physiological/medical justification. Pro-life critics of
Roe’s trimester framework have also seized upon the Court’s logic to contend that the state’s
interest in “protecting potential life” exists throughout the pregnancy.\footnote{Feminist legal scholars err, I think, in concluding that the recent increase in state regulation of abortion reflects a state interest in “compelling women who are resisting motherhood to bear children.” Siegel, for example, supports this conclusion by citing public opinion polls in which 89% of the respondents favored}
For feminist theorists, the "discourse of reproductive physiology" functions as a discourse of gender status. In this discourse, laws criminalizing abortion and contraception (i.e., that compel motherhood) can from a historical perspective be understood as a form of "gender status regulation," or male-imposed social control, which dates back to the nineteenth century. Interest in reproductive regulation is also seen as shaped by concerns of gender, race, and class.47

Similarly, feminist historians view new reproductive technologies as altering women's lives negatively "by making conception, gestation, and birth something that predominately male authorities increasingly monitor, examine, and control." Feminist historian Laura Woliver argues that motherhood is shaped by culture and that defining human sexuality and reproduction issues within a medical and scientific vocabulary "displaces a more comprehensive focus on the social, economic, and environmental issues of reproduction." The new medical technologies, Woliver says, are being offered as the solution to reproductive problems and concerns: "We are told that these technologies are for our own good and are responding to our demands." At the same time, the medical profession's "gate-keeping role and its monopoly over birth control information and services" has not been broken by new technologies. "These technologies," she concludes, "might actually decrease women's power over their bodies." Woliver is one of a number of

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47Feminist scholars have also argued that certain forms of fetal-protection regulations are overwhelmingly directed at pregnant women who are poor, of color, and on public assistance (for example, forced surgical treatment such as sterilization or the insertion of NORPLANT, or drug-related prosecutions and custody deprivations. These regulations are seen as reflecting gender-bias, as well as antipathy toward poor women of color and their children.
feminist scholars who view skeptically both medical and legal power over reproduction, and the role of technology in buttressing that power.⁴⁸

New reproductive technologies add new issues to the legal and political debates about abortion as well. First, new reproductive technologies such as RU-486, Methotrexate, and early abortion are predicated on the availability of legal abortion, which is always under threat. Any changes in abortion laws will directly affect the use of these technologies. From a legal perspective, new technologies that contribute to the blurring of the boundaries between contraception and abortion are particularly problematic. The controversy over RU-486 and Methotrexate is one example. Any abortion decision that addresses the problem of whether abortion should be legal must also determine when a woman is “pregnant.” If the Supreme Court arrives at a new legal definition of pregnancy which declares a woman to be pregnant at implantation, RU-486 and Methotrexate (which can act before that time) will be legal “interceptives.” If the Court determines that a woman is pregnant from the time of fertilization, chemical “abortion,” like all types of surgical abortion, will be illegal.

Most important, neonatal technologies have altered our perceptions of fetal viability, undermining one of the premises of Roe. Supreme Court Justice Sandra Day O’Connor has noted that Roe is “on a collision course with itself” because of these changes. Technologies that push back the gestational age when fetuses might survive outside the womb threaten to debunk the trimester framework of Roe. The result might be, as feminist scholars speculate,
“to pit the woman’s rights against those of her fetus.” Indeed, recent reproductive rights cases indicate that when maternal actions are judged detrimental to the health of a potential child, courts have shown little hesitancy to constrain the liberty of the mother.\footnote{City of Akron v. Akron Center for Reproductive Health, Inc., at 458. In reality only a very small number of women and babies have access to these neonatal technologies, but the experience of a privileged few is being generalized into the abortion debate as a whole.}

Reproductive technologies such as ultrasound and fetal medicine are also playing a significant, if subtle, role in efforts to restrict abortion rights by furthering the construction of the image of the fetus as an entity distinct from the woman who carries and delivers it. Ultrasound images, for example, which allow “the viewing of a woman’s innards,” is an integral part of the politics and the cultural shift of re-envisioning pregnancy. Any technology that allows physicians to view, study, and treat fetuses medically further “elevates the moral status of the fetus.” The image of the fetus \textit{in utero} is a powerful symbol in American anti-abortion politics.\footnote{Woliver, “Reproductive Technologies.”}

The new technologies also push women away from the center of medical attention in gestation and birth, except for efforts to control female behavior for the well-being of the fetus. Discussions and lawsuits about what pregnant women eat and drink (alcohol, tobacco, drugs) or how they live (working in unsafe occupations, engaging in unsafe sex, or practicing risky sports) have troubling implications for controlling women’s behavior. In sum, the elevation of the fetus as a patient in medicine, politics, and the law, combined with more detailed and heightened monitoring of the behavior of pregnant women, threatens to marginalize women and to impact abortion choice. In this paradigm a society that oversees

regulate pregnancy by the medical establishment. In this paradigm an “abusive” mother might include one who refused to utilize the available technologies.
the nutrition and lifestyle of pregnant women in order to ensure the health of the fetal
“patient” becomes less and less willing to condone abortion of the “patient.”

In the late 1980s abortion-rights activists heralded the arrival of the abortion pill with
understandable optimism. Although abortion had been legalized since 1973, subsequent
Supreme Court decisions had upheld restrictions imposed by states upon women seeking
abortions. Parental consent statutes, informed consent and reporting requirements,
prohibition of the use of public funds to pay for abortions, parental notification requirements,
prohibition of the use of public facilities and personnel to perform abortions, requirements
for viability testing, waiting periods, prohibitions on abortion counseling at publicly-funded
family planning clinics, all had passed judicial scrutiny and become law despite Roe’s
guarantee of a woman’s right to reproductive privacy. With the possibility of new legislation
that might lower the current time limits set on abortion (in effect, abandoning the trimester
framework of Roe), abortion-rights advocates were anxious for new contraceptive technology
that might render all questions of time limits and other restrictions moot.

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51Ibid. Feminist scholars who consider the risks as well as the benefits of the new technologies conclude that
they are helping to make women “transparent:” “A cultural shift has occurred,” Woliver argues,
where women have been “skinned” and authorities are permitted to examine and monitor their innards.” In “the
new politics of motherhood” she envisions the role of the woman as secondary to that of the medical profession
and those who make laws—much like historians have depicted the criminalization of abortion during the
nineteenth century.
52The right of reproductive privacy had its origins in Griswold v. Connecticut, 381 U.S. 479 (1965), in which
the Court invalidated a Connecticut statute that prohibited the use of contraceptives, holding that the statute
violated the Constitutional right to marital privacy. The Court expanded that right in 1972 when it invalidated a
law prohibiting the distribution of contraceptives to unmarried people, holding that the Constitutional right to
privacy extends to the reproductive decisions of both married and unmarried people, in Eisenstadt v. Baird, 405
U.S. 438 (1972). In 1973, the Court held in Roe v. Wade, 410 U.S. 113 (1973), that the fundamental right to
privacy extends to a woman’s decision whether to have an abortion and that any governmental interference with
that right is subject to strict judicial scrutiny. The Court recognized two compelling state interests sufficient to
justify restrictions on a woman’s right to choose. States may regulate the abortion procedure after the first
trimester of pregnancy in ways necessary to promote women’s health. After the point of fetal viability—
approximately 24-28 weeks—a state may, to protect the potential life of the fetus, prohibit abortions not
necessary to preserve the woman’s life or health. Only three years later, the Court upheld provisions of a
Missouri law that required abortion facilities to keep confidential records (available only to health officials),
that required women to sign a consent form prior to having an abortion, and that redefined viability as “that
Abortion rights advocates and foes alike expected RU-486, and to a lesser degree Methotrexate, to render laws on abortion irrelevant and public regulation impossible. Instead, the "traditional publicly regulated nexus, the doctor-patient relationship"—and therefore the laws regulating it—survived intact. Neither RU-486 nor Methotrexate have transformed the abortion debate by making abortion a truly private decision. Nor have they put an end to the stigma that still attaches to those doctors who perform surgical abortions.

Ultimately, reproductive rights can only be expanded through chemical abortion if private physicians practice it rather than just abortion clinics. Given the cumbersome process and the difficulties associated with administering the drug, the expense, and the possibility of lawsuits, it is unlikely that RU-486 (and to a certain extent Methotrexate) will ever reach beyond a niche market or be administered by any but a limited group of physicians already committed to the practice of abortion.

With early surgical abortion, however, a real possibility exists that abortion will expand to areas where it was not practiced before and consequently expand abortion rights.

stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems," in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976). In a series of cases from 1977 to 1980 (Maher v. Roe, 432 U.S. 464 (1977), Beal v. Doe, 432 U.S. 438 (1977), Poelker v. Doe, 432 U.S. 519 (1977), and Harris v. McRae, 448 U.S. 297 (1980)), the Court upheld state prohibitions of the use of public funds/facilities for abortions. In 1981, in H.L. v. Matheson, 450 U.S. 398 (1981), the Court upheld a Utah statute requiring physicians to notify a minor's parents before performing an abortion. Seven years later, the Court upheld provisions of a Missouri statute prohibiting the use of public facilities for abortion and requiring viability testing before performing an abortion, in Webster v. Reproductive Health Services, 492 U.S. 490 (1989). A year later, in Hodgson v. Minnesota, 497 U.S. 417 (1990), the Court upheld a parental notification requirement for minors seeking abortions (with a judicial bypass) and a 48-hr. waiting period for minors. In 1991, in Rust v. Sullivan, 500 U.S. 173 (1991), the Court upheld federal regulations prohibiting health care professionals at family planning clinics funded through federal Title X programs from counseling or referring women regarding abortion, or even informing a pregnant patient that abortion was a legal option (the so-called "gag rule"). And finally, in 1992, in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), the Court upheld provisions of a Pennsylvania statute that required physicians to provide patients with anti-abortion information, imposed a mandatory 24-hr. waiting period, required the filing of publicly available reports, and imposed a parental consent requirement for minors. More frightening for abortion advocates have been advances in medical technology making it possible for the fetus to survive outside the womb before the third trimester, which threaten to debunk the basis of Roe's
Because of the "low-tech," portable nature of the procedure, it is likely that it can be performed by people other than "regular" physicians and in places other than abortion clinics. Because it is inexpensive, it is likely that it will make its way to a greater number of women, not just the small, elite group of women able to afford RU-486. And, because it is quicker and less cumbersome than both RU-486 and Methotrexate—that is, it does not involve several trips to clinics or require hours or days to take effect—it is more likely to be practiced by a greater number of women who want to expedite the procedure. Finally, those women seeking the privacy that seems to elude abortion clinics may choose early surgical abortion. Then, to re-phrase Tribe, many of the arguments, and to some extent the laws, about abortion would be made largely irrelevant by a widely available early surgical procedure.\textsuperscript{53}

A Note on the New Technologies and the Women's Movement:

The 1960s and 1970s saw the emergence of birth control as a key concern of the women's movement. Yet the involvement of the women's movement did not result in overwhelming support for the development of new contraceptives. In part this was the case because feminists were more concerned with keeping abortion legal and accessible than with trimester framework and open it yet again to judicial scrutiny. The "undue burden" test enunciated in the \textit{Casey} decision is another fertile field of endeavor for abortion foes.

\textsuperscript{53}Patricia Miller is one of a number of historians who argue that the fundamental right conferred in \textit{Roe} is of little practical benefit to women if abortion providers are harassed, intimidated, and murdered—that is, if abortion is legal but effectively unavailable because there is no one to perform them. She also details a fascinating tale of illegal abortions performed in the days before \textit{Roe}. Abortions were then (and would be again if abortion were recriminalized, she postulates) performed by physicians and non-physicians with varying degrees of competence. From her story it can be extrapolated that early surgical abortion, which would greatly reduce the likelihood of perforation of the uterus, and antibiotics, which greatly reduce the likelihood of infection, would revolutionize the illegal abortion trade. See \textit{The Worst of Times} (New York: Harper Collins, 1993). Dallas Blanchard, a historian of the anti-abortion movement, also speculates that an underground abortion network similar to that of the pre-\textit{Roe} days would spring up again if abortion were re-criminalized. "There already exist groups helping women to find access to abortions in states where limitations have been or are expected to be placed on them. There are also cadres training women in self-abortion. These existing groups could easily turn their ingenuity and efforts toward methods of importing and distributing RU-486." See \textit{The Anti-Abortion Movement and the Rise of the Religious Right} (New York: Mcmillan, 1994), 117. Early
the development of new contraceptives. But the feminist health movement has also been critical of the family planning establishment and of specific contraceptives, including Depo Provera, the IUD, and the Pill. This critique, along with a number of class-action lawsuits against contraceptive manufacturers, has overshadowed concurrent feminist pleas for improved contraceptives. In sum, even though there has always been a common understanding that birth control has a special significance for women, feminist views have been influenced by a variety of other factors including race, religion, social class, education, and labor force participation. Ultimately, the women’s movement has not been able to subordinate its diversity to a single vision of what is best for women simply as women.
Chapter 22

At the Crossroads of Reproductive Freedom:
Planned Parenthood, 1995-1997

By 1995 Planned Parenthood of Houston’s (PPH) leadership and the central Planned Parenthood Federation of America (PPFA) recognized that they had inherited a medical system based on an outdated concept of women’s health. Prodded by proposed changes in the national health care system and by physicians who were determined to bring women’s health into the mainstream of medicine, both the national and local Planned Parenthood began to “reinvent” themselves in the name of comprehensive women’s health care. Planned Parenthood’s leaders began to address deficiencies in the medical care of women and to offer as a solution the possibility of comprehensive, woman-centered health services.

The central idea of reinvention was that both the national organization and its affiliates serve better the women and families who had always depended on them for health services, education, and advocacy. The way to do this, affiliate and national leaders concluded, was not to change Planned Parenthood’s traditional mission, which they believed was the agency’s greatest strength. Rather, the organization and its membership should change their “historical structures, systems, and services that need radical transformational change in order to withstand the financial and political assaults that relentlessly confront us now and in years to come.” To effect this change, they proposed that “we must become economically strong and create a socially responsible, profitable, thriving enterprise, one that
allows us the freedom to move away from dependence on traditional sources of revenues, which are eroding daily.”

In 1994 the Planned Parenthood affiliate membership had voted almost unanimously to begin a process of radical reinvention. At a two-day retreat in Atlanta, Georgia, members of the national organization considered every aspect of Planned Parenthood’s mission, structure, and fundamental operating assumptions, then boldly called for changes. The delegates agreed that Planned Parenthood’s traditional mission remained paramount. Given new health care realities, however, the success of that mission and the survival of affiliates as health care providers were in jeopardy. The membership recognized that though change would be difficult, they risked being left behind if they ignored the facts and did nothing.

With mandates from member affiliates in hand, the PPFA outlined a blueprint for change: “for establishing new ways of working together, methods for better integrating our services, and capital-raising ventures to ensure our independence.” The plan included risks far greater than any affiliate had been asked to take in their histories. In its plan, the Federation outlined the problem faced by affiliate members:

As the restructuring of the delivery of health services becomes increasingly competitive, affiliates across the nation are at risk. Many are facing increasingly dramatic declines in their margins and financial bankruptcy within the next three years. These declines are more acute in affiliates that have not achieved the scope of service and scale of operation that allow them to maintain their positions in the changing marketplace. Many affiliates are experiencing the reality of clients moving to managed care organizations and changing service providers in managed Medicaid programs. Planned Parenthood’s

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1“Planned Parenthood Federation of America, Inc., Reinvention Plan: 1995 to 2000.” Indeed, the “federalism” of Planned Parenthood, or its historical structure as a loosely-bound federation of local and state affiliates with a central rule-making body (the PPFA) has clear parallels to US/state/local arrangements.

2Ibid.

3Ibid.
contraceptive price advantage is eroding....All affiliates are at a considerable competitive disadvantage. Virtually all affiliates are experiencing deterioration in their traditional sources of income. Most are facing continuing reductions in their governmental revenue sources. These factors, in conjunction with the decline of the number of 18-24 year-old-women, will inevitably lead to major financial disruptions, closings, and eventual bankruptcies.

The Federation’s reinvention plan consisted of ten major changes. First, the focus of all Planned Parenthood’s clinical services would switch from reproductive health care to “primary,” or comprehensive women’s healthcare—which meant that PPFA would have to expand dramatically its national network of clinics and its menu of services. Second, primary health care would be infused with Planned Parenthood’s vision of “healthy sexuality” in all its programs and services. Next, the governance of the Federation and affiliate boards had to be streamlined to ensure efficiency and progress. Fourth, the membership had to create more opportunities for volunteers rather than paid staff, especially in the areas of education, advocacy, and fundraising. Fifth—and perhaps most important—PPFA would create a national “Management Service Organization” (MSO) to assist affiliates with financial services, bulk purchasing, research, managed care contracting, and information systems.

Within the overall MSO, or federation, the overall number of affiliates would diminish from 163 to approximately thirty “market groups” (leaving 68 traditional affiliates untouched). These market groups would generate 75 percent of all federation revenues, in the process encouraging the remaining independents to consolidate. In cooperation with the national MSO, these regionally based market groups would then work together to raise money, build advocacy programs, and implement strategies for the “financial reinvention” that had to accompany organizational reinvention. Last, PPFA would establish a for-profit
arm, "For Women, Ltd.,” which would oversee licensing of Planned Parenthood products, catalog sales, diagnostic health services, self-care products, and retail outlets to generate revenue for health services.\(^4\)

At the very least it was ambitious. It was also intimidating, even for affiliates like Planned Parenthood of Houston, which in 1995 ranked eighth largest in the nation. PPH had grown in size, created new educational programs, expanded medical services, and added new clinics to serve clients—evolving from a small “maternal health” center that educated women about their reproductive systems and offered some choices to plan pregnancies, into a complex, multi-purpose agency offering comprehensive reproductive health care. Its leadership had planned for the future, taken necessary risks, and updated its mission to remain a resource (sometimes, of last resort) for women who had no access to private health care programs. As an affiliate, a self-governing, self-sustaining, influential franchisee within a loosely structured national federation, it had come of age. It remained uncertain whether PPH, to say nothing of a number of other large independents, could subsume its independence beneath the mantle of a national MSO and serve in a regionally structured marketing group, working and fundraising for a distant national master.

In sum, in 1995 the leadership of PPH was again at a crossroads: it had to find a way to work within a health care system that was rapidly reorganizing, while maintaining its traditional clientele and mission and increasing its services. And it had to decide whether becoming part of the proposed new PPFA structure was the best way to ensure survival.

\(^4\)Ibid.
Reinventing Planned Parenthood

In 1995 the buzz-word at Houston’s Planned Parenthood was “reinvention.” As one of the federation’s largest affiliates, and one at the cutting edge of reproductive technology, PPH had a large stake in any nationwide restructuring. PPH executive director, Peter Durkin, who had been a member of the national reinvention committee, was pro-change. Not one to fear risks, Durkin had encouraged the Houston Board to embrace change and to take a leading role in reinvention at both the local and national level. At the January PPH Board meeting he stressed to Board members that managed care networks were expected to dominate the future of health care, and that if PPH wanted to survive it must restructure its services. Rather than simply providing “quality comprehensive reproductive healthcare,” as PPFA affiliates had been doing all along, Planned Parenthood had to prepare for “women-centered healthcare.” To buttress his case, Durkin circulated an essay entitled “Reframing Women’s Health: From Female Organs to Woman as Person,” by Dr. Eileen Hoffman of NYU’s School of Medicine and Professor Karen Johnson, Clinical Professor of Medicine at the University of California.⁵

Hoffman and Johnson argued that women and their health care providers had inherited a medical system based on outdated concepts of women’s health. For more than a century, medical practitioners assumed that women’s health concerns were essentially limited to reproduction and the surgical specialty of Obstetrics/Gynecology. All else was thought of as “androgynous.” As a result, the authors stated, “androgynous anonymity has contributed to the invisibility of women within the broader field of medicine.” For example, women had been systematically excluded from medical research in areas other than
reproduction; yet the results of this "sex- and gender-biased research" still formed the database from which physicians were taught and from which they drew in treating female patients. A "fundamental flaw in the delivery of medical care to women" resulted. The specialty of obstetrics/gynecology—often the only regular health care service women receive—was, in the authors' opinion, simply not meeting women's health needs.6

What was needed instead, the authors postulated, was a new curriculum in "women's health," a medical specialty like pediatrics, but one that focused on the overall health of women. Women's health professionals, in their model, would learn to treat not just women's reproductive systems but their entire bodies, using behavioral medicine and health psychology as well as standard medical training. Their conclusions echoed those of a number of feminist historians.7 In this way, women's health concerns that resided outside what the authors termed "the traditional biomedical model" would be addressed.8

The psychological impact of violence and poverty disproportionately experienced by women versus men, have profound health consequences. Cultural stereotyping and societal pressures dramatically effect the well-being of many women, lowering self-esteem and generating a preoccupation with body size and shape. Within the current paradigm older women, poor women, women of color, disabled women, lesbians and bi-sexual women rarely receive the level of care appropriate to their needs. A specialty in women's health must integrate behavioral medicine and health psychology with knowledge of specific subpopulations if it is to reflect the differences as well as the commonalities among women.

6Ibid.
8Ibid.
The Hoffman and Johnson article influenced the leadership of the Federation and the Houston affiliate. It offered a concrete conceptualization of a possible new kind of women’s health care. If Planned Parenthood could provide comprehensive women’s health services rather than reproductive services only, PPH would be well positioned in the new managed care environment; in fact, its survival would be almost ensured.

But heavy odds mitigated against PPH and its satellite clinics offering comprehensive women’s healthcare. Even if PPH could afford the salaried professional and support staff needed to offer comprehensive services, it had nowhere to put them. Its main clinic on Fannin Street, newly renovated, was a modest two-story building, and its eleven satellite clinics ranged from small to tiny. As one physician noted when asked to comment upon whether PPH could/should switch to “women-centered health care”: “What would we do, keep adding stories to the building on Fannin? Even if we added four stories it wouldn’t be enough.”

At the Federation level, reinvention and its advocates were also running into political stumbling blocks. While local affiliates like PPH were contemplating the possibility of women-centered health care, PPFA President Pam Maraldo was encountering resistance to the new vision of reinvention and the changes that it implied. Disgruntled affiliates objected to the suggestion in Maraldo’s reinvention plan that every affiliate expand services so that they could take care of all women’s health needs. Although affiliates had voted at the Atlanta PPFA meeting to “reinvent” themselves, this was too much reinvention for some.

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10Confidential Memo from Durkin to Nicki Gamble, Chair of MEXDICO (a group of 35 of the largest affiliates), dated July 7, 1995.
And times kept changing. When Maraldo became the president of the Federation in 1993, soon after President Clinton’s inauguration, the most immediate problem for PPFA was the government’s looming presence in health care reform. Maraldo, then chief executive of the National League for Nursing, seemed ideally suited to lead Planned Parenthood into the health care system’s managed care future. Access to abortion seemed safe—so safe, in fact, that contributions to Planned Parenthood had dropped precipitously. Decreased donations and a high level of staffing by then had created a multimillion-dollar deficit and forced layoffs at the national headquarters. But immediately after Maraldo had arrived at the PPFA national office in February 1993, violence against abortion doctors had accelerated. Dozens of clinics, including those run by PPFA, suffered arson and chemical attacks. Maraldo began a clinic defense project, which brought in new contributions. These income enlargements, combined with necessary staff cuts, put the Federation back into the black.

But the conservative sweep in the 1994 national elections soon subjected abortion rights to their most serious attack to date. Congress considered measures to criminalize late-term abortion, to end abortions in the military, to deny Medicaid-funded abortions for female victims of rape or incest, and to remove medical schools’ requirements that doctors be trained to perform abortions. Funding for family planning also came under attack in the Congress. At the same time, the Clinton national health care plan, under a barrage of special-interest attacks, failed, making affiliates even more reluctant to abandon their original mission of reproductive care and advocacy in favor of primary health care. A New York
Times reporter noted that "Indeed, the internal shake-up could hardly have come at a worse time for Planned Parenthood." 11

By April 1995, when the affiliates met again at a special membership meeting in Chicago, the idea that every affiliate should move into primary health care was aborted. Instead, the affiliates voted to make primary care optional and to create a new group at PPFA to help affiliates negotiate managed care contracts. Although PPFA insisted still that the reinvention process would continue, in reality, it seemed to be stillborn, or at least relegated to "design and review teams." 12

Meanwhile, Maraldo's personal troubles escalated. In June 1995 a Federation steering committee, the National Executive Director's Committee (NEDC), forwarded to Jackie Jackson, Chair of PPFA, a letter detailing the "widespread lack of confidence in Pam's leadership." That letter was never published. But perhaps Tamar Lewin of the New York Times learned of it. She later speculated that Maraldo had "aroused opposition with her emphasis on reshaping Planned Parenthood into a broad health organization that could compete in the era of managed care—a focus that some of the group's affiliates felt would inevitably diminish their role as advocates for abortion rights and low-income women's access to health care." 13 After apparently failing to muster a vote of confidence at a July board meeting, Maraldo resigned, July 21, 1995. Her resignation demonstrated that Planned

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12 Durkin disagreed with my characterization of reinvention at the Federation level as "stillborn." "Not true," he noted in the margin of my rough-draft. "the membership voted to form a number of design and review teams to focus on developing operational plans in a number of different areas for future membership action following the Chicago meeting."
Parenthood remained a very diverse family bound together primarily by a fierce commitment to a single mission, but a family at odds with itself about others.14

Reinvention had problems that increased those odds in Houston. PPH staff had expressed difficulties with a number of the plan’s provisions. For example, medical staff personnel had counseled the Board not to expand services too quickly, in essence rejecting the plan’s notion of primary care. Fundraising staff had urged the Board not to take part in joint Federation-PPH fundraising, or even regional fundraising, unless it profited PPH. And the agency’s business managers had expressed their desire to see PPH create its own “market group,” rather than as part of a group of market-based affiliates as the PPFA plan envisioned. Nationwide reinvention, it seemed, would continue to take a back seat to local interests.15

The new PPFA President, Gloria Feldt, did not repeat her predecessors’ mistakes. A native Texan and an ardent pro-choice advocate, Feldt had been president of the Arizona affiliate for eighteen years. She was committed to reproductive choice, and, as Fayé Wattleton had been, to leading the charge for reproductive rights. And Feldt was also an expert and experienced politician. Unlike her predecessor, Maraldo, who lacked charisma, Feldt was loaded with charm. She assumed the Presidency of the Federation in June 1996 after serving as CEO of Planned Parenthood of Central and Northern Arizona Feldt steered clear of any mention of “reinvention” and charted an uncontroversial course designed to re-unite affiliate members and the Federation. She quickly became the darling of the national

14The historical parallels between the reproductive rights movement, led by Planned Parenthood, and the anti-slavery movement, as well as the crusade for prohibition, are unmistakable. All brought together diverse groups of people (and indeed, groups that were otherwise in opposite camps) who were bound together only by their single-minded commitment to a cause.

15"Reinventing PPH," Confidential Memo from Durkin to the Executive Committee, March 29, 1995. See also the individual Resolutions of the Medical Services Committee, the Business Practices Committee, and the Fundraising Committee following the March 1994 budget.
press. It loved "the idea of a liberal East Coast institution in the hands of a former
housewife from the Bible Belt."\textsuperscript{16}

Feldt made it clear that her primary objective was to nurture public opposition to the
conservative trend in national politics affecting PPFA. "There [has been] great concern that
in the last few years Planned Parenthood has not been visibly leading the charge for
reproductive rights and reproductive health care," Feldt she said at her first press conference.
She conceded that the fight was going to be a long one. "This isn't about abortion," she
concluded, "it's about women's role in society. It's about whether we're going to be a nation
that embraces knowledge and education about responsible sex, as opposed to trying to keep
people ignorant about it." Feldt could have been Agnese Nelms, in 1936, or Margaret
Sanger, in 1916.\textsuperscript{17}

\textbf{Reinventing PPH}

In the absence of a consensus among affiliates, Durkin decided to push for the
reinvention of the Houston affiliate. On February 28 Kurkin sent the PPH Board's executive
committee a memo entitled "The Future" that called for sweeping changes in the governance
of the affiliate. First, he recommended that the Board be "tailored" to a more manageable
size, to fifteen rather than forty members. Then, he noted, "the Board would be \textit{the} Board
and there would be no need for a separate Executive Committee. [And] attendance and
participation would be more meaningful and rewarding." Next, he asked that the Board
reduce the number of committees to one, the Board Affairs Committee, to increase
effectiveness and ability to make timely decisions. Third, he suggested that his title,

\textsuperscript{16}Texas Monthly, September 1996. On Feldt's presidency of PPFA, see also "Family History Shapes Vision of
Executive Director, be changed to “President and CEO,” and that the Board President’s
title be changed to “Chairman of the Board,” to reflect PPH’s new “corporate status.” “As
we move into managed care contracting,” Durkin stressed, “moving away from not-for-profit
language toward corporate language would serve us well.” And he added: “The new CEO
would also be a Board member with a vote.”

Durkin also called for staffing changes. First, he asked that the Director of Business
Operations be re-titled Chief Financial Officer, with expanded responsibilities. The Director
of Finance could become the Comptroller. These changes were also in keeping with the new
corporate language that PPH would have to assume if it wanted to compete in an increasingly
market-driven health care environment. “In the past we have only had to please one payer:
the government. In the new environment we will have multiple revenue sources (including
the government) and we will have to market ourselves to attract clients, both fully and
marginally insured, government insured, and the 29% of Texans with no insurance.” At the
same time, he asked the Board to create new opportunities for volunteers. Many volunteers
felt that they had been squeezed out of their traditional fundraising and staff roles as the
agency’s professional staff had grown.

Acknowledging implicitly that he would be fighting an uphill battle to change the
affiliate culture of PPH, Durkin, in conclusion argued that:

To survive, prosper and expand in the new health care
environment, we will have to be flexible and nimble. I am
convinced we have an opportunity to fulfill our mission

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17 Ibid.
18 Confidential Memo from Durkin to the Executive Committee, February 28, 1995.
19 Ibid. See also, with regard to PPH Volunteers, OHI, Christine Jarvis, June 23, 1995. She was former
    Director, Volunteer Services. Jarvis left PPH soon after her interview because she felt strongly that Volunteers
    no longer had a place at Planned Parenthood.
20 Ibid.
through medical services, education and public affairs—but only if we are willing to change our national and affiliate corporate culture and take some calculated risks.

The Board failed to act on his February recommendations. Durkin, apparently hoping to create a corporate structure without the usual corporate bureaucracy and bureaucratic red tape, sent another memo to the executive committee, this one in April 1995, making essentially the same points, but adding: "Rather than creating yet another task force [to make recommendations about change] why not task [an existing] committee with looking at these issues, making a recommendation to the Board and having the by-laws committee formalize any approved recommendations?"  

A key to Durkin’s PPH reinvention plan was the Endowment Fund, a ten-million-dollar income source Durkin envisioned to fund the agency over the long term, regardless of whether annual fundraising goals were met. But the Endowment Fund concept could only be implemented through fundraising. Durkin had tried for years, largely unsuccessfully, to solicit large donations from some of PPH’s biggest benefactors. But few donors were willing to give the large sums of money necessary to achieve Durkin’s goal. He had approached Susan McAshan, who had been unstintingly generous to PPH for over forty years, but, he noted dryly that, “the idea fell flat.” Nor could other large donors such as the Houston Endowment be persuaded to provide special “endowment gifts” in addition to the large amounts they were already giving.  

Although nearly every matter of concern usually related in some way to budgets, organizational and fundraising pressures were not the only weights on the minds of PPH’s

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21 Memorandum, Durkin to the Executive Committee, April 26, 1995.
leadership. Security concerns remained grave. Anti-abortion activists had become increasingly violent. Abortion providers like PPH had to step up security to combat threats to personnel and property, and often at large cost. After Dr. David Gunn was shot to death by a man affiliated with the anti-abortion group Rescue America in 1993, outside his clinic in Pensacola, Florida and soon after another abortion provider was wounded near a Wichita clinic, PPH’s staff and Board responded with new security measures. The staff plans, all to be implemented quietly and confidentially in several phases, aimed to provide for the safety of personnel and for building security. By January 1995 a security guard was on duty during business hours and was inspecting all bags and purses before visitors were admitted in to the building. Everyone entering the building was required to present a photo ID and to sign in, and staff members were required to wear name tags and to carry “swipe cards” for access into the building. Controlled access locks were installed on all clinic entry doors, and a portable metal detector was set up just inside the front doors. All visitors were required to pass through the metal detector before entry into any clinic. Finally, compliments of US Attorney General Janet Reno, two federal marshals, armed, would patrol during business hours. The plan also projected that bullet resistant glass should be installed in the reception area at Fannin.\footnote{PPH, Minutes (Administrative Services Committee Meeting), January 13, 1995. For a comprehensive survey of the anti-abortion movement, see Dallas Blanchard, \textit{The Anti-Abortion Movement and the Rise of the Religious Right} (New York: Twayne Publishers, 1994).} By May 1995 the US marshals had departed. PPH’s security system was complete. But the maintenance costs for the system would be fifty thousand dollars annually.\footnote{PPH, Minutes (Administrative Services Committee Meeting), January 13, 1995. For a comprehensive survey of the anti-abortion movement, see Dallas Blanchard, \textit{The Anti-Abortion Movement and the Rise of the Religious Right} (New York: Twayne Publishers, 1994).}

PPH felt itself embattled also on the legislative front. Welfare reform and attempts to kill health care programs for the poor dominated. Title X (federal family planning funds),
Title XIX (Medicaid), and Title XX (family planning grants to states) were assailed at both the federal and state levels, while PPH public affairs staff lobbied to save the programs. Anti-birth control and anti-abortion bills, including one in Texas requiring that doctors notify parents when prescribing birth control to teens, kept PPH staff on the defensive. Without state and federal funding for contraception, and with more restrictive state regulations for obtaining both contraception and abortions, Planned Parenthood staff would find themselves in the unenviable position of trying to reduce unplanned and unwanted births with reduced and restricted funds, and without increasing the number of abortions.²⁵

Additionally, one of the PPH Board’s most prominent members was giving Board and staff cause for concern. Early in 1995 at least one Board member became uncomfortable with the presence on the Board of John O’Quinn and recommended his resignation to the Board and Executive Director. An eminent trial attorney and generous patron of PPH, O’Quinn had been on the Board only a short time when he had become attorney for a plaintiff in a class-action lawsuit against the makers of the Norplant contraceptive device. He had never on behalf of clients sued PPH or named it in any lawsuit. But he had sued Planned Parenthood of Austin. That lawsuit was settled or dropped. But others were pending, and since PPH personnel were presently inserting the Norplant device, it was likely that PPH clinic personnel would be named as defendants.²⁶

The Norplant contraceptive system had entered the US market in 1991. It consists of a series of six matchstick-size capsules placed in the forearm. These capsules release a synthetic hormone which prevents pregnancy for five years. But some side effects women

²⁵PPH, Minutes (Administrative Services Committee Meeting), March 20, 1995; Executive Director’s Report, March 29, 1995; and PPH, Minutes (Administrative Committee Meeting), May 19, 1995.
²⁶PPH, Minutes, March 29, 1995; PPH, Minutes (March and August Legislative Updates).
complained of included unusual menstrual periods, headaches, fatigue, depression, muscle and joint pain, weight gain, and hair loss. Two women suing the manufacturer, Wyeth-Ayerst Laboratories of Pennsylvania, had lost vision in one or both of their eyes. Lawyers alleged that women who received the Norplant device were improperly warned about the effects of the implants and were “due compensation for damages.” Human rights activists claimed that the government was using Norplant “coercively” among welfare dependents, drug and child abusers, and teens, in violation of their civil rights.27

The Board member who was concerned about O’Quinn and the impending Norplant litigation feared what in technical law is referred to as a “conflict of interest.” A conflict arises when a lawyer exercises professional judgment on behalf of a client in circumstances that tend to undermine his/her ability to exercise that judgment properly. The lawyer’s judgment, though still competent, is no longer “independent.” As one legal scholar has aptly described the dilemma: “A conflict of interest is a tension within the lawyer’s role that is not

26Letter from Jane Moser, Board Member, to Gwyn Smith, President of the Board and Peter Durkin, Executive Director, dated January 31, 1995.
supposed to be there. A conflict of interest is a threat to the ordinary lawyer-client relation."^{28}

At the same time, legal ethicists caution against thinking of all the tensions inherent in the lawyer-client relationship as "conflicts of interest." The lawyer, for example, is supposed to be both a "zealous advocate" and an "officer of the court," to perform a public service and to serve a private client, to be relatively neutral concerning the client's ends and yet scrupulously moral concerning the means employed to achieve those ends. The Preamble to *The Model Rules of Professional Conduct* notes that "virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." While lawyers usually try to avoid conflicts of interest, sometimes they fail. When this happens the lawyer has options: He can give the client opportunity to change lawyers (this sort of resolution is often described as "consent after full disclosure"); or he can withdraw from the representation in question (this occurs when disclosure is not enough). Some conflicts cannot be resolved The lawyer may be unable to resolve the conflict by disclosure because the disclosure itself would require doing something he should not—for example, revealing the confidences of another client. The lawyer also may be unable to withdraw without producing an adverse effect on the client's interests. Ultimately, unless resolved, all conflicts of interest are betrayals of trust.^{29}

For a lawyer serving on the board of directors of a corporation such as Planned Parenthood of Houston, membership means that he has to be both an active participant in

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^{28}Michael Davis and Frederick Elliston, eds., *Ethics and the Legal Profession* (New York: Prometheus Books, 1986), 279.

^{29}Geoffrey Hazard, Jr., *Ethics in the Practice of Law* (New Haven: Yale University Press, 1978), 69-86. Lawyers are also governed by the ABA's *Canons of Professional Ethics* (see Canon 6).
deciding corporation policy and a detached judge of related legal matters. In many ways
the organization becomes a client. Conflicts of interest can occur when another one of the
lawyer’s clients has an interest that he cannot satisfy without failing to satisfy his obligations
to those he is supposed to serve—i.e., the board. In theory, the lawyer should not “act for”
either party, nor should he make either party “present,” or known, to the other.30 In practice,
lawyer O’Quinn, who is asked to pursue NORPLANT litigation while serving on the board
of PPH, has a professional pecuniary interest in suing the organization upon whose board he
sits. Although O’Quinn did no legal work for PPH, his interest in the Norplant litigation
clearly conflicted with his role on the board. When his partner decided to pursue litigation
against the makers of Norplant and the physicians who inserted it, O’Quinn was placed in
circumstances where he might appear to betray the trust of his nominal client, Planned
Parenthood. This conflicting interest gave the appearance of undermining his independent
judgment even if no undermining occurred.

In O’Quinn’s instance, the situation was ambiguous because Norplant litigation
against PPH was rumored but had not commenced. However, even with respect to
impending litigation, O’Quinn had a potential conflict. If the plaintiffs had choices about
how to formulate their claims and select their targets, a conflict of interest could arise about
how O’Quinn’s firm asserted those claims. For example, O’Quinn’s “inside” knowledge of
PPH’s financial situation might lead him to pursue a claim against PPH or to “non-suit” the
agency and pursue a claim against Norplant’s manufacturers, which had deeper pockets, or
against PPH’s physicians, who were independently insured. In this respect, PPH and its
sister clinics were even more at a disadvantage because they did not know who would be

sued or on what grounds, while O’Quinn—and potentially his partner and the plaintiffs—
knew the positions that might be taken on PPH’s behalf in negotiations over the claim.

As matters developed, the Board member’s concern seemed to be warranted. Late in
January, PPH Director of Communications Susan Nenney had learned that O’Quinn’s
Houston law firm, O’Quinn, Kerensky, McAninch & Laminack, was offering legal advice to
women who believed they had been injured by the Norplant system. When PPH’s Deputy
Executive Director Judy Reiner spoke to O’Quinn’s partner, Richard Laminack, the latter
confirmed that there was to be a workshop on that topic the next day (January 28), and
expressed his displeasure that his firm’s press release had been leaked to PPH.\footnote{Memo from Nenney to Durkin, dated February 7, 1995. Nenney also outlined Norplant statistics in her memo. From 1992 to 1994, 2,644 Norplant devices had been inserted, and 704 had been removed. All of the devices removed were taken out in 1994.}

It was awkward for Planned Parenthood of Houston. O’Quinn, whom one reporter
has labeled “one of the pro-choicest attorneys around,” had been good to Planned
Parenthood. But he could prove to be an embarrassment if he remained on the Board. If his
firm was to represent plaintiffs against the makers of Norplant and agencies that distributed
it—such as PPH—it would be a clear conflict of interest. No such suit had been filed in
Houston. But O’Quinn’s firm had been involved in the groundwork on the Norplant class
action suit and a conflict suit was a possibility.\footnote{“Matter of Choice,” The Houston Press, July 20-26, 1995.}

O’Quinn’s law firm was not the only one involved in possible Norplant litigation. As
of February 7, 1995, PPH had handled a dozen requests for medical/legal information from
other law firms than O’Quinn’s; seven requests were from the firm of Jim S. Adler, whose
television advertisements marketed him as "The Injury Lawyer," and in Spanish as the "Abogado de los Lastimas."\(^{33}\)

At some point the leadership of PPH suggested that O'Quinn resign from the PPH Board to avoid any embarrassment from conflict, and on March 21, 1995, he did. O'Quinn thanked the Board "for all [its] courtesies" to himself. It was a gracious letter, and it was received graciously. Accepting O'Quinn's resignation, Smith expressed her appreciation to him for helping PPH out of an awkward situation and thanked O'Quinn for his continued support of PPH's programs. Durkin later described the parting of ways as "mutually agreeable based upon the as yet unknown direction of [the] Norplant cases." He also added in a letter to O'Quinn, "I think the Norplant cases are driven by greed. Clients with no adverse side effects are having their Norplants removed to be part of the suit. Unfortunately there is a lot of misinformation...about this contraceptive option."\(^{34}\)

The loss of Norplant reimbursements through federal and state programs was a blow to PPH. In a May 12 budget memo to staff, Durkin warned staff members that the coming fiscal year would be "tighter," because requests for Norplant, and therefore reimbursements

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\(^{33}\)Memo from Nenney to Durkin, February 7, 1995. And "Matter of Choice." The Houston Press. July 20-26, 1995. The other law firms which had made requests to PPH for information about Norplant were Shapiro & Wabon, Mark Midani & Associates, Morley & Associates, and Modad & Miller. But Adler's firm had made the most requests: 7 of the 12. By July 1995, the number of requests had risen to 49, three from O'Quinn's firm, most of the rest from Adler's.

\(^{34}\)Letter from O'Quinn to Durkin and Smith, dated March 21, 1995. See also letter from Smith to O'Quinn, dated March 24, 1995. And Letter from Durkin to O'Quinn, dated July 13, 1995. In August 1996, the federal court coordinating nationwide discovery efforts for the Norplant litigation decided that any effort to consolidate Norplant cases into a nationwide class action were "premature." Instead, the court set several representative cases ("bellwether" cases) for trial, beginning in February 1997. In March 1997, as the first five bellwether cases approached trial, the court dismissed all five cases because the inserting physicians for each of the five plaintiffs had testified at deposition that the manufacturer's warnings were adequate, and further, that each of them believed that Norplant was a safe and effective method of contraception. All five cases arose in the State of Texas, and pursuant to the Texas "learned intermediary rule," the manufacturer of a prescription drug or device does not have to warn consumers about product hazards, as long as it adequately warns physicians. After the March 1997 decision (which is currently on appeal), class action certification became unlikely. Instead, each case had to be evaluated individually to determine whether it was viable; lawyers then had to file a separate lawsuit in state court, against both the inserting physician and the manufacturer, for each plaintiff.
($450 per client) for Medicaid-eligible clients, had virtually ceased. Patients were now asking for Depo Provera, a contraceptive shot lasting three months but for which PPH was only reimbursed $25. The effect was that PPH clinics were seeing roughly the same number of clients, but were being reimbursed significantly less.\footnote{Memo from Durkin to PPH Staff. May 12, 1995.}

**PPH and PPA: A Merger That Didn’t Happen**

Despite the overblown O’Quinn “scandal” and organizational pressures stemming from reinvention, 1995 was in many respects a beneficial year for PPH. During 1995 Dr. Jerry Edwards, director of clinical services at PPH, conducted RU-486 trials at the Fannin clinic and introduced the protocol for his new early abortion procedure—things that promised to revolutionize women’s reproductive rights, to put PPH at the forefront of contraceptive technology, and to help position the agency favorably in the future—all of the things for which “reinvention” had been touted. Edwards, whom many have credited with “turning things around” at PPH, modestly accepted the National Abortion Federation’s annual award for his early abortion procedure and promptly donated the award money to Medical Students for Choice, a pro-choice organization. Edwards was also one of PPH’s most generous benefactors; in 1995 he donated $100,000 in stocks to PPH during its annual fundraising drive.\footnote{PPH, Minutes (Administrative Committee Meeting), May 19, 1995. See also Memo from Durkin to Staff, April 25, 1996 (NAF award). The paper value of the stock was $100,000. When the stock was sold, however, PPH realized significantly less than that: $46,000.}

PPH entered 1996 stronger than ever in terms of financial stability, public support, and its ability to provide leading-edge, quality medical care. Perhaps because of these things the Houston affiliate was an attractive prospect for a smaller affiliate looking to merge. PPH
found itself being courted by both another Texas affiliate and one in Louisiana, and the
buzz-word at PPH became “merger.”

In January, Durkin announced that the Austin affiliate, PPA, had approached PPH
and proposed a merger of the two. “Traditionally, affiliates merge when one affiliate is in
financial trouble or upon the departure of the Executive Director,” Durkin informed the PPH
Board’s executive committee. But in this case, he said, Austin and Houston were both
“strong” affiliates with “good balance sheets.” The proposed merger was instead an effort to
combine forces, to improve fundraising capabilities and increase political clout, to reduce
administrative costs, and to increase services to outlying areas of Texas.37

Board meetings focused on the proposed merger. Special board meetings were held
in Houston and Austin to win support for the idea among the respective memberships; in
June 1996 the Houston board approved the proposed merger, and the Austin board soon
followed. A concrete merger plan and the two board’s approval for it remained the final step.
A “Tango Committee” was formed, charged with creating a “transition” plan, and a vote for
approving the plan was set for January 15, 1997.38

On September 6, members of the two affiliate staffs met in Houston for a Tango
Committee planning meeting. Several possible mergers were proposed by different
committee members, ranging from timid to bold. The most practical plan was one which
called for a restructured board (meaning a smaller board rather than a combined one of
seventy to eighty members), expanded medical services including mental health counseling,
larger education programs, established (rather than volunteer) public affairs/lobbying staff.

37PPH, Minutes (Executive Committee Meeting), January 31, 1996.
38PPH, Minutes, February 7, 1996. June 5, 1996 (Special Board Meeting), and Memo from Durkin to the
Board’s Executive Committee, dated June 7, 1996. “Tango” had its origins in the saying that “it takes two to
tango.”
new administrative services, expanded joint ventures, limited managed care contracting, and integrated information systems. Specifically, abortion services would be expanded to Austin, (and Beaumont), the administrative headquarters would be Houston, the political headquarters would be Austin, and both boards would be pared down. The expansion of services would be provided for by the increased cash flow from a larger clientele. The Tango Committee also came up with a proposed new name for the merged affiliate: Planned Parenthood Lone Star. In the event that other Texas affiliates were unhappy with the choice or felt that the name was too ambitious, the committee chose some alternative names.39

Even among PPFA affiliates, consolidation was becoming the trend. It was clear to the small affiliates that, as long as they were not concerned about being swallowed up by the larger affiliates, they might be able to survive and even prosper through merging. As the Tango Committee was putting the finishing touches on the PPH/PPA merger plan, Planned Parenthood of Louisiana (PPofL) also put out feelers to several affiliates, including Houston, for a "management contract." What the Louisiana affiliate needed was the benefit (without the cost) of a centralized administrative staff, information systems, and accounting services. For PPofL, a "management contract" with PPH offered the added attraction of administrative management by the larger affiliate, but from a distance. PPofL would still be able to manage its own daily affairs through its own board without interference from PPH. At the PPH November executive committee meeting, Durkin outlined the request from the PPofL board. It fell upon tired ears. Committee members expressed concerns about taking on another

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39Minutes of the Merger Meeting, Tango Committee, September 6, 1996. The idea that the expansion of services would be provided for by savings in administrative costs—meaning the salaries of redundant personnel—was never explicitly stated, but participants at the September 6 meeting expressed their concern that the merger committee should provide some sort of guarantee that no one would lose his or her job. Durkin has since insisted that everyone was needed: "We virtually needed everybody we had to do what we wanted to do." The
affiliate, and ultimately decided to put off deciding until after the PPFA Annual
Conference. If the Louisiana affiliate had not found another affiliate with which to merge by
then, PPH would reconsider the option. By that time the final vote regarding the merger with
Planned Parenthood of Austin would be complete.⁴⁰

In keeping its options open with regard to PPOfL, Board members at PPH might have
been considering the possibility that the merger with Austin would not go through. On
January 29, 1997, as the Houston board was voting to approve the final merger plan, the
Austin board voted adversely to it. Durkin cited fears on the part of some PPA staff and
board members that the Austin affiliate would be “swallowed up” by the larger Houston one.
Whatever the reason, change had once again been rejected in favor of the status quo. There
was disappointment expressed by the Houston board.

Perhaps it was all in the name. When the PPH Development and Evaluation
Committee had met to discuss the merger, it had rejected the proposed name, Planned
Parenthood Lone Star, in favor of the much longer-winded and more timid, “Planned
Parenthood of the Capital and Coast of Texas.”⁴¹

The Future and Planned Parenthood of Houston

In 1997 PPH restated its mission:

VISION
We seek a world in which all children are wanted and cared
for, All women and men have equal rights and dignity,
Sexuality is expressed with honesty, equality, and
responsibility, And the decision to bear children is private and voluntary.

⁴⁰PPH, Minutes (Executive Committee Meeting, November 8, 1996).
⁴¹Ibid. The Austin board voted the measure down 15-13 (four votes short of the necessary two-thirds majority).
In its full mission statement, PPH leaders vowed to provide comprehensive and complementary reproductive health care services to women, to encourage public policies that guaranteed reproductive rights and access to the means of exercising the right, to provide education that enhanced personal and social understanding of human sexuality as an integral part of human life, and to encourage advances in reproductive technology. In short, the leadership vowed to continue providing the reproductive services PPH had always provided, albeit in a more sophisticated and expanded way. Once again, at it had been in the 1940s, its slogan was: EVERY CHILD A WANTED CHILD.

Despite the failed merger with Austin, PPH leaders decided to go ahead with the Houston portion of the transition plan. During a special March 8 Board meeting, Durkin outlined new by-laws (articles of incorporation), new service areas, and specific service plans for the future, and won Board approval for his new “corporate structure.” Along with the title changes, new corporate by-laws, and new corporate language, came a renewed commitment to Planned Parenthood’s original mission. Despite all the failed plans of 1995-96, Planned Parenthood of Houston had somehow managed to grow and to progress as an organization. Its leadership and Board had embraced the idea of change when it was presented to them, and when change did not come from the Federation or from sister affiliates, had made their own changes.

The Board and staff would need a high level of commitment to face the challenges of 1997. PPH had reinvented itself so that the agency might better be able to respond to the political and financial challenges of the future, and the future was upon it. PPH might be a member of a kinder and gentler Federation, but the national and state legislatures were still conservative and essentially anti-choice. At the same time, the competition for federal
dollars was getting fiercer. In March 1997 PPH’s business manager reported that Medicaid revenues were down, due to competition from private doctors for Title XIX patient dollars and the reorganization of Medicaid in Harris/Ft. Bend/Galveston counties into a managed care system. Managed care and reduced funding were upon the affiliate, and the race for contracts in the state-managed, state-and-federally-funded system was on.

Nevertheless, the PPH Board and Durkin boldly approved plans for an $800,000 new satellite clinic in Bryan-College Station and the extension of services to Beaumont, should the affiliate receive the $200,000 in funding necessary for a new clinic there. Revenues for both clinics were, of course, dependent upon the receipt of sufficient Title XX (federal family planning grants to the states) contracts. At the same time the Board voted to expand abortion services to the Bryan-College Station clinic, and to reconsider PPH’s abortion policy in light of new technologies and laws. The Board’s primary concern was to ensure that abortion remained an affordable, safe, legal alternative.\(^{42}\)

It would be an uphill battle. In June 1997 Governor George Bush approved the appointment to the State Health Commissioner’s post by the Texas Board of Health of Dr. William “Reyn” Archer, son of Congressman Bill Archer (R-Houston). William Archer was, and is, an outspoken abortion opponent who had told a woman who worked in a family planning clinic that the birth control pill had given “too much power to women.” Archer had achieved fame as the chief defender of the “gag” rule under President Bush. That rule, since dropped, prevented staffers at tax-supported health clinics from discussing abortion with pregnant clients. Archer had also opposed not only abortion but out-of-wedlock sex and the

\(^{42}\)PPH, Minutes, March 8 and May 7, 1997; and Minutes (President/CEO’s Report), May 7, 1997.
U.S. Supreme Court’s 1965 decision in *Griswold v. Connecticut*, that legalized birth control. All that family planning professionals could do was hope for the best.

When he began his new job in September, Archer took the reins of an agency with 6,000 employees, a budget of $6.4 billion, and nearly 100 programs affecting millions of Texans. “Fasten your seatbelts,” said Susan Nenney, spokeswoman for PPH. “We certainly hope that Dr. Archer’s views have changed over the past few years. Our attitude is going to be one of watchful waiting.”

PPH’s first skirmish with the new Health Commissioner came quickly. In August 1997 PPH won its legal battle to strike down a birth control consent law recently enacted by the state legislature, and the battle lines were drawn. The law, written by Senator Steve Ogden (R-Bryan) and tacked onto the state’s 800-page budget bill (a tactic that usually allows controversial bills to slip into law with little debate), would have prohibited girls younger than eighteen from getting state-funded birth control pills and other prescription drugs without a parent’s permission. The Ogden rider prohibited the use of state money to distribute prescription drugs to minors without a parent’s consent.

District Judge Scott McCown blocked the law from taking effect as scheduled on September 1. McCown ruled that the rider violated the state’s constitutional ban on amending or repealing general state law through the budget bill and decried the practice of attaching riders to budget bills: “Our general appropriations bills have become laden with [unconstitutional] riders—and this should be of grave concern.” He noted also that while

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44 See the “Final Judgment” in *Planned Parenthood of Houston and Southeast Texas, Inc., vs. Patti Patterson, M.D., Interim Commissioner of Health, and William Reyn Archer, III, M.D., Recently Appointed Commissioner of Health and the Texas Department of Health*, 250th District Court (Travis County, Texas), August 29, 1997 (Cause No. 97-08292).
Texas' family laws allowed only parents or acceptable substitutes to make medical decisions for children, the state Human Services Code requires the Texas Health Department to comply with regulations governing use of federal family planning money. Those regulations encourage parental consent but prohibit requiring a minor to get parental consent in order to receive services. Health Department officials had devised an expensive, elaborate tracking system to get around federal law and to ensure that no state family planning money was spent on minors without parental consent, but McCown struck the plan down. He also agreed with Planned Parenthood's argument that the law would jeopardize $93 million in federal family planning money, which the state uses to provide services to adult women as well as girls under eighteen.  

PPH's lawsuit against the parental consent law and the State Health Commissioner fittingly ends this history because it suggests that most of Planned Parenthood's present battles, both legal and political, will be won or lost incrementally. It is a sign that, although the vast majority of Americans (and even Texans) are pro-choice when it comes to birth control and abortion, the anti-choice minority will impose its will on the majority if organizations like PPH are not vigilant. It is indicative also that vigilance pays, and that the will of the majority can ultimately prevail through the justice system.

Planned Parenthood may have failed to "reinvent" itself into a primary health care organization, but odds are that it will retain a well-respected niche in reproductive health care and reproductive rights. The combination of medical services, education, and advocacy is its unique feature, and the asset that will most likely ensure Planned Parenthood's survival.

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