

It's My Choice, Right? Abortion Law Reform in the United States

By LaTasha Ross

“Reproductive freedom is critical to a whole range of issues. If we can't take charge of this most personal aspect of our lives, we can't take care of anything. It should not be seen as a privilege or as a benefit, but a fundamental human right.” — Faye Wattleton¹

Introduction

Abortion is the termination of a pregnancy by removal or expulsion of an embryo or fetus before it can survive outside the uterus.² The battles in law for or against abortions and reproductive rights have filtered in and out of the mainstream since the 1800s³ and is currently making a return to the spotlight once again. The rights of the woman and unborn child are constantly being debated. But who is right? Once again, the same questions are being asked: when is it okay to end a pregnancy, who has the right to make this decision, and in what situation is it acceptable? To truly understand the issue, we must review both sides of the argument and the preceding case history.

History

For a hundred years after the formation of the United States, abortions were legal. There was no law to govern the procedure. It was a choice of

¹ Faye Wattleton Quotes, *Women's History with Jone Johnson Lewis* (2016), <http://womenshistory.info/faye-wattleton-quotes/>.

² The Editors of Encyclopædia Britannica, *Abortion* Encyclopædia Britannica (2019), <https://www.britannica.com/science/abortion-pregnancy>.

³ *History of Abortion*, National Abortion Federation, <https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/>.

the expectant mother and, safe to say, the father (if present) to end the term before the first movements of the unborn fetus. These initial movements are defined as quickening, or the first movements of the fetus similar to a flutter in the belly.⁴ In the 1820s, the United States, following the English monarchy and their Lord Ellenborough's Act began to establish laws making abortions illegal and banned birth control medicines.⁵ Laws were enacted to restrict abortion unless a pregnancy was conceived in rape, incest, or was needed to save the life of the mother.” The AMA, (American Medical Association), was concerned about the safety of the women, as abortions then were rather risky and primitive.⁶ The goal of the association was to defend human life. They believed they were protecting these women who, at the time, had neither the right to vote or advocate on their own behalf. As a male-dominated field, medical professionals who practiced in the early days before the suffrage movement made decisions for women and by the 1900s, abortion was illegal and a felony in every state.

On June 8, 1964, Gerri Santoro checked into a hotel with a man with whom she was having an affair and with whom she found herself pregnant, after she fled her abusive husband.⁷ Santoro was found dead alone, naked, kneeling with a bloodied towel between her knees. The cause of death was an illegal self-induced abortion. The police took a picture of the horrific and shocking scene and it hit the front page of the

⁴ *Abortion History in the U.S.*, FINDLAW (2018), <https://family.findlaw.com/reproductive-rights/abortion-and-the-law-background.html>.

⁵ *Ellenborough's Act Law and Legal Definition*, US Legal, Com., <https://definitions.uslegal.com/e/ellenboroughs-act/>.

⁶ *Id.*

⁷ *The Tragedy of Illegal Abortion: The Lonesome Death of Gerri Santoro*, PERSONAL PAC, <https://www.personalpac.org/the-tragedy-of-illegal-abortion-gerri-santoros-lonesome-death/>.

newspapers. The following year, *Griswold v. Connecticut*⁸ arrived at the Supreme Court, overturning the Comstock Law in terms of married couples.⁹ The Comstock Law prohibited the use of any drug or medical instrument for the purpose of preventing conception.¹⁰

The laws revolving around the practice of abortion would hold steady until 1972 with the ruling of *Eisenstadt v. Baird*, where new rights would be granted to unmarried women to choose to use contraception such as birth control pills.¹¹ *Roe v. Wade*¹², a landmark case decided in 1973, would finally give women the unrestricted right to choose when it came to their reproductive rights.¹³ The ruling made it illegal to prohibit abortions in all states. *Roe v. Wade* set a trimester deadline and opened the reasoning for abortion beyond medical reasons. The Court deemed reproductive rights an issue of privacy and constitutionally protected it.

The Right of Privacy

The Fourteenth Amendment includes the right of life, liberty and property due process of law.¹⁴ Pro-choice arguments on the amendment stress the importance of bodily integrity and freedom to make decisions about family.¹⁵ The Due Process Clause interpretation used to win the

⁸ *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁹ Bridgette Dunlap, *Three Constitutional Basics Every Abortion Rights Supporter Should Know*, REWIRE.NEWS (2016), <https://rewire.news/article/2016/06/17/three-constitutional-basics-every-abortion-rights-supporter-know/>.

¹⁰ *Id.*

¹¹ Susan Frelich, *The Forgotten Family Law of Eisenstadt v. Baird*, YALE JOURNAL OF LAW AND FEMINISM (2017), <https://digitalcommons.law.yale.edu/yjlf/vol28/iss1/1/>.

¹² *Roe v. Wade*, 410 U.S. 113 (1971).

¹³ Dorothy E. McBride & Jennifer L. Keys, *Abortion in the United States: A Reference Handbook* (2018), ABC-CLIO.

¹⁴ Dunlap, *supra* note 9

¹⁵ *Id.*

Roe v. Wade case applied to individual liberty.¹⁶ That is, liberty to be free of oppressive regulations imposed on a person's life. The choice to end a pregnancy is deemed not to be regulated by the government. Women have the right to control their bodies and destinies, a ruling given in *Planned Parenthood v. Casey*.¹⁷ Pro-choice advocates maintain that if a woman is not ready to be a mother, or if the pregnancy is detrimental to her health, whether that be physically or mentally, are part of her legal rights.

On the other side of the argument, there are those that fight for the life of the unborn. The life of a fetus is a critical part of the discussion for pro-life advocates, their position is that life begins at conception, not at the "quickening" of the baby. Because of that fact, abortion is considered murder and constitutionally illegal. The Constitution does not outright say that abortion is protected. For example, the Fourteenth and Ninth Amendments¹⁸ that were used quite heavily in the pro-choice defense state only that citizens do have a right to privacy. Privacy from home searches without a warrant as stated in the Due Process Clause but does not extend per se to abortion rights.¹⁹ Their argument is that an abortion under these amendments is a far reach that infringes on the rights of the possible child. A right to life and liberty, in this interpretation of liberty, applies to an unborn child – they have the right to be born.

¹⁶ H.R.254- ABORTION RIGHTS BILL 93RD CONGRESS (1973-1974), CONGRESS.GOV (1973), [https://www.congress.gov/bill/93rd-congress/house-bill/254?q={"search":\["abortion"\]} &s=5&r=2512](https://www.congress.gov/bill/93rd-congress/house-bill/254?q={).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

New Laws on Women's Health

For years following *Roe v. Wade*, anti-choice activists have chipped away at the ruling, implementing financial and logistical barriers.²⁰ TRAP laws or targeted regulations of abortion providers make it difficult for clinics that would normally be accessible for abortions to stay open.²¹ These are regulations that had nothing to do with the actual practice or well-being of the patient. Below are a few illustrations:

- 24 states have laws or policies that regulate abortion providers and go beyond what is necessary to ensure patients' safety; all apply to clinics that perform surgical abortion.
 - 14 states' regulations apply to physicians' offices where abortions are performed.
 - 19 states' regulations apply to sites where medication abortion is provided, even if surgical abortion procedures are not.
- 17 states have onerous licensing standards, many of which are comparable or equivalent to the state's licensing standards for ambulatory surgical centers.²²
- 18 states have specific requirements for procedure rooms and corridors, as well as requiring facilities to be near and have relationships with local hospitals.
 - 9 states specify the size of the procedure rooms.
 - 8 states specify corridor width.
 - 8 states require abortion facilities to be within a set distance from a hospital.

²⁰ *Abortion History in the U.S.*, *supra* note 4

²¹ *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST., (2020), <https://www.guttmacher.org/evidence-you-can-use/targeted-regulation-abortion-providers-trap-laws>.

²² *Id.*

- 6 states require each abortion facility to have an agreement with a local hospital in order to transfer patients in the event complications arise. (Including requirements on clinicians, a total of 21 states require a provider to have a relationship with a hospital.)
- 11 states place unnecessary requirements on clinicians that perform abortions.
 - 11 states require abortion providers to have some affiliation with a local hospital.
 - 2 states require that providers have admitting privileges.
 - 9 states require providers to have either admitting privileges or an alternative arrangement, such as an agreement with another physician who has admitting privileges.
 - 1 state requires the clinician to be either a board-certified obstetrician-gynecologist or eligible for certification.

On January 22, 2019, the 46th anniversary of *Roe v. Wade*, New York passed the *Reproductive Health Act*,²³ giving women the right to terminate a pregnancy at any point it becomes dangerous to her health, or when the fetus was no longer viable.²⁴ The law also repealed criminal punishment against doctors for harming a child still in the womb but not for harming the mother. The Reproductive Health Act after being signed into effect, once again gave women the ability to choose to abort without

²³ *Memorandum of Support for the Reproductive Health Act*, Planned Parenthood Act, https://www.plannedparenthoodaction.org/uploads/filer_public/37/1e/371ed495-e0b2-4ad5-853a-54507f01d403/updated_rha_post.pdf.

²⁴ *5 Facts About the Reproductive Health Act*, Planned Parenthood (2020), <https://www.plannedparenthoodaction.org/planned-parenthood-new-york-city-action-fund-inc/blog/5-facts-about-the-reproductive-health-act>.

fear of criminal conviction. It also protects medical professionals who in their practice terminate pregnancies.

Alabama's draconian bill was signed in May 2019 making it legal to punish any doctor that performed an abortion.²⁵ In other words, Alabama echoed pro-life sentiments by making abortions illegal in almost every capacity. Many other states, including Florida, began pushing for a different type of abortion restriction known as "heartbeat" bills.²⁶ Once the heartbeat of the fetus is found, the abortion would be deemed illegal to perform. It would have been one of the strictest bills on abortion ever signed into law, but the bill failed to pass the Florida legislature. Another effort to make abortions unavailable to women can be found on the Supreme Court docket site, *June Medical Services v. Gee*. This case would only allow one doctor to perform abortions within 30 miles of a hospital where they were listed also as a practitioner.²⁷

Conclusion

The issue of who really holds the right to choose when it comes to the "life" that cannot speak for itself has been debated for over a century. The arguments from both groups come from a place of hope for a better future. Pro-life advocates believe that the right to life should not be controlled by anyone, not even the mother, and that other options that do not include abortion should be utilized, while pro-choice supporters fight for the voice of the women that have no other option, whether it be for

²⁵ *10 Things You Need to Know About Abortion Laws in the US*, Amnesty International (2019), <https://www.amnesty.org/en/latest/news/2019/06/abortion-laws-in-the-us-10-things-you-need-to-know/>.

²⁶ *H.R.490 - Heartbeat Protection Act of 2017*, 115th Congress (2017-2018), Congress.Gov, <https://www.congress.gov/bill/115th-congress/house-bill/490>.

²⁷ Regina Schliep, *Abortion Access Faces the Supreme Court*, THE HAWK NEWSPAPER (2019), <https://www.sjuhawknnews.com/abortion-access-faces-the-supreme-court/>.

medical or personal reasons. Justice Blackmun of the Supreme Court took the time to speak to the women in his life and got their opinions.²⁸ He even sat with his own daughter when she got pregnant young and decided to marry instead of going to school. He supported her decision and unofficially found himself as the voice for women to choose what is best for them.

Perhaps that's all we're supposed to do, listen and allow women to decide for themselves. It can't be an easy decision to make considering the stigma. To be judged for not keeping your child, whether by a selfish or selfless act, or to be looked down upon for not being able to care for a child that you had too young, too poor, or too sickly. Currently, we wait for *June Medical Services v. Gee* to make its way through the Supreme Court, a case that will move abortions even further out of reach if passed.²⁹ This debate has been fought long and hard and, as controversial as it is, it is hard to believe that either side will be truly content.

²⁸ Linda Greenhouse, *Blackmun: Harry Blackmun's Supreme Court Journey* (2006), Henry Holt & Co. Publishers.

²⁹ Schliep, *supra* note 24