

**RELIGIOUS DIVERSITY AND A WOMAN’S RIGHT TO CHOOSE:  
THE RELIGIOUS RIGHT’S MISTAKENLY ASSUMED MONOPOLY  
ON BELIEF AND RELIGIOUS SUPPORT FOR ABORTION**

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**INTRODUCTION**

Often the loudest voices in the debate over abortion are those who consider themselves pro-life (and therefore opposed to abortion) because of their religious beliefs, yet, importantly, they do not speak for a majority of Americans—or even a majority of people of faith.<sup>1</sup> Many religious people, including Jews, Muslims, Hindus, Buddhists, and even some Christians—backed by the religious texts, doctrines, or proclamations of their respective faiths<sup>2</sup>—support women’s<sup>3</sup> access to abortion, in at least some circumstances.<sup>4</sup>

As countless Court observers—both formal and informal—have recognized, the Supreme Court appears poised to relegate *Roe v. Wade*’s constitutionally protected right to abortion to the ash heap of history in its forthcoming decision in *Dobbs v. Jackson Women’s*

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<sup>1</sup> See Lindsay Schnell, *Jews, Outraged by Restrictive Abortion Laws, Are Invoking the Hebrew Bible in the Debate*, USA TODAY (July 24, 2019), <https://www.usatoday.com/story/news/nation/2019/07/24/abortion-laws-jewish-faith-teaches-life-does-not-start-conception/1808776001/> (Jewish interviewee explaining “It’s distressing to me that extreme right wing conservatives, that specific segment of Christianity, has co-opted this entire discussion. . . . They present themselves as speaking for all people of faith when that is really not the case.”); *Religious Voices Worldwide Support Choice: Pro-Choice Perspectives in Five World Religions*, CTR. REPROD. RTS. 1 (2005), <https://www.oursplatform.org/wp-content/uploads/CRR-Religious-Voices-Worldwide-Support-Choice-Briefing-Paper.pdf> (“Vociferous lobbying of anti-abortion conservatives often overshadows a strong faith-based movement in support of legal access to abortion.”).

<sup>2</sup> See generally DANIEL C. MAGUIRE, SACRED CHOICES: THE RIGHT TO CONTRACEPTION AND ABORTION IN TEN WORLD RELIGIONS (2001); see also Section IV, *infra*.

<sup>3</sup> For simplicity’s sake and because most of the sources quoted predate modern recognition of gender identity, this Article will often refer to pregnant persons as women, even though the author recognizes that not every pregnant person identifies as a woman.

<sup>4</sup> See Section III.B, *infra*.

*Health*.<sup>5</sup> These predictions have all but been confirmed following the unprecedented leak of Justice Alito’s draft majority opinion on May 2, 2022.<sup>6</sup> The science has not changed significantly since 1973.<sup>7</sup> The difference, instead, is that the current Supreme Court was constructed with the explicit purpose of overturning this notable “super precedent” and thereby disregarding the fundamental principle of *stare decisis*.<sup>8</sup> Put simply, by undermining *Roe* and permitting states to curtail abortion access, the Supreme Court caters to an outspoken religious minority, and ignores the infringement on others’ religious beliefs.<sup>9</sup>

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<sup>5</sup> See e.g., Devin Dwyer, *Roe v. Wade on the Line as Supreme Court Takes Up Mississippi Abortion Rights Case*, ABC NEWS (Nov. 30, 2021 4:03 AM), <https://abcnews.go.com/Politics/roe-wade-line-supreme-court-takes-mississippi-abortion/story?id=81252849>; Alice Miranda Ollstein, *‘A Post-Roe Strategy’: The Next Phase of the Abortion Fight Has Already Begun*, POLITICO (Nov. 30, 2021 6:00 A.M. EST), <https://www.politico.com/amp/news/2021/11/30/roe-wade-strategy-scotus-abortion-523488> (“The expectation from all corners is that the conservative supermajority of justices would not have agreed to consider a Mississippi law prohibiting abortion after 15 weeks unless they were ready to significantly pare down or completely overturn *Roe v. Wade*.”); Talia Smith, *How SCOTUS’ Mississippi Abortion Ban Trial Could Determine the Future of Reproductive Rights*, NOW THIS (Nov. 30, 2021 5:12 PM), <https://nowthisnews.com/news/mississippis-15-week-abortion-ban-supreme-court-hearing-could-determine-the-future-of-us>; Mark Sherman & Jessica Gresko, *Justices Signal They’ll OK New Abortion Limits, May Toss Roe*, ASSOCIATED PRESS (Dec. 1, 2021), <https://apnews.com/article/abortion-donald-trump-us-supreme-court-health-amy-coney-barrett-a3b5cf9621315e6c623dc80a790842d8>.

<sup>6</sup> Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022 8:32 P.M. EDT), <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473> (“The draft opinion is a full-throated, unflinching repudiation of the 1973 decision which guaranteed federal constitutional protections of abortion rights and a subsequent 1992 decision—*Planned Parenthood v. Casey*—that largely maintained the right. . . . No draft decision in the modern history of the court has been disclosed publicly while a case was still pending.”).

<sup>7</sup> See Krissi Danielsson, *What Is Fetal Viability*, VERY WELL FAMILY (Apr. 20, 2021), <https://www.verywellfamily.com/premature-birth-and-viability-2371529> (“A perivable birth is a birth that takes place near the limit of viability—usually defined as between 23 and 26 weeks gestation. Birth before 23 weeks is usually considered preivable, which means there is virtually no chance of survival.”).

<sup>8</sup> See e.g., Dwyer, *supra* note 5 (“The three most recently appointed justices were all elevated to the high court by former President Donald Trump with the express purpose of overturning *Roe*.”).

<sup>9</sup> See MAGUIRE, *supra* note 2, at viii (“Governments that restrict that right [to abortion] are abusing the religious freedom of many—in some cases, most—of their citizens.”); see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

This Article will begin with a summary of American views on abortion generally, before tracing the relevant constitutional jurisprudence from *Griswold* to *Dobbs* and the Texas Heartbeat Law, noting recent legislative developments seeking to protect or expand abortion access. Next, this Article will outline the beliefs underlying the Religious Right's opposition to abortion, before showing how the Religious Right does not represent all people of faith. This Article will then analyze Jewish, Muslim, Christian, Buddhist, and Hindu texts, doctrines, and proclamations supporting abortion access. Finally, this Article will conclude with a brief discussion of religious leaders' prior, and perhaps future, involvement in procuring abortions and how enforcing restrictive abortion laws will violate religious beliefs. Admittedly, this Article will likely come too late to save *Roe*, however the author hopes to help inform thinking going forward.<sup>10</sup>

## I. AMERICANS' OPINIONS ON ABORTION

Despite strong feelings on all sides of this issue, Americans appear surprisingly underinformed about abortion. Americans generally do not understand the concept of gestational age and mistakenly believe that abortions happen later in pregnancy than they do in actuality.<sup>11</sup> Likewise, most Americans "aren't aware of what abortion restrictions are on the books in their own area."<sup>12</sup> In one 2020 study, Americans were able to answer only eighteen percent of state-specific abortion-regulation questions correctly.<sup>13</sup> Nor are

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<sup>10</sup> Cf. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 4 (2010) ("A dissent . . . is an appeal . . . to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." (internal citation omitted)).

<sup>11</sup> See Amelia Thomson-DeVeaux, *What Americans Really Think About Abortion*, FIVETHIRTYEIGHT (Dec. 1, 2021), <https://fivethirtyeight.com/features/what-americans-really-think-about-abortion/>. Gestational age "is measured in weeks, from the first day of the woman's last menstrual cycle to the current date." Gestational Age, MEDLINEPLUS (Oct. 2, 2019), <https://medlineplus.gov/ency/article/002367.htm>. The vast majority of abortions occur early in pregnancy, while only 1% of abortions in the United States occur at or after 21 weeks' gestation. *Id.*; see also Amelia Thomson-DeVeaux & Anna Wiederkehr, *How Abortion Has Changed Since 1973*, FIVETHIRTYEIGHT (Jan. 20, 2022), <https://fivethirtyeight.com/features/how-abortion-has-changed-since-1973/> ("In 1973, about 15 percent of abortions happened after 12 weeks, but the share that happened after 13 weeks was just 7 percent in 2019. One thing has been consistent over time, though—despite taking up an enormous amount of political oxygen—is that abortions after 20 weeks of pregnancy have always been exceedingly rare.").

<sup>12</sup> Thomson-DeVeaux, *supra* note 11.

<sup>13</sup> *Id.*

they cognizant of what would happen if *Roe* were overturned: “only 38 percent of people living in states with ‘trigger laws’ knew that abortion would immediately become illegal” and “only 35 percent of people in states without trigger laws know that abortion would stay legal.”<sup>14</sup>

Despite our collective ignorance, Americans fall into three main categories when it comes to opinions on abortion: (1) those who believe abortion should be legal in all cases; (2) those who believe abortion should be illegal in all cases; and (3) those who fall somewhere in between.<sup>15</sup> A majority of Americans fall into the last category, which ranges from “people who think abortion should be legal only in cases of rape, incest and when the mother’s life is at risk” to those who favor “only limited restrictions, perhaps for minors or for abortions in later stages of pregnancy.”<sup>16</sup> A November 2021 poll concluded that “[m]ajorities of Americans support the Supreme Court upholding *Roe v. Wade* and oppose states making it harder for abortion clinics to operate.”<sup>17</sup> That same poll found that three out of four Americans—including majorities of Democrats, independents, and Republicans—“say the decision of whether or not to have an abortion should be left to a woman and her doctor.”<sup>18</sup>

Turning to those on the ends of the spectrum, approximately twenty-five to thirty percent believe abortion should be legal in all cases, while only ten to fifteen percent of Americans believe abortion should be illegal in all cases.<sup>19</sup> Accordingly, “the vast majority of Americans—somewhere between 85 and 90 percent, according to most polls—think abortion should be legal in at least some circumstances,” while total abortion bans “are popular only with a small sliver of the public.”<sup>20</sup>

With an understanding of public opinion, this Article will next briefly trace key Supreme Court jurisprudence related to abortion from *Griswold* to the pending decision in *Dobbs* and the Court’s handling of challenges to the recent Texas Heartbeat Law. This

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Dwyer, *supra* note 5. Even so, polling data suggests that many Americans do not actually know what *Roe* held: support for abortion drops from the first trimester to the second, even though *Roe* protects the right to an abortion until viability, which is found near the end of the second trimester. See Thomson-DeVeaux, *supra* note 11.

<sup>18</sup> Dwyer, *supra* note 5.

<sup>19</sup> Thomson-DeVeaux, *supra* note 11.

<sup>20</sup> *Id.*

Article will also summarize legislative efforts to protect and expand abortion access.

## II. THE RIGHT TO PRIVACY AND A WOMAN'S RIGHT TO CHOOSE

### A. REPRODUCTIVE FREEDOM AND THE RIGHT TO PRIVACY BEFORE *ROE*

Nearly a decade before *Roe*, the Supreme Court recognized the right of privacy, founded upon the “penumbras” emanating from guarantees in the Bill of Rights.<sup>21</sup> The Court concluded that a statute prohibiting the use of contraception was unconstitutional because it invaded “the notions of privacy surrounding the marriage relationship.”<sup>22</sup> In 1972, this right of privacy was extended beyond the marital relationship, recognizing the reality that “the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup.”<sup>23</sup> “If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>24</sup>

### B. *ROE*: A WATERSHED DECISION

The following year, the Court decided *Roe*. The Supreme Court reiterated that the Constitution protected “a right of personal privacy, or a guarantee of certain areas or zones of privacy” and concluded that those privacy protections were “broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”<sup>25</sup> The Court understood that “denying [pregnant persons] this choice” would impose “apparent” detriment, including “medically diagnosable” harm, “a distressful future, or psychological harm,” as well as “the additional difficulties and continuing stigma of unwed motherhood.”<sup>26</sup>

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<sup>21</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>22</sup> *Id.* at 486.

<sup>23</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>24</sup> *Id.* at 454. The Court continued, stating that “on the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistent with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons.” *Id.*

<sup>25</sup> *Roe v. Wade*, 410 U.S. 113, 152–53 (1973).

<sup>26</sup> *Id.* at 153.

Importantly, in *Roe*, the Supreme Court did not give women an absolute right to terminate their pregnancies. Rather, the Court tried to balance the rights of those who wanted to terminate their pregnancies with “important [State] interests in safeguarding health, in maintaining medical standards, and in protecting potential life,” such that “[a]t some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision.”<sup>27</sup> While recognizing the State’s interests in protecting both maternal health and the potentiality of human life, the Court saw these interests as distinct and becoming “compelling” at different points: Maternal health becomes “compelling” “at approximately the end of the first trimester” because “first trimester mortality in abortion may be less than mortality in normal childbirth,” such that “a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.”<sup>28</sup> As such, before the first trimester, “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient’s pregnancy be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.”<sup>29</sup> As to the State’s interest in potential life, that “important and legitimate interest” becomes “compelling” only “at viability . . . because the fetus then presumably has the capability of meaningful life outside the mother’s womb”; accordingly, at that point, the State “may go so far as to proscribe abortion . . . except when it is necessary to preserve the life or health of the mother.”<sup>30</sup> Accordingly, the Texas statute at issue in *Roe* was unconstitutional.<sup>31</sup>

### C. CASEY AND THE UNDUE BURDEN STANDARD

While Americans can name *Roe v. Wade* as the decision creating a constitutionally protected right to abortion, *Roe* has not

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<sup>27</sup> *Id.* at 154; *see also id.* (“We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.”).

<sup>28</sup> *Id.* at 163.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 163–64. *But see* Roger Robinson, *The Pre-Term Baby*, 4 BRIT. MED. J. 416, 417 (1971) (explaining that babies “born before 28 weeks’ gestation have a rather slender chance of survival and usually die of respiratory failure or intraventricular cerebral haemorrhage.”).

<sup>31</sup> *Roe*, 410 U.S. at 164.

truly been the governing standard for decades. In the nearly twenty years following *Roe*, the Supreme Court considered numerous state and federal laws purporting to regulate abortion or encourage childbirth, with somewhat mixed results.<sup>32</sup>

In 1992, the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court upheld most of the challenged provisions of the 1989 Pennsylvania Abortion Control Act and subtly changed the standard of review while “retain[ing]” and “reaffirm[ing]” “the essential holding of *Roe v. Wade*.”<sup>33</sup> The Court began by outlining the three portions of “*Roe*’s essential holding” which were “reaffirm[ed]”:

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. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure. Second is a confirmation of the State’s power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman’s life or health. And 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.<sup>34</sup>

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<sup>32</sup> See *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747 (1986); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977); *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52 (1976).

<sup>33</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 845–46 (1992) (“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.”).

<sup>34</sup> *Id.* at 846.

The Court, then, also recognized that overruling *Roe* would have dire consequences: “A decision to overrule *Roe*’s essential holding under the existing circumstances would . . . [be] at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law.”<sup>35</sup>

In Justice O’Connor’s lead opinion, she contended that “[o]nly where state regulation imposes an undue burden on a woman’s ability to make this decision [to have an abortion] does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”<sup>36</sup> An undue burden exists where “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>37</sup> Writing for herself, she declared “the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”<sup>38</sup> Even though the section of her opinion describing the undue burden standard did not constitute the opinion of the Court, other portions of the Court’s opinion adopted the undue burden analysis,<sup>39</sup> as did later decisions of the Court.<sup>40</sup>

*D. TARGETED REGULATION OF ABORTION PROVIDERS, HELLERSTEDT, AND THE IMPORTANCE OF FACTS*

Following *Casey*, “[t]he landscape of abortion regulation changed”: “States seeking to regulate or restrict abortion had a new standard to meet, and a template for a law that met this standard” so that “[r]estrictions modeled on [the Pennsylvania law challenged in *Casey*] spread rapidly.”<sup>41</sup> The Pennsylvania law “introduced what have become familiar abortion requirements: counseling with state-mandated content, a 24-hour waiting period between counseling and abortion, parental consent for minors, [and] extensive reporting

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<sup>35</sup> *Id.* at 869.

<sup>36</sup> *Id.* at 874.

<sup>37</sup> *Id.* at 877.

<sup>38</sup> *Id.* at 876.

<sup>39</sup> *See id.* at 880 (concluding “the medical emergency definition imposes no undue burden on a woman’s abortion right”); *id.* at 895 (concluding the spousal notification requirement was “an undue burden, and therefore invalid”).

<sup>40</sup> *See Stenberg v. Carhart*, 530 U.S. 914, 930 (2000); *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610, 1626 (2007).

<sup>41</sup> Rebecca J. Mercier, et al., *TRAP Laws and the Invisible Labor of US Abortion Providers*, 26 CRIT PUB. HEALTH 77, 79 (2016).



requirements for abortion providers.”<sup>42</sup> Targeted regulation of abortion providers (“TRAP laws”) ostensibly “regulate the behavior and actions of abortion providers,” yet “they ultimately add to the steps a woman must take to access abortion services.”<sup>43</sup> As one medical provider explained:

Abortion provision in the United States has become a dance between lawmakers and providers. The challenge for anti-choice lawmakers is to write abortion restrictions in a way that complicates access, but not to such an extent that they impose a blatant undue burden on patients, which will not stand up in court. The challenge for abortion providers is to meet the standards of the law, which may require extensive changes to a clinic’s physical structures and patient care procedures, so that they can continue to operate legally and ensure abortion access.<sup>44</sup>

In 2016, the Supreme Court addressed a Texas TRAP law that required (1) abortion providers to have admitting privileges at a hospital no more than 30 miles from the abortion facility and (2) abortion facilities to meet the physical standards required for ambulatory surgical centers.<sup>45</sup> The Court concluded that both requirements “constitute[d] an undue burden on abortion access” and were thus unconstitutional.<sup>46</sup> It explained that courts must “consider the burdens a law imposes on abortion access together with the benefits those laws confer,” which required courts to give “significant weight to evidence in the judicial record.”<sup>47</sup>

The Court looked at the evidence and found it lacking. As to the admitting privileges requirement, it “found nothing in Texas’ record evidence that shows that, compared to prior law . . . , the new

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<sup>42</sup> *Id.* As noted previously, *Casey* invalidated only a spousal notification requirement. *See Casey*, 505 U.S. at 879 (“The Court of Appeals applied what it believed to be the undue burden standard and upheld each of the provisions except for the husband notification requirement. We agree generally with this conclusion . . .”).

<sup>43</sup> *Mercier*, *supra* note 41, at 79.

<sup>44</sup> *Id.* at 80.

<sup>45</sup> *See generally* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>46</sup> *Id.* at 2300.

<sup>47</sup> *Id.* at 2309–10.

law advanced Texas' legitimate interest in protecting women's health."<sup>48</sup> Likewise, "[t]he record makes clear that the surgical-center requirement provides no benefit when complications arise in the context of an abortion produced through medication" because "complications would almost always arise only after the patient has left the facility" and evidence indicated that "abortions taking place in an abortion facility are safe—indeed, safer than numerous procedures that take place outside hospitals and to which Texas does not apply its surgical-center requirements."<sup>49</sup> Further, "many surgical-center requirements are inappropriate as applied to surgical abortions" because: (1) "abortions typically involve either the administration of medicines or procedures performed through the natural opening of the birth canal, which is itself not sterile"; (2) "abortion facilities do not use general anesthesia or deep sedation"; and (3) where the few serious complications arise following abortion, hospital treatment—not treatment at a surgical center—is required.<sup>50</sup> Both requirements of the challenged Texas law were found to impose an undue burden by significantly reducing access to abortion providers: "closures meant fewer doctors, longer waiting times, and increased crowding" with the few remaining clinics unable to meet the entire State's demand.<sup>51</sup>

*E. DOBBS AND THE TEXAS HEARTBEAT LAW: THE BEGINNING OF THE END*

After *Hellerstedt*, the Supreme Court addressed a Louisiana law requiring abortion providers to have admitting privileges which was "almost word-for-word identical to Texas' admitting privileges law" addressed in *Hellerstedt*.<sup>52</sup> In a 5–4 decision, the Supreme Court held the statute unconstitutional in June 2020.<sup>53</sup> Chief Justice Roberts delivered the tiebreaking vote, explaining that "[t]he legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the

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<sup>48</sup> *Id.* at 2311.

<sup>49</sup> *Id.* at 2315.

<sup>50</sup> *Id.* at 2316.

<sup>51</sup> *See id.* at 2313, 2317.

<sup>52</sup> *See* June Medical Servs. LLC v. Russo, 140 S. Ct. 2103, 2112 (2020).

<sup>53</sup> *Id.*

same reasons. Therefore Louisiana’s law cannot stand under our precedents.”<sup>54</sup>

Less than three months after the Court issued its decision in *June Medical Services*, Justice Ruth Bader Ginsburg died and Republicans moved to quickly jam through Amy Coney Barrett’s confirmation before the 2020 election.<sup>55</sup> With a 6–3 conservative majority on the Court, the country anticipates the Court’s forthcoming decision in *Dobbs v. Jackson Women’s Health* will drastically alter the constitutional landscape.<sup>56</sup> At issue in *Dobbs* is the Mississippi Gestational Age Act, which bans abortions after fifteen weeks’ gestation except for severe fetal abnormality or medical emergencies.<sup>57</sup>

Following oral argument, the justices “seemed poised . . . to uphold a Mississippi law that bans abortions after 15 weeks of pregnancy,” but the court’s “conservative majority seemed divided about whether to stop at 15 weeks, for now at least, or whether to overrule *Roe* entirely.”<sup>58</sup> If Justice Alito’s leaked draft opinion remains intact, the Court will hold that “*Roe* and *Casey* must be overruled” because “*Roe* was egregiously wrong from the start.”<sup>59</sup> A decision is expected in June 2022. Should the Court outright overturn *Roe*, a dozen states have “trigger” laws which would immediately ban abortion, while nine have bans predating *Roe*, which would return.<sup>60</sup>

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<sup>54</sup> *Id.* at 2134 (Roberts, C.J., concurring in the judgment).

<sup>55</sup> See e.g., Nina Totenberg, *Justice Ruth Bader Ginsburg, Champion of Gender Equality, Dies at 87*, NPR (Sept. 18, 2020 7:28 P.M. ET), <https://www.npr.org/2020/09/18/100306972/justice-ruth-bader-ginsburg-champion-of-gender-equality-dies-at-87>; Barbara Sprunt, *Amy Coney Barrett Confirmed to Supreme Court, Takes Constitutional Oath*, NPR (Oct. 26, 2020 8:07 P.M. ET), <https://www.npr.org/2020/10/26/927640619/senate-confirms-amy-coney-barrett-to-the-supreme-court>.

<sup>56</sup> See generally notes 5–6, *supra*.

<sup>57</sup> See generally Petition for a Writ of Certiorari, *Dobbs v. Jackson Women’s Health Org.* (No. 19-1392).

<sup>58</sup> See Adam Liptak, *The Supreme Court Appears Open to Upholding Mississippi Abortion Restriction*, N.Y. TIMES (Dec. 1, 2020 12:19 P.M. ET), <https://www.nytimes.com/live/2021/12/01/us/abortion-mississippi-supreme-court>; see also Robert Barnes, *Supreme Court Seems Inclined to Uphold Mississippi Abortion Law that Would Undermine Roe v. Wade*, WASH. POST (Dec. 1, 2021 7:30 P.M. EST), [https://www.washingtonpost.com/politics/courts\\_law/mississippi-abortion-case-supreme-court/2021/12/01/367004a6-52b4-11ec-9267-17ae3bde2f26\\_story.html](https://www.washingtonpost.com/politics/courts_law/mississippi-abortion-case-supreme-court/2021/12/01/367004a6-52b4-11ec-9267-17ae3bde2f26_story.html).

<sup>59</sup> See Gerstein & Ward, *supra* note 6.

<sup>60</sup> Ollstein, *supra* note 5 (chart summarizing “abortion policy in the absence of *Roe v. Wade*” (capitalization altered)); see also Dwyer, *supra* note 5 (“Twenty-one states have laws in place that would quickly impose abortion bans in the event the Supreme Court overturns *Roe*.”).

Thirteen states have abortion restrictions that have been enjoined by the courts, which could also become effective.<sup>61</sup> Put simply, if *Roe* is overturned, “about half the states in the country would be poised to either ban abortion entirely or ban it at extremely early points in pregnancy.”<sup>62</sup>

In the meantime, in September 2021, the Court refused to enjoin a Texas statute, despite the obvious contradiction of *Roe* and *Casey*.<sup>63</sup> The Texas law bans “abortions after cardiac activity can be detected—usually at six weeks of pregnancy and well before most people even know they are pregnant” and “was structured to insulate the law from being tested quickly in court,” as it “put citizens in charge of enforcement,” “allow[ing] anyone, without establishing any vested personal interest, to sue clinics and individuals alike for ‘aiding and abetting’ abortions performed after about six weeks.”<sup>64</sup> The only exception to the ban exists “if a doctor determines a patient will face a ‘medical emergency’ if the procedure isn’t performed.”<sup>65</sup> As Justice Sotomayor wrote, dissenting from the unsigned opinion allowing the law to take effect:

The Court’s order is stunning. Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand. Last night, the Court silently acquiesced in a State’s enactment of a law that flouts nearly 50 years of federal precedents.

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<sup>61</sup> Ollstein, *supra* note 5.

<sup>62</sup> Nina Totenberg, *Supreme Court Considers Whether to Reverse Roe v. Wade*, NPR (Dec. 1, 2021 5:04 A.M. ET), <https://www.npr.org/2021/12/01/1056950304/supreme-court-abortion-roe-v-wade-historic-arguments>.

<sup>63</sup> See *Whole Woman’s Health v. Jackson*, 141 S. Ct. 2494, 2495–96 (2021); see also Nina Totenberg, *Supreme Court Upholds New Texas Abortion Law, For Now*, NPR (Sept. 2, 2021 12:20 P.M. EST), <https://www.npr.org/2021/09/02/1033048958/supreme-court-upholds-new-texas-abortion-law-for-now>.

<sup>64</sup> Totenberg, *supra* note 63.

<sup>65</sup> Ariana Garcia, *Abortion Procedures in Texas Dropped Sharply During First Month of Ban, Data Shows*, CHRON (Feb. 2, 2022 11:48 A.M.), <https://www.chron.com/politics/article/Texas-abortion-law-clinic-supreme-court-ruling-16825325.php>.

Today, the Court finally tells the Nation that it declined to act because, in short, the State's gambit worked. . . . This is untenable. It cannot be the case that a State can evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry.

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The Court should not be so content to ignore its constitutional obligations to protect not only the rights of women, but also the sanctity of its precedents and of the rule of law.<sup>66</sup>

The Court scheduled the matter for expedited hearing and an opinion permitting some of the legal challenges to move forward was issued in mid-December 2021.<sup>67</sup> Following the mandate, the Fifth Circuit refused to remand the case back to the district court and instead “certified questions about the licensing official defendants to the Texas Supreme Court.”<sup>68</sup> The United States Supreme Court then denied petitioners’ request for a writ of mandamus requiring the case be returned to the District Court.<sup>69</sup> Again dissenting from the Court’s decision, Justice Sotomayor chastised the Court for failing to “stop[] a Fifth Circuit panel from indulging Texas’ newest delay tactics,” and thereby “declin[ing] to protect pregnant Texans from egregious violations of their constitutional rights” “for the fourth time.”<sup>70</sup> She noted that the Texas Heartbeat Law had “immediately devastated access to abortion care in Texas.”<sup>71</sup> She was not wrong. In the first month after the law took effect, abortions dropped 66% from the previous monthly average and only two abortions occurred more than eight weeks after fertilization—compared to the previous average of over 700 such procedures.<sup>72</sup> Women who are more than six weeks’ pregnant “are being forced to either carry their unwanted pregnanc[ies] to term, travel out of state—where the surge of Texas patients is causing longer waits for anyone seeking an abortion—or

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<sup>66</sup> *Whole Woman’s Health*, 141 S. Ct. at 2498–99 (2021) (Sotomayor, J., dissenting).

<sup>67</sup> *Whole Woman’s Health v. Jackson*, No. 21-463 (S. Ct. Dec. 10, 2021).

<sup>68</sup> *In re Whole Woman’s Health*, No. 21-962, slip op. at 1 (S. Ct. Jan. 20, 2021) (Kagan, J., dissenting).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 3 (Sotomayor, J. dissenting).

<sup>71</sup> *Id.*

<sup>72</sup> Garcia, *supra* note 65.

try to end their pregnancies on their own.”<sup>73</sup> In the first few months after the Texas Heartbeat Law took effect, the District of Columbia and eleven states that do not border Texas reported “an increase in the number of abortions provided to Texas residents.”<sup>74</sup>

The Court’s handling of this law “signal[s] that its *Roe* precedent . . . does not stand to be fully intact by its 50th anniversary,” with the resulting “fallout . . . provid[ing] a preview of what abortion access will look like across the country if *Roe* is dismantled.”<sup>75</sup> As of late January, “[l]egislators in eight states—Ohio, Florida, Missouri, Alabama, Arkansas, Oklahoma, Arizona and Wisconsin—have looked to duplicate Texas-style bans since September, with several more states expected to introduce similar legislation in the coming weeks.”<sup>76</sup>

On the other hand, in recent years, some states and cities have started taking steps to protect abortion access should *Roe* and its progeny fall.<sup>77</sup> As of late January 2022, fifteen states have codified the right to abortion.<sup>78</sup> In 2019, “36 measures that protect abortion [were] enacted,” totaling more protections than enacted in the preceding decade.<sup>79</sup> In 2020, “21 provisions that protect and expand

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<sup>73</sup> Tierney Sneed, *What the Fallout from the Supreme Court’s Texas Abortion Ruling Means for the Future of Roe*, CNN (Jan. 22, 2022 6:00 A.M. EDT), <https://www.cnn.com/2022/01/22/politics/texas-supreme-court-ro-abortion/index.html>.

<sup>74</sup> Rachell K. Jones et al., *New Evidence: Texas Residents Have Obtained Abortions in at Least 12 States that Do Not Border Texas*, GUTTMACHER INST. (Nov. 9, 2021), <https://www.guttmacher.org/article/2021/11/new-evidence-texas-residents-have-obtained-abortion-least-12-states-do-not-border>.

<sup>75</sup> See Sneed, *supra* note 73.

<sup>76</sup> Caroline Kitchener, *Republican-Led States Rush to Pass Antiabortion Bills before Supreme Court Rules on Roe*, WASH. POST (Jan. 29, 2022 10:14 A.M. EST), <https://www.washingtonpost.com/politics/2022/01/29/abortion-supreme-court-ro-texas-mississippi/>.

<sup>77</sup> *Id.*; Amy Littlefield, *These Cities and States Are Fighting the Tide and Expanding Abortion Access*, THE NATION (Sept. 24, 2021), <https://www.thenation.com/article/politics/abortion-access-state-victories/>.

<sup>78</sup> Kitchener, *supra* note 76; see also Caroline Kitchener, *Vermont Moves Forward on Becoming First State to Guarantee the Right to Abortion in its Constitution*, WASH. POST (Feb. 8, 2022 12:56 P.M. EST), <https://www.washingtonpost.com/politics/2022/02/08/abortion-ro-vermont/> (describing November 2022 ballot measure that, if approved, “would guarantee the right to abortion and contraception” in Vermont’s state constitution).

<sup>79</sup> Elizabeth Nash, et al., *State Policy Trends 2019: A Wave of Abortion Bans, But Some States Are Fighting Back*, GUTTMACHER INST. (Dec. 10, 2019), <https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back>.

access to abortion services . . . and another 68 provisions that expand access to reproductive health services and education” were enacted nationwide.<sup>80</sup> States have repealed unenforced laws criminalizing abortion;<sup>81</sup> increased insurance coverage for abortion;<sup>82</sup> and expanded the universe of medical providers who can provide abortion care to include some nurses or physician assistants.<sup>83</sup> The District of Columbia also “prohibited prosecution for self-managed abortion.”<sup>84</sup> Portland, Oregon, New York City, and Austin, Texas have allocated funds to support abortion access.<sup>85</sup> Most ambitiously, California lawmakers are trying to make the state an abortion sanctuary state.<sup>86</sup> Connecticut and Colorado have also taken steps to protect access to abortion within their borders.<sup>87</sup>

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<sup>80</sup> Elizabeth Nash, et al., *State Policy Trends 2020: Reproductive Health and Rights in a Year Like No Other*, GUTTMACHER INST. (Feb. 3, 2021), <https://www.guttmacher.org/article/2020/12/state-policy-trends-2020-reproductive-health-and-rights-year-no-other>.

<sup>81</sup> Nash, et al., *supra* note 79 (Nevada); Littlefield, *supra* note 77 (New Mexico).

<sup>82</sup> Littlefield, *supra* note 77 (Virginia and Washington); Nash, et al., *supra* note 79 (Maine); Giulia Heyward, *Maryland Lawmakers Expand Abortion Access, Overriding Governor’s Veto*, N.Y. TIMES (Apr. 10, 2022), <https://www.nytimes.com/2022/04/10/us/maryland-abortion-rights-veto.html>.

<sup>83</sup> Nash et al., *supra* note 80 (Virginia and Massachusetts); Littlefield, *supra* note 77 (Hawaii); Nash, et al., *supra* note 79 (Illinois, New York, Vermont, and Maine); *see also* Heyward, *supra* note 82; Christopher Keating, *Connecticut Senate Passes Abortion Bill After Emotional Debate; Gov. Lamont Pledges Signature*, HARTFORD COURANT (Apr. 29, 2022 12:03 A.M.), <https://www.courant.com/politics/hc-pol-abortion-bill-passes-20220430-wnu2xkkaanct5dhgmz56qhwqve-story.html>.

<sup>84</sup> Nash et al., *supra* note 80.

<sup>85</sup> Littlefield, *supra* note 77.

<sup>86</sup> Kitchener, *supra* note 76; Morgan Rynor, *Lawmakers Are Pushing a Package of Bills that Will Help Make California an Abortion Sanctuary State*, ABC 10 (Jan. 25, 2022 7:00 P.M. PST), <https://www.abc10.com/article/news/local/california/california-possible-abortion-sanctuary-state/103-c1be6369-38ea-4c14-af54-28c8e04d2160> (describing proposed legislation that would (1) “enhance privacy laws so anyone who travels [to California] from another state that has stricter abortion laws will not face trouble back home”; (2) “protect women from being charged with murder for pregnancy loss”; (3) “eliminate cost-sharing expenses”; (4) “expand the abortion workforce”; (5) “create a centralized webpage where people across the country can go for easy information on how to access an abortion in California”; (6) “create a state ran fund where people can donate their own money to help women with costs like traveling to California”; (7) “create a pilot program to direct funds to community health clinics providing reproductive health care”).

<sup>87</sup> Connecticut recently approved legislation that would prevent “extraditing someone who did something in Connecticut that leads to a crime in another state if what they did is legal in Connecticut” and “allow Connecticut to protect the medical records of women who travel here from states like Texas or Louisiana”—including to protect it

In light of the present uncertainty and likely overruling of *Roe*, states are likely to continue legislating in both directions.

### III. THE RELIGIOUS RIGHT'S OPPOSITION TO ABORTION VS. SUPPORT FOR ABORTION AMONG PEOPLE OF FAITH

#### A. THE RELIGIOUS RIGHT'S OPPOSITION TO ABORTION

Christianity is most often associated with the “pro-life” side of the abortion debate. As some states began to liberalize abortion laws in the late 1960s, “[s]mall groups of Catholic doctors, nurses, lawyers, and housewives joined together to oppose liberalization”; they “were often joined by a handful of non-Catholics, usually Protestants, Mormons, or Orthodox Christians.”<sup>88</sup> Following *Roe*, “the anti-abortion movement remained heavily Catholic” until the late 1970s and early 1980s when they were joined “in great numbers” by evangelical Christians.<sup>89</sup> By the 1990s, the pro-life movement made “fetal life central to how many Christians viewed their religion and their politics.”<sup>90</sup>

These groups oppose abortion based on the ideas that (1) human life begins at conception and (2) all human life is sacred.<sup>91</sup>

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“from subpoenas in other states.” Keating, *supra* note 83. Colorado recently codified “the full range of reproductive care, including abortions, and makes it so that a fertilized egg, embryo or fetus does not have personhood rights under Colorado law.” Kyle Cooke, *Gov. Polis Signs Bill Guaranteeing Abortion Access in Colorado*, ROCKY MOUNTAIN PBS (Apr. 4, 2022), <https://www.rmpbs.org/blogs/news/colorado-abortion-protection-new-law/>.

<sup>88</sup> Jennifer L. Holland, *Abolishing Abortion: The History of the Pro-Life Movement in America*, OAH. OF AM. HISTORIANS, <https://www.oah.org/tah/issues/2016/november/abolishing-abortion-the-history-of-the-pro-life-movement-in-america/>. As Professor Holland explains, early in American history, “abortion was a widespread, largely stigma-free experience for American women,” but this changed in the mid-nineteenth century, with every state outlawing abortion by 1900. *Id.* Americans started publicly demanding liberalization of restrictive abortion laws in the 1960s. *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *The Ethics of Abortion*, HARVARD UNIV. THE PLURALISM PROJECT, <https://pluralism.org/the-ethics-of-abortion>. See also *Our Mission*, PROLIFE ACROSS AMERICA, <https://prolifeacrossamerica.org/about/> (“We base our beliefs on Biblical principles and Roman Catholic teaching.”); *National Right to Life Mission Statement*, NATL. RIGHT TO LIFE COMM., <https://www.nrlc.org/about/mission/> (explaining its mission “is to protect and defend the most fundamental right of humankind, the right to life of every innocent human being from the beginning of life to natural death”);



They point to a number of biblical passages as support for these beliefs.<sup>92</sup> For example, Jeremiah 1:4-5 indicates that God formed individual lives before birth: “Now the word of the Lord came to me, saying, ‘Before I formed you in the womb, I knew you, and before you were born, I consecrated you . . . .’”<sup>93</sup> As one pro-life organization summarizes,

The Bible teaches us that mankind is made in God’s image (Gen. 1:27, James 3:9); God knows a person before birth (Ps. 22:10, 139:15 Gal. 1:15); children are a gift and a reward (Ps. 127:3); and we need to protect and help those in need (I John 3:17). This is not a one-verse-

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Sherman & Gresko, *supra* note 5 (quoting protest signs outside the Supreme Court when *Dobbs* was argued as saying “God Hates the Shedding of Innocent Blood” and showing pro-life protest signs saying “Abortion is Murder Exodus 20:13”). *See also* Amy Littlefield, *The Christian Legal Army Behind the Ban on Abortion in Mississippi*, *THE NATION* (Nov. 30, 2021), <https://www.thenation.com/article/politics/alliance-defending-freedom-dobbs/> (explaining that central to the assault on reproductive rights is also “a legal narrative asserting that Christians are under threat of persecution from the advance of LGBTQ and reproductive rights, and that the law must allow Christians to disregard, disobey, or even dismantle laws protecting those rights.”).

<sup>92</sup> *See Scriptures Advocating for the Pre-Born*, FOCUS ON THE FAMILY (Feb. 19, 2021), <https://www.focusonthefamily.com/pro-life/scriptures-advocating-for-the-pre-born/>. *But see* MARGARET D. KAMITSUKA, ABORTION AND THE CHRISTIAN TRADITION: A PRO-CHOICE THEOLOGICAL ETHIC 49 (2019) (“[T]he biblical text does not define human personhood and only rarely speaks of conception or life in the womb. Hence, pro-life writers must rely on related general ideas that they believe undergird a biblical pro-life worldview—principally, creation in God’s image and God’s providential plan for all people. As we will see, they have a large hermeneutical obstacle to surmount in order to link those general ideas to their specific pro-life claim that abortion is ‘clearly incompatible’ with a biblical worldview.”); *see generally id.* at 49–70 (arguing that pro-life theologians’ “arguments for personhood from conception based on the notion of creation in God’s image fail to provide a convincing biblical basis for fetal personhood,” such “claims lack support in the New Testament,” “notions of predestination, election, or providence to human reproductive matters is . . . a biologically deterministic way of doing theology,” and “compel[ling] a pregnant woman, based on an appeal to ambiguous verses in the Bible[] that her Christian duty is to do only one thing—gestate—diminishes her humanity as a creature bearing God’s image and diminishes her agency as a follower of Christ”).

<sup>93</sup> *Jeremiah* 1:4-5, *BIBLE* GATEWAY, <https://www.biblegateway.com/passage/?search=Jeremiah+1%3A4-5>.

argument against abortion but a theme throughout the Bible.<sup>94</sup>

According to Pope John Paul II, “[t]he legalization of the termination of pregnancy is none other than the authorization given to an adult, with the approval of an established law, to take the lives of children yet unborn and thus incapable of defending themselves.”<sup>95</sup> From teachings like this, anti-abortion advocates consider abortion to be murder and an infringement on fetal “right to life.”<sup>96</sup> To them, because “abortion is the murder of an innocent child,” intervention is necessary “to save that child from death.”<sup>97</sup> They view fetuses as “a special class of persons in need of legal protection,” creating “a false equivalency between the rights of women and the ‘rights’ of the unborn.”<sup>98</sup> As one observer noted,

Truly one of the most remarkable efforts in information control in human history has moved U.S. public discourse into an atmosphere in which any moral analysis of fetal life is suspect. Our public debate imag[in]es the well-being of early gestating fetuses powerfully as ‘the innocent unborn.’ The well-being of a pregnant woman, willingly or unwillingly pregnant, is hardly mentioned.<sup>99</sup>

The staunchest among the pro-life factions want to ban abortion completely—including where the mother’s life is in danger, cases of rape or incest, and instances of fetal abnormality.<sup>100</sup>

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<sup>94</sup> *Preaching the ProLife Message*, RIGHT TO LIFE OF MICHIGAN (June 17, 2020), <https://rtl.org/wp-content/uploads/2018/11/PreachingTheProlifeMessage.pdf>.

<sup>95</sup> *The Ethics of Abortion*, *supra* note 91.

<sup>96</sup> See Dabney P. Evans & Subasri Narasimhan, *A Narrative Analysis of Anti-Abortion Testimony and Legislative Debate Related to Georgia’s Fetal “Heartbeat” Abortion Ban*, 28 SEXUAL AND REPROD. HEALTH MATTERS 215, 215 (2020).

<sup>97</sup> KAMITSUKA, *supra* note 92, at 48.

<sup>98</sup> Evans & Narasimhan, *supra* note 96, at 218, 223–25 (noting “it is clear that patriarchal control of women’s bodies and the furtherance of fetal rights is the true goal”).

<sup>99</sup> MAGUIRE, *supra* note 2, at 126.

<sup>100</sup> *The Ethics of Abortion*, *supra* note 91. Some Catholic institutions “signal that practicing Catholics could not vote for prochoice candidates.” Frederick Clarkson, *The Prochoice Religious Community May Be the Future of Reproductive Rights*,

Notably, moral arguments against abortion have been raised and rejected previously by the Supreme Court. For example, in *Casey*, Justice O'Connor wrote:

Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.<sup>101</sup>

While religious groups raise these concerns, many people of faith actually support abortion, as explored below.

#### *B. SUPPORT FOR ABORTION AMONG PEOPLE OF FAITH*

As discussed above, a majority of Americans believe that abortion should be legal in at least some circumstances. This should not be surprising considering the diversity of religious affiliations—as well as the increasing numbers of religiously unaffiliated persons—in the United States. The percentage of American adults who self-identify as Christian dropped 12% between 2007 and 2018/2019 and has dropped further by December 2021.<sup>102</sup> In 2007, 78% of adults

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*Access, and Justice*, POLITICAL RES. (Sept. 28, 2020), . See also e.g., Associated Press, *Catholic Bishops Avoid Direct Rebuff to Biden in New Communion Document*, NBC NEWS (Nov. 17, 2021 3:28 P.M. CST), <https://www.nbcnews.com/politics/joe-biden/catholic-bishops-avoid-direct-rebuff-biden-new-communion-document-n1284062> (“U.S. Catholic bishops overwhelmingly approved a long-anticipated document on Communion on Wednesday that stops short of calling for withholding the sacrament from politicians such as President Joe Biden who support abortion rights but offers plenty of tacit justification for individual bishops to do so.”).

<sup>101</sup> *Casey*, 505 U.S. at 850; see also Laura P. Moyer, Alyson Hendricks-Benton, & Megan Balcom, *Opposition to Abortion, Then and Now: How Amicus Briefs Use Policy Frames in Abortion Litigation*, in ACTORS IN THE JUDICIAL PROCESS, available at <https://open.oregonstate.edu/open-judicial-politics/chapter/opposition-to-abortion/> (explaining that “[i]n *Roe v. Wade* and *Planned Parenthood v. Casey*, abortion opposition was largely framed in terms of morality language”).

<sup>102</sup> See *In U.S., Decline of Christianity Continues at Rapid Pace: An Update on America's Changing Religious Landscape*, PEW RES. CTR. (Oct. 17, 2019),

identified as Christian; in 2021, that population was down to 63%.<sup>103</sup> In that same time period, the proportion of adults who are religiously unaffiliated increased from 16% to 29%,<sup>104</sup> with the increase in religiously unaffiliated adults being “most pronounced among young adults,” who also happen to be far more religiously diverse than previous generations.<sup>105</sup> The proportion of American adults who identify with other religions has remained fairly steady at between 5–7%.<sup>106</sup> At the same time, Americans appear to be growing less religiously observant.<sup>107</sup>

Unsurprisingly, Americans’ opinions about abortion vary with their religious identity—although not always perfectly aligned with religious doctrine<sup>108</sup>—majorities of many non-Christian religions

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<https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/> [hereinafter, “Decline of Christianity”]; Gregory A. Smith, *About Three-in-Ten U.S. Adults Are Now Religiously Unaffiliated*, PEW RES. CTR. (Dec. 14, 2021), <https://www.pewforum.org/2021/12/14/about-three-in-ten-u-s-adults-are-now-religiously-unaffiliated/>; but see *The 2020 Census of American Religion*, PRRI (July 8, 2021), <https://www.prrri.org/research/2020-census-of-american-religion/> (“Seven in ten Americans (70%) identify as Christian,” while “[n]early one in four Americans (23%) are religiously unaffiliated, and 5% identify with non-Christian religions.”).

<sup>103</sup> Smith, *supra* note 102.

<sup>104</sup> *Id.*

<sup>105</sup> Decline of Christianity, *supra* note 102 (“More than eight-in-ten members of the Silent Generation (those born between 1928 and 1945) describe themselves as Christians (84%), as do three-quarters of Baby Boomers (76%). In stark contrast, only half of Millennials (49%) describe themselves as Christians; four-in-ten are religious ‘nones,’ and one-in-ten Millennials identify with non-Christian faiths.”).

<sup>106</sup> *Id.*

<sup>107</sup> See Smith, *supra* note 102 (showing decreasing percentages of American adults who pray daily or consider religion “very important” in their lives, as well as increasing percentages who pray seldom or never and do not consider religion to be “very important” in their lives); see also Scott Neuman, *Fewer than Half of U.S. Adults Belong to a Religious Congregation, New Poll Shows*, NPR (Mar. 30, 2021), <https://www.npr.org/2021/03/30/982671783/fewer-than-half-of-u-s-adults-belong-to-a-religious-congregation-new-poll-shows> (reporting that less than half the adult American population belongs to a house of worship—down from 70% in 1999).

<sup>108</sup> See generally, David Masci, *Where Major Religious Groups Stand on Abortion*, PEW RES. CTR. (June 21, 2016), <https://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/> (categorizing major religious groups’ positions on abortion); see also Kelly Percival, *Religion Must Not Substitute Science in the Abortion Debate*, BRENNAN CTR. FOR JUST. (Nov. 5, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/religion-must-not-substitute-science-abortion-debate> (identifying competing amicus curiae briefs filed in *Dobbs* by religious groups).

agree that abortion should be legal in all or most cases.<sup>109</sup> Specifically, 83% of Jews, 82% of Buddhists, 68% of Hindus, 55% of Muslims, and 73% of religious “nones” believe abortion should be legal in all or most cases.<sup>110</sup> Large segments of the Christian population also believe that abortion should be legal in all or most cases including 64% of black protestants, 63% of white protestants, and 55% of Catholics.<sup>111</sup> Put simply, “the pro-choice religious community is under-recognized, under-resourced, under-reported on and under-organized,” with “prochoice religious people and their concerns [being] largely marginalized in public life generally and the electoral arena in particular.”<sup>112</sup>

Given the broad support for abortion among religious communities, as discussed above, and the religious support for abortion, as discussed below, it is unsurprising that in the United States “research has consistently shown that the majority of people who obtain an abortion have a religious affiliation.”<sup>113</sup> A majority of abortion patients identified as Christian: 24% Catholic, 17% mainline Protestant, and 13% evangelical Protestant. Eight percent of abortion patients reported a different religious affiliation and the remaining thirty-eight percent reported no religious affiliation.<sup>114</sup>

#### IV. RELIGIOUS SUPPORT FOR ABORTION FOUND IN JUDAISM, ISLAM, CHRISTIANITY, BUDDHISM, AND HINDUISM

Not only do many people of faith support access to abortion—and access the procedure themselves—but their opinions may also be derived from religious sources. In this Section, this Article will examine formal religious support for abortion—namely, religious

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<sup>109</sup> *Religious Landscape Study: Views About Abortion*, PEW RES. CTR. (last visited April 6, 2022), <https://www.pewforum.org/religious-landscape-study/views-about-abortion/> [hereinafter “*Views About Abortion*”].

<sup>110</sup> *Id.*

<sup>111</sup> *Public Opinion on Abortion*, PEW RES. CTR. (May 6, 2021), <https://www.pewforum.org/fact-sheet/public-opinion-on-abortion/>.

<sup>112</sup> Clarkson, *supra* note 100.

<sup>113</sup> Rachel K. Jones, *People of All Religions Use Birth Control and Have Abortions*, GUTTMACHER INST. (Oct. 19, 2020), <https://www.guttmacher.org/article/2020/10/people-all-religions-use-birth-control-and-have-abortions>.

<sup>114</sup> *Id.* For an analysis of conservative Christian women’s experiences having abortions, see Linda Ellison, *Abortion and the Politics of God: Patient Narratives and Public Rhetoric in the American Abortion Debate* (2008) (unpublished Ph.D. dissertation, Harvard Divinity School) (cited in KAMITSUKA, *supra* note 92, *en passim*).

texts, doctrines, and proclamations supporting access. As the discussion below demonstrates, opposition to abortion is not the only religiously-justified position.<sup>115</sup>

## A. JUDAISM

Under Jewish law, life begins at birth—with a child’s first breath of air.<sup>116</sup> This opinion is founded on religious texts that generally consider a fetus part of its mother, instead of a separate human life.<sup>117</sup> During the first forty days of pregnancy, it is considered “merely water” such that it would not trigger other religious obligations if lost.<sup>118</sup> Likewise, a pregnancy is not confirmed until “the existence of [the] fetus is known to all who see [the mother].”<sup>119</sup> After that until birth, the fetus is considered only a “limb of its mother.”<sup>120</sup>

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<sup>115</sup> In fairness, this Article does not purport to be comprehensive as each religious tradition has its own great diversity of thought on this and related topics. Instead, this Article seeks to provide an overview the relevant religious considerations permitting, encouraging, or requiring abortion.

<sup>116</sup> Schnell, *supra* note 1 (“The baby is considered a *nefesh*—Hebrew for ‘soul’ or ‘spirit’—once its head has emerged, and not before.”).

<sup>117</sup> See David M. Feldman, *Abortion: The Jewish View*, in HOSHEN MISHPAT: HARMING OTHERS 800, 800 (1983) (“The fetus is deemed a ‘part of its mother’ rather than an independent entity.”). Rabbi Feldman’s “paper was adopted as a Majority Opinion” by the Conservative Movement’s Committee on Jewish Law and Standards of the Rabbinical Assembly. *See id.*

<sup>118</sup> *Yevamot* 69b:9, available at <https://www.sefaria.org/Yevamot.69b.11> (“And if she is pregnant, until forty days from conception the fetus is merely water. It is not yet considered a living being . . .”). *See also* Ari Berger, *Abortion of the Diseased Fetus in Jewish Law*, in AND YOU SHALL SURELY HEAL 133 (2009) (“Anytime a woman gives birth she commences a phase of ritual impurity. This holds true even if she miscarries; however, the loss of an embryo less than forty days old does not engender such impurity. Furthermore, the first issue of the womb, whether alive or not, receives the status of *bechor*, firstborn; however, should the birth be that of a fetus less than forty days old, it is not considered the first issue of the womb and the subsequent birth is deemed the firstborn.”).

<sup>119</sup> *Mishnah Niddah* 1:4, available at [https://www.sefaria.org/Mishnah\\_Niddah.1.4](https://www.sefaria.org/Mishnah_Niddah.1.4) (“The time of a pregnant woman is from the point in her pregnancy when the existence of her fetus is known to all who see her.”).

<sup>120</sup> *See e.g.*, Tirzah Meacham, *Abortion*, JEWISH WOMEN’S ARCHIVE (updated July 14, 2021), <https://jwa.org/encyclopedia/article/abortion>.

The position that a fetus is not a separate human life is made clear in Chapter 21 of Exodus, which states:

When men fight, and one of them pushes a pregnant woman and a miscarriage results, but no other damage ensues, the one responsible shall be fined according as the woman's husband may exact from him, the payment to be based on reckoning. But if other damage ensues, the penalty shall be life for life, eye for eye, tooth for tooth, hand for hand, foot for foot.<sup>121</sup>

Thus, there is no expectation that the person causing the miscarriage is liable for murder and the fetus is not considered a separate human being.<sup>122</sup> The same rationale applies in the context of capital punishment:

In the case of a pregnant woman who is taken by the court to be executed, the court does not wait to execute her until she gives birth. Rather, she is killed immediately. But with regard to a woman taken to be executed who sat on the travailing chair in the throes of labor,

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<sup>121</sup> *Exodus* 21:21–23, available at <https://www.sefaria.org/Exodus.21.25>. There is a split between religions on how to interpret this verse. Christian thinking differentiates a miscarriage of a fetus with a human form from one without—in the latter case, a fine is required of the assaulter; in the former, the attacker must pay with his life. Jewish thought, on the other hand, distinguishes between the loss of the pregnancy—for which a fine must be paid—from the death of the pregnant woman—for which the attacker must pay with his life. See Y. Michael Barilan, *Her Pain Prevails and Her Judgment Respected—Abortion in Judaism*, 25 *J. OF L. & RELIGION* 97, 123 (2009).

<sup>122</sup> See e.g., Graham Spurgeon, *THE RELIGIOUS CASE FOR ABORTION* 16 (1983) (“In other words, if you cause the death of the fetus, you merely pay a fine; if you cause the death of the woman, you lose your own life. Thus the Bible clearly shows that a fetus is *not* considered a person. If the fetus were considered to be a person, then the penalty for killing it would be the same as for killing the woman—death. Abortion, then, is *not* murder.”) (quoted in Russell Fuller, *Exodus 21:22–23: The Miscarriage Interpretation and the Personhood of the Fetus*, 37 *J. EVANGELICAL THEOLOGICAL SOCIETY* 169, 170 (1994)).

the court waits to execute her until she gives birth.<sup>123</sup>

Accordingly, abortion is not considered murder and a long string of rabbinic authority so holds.<sup>124</sup>

Rabbinic thought differs from some Christian counterparts because “the mother’s life took precedence over the fetus[].”<sup>125</sup> This position is rooted in the Mishnah and holds true throughout pregnancy until the fetus’s head is born:

If a woman is having trouble giving birth, they cut up the child in her womb and bring it forth limb by limb, because

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<sup>123</sup> *Mishnah Arakhin* 1:4, available at [https://www.sefaria.org/Mishnah\\_Arakhin.1.4](https://www.sefaria.org/Mishnah_Arakhin.1.4). In fact, to preserve the executed woman’s remaining dignity, the fetus would be killed at the start of the woman’s execution. See Berger, *supra* note 118, at 129 (“Shmuel states that we do not simply allow the fetus to die with the mother, but we actively terminate its life prior to her execution. Why? Merely because it will be more shameful to the deceased mother should a partially living fetus emerge from her mutilated and disfigured body. Thus, the concern to preserve the remaining vestiges of this criminal’s dignity after her death suffices to permit feticide.”).

<sup>124</sup> See Meacham, *supra* note 120; Feldman, *supra* note 117, at 800–01 (“In the words of Rashi, only when the fetus ‘comes into the world’ is it a ‘person.’) (explaining that Jewish law on homicide “exclude[s] the fetus in the womb for the fetus in the womb is *lav nefesh hu* (not a person) until he is born”); *id.* at 802 (“In the rabbinic system, then, abortion is not murder.”); Schnell, *supra* note 1 (“The baby is considered a nefesh—Hebrew for ‘soul’ or ‘spirit’—once its head has emerged, and not before.”). Interestingly, in the twentieth century, “the militant pro-life position of the Catholic Church and various fundamentalist Christian groups became the model for modern rabbinic positions on abortion,” based on the idea that “whatever is forbidden to Gentiles should certainly be forbidden to Jews.” See Meacham, *supra* note 120; *but see* Barilan, *supra* note 121, at 113–18 (arguing the principle of “do not destroy” influenced rabbinic thinking on abortion, permitting abortion where the destruction of the fetus was properly justified). In reality, these positions—adopted only by Orthodox rabbis—“had no basis in traditional Jewish sources” and are otherwise influenced by the Holocaust, low Jewish birth rates, and a general disapproval of society’s sexual liberalization. See Meacham, *supra* note 118; Feldman, *supra* note 117, at 806 (“In the Jewish community, today, with a conscious or unconscious drive to replenish ranks decimated by the Holocaust, contemporary rabbis invoke not the most lenient, but rather the more stringent responsa of the earlier authorities.”); Barilan, *supra* note 121, at 165–68 (discussing a “paradigm shift” in rabbinic thought on abortion which is “not consistent with either precedent or the leniency of the accompanying casuistic deliberation” and partially motivated by disdain for the sexual revolution).

<sup>125</sup> Meacham, *supra* note 120; see also Rhami Khorfan & Aasim I. Padela, *The Bioethical Concept of Life for Life in Judaism, Catholicism, and Islam: Abortion When the Mother’s Life Is in Danger*, 42 *J. ISLAMIC MED. ASS’N* 99, 100–01 (2010) (“Only at birth are full rights given to the fetus. . . . [A]bortion . . . is not considered murder by Jewish law.”).



her life comes before the life of [the child]. But if the greater part has come out, one may not touch it, for one may not set aside one person's life for that of another.<sup>126</sup>

All opinions “agree that if the birth (and they extrapolate that to include the pregnancy itself) endangers a woman's life, abortion is acceptable even at the moment of birth”—the differences stem from the severity of threatened damage to the mother considered necessary to justify abortion.<sup>127</sup> Put simply, the mother's “welfare is primary,”<sup>128</sup> or as one halakhic scholar put it, “the pain of her body prevails.”<sup>129</sup> Some rabbinic authorities consider the fetus in this situation to be a *rodeif* or pursuer who is threatening its mother's life.<sup>130</sup> This understanding is underscored by the overarching Jewish value of *pikuach nefesh*, which provides that the preservation of human life overrides virtually all other religious rules or requirements.<sup>131</sup> When the pregnant person's life is endangered by continuation of the pregnancy, it is a religious duty to terminate.<sup>132</sup> Many rabbinic

<sup>126</sup> *Mishnah Oholot* 7:6, available at [https://www.sefaria.org/Mishnah\\_Oholot.7.6](https://www.sefaria.org/Mishnah_Oholot.7.6).

<sup>127</sup> See Meacham, *supra* note 120.

<sup>128</sup> Feldman, *supra* note 117, at 804; Kenneth Shuster, *An Halachic Overview of Abortion* 26 SUFFOLK U. L. R. 641, 646–47 (1992) (“[E]ven those authorities who hold that abortion is akin to homicide *require* that a fetus that threatens maternal life be aborted.” (emphasis added)).

<sup>129</sup> See Barilan, *supra* note 121, at 133 (quoting Maimonides).

<sup>130</sup> See e.g., Berger, *supra* note 118, at 136–37 (quoting Rambam).

<sup>131</sup> Simon Glustrom, *Saving a Life (Pikuach Nefesh)*, MY JEWISH LEARNING, <https://www.myjewishlearning.com/article/saving-a-life-pikuach-nefesh/> (“The preservation of human life takes precedence over all other commandments in Judaism. . . . One is not merely permitted—one is required to disregard a law that conflicts with life or health.”); *Jewish Concepts: Pikuach Nefesh*, JEWISH VIRTUAL LIBRARY, <https://www.jewishvirtuallibrary.org/pikuach-nefesh/> (“This obligation [of *pikuach nefesh*] applies to both an immediate threat and a less grave danger that has the potential of becoming serious. . . . According to *pikuach nefesh* a person must do everything in their power to save the life of another . . . .”); see Barilan, *supra* note 121, at 119 (explaining that *pikuach nefesh* “requires that almost every religious prohibition be violated for the sake of saving a life” and listing the only three exceptions: “the prohibitions against worshiping idols, homicide and other forms of physical battery on others, and sexual prohibitions”); see also Feldman, *supra* note 117, at 805 (“The right to be born is relative; the right to life for existing persons is absolute.”).

<sup>132</sup> Religious Voices Worldwide Support Choice, *supra* note 1, at 4. *But see* Barilan, *supra* note 121, at 151–52 (explaining that even though rabbis agree that where a pregnancy threatens a woman's life, her life takes precedence over that of the

authorities extend this beyond physical health to encompass mental or psychological well-being as well.<sup>133</sup>

While much analysis is focused on maternal well-being, the permissibility of abortion is not limited to instances where the mother's life or health is at risk.<sup>134</sup> While generally opposed to "abortion-on-demand," abortion is permissible where there is "great need."<sup>135</sup> Put another way, "an adequate reason is necessary to avoid indiscriminate abortion."<sup>136</sup> Abortion may be justified by the potential impact on "the life and welfare of another child" or the future "well-being of the fetus."<sup>137</sup> For example, Rabbi Itzhak Oelbaum would

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developing fetus, rabbis have permitted women to continue pregnancies against medical advice and forbid coercing patients into consenting to medical treatment—even if it could save their lives); Schuster, *supra* note 128, at 650 ("any decision to abort a fetus ultimately rests with the fetus' mother . . . because Orthodox Judaism teaches that everyone has the privilege to choose whether or not to obey the commandments").

<sup>133</sup> See Feldman, *supra* note 117, at 804 ("Rabbinic rulings on abortion are thus amenable to the following generalization: If a possibility or probability exists that a child may be born defective, and the mother seeks abortion on the ground of pity for a child whose life would be less than normal, the rabbi would decline permission. . . . If, however, an abortion for the same potentially deformed child were sought on the grounds that the possibility is causing severe anguish to the mother, permission would be granted.").

<sup>134</sup> See Danya Ruttenberg, *Why Are Jews So Pro-Choice?*, FORWARD (Jan. 30, 2018), <https://forward.com/opinion/393168/why-are-jews-so-pro-choice/> ("In situations where the mother's life is not in danger, modern and contemporary legal decisors have gone on record permitting abortion . . . in cases when a fetus may suffer gravely if carried to term or when a mother's physical or mental health is in danger, or even when her psychological well-being may be at risk."); see also Feldman, *supra* note 117, at 805 ("True, rabbinic opinion permitting abortion for fetal reasons alone is not altogether lacking, but the normative rabbinic view is to permit it for maternal indications only. Yet, the one can blend into the other, as fetal risk can mean mental anguish on the part of the mother, so that the fetal indication becomes a maternal one.").

<sup>135</sup> Kassel Abelson, *Prenatal Testing and Abortion*, PROCEEDINGS OF THE COMM. ON JEWISH LAW & STANDARDS 7 (1988). Rabbi Abelson's paper was adopted as the majority opinion for the Conservative movement in 1983. *Id.* at 3; Berger, *supra* note 118, at 117 ("Judaism halachically and historically eschews abortion-on-demand; consequently the major concern of Jewish law, ethics, and the contemporary halachic debate concerns therapeutic abortion, an issue both presented by and evolving with modern science."). The Conservative Movement's position on abortion based on fetal abnormality can be summarized as follows: "If the [prenatal] tests indicate that the child will be born with major defects which would preclude a normal life, and which make the mother and the family anxious about the future, it is permitted to abort the fetus" with the final decision being "made by the mother in consultation with the family." Abelson, *supra* note 135, at 9.

<sup>136</sup> Abelson, *supra* note 135, at 7.

<sup>137</sup> *Id.* at 7–8.

“permit an abortion for a nursing mother where there is expert evidence that the pregnancy would affect the mother’s milk and would endanger the life of the sickly child who is nursing.”<sup>138</sup> Rabbi Eliezer Waldenberg concluded that a fetus’s Tay-Sachs diagnosis would justify termination until seven months’ gestation and permitted case-by-case evaluation for fetuses diagnosed with Down syndrome.<sup>139</sup> Some rabbis go so far as to consider the “abortion of seriously defected fetuses a *moral duty*, not an optional choice.”<sup>140</sup> At least one rabbi has ruled that aborting a fetus conceived through an extramarital affair “almost has the reward of a mitzvah.”<sup>141</sup>

Notably absent from the halakhic debate is *any* argument about the fetus’s personhood or any attempt to distinguish viable from nonviable fetuses.<sup>142</sup> A fetus “has no legal claim that is separable from the claim and well-being of its mother”—instead, it obtains “an independent claim of human life only after birth; or more accurately, after it cannot endanger the life and well-being of its mother.”<sup>143</sup> For this same reason, only after a pregnant woman has died is the fetus’s potential viability considered.<sup>144</sup> Likewise, rabbinic thought differs from Christian thought on the concept of “original sin.” In Judaism, “the soul is immortal no matter when it enters or leaves the body,” and “it is a pure soul, free of the taint of ‘original sin,’” since “Judaism

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<sup>138</sup> *Id.*

<sup>139</sup> Berger, *supra* note 118, at 147. Interestingly, Rabbi Waldenberg’s initial opinion permitted abortion through only the first trimester, but he reevaluated his ruling upon learning that the disorder could not be diagnosed so early in pregnancy. *Id.*

<sup>140</sup> See Barilan, *supra* note 121, at 142.

<sup>141</sup> MAGUIRE, *supra* note 2, at 103.

<sup>142</sup> See Barilan, *supra* note 121, at 122–29 (“In summary, we have shown that from the days of the Sages until now, both the more strict and the more liberal commentators on abortion ignore metaphysical considerations (except, perhaps, for the stage of the first forty days) or reject them out of hand. This is not because Jewish sages argued that the fetus is devoid of *Imago Dei* or is not human; quite the contrary. They merely believed that these facts were not relevant to the *halakhic* discussion of abortion.”).

<sup>143</sup> See *id.* at 129; see also *id.* at 132 (“[B]irth marks the end of the fetus’s dependence on its mother’s body, and concomitantly, the end of any threat which that dependence may pose to the mother’s needs or even to her welfare.”).

<sup>144</sup> See *id.* at 130 (“According to a sixteenth-century rabbi, fetal life gains legal standing only when it is possible to regard the mother as a ‘box.’ Instrumentalization of a living person, especially a pregnant mother, is possible only after her death; hence, fetal life has legal status only in those rare moments in which the mother has died and the fetus is still salvageable.”). However, a rabbinic code of law prohibited this practice due to fear that the mother would be declared dead inappropriately in an attempt to salvage the fetus. See *id.* at 148.

has no concept of ‘original sin.’”<sup>145</sup> Likewise, while Christians are concerned about condemning an unbaptized fetus to hell and burial outside consecrated graveyards,<sup>146</sup> Jews permit dead infants and aborted fetuses to be buried in the cemetery.<sup>147</sup>

With all this in mind, Jews, unsurprisingly, are the most pro-choice religious group in America.<sup>148</sup>

## B. ISLAM

While the Quran does not explicitly mention abortion,<sup>149</sup> it does identify five stages of pregnancy:

And certainly We created man of an extract of clay, then We made him a small seed (*nutfah*) in a firm resting-place (the uterine wall), then We made the seed a clot (*‘alaqah*), then We made the clot a lump of flesh (*mudhghah*), then We made (in) the lump of flesh bones (*‘idham*), then We clothed the bones with flesh (*lahim*) . . . .<sup>150</sup>

Each of these stages lasts for forty days, starting from conception.<sup>151</sup> At the end of the *mudhghah* stage—120 days into pregnancy—“the fetus is considered a human and gains almost full rights” because it has been ensouled, thereby making it “another creation.”<sup>152</sup> As one hadith explains, at the point of ensoulment, “God sends an angel to write four words: He writes his deeds, time of his death, means of his

<sup>145</sup> Feldman, *supra* note 117, at 803.

<sup>146</sup> See Barilan, *supra* note 121, at 161 (“Catholic theologians knew well that most babies delivered from dying mothers would not survive, yet they struggled hard to allow every fetus the chance at baptism to save it from hell and from burial outside of consecrated graveyards as an outcast from the community.”).

<sup>147</sup> *Id.* at 162.

<sup>148</sup> See note 110, *supra*, and related discussion.

<sup>149</sup> Kiarash Aramesh, *Abortion: An Islamic Ethical View*, 6 IRANIAN J. ALLERGY, ASTHMA AND IMMUNOLOGY 29, 31 (2007).

<sup>150</sup> KM Hedayat, et al., *Therapeutic Abortion in Islam: Contemporary Views of Muslim Shiite Scholars and Effect of Recent Iranian Legislation*, 32 J. MED. ETHICS 652, 653 (2006).

<sup>151</sup> *Id.*; see also Khorfan & Padela, *supra* note 125, at 104 (“Each of you is gathered in his mother’s womb for forty days; then [he is] a clot of blood for the same period; then he is a clump of flesh for the same period . . . . Then the spirit is breathed into it.”).

<sup>152</sup> Khorfan & Padela, *supra* note 125, at 104; Hedayat et al., *supra* note 150, at 653.

livelihood, and whether he will be wretched or blessed (in religion).”<sup>153</sup> Based on this, Muslim scholars typically agree that abortion is prohibited after 120 days of pregnancy—unless the pregnancy threatens the mother’s life.<sup>154</sup> At ensoulment, the fetus has become a “life of a soul” and the Quran provides that: “Whosoever has spared the life of a soul, it is as though he has spared the life of all people. Whosoever has killed a soul, it is as though he has murdered all of mankind.”<sup>155</sup>

Islamic law preferences the mother’s life over that of the fetus as the lesser of two evils because the mother is part of a family, her life is well-established, she created the fetus, and the fetus would likely die if its mother died.<sup>156</sup> This preferencing of the mother’s life can be derived from the Quran: “No soul shall have imposed upon it a duty but to the extent of its capacity; neither shall a mother be made to suffer harm on account of her child nor the father for his offspring . . . .”<sup>157</sup>

As to other reasons, Muslim scholars are split about whether abortion is permitted and for how long.<sup>158</sup> Medieval Muslim scholars were permissive so long as there was a “just cause,” with some permitting women to terminate a pregnancy when they were breastfeeding another child or could not afford to feed another child or even “due to a pregnant woman’s desire to maintain her beauty.”<sup>159</sup> More recently, some jurists have prohibited abortion “for economic

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<sup>153</sup> Khaleel Mohammed, *Islam and Reproductive Choice*, REL. COAL. FOR REPROD. CHOICE, <https://rerc.org/muslim/>.

<sup>154</sup> Khorfan & Padela, *supra* note 125, at 104; Hedayat et al., *supra* note 150, at 653. On the other hand, some Muslim scholars prohibit abortion after the first forty days because at that point “an angel endows the fetus with hearing, sight, skin, flesh and bones,” thereby “indicat[ing] the formation of a human being.” Mohammed, *supra* note 153. However, recent scholarship positing that a separate human being exists from the moment of conception “contradicts with the classical Islamic practice in which the fetus was never seen as a legal person before birth.” *Id.*

<sup>155</sup> Aramesh, *supra* note 149, at 31.

<sup>156</sup> See MAGUIRE, *supra* note 2, at 119 (explaining that late abortion is justified on the principle of “lesser evil”).

<sup>157</sup> See Abdulrahman Al-Matary & Jaffar Ali, *Controversies and Considerations Regarding Termination of Pregnancy for Foetal Anomalies in Islam*, 15 BMC MEDICAL ETHICS 10, at 5 (2014).

<sup>158</sup> See generally, *Abortion in Islam*, BBC (Sept. 7, 2009), [https://www.bbc.co.uk/religion/religions/islam/islamethics/abortion\\_1.shtml](https://www.bbc.co.uk/religion/religions/islam/islamethics/abortion_1.shtml).

<sup>159</sup> Leila Hessini, *Islam and Abortion: The Diversity of Discourses and Practices*, 39 INSTITUTE OF DEV. STUDIES BULLETIN 18, 23 (2008). See also Aramesh, *supra* note 149, at 32 (identifying fatwas in Bosnia and Algeria and a draft law in Egypt permitting abortion).

reasons” even if the pregnancy would cause financial hardship to the family or based on the mother’s mental health concerns.<sup>160</sup> A more progressive Shiite jurist, Ayatollah Sane’I, permits abortion for “[a]ny fetal or maternal condition that brings extreme difficulties” to the mother *or* the family.<sup>161</sup> More recently, rape is increasingly recognized as a legitimate reason for abortion;<sup>162</sup> contrary opinions “have more in common with fundamentalist Christian views than Islamic jurisprudence.”<sup>163</sup>

Some Islamic jurists permit abortion to preserve maternal health before four months of pregnancy and some permit abortion due to fetal abnormalities in limited circumstances—including, possibly, after four months’ gestation where “the fetus will not survive outside the uterus.”<sup>164</sup> Support for permitting termination after 120 days’ gestation for pregnancies involving fetuses with anomalies can be found in Islam’s five guiding principles, which are “(i) preservation of religion, (ii) preservation of life, (iii) preservation of genealogy or parentage, (iv) preservation of the mind and health, and (v) the preservation of property.”<sup>165</sup> First, forcing a pregnant person to continue a pregnancy and ultimately deliver a fetus whose anomalies are incompatible with life is a wasteful and traumatic exercise—just as it would be if the anomaly were diagnosed before 120 days’ gestation.<sup>166</sup> Because of advances in medicine, not only can definitive diagnoses be made with a high degree of accuracy—obviating concerns about uncertainty in diagnosis—but abortions can be performed safely—decreasing the health risks to the mother of the

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<sup>160</sup> Hedayat et al., *supra* note 150, at 653.

<sup>161</sup> *Id.* at 653–54.

<sup>162</sup> See Al-Matary & Ali, *supra* note 164, at 3 (“The Egyptian Grand Sheikh of Al-Azhar, the highest Islamic council in Egypt, issued a religious edict in 1998 and 2004 permitting unmarried women that are victims of rape access to abortion even after 120 days.”).

<sup>163</sup> Hessini, *supra* note 159, at 23.

<sup>164</sup> Hedayat et al., *supra* note 150, at 654–55. Interestingly, seven socially conservative Muslim countries permit abortion for fetal abnormalities in the first four months of pregnancy. *Id.* at 654; see also Al-Matary & Ali, *supra* note 157, at 3 (explaining that a religious edict in Jordan permits termination of pregnancy based on severe fetal anomalies *after* 120 days’ gestation “if three specialists document these severe anomalies and both parents consent”).

<sup>165</sup> Al-Matary & Ali, *supra* note 157, at 3, 5.

<sup>166</sup> See *id.* at 5; see also *id.* at 6 (“It is argued the physical well-being takes precedence over religious well-being. Intervention is lawful if it is useful and beneficial, and the performance of a specific medical procedure that benefits the physical well-being of an individual outweighs generalized religious prohibitions.”).

procedure.<sup>167</sup> Additionally, because of medical advances, babies born with anomalies may survive birth and require costly—monetary and emotional—care or treatment.<sup>168</sup> There is at least an argument that abortion in these cases is a grey area in Islam.<sup>169</sup>

Given all this, it is not surprising that a majority Muslims support abortion being available in at least some cases.<sup>170</sup>

### C. CHRISTIANITY

As discussed above, Christianity is most often associated with the “pro-life” side of the abortion debate.<sup>171</sup> However, that is not the only religiously justifiable position. Notably, the protection of fetal life justification discussed above is of a recent vintage and Christian opinion on abortion has varied over time. Historically, the driving force “for the occasional condemnations of abortion in theological sources” was the invariable assumption that the women seeking abortions were adulteresses.<sup>172</sup> “[O]ne can see that the supposedly almost absolute anti-abortion stance in the church was more a factor of condemning contraception, nonprocreative sex, and women’s sexual sins and only distantly a factor of ‘a clarified moral evaluation of fetal life.’”<sup>173</sup>

This Section will discuss the inconsistent history of Catholic opposition to abortion—including the concept of life beginning at conception. Next, it will demonstrate how anti-abortion arguments abuse the concept of probabilism, before addressing circumstances when abortion may be permissible under Catholic doctrine. Finally,

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<sup>167</sup> *See id.* at 5.

<sup>168</sup> *See id.*

<sup>169</sup> *Id.* at 6; *see also id.* (“There are verses in the Glorious Qur’an that remove guilt if a certain course of action is pursued when there is no recourse: ‘But if compelled by necessity, neither desiring it nor transgressing bounds, there is no sin. Indeed, God is ever forgiving and merciful.’”).

<sup>170</sup> *See* note 110, *supra*, and related discussion.

<sup>171</sup> *See* Section III.A, *supra*.

<sup>172</sup> MAGUIRE, *supra* note 2, at 124; *see also* KAMITSUKA, *supra* note 92, at 22 (“Nearly all extant early Christian objections to abortion . . . either directly condemn wanton women . . . or denounce the triad of adulterous, pleasure-oriented sex, contraception, and abortion.” (quoting BEVERLY WILDUNG HARRISON, *OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION* 130 (1984))).

<sup>173</sup> KAMITSUKA, *supra* note 92, at 20 (quoting HARRISON, *supra* note 172, at 142); *see also id.* at 48 (“The church’s criminalizing of all behaviors that impeded or fell outside of marital procreativity was a top-down imposition of morality that was more concerned with sex outside of marriage (and even sexual pleasure within marriage) than protecting fetal life or promoting the raising of healthy children.”).

this Section will summarize some Protestant organizations' resolutions supporting abortion access.

### 1. CATHOLICISM

Historically, the Catholic position on abortion was not as uniform as it is now portrayed. In fact, through most of history the Church's "teaching was a mixed bag,"<sup>174</sup> with "a range of opinions on issues surrounding abortion."<sup>175</sup> "[T]here never was a univocal sanctity-of-fetal-life message in Christianity."<sup>176</sup> Evidence suggests that "premodern Christians actively developed reproductive options for women," including Christian physicians in the sixth and seventh centuries providing "detailed instructions for performing abortions and making contraceptives."<sup>177</sup> Before the eleventh century, penitential manuals, which provided "instructions for confessors," show that "the designated penance for abortion fell significantly lower than that for murder," with the penance adjusted based on the circumstances.<sup>178</sup> In the thirteenth century, Pope Gregory IX considered sterilization more serious than abortion based largely on the aforementioned negative attitudes towards sexuality and the position that reproduction was the only permissible purpose of sex.<sup>179</sup> In the second half of the nineteenth century, the Vatican refused to weigh in "on a very late-term abortion, requiring dismemberment of a formed fetus to save the woman's life," and instead referred the questioner to theologians' teachings.<sup>180</sup> Similarly, "when church leaders had the authority and the means to enforce civil penalties for abortion, they did not seem inclined to do so."<sup>181</sup>

Relatedly, the idea that life begins at conception is also a recent development. Historically, the dominant tradition in

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<sup>174</sup> MAGUIRE, *supra* note 2, at 34.

<sup>175</sup> KAMITSUKA, *supra* note 92, at 18 (describing the "historical particularities of the church's abortion discourses and the diverse range of theological viewpoints on abortion and fetal life" as "an approach that eschews a predetermined ecclesial standpoint").

<sup>176</sup> *Id.* at 46.

<sup>177</sup> Luis Josué Sales, *Christian Attitudes Surrounding Abortion Have a More Nuanced History than Current Events Suggest*, THE CONVERSATION (July 13, 2021 8:29 A.M. EDT), <https://theconversation.com/christian-attitudes-surrounding-abortion-have-a-more-nuanced-history-than-current-events-suggest-162560>.

<sup>178</sup> KAMITSUKA, *supra* note 92, at 29–31.

<sup>179</sup> MAGUIRE, *supra* note 2, at 34; *see also* KAMITSUKA, *supra* note 92, at 22 ("Some church leaders even implied that contraceptive acts are more evil than abortion[.]").

<sup>180</sup> MAGUIRE, *supra* note 2, at 38.

<sup>181</sup> KAMITSUKA, *supra* note 92, at 20 (internal citations omitted).



Christianity was that of delayed ensoulment—a fetus did not attain the moral status of a person until at least three months into pregnancy based on the theological rationale that “the *conceptum* was enlivened first by a vegetative soul, then an animal soul, and only by a human spiritual soul after it was formed sufficiently.”<sup>182</sup> Even so, “the common pastoral view was ‘that ensoulment occurred at quickening, when the fetus could first be felt moving in the mother’s womb, usually early in the fifth month.’”<sup>183</sup> There was no “consensus on the issue of when fetal ensoulment happened.”<sup>184</sup> As Augustine of Hippo, “[t]he most eminent Christian thinker in the West by the early fifth century,” stated after being unable to “find biblical evidence that proved the divine infusing of a soul at conception”: a “question may be most carefully discussed by the most learned men, and still I do not know that any man can answer it, namely: When does a human being begin to live in the womb?”<sup>185</sup> Even more recent “papal documents exercise some terminological reserve regarding when a human person actually comes into existence.”<sup>186</sup>

The Catholic anti-abortion argument premised on probabilism is inconsistent with other probabilistic analyses of the Church as it seeks “to secure more rights at conception than [are] logically warranted given the presence of doubts about the personhood of an embryo.”<sup>187</sup> As Carol Tauer explained, “there are many ways the term ‘probable’ has been used in traditions of Catholic teaching and certain

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<sup>182</sup> MAGUIRE, *supra* note 2, at 36–37; *see also* KAMITSUKA, *supra* note 92, at 26–27 (“[T]he consensus opinion, from the time of Hippocrates in the fifth century BCE, was that unformed embryonic matter developed into an increasingly formed fetal person.”); *id.* at 38 (“Many church fathers interacted with the medical science and philosophy of their day, and that knowledge seems to have influenced their views on fetal personhood, which in most cases mirrored the common opinion that ensoulment was delayed.”); *id.* at 78 (“Following Aristotelian embryology, Aquinas believed ensoulment of a human being happened in stages, as one type of soul supplanted another, the last being the rational soul infused by God when the fetus was sufficiently formed.”).

<sup>183</sup> MAGUIRE, *supra* note 2, at 36; *see also* KAMITSUKA, *supra* note 92, at 34 (noting that in Medieval times, canon law distinguished between abortion of a formed versus an unformed fetus, with only the former being considered homicide (citing WOLFGANG MULLER, *THE CRIMINALIZATION OF ABORTION IN THE WEST: ITS ORIGINS IN MEDIEVAL LAW* 62–63, 71–72 (2012))).

<sup>184</sup> KAMITSUKA, *supra* note 92, at 20 (citing HARRISON, *supra* note 172, at 134–35, 142, 145).

<sup>185</sup> *Id.* at 38. As Professor Kamitsuka notes, Augustine condemned abortion because he tied it to illicit sexuality.

<sup>186</sup> *Id.* at 109; *see also id.* at 109–11 (analyzing language of *Dignitas personae* and *Donum vitae*, which were published in 2008 and 1987, respectively).

<sup>187</sup> *See id.* at 97.

rules of moral reasoning are standard.”<sup>188</sup> Normal “probabilistic moral reasoning” recognizes that “rights of an uncertain subject . . . are automatically uncertain rights.”<sup>189</sup> As such, “[i]n probabilism, doubt is not supposed to translate into more rights.”<sup>190</sup> As Professor Kamitsuka explained, the Catholic Church’s “magisterial teachings on abortion appeal to probabilism and even admit that fetal personhood is open to scientific and philosophical debate; however, they do not adhere to the logic of their own principle of probabilism and, instead, accord full personhood rights to an embryo whose personhood is actually in doubt.”<sup>191</sup> Thus, the argument for fetal personhood and attendant rights which dominate over the rights of the mother is the opposite of the standard probabilistic approach.<sup>192</sup>

Additionally, abortion has been deemed permissible to save the life of the pregnant person. This was recognized by Tertullian, an early church writer, who considered dismembering a fetus to remove it to save its mother’s life a necessary cruelty.<sup>193</sup> Likewise, Antoninus, a later-canonized archbishop of Florence, approved of early abortions to save women’s lives.<sup>194</sup> Early abortion was also approved of by other sixteenth century Catholic theologians,<sup>195</sup> one of whom, Antoninus de Corduba, extended it to permit women to take abortifacient medicines throughout pregnancy if their *health* required it because the mother “had a *jus prius*, a prior right.”<sup>196</sup>

Similarly, some Catholics avoid the religious prohibition on abortion if the fetus is not harmed directly based on the principle that “[a]n action that has both a good and a bad effect may be performed if

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<sup>188</sup> *Id.* at 111 (citing Carol A. Tauer, *The Tradition of Probabilism and the Moral Status of the Early Embryo*, 45 THEOLOGICAL STUD. 1, 18 (1984)).

<sup>189</sup> *Id.* at 112 (quoting Tauer, *supra* note 188, at 28).

<sup>190</sup> *Id.* at 111.

<sup>191</sup> *Id.* at 116.

<sup>192</sup> *Id.* at 112 (quoting Tauer, *supra* note 188, at 28).

<sup>193</sup> MAGUIRE, *supra* note 2, at 36; KAMITSUKA, *supra* note 92, at 42–43 (internal citation omitted). As Professor Kamitsuka explains, while Tertullian was opposed to abortion, he recognized that it could be medically necessary. *Id.* at 43. He understood that when embryotomy was “done quickly and professionally, the ‘luckless infant’ will ‘escape being tortured alive’ by dying along with its mother in a protracted, futile labor.” *Id.*; see also *id.* at 48 (“For all his anti-abortion invectives and his belief in human ensoulment from conception, Tertullian was apparently able to see that killing a fetus during an obstructed birth, in order to avoid the gruesome death of both the mother and child, was a tragic but morally justifiable medical action.”).

<sup>194</sup> MAGUIRE, *supra* note 2, at 37.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

the good effect accomplished is greater than the evil effect.”<sup>197</sup> Put another way, if “the intended result of the procedure that indirectly harms the fetus is saving the mother’s life, which is good, and the death of the fetus is an indirect evil,” then “the good result outweighs the bad result and the procedure is allowed.”<sup>198</sup> Apparently, “Roman Catholic hospitals already have in place instructions for allowable procedures that would maintain the distinction that Roman Catholic moral teaching considers important between ‘direct’ versus ‘indirect’ killing.”<sup>199</sup>

In light of the Catholic Church’s varied positions on abortion and its inconsistency regarding when life begins, coupled with traditional probabilistic thinking and recognition of the need for abortion to save the mother’s life, a pro-choice position among Catholics need not be surprising.

## 2. PROTESTANTISM

Despite vocal opposition to abortion from Protestants, a number of Protestant Churches and affiliated organizations have either recognized and respected the diversity of opinions on abortion or signaled their support for access to the procedure.

The American Friends Service Committee (“AFSC”), a Quaker organization seeking “to challenge unjust systems and promote lasting peace,”<sup>200</sup> has “been unequivocally supportive of reproductive freedom since the issue emerged on the public stage.”<sup>201</sup> In 1969, the AFSC published a report supporting “public funding for elective abortions” and arguing that “no woman should be forced to bear an unwanted child.”<sup>202</sup> The AFSC’s support for abortion did not waiver after *Roe*.<sup>203</sup> For example, AFSC filed numerous amicus briefs, while its Nationwide Women’s Program joined nationwide fundraising efforts to help low-income women access abortions, supported the

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<sup>197</sup> Khorfan & Padela, *supra* note 125, at 102.

<sup>198</sup> *Id.* In fairness, some “Catholic moral philosophers explicitly state that in this case two natural deaths are better than one murder.” *Id.*

<sup>199</sup> KAMITSUKA, *supra* note 92, at 132–33.

<sup>200</sup> *Vision, Mission, and Values*, AM. FRIENDS SERVICE COMM., <https://www.afsc.org/vision-mission-and-values>.

<sup>201</sup> *Nationwide Women’s Program*, AM. FRIENDS SERV. COMM. 11 (2007), available at <https://www.afsc.org/sites/default/files/documents/NWP%20History%20%28final%20final%29.pdf>.

<sup>202</sup> *Id.*

<sup>203</sup> *See id.* at 12.

founding of the Reproductive Rights National Network, and became a co-sponsor of the annual March for Women's Lives.<sup>204</sup>

In response to the Supreme Court's decision in *Webster v. Reproductive Health Services*,<sup>205</sup> the General Assembly of the Disciples of Christ adopted an emergency resolution to "express[] opposition" to that decision and "any laws that restrict women's guaranteed access to abortions under *Roe v. Wade*," as well as to "reaffirm[] our historic commitment to reproductive freedom for women."<sup>206</sup> Recognizing that "the majority of United States citizens are opposed to making abortion illegal," this resolution warned that "making abortion illegal, when many committed Christians do not even agree when life begins, would become coercion and create widespread disrespect and cynicism for what may be an unenforceable law."<sup>207</sup> The General Assembly referenced its 1975 resolution that "affirmed" its "respect for differences in the religious beliefs concerning abortion and oppose[d], in accord with the principle of religious liberty, any attempt to legislate a specific religious opinion or belief concerning abortion upon all Americans."<sup>208</sup> Finally, the resolution encouraged its adherents who supported reproductive choice to (1) "oppose state or federal legislation which would explicitly or effectively limit the access of any woman to legal and safe abortion counseling and services"; (2) contact their legislators; and (3) consider donating to "private agencies offering these services to women, regardless of their ability to pay," if they live in states where "public health money is not available for legal abortion services."<sup>209</sup>

Similarly, the General Board of the American Baptist Churches approved—and later reaffirmed—a resolution recognizing "[g]enuine diversity of opinion" and "deeply held convictions," resulting in an acknowledgment of "the freedom of each individual to advocate for a public policy on abortion that reflects his or her

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<sup>204</sup> *Id.* at 12, 31–32.

<sup>205</sup> 492 U.S. 490 (1989) (upholding Missouri legislation's "restrictions on the use of public employees and facilities for the performance or assistance of nontherapeutic abortions").

<sup>206</sup> *Emergency Resolution Concerning Webster v. Reproductive Health Services*, DISCIPLES OF CHRIST GEN. ASSEM. (1989), <https://disciples.org/wp-content/uploads/2015/09/8954WebsterV.ReproductiveHealthServices1.pdf>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

beliefs.”<sup>210</sup> Instead of condemning abortion across the board, the resolution states:

As American Baptists we oppose abortion,  
as a means of avoiding responsibility for conception,  
as a primary means of birth control, [and]  
without regard for the far-reaching consequences of the act.<sup>211</sup>

On the other hand, it unequivocally condemns “violence and harassment directed against abortion clinics, their staff and clients, as well as sanctions and discrimination against medical professionals whose consciences prevent them from being involved in abortions.”<sup>212</sup> The resolution explains that “[t]he role of the General Board in this matter is not to direct churches, but to assist them in carrying out ministry and advocacy according to their convictions” and encourages people considering abortion to “seek spiritual counsel as they prayerfully and conscientiously consider their decision.”<sup>213</sup>

In 2019, the Episcopal Church’s General Convention summarized its multifaceted approach to abortion. On the one hand, it “emphatically oppose[s] abortion as a means of birth control, family planning, sex selection, or [for] any reason of mere convenience,” while on the other it is “unequivocally oppos[ed] to any legislation on the part of the national or state governments which would abridge or deny the right of individuals to reach informed decisions [about the termination of pregnancy] and to act upon them.”<sup>214</sup> The General

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<sup>210</sup> *American Baptist Resolution Concerning Abortion and Ministry in the Local Churches*, GEN. BD. OF THE AM. BAPTIST CHURCHES 1 (adopted June 1988; modified Mar. 1994 & 2002), <https://www.abc-usa.org/wp-content/uploads/2012/06/Abortion-and-Ministry-in-the-Local-Church.pdf>.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Summary of General Convention Resolutions on Abortion and Women’s Reproductive Health*, EPISCOPAL CHURCH’S GEN. CONVENTION (May 17, 2019), <https://www.episcopalchurch.org/ogr/summary-of-general-convention-resolutions-on-abortion-and-womens-reproductive-health/> [hereinafter *Episcopal General Convention Summary*] (alteration in original). See also *Reaffirm the Church’s Guidelines on the Termination of Pregnancy*, in J. OF THE GEN. CONVENTION OF ... THE EPISCOPAL CHURCH 1 (1982), [https://episcopalarchives.org/cgi-bin/acts/acts\\_generate\\_pdf.pl?resolution=1982-B009](https://episcopalarchives.org/cgi-bin/acts/acts_generate_pdf.pl?resolution=1982-B009) (identifying instances where

Convention explained the Church's position: that "any proposed legislation . . . regarding abortions must take special care to see that the individual conscience is respected, and that the responsibility of individuals to reach informed decisions in this matter is acknowledged and honored."<sup>215</sup> The Episcopal Church's opposition to restrictive abortion legislation includes "unequivocal opposition" to the proposed "Human Life Amendment."<sup>216</sup>

That so many Christian groups support access to abortion may be surprising on first blush given that Christians are often the most vocal abortion opponents.<sup>217</sup> But an anti-abortion position is not required to be a good Christian. As Reverend Charles Landreth explained, "Whenever we try to make conditions for each other more human, we are engaged in a religious pursuit. Christians and the Christian church simply cannot turn their backs on the problem of abortion and the dilemmas which it creates."<sup>218</sup> Likewise, when speaking as a representative for the Michigan Council of Churches, Reverend Carl Bielby explained that "as a matter of human right, each woman be given the control of her own body and procreative function, and that she has the moral responsibility and obligation for the just and sober stewardship thereof."<sup>219</sup>

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"the physical or mental health of the mother is threatened seriously, or where there is substantial reason to believe that the child would be born badly deformed in mind or body, or where the pregnancy has resulted from rape or incest" as "permissible" instances for abortion); *Reaffirm the 1967 General Convention Statement on Abortion*, in J. OF THE GEN. CONVENTION OF ... THE EPISCOPAL CHURCH 1 (1976), [https://episcopalarchives.org/cgi-bin/acts/acts\\_generate\\_pdf.pl?resolution=1976-D095](https://episcopalarchives.org/cgi-bin/acts/acts_generate_pdf.pl?resolution=1976-D095) (same).

<sup>215</sup> Episcopal General Convention Summary, *supra* note 214; *see also Reaffirm General Convention Statement on Childbirth and Abortion*, in J. OF THE GEN. CONVENTION OF ... THE EPISCOPAL CHURCH 1 (1994), [https://episcopalarchives.org/cgi-bin/acts/acts\\_generate\\_pdf.pl?resolution=1994-A054](https://episcopalarchives.org/cgi-bin/acts/acts_generate_pdf.pl?resolution=1994-A054); *Adopt a Statement on Childbirth and Abortion*, in J. OF THE GEN. CONVENTION OF ... THE EPISCOPAL CHURCH 1-2 (1988), [https://episcopalarchives.org/cgi-bin/acts/acts\\_generate\\_pdf.pl?resolution=1988-C047](https://episcopalarchives.org/cgi-bin/acts/acts_generate_pdf.pl?resolution=1988-C047).

<sup>216</sup> *Opposition to the Human Life Amendment to the U.S. Constitution*, in J. OF THE GEN. CONVENTION OF ... THE EPISCOPAL CHURCH 1 (1981), [https://www.episcopalarchives.org/cgi-bin/executive\\_council/EXCgenerate\\_pdf.pl?exc\\_id=EXC021981.10](https://www.episcopalarchives.org/cgi-bin/executive_council/EXCgenerate_pdf.pl?exc_id=EXC021981.10).

<sup>217</sup> *See also* Maguire, *supra* note 2, at 128-30.

<sup>218</sup> Gillian Frank, *The Surprising Role of Clergy in the Abortion Fight before Roe v. Wade*, TIME (May 2, 2017 12:30 P.M. EDT), <https://time.com/4758285/clergy-consultation-abortion/>.

<sup>219</sup> *Id.*

#### D. BUDDHISM

According to Buddhism, life begins at conception, provided that three conditions occur: “(1) the father and mother have sexual intercourse; (2) it is the mother’s fertile period; and (3) there is a ‘being to be born’ (*gandhabba*) present, ready to reenter life in the form of a baby.”<sup>220</sup> This understanding, combined with the First Precept of Buddhism—not to kill—leads traditional Buddhists to oppose abortion.<sup>221</sup> However, that is not the end of the discussion. The Dalai Lama has recognized that “abortion should be approved or disapproved according to each circumstance”<sup>222</sup> because “compassion has the last word in Buddhism.”<sup>223</sup>

Buddhism requires individuals to take responsibility for their actions,<sup>224</sup> with the intention behind an action weighing heavily in determining the action’s morality.<sup>225</sup> As such, an abortion pursued for “good motives, . . . uncontaminated by greed, hatred, anger, or delusion, will not be considered a serious moral issue.”<sup>226</sup> Accordingly, where abortion is pursued to protect the pregnant person’s life or health—including following rape—it “would not necessarily be considered an immoral act.”<sup>227</sup> This also applies where the fetus suffers from a dangerous anomaly.<sup>228</sup> Finally, despite the aforementioned First Precept, Buddhists posit that not all life is created equally: “Some have higher standing.”<sup>229</sup> Accordingly, if a pregnancy were threatening the mother’s life, abortion would be permissible, while it would not be permissible to “endanger the mother to save the fetus.”<sup>230</sup>

#### E. Hinduism

While, admittedly, classical Hindu texts oppose abortion, abortion is permitted to save the life of the mother based on the

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<sup>220</sup> MAGUIRE, *supra* note 2, at 63. This last portion is premised on a belief in reincarnation. *Id.*

<sup>221</sup> *Buddhism and Abortion*, BBC (Nov. 23, 2009), <https://www.bbc.co.uk/religion/religions/buddhism/buddhistethics/abortion.shtml>.

<sup>222</sup> *Id.*

<sup>223</sup> MAGUIRE, *supra* note 2, at 67.

<sup>224</sup> *Buddhism and Abortion*, *supra* note 221.

<sup>225</sup> Religious Voices Worldwide Support Choice, *supra* note 1, at 3.

<sup>226</sup> MAGUIRE, *supra* note 2, at 66.

<sup>227</sup> Religious Voices Worldwide Support Choice, *supra* note 1, at 3.

<sup>228</sup> MAGUIRE, *supra* note 2, at 65.

<sup>229</sup> *Id.* at 64.

<sup>230</sup> *Id.* at 65.

principle of *ahimsa* (non-violence) and is widely culturally accepted.<sup>231</sup> “Early Hindu texts, including medical treatises, recognize the practice of abortion in cases where pregnancy poses a risk of grave injury or death to the woman, or in cases of fetal impairment where the chances of a normal delivery are negligible.”<sup>232</sup> Similarly, abortion has been legal in India since 1971, permitting access to abortion to preserve the mental or physical health of the pregnant person, as well as in cases of contraceptive failure within marriage, rape, incest, fetal anomaly, and social or economic necessity.<sup>233</sup> The gestational periods in which abortion is available were extended in 2021.<sup>234</sup> Yet, “Hindu religious bodies have not expressed any opposition” to the legalization of abortion.<sup>235</sup> This may be explained by Hinduism’s concept of *dharma* (natural law), which provides an adherent the flexibility to decide whether to terminate a pregnancy in light of her own unique situation.<sup>236</sup> In light of Hinduism’s emphasis on personal responsibility, over two-thirds of American Hindus support access to abortion.<sup>237</sup>

#### CONCLUSION

Despite the loudest voices in the debate about abortion coming from religious conservatives seeking to restrict access, they do not fairly represent religious beliefs on the issue. Rather, people of faith often are in favor of protecting legal access to abortion—as are a majority of Americans generally—and are often supported by their religious doctrine and leaders. In fact, before the Supreme Court issued its decision in *Roe v. Wade*, “respected religious leaders participated in a nationwide struggle to make abortion more accessible.”<sup>238</sup> In 1967, clergy in New York City created the Clergy Consultation Service on Abortion, which was comprised of over 2,000 clergypersons in the United States and Canada, to help women obtain

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<sup>231</sup> *Hinduism and Abortion*, BBC (Aug. 8, 2009), [https://www.bbc.co.uk/religion/religions/hinduism/hinduethics/abortion\\_1.shtml](https://www.bbc.co.uk/religion/religions/hinduism/hinduethics/abortion_1.shtml).

<sup>232</sup> Religious Voices Worldwide Support Choice, *supra* note 1, at 3.

<sup>233</sup> MAGUIRE, *supra* note 2, at 51; *India Passes Abortion Reform but Fails to Undo Barriers to Access*, CTR. REPROD. RTS. (Mar. 19, 2021), <https://reproductiverights.org/parliament-india-passes-abortion-reform-entrenches-barriers-access/> [hereinafter *India Passes Abortion Reform*].

<sup>234</sup> *India Passes Abortion Reform*, *supra* note 233.

<sup>235</sup> MAGUIRE, *supra* note 2, at 51.

<sup>236</sup> Religious Voices Worldwide Support Choice, *supra* note 1, at 3.

<sup>237</sup> See note 110, *supra*.

<sup>238</sup> Frank, *supra* note 218.



abortions from licensed medical providers.<sup>239</sup> Between May 1967 and the end of 1972, the Clergy Consultation Service on Abortion “helped between a quarter and half a million women obtain safe legal and illegal abortions from physicians.”<sup>240</sup> This organization’s members “emphasized that no single religion had a right to impose its religious values upon others. For these clergy, freedom of religion had to include freedom from those religious groups that sought to place restrictions on abortions.”<sup>241</sup> As such, “[t]hey publicly challenged restrictive abortion laws as infringements upon religious freedoms, and sought media coverage to widely broadcast their message.”<sup>242</sup>

By limiting or overturning *Roe* and *Casey* and permitting restrictive abortion laws to take effect, the Court is “unduly privileg[ing] religious persons who espouse the most conservative views while disenfranchising those who hold equally religiously-grounded pro-choice views.”<sup>243</sup> Not only would this have profound impacts on the lives of involuntarily pregnant persons,<sup>244</sup> but should

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* As an interestingly historical side note, following *Roe*, many branches of the Clergy Consultation Service on Abortion disbanded while “others merged with local Planned Parenthoods or formed new reproductive health organizations.” *Id.*

<sup>243</sup> MAGUIRE, *supra* note 2, at 105. Additional negative consequences are generally outside the scope of this Article. See generally, Katie Kindelan, *Amy Coney Barrett Raises Adoption in Abortion Case Hearing that Poses Challenge to Roe v. Wade*, ABC (Dec. 5, 2021), <https://abc7.com/amy-coney-barrett-adoption-supreme-court-abortion-law-mississippi/11303046/> (“The U.S. is also a particularly dangerous place to give birth. It has the highest maternal mortality rate among developed countries, according to a 2020 study from the Commonwealth Fund . . . . Black women are three to four times more likely to die during childbirth or in the months after than white, Asian or Latina women, while Indigenous women are two to three times more likely, according to the Centers for Disease Control and Prevention.”); *id.* (“In addition to the physical risks people face during pregnancy, there are also other factors to consider, like the lack of safeguards for pregnant people in the U.S. . . . . The U.S. does not have universal health care and does not provide universal child care . . . . [;] the U.S. remains the only industrialized, modernized country in the world without federally mandated paid family leave . . . .”); Amanda Jean Stevenson, *Study Shows an Abortion Ban May Lead to a 21% Increase in Pregnancy-Related Deaths*, THE CONVERSATION (Sept. 22, 2021 8:55 a.m. EDT), <https://theconversation.com/study-shows-an-abortion-ban-may-lead-to-a-21-increase-in-pregnancy-related-deaths-167610> (conservatively estimating that a nationwide ban on abortions would result in 140 additional pregnancy-related deaths by the second year following the ban, increasing pregnancy related deaths by 21%).

<sup>244</sup> See *Casey*, 505 U.S. at 853 (“the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*”).

prompt challenges under the First Amendment or state-level Religious Freedom Restoration Acts.<sup>245</sup> By starting down this slippery slope, the Court may again require religious leaders and other people of faith to step into this void in defense of their religious beliefs. Only this time, it may not make a difference.

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<sup>245</sup> See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”); Percival, *supra* note 108 (arguing that “[t]he First Amendment gives us the right to debate the meaning of life and when it begins. But it also says that such debates have no place in our legislatures or courts of law if we are to be a society that fosters religious freedom for all.”); see also Raymond Shih Ray Ku, *Free Speech & Abortion: The First Amendment Case Against Compelled Motherhood*, 42 CARDOZO L. REV. \_\_, at 31 (2021) (“Aside from viability or live birth, any other definition is essentially arbitrary and implicates the freedom of religion protected by the First Amendment because it compels dissenters to accept, endorse, and celebrate a particular religious belief.”).