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Roe's Race: The Supreme Court, Population Control, and Reproductive Justice

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ABSTRACT: Questions of race and abortion have shaped current legal debates about defunding Planned Parenthood and banning race-selection abortion. In these discussions, abortion opponents draw a close connection between the eugenic or population-control movements of the twentieth century and the contemporary abortion-rights movement. In challenging legal restrictions on abortion, abortion-rights activists generally insist that their movement and its predecessors have primarily privileged reproductive choice.

Notwithstanding the centrality of race to abortion politics, there has been no meaningful history of the racial politics of abortion that produced or followed *Roe v. Wade*. This Article bridges this gap in the abortion discussion by focusing on the racial politics of abortion in the 1970s. In the 1970s, some population controllers did have ties to the eugenic legal reform movement or a particular interest in limiting the growth of poor, non-white populations. Those most closely involved with the abortion-rights movement, however, primarily focused on family planning for white, middle-class families, emphasizing the importance of environmental stewardship and sexual liberation. Arguments treating the abortion-rights, population-control, and eugenics movements as indistinguishable from one another are flawed.

At the same time, by reinterpreting *Roe*, feminists created new opportunities to reshape the racial politics of abortion. By defending their own understanding of the opinion against anti-abortion attack, feminists were able to redefine abortion as a right that belonged to women irrespective of its political consequences.

In telling the story of *Roe's* racial politics, we can gain new insight into legislative battles on laws defunding Planned Parenthood or banning race-selection abortions. Legislators sponsoring these laws at times raise important questions about the disproportionately high number of African American women who have abortions. Racial disparities in access to reproductive health

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care are real and disturbing, but as the history offered here suggests, legislators cannot address those disparities by punishing clinics on the basis of the history of race, population control, and abortion.

The materials presented here also speak to upcoming juridical battles about defunding and race selection. The issue of legislative intent figures centrally in doctrinal disputes under the Bill of Attainder Clause, the undue-burden test, and the First and Fourteenth Amendments. The desire to address the present impact of past racism may be sincere, but legislation of this kind does not address a present danger of racial bias. As the history of the racial politics of abortion makes clear, contemporary legislative concerns about racism and abortion are overstated. A better understanding of the racial history of abortion should reinforce, rather than undermine, judicial concerns about the true purpose of laws said to address racism and abortion.

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A little over three decades after the Supreme Court upheld the constitutionality of the Hyde Amendment,¹ a ban on the Medicaid funding of abortion, the issue of abortion funding has once again taken center stage.²

1. *Harris v. McRae*, 448 U.S. 297 (1980).

2. For examples of cases evaluating the new statutes defunding abortion providers, see, for example, *Planned Parenthood of Ind. v. Comm'r of Ind. State Dep't of Pub. Health*, 794 F. Supp. 2d 892 (S.D. Ind. 2011); *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218 (D. Kan. 2011); and *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310 (M.D.N.C. 2012). For coverage of the effort to promote such legislation, see, for example, Jennifer Skalka, *Abortion Opponents Have a New Voice*, CHRISTIAN SCI. MONITOR (Aug. 13, 2011), <http://www.csmonitor.com/USA/society/2011/0813/Abortion-opponents-have-a-new-voice>; Cheryl Wetzstein, *GOP Has "Blueprint for Action" on Planned Parenthood*, WASH. TIMES (July 14, 2011), <http://washingtontimes.com/news/2011/jul/14/gop-has-blueprint-for-action-on-planned-parenthood>; and

Beginning in the winter of 2011, abortion opponents in Congress and state legislatures mobilized to demand the defunding of abortion providers rather than the outlawing of abortion procedures, particularly targeting Planned Parenthood.³ Underlying the debate about defunding Planned Parenthood have been broader questions about the role of race and racism in abortion politics.⁴ Similar arguments have played a part in discussions of legislation banning race-selection abortions—abortions based on the race of a fetus—that has been passed in four states, considered in several others, and voted on in Congress.⁵

Questions of race have preoccupied commentators on both sides of the abortion debate. In promoting new legal restrictions on abortion, abortion opponents have drawn on the history of the early movement for birth control to charge abortion-rights supporters with racism.⁶ The anti-abortion movement ties earlier proponents of family planning and legal abortion to what they characterize as a bigoted movement for population control or eugenics.⁷ Abortion-rights activists counter with an alternative history, tracing an emphasis on reproductive freedom back through the 1970s and beyond.⁸

Jane Norman, *States Ramp Up Drive to Defund Planned Parenthood*, CONG. Q.: HEALTH BEAT (July 1, 2011), <http://interest.healthcare.thomsonreuters.com/content/CQNewsletter20110708>;

3. See, e.g., Erik Eckholm, *Planned Parenthood Financing Is Caught in Budget Feud*, N.Y. TIMES (Feb. 17, 2011), <http://www.nytimes.com/2011/02/18/US/politics/18parenthood.html>; Kathleen Hennessey, *House Republicans See Timely Target in Planned Parenthood*, L.A. TIMES (Feb. 10, 2011), <http://articles.latimes.com/2011/feb/10/nation/la-na-abortion-20110211>; Peter Roff, *House Votes to Defund Planned Parenthood*, U.S. NEWS & WORLD REP. (Feb. 18, 2011), <http://www.usnews.com/opinion/blogs/peter-roff/2011/02/18/house-votes-to-defund-planned-parenthood-over-abortion>.

4. For discussion of charges of racism in the abortion-rights movement, see, for example, Robin Abcarian, *Anti-Abortion Movement Gets a New-Media Twist*, L.A. TIMES (Apr. 26, 2009), <http://articles.latimes.com/2009/apr/26/nation/na-abortion26>; Mark Barna, *Black Abortion Opponents Latest to Lay Claim to King's Legacy*, THE GAZETTE (Colo. Springs) (Jan. 13, 2011), <http://www.gazette.com/articles/-111095-.html>; and Jeff Jacoby, *Abortion and the Echo of Eugenics*, BOS. GLOBE (July 26, 2009), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/07/26/abortion_and_the_echo_of_eugenics; and Chris McGreall, *Row as Anti-Abortionists Target African Americans with US Racist History*, GUARDIAN (Mar. 3, 2010), <http://www.guardian.co.uk/world/2010/mar/03/anti-abortionists-target-African-Americans>.

5. On race-selection laws in the states, see Sujatha Jesudasan & Susannah Baruch, *Race and Sex in Abortion Debates: The Legislation and the Billboards*, GENERATIONS AHEAD, <http://www.generations-ahead.org/files-for-download/success-stories/RaceAndSexSelection.pdf> (last visited Aug. 1, 2012). On race-selection abortion and the Prenatal Nondiscrimination Act in Congress, see, for example, Susan B. Anthony and Frederick Douglass *Prenatal Nondiscrimination Act of 2011: Hearing on H.R. 3541 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011); and Editorial, *When Feminists Hate Abortion*, WASH. TIMES (May 31, 2012), <http://www.washingtontimes.com/news/2012/may/31/when-feminists-hate-abortion>.

6. See *supra* note 4 and accompanying text. On the historical context for the early twentieth-century relationship between the birth-control and eugenics movements, see, for example, JEAN H. BAKER, MARGARET SANGER: A LIFE OF PASSION 147 (2011); and ELLEN CHESLER, WOMAN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT IN AMERICA 216-17, 343-45 (1992).

7. See, e.g., Mary Meehan, *Why Liberals Should Defend the Unborn*, HUMAN LIFE REV., Summer 2011, at 15; Rebecca Messall, *Margaret Sanger and the Eugenics Movement*, HUMAN LIFE REV., Spring 2010, at 98; Randall K. O'Bannon, *Margaret Sanger's Eugenic Legacy*, NAT'L. RIGHT TO LIFE NEWS, Apr. 1, 2005, at 22 (book review).

8. See, e.g., John Cavanaugh-O'Keefe, *The Pro-Choice Movement Is Eugenics Under a Different Name*, WASH. TIMES, Sept. 18, 1997, at A20; Barbara Karkabi, *Sanger and Planned Parenthood*

But what was the role of *Roe* in the racial politics of abortion in the 1970s? Although there is an impressive body of work on the histories of the abortion-legalization and population movements, leading scholars have not adequately addressed this question.⁹ This Article works to close this gap in the abortion discussion. By drawing on extensive archival research, the Article offers the first comprehensive history of the racial politics leading up to and immediately following *Roe*.

Roe came down at a time when the abortion-rights movement was closely tied to the population-control cause.¹⁰ As a general matter, members of the population-control coalition lobbied for legal reforms or government funding designed to check domestic or international population growth.¹¹ Because of the widespread popularity and political salience of population-control politics, abortion supporters often borrowed population-based claims in demanding the legalization of abortion.¹² Moreover, some population controllers did have ties to the eugenic legal reform movement or a particular interest in limiting the growth of poor, non-white populations.¹³ Those most closely involved with the abortion-rights movement, however, primarily focused on family planning for white, middle-class families, emphasizing the importance of environmental

Celebrate Roe v. Wade Decision, HOUSTON CHRON., Feb. 4, 1993, at 1; Alexander C. Sanger, Letter to the Editor, *Abortion-Rights Movement*, ORLANDO SENTINEL (Jan. 9, 2000), http://articles.orlandosentinel.com/2000-01-09/news/0001090164_1_margaret-sanger-civil-disobedience-planned-parenthood; Jasmin K. Williams, *Planned Parenthood Fires Back at Herman Cain*, N.Y. AMSTERDAM NEWS, Nov. 10, 2011, at 47.

9. On the history of the relationship between the movements for abortion and population control, see, for example, MATTHEW CONNELLY, *FATAL MISCONCEPTION: THE STRUGGLE TO CONTROL WORLD POPULATION* (2008); DONALD T. CRITCHLOW, *INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA* 8, 10, 111, 132-35 (2001) [hereinafter CRITCHLOW, *INTENDED CONSEQUENCES*]; JENNIFER NELSON, *WOMEN OF COLOR AND THE REPRODUCTIVE RIGHTS MOVEMENT* 76-83 (2003); SUZANNE STAGGENBORG, *THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT* 113-14 (1991); and Donald Critchlow, *Birth Control, Population Control, and Family Planning: An Overview*, in *THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE* 1 (Donald T. Critchlow ed., 1996) [hereinafter Critchlow, *Birth Control*].

10. See *supra* note 9 and accompanying text.

11. See Mary Ziegler, *Framing of a Right to Choose: Roe v. Wade and the Changing Debate on Abortion Law*, 27 L. & HIST. REV. 281, 283, 285 (2009).

12. See *id.* at 285-91.

13. For example, the Human Betterment Foundation, the forerunner of the Association for Voluntary Sterilization ("AVS") (an influential population-control organization), was founded in 1929 in order to study the psychological, physical, and sexual effects of compulsory eugenic sterilization. For discussion of the early work of Human Betterment, see, for example, HARRY BRUNIUS, *BETTER FOR ALL THE WORLD: THE SECRET HISTORY OF FORCED STERILIZATION AND AMERICA'S QUEST FOR RACIAL PURITY* 272-73 (2006); and WENDY KLINE, *BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM* 70-78 (2001). Other organizations, like the Population Council, focused on population growth among poor, often non-white persons, particularly in developing countries. See, e.g., CONNELLY, *supra* note 9, at 375. For examples of programs with this aim, see, for example, Jane E. Brody, *Overpopulation War Escalated*, N.Y. TIMES, Jan. 6, 1969, at 142; Jane E. Brody, *Population Group Offers Care Plan*, N.Y. TIMES, Apr. 20, 1971, at 36; Roy Reed, *Birth Control Gains In the Rural South*, N.Y. TIMES, Mar. 28, 1966, at 1.

stewardship and sexual liberation.¹⁴ The abortion-rights movement itself differed considerably from the population-control movement in that many abortion-rights activists defined themselves by concerns about women's rights or public health rather than population growth.¹⁵ It is wrong to treat the abortion-rights, population control, and eugenics movements as indistinguishable from or even similar to one another.

At the same time, current accounts of the impact of *Roe* on feminist activists tell only part of a more complex story. By reinterpreting *Roe*, feminists created new opportunities to reshape the racial politics of abortion. This Article argues that by defending their own understanding of the opinion against anti-abortion attacks, feminists were able to redefine abortion as a right that belonged to women irrespective of its political consequences.

The stakes of this history become clear when one recognizes how it has been invoked in debates about laws defunding Planned Parenthood or prohibiting race-selection abortions.¹⁶ For example, in sponsoring a defunding law, the majority leader of the North Carolina House of Representatives stressed "the connection of Margaret Sanger, the founder of Planned Parenthood, with the eugenics movement."¹⁷ Concerns about race and abortion also helped to motivate the first law in the nation, passed in Arizona, to ban

14. For discussion of groups of this kind, see, for example, *Looking to the ZPGeneration*, TIME MAG., Feb. 28, 1977; and Judy Klemesrud, *To Them, Two Children Are Fine. But Three Crowd the World*, N.Y. TIMES, Jan. 12, 1971, at 30.

15. Ziegler, *supra* note 11, at 302-04.

16. See, e.g., *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 325 (M.D.N.C. 2012) (commenting on the uses of history and race in the promotion of a defunding law). For the use of similar arguments by legislators in the push to introduce federal defunding legislation, see, for example, Amanda Terkel, *Rick Santorum: Planned Parenthood "Not Far" From Its Origins of Racism and Eugenics*, HUFFINGTON POST (Apr. 28, 2011), http://www.huffingtonpost.com/2011/04/28/rick-santorum-planned-parenthood-racism-eugenics_n_855126.html. Former presidential candidate Herman Cain joined the call for defunding Planned Parenthood, arguing that the organization's original goal "was a sham to be able to kill black babies," and insisted that the organization was still carrying on its "original mission" of "planned genocide." Michelle Bauman, *Cain Maintains That Planned Parenthood Has Racist Roots*, CATHOLIC NEWS AGENCY (Oct. 31, 2011), <http://www.catholicnewsagency.com/news/cain-maintains-planned-parenthood-has-racist-roots>. On arguments about race, history, and abortion in the campaign for a race-selection law in Arizona, see, for example, Caitlin Coakley, *After Lengthy Debate, Arizona House Committee Passes Abortion Bill "We All Can Agree On,"* ARIZ. CAPITOL TIMES, Feb. 9, 2011; and *Arizona Bans Abortion Over Ethnicity*, BOS. GLOBE (Mar. 31, 2011), http://www.boston.com/news/nation/articles/2011/03/31/arizona_bans_abortion_over_ethnicity. On PRENDA and the arguments for it, see, for example, *Prenatal Nondiscrimination Act (PRENDA)* of 2012, H.R. 3451, 112th Cong. (as reported by H. Comm. on the Judiciary, May 29, 2012); *The Susan B. Anthony and Frederick B. Douglass Prenatal Nondiscrimination Act of 2011: Hearing on H.R. 3541 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. (2011) (testimony of Steven Aden of the Alliance Defense Fund); Press Release, Congressman Trent Franks, Franks Praises Passage of PRENDA (Feb. 16, 2012), <http://franks.house.gov/press-release/franks-praises-passage-prennda>; and Press Release, Congressman Tim Huelskamp, Huelskamp Sponsors Prenatal Nondiscrimination Act (Dec. 7, 2011), http://huelskamp.house.gov/index.php?option=com_content&view=article&id=3778.

17. *Cansler*, 877 F. Supp. 2d at 325.

race-selection abortions.¹⁸ Debate on that bill turned on whether or not there was evidence that abortion providers associated with or were themselves racists, and proponents of the bill stressed the supposed financial connections of Planned Parenthood to individuals seeking to reduce the size of minority populations.¹⁹

The history of race, abortion, and population control may also play a role in upcoming battles about the constitutionality of the new laws. At the heart of many of these constitutional struggles are questions of legislative intent. In *Planned Parenthood of Central North Carolina v. Cansler*, for example, the district court addressed whether a defunding law constitutes an unconstitutional bill of attainder.²⁰ To constitute a bill of attainder, a law must single out a particular actor and punish her without a judicial trial.²¹ Invoking legislative concerns about race, history, and abortion, Planned Parenthood argued that defunding laws reflect precisely such a punitive intent.²²

Providers also contend that defunding laws constitute impermissible viewpoint discrimination under the First or Fourteenth Amendments.²³ According to providers, states have unconstitutionally punished Planned Parenthood for its advocacy of abortion rights.²⁴ Legislators respond that they instead advance a legitimate, nondiscriminatory purpose.²⁵ At the state and federal level, as we have seen, the past racial transgressions of the abortion-rights movement have served as one potential rationale for the laws proposed. Does mention of this history signal an intent to discriminate against abortion-rights activists, or do efforts to address racism represent a legitimate legislative purpose?

Finally, as race-selection laws come before the courts, legislative intent will likely play a part in constitutional decisionmaking. Under *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁶ a law creates an undue burden if it has the purpose or effect of creating a substantial obstacle to a woman's right to choose abortion.²⁷ Do race-selection laws reflect a sincere

18. See, e.g., Coakley, *supra* note 16; *Arizona Bans*, *supra* note 16; Caitlin Coakley Beckner, *Arizona Bill Sponsor Unfazed by Doubts Cast on His Evidence*, ARIZ. CAPITOL TIMES (Feb. 25, 2011), <http://azcapitoltimes.com/news/2011/02/25/abortion-bill-sponsor-unfazed-by-doubts-cast-on-his-evidence>.

19. See sources cited *supra* note 18.

20. *Cansler*, 877 F. Supp. 2d at 321-25.

21. *Id.* at 321.

22. *Id.* at 324-25.

23. For examples of claims of this kind, see *Planned Parenthood Ass'n of Hidalgo Cnty. Tex. v. Suehs*, 692 F.3d 343, 348-50 (5th Cir. 2012); *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1232-34 (D. Kan. 2011); *Planned Parenthood of Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 733 (M.D. Tenn. 2012); and *Planned Parenthood Ass'n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872, 884-86 (W.D. Tex. 2012), *vacated*, 692 F. 3d 343 (5th Cir. 2012).

24. See, e.g., *Brownback*, 799 F. Supp. 2d at 1232-34; *Suehs*, 828 F. Supp. 2d at 884-86.

25. See, e.g., *Suehs*, 692 F.3d at 348-50.

26. 505 U.S. 833 (1992) (plurality opinion).

27. *Id.* at 877.

desire to address the legacy of population control in the abortion-rights movement, or do these laws instead serve only to narrow abortion rights?

In telling the story of *Roe*'s racial politics, we can gain new insight into these legislative contests. Legislators sponsoring defunding or race-selection laws at times raise important questions about the disproportionately high number of African American women who have abortions.²⁸ Racial disparities in access to reproductive health care are real and disturbing.²⁹ But as the history offered here suggests, legislators cannot address those disparities by punishing clinics on the basis of the history of race, population control, and abortion. We cannot equate the often racist eugenic movement with the diverse population-control movement, particularly those members of it who endorsed legal abortion, environmentalism, sexual freedom, and responsible child-bearing for the white middle class. Nor can we draw any direct historical connection between the population-control movement of the 1970s and the contemporary abortion-rights movement, for the latter has changed dramatically since 1973. Lawmakers should use the law to address racial disparities in access to and provision of reproductive health care, but relying on a flawed historical account to penalize providers will do little to achieve this goal.

As we have seen, the issue of legislative intent also figures centrally in doctrinal disputes under the Bill of Attainder Clause, the undue-burden test, and the First and Fourteenth Amendments. In any of these doctrinal contexts, the desire to address the present impact of past racism may be sincere, but as the materials assembled here suggest, legislation of this kind sometimes addresses a problematic historical narrative rather than a present danger of racial bias. As the history of the racial politics of abortion makes clear, contemporary legislative concerns about racism and abortion are overstated. A better understanding of the racial history of abortion should reinforce, rather than undermine, judicial concerns about the true purpose of laws said to address racism and abortion.

The Article proceeds in eight parts. Part I examines the emergence of a racially charged dialogue about reproduction, crime, and juvenile delinquency in the 1950s and 1960s. In this period, some members of family-planning organizations like Planned Parenthood attributed a host of social ills to inadequate parenting and unwanted children in predominantly poor or minority communities. At the same time, civil rights organizations like the NAACP developed a competing explanation: crime and delinquency stemmed from racial discrimination and its social, economic, and political consequences rather than from the culture of poor, non-white communities. Over time, arguments

28. For examples of arguments of this kind, see *supra* note 16 and accompanying text.

29. See, e.g., KHIARA BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* (2011) (illustrating how medical professionals socially construct race and establishing that this construction serves to marginalize women in broader conversations about Medicaid and infant mortality).

about the social costs of unwanted children increased anxieties about racism in the family-planning and abortion-rights movements.

Part II explores the identity and priorities of the population-control movement between 1965 and 1973, as activists concerned about sexual freedom and environmental stewardship joined a movement that already included those concerned about eugenics, Cold War politics, and international development. Part III examines the relationship between the movements for abortion rights and population control. Contrary to what some activists and legislators now suggest, this relationship did not necessarily reflect any racial bias on the part of abortion-rights supporters. Instead, some activists sympathized with calls for environmental preservation or sexual liberation. Abortion-rights-movement pragmatists highlighted the political benefits that might be available through an alliance with population controllers.

Part IV evaluates the interplay between population-control arguments, the abortion-rights struggle, and the politics of black power between 1965 and 1973. In particular, this Part traces the spread of a "black genocide" argument against the legalization of abortion: a claim that legal abortion had the purpose or effect of decimating the African American population.

Part V studies the use of race-based arguments in the litigation of *Roe*. For the most part, *Roe* made invisible politically powerful concerns about abortion, racism, population control, crime, and environmental decline. *Roe* presented a medical, rights-based framework as a way of avoiding the more explosive questions in abortion politics.

Part VI chronicles the decline of population-control arguments in the aftermath of *Roe*. This shift came in response to a number of developments. Outside of abortion politics, the population-control movement attracted controversy when leaders of developing countries, at a major UN conference, accused movement leaders of seeking to manipulate people of color served by population programs. An emerging awareness of the political costs of such claims came at a time when feminists managed to attain positions of leadership in the abortion-rights movement. Relying on a reinterpretation of *Roe* or on their own understandings of abortion rights, these feminists justified abortion because of its intrinsic importance to women rather than because of its beneficial impact on crime, welfare expenses, or the environment. Part VII puts this history in dialogue with contemporary legal and legislative battles about laws defunding Planned Parenthood or race-selection abortion, and Part VIII offers a brief conclusion.

The Article shows that, in the 1950s and 1960s, discussion of law, juvenile delinquency, eugenics, population control, and family planning had explosive racial undertones. In the late 1960s and early 1970s, by contrast, discussion of both population control and abortion changed substantially. Those population groups most interested in legalizing abortion focused on the reproductive

decisions of the white middle class, discussing the environment and the sexual revolution as much as the reduction of crime or welfare costs. Nonetheless, because of the tenor of the population-control debate in the 1950s and 1960s, some black-power and civil-rights leaders worried that legal abortion would decimate minority populations and advance a racist agenda. Anti-abortion arguments about race, eugenics, and population control are inaccurate and misleading, but such claims resonate with the public because of the racially charged discussion of family planning and even population control that has unfolded in previous decades.

I. RACE, DELINQUENCY, AND FERTILITY CONTROL, 1950-1968

The first tensions between civil-rights supporters and the family-planning movement emerged in the 1950s, in the context of a panic about juvenile delinquency and the law. Earlier in the twentieth century, the eugenic legal reform movement had sponsored compulsory-sterilization laws that primarily applied to immigrants and residents in state institutions.³⁰ After World War II, the remaining eugenic sterilization laws primarily impacted racial minorities.³¹

Even outside the eugenic context, however, law, racial bias, and family planning became increasingly connected, especially during discussions of juvenile delinquency. The issue of delinquency became salient during World War II, when the media pointed to an increase in gang activity, homicides, and youth crime.³² Public concern about delinquency increased in the early 1950s.³³ In the spring of 1952, the *New York Times* reported that, nationally, juvenile offenses had increased by 10% over a one-year period.³⁴ By 1954, New York City, widely regarded as the epicenter of the delinquency epidemic, reported an 18.5% increase in youth offenses since 1947.³⁵ Between 1947 and 1957, psychiatrists, politicians, sociologists, and even teenagers offered a wide variety of explanations for the perceived increase in delinquency, including the

30. NANCY ORDOVER, *AMERICAN EUGENICS: RACE, QUEER ANATOMY, AND THE SCIENCE OF NATIONALISM* xii (2003); ALEXANDRA STERN, *EUGENIC NATION: FAULTS AND FRONTIERS IN AMERICA'S QUEST FOR BETTER BREEDING* 10, 16, 88-90 (2005).

31. DANIEL J. KEVLES, *IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY* 168 (1985); DOROTHY ROBERTS, *KILLING THE BLACK BODY* 90 (1997).

32. See, e.g., DAVID B. WOLCOTT, *COPS AND KIDS: POLICING JUVENILE DELINQUENCY IN AMERICA, 1890-1940*, at 193-94 (2005); see also THOMAS BERNARD & MEGAN KURLYCHEK, *THE CYCLE OF JUVENILE JUSTICE* 12 (2010) (attributing a reported increase in juvenile crime in the 1940s to an increase in the number of young men).

33. See ARNOLD BINDER ET AL., *JUVENILE DELINQUENCY: HISTORICAL, CULTURAL AND LEGAL PERSPECTIVES* 220 (3d ed. 2001).

34. See, e.g., Lucy Freeman, *Youth Delinquency Growing Rapidly Over the Country*, N.Y. TIMES, Apr. 20, 1952, at 1.

35. *City Trend Rising for Delinquency*, N.Y. TIMES, Mar. 29, 1954, at 16.

exposure of children to violent comic books, amoral television programs, and pornography.³⁶

At the same time, a growing body of sociological scholarship attempted to trace the roots of the delinquency problem. These studies sometimes directly touched on the question of race.³⁷ As Kenneth B. Clark, the author of the “doll studies” relied on by the Court in *Brown v. Board of Education*, put it, “The fact that there is a disproportionately higher rate of delinquency and crime among American Negroes is generally known and not in itself debatable.”³⁸

What led to rising delinquency rates? One group of scholars, led by William B. Miller of the University of Chicago, concluded that juvenile delinquency reflected a distinctive set of values held by the lower classes and by minorities.³⁹ Miller and his sympathizers, including the pioneering sociologist Ruth Shonle Cavan, emphasized the importance of “broken homes” as a cause of delinquency.⁴⁰ As Cavan explained in 1959, in poor African American communities, “families may be permanent relief clients.”⁴¹ Moreover, she stressed that African American youths suffered because of the values held by members of their communities: the prevalence of “illicit sex relations,” absent fathers, working mothers, and illegitimacy.⁴²

The lower-class-values theory gained currency in the late 1950s. In May 1957, a report produced by the Senate Subcommittee to Investigate Juvenile Delinquency primarily blamed “weak family life” for climbing delinquency rates.⁴³ Similarly, in August 1957, the *New York Times* attributed New York’s juvenile delinquency rate to “economically underprivileged neighborhoods—areas that are poverty-ridden, filled with broken homes, alcoholics and working

36. See, e.g., “Absentee Parents” Called Crime Cause, N.Y. TIMES, June 7, 1956, at 26; *Parents Help Fill Prisons, Ragen Asserts*, CHI. TRIB., Aug. 20, 1957, at 18; Thomas M. Pryor, *Impact of Movies on Youth Argued*, N.Y. TIMES, June 17, 1955, at 24; Murray Schumach, *The Teen-Age Gang—Who and Why*, N.Y. TIMES, Sept. 2, 1956, at SM4; Warren Weaver Jr., *Javits Maps Body to Develop Curbs for Delinquency*, N.Y. TIMES, Feb. 27, 1955, at 1; Robert Young, *Discuss Role of Parents in Delinquency*, CHI. TRIB., June 14, 1954, at B10.

37. See *infra* notes 39-40 and accompanying text. In the “doll studies,” Clark and his wife, Mamie, gave African American children, ages six through nine, an African American doll and a white doll. Among other things, Clark asked children to give him “the doll you like best.” Jack M. Balkin, *Rewriting Brown: A Guide to the Opinions, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID*, 44, 51 (Jack M. Balkin ed., 2001). When children gave Clark the white doll, he concluded that segregation created feelings of inferiority in African American children. *Id.*

38. Kenneth B. Clark, *Color, Class, Personality and Juvenile Delinquency*, 28 J. NEGRO EDUC. 240, 240 (1959).

39. See, e.g., Walter B. Miller, *Implications of Urban Lower-Class Culture for Social Work*, 33 SOC. SERVICE REV. 219, 225-27, 234 (1959); Walter B. Miller, *Lower Class Culture as a Generating Milieu of Gang Delinquency*, 14 J. OF SOC. ISSUES 5, 5-6 (1958).

40. Ruth Shonle Cavan, *Negro Family Disorganization and Juvenile Delinquency*, 28 J. NEGRO EDUC. 230, 234 (1959).

41. *Id.* at 231.

42. *Id.*

43. Bess Furman, *Senate Report on Child Crime Dismisses Traditional “Causes,”* N.Y. TIMES, May 6, 1957, at 1.

parents who have little time for their children.”⁴⁴ The same year, New York Senator Jacob Javits, a great champion of programs to curb delinquency, called on Congress to spearhead the Family Fund Appeal, an effort to help broken families.⁴⁵ An advertisement for the Appeal pleaded: “You Can Help Prevent the Greatest Tragedy of All: A Broken Home.”⁴⁶

Since 1947, the Planned Parenthood Federation of America (“Planned Parenthood”) had been an eager participant in the delinquency debate.⁴⁷ At a 1947 conference held by the organization, several speakers suggested that unwanted children were a prime cause of delinquency.⁴⁸ Equating unplanned with unwanted children, Planned Parenthood speakers concluded that unplanned pregnancies led to bad mothering, as overburdened women could not financially or psychologically provide adequate care for their children.⁴⁹

In 1952, in a letter to the editor of *The New York Times*, Planned Parenthood President William Vogt offered similar arguments in criticizing the delinquency reforms championed by then-New York State Attorney General Javits, highlighting the impact of unwanted children on youth crime rates.⁵⁰ He wrote: “It is well known that unloved and ‘rejected’ children are prone to becoming neurotics. Much juvenile misbehavior shows a marked neurotic pattern.”⁵¹ Vogt insisted, “[p]erhaps these poor youngsters should never have been born at all to parents who, because of their own deficiencies, are unable to provide children the emotional and spiritual environment indispensable to their health.”⁵²

For the rest of the decade, Planned Parenthood leaders worked to form alliances with the scholars tasked with identifying the causes of delinquency.⁵³ As the decade went on, Planned Parenthood focused on gathering evidence for

44. *Youth Crime Laid to Neighborhood*, N.Y. TIMES, Aug. 6, 1957, at 18.

45. Emma Harrison, *U.S. Move to Curb Delinquency Is Deemed Necessary by Javits*, N.Y. TIMES, Oct. 15, 1957, at 28.

46. *Id.*

47. On Planned Parenthood’s involvement in the delinquency debate in the 1940s, see, for example, LINDA GORDON, *THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA* 261, 276 (2002).

48. *Id.* at 261.

49. *Id.*

50. Letter from William Vogt, Nat’l Dir., Planned Parenthood Found. of America, to the editor of *The New York Times* (Jan. 17, 1952) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers).

51. *Id.*

52. *Id.*

53. See, e.g., Letter from Doris L. Rutledge, Dir. Field Serv., to Mrs. Walter B. Cannon (June 3, 1955) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers) (asking for an official statement on behalf of Harvard professors Eleanor and Sheldon Gluck supporting the theory that unwanted children tended to be delinquent); see also Letter from Mary Steichen Calderone, Med. Dir., to Dr. Seymour Rubinfeld, Nat’l Training School for Boys (Dec. 12, 1956) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers) (asking for evidence of the same).

a causal relationship between delinquency and unplanned children, although refusing at times to draw such a connection publicly.⁵⁴

Planned Parenthood used the juvenile delinquency scandal as a tool to build support for family planning. In doing so, however, the organization popularized claims that blamed crime on the birth of and culture surrounding unwanted children, a disproportionate number of whom likely came from poor, minority communities. Planned Parenthood's argument directly blamed outmoded contraception laws for the problems of minority communities.⁵⁵ At the same time, such arguments described unwanted children, their families, and their culture as the proximate cause of juvenile delinquency. Such claims would later help to fuel fears about racism within the movements for family planning, abortion, and population control.

One important development came with the emergence, in the late 1950s, of an alternative sociological explanation for delinquency. In 1955, in his book *Delinquent Boys*, Albert K. Cohen argued that delinquency was not caused by distinctive "Negro" or "lower class" values but rather by the frustrations of poor children who could not achieve middle-class wealth or status.⁵⁶ In 1960, sociologists Lloyd Ohlin and Richard Cloward highlighted the relevance of racial discrimination in creating such frustrations.⁵⁷ Unfair obstacles to the advancement of African Americans, Ohlin and Cloward argued, heightened their "sense of discrimination and justifie[d] withdrawal of attributions of legitimacy from conventional rules of conduct."⁵⁸

In the late 1950s, perhaps unsurprisingly, the debate about the causes of delinquency took on racial overtones.⁵⁹ Opponents of school desegregation drew on race-based fears of juvenile violence to defend their views.⁶⁰ Other segregationists suggested that delinquency was a "Negro problem" and attacked the NAACP for being soft on juvenile offenders.⁶¹ For its part, in a 1959 edition of its publication *The Crisis*, the NAACP borrowed from discrimination-based arguments like those made by Ohlin and Cloward.⁶² In

54. See *Planned Parenthood and Juvenile Delinquency* 1-2 (c. 1960) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers) (studying possible causal arguments); Letter from Russell Richardson, Reg'l Dir., Planned Parenthood, to the Hon. Robert M. Hill, Judge, Eleventh Circuit (Feb. 2, 1968) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers) (refusing to publicly draw a connection between delinquency and unwanted children).

55. For discussion of the reasons for the later repeal of restrictions on contraception, see generally PETER ENGEL, *A HISTORY OF BIRTH CONTROL IN AMERICA* (2011); and GORDON, *supra* note 47.

56. Albert Cohen, *DELINQUENT BOYS: THE CULTURE OF THE GANG* 73-93 (1955).

57. LLOYD OHLIN & RICHARD CLOWARD, *DELINQUENCY AND OPPORTUNITY* 113-17, 121 (1960).

58. *Id.* at 121.

59. See, e.g., MICHAEL FLAMM, *LAW AND ORDER: STREET CRIME, CIVIL UNREST, AND THE CRISIS OF LIBERALISM IN THE 1960S* 21 (2005); Anders Walker, *Blackboard Jungle: Juvenile Delinquency, Segregation, and the Politics of Brown v. Board of Education*, 110 COLUM. L. REV. 1911 (2010).

60. See, e.g., FLAMM, *supra* note 59, at 21.

61. See *id.*

62. *Juvenile Delinquency*, *THE CRISIS*, Oct. 1959, at 490.

particular, *The Crisis* contended that “the motivation for some misdeeds is rooted in a background of social disabilities and economic inequities.”⁶³

Some Planned Parenthood leaders sided with those who attributed delinquency to bad parents and the dysfunctional values held by the poor.⁶⁴ In a 1962 letter to the editor of the *New York Times*, for example, Planned Parenthood leader Harriet Pilpel criticized a federal grant given to New Haven, Connecticut, a community known for its hostility to family planning.⁶⁵ Pilpel asserted that two of the most important causes of delinquency were “overcrowded families and overburdened parents without sufficient means” and “unwanted children.”⁶⁶ As we have seen, Planned Parenthood’s arguments could have troubling racial implications. The organization focused on unwanted children and pathological parenting in poor African American communities, suggesting that minority “culture” created the delinquency that the government sought to prevent.

Throughout the delinquency debate, members of Planned Parenthood tended to attribute juvenile crime to the births of unwanted children. Planned Parenthood blamed poor women for the problems in their communities, “removing from the spotlight the contributions of men, poverty, unemployment, and racism.”⁶⁷ By blaming pathological parenting and unwanted children for juvenile delinquency, Planned Parenthood set the stage for later concerns about race genocide and legal abortion. Today, legislators and anti-abortion activists play on fears that the attitudes motivating Planned Parenthood’s juvenile-delinquency claims still animate the contemporary abortion-rights movement.

It was not until the late 1960s, however, that controversy about the racial politics of birth control and abortion became intense. There were several reasons for this shift. First, over the course of the 1950s and early 1960s, efforts to curb population growth enjoyed substantial popular support.⁶⁸ In the same period, the movement for the legalization of abortion had picked up steam, attracting the official endorsement of Planned Parenthood in 1968.⁶⁹ During this time, a militant streak within the civil-rights movement became more

63. *Id.*

64. Letter from Harriet Pilpel, Planned Parenthood, to the editor of *The New York Times* (Mar. 28, 1962) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers).

65. *Id.*; on the praise later bestowed on New Haven, see *New Haven Plan for Youth Halted*, N.Y. TIMES, Oct. 19, 1963, at 45.

66. Pilpel, *supra* note 64.

67. GORDON, *supra* note 47, at 261.

68. See NELSON, *supra* note 9, at 11; Critchlow, *Birth Control*, *supra* note 9, at 11.

69. For an examination of the successes of the abortion-legalization movement in the period, see DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 270-388 (1994); and LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, LAW, AND MEDICINE IN THE UNITED STATES, 1867-1975, at 216-20 (1998).

visible and politically significant.⁷⁰ Organizations like the Black Panthers contended that birth control and abortion were part of a plan to eliminate poor people of color.⁷¹ Finally, the anti-abortion movement began to organize, connecting the abortion-legalization movement to eugenics and racism. These were the events that made the racial politics of abortion in the early 1970s so combustible.

Part II begins to study these events by examining the evolution of the population-control movement between 1965 and 1973. In this period, the movement became less focused on the reproductive decisions of poor, non-white women. In the late 1960s, a new group of activists mobilized, focusing on the family-planning decisions of white middle-class Americans. These advocates joined a movement that still included some concerned about eugenics, Cold War politics, or international development. Contemporary abortion opponents describe the population-control movement of the pre-*Roe* decade as being uniformly racist. Part II demonstrates that these claims are flawed.

II. THE POPULATION-CONTROL MOVEMENT BEFORE *ROE*: RACE, DIVERSITY, AND CHANGE, 1965-1973

Although the movements for legal abortion and population control differed in meaningful ways, an understanding of the abortion-rights movement should begin with an analysis of the relationship between them. As a general matter, members of the population-control coalition lobbied for legal reforms or government funding designed to check domestic or international population growth.⁷²

The abortion-rights movement did work with population controllers and borrow from their argumentative strategies. Some population controllers did have ties to the eugenic legal reform movement, and population programs at times focused on the fertility of poor, non-white individuals. Nonetheless, arguments conflating the movements for legal abortion, population control, and eugenics are misleading. Indeed, as we shall see, Zero Population Growth, Inc. (ZPG), the only major population-control organization to lobby for abortion reform before *Roe*, tended to focus on population control within the white American middle class.

70. See, e.g., ROBERT O. SELF, *AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND* 220 (2003); JEFFREY OGBONNA GREEN OGBAR, *BLACK POWER: RADICAL POLITICS AND AFRICAN AMERICANS* 37-38 (2005); Faith Berry, *On Misunderstanding Black Militancy*, *THE CRISIS*, June-July 1970, at 220 (describing the 1960s as "a decade that signaled in a new militancy" in the civil rights movement).

71. See, e.g., Robert Weisbord, *Birth Control and the Black American: A Matter of Genocide*, 10 *DEMOGRAPHY* 571, 571-85 (1973).

72. See, e.g., SIMONE CARON, *WHO CHOOSES?: AMERICAN REPRODUCTIVE HISTORY SINCE 1850*, at 149-55, 160-63 (2008); *supra* note 9 and accompanying text.

Members of the abortion-reform movement did not always emphasize population rhetoric, often expressing concern about the deaths caused by dangerous illegal abortions. Additionally, many supporters of abortion did frame the procedure as a fundamental right for women.⁷³ Members of the population movement, on the other hand, campaigned for a variety of measures unrelated to abortion, including voluntary-sterilization initiatives, maternal-health programs, and domestic or international contraception measures.⁷⁴ Some population-control groups never endorsed abortion reform.⁷⁵

Nonetheless, before *Roe*, claims about population control, like contentions about public health, became a prominent part of the abortion-rights arsenal. There were several reasons for this emphasis. Many of the older leaders of abortion-rights organizations had ties to the population-control movement.⁷⁶ Leading figures in the movement, like Hugh Moore and John D. Rockefeller III, provided financial support to state-level campaigns to legalize abortion.⁷⁷

Nor did abortion-legalization groups discount the political appeal of population arguments. Similar claims found favor with a broad spectrum of politicians, judges, and members of the public, and influential members in the population-control movement endorsed the repeal of abortion bans.⁷⁸

The population-control movement took shape after the end of World War II, when those concerned with overpopulation came to exercise considerable influence over the family planning movement.⁷⁹ By the late 1960s, the federal government had become deeply involved in population politics, providing funding for family planning under the federal Social Security Act, offering international population-control funding as part of the United States Aid for International Development program, and creating a National Center for Population and Family Planning in the Department of Health, Education, and Welfare (HEW).⁸⁰ In June of 1969, when President Nixon was considering a bill that proposed the creation of the National Center for Population and Family Planning within HEW, the population movement was influential as well as

73. See Ziegler, *supra* note 11, at 302-04.

74. See *id.*

75. *Id.*

76. See IAN DOWBIGGIN, *THE STERILIZATION MOVEMENT AND GLOBAL FERTILITY IN THE TWENTIETH CENTURY* 151 (2008). Alan Guttmacher, the long-time leader of Planned Parenthood, maintained a relationship with AVS and the American Eugenics Society (AES). For a sample of Guttmacher's correspondence with the AES in the period, see Letter from Frederick Osborn, AES, to Alan Guttmacher (Mar. 9, 1964), (on file with Sophia Smith Collection, Smith College, The PPFA II Papers) (inviting Guttmacher to make suggestions for the AES's future activities). Similarly, Larry Lader, a NARAL leader, played a prominent part in the Population Crisis Committee, a major population-control organization. See CRITCHLOW, *INTENDED CONSEQUENCES*, *supra* note 9, at 151.

77. See, e.g., CRITCHLOW, *INTENDED CONSEQUENCES*, *supra* note 9, at 147, 193-97.

78. For example, a 1972 Gallup poll found that sixty-five percent of respondents believed population growth to be a serious problem. Ernest Ferguson, *Zero Population Growth Isn't Zero*, L.A. TIMES, Jan. 30, 1972, at 17.

79. See CRITCHLOW, *INTENDED CONSEQUENCES*, *supra* note 9, at 41-43.

80. *Id.* at 6, 73, 91.

diverse.⁸¹ Sponsored by 23 senators and 60 House members, the bill enjoyed strong bipartisan support.⁸² Political support for population reforms mirrored popular support. A 1972 poll found that 65% percent of respondents agreed that population growth was a serious problem, and more than half felt that population growth caused the nation to use up its natural resources too fast and produced social unrest and dissatisfaction.⁸³

A variety of population-control organizations were active in the years immediately before *Roe*. Some groups, like the Population Council and the Population Crisis Committee (PCC), already had a significant track record by 1970.⁸⁴ In the 1950s and 1960s, some of these organizations took up arguments about international instability, the Cold War, poverty, and famine.⁸⁵ These organizations expressed concern about the fertility of poor, non-white individuals in the developing world. Hugh Moore, a leading activist and the founder of the PCC, was among those to publicize such claims.⁸⁶ His widely circulated pamphlet in 1954, "The Population Bomb," argued that "food shortages and population pressures are already contributing to the conditions that can lead to social unrest and war."⁸⁷

The Population Council, a research-oriented organization founded in 1952 by John D. Rockefeller III, also worked to reduce population pressures in the developing world.⁸⁸ The organization pioneered contraceptive-access programs in the developing world, publicly stressing "the social and economic crisis confronting underdeveloped countries."⁸⁹ The Council also funded research on increasing contraceptive use among racial minorities in "the Black Belt" counties of Alabama.⁹⁰ As these initiatives suggested, the Council prioritized programs that would reduce the rate of population growth among the poor.

81. Nan Robinson, *Nixon Considers Proposal for a Commission on Domestic Population Reforms*, N.Y. TIMES, June 11, 1969, at 20. On the influence and diversity of the population-control movement, see, for example, Ziegler, *supra* note 11, at 283, 304-05.

82. *Id.*

83. Ferguson, *supra* note 78, at 17.

84. On the forming of the PCC, see CRITCHLOW, INTENDED CONSEQUENCES, *supra* note 9, at 66. For examples of the PCC's activities, see, for example, *Family Plan Aid Called Deficient*, N.Y. TIMES, May 10, 1967, at 23; John Finney, *Wide Starvation in Decade Is Seen*, N.Y. TIMES, Dec. 2, 1965, at 20; and Warren Weaver, *Keating to Head Birth Curb Drive*, N.Y. TIMES, Apr. 20, 1965, at A1. For examples of the Council's activities, see Ziegler, *supra* note 11, at 290-93.

85. On the connection drawn by some population controllers between population growth, instability, and communism, see, for example, John Sharpless, *World Population Growth, Family Planning, and U.S. Population Policy*, in THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE, *supra* note 9, at 72, 84-98.

86. For discussion of Moore's career in the movement, see CRITCHLOW, INTENDED CONSEQUENCES, *supra* note 9, at 30.

87. *Id.*

88. See, e.g., *infra* notes 89-90 and accompanying text.

89. Seymour Topping, *Taiwan Program Curbs Births, Contraceptive Loops Praised*, N.Y. TIMES, June 13, 1965, at 10.

90. On the Council's work in Alabama, see, for example, Reed, *supra* note 13.

Some members of the Population Council and the Association for Voluntary Sterilization (AVS), another major population-control organization, also had ties to the eugenic legal reform movement of the early twentieth century. The Human Betterment Foundation for Voluntary Sterilization, the forerunner of AVS, had itself taken the place of an openly eugenic organization, the Human Betterment Foundation.⁹¹ Eugenics, a term coined by the geneticist Francis Galton in 1883, had come to describe the use of law to prevent the births of persons with physical, mental, and "moral" defects.⁹² As late as 1962, Moore, who would soon become the AVS President, believed that the organization "favored legal sterilization of imbeciles and the like."⁹³ Similarly, a preliminary draft of the Population Council Charter had set forth seemingly eugenic aims.⁹⁴

In the early-to-middle 1960s, however, organizations like the Population Council and AVS focused primarily on increasing access to and funding for contraception for the poor rather than on legalizing abortion.⁹⁵ In the early 1960s, for example, AVS pioneered a voluntary sterilization program for the poor in rural Fauquier County, Virginia.⁹⁶ Similarly, the Population Council sponsored research by Donald Bogue, a member of the University of Chicago's Population Research and Training Center, designed to target "high fertility" groups, such as African Americans, Puerto Ricans, and Native Americans.⁹⁷

It is true that some older leaders of the population movement supported legal abortion. Moore had a close relationship with Larry Lader, a former member of the Population Crisis Committee, and provided substantial financial support to organizations like NARAL.⁹⁸ Rockefeller made significant donations to NARAL, the Religious Coalition for Abortion Rights, and the ACLU Reproductive Rights Project.⁹⁹ Generally, however, support for legal abortion

91. For discussion of the activities of AVS in the period, see, for example, Judy Klemesrud, *Sterilization Is Answer For Many*, N.Y. TIMES, Jan. 18, 1971, at 24. For further analysis of the Human Betterment Foundation, see *supra* note 13 and accompanying text.

92. On Galton's coining of the term eugenics, see FRANCIS GALTON, *INQUIRIES INTO HUMAN FACULTY AND ITS DEVELOPMENT* 24 (1883). On the diversity of the eugenic legal reform movement and its influence on the Municipal Court of Chicago, see Michael Willrich, *The Two Percent Solution: Eugenic Jurisprudence and the Socialization of American Law, 1900-1930*, 16 L. & HIST. REV. 67, 67-100 (1998).

93. Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 CARDOZO J.L. & GENDER 323, 341 n.167 (2009) (quoting Letter from Hugh Moore to Ruth Proskauer Smith (Oct. 19, 1962) (on file with Mudd Manuscript Library, Princeton University, The Hugh Moore Papers)).

94. CRITCHLOW, *INTENDED CONSEQUENCES*, *supra* note 9, at 23.

95. *Id.* at 15-19.

96. On the Virginia sterilization law, see, for example, David Binder, *Clinic Defended on Sterilization*, N.Y. TIMES, Oct. 7, 1962, at 40; and David Binder, *Clinic Is Backed on Sterilization*, N.Y. TIMES, Sept. 12, 1962, at 31.

97. Ziegler, *supra* note 93, at 335 & n.126 (quoting Research Proposal, "Problems of Bearing and Rearing Children in High-Fertility, Low-Income, Low Education American Families" (1960) (on file with The Rockefeller Archive, Rockefeller University, The Population Council Papers)).

98. See, e.g., DOWBIGGIN, *supra* note 76, at 151.

99. CRITCHLOW, *INTENDED CONSEQUENCES*, *supra* note 9, at 147.

defined a younger, more environmentalist wing of the population-control movement.

By the late 1960s, when some members of the movement endorsed legal abortion, a new generation of movement members linked population control to the sexual revolution, the women's movement, and better environmental stewardship. Starting in 1968, some movement experts began to conclude that, as Joseph Swartland of the Family Planning Program at the University of Chicago put it, "[t]he population explosion is largely a white middle class phenomenon."¹⁰⁰

New organizations formed to respond to calls for sexual and social responsibility among the white middle class. Founded in 1968 by Stanford Professor Paul Ehrlich, Connecticut attorney Richard M. Bowers, and Cornell Professor Thomas Eisner, Zero Population Growth became the only major population-control organization to campaign heavily for abortion before *Roe*.¹⁰¹ In contrast to those who worked with the Population Council or the PCC, ZPG members were young—in 1971, three out of five members were under thirty, and four out of five members were under forty.¹⁰²

Since 1968, ZPG leaders had described sexual liberation as a benefit of curbing population growth. In his seminal book, *The Population Bomb*, Ehrlich argued that curbing population growth would allow Americans to free themselves from "a sexually repressed and repressive society."¹⁰³ Thomas Eisner, another ZPG founder, justified widespread access to sterilization by praising it as "a lovely kind of solution that has given us a nice relaxed attitude toward making love."¹⁰⁴

ZPG pamphlets and advertising materials also praised the sexual revolution while demanding personal responsibility. Slogans like "Worship Cupid, Don't Be Stupid," "Love Carefully," and "Make Love, Not Babies" defined the organization's public image, especially on college campuses.¹⁰⁵ As ZPG framed it, abortion was an important tool that should be available to sexually active, middle-class people concerned about overpopulation. Indeed, when the *Chicago Trib.* asked a group of concerned college students what would be "the first and most feasible step" that could be taken to curb overpopulation, legalizing abortion was one of the most popular answers.¹⁰⁶

100. Ruth Moss, *Population—Our Most Pressing Problem*, CHI. TRIB., Mar. 2, 1970, at B11. For similar conclusions in this vein, see, for example, Klemesrud, *supra* note 14, at 30; and John Sibley, "Wanted" Babies Said to Cause U.S. Population Explosion, N.Y. TIMES, Nov. 14, 1968, at 26.

101. See, e.g., Critchlow, INTENDED CONSEQUENCES, *supra* note 9, at 156.

102. Larry D. Barnett, *Zero Population Growth Inc.*, 21 BIOSCIENCE 759, 759 (1971).

103. PAUL EHRLICH, *THE POPULATION BOMB* 135 (1968).

104. Jane Brody, *More Than 100,000 Persons Are Reported Seeking Sterilization as Method of Contraception*, N.Y. TIMES, Mar. 22, 1970, at 62.

105. See, e.g., *Looking To the ZP Generation*, *supra* note 14, at 85; Klemesrud, *supra* note 14, at 30.

106. Daniel C. Beggs & Henry A. Copeland, *Some Students Offer Methods for Curbing World Population*, CHI. TRIB., Nov. 7, 1970, at 2.

ZPG also justified population control in the context of the emerging environmentalist movement. As a leader of ZPG in New York explained, "[i]t doesn't make any difference whether the family can support all those children or not. . . . [T]he food and water supply [will diminish]. And I'd hate to think about all that pollution."¹⁰⁷

The mobilization of those who sympathized with ZPG helped to reshape the population-control movement in the lead-up to *Roe*. Alongside those concerned about welfare costs, urban crime, or the births of defective children were activists worried about the environment and sexual freedom. The stories told by contemporary abortion opponents in state legislatures fail to capture the diversity or mutability of the population-control movement in the lead-up to *Roe*.

Moreover, the groups and individuals within the population movement that were most directly involved in the abortion battle tended to come disproportionately from groups like ZPG. More established groups like the Population Council did not endorse legal abortion before *Roe*.¹⁰⁸ By contrast, organizations like ZPG tended to be more involved in the movement to legalize abortion. By April 1969, Richard Bowers began publicly arguing in favor of abortion-restriction repeal as a population-control measure and tied population control to the preservation of the environment.¹⁰⁹ State-level ZPG affiliates also participated in pro-repeal rallies in Connecticut and Illinois and worked as part of the national pro-repeal effort.¹¹⁰

The population-control movement was neither uniformly nor predominantly racist, and those most heavily involved in the campaign to legalize abortion tended to focus on controlling population growth among white, relatively well-to-do families. Moreover, as Part III shows, the relationship between the abortion-rights and population-control movements was far more complex than some contemporary anti-abortion activists and legislators suggest.

III. THE POPULATION-CONTROL AND ABORTION-RIGHTS MOVEMENTS: AGREEMENT, CONFLICT, AND POLITICAL EXPEDIENCY, 1965-1973

For the abortion-rights movement, an alliance with population controllers had a number of practical advantages. Some members of the abortion-rights

107. Klemesrud, *supra* note 14, at 30.

108. See CRITCHLOW, *INTENDED CONSEQUENCES*, *supra* note 9, at 177 (explaining that the Council took no position on abortion before *Roe*).

109. See *Forum Set on Abortion Legislation*, HARTFORD COURANT, Apr. 9, 1969, at 10B.

110. See, e.g., Kit Barrett, *Women's Rights: Where Have All the Shrinking Violets Gone?*, CHI. TRIB., May 17, 1970, at SCL4 (describing the participation of Illinois branch of ZPG in a repeal rally); Elaine Johnson, *Abortion Law Repeal Pondered at Parley*, HARTFORD COURANT, Jan. 17, 1971, at 9A (mentioning participation of state-level ZPG affiliate in abortion repeal discussion).

movement likely sympathized with the priorities articulated by groups like ZPG. Protecting the environment appealed to some members of organizations like NARAL or NOW, as did calls to end sexual oppression or compulsory childbearing.¹¹¹ The leadership of ZPG and NARAL sometimes overlapped.¹¹² As importantly, population-control programs enjoyed bipartisan support and attracted the approval of established donors. If legalizing abortion fit within this broader program, the abortion-rights cause would appear more mainstream, less controversial, and more likely to succeed.

Abortion-rights groups often adopted population-control arguments as a more pragmatic alternative to those involving women's rights. For movement pragmatists, women's-rights claims likely seemed risky. In the early 1970s, the women's movement remained poorly understood and, in some cases, unpopular.¹¹³ A 1970 Harris poll, for example, found that sympathy for the women's movement did not top fifty percent in any of the age groups surveyed.¹¹⁴

Just the same, overpopulation rhetoric made the politics of abortion more racially charged. The past ties of some members of the population movement to segregationists and to eugenic legal reformers generated concern for some civil-rights activists. So too did the focus on international overpopulation and domestic family-planning programs, many of which applied primarily to poor, non-white individuals. When New York repealed its abortion laws, a disproportionate number of African American women sought out the procedure, raising further concern in civil-rights organizations and black-power organizations like the Congress for Racial Equality and the Student Non-Violent Coordinating Committee.¹¹⁵ For this reason, conflict about population control claims impacted many pre-*Roe* abortion-rights organizations.

For example, in the late 1960s, when its members first considered an endorsement of legal abortion, Planned Parenthood was a part of the population-control movement.¹¹⁶ William Draper of the PCC had worked closely with Planned Parenthood in lobbying for an expansion of federal family

111. On the overlapping membership and leadership of ZPG and NARAL, see, for example, STAGGENBORG, *supra* note 9, at 53.

112. On Lader's involvement with the PCC, see, for example, CRITCHLOW, *INTENDED CONSEQUENCES*, *supra* note 9, at 150-51.

113. On popular views of the women's movement in the period, see LOUIS HARRIS AND ASSOCIATES, INC., *THE 1970 VIRGINIA SLIMS AMERICAN WOMEN'S OPINION POLL 4-7* (1971).

114. *Id.* at 4 (finding that forty-two percent of women "opposed to efforts made to change or strengthen women's status in society," and that fifty-one percent of women respondents concluded that these efforts were "not accomplishing their objectives").

115. On the disproportionate rate of abortions in the African American community in New York following legalization, see, for example, Barbara Campbell, *City Blacks Get Most Abortions*, N.Y. TIMES, Dec. 6, 1973, at 94. For further discussion of the state's abortion rate, see Philip Wechsler, *State's Abortion Rate Soaring*, N.Y. TIMES, Nov. 25, 1973, at 97.

116. See, e.g., GORDON, *supra* note 47, at 281.

planning assistance and in promoting the cause of population control.¹¹⁷ Alan Guttmacher, the leader of Planned Parenthood until 1974, was a member of the American Eugenics Society as late as the mid-1960s and held a position in AVS.¹¹⁸

Under Guttmacher's influence, members of Planned Parenthood primarily justified abortion in consequentialist terms, invoking, among other things, the importance of population control. In a pamphlet on the benefits of legalizing abortion in New York, for example, Planned Parenthood stressed such arguments, arguing that legalization would result in lower rates of population growth and illegitimacy and decreased welfare expenses.¹¹⁹ Similar rhetoric appeared again in a 1969 interview with the *New York Times*, when Guttmacher argued that abortion reform was a problem closely related to the "population explosion" and contended that population-control efforts, including abortion, were intended to reduce poverty, not eliminate the poor.¹²⁰ In 1970, in praising repeal acts in New York and Hawaii, Guttmacher also emphasized "the realization of the population problem."¹²¹ "We're now concerned more with the quality of population than the quantity," he told the Associated Press, in commenting on efforts to reform abortion laws.¹²²

Other pro-legalization organizations formed alliances with population controllers and argued for abortion reform partly by making population-based claims. Consider the example of NARAL. Formed in 1969, the organization included a variety of pro-reform doctors, lawyers, members of the clergy, students, women's liberation activists, and members of the American Public Health Association.¹²³

The subject of population control came to the fore in NARAL when feminist Lucinda Cisler proposed a resolution redefining the organization's mission.¹²⁴ She explained the strategic importance of redefining abortion as a method of birth control, thereby framing legalization as something that

117. For a sample of the correspondence between Draper and Planned Parenthood, see, for example, Letter from William Draper to Winfield Best of Planned Parenthood (Mar. 31, 1964) (on file with Sophia Smith Collection, Smith College, The William Draper Papers); Letter from John C. Robbins, CEO of Planned Parenthood, to William Draper (Jan. 10, 1973) (on file with Sophia Smith Collection, Smith College, The William Draper Papers); and Letter from John Scanlon, Vice President of Planned Parenthood, to William Draper (July 7, 1970) (on file with Sophia Smith Collection, Smith College, The William Draper Papers).

118. DOWBIGGIN, *supra* note 76, at 60. For a sample of Guttmacher's correspondence with the AES in the period, see Letter from Frederick Osborn, AES, to Alan Guttmacher (Mar. 9, 1964) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers).

119. See Facts and Figures on Abortion of Interest to All Americans (1973) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers).

120. See David Dempsey, *Dr. Guttmacher Is Evangelist of Birth Control*, N.Y. TIMES, Feb. 9, 1969, at SM32.

121. *Abortion Reforms Termed Fantastic*, HARTFORD COURANT, Mar. 21, 1970, at 16.

122. *Id.*

123. Myra MacPherson, *Abortion Laws: A Call for Reform*, WASH. POST, Feb. 17, 1969, at D1.

124. Letter from Lucinda Cisler to NARAL Board of Directors (Sept. 27, 1969) (on file with Schlesinger Library, Harvard University, The NARAL Papers).

"Planned Parenthood, the Association for Voluntary Sterilization, and Zero Population Growth could all support."¹²⁵ Cisler insisted that NARAL should take a stand that would "appeal to groups concerned about population and conservation," groups she called "important potential allies."¹²⁶ On September 1969, the NARAL Board of Directors approved Cisler's resolution.¹²⁷

As Cisler's memo indicated, some abortion-rights activists gravitated toward population-control claims not because they had any inherent concern about minority birth rates, crime, or welfare costs, but rather because an alliance with population controllers seemed politically valuable. Certainly, some movement members sympathized with the concerns about sexual liberation and the environment expressed by younger population controllers. At the same time, as Cisler apparently recognized, population-based claims were attractive because of the political benefits thought to flow from them. For example, the idea of an alliance with population controllers caught the attention of Larry Lader, who, as early as October 1969, began pushing for a ZPG-style resolution recommending that families have no more than two children.¹²⁸ Just the same, not all abortion-rights activists were equally enthusiastic about the use of population-control claims.

By September of 1970, feminists expressed concern about the heavy emphasis put on arguments for population control. To counter this trend, Friedan proposed a resolution stating that "NARAL should support political groups working toward the basic purpose of the right of a woman to decide when to have or not to have children."¹²⁹ At a meeting of the group's Board of Directors, the motion died for lack of a second.¹³⁰ In response, Lader again proposed his two-child resolution, which was tabled by a vote of twenty-six to eighteen.¹³¹ Greitzer led the charge against the resolution, arguing that too close a relationship with population controllers could "hurt [NARAL's] position with legislators."¹³²

Notwithstanding Greitzer's concerns, partly for pragmatic reasons, NARAL increasingly defined its cause by reference to the movement for population control. Between 1971 and 1973, NARAL and ZPG collaborated on abortion reform efforts in Washington State and Colorado, and supported Senator Robert Packwood's ultimately unsuccessful National Abortion Rights

125. *Id.*

126. *Id.*

127. NARAL Board of Directors, Meeting Minutes 1-3 (Sept. 28, 1969) (on file with Schlesinger Library, Harvard University, The NARAL Papers).

128. Letter from Larry Lader to NARAL Executive Committee (Oct. 23, 1969) (on file with Schlesinger Library, Harvard University, The NARAL Papers).

129. NARAL Board of Directors Meeting Minutes (Sept. 28, 1970) (on file with Schlesinger Library, Harvard University, The NARAL Papers).

130. *Id.*

131. *Id.*

132. *Id.*

Bill.¹³³ That November, the NARAL Board published a resolution endorsing existing federal population-control legislation.¹³⁴

NARAL also framed abortion access partly by stressing concerns about population control. Along with arguments that abortion was a privacy right, the organization's official debate handbook included a whole category of arguments related to overpopulation.¹³⁵ When faced with arguments that Beethoven would not have been born if people used legal abortion for eugenic purposes, NARAL activists were advised to reply that "possibly Hitler wouldn't have been born either."¹³⁶ Other proposed claims asserted that "[l]egal abortion will decrease the number of unwanted children . . . and possibly subsequent delinquency, drug addiction, and a host of social ills."¹³⁷ A final population control argument stated that "[s]ince contraception alone seems insufficient to reduce fertility to the point of no-growth, . . . we should permit all voluntary means of birth control (including abortion)."¹³⁸

Even the National Organization for Women (NOW), a major feminist group, worked closely with population controllers and, for tactical reasons, borrowed some of their ideas. In November 1970, Christopher Tietze of the Population Council asked NOW President Wilma Scott Heide for NOW volunteers to participate in a study on the health effects of abortion.¹³⁹ In writing to NOW state affiliates, Heide recommended participating, suggesting that "[t]he request from the Population Council represents the fact that we are viewed as responsible and stable."¹⁴⁰ While some feminist proposals, like the Equal Rights Amendment, enjoyed substantial support in the early 1970s,¹⁴¹ population-control legislation, as we have seen, also enjoyed bipartisan support and popular approval. Heide's wish to tie her organization to the population-control cause made strategic sense. Indeed, Heide also testified about population control in Congress, arguing that women's rights and overpopulation were inextricably linked. She explained:

[F]irst we must affirmatively change the [role of women]; then family size will change . . . On the question of overpopulation . . . , no matter

133. See Ziegler, *supra* note 11, at 313.

134. *Id.* at 314.

135. National Abortion Rights League, Speaker's and Debater's Notebook Excerpt (c. 1972) (on file with Schlesinger Library, Harvard University, The NARAL Papers).

136. *Id.*

137. *Id.*

138. *Id.*

139. Letter from Christopher Tietze, Assoc. Dir. of Biomed. Div., Population Council, to Wilma Scott Heide (Nov. 5, 1970) (on file with Schlesinger Library, Harvard University, The Wilma Scott Heide Papers).

140. Letter from Wilma Scott Heide to NOW Board of Directors et al. (Winter 1970-1971) (on file with Schlesinger Library, Harvard University, The Wilma Scott Heide Papers).

141. Congress passed the Equal Rights Amendment in 1972, and as many as thirty states ratified it the following year. The Amendment ultimately failed. See, e.g., SUZANNE UTARRO SAMUELS, FETAL RIGHTS, WOMEN'S RIGHTS: GENDER EQUALITY IN THE WORKPLACE 44 (1995).

how safe, effective, and universally available is any contraceptive method for women or men, women will continue to be producers of excess children . . . unless they have viable significant alternatives to motherhood.¹⁴²

By 1973, NOW called its reproductive-rights task force the "Task Force for Reproduction and Population."¹⁴³ That February, the NOW Board considered participating in another population study, this time involving the Ford Foundation.¹⁴⁴ In 1972, NOW also formed a close working relationship with ZPG in campaigning for abortion reform.¹⁴⁵

In today's battles about the defunding of Planned Parenthood or race-selection abortion, abortion opponents and some conservative legislators invoke the close relationship between the historical abortion-rights and population-control movements as evidence that contemporary providers and activists harbor racist intentions. However, the history of the relationship between the two movements in the 1970s shows that most abortion-rights activists adopted population-based claims for quite different reasons. Some activists were attracted to population-control claims because they shared concerns about preserving the environment or protecting individual sexual freedom. Other advocates adopted population-control claims for instrumental purposes, seeking to benefit from the influence and popularity of the movement for population control. And not all members of the abortion-rights movement were willing to stress population-control claims. We should reject historical arguments that identify the relationship between the movements for population control and abortion as evidence of racism. Nonetheless, as Part IV shows, the history of concerns within the family-planning movement about unwanted children, crime, and welfare expenses continued to shape the abortion debate in the 1970s.

IV. RACE GENOCIDE: ABORTION, BLACK POWER, AND THE ANTI-ABORTION MOVEMENT, 1965-1973

The alliance between abortion reformers like those in NOW and population controllers emerged at a time when national racial politics were changing. Civil-rights organizations began adopting a more confrontational and at times

142. Ziegler, *supra* note 11, at 319 & n.230 (quoting Wilma Scott Heide, President of NOW, Statement in Support of Public Law 91-213, 92d Congress, *An Act to Establish a Commission on Population Growth and the American Future* (April 15, 1971) (on file with Schlesinger Library, Harvard University, The Wilma Scott Heide Papers)).

143. Ziegler, *supra* note 11, at 319. For an example of this usage, see Jan Liebman, NOW Task Force on Reproduction and Population (Nov. 1973) (on file with Schlesinger Library, Harvard University, The NOW Papers).

144. Ziegler, *supra* note 11, at 320.

145. *Id.*

separatist stance. In the same period, the anti-abortion movement drew on the history of the population-control movement, arguing that the abortion-rights movement was itself racist and indistinguishable from the eugenic legal reform movement. Together, these factors made population-based arguments for abortion racially explosive.

The radicalization of civil-rights politics began in the mid-1960s. On July 18, 1964, Police Lieutenant Thomas Gilligan shot and killed James Powell, a student at Robert F. Wagner Junior High.¹⁴⁶ Powell's killing touched off a riot in Harlem that ultimately led to 465 arrests and 118 injuries.¹⁴⁷ In the wake of the Harlem riots, in August 1965, the Watts neighborhood of Los Angeles exploded in violence.¹⁴⁸ The Watts riots resulted in 34 deaths, over 1,000 injuries, and over 400 arrests.¹⁴⁹

The Watts riots also galvanized change in some civil-rights organizations. The Student Non-Violent Coordinating Committee (SNCC) had been a bi-racial, student organization best known for its Freedom Summer efforts to register black voters in the Deep South.¹⁵⁰ In May 1966, SNCC elected as Chairman Stokely Carmichael, a Trinidad-born, naturalized citizen thought of as a leading intellectual in the organization.¹⁵¹ Within a month, Carmichael had begun to popularize calls for "black power" rather than civil rights.¹⁵² As debate about the meaning and legitimacy of the subject grew, Martin Luther King, Jr. deemed the term "unfortunate."¹⁵³ However, Floyd McKissick, the leader of the Congress of Racial Equality (CORE) defended the term.¹⁵⁴ He explained its meaning as follows: "The syndrome of the powerlessness of black Americans could only be ended by their own efforts; by harnessing the tremendous economic potential of the ghetto and by developing political movements that would fulfill the needs of its people."¹⁵⁵ CORE had been in operation since after World War II, attracting the most attention for its Freedom Rides, efforts to desegregate interstate bus travel.¹⁵⁶ By 1966, like SNCC,

146. See, e.g., Theodore Jones, *Negro Boy Killed*, N.Y. TIMES, July 17, 1964, at 1; Theodore Jones, *Teenage Parade Protests Killing*, N.Y. TIMES, July 18, 1964, at 1.

147. See, e.g., Theodore Jones, *Negroes Attack Gilligan Ruling*, N.Y. TIMES, Nov. 1, 1964, at 47; Theodore Jones, *Uneasy Calm in Harlem*, N.Y. TIMES, July 17, 1965, at 1.

148. On the Watts riots, see, for example, *Riots Unreal to Most in Los Angeles*, CHI. TRIB., Aug. 15, 1965, at 3; and Seymour Korman, *Troops Fight LA Rioters*, CHI. TRIB., Aug. 15, 1965, at 1.

149. STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 159 (1997).

150. On SNCC and Freedom Summer, see, for example, DOUG MCADAM, *FREEDOM SUMMER* 126 (1988); and Hollis Watkins et al., *"In the Middle of the Iceberg": Mississippi and the Mississippi Freedom Democratic Party*, in *A CIRCLE OF TRUST: REMEMBERING SNCC* 61 (Cheryl Greenberg ed., 1998).

151. See, e.g., Gene Roberts, *The New SNCC: Weaker, Fierier*, N.Y. TIMES, Aug. 20, 1967, at 45.

152. See *id.*

153. *"Black Power" Slogan of Negroes Lambasted and Defended*, CHI. TRIB., July 27, 1966, at 9.

154. See, e.g., *id.*; see also McKissick *Defines "Black Power"*, CHI. DEFENDER, July 11, 1966, at 5.

155. McKissick *Defines "Black Power"*, *supra* note 154, at 5.

156. See, e.g., RAYMOND ARSENAULT, *FREEDOM RIDERS: 1961 AND THE STRUGGLE FOR RACIAL EQUALITY* 29 (2006).

CORE had expelled white members, and McKissick called opponents of black power part of a "malevolent Southern tradition that seeks, even now, to divide black America into 'good niggers' and 'bad niggers.'"¹⁵⁷

Later in 1966, riots began in Chicago and San Francisco.¹⁵⁸ By the end of that year, there were growing signs of a white backlash. In October 1966, the *New York Times* reported mounting "disaffection among white liberals for the Negro cause of equality."¹⁵⁹ Polls taken in the fall of the same year showed white opposition to all civil rights demonstrations and black power.¹⁶⁰ As John Herbers of the *New York Times* reported in discussing one such poll, whites agreed "that Negroes were moving too fast on civil rights."¹⁶¹

At the same time, members of the new black power movement often framed the riots as legitimate and even inevitable forms of resistance. The Black Panther Party (BPP), founded in 1966, emerged as a response to police violence in Oakland, California.¹⁶² In April 1967, McKissick argued that the riots had occurred because African Americans "no longer believe in the white man's promise."¹⁶³ After Carmichael left SNCC for the BPP,¹⁶⁴ his successor, H. "Rap" Brown, a Louisiana native and a member of the civil-rights movement since 1960, offered even more menacing rhetoric, suggesting that the unrest in the city would "look like a picnic" compared to the violence that would ensue if blacks organized to take on their oppressors.¹⁶⁵ As he put it later in 1967: "[B]urn this town down if this town don't turn around."¹⁶⁶

The black-power movement had a far-reaching program, including demands for prison reform, economic self-sufficiency, and rights to employment and housing.¹⁶⁷ Between 1969 and 1973, in criticizing white racism, a number of movement members also began to attack legal abortion.¹⁶⁸ Attacks on birth control and abortion tended to feature in much larger

157. McKissick Defines "Black Power," *supra* note 154, at 5.

158. On the Chicago riots, see, for example, Donald Johnson, *4,000 Called Up*, N.Y. TIMES, July 16, 1966, at 1; and Betty Washington, *West Side Riots Parallel Earlier Outbreaks*, CHI. DEFENDER, July 18, 1966, at 4. On the San Francisco riot, see, for example, *The Backlash*, N.Y. TIMES, Oct. 2, 1966, at 203.

159. *The Backlash*, *supra* note 158, at 203.

160. See, e.g., *Most Whites Found Opposed to Civil Rights Demonstrations*, N.Y. TIMES, Aug. 16, 1966, at 24.

161. John Herbers, *White Backlash Evident in Voting*, N.Y. TIMES, Nov. 9, 1966, at 31.

162. On the founding of the BPP, see, for example, Carolyn Calloway, *Group Cohesiveness in the Black Panther Party*, 8 J. BLACK STUD. 55, 55-67 (1977); and Lawrence Swain, *An Interview with a Black Panther*, 253 N. AM. REV. 27 (1968).

163. *CORE Director Tells of Negro Ghetto Unrest*, CHI. DEFENDER, Apr. 22, 1967, at 2.

164. See Roberts, *supra* note 151, at 45.

165. *Detroit Crowd Warmly Greets H. Rap Brown*, CHI. DEFENDER, Aug. 28, 1967, at 2; see also Homer Bigart, *Rap Brown Calls Riots "Rehearsal for Revolution"*, N.Y. TIMES, Aug. 7, 1967, at 1; Lois Dombrowski, *Negro Leader Hails Rioters as Patriots*, CHI. TRIB., July 28, 1967, at 7.

166. See Roberts, *supra* note 151, at 45.

167. HERBERT HAINES, *BLACK RADICALS AND THE CIVIL RIGHTS MAINSTREAM, 1954-1970*, at 62 (1995); see also *The Black Panther Ten-Point Program*, 253 N. AM. REV. 16-17 (1968); Charles Hamilton, *An Advocate of Black Power Defines It*, N.Y. TIMES, Apr. 14, 1968, at SM22.

168. See Weisbord, *supra* note 71, at 577-81.

narratives about efforts on the part of the United States to "herd [black people] into small, overcrowded areas called ghettos"¹⁶⁹ or to "cut back on welfare."¹⁷⁰ In 1969, Brown made the argument that birth control was "genocide."¹⁷¹ Dick Gregory, a leading black comedian, expressed concern about the issue in a much-debated article in *Ebony Magazine*.¹⁷² *The Black Panther*, the official publication of the BPP, criticized the legalization of abortion in New York in 1970, and equally scathing essays continued to appear throughout the early 1970s.¹⁷³ Jesse Jackson of Operation Breadbasket also took a strong stand against legal abortion.¹⁷⁴

Of course, these arguments were far from universally convincing to African Americans in the years leading up to *Roe*. Jerome Holland, an African American, served as Planned Parenthood chairman before *Roe* and asserted that legalized abortion would prevent the unnecessary deaths of black mothers and babies as a result of botched illegal abortions.¹⁷⁵ An African American physician, Edward Keemer, worked with NARAL in a Michigan abortion test case pursued in 1971.¹⁷⁶

Arguably more important to the abortion-reform movement were African American women's-rights activists who spoke out against the black genocide argument. One African American women's-rights advocate, Congresswoman Shirley Chisholm, served as NARAL's honorary president in the years immediately before *Roe* and frequently argued that abortion reform was in the best interest of African American women because, under present law, "the poor [and] the blacks . . . are denied a choice available to the rich."¹⁷⁷ Subsequent studies supported Chisholm's claim: as Mark Graber and Leslie Reagan have shown, pre-*Roe* abortion laws disproportionately affected poor women.¹⁷⁸

African American women's-rights activists outside of the abortion reform movement also publicly argued that legalized abortion would better protect women. For example, popular advice columns in the *Chicago Defender* advised African American women about how and why to seek contraception or support abortion reform.¹⁷⁹ Nevertheless, African American women remained divided

169. Dick Gregory, *My Answer to Genocide*, EBONY MAG., Oct. 1971, at 70.

170. Mary Smith, *Birth Control and the Negro Woman*, EBONY MAG., Mar. 1968, at 29.

171. H. "RAP" BROWN, DIE, NIGGER, DIE 138 (1969).

172. Gregory, *supra* note 169, at 66-72.

173. See Weisbord, *supra* note 71, at 580.

174. See, e.g., Jesse Jackson, *Country Preacher*, CHI. DEFENDER, Mar. 24, 1973, at 29.

175. See *Genocide Denied in Birth Curbs*, WASH. POST, Nov. 14, 1968, at A17.

176. See Eileen Shanahan, *Doctor Leads Group's Challenge to Michigan Anti-Abortion Law*, N.Y. TIMES, Oct. 5, 1971, at 28.

177. Myra MacPherson, *MDs File Abortion Lawsuit*, WASH. POST, Sept. 30, 1969, at B1.

178. MARK GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 6, 56-62 (1996); see also REAGAN, *supra* note 69, at 137-38, 249.

179. See, e.g., Margaret Sloan, *Do Blacks Belong in Women's Lib? Yes!*, CHI. TRIB., June 6, 1971, at E12; see also Ellen Faulkner, *From Our Readers: Unite, Sisters*, CHI. DEFENDER, Sept. 28, 1971, at 13; Leontyne Hunt, *Keep Your Family the Right Size*, CHI. DEFENDER, Oct. 22, 1966, at 11.

on the question of abortion reform, at least insofar as it was framed as an issue of population control.¹⁸⁰

There were several reasons that the abortion issue generated a particular kind of racial politics. The spread of abortion-reform statutes in the American South exacerbated fears about race genocide. There might have been nothing inherently suspicious in these developments; in North Carolina and Georgia, for example, a small and unmobilized Catholic population, combined with a low amount of media attention, contributed to the easy passage of the abortion-reform laws.¹⁸¹ However, the American South had a troubling history of forcing women of color to undergo sterilization, either under eugenic statutes or through informal, involuntary "Mississippi appendectomies."¹⁸² Efforts to introduce involuntary sterilization laws in the South continued in the mid-1960s, a phenomenon noted and condemned by SNCC.¹⁸³

This support for coerced sterilization seemed all the more troubling after there was news of involuntary sterilizations performed in the South.¹⁸⁴ In June 1973, in Montgomery, Alabama, two African American girls, Minnie Lee Relf, aged twelve, and Mary Alice, aged fourteen, were sterilized without their own or their mother's informed consent.¹⁸⁵ Over eighty other minors were revealed to have been sterilized at federally-funded birth-control clinics in a fifteen-month period.¹⁸⁶ Chicana and African American women responded by bringing lawsuits based on compulsory-sterilization claims.¹⁸⁷ The sterilizations at issue were carried out without formal authorization, and by 1970, no population-control organization supported involuntary sterilization (although one group,

180. For discussion of the divisions between Black women on the subject of black genocide, see, for example, *Birth Control Views*, CHI. DAILY DEFENDER, Sept. 5, 1972, at 19; and Robert E. Johnson, *Legal Abortion: Is It Genocide or Blessing in Disguise?*, JET, Mar. 22, 1973, at 12 (describing "Black women whose responses range from freedom from grief to fear of genocide").

181. On the lack of organized Catholic opposition to the reforms in North Carolina and Georgia, see, for example, GENE BURNS, *THE MORAL VETO: FRAMING CONTRACEPTION, ABORTION, AND CULTURAL PLURALISM IN THE UNITED STATES* 181 (2005); and GARROW, *supra* note 69, at 329, 348.

182. See, e.g., REBECCA KLUCHIN, *FIT TO BE TIED: STERILIZATION AND REPRODUCTIVE RIGHTS IN AMERICA, 1950-1980*, at 90-94 (2011).

183. See, e.g., NELSON, *supra* note 9, at 68 (describing SNCC's reaction to a compulsory sterilization law proposed in Mississippi).

184. See *infra* notes 186-187 and accompanying text.

185. See, e.g., *Clinic Defends Sterilization of 2 Girls, 12 and 14*, N.Y. TIMES, June 28, 1973, at 14. The Relf controversy produced a Senate Panel, a well-publicized lawsuit, and a halt to sterilizations funded by the federal government. See *Expand Sterilization Suit*, CHI. DEFENDER, Aug. 14, 1973, at 4 (on the lawsuit); *Sterilization Halt*, CHI. DEFENDER, Aug. 2, 1973, at 17 (on the suspension of federally funded sterilizations); Bill Kovach, *Sterilization Consent Not Given, Father Tells Kennedy's Panel*, N.Y. TIMES, July 11, 1973, at 16 (on the Senate panel).

186. See, e.g., Jack Slater, *Sterilization: Newest Threat to the Poor*, EBONY MAG., Oct. 1973, at 150.

187. See KLUCHIN, *supra* note 182, at 166 (describing a suit brought by ten Chicanas against the U.S.C. L.A. County Medical Center); NELSON, *supra* note 9, at 72 (describing the lawsuit of Nial Cox Ramirez, an African American woman from North Carolina, following a compulsory sterilization procedure).

AVS, had endorsed compulsory sterilization as late as 1960).¹⁸⁸ Nonetheless, the sterilization abuse scandal once again raised the possibility that, if racism was a real part of the population movement, abortion reformers might have similar biases.

As importantly, before and after *Roe*, influential state anti-abortion organizations like Women for the Unborn in New York made claims about the supposed racism of abortion supporters.¹⁸⁹ Members of Women for the Unborn belonged to the recently mobilized anti-abortion movement. Beginning in the late 1960s, a number of private citizens responded to changes in abortion laws by forming small organizations designed to stall the progress of the abortion-rights movement.¹⁹⁰ While some members of the anti-abortion movement had been involved in civil-rights politics,¹⁹¹ the movement focused on protecting the rights of the fetus, the disabled, and the dying.¹⁹² For example, in 1971, Robert Byrn, a Fordham Law School professor and a leader of New York State Right to Life, brought suit as a guardian ad litem for unborn children scheduled to be aborted in New York hospitals.¹⁹³ Byrn also used the media to publicize his understanding of the personhood and rights of the fetus, arguing that "[t]he eight-week fetus has a human baby face, arms, legs, fingers, toes, a strongly beating heart and a brain that emits recordable impulses."¹⁹⁴ New York

188. Indeed, as indicated by a 1973 study by the Department of Health, Education, and Welfare, the sterilization rate for poor women was twice as high as it was for women of any other income level. Childbearing Rights Information Project, *To Bear or Not to Bear*, in MAKING SENSE OF WOMEN'S LIVES: AN INTRODUCTION TO WOMEN'S STUDIES 353 (Michele Plott & Lauri Umansky eds., 2000). On AVS's previous support for involuntary sterilization and change of position, see, for example, Ziegler, *supra* note 11, at 285-90.

189. See, e.g., Brief for Women for the Unborn as Amicus Curiae at *16, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

190. For a sample of historical writing on the anti-abortion movement, see, for example, CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS (1998); KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); ANDREW H. MERTON, ENEMIES OF CHOICE: THE RIGHT TO LIFE MOVEMENT AND ITS THREAT TO ABORTION (1981); ZIAD MUNSON, THE MAKING OF PRO-LIFE ACTIVISTS: HOW SOCIAL MOVEMENT MOBILIZATION WORKS (2008); CONNIE PAIGE, THE RIGHT TO LIFERS: WHO THEY ARE, HOW THEY OPERATE, WHERE THEY GET THEIR MONEY (1983); JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR (1998); and Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, in THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE, *supra* note 9, at 128.

191. For examples of this involvement, see, for example, MUNSON, *supra* note 190, at 19; and Mary Krane Derr, *Pro-Life Feminism*, in HISTORICAL AND MULTICULTURAL ENCYCLOPEDIA OF FEMALE REPRODUCTIVE RIGHTS IN THE UNITED STATES 172-73 (Judith A. Baer ed., 2002).

192. For example, the National Right to Life Committee, at the time the largest national anti-abortion organization, described its mission as follows: "Protecting the right to life of the unborn child is a central issue for the National Right to Life Committee." Pennsylvanians for Human Life, National Right to Life Committee Statement of Purpose (c. 1972) (on file with Gerald Ford Memorial Library, University of Michigan, The American Citizens Concerned for Life Papers). On anti-abortion opposition to euthanasia and the right to die, see, for example, IAN DOWBIGGIN, A MERCIFUL END: THE EUTHANASIA MOVEMENT IN MODERN AMERICA 135, 147 (2003).

193. See, e.g., Judy Klemesrud, *He's The Legal Guardian of Fetuses About to Be Aborted*, N.Y. TIMES, Dec 17, 1971, at 48; Fred C. Shapiro, "Right to Life" Has a Message for New York State Legislators, N.Y. TIMES, Aug. 20, 1972, at SM10.

194. Robert M. Byrn, Letter to the Editor, *Abortion: Old Right or New Ethic?*, N.Y. TIMES, May 10, 1971, at 32.

abortion opponents translated Byrn's claims into "a visual argument," depicting late-term abortions using "still photographs of fetuses and film strips."¹⁹⁵ Nationally, anti-abortion organizations publicized similar claims, circulating slide shows explaining "the reality of abortion."¹⁹⁶

In promoting fetal-rights claims, abortion opponents certainly oversimplified the relationship between population control, eugenics, and racism. At the same time, some abortion reformers, like Lader, argued that juvenile delinquency and crimes of all kinds would become less prevalent if abortion were legal.¹⁹⁷ By contrast, as we have seen, some civil-rights leaders tended to interpret riots or crime as natural or even desirable responses to entrenched discrimination and police violence. Abortion opponents drew on the history of some population reformers and the uncomfortable implications of some population-based claims. Although the abortion-rights movement itself—including those population organizations involved with it—did not harbor obviously racist motives, some population controllers' past experience reinforced the concerns some minority activists had about population control and abortion.

Concern over race genocide played an important part in debates about abortion within the civil-rights community. The connection between the movements for population control and abortion rights served only to heighten these concerns. As Part V shows, *Roe* came down at a time when the racial politics of abortion were salient and highly divisive, but the Court's opinion obscured the relevance of race to the law and politics of abortion.

V. THE INVISIBLE QUESTION: RACE, POPULATION CONTROL, AND RIGHTS TALK IN THE *ROE* COURT

Amicus curiae briefs in *Roe* made questions of race, population control, and race genocide central to debate about the case. Initially, when the Court conferenced the case in December 1971, Justices William O. Douglas and Thurgood Marshall raised concerns about whether existing abortion restrictions denied "equal protection by discriminating against the poor."¹⁹⁸ By the time Justice Harry Blackmun drafted the final version of *Roe*, however, questions of race and population control had receded into the background of the opinion. Significantly, Blackmun described the framework of *Roe*—one based on

195. Shapiro, *supra* note 193, at SM10.

196. Third Annual National Right to Life Conference (June 16-18, 1972) (on file with Gerald Ford Memorial Library, University of Michigan, The American Citizens Concerned for Life Papers).

197. See, e.g., Memorandum, Larry Lader to Members of NARAL Board et al., "The Damage Done to the Abortion Movement From the Second Hour of the TV Report on the Commission on Population Growth and the American Future" (c. 1972) (on file with Schlesinger Library, Harvard University, The NARAL Papers); NARAL Speaker's and Debater's Notebook Excerpt, *supra* note 135, at 29.

198. GARROW, *supra* note 69, at 530-31.

constitutional rights and the history of the medical profession—as a way of avoiding the more emotional questions surrounding race and abortion.

As David Garrow has shown, the issues of race and poverty did come up during the Court's first conference of *Roe v. Wade* and *Doe v. Bolton*.¹⁹⁹ *Roe* involved a Texas statute that prohibited all abortions but those necessary to save the life of the mother.²⁰⁰ By contrast, *Doe* involved a statute patterned on the American Legal Institute's ("ALI") model reform: the statute allowed abortions subject to particular restrictions, requiring, among other things, several diagnoses by licensed physicians.²⁰¹

During the conference, the Justices generally favored striking down the Texas law but found the constitutionality of the Georgia statute to be a closer question. Warren Burger, who led off voting on the Georgia measure, stated that it was constitutional.²⁰² In discussing *Doe*, William Douglas, the next to vote, raised questions about the practical operation of the Georgia statute, asking: "Is it weighted on [the] side of only those who can afford this? What about the poor?"²⁰³ Thurgood Marshall similarly expressed concern about the impact of the Georgia statute on women in rural areas where "there [were] no negro doctors."²⁰⁴ Although there was some discussion of whether the Court ought to remand for lower court findings as to how the statute affected poor, non-white women, it ultimately did not.²⁰⁵ Just the same, Douglas and Marshall's comments revealed a doctrinal path the Court could have followed in *Roe* or *Doe* if it had wanted to address the question of race, poverty, and abortion. Under the Equal Protection Clause, the Court could have asked whether facially neutral statutes, like the ALI model, had an impermissibly discriminatory impact on poor, non-white women. Assuming that there was some constitutional right or liberty interest protecting the abortion decision, unequal access to abortion services might have posed an equal-protection problem.²⁰⁶

Between December 1971 and October 1972, when the cases were reargued,²⁰⁷ amicus briefs brought different but equally explosive racial

199. *Id.*

200. *Roe v. Wade*, 410 U.S. 113, 117-18 (1973).

201. *Doe v. Bolton*, 410 U.S. 179, 182 & n.4 (1973). For further discussion of the ALI reform and its reception, see, for example, REAGAN, *supra* note 69, at 222-39; and BURNS, *supra* note 181, at 163-74. The ALI model statute allowed abortions for "physical and mental health reasons, fetal defects, or when pregnancy was the result of rape or incest." REAGAN, *supra* note 69, at 221.

202. GARROW, *supra* note 69, at 530.

203. *Id.*

204. *Id.*

205. *See id.* at 530-32.

206. *Eisenstadt v. Baird*, 405 U.S. 438 (1972), took a similar approach. Although deciding that a contraception regulation had at best a "marginal relation to the proffered [legislative] objective[s]," *Eisenstadt* explained: "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on the distribution to unmarried persons would be equally impermissible." *Id.* at 438. A similar argument could have been made if the abortion decision gained constitutional protection.

207. On the Justices' decision to have the cases reargued, see GARROW, *supra* note 69, at 552-56.

arguments to the fore. No prominent civil-rights or black-power organizations participated in amicus advocacy in *Roe*, but Planned Parenthood, NOW, and other abortion-rights organizations joined amicus briefs arguing that abortion bans had undesirable social consequences, leading to the births of antisocial, poor, and unwanted children who depended on government services. Planned Parenthood, for example, cited a study of children born to women who had unsuccessfully sought abortions in Sweden.²⁰⁸ The study showed that "many more of the unwanted children than control children . . . registered more often in psychiatric services, . . . were more often registered for antisocial and criminal behavior, . . . [and] got public assistance more often."²⁰⁹

Relying on the same study, an amicus brief joined by several women's organizations, including NOW, asserted that "[i]n addition to the effect of the unwanted pregnancy upon the mother and upon the unwanted children, those unwanted children who are economically or emotionally harmed transmit their psychosocial pathology to succeeding generations."²¹⁰ The brief stressed "concrete evidence of, the direct cost in alcoholism, drunkenness, crime, and welfare costs" of existing abortion laws.²¹¹

Abortion opponents responded to these contentions partly by playing up the concerns about race genocide expressed by some in the black power movement. For example, Women for the Unborn, a prominent New York anti-abortion group, argued:

The easy solution of abortion discourages more constructive solutions . . . Such a fear appears to lie behind the opposition to abortion on demand within the black community. Despite assurances by abortion advocates, many members of the black community seem to suspect that numerous abortion clinics in ghetto areas could end up as the white man's solution to the problems of poverty and race.²¹²

While not explicitly acknowledging these concerns, Planned Parenthood's amicus brief did stress that abortion bans disproportionately harmed poor women, who lacked access to adequate contraceptive services and who might try self-abortion "or may turn to the quack abortionist, and serious injury or even death may result from either course."²¹³

208. Brief for the Planned Parenthood Federation of America et al. as Amici Curiae at *28-29, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

209. *Id.*

210. Brief for Women's Organizations et al. as Amici Curiae at *34, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18).

211. *Id.* at *35.

212. Brief for Women for the Unborn as Amicus Curiae, *supra* note 189, at *16.

213. Brief for the Planned Parenthood Federation of America et al. as Amici Curiae, *supra* note 208, at *12, *26-27.

The racial politics of *Roe* were complex and divisive. Some abortion-rights proponents invoked arguments, similar to those made in the juvenile delinquency debate, about the connection between unwanted children, poverty, crime, welfare costs, and social pathology. Abortion opponents stoked fears about race genocide. At the same time, abortion-rights briefs acknowledged that abortion bans disproportionately impacted the constitutional interests of poor, non-white women.

Generally, however, the Court's decision obscured any question about race, population control, and abortion. Since *Roe* was the lead opinion, *Doe* offered little in the way of novel constitutional analysis, instead applying the trimester framework set forth in *Roe*.²¹⁴ Significantly, *Doe* made no mention of the equal-protection concerns raised by Justices Douglas and Marshall during the conference of the case.²¹⁵

Further, as Linda Greenhouse has shown, Justice Blackmun's extensive research at the Mayo Clinic over the summer of 1972 convinced him to rely on the history of medical attitudes toward abortion in drafting *Roe*.²¹⁶ As importantly, the final draft of *Roe* relied not on the Equal Protection Clause but rather on a privacy right related to interests in procreation, marriage, and contraception already recognized by the Court.²¹⁷

Blackmun seemed to believe that the framing of abortion as a medical matter and a privacy right would minimize the controversy that would greet the opinion. In January 1973, in order to achieve this goal, he drafted a proposed announcement of the decision, acknowledging the complexity of the issue while stressing that "abortion is essentially a medical decision."²¹⁸ The final draft of *Roe* more explicitly used Blackmun's framing of the abortion right as a way of avoiding the controversy surrounding abortion in general and the racial politics of abortion in particular:

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion. *In addition, population growth, pollution, poverty, and*

214. *Doe v. Bolton*, 410 U.S. 179, 180-202 (1973).

215. *See id.*

216. LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY 90-92 (2005).

217. *Roe*, 410 U.S. at 152 (1973).

218. GARROW, *supra* note 69, at 587.

racial overtones tend to complicate and not to simplify the problem. Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.²¹⁹

Roe acknowledged powerful arguments about race that had informed debate inside and outside of the Court, but the justices made no other reference to concerns about race, poverty, abortion access, or equal protection.²²⁰ Indeed, a few years later, in *Maier v. Roe* (1977)²²¹ and *Harris v. McRae* (1981),²²² the Court upheld laws denying public funding for abortion, rendering seemingly irrelevant any constitutional claim that abortion restrictions disproportionately impacted poor women.²²³

By describing abortion as a medical matter or a private decision belonging to the woman and her doctor, the *Roe* Court hoped to set itself above the political fray surrounding abortion and race.²²⁴ This choice proved to be consequential. On the one hand, by neglecting questions involving poor, non-white women's lack of access to reproductive health care, *Roe* set the stage for later opinions that held that abortion funding bans did not violate the Constitution.²²⁵ Within a few years, *Maier*²²⁶ and *Harris*²²⁷ would translate

219. *Roe*, 410 U.S. at 116-17 (emphasis added).

220. *See id.*

221. 432 U.S. 464 (1977).

222. 448 U.S. 297 (1981).

223. Interestingly, the issue of race was largely absent from the litigation of *Maier* and *Harris*. Relying on the privacy rationale in *Roe*, abortion-rights advocates primarily argued that, if the Constitution protected the abortion right, the State violated the Equal Protection Clause by funding childbirth but not abortion—impermissibly discriminating against or burdening the abortion decision. *See* Brief for Appellees at *13-15, *Maier v. Roe*, 432 U.S. 464 (1977) (No. 75-1440). Abortion-rights attorneys also argued that the Hyde Amendment violated the Establishment Clause, imposing one religion's beliefs on everyone else. *See, e.g.*, Brief for Appellees at *66-92, *Harris v. McRae*, 448 U.S. 297 (1981) (No. 79-1268); Brief for the American Public Health Association et al. as Amici Curiae at *14, *29-30, *Maier v. Roe*, 432 U.S. 464 (1977) (Nos. 75-1440, 75-442). The absence of race in the *Maier* and *Harris* litigation testifies both to its invisibility in *Roe* and to the Court's rejection of equal-protection claims based on racially disparate impacts rather than on racially discriminatory intent. *See, e.g.*, *Washington v. Davis*, 426 U.S. 229 (1976).

224. *See Roe*, 410 U.S. at 116.

225. *See, e.g.*, Rebecca Rauch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER L. & JUST. 28, 63 (2012) ("[T]he right to privacy yields no positive rights to funding or access support from the government; it is relegated to the land of negative rights, which might provide the right woman with reproductive choice free from government intrusion, but for the wrong woman—one with limited resources—the so-called 'choice' becomes nonexistent"); Rachel Rebouché, *The Limits of Reproductive Rights in Improving Women's Health*, 63 ALA. L. REV. 1, 24 (2011) ("*Roe* has not been a ready platform for thinking about abortion in terms of women's right to health care."); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1411 (2009) ("[T]he choice rhetoric of *Roe* undercuts the arguments for . . . the rights of caregivers, women and men both, to a level of public assistance for their caregiving work").

226. *Maier*, 432 U.S. 464 (1977).

Roe's silence on the questions of race and access to care into a conclusion that the abortion right protected women only from undue burdens on the ability to choose abortion rather than guaranteeing them access to the procedure.²²⁸

At the same time, as Part VI argues, *Roe's* relative silence on the issues of race and population control made the holding of the opinion an ideal symbol for feminists seeking to redefine the abortion right. Because *Roe* framed abortion as a right belonging at least partly to women, feminists reinterpreted the decision, arguing that it recognized that abortion mattered because of its intrinsic importance to women rather than because of any desirable impact legal abortion would have on the environment, population growth, welfare costs or crime.

VI. THE SEPARATION OF REPRODUCTIVE RIGHTS AND POPULATION CONTROL

Between 1973 and 1981, the abortion-rights movement gradually deemphasized claims about population control. There were a number of reasons for this shift. First, the very idea of population control became more divisive in the mid-1970s as a number of scandals emerged surrounding the very idea of population control. One such scandal broke in 1974, at the U.N. Conference on World Population in Bucharest, Hungary.²²⁹ At the Bucharest conference, leaders of developing countries characterized existing population programs as exploitative, and they demanded that excess population no longer be identified as the primary cause of poverty.²³⁰ The Bucharest Conference sent shock waves through the population-control movement, refocusing organizations like the PCC and the Population Council on international family planning and, in particular, on the importance of economic development.²³¹ In 1976, another scandal broke when Dr. Karan Singh, the Indian Minister for Health and Family Planning, issued a statement that the door had been "left open" for compulsory sterilization programs in the Indian states.²³² As population control

227. *Harris*, 448 U.S. 297 (1980).

228. *Maher*, 432 U.S. at 473-74 ("Roe did not declare an unqualified 'constitutional right to an abortion' . . . Rather, the right protects women from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.").

229. See Ziegler, *supra* note 11, at 300-01.

230. Frederick S. Jaffé, *Bucharest: The Tests Are Yet to Come*, 6 FAM. PLAN. PERSP. 213, 214 (1974).

231. For contemporary analyses of the World Population Plan, the document produced at the Bucharest Conference, see Michael S. Teitelbaum, *Population and Development: Is Consensus Possible?*, 52 FOREIGN AFFAIRS 742, 742-60 (1974). For further discussion of the Conference and its impact, see, for example, CRITCHLOW, INTENDED CONSEQUENCES, *supra* note 9, at 7.

232. See Kaval Gulhati, *Compulsory Sterilization: The Change in India's Population Policy*, 195 SCIENCE 1300-05 (1977). For further discussion of compulsory-sterilization programs in India in the period, see, for example, *Sterilization: No Choice in India*, OFF OUR BACKS, Jan.-Feb. 1976, at 10; and Henry Kamm, *India State Is Leader in Forced Sterilization*, N.Y. TIMES, Aug. 13, 1976, at 8.

became more controversial, the political benefits of population control claims no longer seemed as evident to the abortion-rights movement.

At the same time, anti-abortion organizations put more emphasis on concerns about racism in abortion clinics and within the abortion rights movement. For example, Dr. Joseph Stanton, a leading abortion opponent in Massachusetts and the leader of Americans United for Life (AUL), a major national group, widely distributed materials on the connection between population control and what he called the "abortion elitist apparatus."²³³ The National Right to Life Committee, the nation's largest anti-abortion organization, stressed claims about the supposed racism of Planned Parenthood's connection to the population-control movement of the 1970s.²³⁴ As anti-abortion activist Burke Balch stated in the early 1980s: "Does Planned Parenthood's championship of abortion really stem from a concern for women's rights and social justice and equality, or is its true basis their organizational commitment to population control, especially of the 'burdensome' poor[?]"²³⁵

As activists became aware of the costs associated with population claims, an effort to stress new arguments began. Within Planned Parenthood, this process began in October 1973, at a strategy meeting in Denver, Colorado.²³⁶ In a confidential memorandum, Robin Elliott, one of the conference organizers, stated that abortion opponents had raised an important "question [about] Planned Parenthood's credibility in its reference to the population problem."²³⁷ Those present at the conference saw Planned Parenthood's support for population control as a vulnerability, because pro-life organizers had successfully "sought to exploit to their own advantages the fears of minorities."²³⁸ Elliott suggested that abortion-reform advocates adopt a new strategy involving rhetoric that echoed *Roe*, invoking "the reaffirmation of commitment to freedom of choice in parenthood."²³⁹

Finally, as feminists gained positions of leadership in the abortion-rights movement, women activists began reinterpreting abortion rights, arguing that they reflected the constitutional significance of women's interests in autonomy and equality. As had been the case for Betty Friedan and Carol Greitzer before *Roe*, many feminists viewed abortion as being a women's-rights issue. With the

233. Letter from Dr. Joseph Stanton to Members of the Value of Life Committee (Aug. 1, 1978) (on file with Dr. Edward Stanton Library, Sisters for Life Convent, Bronx, New York).

234. See, e.g., *Margaret Sanger: Founder of Modern Society*, NAT. RIGHT TO LIFE NEWS, Oct. 1978 (on file with Dr. Edward Stanton Library, Sisters for Life Convent, Bronx, New York).

235. Burke Balch, *Abortion as Birth Control*, NAT. RIGHT TO LIFE NEWS, Nov. 23, 1981 (on file with Dr. Edward Stanton Library, Sisters for Life Convent, Bronx, New York).

236. See Ziegler, *supra* note 11, at 308-10 (citing The Denver Conference Memorandum (November 2, 1973) (on file with Schlesinger Library, Harvard University, The NARAL Papers) [hereinafter Denver Conference Memorandum]).

237. *Id.* at 308 (citing Denver Conference Memorandum, *supra* note 236).

238. *Id.* at 309 (citing Denver Conference Memorandum, *supra* note 236).

239. *Id.*

controversy surrounding population control and the necessity of defending *Roe*, feminists saw a valuable opportunity to reframe abortion as an issue of rights for women.

By 1977, for example, the need to defend *Roe* prompted a change in strategy. Planned Parenthood led Abortion Rights Strategy '77, a conference and strategy session.²⁴⁰ Abortion Rights Strategy '77 reflected a conviction that "[t]he record of national pro-choice organizations over the last four years . . . [had] been decidedly mixed."²⁴¹ The invitation to the parley expressed particular concern about the Hyde Amendment, a ban on the Medicaid funding of abortion, which was labeled the "most devastating congressional defeat of the last four years."²⁴²

What could be done to overcome these obstacles? In 1978, the organization selected an African American feminist, Faye Wattleton, as its new president.²⁴³ Wattleton told *The New York Times* that she was likely chosen to head the organization "for being a woman and because [Planned Parenthood] needed to change [its] image."²⁴⁴ That change in image involved a more "aggressive" campaign for "abortion rights" and increased emphasis on rights- and equality-based arguments.²⁴⁵ Explaining that preserving *Roe* was a priority for the organization, Wattleton told the press in the winter of 1978 that "[w]hat's really important is that Black women have equal access to determine when and how they will have children."²⁴⁶

In defending *Roe*, NARAL also elevated new leaders and stressed arguments more responsive to the needs of women. In Congress, by drawing on *Roe*, Sarah Weddington, one of the attorneys who had argued *Roe* and a leading NARAL member, stressed arguments linking sex equality and abortion.²⁴⁷ After speaking to Democratic Senator Birch Bayh, a supporter of the Equal Rights Amendment, Weddington reported that she had persuaded him primarily by contending that "women cannot take advantage of opportunities guaranteed under [the] ERA if they cannot control their fertility."²⁴⁸ In December 1975, Weddington became the president of the organization.²⁴⁹ As she had done previously, she emphasized that abortion was a matter of women's rights to

240. Abortion Rights Strategy '77 Invitation (Apr. 4, 1977) (on file with Sophia Smith Collection, Smith College, The PPFA II Papers).

241. *Id.*

242. *Id.*

243. Judy Klemesrud, *Planned Parenthood's New Head Takes a Fighting Stand*, N.Y. TIMES, Feb. 3, 1978, at A14.

244. *Id.*

245. *Id.*

246. *Id.*

247. See Minutes of the Executive Committee Meeting (Apr. 13, 1975) (on file with Schlesinger Library, Harvard University, The NARAL Papers).

248. *Id.*

249. See Joan Zyda, *Abortion Rights Leader Argues for a Free Choice for Women*, CHI. TRIB., Dec. 9, 1975, at B1.

privacy and equality. For example, when speaking to the press, Weddington insisted that abortion-reform advocates were women's-rights supporters while anti-abortion activists "still [thought] that a woman's place [was] in the home—barefoot and pregnant."²⁵⁰ As we have seen, NARAL's pre-*Roe* debating manual highlighted a number of population-control arguments. By contrast, at the end of the decade, NARAL's debating manual included a denunciation of the very idea of population control:

Allegation: That abortion should not be used as a means of population control. [Response]: Agreed. The decision to have an abortion is and should be a private one, free from outside pressures or interference. . . . The term 'population control' implies the use of coercive policies and programs to limit population growth; the United States has no such policy.²⁵¹

As population-control arguments became a less central part of abortion-rights advocacy, a broader group of Black feminists also became actively involved in the abortion-rights movement. The emergence of a distinctive Black feminist movement for reproductive health came in the late 1960s, with the publication of works like Frances Beale's *Double Jeopardy: To Be Black and Female* (1970) and Florynce Kennedy's *Abortion Rap* (1971).²⁵²

Beale, a former member of the SNCC International Affairs Commission, formed a Black Women's Liberation Caucus within the organization.²⁵³ After receiving little support from SNCC leaders, in 1969 Beale formed a stand-alone group, the Black Women's Alliance.²⁵⁴ In turn, after forming working relationships with Chicana, Puerto Rican, and Native American women, the group renamed itself the Third World Women's Alliance.²⁵⁵ Although some of these efforts involved reproductive rights, after *Roe*, Black feminists mobilized to an unprecedented extent.²⁵⁶

Some efforts involved the founding of separate organizations committed to the reproductive rights of women of color. For example, in 1973, following a meeting on "Black Women and Their Relationship to the Women's Movement," activists formed the National Black Feminist Organization, whose

250. *Id.*

251. NARAL Speaker's and Debater's Notebook 29 (1978) (on file with Montana Historical Society, The Montana Abortion Rights League Papers).

252. See generally DIANE SCHULDER & FLORYNCE KENNEDY, *ABORTION RAP* (1971); Frances Beale, *Double Jeopardy: To Be Black and Female*, in *THE BLACK WOMAN: AN ANTHOLOGY* 109 (Toni Cade Bambara ed., 1970).

253. On the formation of the Women's Caucus, see, for example, KIMBERLY SPRINGER, *LIVING FOR THE REVOLUTION: BLACK FEMINIST ORGANIZATIONS* 47 (2005).

254. *Id.*

255. *Id.* at 49.

256. See Loretta Ross, *African American Women and Abortion*, in *ABORTION WARS: A HALF CENTURY OF STRUGGLE* 161, 184-88 (Rickie Solinger ed., 1998).

members campaigned for reproductive justice, understood as a demand for legal abortion and a condemnation of sterilization abuse.²⁵⁷ In 1975, Barbara Smith formed the Combahee River Collective, a Boston-based reproductive justice organization that combined demands for legal abortion with criticism of sterilization abuse and calls for general improvements to the health care available to women of color.²⁵⁸

On other occasions, women of color worked in multiracial organizations that focused on the rights of poor, often non-white women. One such organization was the Committee for Abortion Rights and Against Sterilization Abuse (CARASA), formed in 1977 by representatives of NOW, NARAL, and the Socialist Workers' Party.²⁵⁹ CARASA emphasized the importance of abortion access and focused primarily on the needs of poor, non-white women.²⁶⁰ The group also argued that the struggle for abortion rights had to be part of a broader battle for reproductive justice, a program that included free universal daycare, welfare rights, decent health care, and opposition to population control.²⁶¹ As a 1979 policy statement released by the organization asserted: "Reproductive freedom means the freedom to have as well as not to have children. Policies that restrict women's right to have or raise children—through forced sterilization or the denial of adequate welfare benefits—are directly related to policies that compel women to have children."²⁶²

As African American feminists became more active in the abortion-rights movement, other members of the black community became more receptive to the idea of abortion rights. African Americans have remained more opposed to abortion than have members of other ethnic or racial groups.²⁶³ This likely reflects a variety of factors likely to influence a person's views on abortion, including family income, years of education, region of residence, frequency of church attendance, and religious denomination.²⁶⁴

Just the same, published studies on race and views on abortion suggest that the post-*Roe* changes to the debate might have had some impact on the views of

257. See *id.* at 184.

258. See *id.* at 185; see also Barbara Smith, *Combahee River Collective: A Black Feminist Statement*, in 9 OFF OUR BACKS 6, 8 (1979).

259. See NELSON, *supra* note 9, at 135.

260. See *id.* at 133.

261. See *id.* at 133-43.

262. *Id.* at 133.

263. See, e.g., ABC News/BeliefNet Poll: *Abortion* – 6/24/01, ABC NEWS (July 2, 2011), <http://abcnews.go.com/images/PollingUnit/855a2Abortion.pdf>.

264. See, e.g., Elaine J. Hall & Myra Marx Ferree, *Race Differences in Abortion Attitudes*, 50 PUB. OPINION Q. 193, 206 (1986) (identifying as a supposed explanation of differing racial attitude "the traditional values of [African American] subculture"); John Lynxwiler & David Gay, *Reconsidering Race Differences in Abortion Attitudes*, 75 SOC. SCI. Q. 67, 71-72 (explaining the importance of income, education, region of residence, community size, and church attendance); Clyde Wilcox, *Race, Religion, Region and Abortion Attitudes*, 53 SOC. RELIGION 97, 105 (1992) (finding that "the racial gap in abortion attitudes is closing over time" and suggesting that "[r]acial differences in religious orthodoxy and religiosity are an important source of racial differences in abortion attitudes").

African Americans.²⁶⁵ Controlling for a variety of factors likely to determine a person's views on abortion, one study found that the differences in racial attitudes toward abortion decreased substantially from 1972 to 1980.²⁶⁶ Although some difference in racial attitudes remained, race alone was a less significant predictor of attitudes for abortion between 1975 and 1980 than it had been between 1972 and 1974, particularly when researchers controlled for other relevant variables, such as religiosity.²⁶⁷

By 1975, moreover, the Black Panthers had endorsed abortion rights.²⁶⁸ The organization first reversed positions when protesting the conviction of Dr. Kenneth Edelin, an African American obstetrician-gynecologist convicted for manslaughter in the death of a fetus during a late term abortion.²⁶⁹ In 1977, the Panthers ran a series of articles criticizing the Hyde Amendment and calling for access to abortion as part of a broader program of welfare rights.²⁷⁰

This change in racial politics came as debate turned to the meaning of and justification for *Roe*. Advocates defending *Roe*, much like the decision itself, focused on claims involving constitutional rights. Fighting for *Roe* meant downplaying arguments about population control and highlighting and developing the kinds of claims advanced by the Court. As population control claims and advocates became a smaller part of the abortion-legalization cause, as we have seen, the racial politics of abortion changed.

VII. WRITING THE HISTORY OF RACE AND ABORTION IN THE LEGISLATURES AND THE COURTS

Laws defunding Planned Parenthood or banning race-selection abortion draw on an alternative narrative, forged by the anti-abortion movement, about the history of race, population control, and abortion. Researchers opposed to abortion, such as Angela Franks and Mary Meehan, began writing this history in the mid-2000s.²⁷¹ For example, in reviewing Franks's book on Margaret Sanger, *The National Right to Life News* asserted that "the primary agenda driving Planned Parenthood and like-minded 'family planning' organizations/population control agencies has never been women's health or their liberation, but control of their fertility for eugenic purposes."²⁷²

265. See, e.g., Michael Combs & Susan Welch, *Blacks, Whites, and Attitudes Toward Abortion*, 46 PUB. OPINION Q. 510, 518 (1982).

266. *Id.* at 516.

267. *Id.*

268. NELSON, *supra* note 9, at 109.

269. *Id.*

270. *Id.*

271. See Meehan, *supra* note 7; see also ANGELA FRANKS, MARGARET SANGER'S EUGENIC LEGACY: THE CONTROL OF FEMALE FERTILITY (2005).

272. O'Bannon, *supra* note 7, at 22.

This claim reflects many of the premises of anti-abortion arguments about eugenics and abortion. One treats the eugenics and population-control movements as being functionally identical to one another. For example, a 2010 edition of the *Human Life Review* suggested that eugenics was "[l]ater called ... population control."²⁷³ Similarly, Mary Meehan has claimed: "Thomas Malthus's obsession with population numbers and Francis Galton's ideas about breeding better babies through eugenics eventually led to a U.S. population-control movement that attained major power by the late 1960s."²⁷⁴

A second claim asserts that the abortion-rights movement is related to the population-control movement (and by extension, to the eugenics movement). Meehan contends, for example: "Anyone concerned about civil rights should be alarmed by abortion as lethal discrimination against poor people and ethnic minorities. . . . Eugenicists long have targeted both groups."²⁷⁵

Legislators who form part of the movement to defund Planned Parenthood invoke this history in promoting a new legal agenda.²⁷⁶ For example, Senator Rick Santorum, a former presidential candidate, endorsed federal defunding legislation, explaining: "This [Planned Parenthood] is an organization that was founded on the eugenics movement, founded on racism Its origins are horrific. You can say well, it's not that anymore. It's not far from where it was in my opinion in its activities and in its motivations."²⁷⁷

In 2011, Herman Cain, another former presidential candidate, offered a similar criticism of Planned Parenthood.²⁷⁸ Cain emphasized that Margaret Sanger, the founder of Planned Parenthood, had worked to "prevent[] the increasing number of poor blacks in this country by preventing black babies from being born."²⁷⁹ In Cain's view, this history continues to shape Planned Parenthood's work: a form of "planned genocide" that targets racial minorities and the poor.²⁸⁰

Such arguments have also influenced some successful state legislative campaigns in Arizona and have contributed to votes in the United States House of Representatives favoring laws defunding Planned Parenthood or banning race-selection abortion. Since 2011, states including Texas, Kansas, Indiana, and Wisconsin have passed laws denying Medicaid or Title X funding to

273. Messall, *supra* note 7, at 98.

274. Meehan, *supra* note 7, at 15.

275. *Id.* at 24; see also Kathryn Jean Lopez & Anne Conlon, *Combating Roe: One Word at a Time*, HUMAN LIFE REV., Jan. 1, 2012, at 84.

276. See *supra* note 16 and accompanying text.

277. Terkel, *supra* note 16.

278. See *Planned Parenthood Rejects Cain Claim Abortion Clinics Are Aimed at Black "Genocide"*, FOX NEWS (Oct. 30, 2011), <http://www.foxnews.com/politics/2011/10/30/planned-parenthood-rejects-cain-claim-abortion-clinics-are-aimed-at-black>.

279. *Id.*

280. *Id.*

organizations that also provide abortion services.²⁸¹ Since the passage of the Hyde Amendment in 1976 and the introduction of a federal law banning the use of Title X monies for abortion, providers cannot use either Title X or Medicaid funds to pay for abortion services.²⁸² The new defunding laws, by contrast, deny Medicaid or Title X funds to organizations that provide or advocate for abortion even when the funds would exclusively cover non-abortion services, such as contraception or STI testing.²⁸³ In 2011, by a vote of 240 to 185, the federal House of Representatives passed an amendment to a government funding bill that would have defunded Planned Parenthood; in the House, eleven Democrats voted for the amendment before it was subsequently defeated in the Senate.²⁸⁴ A campaign for similar laws is already under way in Pennsylvania and Ohio.²⁸⁵ At times, the history of race and abortion has played a part in justifying policy makers' support for these bills. For example, North Carolina House Majority Leader John Stam argued that "Planned Parenthood in general, and Margaret Sanger in particular, its founders, were the driving force behind that [eugenics] effort."²⁸⁶ In explaining his support for a defunding bill, Stam argued: "[W]e should not be supporting the perpetrators of that program."²⁸⁷

Similar concerns animate proposed race-selection abortion laws. Arizona's race-selection abortion law criminalizes any abortion "sought based on the sex or race of the child or the race of a parent of that child."²⁸⁸ While women choosing an abortion for any purpose may not be penalized, the law covers anyone supposedly performing or "accepting monies to finance" such an abortion, as well as anyone who uses "force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing" such

281. On the state of defunding laws, see, for example, Naomi Wolf, *What Really Lies Behind the "War on Women,"* GUARDIAN (May 24, 2012), <http://www.guardian.co.uk/commentisfree/cifamerica/2012/may/24/what-lies-behind-war-on-women-naomi-wolf>. In addition, Maine, Arizona, and Tennessee have either passed such a law or introduced a bill to do so. See *id.* For further study of the defunding movement, see Mary Ziegler, *Sexing Harris: The Law and Politics of the Movement to Defund Planned Parenthood*, 60 BUFF. L. REV. 701 & n.1 (2012).

282. Title X, enacted in 1970, provided that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." 42 U.S.C. § 300a-6 (2006). For its part, the Hyde Amendment, originally passed in 1976, prohibits the use of Medicaid funds for abortion. Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997).

283. See, e.g., *infra* notes 321-323 and accompanying text.

284. See, e.g., Jennifer Steinhauer, *Congress Passes Budget Bill, But Some in G.O.P. Balk*, N.Y. TIMES (Apr. 15, 2011), <http://www.nytimes.com/2011/04/15/us/politics/15congress.html>. For the roll call vote on the federal defunding bill, see 157 CONG. REC. H1235 (daily ed. Feb. 18, 2011).

285. On the campaign to defund Planned Parenthood in Pennsylvania, see, for example, Laura Bassett, *Planned Parenthood in Pennsylvania May Be Defunded*, HUFFPOST POLITICS (May 22, 2012, 4:54 PM), http://www.huffingtonpost.com/2012/05/22/planned-parenthood-pennsylvania_n_1537256.html. On the campaign in Ohio, see Aaron Marshall, *Ohio House Republicans Move to Defund Planned Parenthood*, CLEVELAND PLAIN DEALER (Apr. 17, 2012), http://www.cleveland.com/open/index.ssf/2012/04/ohio_house_republicans_move_to.html.

286. *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 325 (M.D.N.C. 2012).

287. *Id.*

288. ARIZ. REV. STAT. ANN. § 13-3603.02(A) (2011).

an abortion.²⁸⁹ Violators of the Arizona statute may be found guilty of a felony, and the statute explicitly creates a civil-rights action on behalf of the father of the aborted child.²⁹⁰ The statute protects against the possibility of race- (or sex-) selection abortion by requiring providers to sign an affidavit stating that the provider “has no knowledge that the child to be aborted is being aborted because of the child’s sex or race.”²⁹¹

In promoting the bill, Representative Steve Montenegro, the chief sponsor of Arizona’s race-selection law, stressed evidence that “abortions were being performed disproportionately among minority populations” and that “some clinics ha[d] been exposed as receiving financial contributions from sources that stipulate the money be used to slow the growth of minority populations.”²⁹² Relying exclusively on the fact that a disproportionate number of women of color chose abortion, Montenegro implied that racism influenced not only the views of past family-planning activists but also the work of contemporary abortion providers. Representative Albert Hale, a Native American, explained his support for the bill by reference to the history of race, abortion, and population control—in his words, the “decimation of . . . Native Americans.”²⁹³

Since 2011, similar arguments played a part in an unsuccessful Georgia campaign to ban race- and sex-selection abortions.²⁹⁴ The campaign featured billboards and advertising suggesting that minority children were becoming “an endangered species” by virtue of abortion used as a tool for population control.²⁹⁵

Similarly, at the federal level, in early 2012, Representative Trent Franks (R-AZ) proposed the Prenatal Nondiscrimination Act (PRENDA) and justified his bill in similar terms. PRENDA would ban sex- and race-selection abortions, or those “performed for purposes of eliminating an unborn child because the child or the parent of the child is of an undesired race.”²⁹⁶ Like the Arizona law, PRENDA would provide civil and criminal penalties for anyone funding, performing, coercing or transporting a woman across state lines for the purpose

289. *Id.*

290. The statute provides a similar action for maternal grandparents in cases in which the woman seeking such an abortion is a minor. *See id.* § 13-3603.02(C).

291. *Id.* § 36-2157.

292. Coakley, *supra* note 16.

293. Caitlin Coakley Beckner, *House OKs Outlawing of Race and Gender Abortions*, ARIZ. CAPITOL TIMES (Feb. 21, 2011), <http://azcapitoltimes.com/news/2011/02/21/bill-to-ban-selection-abortion-gets-initial-oks>.

294. *See* Stephanie Mencimer, *Behind the GOP's Sudden Civil Rights Crusade*, MOTHER JONES (Dec. 27, 2011, 3:00 AM), www.motherjones.com/politics/2011/12/race-gender-selection-abortion-bills-trent-franks.

295. *See* Tom Krattenmaker, *Abortion's Middle Ground? Reducing Them*, USA TODAY (May 2, 2010), http://usatoday30.usatoday.com/news/opinion/forum/2010-05-03-column03_ST_N.htm; Star Parker, *Star Parker: Campaign Fights Back Against Black Genocide of Abortion*, DESERET NEWS (Jan. 22, 2011), <http://www.deseretnews.com/articles/700102872/campaign-fights-back-against-black-genocide-of-abortion.html>.

296. Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3451, 112th Cong. § 2(a)(2)(C) (2012).

of obtaining a race- or sex-selection abortion.²⁹⁷ Significantly, PRENDA would also create a reporting requirement to law enforcement for any “physician, physician’s assistant, nurse, counselor, or other medical or mental health professional” who is aware of “known or suspected violations” of the statute.²⁹⁸

The bill drew on fears about population control, race, and abortion, asserting that “race-selection abortions have the effect of diminishing the number of minorities in the American population.”²⁹⁹ Representative Franks put the point more baldly, reasoning that “[f]ar more black children, far more of the African American community is being devastated by the [abortion] policies of today than were being devastated by the policies of slavery.”³⁰⁰ After House Republicans invoked a rule allowing for non-binding votes that fell short of the required two-thirds majority, the House voted 246 to 168 for the bill,³⁰¹ raising the possibility that Congress will later revisit the issue. As had been the case with a federal defunding law, PRENDA had some bipartisan support, as twenty Democrats joined 226 Republicans voting for the bill.³⁰²

Moreover, PRENDA, like the Arizona statute, would have more than a symbolic impact. Both laws would require abortion providers to interrogate women about their reasons for choosing an abortion, making more traumatic what is, for many, an already stressful experience. PRENDA would go further, allowing any health-care worker to report and potentially interfere with suspect decisions and giving virtually no guidance as to what would constitute such a suspicion or make it reasonable.³⁰³ As abortion-rights activists have argued, the scrutiny and reporting required by PRENDA would likely have a significant chilling effect on abortion.³⁰⁴

For lawmakers considering defunding or race-selection legislation, the racial history and politics of abortion continue to remain a central issue. Legislators like Representative Franks suggest that a legacy of racism in the movements for population control and abortion rights still shapes the work of Planned Parenthood and other supporters of legal abortion.³⁰⁵ Opponents of the bills suggest that PRENDA represents a thinly disguised attempt to undermine abortion rights: for example, Representative John Conyers (D-MI) called

297. *Id.* § 3(a).

298. *Id.*

299. *Id.* § 2(a)(2)(E).

300. Mencimer, *supra* note 294.

301. See 158 CONG. REC. H3289 (daily ed. May 31, 2012) (recorded vote).

302. See *House Vote 299 - Rejects Ban on Sex-Selective Abortions*, N.Y. TIMES: INSIDE CONGRESS (May 29, 2012), <http://politics.nytimes.com/congress/votes/112/house/2/299>.

303. Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3951, 112th Cong. § 3(a).

304. See, e.g., Rep. Judy Chu, *PRENDA: A Wolf in Sheep's Clothing*, HUFFINGTON POST (Feb. 8, 2011), http://www.huffingtonpost.com/rep-judy-chu/prenda-a-wolf-in-sheeps-c_b_1262806.html.

305. See, e.g., Cheryl Weitzstein, *Debate Heated on Sex Selection Abortion Ban*, WASH. TIMES (May 30, 2012), <http://www.washingtontimes.com/news/2012/may/30/debate-heated-on-sex-selection-abortion-ban>.

PRENDA “just the latest in a series of measures intended to chip away” at abortion rights.³⁰⁶

Legislators supporting measures defunding Planned Parenthood or banning race-selection abortion use the history of the racial politics of abortion in several ways. First, they point to the historical relationship between the movements for eugenics, population control, and abortion as evidence that racism still influences the contemporary abortion-rights movement. In the case of defunding Planned Parenthood, the supposed influence of racism on the contemporary movement serves to justify laws denying public monies to an organization that still supposedly caters to racist supporters. By contrast, in the context of race-selection laws, legislators invoke the relationship between the movements for population control, eugenics, and abortion rights in arguing that race-selective abortions are a real problem deserving legislative attention rather than a smokescreen for narrowing abortion rights.

Legislators have raised important questions about the disproportionate number of women of color who seek abortions. As Khiara Bridges has shown, racial disparities in reproductive health care are real and disturbing.³⁰⁷ As Bridges argues, race impacts not only women's access to reproductive health care but also the attitudes of providers and the quality of care available.³⁰⁸ But punishing abortion providers for the past relationship between the movements for population control and abortion rights will do little to address these disparities. The contemporary abortion-rights movement bears little resemblance to past drives for eugenics or population control. Even population controllers involved in the campaign to legalize abortion in the 1970s had little to do with the racially charged demands of eugenic legal reformers. It is worth using the law to tackle racial disparities in reproductive health care, but to the extent that they draw on a flawed historical account, existing legislative strategies promise to achieve little change.

The materials presented here also contribute to discussion of how courts ought to adjudicate constitutional challenges to laws defunding Planned Parenthood or race-selection abortions. As race-selection and defunding legislation cases reach the courts, opposing attorneys have started to contest the history of race and abortion. Consider, for example, *Cansler*, a case involving a challenge to North Carolina's ban on Title X funding for organizations that provide abortions directly or through affiliates.³⁰⁹ In the *Cansler* litigation, Planned Parenthood argued, among other things, that the defunding law

306. *Id.*

307. See generally BRIDGES, *supra* note 29 (illustrating how medical professionals socially construct race and establishing that this construction serves to marginalize women in broader conversations about Medicaid and infant mortality).

308. *Id.*

309. *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310 (M.C.N.C. 2012).

represented an unconstitutional bill of attainder.³¹⁰ Generally, to constitute a bill of attainder, a statute must target specific individuals and impose punishment on them without a judicial trial.³¹¹ The issue in *Cansler* was whether the legislature had a legitimate, nonpunitive purpose for its action.³¹² Planned Parenthood invoked the legislative history of the defunding law to indicate the punitive intent behind it.³¹³ This history, as Planned Parenthood indicated, suggested a legislative intent to punish past and present "perpetrators" of racist programs.³¹⁴ If Planned Parenthood no longer carries out a racist program, the argument goes, punishing the organization for a real (or fictitious) past would be punitive. By contrast, if the organization still targeted minority groups, Planned Parenthood's bill-of-attainder argument would have less force—a defunding law would express disapproval of an immoral and possibly illegal practice rather than a mere desire to punish. Distinguishing between a punitive and non-punitive legislative intent may well require courts to determine whether accusations of past and present racism carry factual weight.

The legitimacy of historical justifications of this kind will likely play a part in upcoming defunding litigation. These cases fall partly under the Supreme Court's jurisprudence on unconstitutional conditions.³¹⁵ Under this line of cases, the state cannot penalize the exercise of particular rights or deny benefits so as to "produce a result which [it] could not command directly."³¹⁶ The defunding laws tend to differ from the program upheld by the Supreme Court in *Rust v. Sullivan*.³¹⁷ *Rust* ultimately upheld regulations promulgated by the Secretary of Health and Human Services prohibiting the use of Title X funds for programs in which abortion counseling, referrals, or promotion were included.³¹⁸ Defunding laws differ from the one upheld in *Rust*, since those laws reach organizations that carry out abortion-related speech through "separate and independent projects" rather than limiting, in a particular program, the use of funds for abortion-related speech.³¹⁹ *Rust* specifically left

310. *Id.* at 322.

311. *See, e.g.,* *United States v. Lovett*, 328 U.S. 303, 315 (1946) ("[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.").

312. *See Cansler*, 877 F. Supp. 2d at 324-25.

313. *See id.*

314. *See id.*

315. Scholars have argued that this body of law is conceptually incoherent. *See, e.g.,* Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 103 (1988); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1496 (1989); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 595 (1990).

316. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

317. 500 U.S. 173 (1990).

318. *Id.* at 177-80.

319. *Id.* at 196-97.

open the constitutionality of laws punishing organizations that carry out abortion-related services or speech through separate projects.³²⁰

Defunding laws vary in the degree to which they explicitly target Planned Parenthood. Some laws, like the one introduced in North Carolina, explicitly prohibit the allocation of Title X funds to “Planned Parenthood, Inc. or its affiliates.”³²¹ Others, like those in place in Texas or Arizona, explicitly deny funding to entities or facilities that perform elective abortions.³²² By contrast, for the purpose of Title X funding, the Kansas statute gives priority to “public entities (state, county, local health departments and health clinics)” and, secondarily, to “non-public entities which are hospitals or federally qualified health centers that provide comprehensive primary and preventative care in addition to family planning services.”³²³ The effect and apparent purpose of the law was still to defund Planned Parenthood; affidavits, press releases, and media comments cited by the *Brownback* court highlighted the state legislature’s intent to target the organization.³²⁴

In making out an unconstitutional-conditions claim, Planned Parenthood affiliates in different states have argued, under the First and Fourteenth Amendments, that such defunding laws punish providers for “participation in unrelated [speech and] conduct.”³²⁵ Planned Parenthood first asserts that defunding laws impermissibly penalize the organization and other abortion providers for their speech rights and political advocacy in favor of abortion rights.³²⁶ Alternatively, Planned Parenthood argues that the defunding laws constitute an undue burden on women’s right to abortion under *Planned Parenthood v. Casey* by making providers less accessible or making it impossible for women to obtain abortions in a particular jurisdiction.³²⁷

In defending themselves against these claims, states have to identify legitimate purposes behind their laws.³²⁸ Texas and Kansas have argued that their defunding laws express a purpose to promote childbirth over abortion.³²⁹

320. *See id.*

321. H.B. 200 § 10.19, 2011 Leg., Reg. Sess. (N.C. 2011), 2011 N.C. Sess. Laws 117.

322. For the Texas law, see 2011 Tex. Gen. Laws §§ 300, 335, 4025, 4020; 1 TEX. ADMIN. CODE § 354.1363(a) (2012). For the Arizona law, see ARIZ. REV. STAT. ANN. § 35-196.05 (West 2012).

323. *Planned Parenthood of Kan. & Mid-Mo. v. Brownback*, 799 F. Supp. 2d 1218, 1223-24 (D. Kan. 2011).

324. *See id.*

325. *Id.* at 1234.

326. For arguments of this kind, see, for example, *Brownback*, 799 F. Supp. 2d at 1234; *Planned Parenthood of Cent. N.C. v. Cansler*, 804 F. Supp. 2d 482, 494 (M.D.N.C. 2011); *Planned Parenthood of Ark. & E. Okla. v. Cline*, No. CIV-12-1245-F, 2012 WL 6700364, at *5 (W.D. Okla. Dec. 24, 2012); *Planned Parenthood of Greater Memphis Region v. Dreyzehner*, 853 F. Supp. 2d 724, 733 (M.D. Tenn. 2012); and *Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 828 F. Supp. 2d 872, 881-86 (W.D. Tex. 2012) and.

327. *See, e.g., Cline*, 2012 WL at *5.

328. *See, e.g., Planned Parenthood of Mid-Mo. & E. Kan. v. Dempsey*, 167 F.3d 458, 463-64 (8th Cir. 1999).

329. *See, e.g., Planned Parenthood Ass’n of Hidalgo Cnty. Tex. v. Suehs*, 692 F.3d 343, 350 (5th Cir. 2012); *Brownback*, 799 F. Supp. 2d at 1233-35.

This argument seems problematic, however, since the record in defunding cases tends to indicate that Planned Parenthood did not use funds under the statute for abortions and required affiliates providing those services to be legally and financially separated from clinics offering non-abortion care.³³⁰ Another possible state interest, as suggested by *Cansler*, is a legislative concern about the past and present racial biases plaguing abortion-rights advocacy and reproductive health care.³³¹ Like the *Cansler* court, other judges may have to determine whether such concerns are sincere and represent a legitimate governmental purpose.

Similar issues will likely arise with respect to the constitutionality of race-selection laws. Under *Casey*, a statute may constitute an undue burden on a woman's right to choose abortion if that law has the purpose or effect of creating a substantial obstacle to the woman's ability to exercise that choice.³³² As we have seen, opponents of PRENDA and other race-selection laws argue that the statutes reflect only an impermissible desire to obstruct access to abortion. By contrast, supporters of laws like PRENDA stress that the legacy of past racism in the abortion-rights movement has tangible and disturbing effects. In determining whether a race-selection law is unconstitutional under *Casey*, courts may have to determine whether concern about past and present racism is a legitimate state interest or a mere pretext for narrowing abortion rights.

In a variety of doctrinal areas, the courts may well have to evaluate the legitimacy of historically based legislative concerns about racism and the abortion-rights movement. The history offered here does not necessarily suggest that legislators promoting defunding or race-selection laws are insincere, and examination of legislative history or intent certainly requires case-by-case analysis of legislative text, history, and other conventional sources of statutory interpretation. Indeed, the historical claims forged by anti-abortion activists and legislators have power because they have some factual basis. In the 1970s, some population controllers did have ties to the eugenic legal reform movement, and the abortion-rights movement did work with groups interested in curbing population growth. Some supporters of contraception and abortion did use eugenic rhetoric or focus on reducing the size of poor or minority populations.

Just the same, a more nuanced historical perspective should reinforce concerns on the part of courts that the purpose of defunding or race-selection laws is punitive or discriminatory. While some population activists did have ties to the eugenic legal reform movement, many population controllers had different aims, priorities, and arguments than did eugenic reformers. And while

330. See, e.g., *Suehs*, 828 F. Supp. 2d at 884-86.

331. *Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 322 (M.D.N.C. 2012) (discussing Planned Parenthood's claim that state legislators "invoked the supposed wrongdoing that Planned Parenthood and its founder, Margaret Sanger, allegedly engaged in decades ago").

332. 505 U.S. 833, 877 (1992) (plurality opinion).

some abortion-rights activists used population-based claims or joined the population movement, the movements for abortion and population control differed considerably from one another. Legislators invoking concerns about race, eugenics, population control, and abortion speak to past experiences that defined very little about the past or present organized movement for abortion rights. The historical claims underlying such laws should raise judicial suspicions about legislative intent.

Abortion-rights activists themselves also stand to learn something from this analysis. Proponents of legal abortion tend to deemphasize the ways in which the movements for legal abortion and contraception have changed over time. For example, in discussing Margaret Sanger, Planned Parenthood describes her views as mirroring almost exactly those articulated by the movement today. Activists suggest that Sanger “established the principle that a woman’s right to control her own body is the foundation of her individual human rights.”³³³ When abortion-rights activists do acknowledge the past relevance of eugenics or population control, they tend to downplay their importance. For example, in replying to Herman Cain’s accusations, Planned Parenthood claimed that “Sanger worked for social and racial justice when segregation was the law of the land,” while only conceding that Sanger “made statements that were wrong then and are wrong now.”³³⁴

The abortion-rights movement should acknowledge the ways in which the contemporary abortion-rights movement differs both from the efforts of previous decades and from earlier campaigns for family planning or population control. Failing to acknowledge the past fuels anti-abortion claims that proponents of *Roe* have something to hide. Ignoring the past also denies credit to the activists who worked so hard to reframe abortion as a right for women. It was not inevitable that the battle for abortion rights would focus on equality or autonomy for women. The terms of today’s debate directly reflect the work of earlier movement members who saw women’s experiences as central to the abortion question. Acknowledging the movement’s evolution does justice to those who reframed the abortion-rights cause.

VIII. CONCLUSION

A better understanding of *Roe*’s role in the racial politics of abortion provides important historical context for ongoing political debates about Planned Parenthood, health-care funding, abortion, and race. Too often, these debates have turned on historical claims that are incomplete, oversimplified, or unclear. This Article offers an important historical foundation for current debates.

333. See Sanger, *supra* note 8.

334. Williams, *supra* note 8, at 47.

By reconsidering these claims in proper historical context, the Article shows that current claims offered by anti-abortion legislators and activists about race and abortion are flawed. In the years immediately before and after *Roe*, some abortion-rights organizations did use population-based arguments for abortion or form alliances with population organizations. Some population controllers, moreover, did have ties to the eugenic legal reform movement or work primarily to reduce population growth among the poor. Activists involved in the abortion debate, however, tended to focus on population growth among white, middle class individuals, stressing the importance of sexual freedom and environmental preservation. Belonging to the population-control movement did not necessarily mean that an activist was racially biased.

As importantly, some within the abortion-rights movement of the 1970s resisted the population frame of the issue, arguing that women's-rights arguments were more principled and resonant. The movements for population control and abortion were diverse in the 1970s and evolved a good deal over time.

At times, social movements, legislators, and judges contest the history of race, population control, and abortion as part of current battles about laws defunding Planned Parenthood or banning race-selection abortions. Proponents of these laws suggest that the past abortion-rights movement worked to reduce the size of the minority population and continues to do so today. In court, opponents of the laws point to these claims as evidence of an impermissibly punitive legislative purpose.

These struggles have raised the salience of important issues involving the history of the abortion-rights movement and racial disparities in abortion and other reproductive health care. As the materials here suggest, however, legislators cannot successfully address those disparities by punishing clinics. The population-control movement of the 1970s, and particularly those involved in the effort to legalize abortion, were not predominantly racist, and even in the decade after *Roe*, the two movements differed substantially from one another. Over the course of the 1970s, moreover, the abortion-rights movement changed a great deal, as feminists redefined the priorities, identities, and arguments of their organizations. Today, the connections between race, population control, and abortion are tenuous at best. Legislation based on this connection will do little to address any racial disparities in reproductive health care.

As defunding and race-selection laws continue to come before the courts, judges will have to determine whether or not legislators' historical concerns constitute a legitimate government purpose. It may well be that legislators are sincerely concerned about racism, population control, and abortion, but as the materials here indicate, any concerns of this kind are overstated, and courts should carefully scrutinize the intentions of legislators who invoke the history of race as a justification for punishing providers.