Conceiving Criminality: An Evaluation of Abortion Decriminalization Reform in New York and Great Britain

What are the effects of the partial criminalization of abortion? By partial criminalization, I mean a situation in which access is legal only when certain conditions are met. When these conditions, defined in penal codes, are not met, the procedure becomes illegal and the individual runs the risk of being found to have committed a crime. More critically, are the effects of partial criminalization really so different from the effects of other forms of abortion regulation? This Note considers these questions by examining reform movements in New York and Great Britain that seek to decriminalize abortion by moving the procedure's regulation from the penal code into the public health code.

This Note examines how laws make abortion feel like a crime and looks to the history of abortion laws, the current laws, and the reform movements in both jurisdictions to posit that the consequences of partial abortion criminalization vary depending on the existence of other laws and legal norms that question its partial criminalization. Finally, this Note challenges assumptions about the effects of abortion regulation by analyzing it through the lens of stigma. It distinguishes between the stigma associated purely with abortion and the stigma associated more generally with criminal law, and considers how the law, in its penal and non-penal forms, creates both types of stigma and guilts women into feeling as though they have committed a crime even when they have lawfully obtained abortions. In doing so, this Note recognizes the myriad forms beyond criminalization through which the law, and more broadly society, penalizes women who choose to terminate their pregnancies.

INTRODUCTION

Does location always matter? A person, place, or thing's location influences and implies all sorts of characteristics, such as accents, dialects, cuisines, cachet, and even rap styles.[1] Like these social cues and mores, the law also recognizes the importance of location. Federal civil procedure, for example, requires personal and subject matter jurisdiction; a complaint filed in the wrong court or jurisdiction will be removed or thrown out until a lawyer finds its proper place. While many laws may not be substantively concerned with location, laws carry an implicit consideration of location through their placement in a particular code—be it the civil code, business code, public health code, or criminal code. Lawmakers' decisions to place certain laws in one code over another may be attributable to some thoughtful rationale. The effects of such a decision may be practical, symbolic, or theoretical in nature.

The law does more than recognize that it has different rules

1. ALL MUSIC GUIDE TO HIP HOP: THE DEFINITIVE GUIDE TO HIP HOP (Vladimir Bogdanov ed., 2003); Dave One, *The Geography of Hip Hop*, VICE NEWS (Nov. 30, 2001, 7:00 PM), https://www.vice.com/en_us/article/nn3avk/the-geography-v8n10 [https://perma.cc/TSL8-3AN8].

for different locations. The Supreme Court's abortion jurisprudence also recognizes the abstract but crucial importance of allowing women to choose how to locate themselves within society based on their moral and situational imperatives, through the Court's appreciation for women's decisional autonomy and freedom from undue state interference.[2] The woman's decision regarding whether she decides to carry to term or terminate her pregnancy entails personal, moral, emotional, physical, financial, and social consequences that affect her place and role in family, economic, and social life. In light of the profound intimacy of this decision and its vast ramifications, how the law regulates abortion is of the utmost importance. But does that necessarily mean that the location of abortion within a jurisdiction's legal codes carries any significance?

Currently, both New York State and the United Kingdom regulate abortion in their penal codes, meaning that the procedure is partially criminalized.[3] Legislation has been proposed in both jurisdictions that would not only expand access to abortion, but would also wholly decriminalize abortion by moving its regulation from the penal code to the public health code.[4] While it may seem incommensurate to compare a U.S. state to a country, both levels represent the principal sites of lawmaking on abortion in their respective countries. Regulation of abortion in the United States is within the purview of the states, whereas legislation on abortion in the United Kingdom has been passed on a national, rather than local, level.[5]

---

2. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992) ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").

3. *See infra* Part I. This Note refers to "Great Britain" throughout, in recognition of the differences between the abortion law of Northern Ireland and those of the rest of the United Kingdom; it refers to the "United Kingdom" only where Northern Ireland is explicitly included.

4. *See* Assemb. B. A01748, 2017–2018, Reg. Sess. (N.Y. 2017); S.B. S02796, 2017–2018, Reg. Sess. (N.Y. 2017). On the decriminalization movement in the United Kingdom, see *Reproductive Health (Access to Terminations) Bill 2016-17*, U.K. PARLIAMENT, https://services.parliament.uk/bills/2016-17/reproductivehealthaccesstoterminations.html [https://perma.cc/A68K-QT49]. *See also* Siobhan Fenton, *MPs Vote to Decriminalise Abortion in England and Wales*, INDEPENDENT (Mar. 13, 2017), http://www.independent.co.uk/news/uk/politics/abortion-decriminalisation-england-wales-mps-debate-parliament-a7627421.html [https://perma.cc/2M9B-URA2].

5. *See infra* Part I.B for a more detailed explanation of the present status of legislation on the topic of abortion in Great Britain. There is some dispute as to whether abortion is a "devolved" issue in the United Kingdom. Devolution is the statutory delegation of powers from the central government to a regional or local level. However, the major legislation surrounding abortion in the United Kingdom has been passed by Parliament, and legislation continues to be proposed on the national level. *See* BRITISH MED. ASS'N,

This Note aims to evaluate the present partial criminalization of abortion in New York and Great Britain and then analyze how non-criminal and criminal law stigmatize abortion. In doing so, this Note seeks to clarify how non-penal laws have practically criminalized legal abortion by stigmatizing women and limiting access to the procedure, while abortion has been practically normalized in some jurisdictions even though it is regulated in the penal code. It demonstrates that the effects of partially criminalizing abortion are not uniform, and in doing so questions the essentializing nature of the rhetoric surrounding the meaning and effects of partial criminalization.

In the United States, since the landmark case *Roe v. Wade*,[6] the subject of abortion has been ensnared in a national, highly factious debate, imbued with deep religious, moral, and political overtones.[7] At times this debate has more closely resembled a dysfunctional impasse than an actual discussion. In Great Britain, the debate surrounding abortion mirrors the one happening in the United States, in that there are two opposite movements that ardently believe that one of two competing interests, the woman's decisional autonomy or the unborn life, should trump the other.[8] The result is a similar legal standstill, as any sort of a happy compromise between the two groups seems highly unlikely. However, the abortion debate in Great Britain does not occupy the political and cultural centrality that it does in the United States and has not become violent, as it has in the United States.[9]

New York's legislation is particularly unique when considered in the broader American context, where the majority of proposed legislation on abortion aims to restrict access to the procedure, rather than to expand it.[10] Generally, states occupy a role in which they limit abortion access by passing restrictive laws, and courts preserve the status quo or expand access by striking down the laws. After *Roe*, the contours of the process in which abortions may be ob-

---

DECRIMINALISATION OF ABORTION: A DISCUSSION PAPER FROM THE BMA 16–18 (Feb. 2017).

6. Roe v. Wade, 410 U.S. 113 (1973).

7. CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA 1 (2017).

8. Lesley Hoggart, *Internalised Abortion Stigma: Young Women's Strategies of Resistance and Rejection*, 27 FEMINISM & PSYCHOL. 186, 187 (2017).

9. *See* COLIN FRANCOME, ABORTION IN THE USA AND THE UK 8 (2004); *see generally Back-Off: The Campaign*, BACK-OFF, https://back-off.org/the-campaign/ [https://perma.cc/JQ56-LPQS].

10. *Criminalization of Self-Abortion*, NAT'L INST. FOR REPROD. HEALTH, https://www.nirhealth.org/decriminalize/ [https://perma.cc/MEA6-L2A7] (noting that since 2010, at least 379 state laws intending to reduce access to abortion have been passed).

tained are determined through an on-going dialogue between states and federal courts: some conservative states pass laws that functionally serve to increase the requirements and legal hurdles a woman must go through before she can get an abortion, and the courts then consider whether such requirements are constitutionally sound.

Beyond the substantive expansion of categories in which abortion is permitted, supporters of the proposed laws in both New York State and Great Britain contend that abortion's regulation in the penal code itself stigmatizes abortion by treating it as distinct from a "normal" medical procedure.[11] These supporters argue that locating abortion in the penal code makes women seeking to terminate their pregnancies feel as though their actions are criminal, when in both jurisdictions, despite its formal criminal status, abortion is readily accessible as a practical matter. In the opinion of these supporters, these women are only seeking to obtain a medical service and thus should not face the stigma of criminalization.[12]

The two transatlantic decriminalization movements present the question of what really makes abortion feel "criminal," or perhaps more accurately, what makes abortion feel like a near-criminal act. Attributing a perception of criminality to abortion because of where it is codified might be an unrealistic description of what stigmatizes abortion and may better describe a discursive reality than an actual one. Advocates for reform in the Royal College of Obstetricians and Gynecologists have noted that unless the proposed legislation would substantively change the law's present requirements, relocating the law would largely be symbolic and would not have any practical effect on abortion access or its perception.[13] Indeed, a study conducted after a successful decriminalization movement in Australia found that relocating the law failed to change individuals' feelings of abortion-related stigma.[14]

---

11. Paul Gallagher, *Doctors Vote for Decriminalising Abortion After Heated Debate*, INEWS (June 27, 2017), https://inews.co.uk/news/health/bma-annual-conference-abortion-motion-decriminalise/ [https://perma.cc/3JE3-UJ4X].

12. Katherine Bodde & Sebastian Kreuger, *Critical Conditions: How New York's Unconstitutional Abortion Law Jeopardizes Women's Health*, N.Y. CIVIL LIBERTIES UNION (Jan. 2017), https://www.nyclu.org/sites/default/files/field_documents/nyclu_criticalconditions_20170126.pdf [https://perma.cc/ZM35-ZWN8].

13. Denis Campbell, *Abortion Should Not Be a Crime, Say Britain's Childbirth Doctors*, GUARDIAN (Sept. 22, 2017), https://www.theguardian.com/world/2017/sep/22/abortion-decriminalise-crime-britain-childbirth-doctors [https://perma.cc/5WVS-59SR].

14. *See* Louise A. Keogh et al., *Intended and Unintended Consequences of Abortion Reform: Perspectives of Abortion Experts in Victoria, Australia*, 43 J. FAM. PLAN. & REPROD. HEALTH CARE 18, 21–22 (2017).

While both women and abortion providers are affected by abortion regulation, this Note focuses on the effects of abortion regulation on women who have had or are seeking abortions, rather than on providers. Further, while there is an array of harm caused by criminalizing abortion, this Note conceptualizes harm in terms of stigma. Although this Note questions assumptions about the effects of partial criminalization of abortion, this Note is not intended to undermine or criticize movements aimed at liberalizing access to safe abortion. Rather, this Note seeks to facilitate a discussion by articulating legal sources of harm and stigma surrounding abortion. Additionally, this Note does not reach the topic of full criminal prohibitions on abortion, but only considers the present-day effects of partial criminalization.

Part I provides an overview of the reform movements in New York State and Great Britain, discusses the present state of abortion regulations in the two jurisdictions, and considers the effect of abortion's location in the criminal code. Part II compares the laws and their effects in Great Britain and New York and offers conclusions about the significance of the law's criminalization of abortion. Part III analyzes whether New York and Great Britain's laws cause the harm attributed to abortion criminalization by considering how nonpenal laws stigmatize the procedure in a manner intended to punish women, as criminal sanctions do. This Note seeks to problematize the claim that the location of abortion regulation alone stigmatizes and substantively affects women's abortion experiences. In doing so, this Note recognizes the myriad forms beyond formal criminalization through which the law is able to penalize women who choose to terminate their pregnancies.

I. AN OVERVIEW OF THE PRESENT LAWS AND THE LIBERALIZATION MOVEMENTS IN NEW YORK AND GREAT BRITAIN

A. New York

In January 2017, New York State Assemblywoman Deborah Glick and New York State Senator Liz Kreuger introduced the Reproductive Health Act, a bill that would liberalize the present state of abortion regulation, to the State Assembly and State Senate.[15] As it currently stands, New York's laws on abortion are codified in the penal code and provide that a woman may obtain an abortion for any

15. Assemb. B. A01748, 2017–2018, Reg. Sess. (N.Y. 2017); S.B. S02796, 2017–2018, Reg. Sess. (N.Y. 2017).

reason until twenty-four weeks and may obtain an abortion after twenty-four weeks only for the purpose of preserving the woman's life.[16] New York's law also requires the procedure to be done by a licensed physician in a hospital.[17] The law further criminalizes abortions performed by non-physicians as a felony and abortions done by the woman ("self-abortions") as a misdemeanor.[18]

The proposed Reproductive Health Act is unique in certain respects, as the bulk of recent legislative activity surrounding abortion in the United States has tried to limit access to abortion, rather than expand access as this bill seeks to do.[19] The Reproductive Health Act aims to amend the existing law in two distinct ways: First, it expands access to the procedure by authorizing licensed medical practitioners to provide abortions and by permitting abortions after twenty-four weeks when necessary to preserve a woman's health and in cases of fetal non-viability;[20] second, the proposed Act moves abortion regulation from its present location in the penal code to the public health code.[21]

The present placement of abortion in New York's penal code is surprising, given that the state has earned the moniker "the abortion capital of America."[22] But understood in the historical context of New York's approach to abortion, the present laws are a symbol of the state's liberal take on the polarizing and morally fraught issue of abortion. New York is a progressive leader in the United States on abortion. It was one of the first states to legalize access to abortion, doing so before the Supreme Court in *Roe v. Wade*, and continues to recognize the importance of abortion access by imposing relatively few burdens on women seeking to terminate their pregnancies.[23] Presently, New York imposes only the twenty-four week restriction

16. N.Y. PENAL LAW § 125.05 (McKinney 1965).

17. *Id.*

18. *Id.* §§ 125.40, 125.45, 125.55, 125.60.

19. *The 334 Abortion Restrictions Enacted by States from 2011 to July 2016 Account for 30% of All Abortion Restrictions Since Roe v. Wade*, GUTTMACHER INST. (July 21, 2016), https://www.guttmacher.org/infographic/2016/334-abortion-restrictions-enacted-states-2011-july-2016-account-30-all-abortion [https://perma.cc/VYA9-Q947].

20. N.Y. Assemb. B. A01748 at 2; N.Y. S.B. S02796 at 2. *See also* Katharine Bodde, *Subject: Reproductive Health Act*, N.Y. CIVIL LIBERTIES UNION, https://www.nyclu.org/en/legislation/subject-reproductive-health-act [https://perma.cc/4XJR-HZ2Q].

21. N.Y. Assemb. B. A01748 at 2–3; N.Y. S.B. S02796 at 2–3. *See also* Bodde, supra note 20.

22. Ryan Lizza, *The Abortion Capital of America*, N.Y. MAG. (Dec. 2005), http://nymag.com/nymetro/news/features/15248 [https://perma.cc/8VRX-MCZ5].

23. N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1971).

on abortion, has a comparatively high presence of abortion providers in-state,[24] and is one of the only states to require public funding of abortion.[25]

In early nineteenth-century New York, and in the United States generally, abortion was fairly common, and generally accepted as a normal medical practice.[26] Before the 1820s, there were no statutes in the United States on the subject of abortion.[27] At this time, America copied a loose version of the English common law's framework, which allowed for abortion until the fetus had "quickened"—i.e., when the woman could perceive fetal movements.[28] Then in 1828, New York became one of the first states to legislate on the topic of abortion by fully criminalizing it.[29] New York's statute became the model for early anti-abortion statutes as it made abortion illegal regardless of whether the fetus had quickened.[30] In 1881, the legislature amended the statute to return to the quickening distinction by making the abortion of an unquickened fetus a lesser crime.[31] The New York statute was unique at the time in several ways: it allowed for "therapeutic abortions" in cases where an abortion was necessary

24. *See State Facts about Abortion: New York*, GUTTMACHER INST. (May 2018), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-new-york [https://perma.cc/TSK7-HY5H] (noting that, in 2014, only 10% of women in New York lived in counties that did not have an abortion provider).

25. *State Funding of Abortion Under Medicaid*, GUTTMACHER INST. (Feb. 2018), https://www.guttmacher.org/state-policy/explore/state-funding-abortion-under-medicaid [https://perma.cc/RZM4-HZMF]; Vivian Yee, *Andrew Cuomo to Widen Access to Free Abortion and Contraception*, N.Y. TIMES (Jan. 20, 2017), https://www.nytimes.com/2017/01/20/nyregion/new-york-abortion-and-contraception-andrew-cuomo.html [https://perma.cc/24WM-22BD].

26. Roe v. Wade, 410 U.S. 113, 129 (1973) ("It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common-law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century."); JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTIONS OF NATIONAL POLICY 1800–1900, at 17 (1979).

27. MOHR, *supra* note 26, at 20.

28. *Id.* at 4–5, 16; *see* Roe v. Wade, 410 U.S. 113, 131–32 (1973). The moment during pregnancy when a woman feels a fetus move varies between each woman, but generally takes place between the sixteenth and the eighteenth week of pregnancy. *See* Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411, 412 (1968).

29. *Roe*, 410 U.S. at 138.

30. *Id.*

31. MOHR, *supra* note 26, at 227–28

to preserve the life of the mother or was advised by two physicians to be necessary to save her life,[32] and it was particularly punitive because it threatened to hold women who sought abortions that did not fall under the therapeutic exception criminally liable for their actions.[33] In comparison, most laws at the time did not contain a therapeutic exception and only held the physician, not the woman, responsible for an abortion.[34]

Between the 1860s and 1890s, other states began to criminalize abortion as a result of lobbying by licensed physicians, newfound public anxiety regarding the rate at which abortions were being performed, and concerns about the "type" of woman who sought an abortion.[35] Consequently, by the end of the nineteenth century, every state had criminalized abortion in some manner, and until *Roe* all but six states continued to treat the procedure as a crime. Against this background of a near legislative uniformity on abortion's criminal status, in 1970, three years before the Supreme Court constitutionalized the right to an abortion in *Roe v. Wade*, the New York State Legislature decriminalized abortion.[36] This was not New York's first time reconsidering the nineteenth century statute, as bills aiming to liberalize abortion laws were introduced starting in 1965.[37] These early bills had little to no success; before 1970, every proposed abortion bill failed to pass, and before 1968, every proposed abortion liberalization bill failed to even make it past the committee stage.[38] However, these early liberalization bills were more limited and were merely intended to expand the narrow category of therapeutic exceptions to allow a physician to perform an abortion in a few cases other

32. *Roe*, 410 U.S. at 138; *see* MOHR, *supra* note 26, at 27, 39, 43, 227–28. Mohr states that the 1828 New York statute banned abortion after quickening but also explains that the language of the statute could apply to abortions before and after quickening. He also notes that early abortion legislation was generally contained in revisions of the criminal code or in omnibus "crimes and punishments" bills, was of little importance to the public, and was rarely enforced. Further, the laws passed between 1821–1841 punished the person who administered the abortion or performed the operation, and did not punish the woman in any way. *Id.*

33. Susan Brownmiller, *Everywoman's Abortions: "The Oppressor is Man," in* BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 127 (Linda Greenhouse & Reva B. Siegel eds., 2012); *see* Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. REV. 1774, 1785 (1991).

34. *See* MOHR, *supra* note 26, at 27, 39, 43, 227–28.

35. *See id.*

36. N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1971).

37. Linda Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, *in* BEFORE ROE V. WADE, *supra* note 33, at 130–31.

38. *Id.*

than when the woman's life was in danger.[39] Further, the intent underlying New York's early reform bills was generally to shield doctors from potential liability when performing therapeutic abortions rather than to expand actual access to abortion or to affirm a woman's decisional authority to determine whether she would continue her pregnancy.[40]

These early attempted reforms were substantively similar to the American Law Institute's ("ALI") proposed abortion penal code, which defined therapeutic abortions more broadly than the existing nineteenth-century New York statute.[41] The ALI suggested legalizing therapeutic abortions in cases where a pregnancy presented a danger to the physical or mental health of the woman, a condition affecting the development of the fetus, or in cases when the pregnancy itself resulted from a criminal act.[42] The 1969 bill[43] to reform New York's nineteenth-century abortion law went significantly further than the ALI's proposed reforms. Rather than a minor change that would only slightly expand the instances in which a therapeutic abortion was permissible, the 1969 bill partially repealed the criminal ban on abortion by removing all legal restrictions and punishments on abortion within the first twenty-four weeks of pregnancy.[44]

Furthermore, when compared to other states' laws that "legalized" abortion, the proposed bill in New York was a greater change from the status quo because it did not limit access to abortion to in-state residents.[45] The reform movement was endorsed by public health advocates who were concerned by high maternal mortality rates caused by unsafe illegal abortions, as well as a governor-appointed commission that concluded that reforming the existing law was necessary to improve women's health outcomes.[46] To reduce maternal mortality rates, the commission explained that in order to reduce maternal mortality rates, the state needed to establish reasona-

39. *Id.*

40. *Id.*

41. MODEL PENAL CODE § 230.3 (AM. LAW INST., Proposed Official Draft 1962).

42. American Law Institute Abortion Policy, 1962, *reprinted in* BEFORE ROE V. WADE, *supra* note 33, at 24. *See also* American Medical Association Policy Statements, 1967 and 1970, *reprinted in* BEFORE ROE V. WADE, *supra* note 33, at 25.

43. The final 1970 law was originally proposed by New York State Assemblywoman Constance Cook in 1969. *See* Memorandum of Assemblywoman Constance E. Cook, *reprinted in* GREENHOUSE & SIEGEL, *supra* note 33, at 147–48.

44. *Id.*

45. Lizza, *supra* note 22.

46. Bodde & Krueger, *supra* note 12; *see* Memorandum of Assemblywoman Constance E. Cook, *reprinted in* GREENHOUSE & SIEGEL, *supra* note 33, at 147–48.

ble access to safe abortion care.[47] Low-income women bore the brunt of abortion's criminalization and faced high mortality rates from the procedure because they lacked the financial means to skirt the law by either flying abroad to obtain safe, legal abortions or paying local doctors who were capable of providing safe (but expensive) abortions.[48] The 1969 bill thus was conceived to be a remedy not only for the high mortality rates caused by illegal abortions but also for social inequities present in the existing regime that disparately prevented poor women from obtaining safe abortions.[49] Despite its lofty concerns and ambitious goals, the 1969 bill only passed because of Assemblyman George M. Michael's last-minute decision to change his vote, saving the bill by a single vote.[50] By 1970, New York became one of only four states that had legalized abortion by making the procedure available without requiring that a woman either had a medical reason or was a victim of incest or rape.[51]

The legalization of abortion in New York prompted a fierce backlash from pro-life opponents who sought to invalidate the law through litigation and through campaigns intended to persuade the New York State Legislature to repeal the law.[52] Their efforts culminated in 1972 when the New York State Legislature passed a bill that would have completely overturned the 1970 law and return the status of New York's regulation of abortion to its previous full criminal

47. Rockefeller Commission Report, *reprinted in* GREENHOUSE & SIEGEL, *supra* note 33, at 202–03 ("There is nonetheless a strong relationship between high fertility and the economic and social problems that afflict the 13 percent of our people who are poor, and we must address it. . . . [U]nless we address our major domestic social problems in the short run— beginning with racism and poverty—we will not be able to resolve fully the question of population growth.").

48. Bodde & Krueger, *supra* note 12.

49. Memorandum of Assemblywoman Constance E. Cook, *supra* note 43, at 147–49.

50. GREENHOUSE & SIEGEL, *supra* note 33, at 150. *See also* Lizza, *supra* note 22 ("'I realize, Mr. Speaker,' Assemblyman George M. Michaels said, 'that I am terminating my political career, but I cannot in good conscience sit here and allow my vote to be the one that defeats this bill. I ask that my vote be changed from no to yes.'").

51. GREENHOUSE & SIEGEL, *supra* note 33, at 281. By 1970, Alaska, Hawaii, New York, and Washington State were the only states that allowed abortion without restriction before viability. Alaska had a thirty-day in-state residency requirement, and Hawaii and Washington had ninety-day in-state residency requirements. *See* Julie Conger, *Abortion: The Five-Year Revolution and Its Impact*, 3 ECOLOGY L. Q. 311, 345–47 (1973).

52. *See* Brief of Plaintiff-Appellant, Byrn v. NYC Health & Hosp. Corp., 286 N.E.2d 887 (N.Y. 1972), *reprinted in* GREENHOUSE & SIEGEL, *supra* note 33, at 150; Governor Nelson A. Rockefeller's Veto Message, *reprinted in* GREENHOUSE & SIEGEL, *supra* note 33, at 158.

prohibition.[53] Governor Rockefeller responded by vetoing the bill, leaving New York's liberalized regulation of abortion intact.[54] In his veto message, Rockefeller reiterated a commitment to reducing the high mortality rate caused by unsafe illegal abortions and explained that repealing the law would not reduce the rate of abortion but would merely increase the danger posed by what would otherwise be a safe procedure.[55] Yet, more important in terms of affirming the progressive attitude of New York's 1970 law, Rockefeller maintained the significance of the equal access to safe abortions that the 1970 law had created for women of different financial means and stated that as a matter of principle, each woman had the right to decide whether to continue her pregnancy.[56]

While the 1970 law continued to regulate abortion from New York's penal code, it reflected a new consciousness for the difficult realities women faced when deciding to terminate their pregnancies. For example, the New York law's allowance for abortion for any reason indicated the legislature's realization that the law needed a more flexible approach to abortion regulation in order to effectively reduce mortality rates because women may seek an abortion even in instances when the law prohibited it. Indeed, the law even showed tolerance, and perhaps even acceptance, for the myriad personal reasons that may lead a woman to that decision. In terms of the law's immediate practical effects, the absence of any legal restrictions before the twenty-four-week mark paired with the absence of an in-state residency requirement made New York an oasis for women seeking abortions for the three years between the law's passage and the Supreme Court's landmark decision to legalize abortion in *Roe v. Wade*.[57] It was estimated that by the end of 1971, sixty-one percent of abortions performed in New York were on out-of-state residents, earning New York its reputation as the abortion capital of the world.[58]

Given the national and local contexts of abortion's criminal status before *Roe*, the liberalization of abortion in New York was understood as a carve-out to an otherwise criminal act, rather than as a

53. Governor Nelson A. Rockefeller's Veto Message, *supra* note 52, at 158–60.

54. *Id.*

55. *Id.*

56. *Id.* ("The truth is that a safe abortion would remain the optional choice of the well-to-do woman, while the poor would again be seeking abortions at a grave risk to life in back-room abortion mills. . . . Under the present law, no woman is forced to undergo an abortion. . . . Every woman has the right to make her own choice.").

57. Lizza, *supra* note 22.

58. *Id.*

creation of a positive right to a procedure. When New York legalized abortion, nearly every state had considered abortion to be a crime for at least one hundred years.[59] In the face of a near legal consensus on the issue of criminal abortion, it was difficult for legislators to frame abortion as a medical procedure or something to which women had any entitlement, and so the notion of locating abortion in any code other than the penal code would have been inconceivable. Consequently, three of the four states that allowed abortion without restriction before *Roe* codified their regulations in the penal code.[60] Hawaii was the sole exception, choosing to regulate abortion under its business code.[61] Two of the four early adopter states continue to regulate abortion in the penal code;[62] Alaska moved abortion from its criminal code to its Health, Safety and Housing Code in 1980.[63] Conversely, states whose prohibitions on abortion were invalidated by *Roe* had the opportunity to enact entirely new legal regimes to regulate abortion but had to consider the new constitutional right to abortion. Thus, post-*Roe*, states were equipped with a diverse range of legal frameworks within which they could define abortion, and they chose to regulate abortion in public health codes,[64] professional codes,[65] penal codes,[66] or in a combination of

59. *See generally* MOHR, supra note 26, at 200–245.

60. ALASKA STAT. § 11.15.060 (1970); N.Y. PENAL LAW § 125.05(3) (McKinney Supp. 1971); WASH REV. CODE §§ 9.02.060 to 9.02.090 (Supp. 1972).

61. Hawaii continues to regulate abortion in the section of its business code on medicine and surgery. For Hawaii's laws on abortion, see HAW. REV. STAT. § 453-16 (2017). Hawaii's decision to regulate abortion in its business code can be understood as the result of serious consultation of and reliance on the opinion of medical professionals in the Hawaiian community. Further, senators supporting the law and committee reports explicitly stated that the repeal of the criminal ban on abortion was not legalization of the procedure, but the legislature indicated that it "choose[s] not to control or regulate the matter by law and further that [they] neither approve nor disapprove of abortion." DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 412–13 (2015).

62. For New York's laws on abortion, see N.Y. PENAL LAW §§ 125.05, 125.40, 125.45, 125.55, 125.60 (McKinney 1965). For Washington State's laws, see WASH. REV. CODE § 9.02.100 (2018).

63. *See* Planned Parenthood of the Great Nw. v. Alaska, 375 P.3d 1122, 1129 (Alaska 2016) ("[I]n 1980 the legislature removed AS 11.15.060 from the criminal statutes and renumbered it as AS 18.16.010"). For the present law, see ALASKA STAT. §§ 18.16.010 to 18.16.090 (2017).

64. *See, e.g.*, CAL. HEALTH AND SAFETY CODE § 123460 (2017); CONN. GEN. STAT §19a-600 (1990).

65. *See, e.g.*, COLO. REV. STAT. § 12- 37.5-101 (repealed 2018).

66. *See, e.g.*, ALA. CODE § 13A-13-17 (1975) (regulating abortion in its penal code and limiting legal abortion to cases in which the fetus is not viable, or when the woman's life or health is in danger). It is important to note that some states never repealed their pre-*Roe*

various sections.[67]

B. Great Britain

As in the case of New York, Great Britain currently regulates abortion in its penal code because of a historic criminal statute. For the greater part of British legal history, abortion was regulated by common law.[68] While there is some academic debate as to whether abortion performed at any point during pregnancy was a crime under English common law, it is generally considered to have been a crime only when it was performed after quickening.[69] The degree of abortion's criminality under early common law is also uncertain; abortion performed after quickening may have been treated as manslaughter

---

criminal abortion laws. These laws are currently unenforceable, and these states have enacted laws after *Roe* in order to regulate abortion. However, these pre-*Roe* abortion bans do pose a threat that they could potentially be revived if *Roe* were overturned by the Supreme Court. For examples of states that did not repeal their abortion laws after *Roe*, see, e.g., Alabama (ALA. CODE § 13A-13-17 (2017)); West Virginia (W. VA CODE § 61-2-8 (2017)); New Mexico (N.M. STAT. ANN. § 30-5-3 (2017)); Mississippi (MISS. CODE ANN. § 97-3-3 (2017)). *See also* Alison Durkee, *These states have "trigger laws" banning abortion on the books in case 'Roe v. Wade' is overturned*, MIC (July 2, 2018), https://mic.com/articles/190095/these-states-have-trigger-laws-banning-abortion-on-the-books-in-case-roe-v-wade-is-overturned#.cPa4e7lyJ [https://perma.cc/8SUG-PV7R].

67. *See, e.g.*, ARK. CODE ANN. §§ 5-61-101, 20-9-302, 20-16-601, 20-16-701 (1983) (regulating abortion in both penal code and in the public health code).

68. *See* Roe v. Wade, 410 U.S. 113, 132 n.21, 132–33 (1973) (citing Coke, Blackstone, Hawkins, and Hale).

69. English jurists debated whether abortion was a crime, and if so, to what degree. Edward Coke suggested that an abortion post-quickening was a "misprision." *See* EDWARD COKE, THE THIRD PART OF INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN, AND CRIMINAL CAUSES 50 (1644). William Blackstone echoed Coke's statement that abortion was a misprision, but also said that although abortion of a quickened fetus was generally considered to be manslaughter, then-modern law actually treated abortion as a "very heinous misdemeanor." *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *126; 4 WILLIAM BLACKSTONE, COMMENTARIES *198. Cyril C. Means, an abortion scholar and the general counsel of the National Association for the Repeal of Abortion Laws ("NARAL") at the time of *Roe*, studied two precedents Coke relied upon and argued that neither supported Coke's conclusion that the common law treated abortion as a crime. Cyril C. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise From the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?*, 17 N.Y.L.F. 335 (1971). The validity of Means's historical account of the common law has been fiercely contested. *See, e.g.*, Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 814 (1972). For a succinct overview of the debate surrounding abortion's status in common law, see Andrew Grubb, *Abortion Law in England: The Medicalization of a Crime*, 18 L. MED. & HEALTH CARE 146, 147–48 (1990).

or as a misdemeanor.[70] Regardless of the present uncertainty about abortion at common law, in 1803, Parliament made abortion a statutory crime when it passed Lord Ellenborough's "Malicious Shooting Act."[71] Ellenborough's law increased the penalty of aborting (or attempting to abort) a quick fetus to a capital offense.[72] Beyond increasing the penalties for performing an abortion, the law additionally expanded the scope of abortion's illegality by criminalizing the abortion of an unquick fetus. Abortion of an unquick fetus was a lesser felony that merited a fine, imprisonment, physical punishment, or exile.[73]

Ellenborough's law was partially repealed in 1828,[74] and then was completely repealed in 1861 by the passage of the Offenses Against Persons Act ("OAPA"),[75] which continued the legal legacy of abortion's criminal treatment.[76] The OAPA is comprised of two offenses related to abortion, and applies to the woman seeking an abortion, the abortion provider, and anyone who may have played any role in procuring the abortion.[77] The OAPA abandoned the distinction of quickening and prohibited abortions regardless of gestation stage, though it standardized the penalty as either imprisonment

70. *See* BLACKSTONE, *supra* note 69, at *126, *198.

71. Malicious Shooting or Stabbing Act 1803, 43 Geo. c. 58; Grubb, *supra* note 69, at 148. *See also Roe*, 410 U.S. at 136. Ellenborough's act did not initially cover Scotland, but Parliament passed a nearly identical law shortly thereafter that was applicable to Scotland. *See* Malicious Wounding, etc. Act 1825, 6 Geo. 4 c. 126.

72. Malicious Shooting or Stabbing Act 1803, 43 Geo. 3 c. 58; Grubb, *supra* note 69, at 148. *See also Roe*, 410 U.S. at 136.

73. *See* Malicious Shooting or Stabbing Act 1803, 43 Geo. 3 c. 58. ("[I]f any person . . . shall willfully and maliciously administer to, or cause to be administered to, or taken by any woman, any medicines, drug, or substance or thing whatsoever, or shall use or employ or cause or procure . . . with intent thereby to cause the miscarriage of any woman not being, or not being proved to be, quick with child at the time . . . are hereby declared to be guilty of felony, and shall be liable to be fined, imprisoned, set in and upon the pillory, publickly or privately whipped, or to suffer one or more of the said punishments, or to be transported beyond the seas for any term not exceeding fourteen years.").

74. Offenses Against the Person Act 1828, 9 Geo. 4 c. 31 (Eng. & Wales).

75. Offenses Against the Person Act 1837, 7 Will. 4 & 1 Vict. c. 85, § 6; Offenses Against Persons Act 1861, 24 & 25 Vict. c. 100, §§ 58, 59 (Eng., Wales, N. Ir.).

76. Sally Sheldon, *The Decriminalisation of Abortion: An Argument for Modernisation*, 36 OXFORD J. LEGAL STUD. 334, 337 (2015). Note that the OAPA applies only to England, Wales, and Northern Ireland. Scotland is not covered by the OAPA, but abortion in Scotland is still illegal under the common law.

77. *Id. See also* Offenses Against Persons Act 1861, 24 & 25 Vict. c. 100, §§ 58, 59 (Eng., Wales, N. Ir.).

or exile.[78] Unlike Ellenborough's short-lived law, however, the OAPA's prohibition of abortion has managed to survive essentially unaltered and is the oldest statutory framework governing any medical procedure in the United Kingdom.[79] Laws passed on abortion since the OAPA have merely built upon its criminal framework.[80]

The next major development in abortion law in Great Britain was the passage of the Infant Life Preservation Act ("ILPA") in 1929. The act was intended to close a loophole in the OAPA that prevented someone who killed a baby during the process of birth from being convicted of any offense.[81] The ILPA prohibits the intentional destruction of "the life of a child capable of being born alive . . . before it has an existence independent of its mother," unless this is done "in good faith for the purpose only of preserving the life of the mother," and contains a rebuttable presumption that such capacity for life exists at twenty-eight weeks of gestation.[82]

Although the ILPA's intended scope is rather narrow and meant to expand the cases when terminating a pregnancy was a crime, its language was interpreted by courts to create a category of "legal" abortion.[83] On its face, the legal scheme created by the OAPA and the ILPA amounted to a prohibition on most abortions, as

78. Offenses Against Persons Act 1861, 24 & 25 Vict. c. 100, §§ 58, 59 (Eng., Wales, N. Ir.). Sally Sheldon suggests that the lack of differentiation between stages of pregnancy in the OAPA could mean that procedures that prevent a pregnancy shortly after implantation (e.g., Plan B) could potentially be caught in the dragnet of the law. *See* Sheldon, *supra* note 76, at 339.

79. *See* Sheldon, *supra* note 76, at 337–38. Parts of the OAPA have been repealed since, but these sections govern punishment for the crime (i.e., Sect. 1) and tangentially relevant issues such as what constitutes homicide (Sect. 2 and 3). For a full list of sections of the OAPA that have been repealed since its passage, see Offences Against the Person Act 1861, U.K. PARLIAMENT, https://www.legislation.gov.uk/ukpga/Vict/24-25/100/contents [https://perma.cc/7GFA-KV2R].

80. *See, e.g.*, Infant Life Preservation Act 1929, 19 & 20 Geo. c. 34, § 1 (Eng., Wales); The Abortion Act 1967 c. 87, § 1 (Eng., Wales, Scot.).

81. *See* Sheldon, *supra* note 76, at 340–41. Under the OAPA, an individual who procured a miscarriage before the infant was birthed or after the infant was born fell could be convicted for miscarriage or murder. Infant Life Preservation Act 1929, 19 & 20 Geo. c. 34, §1 (Eng., Wales). Although the Act's initial intent was to fix this loophole, there is evidence in legislative history and the Act's title that the law was also intended to apply to acts prior to birth. *See* Grubb, *supra* note 69, at 149.

82. Sheldon, *supra* note 76, at 340–41.

83. *Id.* at 341 ("The ILPA is also important for the significant role that it has played in judicial interpretation of the OAPA. It has been held that the word 'unlawfully' in § 58 presupposes that, on the contrary, in certain circumstances abortion must be lawful, with the interpretation of the term inferred from the exception contained in the ILPA: that a miscarriage was procured for the purpose of 'preserving [the woman's] life.'").

the ILPA's exception only applied to viable fetuses and cases to preserve the life of the woman. Yet in *R v. Bourne*, a criminal court relied on the OAPA's use of the word "unlawfully" to deduce that the law contained a larger class of circumstances in which abortion was lawful.[84] The scope of this new, judicially-created category of legal abortions was delineated by using the ILPA's exemption for abortions in cases where the pregnancy endangered the woman's life.[85] But *R v. Bourne* took the law a step further by holding that the exception to preserve the life of the woman necessarily included an exception when an abortion was necessary to preserve her health.[86] Thus, *R v. Bourne* effectively allowed for lawful abortions when the woman's life or health was threatened by her pregnancy, regardless of the fetus's gestational stage. Later cases continued to expand what constituted a legal abortion by broadly interpreting health to include the woman's mental health in addition to her physical health.[87] Despite the fact that abortion continues to be regulated under the OAPA's criminal framework in Great Britain, the practical consequences of criminalization do not follow. Currently, convictions under the OAPA are rare, with fewer than ten prosecutions per year combined in England and Wales,[88] and even then, the great majority of these prosecutions have been assaults against pregnant women or a nonconsensual administration of an abortifacient.[89] Similarly, prosecutions brought under the ILPA also tend to be assaults against pregnant women that caused miscarriages.[90]

The Abortion Act of 1967 built upon this body of jurisprudence that partially legalized abortion by amending the existing statutory scheme and newly defining what constitutes a legal, therapeutic abortion under British law. Like New York's 1970 abortion liberalization law, the British Abortion Act was primarily enacted because

84. R v. Bourne, [1939] 1 KB 687. *See also* Grubb, *supra* note 69, at 151.

85. Offenses Against Persons Act 1861, 24 & 25 Vict. c. 100, §§ 58, 59 (Eng., Wales, N. Ir.); Sheldon, *supra* note 76, at 338.

86. R v. Bourne [1939] 1KB 687. *See also* Grubb, *supra* note 69, at 151.

87. *See* R v. Newton & Stungo [1969] Crim. L.R. 469. *See also* Grubb, *supra* note 69, at 151.

88. Sheldon, *supra* note 76, at 340; BRITISH MED. ASS'N, *supra* note 5 at 11, 16–18. Police recorded crime data showing that for the year ending March 2016, there were seven cases of intentional destruction of viable unborn child under the ILPA, and seven cases of procuring an illegal abortion. *Id.*

89. Sheldon, *supra* note 76, at 340 (noting two convictions in the last ten years of women who unlawfully procured miscarriages, both acting well after viability, and no convictions of clinicians who have provided an abortion while acting in their medical role).

90. *Id.*

of concerns about the high maternal mortality rates caused by illegal abortions.[91] The Abortion Act of 1967 creates four therapeutic exceptions and requires that two medical practitioners avow that the woman requesting an abortion has met at least one of them.[92] The first exception requires a finding that the pregnancy has not exceeded twenty-four weeks and that continuance of the pregnancy would involve a risk of injury to the physical or mental health of the pregnant woman or any existing children in her family that is greater than the risk of injury if the pregnancy were terminated.[93] The second exception permits an abortion if the physician determines that termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman.[94] The third exception permits abortion upon a determination that continuance of the pregnancy would involve risk to the life of the pregnant woman greater than if her pregnancy were terminated.[95] Finally, the fourth exception enables a woman to get an abortion if a physician determines that there is a substantial risk that a child born would suffer from such physical or mental abnormalities as to be seriously handicapped.[96]

While abortion in Great Britain is technically not available solely because the woman simply desires to terminate her pregnancy, for all practical purposes, scientific advancements combined with a high degree of deference to physicians' discretion under the Act has made abortion generally available upon a woman's request.[97] The vagueness of the terms in the first exception allows for broad clinical discretion; generally, this discretion is used by physicians to liberally interpret the exception and allow a woman to terminate an unwanted pregnancy.[98] Additionally, medical advances have seriously reduced health risks associated with abortion, making it safer than pregnancy in almost all cases, which consequently makes it relatively simple for a woman to satisfy the requirements under the third therapeutic exception.[99] Indeed, a court observed in 1981 that the Abortion Act of

91. *See* BRIT. PREGNANCY ADVISORY SERV., BRITAIN'S ABORTION LAW: WHAT IT SAYS, AND WHY, 15–16 (2013) http://www.reproductivereview.org/images/uploads/Britains_abortion_law.pdf [https://www.perma.cc/L5DB-L63Q].

92. The Abortion Act 1967, c. 87, § 1 (Gr. Brit.).

93. *Id.* at §1(1)(a).

94. *Id.* at §1(1)(b).

95. *Id.* at §1(1)(c).

96. *Id.* at §1(1)(d).

97. Sheldon, *supra* note 76, at 345. *See also* Grubb, *supra* note 69, at 154.

98. Sheldon, *supra* note 76, at 345.

99. *Id.* at 341.

1967 had been interpreted so loosely by physicians that "abortion has become obtainable virtually on demand. Whenever a woman has an unwanted pregnancy, there are doctors who will say it involves a risk to her mental health."[100]

The Abortion Act of 1967 marks the last great change on abortion laws in Great Britain.[101] There have been numerous attempts at reform since the Act's passage, with over a dozen bills aiming to restrict access to abortion and many aiming to further liberalize the law.[102] One of the most recent attempts at reform was proposed on March 13, 2017, when Member of Parliament Diana Johnson introduced the Reproductive Health Access to Terminations Bill under the Ten Minute Rule.[103] The Bill would decriminalize abortion in England and Wales but would also liberalize the law by expanding the scope of cases when a woman could receive an abortion after twenty-four weeks and by removing the law's requirement that two physicians approve the abortion.[104] The bill passed its first reading by a vote of 172 in favor and 142 against.[105] The bill was scheduled to have its second reading debate on May 12, 2017, but Parliament was dissolved on May 3 because of a general election, so no further action was taken on the proposed bill.[106]

Diana Johnson again introduced a similar bill under the Ten Minute Rule on October 23, 2018.[107] Like the Reproductive Health

---

100. Royal Coll. of Nursing of the U.K. v. Dep't Health & Soc. Sec. [1981] AC 800, 803 (CA). *See also* Grubb, *supra* note 69, at 154.

101. *See generally*, BRITISH MED. ASS'N, *supra* note 5, 10–12.

102. BRIT. PREGNANCY ADVISORY SERV., TRUSTING WOMEN TO DECIDE, AND DOCTORS TO PRACTICE 45–50 (June 2015), http://www.abortionreview.org/images/uploads/Trusting_women_and_doctors_June_2015.pdf [https://perma.cc/5KTS-GUEC].

103. Reproductive Health (Access to Terminations) Bill 2016-7, HL Bill [153] cl. 26–32, https://hansard.parliament.uk/commons/2017-03-13/debates/D76D740D-2DDD-4CCB-AC11-C0DBE3B7D0D8/ReproductiveHealth(AccessToTerminations [https://perma.cc/MR65-RECD]. A Ten Minute Rule bill is a type of bill that is introduced in the House of Commons under Standing Order No. 23. The Ten-Minute Rule allows an MP to make a case for a new bill in a speech lasting up to ten minutes, after which an opposing speech challenging the bill may be made. After the speeches have been made, the House of Commons decides whether the bill should be introduced, and if there is popular support for the bill, the bill progresses to have its first reading. For more information, see *Glossary: Ten Minute Rule Bills*, U.K. PARLIAMENT, http://www.parliament.uk/site-information/glossary/ten-minute-rule-bill/ [https://perma.cc/LC74-6C54].

104. 623 Parl. Deb. H.C. (6th ser.) (2017) col. 26–32 (UK).

105. U.K. PARLIAMENT, *Reproductive Health (Access to Terminations) Bill*, *supra* note 4.

106. *Id.*

107. Abortion Bill 2017-19 (HL 276) c. 142–49, https://hansard.parliament.uk/

Access to Terminations Bill, Abortion Bill 2017-19 proposes to remove criminal liability for abortions performed prior to twenty-four weeks, but would create new criminal penalties for abortions performed after twenty-four weeks and for non-consensual abortions.[108] It is broader than its predecessor because it also proposes to decriminalize abortion in Northern Ireland, which is not subject to the Abortion Act of 1967.[109] The bill passed its first reading by a vote of 208 in favor of the bill's passage and 123 against.[110] The bill is scheduled to have its second reading in the House of Commons on November 23, 2018.[111]

II. EVALUATING THE EFFECTS OF CRIMINAL ABORTION IN NEW YORK AND GREAT BRITAIN

This section analyzes the laws and constitutional doctrine in both New York and Great Britain to consider the effects of regulating abortion in the penal code. In both jurisdictions, abortion is relatively easy to access, but the laws are different in terms of structure and language, as well as in terms of the symbolic effects of abortion's criminalization. For example, in the United States, a law that partially criminalizes abortion must interact with a larger body of constitutional law that protects a woman's right to an abortion. This kind of legal protection does not exist in Great Britain, where the State does not recognize that women have a right to abortion, so the norm established by the law is that abortion is a crime. Furthermore, the two jurisdictions differ on *who* they give the final decision-making power on abortion; in New York, women are the ultimate decision-makers, whereas in Great Britain, physicians retain this power. Legally recognizing women as the final authority validates the principle that an abortion is a personal choice that vindicates one's personal autonomy; failing to do so undermines the element of self-determination inherent to the procedure.

Reformers' arguments that regulating abortion in the penal code is harmful in and of itself is more persuasive in the case of Great Britain, which lacks any laws that validate a woman's right to

commons/2018-10-23/debates/50C9945E-B8A1-4B95-BE24-70A76897288B/Abortion [https://perma.cc/MGG5-MZSL].

108. *See* Abortion Bill 2017-19, U.K. PARLIAMENT, https://services.parliament.uk/Bills/2017-19/abortion.html [https://perma.cc/V6AY-WN9H].

109. *Id.*

110. 648 Parl. Deb. H.C. (6th ser.) (2018) col. 142–49 (UK).

111. *Id.*

obtain an abortion. While in practice women are usually able to receive an abortion upon request, the law still treats abortion as a crime for which there are merely exceptions.[112] In New York, however, the state's criminal law on abortion acts within a larger constitutional framework that affirmatively recognizes a woman's right to an abortion.[113] This affirmative right contests the meaning implied by the criminal law, suggesting that the law, rather than the abortion, is unlawful. On the other hand, Great Britain does not recognize that women have a right to an abortion, and consequently there is no legal protection to mete the symbolic effects of partial criminalization.

Part A focuses on the effects and meanings of New York's partial criminalization of abortion, discussing the evolution of the Supreme Court's recognition of women's primary authority in the abortion decision as well as the way in which this jurisprudence interplays with New York's law to conclude that a statute's temporal relationship with *Roe* indicates whether a state intended to sanction abortion. Part B discusses Great Britain and concludes that partial criminalization constitutes a more significant and dangerous dignitary harm than in New York, because the law does not recognize a right to abortion, does not give women the final authority in abortion decisions, and does not validate the personal, non-medical reasons that may contribute to a woman's abortion decision.

A. New York

In the United States, a state's regulation of abortion does not exist in a vacuum. A state's regulation of abortion is overlaid by a constitutional framework that affirms a woman's right to decide to terminate a pregnancy. Thus, in order to fully understand the landscape of abortion regulation in any U.S. jurisdiction, a state's regulation must be viewed in light of its relationship to *Roe* and *Roe*'s progeny. To illuminate possible effects of the regulation of abortion in the penal code in New York, this Note will briefly discuss the Supreme Court's jurisprudence on abortion and then turn to analyze how this jurisprudence affects the significance of New York's partial criminalization of abortion.

A woman's right to terminate her pregnancy was found to be part of the right to privacy guaranteed by the Fourteenth Amendment and was first announced by the Supreme Court in 1973 in *Roe v.*

112. *See supra* notes 91–100 and accompanying text.

113. *See supra* notes 59–67 and accompanying text.

Wade.[114] Balanced against this right is the state's legitimate interest in the health of the pregnant woman and the potentiality of human life.[115] Under *Roe*, the state's interest in the woman's health does not become "compelling," a threshold a state must pass to restrict access to a fundamental right like abortion, until after the first trimester; the interest in fetal life becomes compelling at the point of viability.[116] Therefore, under *Roe*, a state may proscribe abortion only after viability, except when necessary to preserve the life or health of the mother.[117] Despite the fact that *Roe* is remembered today as a proclamation of *women's* rights, the language of the Supreme Court's opinion places the responsibility for the abortion on the "responsible physician"[118] and only briefly recognizes abortion as a woman's act of self-determination by acknowledging the physical and social circumstances that may lead her to decide to terminate her pregnancy.[119]

In 1992, the constitutional terrain on abortion shifted significantly in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In *Casey*, the Court abandoned *Roe*'s trimester framework in favor of a binary structure in which the fetus's viability would determine the woman's rights.[120] *Casey* diminished the strength of the right established by *Roe* by strengthening the state's interest in potential life and changed how abortion laws would be assessed from strict scrutiny review to rational basis review in the form of the "un-

114. Roe v. Wade. 410 U.S. 113, 153 (1973).

115. *Id.* at 154.

116. *Id.*

117. *Id.* at 163–64.

118. *Id.* at 165–66 ("The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.").

119. *Id.* at 153 ("The right of privacy . . . is broad enough to encompass a *woman's* decision whether or not to terminate her pregnancy. The detriment that the State may impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the *woman* and her responsible physician necessarily will consider in consultation" (emphasis added).).

120. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 837 (1992).

due burden test."[121] Now, after *Casey*, a woman has the right to choose to have, and obtain, an abortion before viability without undue interference from the state.[122] A state may regulate abortion prior to viability, so long as the regulation does not amount to an undue burden on the woman's right.[123] After fetal viability, a state may prohibit abortion, but must maintain exceptions for pregnancies that endanger the woman's life or health.[124] Later cases have tweaked and contested *Casey*'s undue burden test,[125] but the specifics of the application of undue burden analysis are not particularly relevant to this discussion.

Casey also changed the law's discussion of who has control and responsibility over the abortion decision from the previous focus on the physician to a newfound recognition of the woman's fundamental primacy in the decision-making process. The Court said:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. . . . Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. . . . The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.[126]

---

121. For a detailed explanation of how *Casey* weakened the Supreme Court's precedents on abortion, see SANGER, *supra* note 7, at 30–34.

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* Stenberg v. Carhart, 530 U.S. 914 (2000); Gonzales v. Carhart, 550 U.S. 124 (2007); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

126. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851–52 (1992) (emphasis in original).

This language is a stark contrast to that of *Roe*, in which the Court vindicated the right of a physician to "administer medical treatment" and held that the abortion decision is "in all aspects . . . a medical decision, and basic responsibility for it must rest with the physician."[127] The excerpted language from *Casey* details the personal nature of the abortion decision, and in doing so, relocates authority to the hands of the woman seeking to terminate her pregnancy.

This emphasis on the woman's choice was reiterated by Justice Ginsburg in her dissent in *Gonzalez v. Carhart*, in which she describes abortion using equal rights rhetoric and analyses; the Justice stated that in order for a woman to fully exercise her right to participate in the "social and economic life" of the nation and possess the benefits of her equal citizenship to men, she must have power to control her life by aborting an unwanted pregnancy.[128] This shift in language validates the idea that an abortion is an expression of ownership over one's life instead of a medication doled out because of a doctor's judgment.[129]

In the United States, courts now operate as a check on a state's regulation of abortion. State abortion laws must be interpreted in conjunction with the constitutional right to abortion. As much as a state's law may contravene the right to an abortion outlined in *Roe* and *Casey*, the Constitution views punitive, restrictive measures suspiciously as these laws and the legislators who enacted them carry the perception of working to unconstitutional ends.[130] Regardless of whether the laws are intended to define the contours of this established right or are intended to directly challenge its validity, every state's laws necessarily engage with the Supreme Court's decisions. The starting and focal point in these abortion dialogues is the woman's (qualified) right to terminate her pregnancy—state laws hostile to abortion can only work to define or constrain this right. Together, a state's statutes and the case law form local constellations of law that determine the degree of liberty a woman possesses.

---

127. Roe v. Wade, 410 U.S. 113, 165–66 (1973).

128. *See Gonzales*, 550 U.S. at 169–89 (Ginsburg, J., dissenting) ("Women, it is now acknowledged, have the talent, capacity, and right 'to participate equally in the economic and social life of the Nation.' . . . Their ability to realize their full potential, the Court recognized, is intimately connected to 'their ability to control their reproductive lives.' Thus, legal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").

129. Reva B. Siegel, Roe*'s Roots: The Women's Rights Claims that Engendered* Roe, 90 B.U. L. REV. 1875, 1879 (2000).

130. Sanger, *supra* note 7, at 28–34.

Thus, the meaningfulness of abortion's placement in the criminal code should vary according to when a state chose to criminalize abortion. A state's decision to regulate abortion in the penal code after *Roe* should carry more evidence of an intent to sanction women than the same decision before *Roe*, despite the fact that the resulting placement would be the same. After *Roe*, when a state places abortion in the criminal code, a state expresses a commitment to the qualified nature of the abortion right and signifies a dedication to limiting access to the procedure. For example, Idaho prefaces its criminal law on abortion by stating that it has a "'profound interest' in preserving the life of preborn children" and declares its public policy to interpret all legal authorities to prefer, by all legal means, live childbirth over abortion.[131]

Prior to *Roe*, a state's decision to regulate abortion through the criminal law was the norm and did not indicate an intent to challenge a constitutional right. Rather, any liberalization of the preexisting absolute prohibition on abortion indicated a position that recognized the difficulties a woman faced, both moral and practical, in making her decision, and the ramifications of full criminalization for public health. In this way, these early liberalization laws—despite regulating abortion in the penal code—reflect an interest in expanding access to safe procedure rather than a commitment to limiting access to the procedure. Thus, abortion's literal criminal status in certain jurisdictions does not necessarily indicate a hostility to abortion; if anything, it may indicate a historically progressive stance.

The current law reflects an interest in expanding access to safe procedure rather than a commitment to limiting access to the procedure. This is illustrated in the case of New York, where the fact that abortion is regulated in the penal code does not indicate an intent to punish women or demonize abortion. Further, the liberal attitude evinced during the partial decriminalization of abortion in the 1970s has continued to this day. Practically speaking, despite the fact that abortion is regulated in the penal code, abortion is not treated as a crime in New York, as the state has taken steps to ensure that women are able to obtain a safe abortion: New York imposes only the twenty-four-week limit restriction on access to abortion,[132] has a compara-

131. IDAHO CODE ANN. § 18-601 ("The supreme court [*sic*] of the United States having held in the case of 'Planned Parenthood v. Casey' that the states have a 'profound interest' in preserving the life of preborn children, Idaho hereby expresses the fundamental importance of that 'profound interest' and it is hereby declared to be the public policy of this state that all state statutes, rules and constitutional provisions shall be interpreted to prefer, by all legal means, live childbirth over abortion.").

132. N.Y. PENAL LAW § 125.05 (McKinney 1965).

tively high presence of abortion providers in-state,[133] and is one of the only states to require public funding of abortion.[134]

Consequently, the practical and symbolic effect of abortion's placement in New York's penal code does not affect women's ability to access abortions or cause a dignitary harm that post-*Roe* sanctions do. Because the law was enacted prior to *Roe*, it does not carry the same intent to punish women and challenge the validity of their decisions in the way that many criminal abortion laws enacted after *Roe* do. The chill that criminalization may impose on abortion is contested and safeguarded by the constitutional right to abortion enshrined by *Roe*'s and its progeny's requirements that a state's regulation of abortion imposes no undue burden on the woman's ability to exercise her right. Thus, the consequences of criminalization in New York are more muted and less harmful than they are in other jurisdictions like Great Britain.

That being said, the law's substantive limitations on abortion still harm women. There are countless tragic stories of women who have suffered because of New York's limitation on late-term abortions to cases in which the woman's life is in danger.[135] But, the law's location in the penal code does not make late-term abortion inaccessible; rather, the law's substance makes abortion after twenty-four weeks inaccessible. If New York reformed the law by expanding the category of cases in which a late term abortion could be obtained, while continuing to regulate abortion in the penal code, then women who were previously unable to get a late term abortion because their lives were not in danger would now be able to do so. By contrast, if New York merely retained the substance of present regulation, but moved it to the public health code, women seeking a late-term abortion would still be unable to get an abortion without leaving the state. To remedy this limitation in the law, in 2016, former New York State Attorney General Eric T. Schneiderman issued an opinion broadening the category of cases in which a late-term abortion was legal to include those in which an abortion is necessary to protect the

133. *See State Facts about Abortion: New York*, *supra* note 24.

134. *State Funding of Abortion Under Medicaid*, *supra* note 25; Vivian Yee, *supra* note 25.

135. Bodde & Kreuger, *supra* note 12, at 15–20; Emma Whitford, *How New York's Current Law Puts Women's Lives at Risk*, GOTHAMIST (Jan. 26, 2017), http://gothamist.com/2017/01/26/abortion_reform_new_york.php [https://perma.cc/8KZY-5MHV]; Jia Tolentino, *Interview with a Woman Who Recently Had an Abortion at 32 Weeks*, JEZEBEL (June 15, 2016), https://jezebel.com/interview-with-a-woman-who-recently-had-an-abortion-at-1781972395 [https://perma.cc/T9ML-V5ES].

health of the woman and when the fetus is not viable.[136]

B. Great Britain

To appreciate the effects of abortion's regulation in the penal code in the United States and in Great Britain, it is important to understand the differences in the legal structures in the two jurisdictions. The fundamental difference between the legal frameworks is that, in the United States, women have a right to an abortion as part of the Constitution's due process protections. By contrast, in Great Britain, there is nothing in the positive law that guarantees women that they will be able to lawfully abort an unwanted pregnancy. Further, the law in Great Britain does not validate or recognize the personal nature of the abortion decision. Compared to New York, Great Britain's choice to regulate abortion in the penal code has far more serious symbolic consequences, as constitutional abortion jurisprudence in the United States relieves some of the consequences of criminalization. Additionally, the structure of the British law denies women's role as the primary decision-maker and transfers the final authority for the abortion decision to her physician, which undermines the elements of sex equality and dignity implicated by abortion.[137] The law's grant of final decision-making power to the physician creates a real dignitary harm as it both implies that women are unable to make such a decision, and that abortion is solely a medical procedure, which conceals the unique, personal dimensions surrounding the decision to abort a pregnancy.

While the European Convention on Human Rights is in effect in Great Britain, the Convention has had little effect on U.K. abortion law thus far. This is despite the suggestion by many scholars,[138] as

136. Formal Opinion from Eric T. Schneiderman, N.Y. State Attorney General, to Nancy Groenwegen, Counsel, Office of State Comptroller (Sept. 7, 2016), https://ag.ny.gov/sites/default/files/abortion_opinion_2016-f1.pdf [https://perma.cc/8KVQ-X47G].

137. Siegel, *supra* note 129, at 1879–86. While Siegel discusses early U.S. laws that had limited therapeutic exceptions for abortions, these laws were relatively similar in structure to the Abortion Act of 1967, and thus the claims that these laws are paternalistic and express and enforce a secondary social status for women still holds applicable to Great Britain's laws.

138. Rosamund Scott, *Risks, Reasons and Rights: The European Convention on Human Rights and English Abortion Law*, 24 MED. L. REV 1 (2015). Scott argues that making access to lawful abortion within early pregnancy conditional on meeting the requirements of the Abortion Act of 1967 is an unjustified interference with a woman's private life under Article 8(2). Further, she problematizes the lack of a system of formal review in the event that a physician declines to provide an abortion. *Id.*

well as the Supreme Court of the United Kingdom,[139] that the United Kingdom's present regulation of abortion is inconsistent with the Convention. The combination of the OAPA, the ILPA, and the Abortion Act of 1967 comprise the entire legal framework for abortion in Great Britain. None of these laws affirm that a woman has a *right* to an abortion. Rather, the bulwark of the law in effect implies the exact opposite—that women do not have a right to an abortion because abortion is a crime with some exceptions. Thus, when a woman in Great Britain obtains an abortion, she must plead that her situation falls under the few established categories that Parliament has deemed acceptable. The language of the law thus offers a begrudging acquiescence to abortions that are requested due to necessity instead of a real cognizance of the validity of the woman's action in and of itself. The letter of the law does not reflect the practical reality of abortion in Great Britain, where liberal interpretations of the law by doctors have made abortion generally available upon a woman's request.[140]

The issues presented by the absence of an affirmative legal right are compounded by the fact that women do not have primary authority over whether they can terminate their pregnancies. In Great Britain, the physician acts as a gatekeeper in the process of acquiring an abortion because the requirement that two physicians find that a woman satisfies an exemption gives the decision-making power to doctors.[141] This requirement reflects a 1960s attitude of "doctor knows best" paternalism that assumed a patient would not be competent enough to act in her own best interests.[142] This attitude is not entirely foreign to the United States' treatment of abortion, as *Roe* also emphasized the role of the physician in the abortion decision.[143]

139. R (A & B) v. Secretary of State for Health [2017] UKSC 41 (appeal taken from Eng. and Wales). Lord Kerr and Lady Hale found that the policy for not providing state funding for Northern Irish women's abortions breached women's rights under Article 14 and Article 8 of the European Convention on Human Rights, but the majority of the court found that this was a matter for Parliament to resolve. *See also* Amelia Gentleman, *Supreme Court Narrowly Rejects Northern Ireland Free Abortions Appeal*, GUARDIAN (June 14, 2017, 7:28 PM), https://www.theguardian.com/world/2017/jun/14/supreme-court-narrowly-rejects-northern-ireland-free-abortions-appeal [https://perma.cc/6CVT-QUME].

140. *See* Sheldon, *supra* note 76, at 345; Grubb, *supra* note 69, at 154.

141. *See* The Abortion Act 1967, c. 87 (Gr. Brit.).

142. Sheldon, *supra* note 76, at 345, 354–55 (suggesting that even at the time the Abortion Act was enacted, physicians were not intended to dissuade a woman from seeking an abortion, and at present there is a strong consensus among constituents that the state does not have a responsibility to reduce the number of abortions).

143. Roe v. Wade, 410 U.S. 113, 162–66 (1973). *Roe* vindicates the right of the physician to administer medical treatment according to his professional judgment up to the

However, while *Roe*'s rhetoric perhaps overemphasized the appropriate role of a doctor, it did not actually confer any judgment or veto power over the woman's decision to terminate her pregnancy to physicians. In the United States, doctors may refuse to perform abortions because of their own religious or moral objections but doctors cannot prevent a woman from obtaining an abortion by finding another physician.[144] There is an important distinction to be made between conscientious refusals and a physician's refusal based on the adequacy of a woman's reason to terminate her pregnancy. The former is an individual objection based on a physician's personal beliefs, whereas the latter is a judgment of the woman, based on her motivations and her situation, and carries a veneer of an impartial medical opinion.

Placing decision-making authority in the hands of physicians gives them enormous power in the doctor-patient relationship, as their role under the law requires them to judge a woman's situation and determine her worthiness for an abortion. This is problematic in the case of abortion, which is unique in some respects from some other medical procedures because it is voluntary in nature. In many instances, a woman's own perspective and situation defines whether the pregnancy is wanted or not and whether an abortion is necessary. But, it is important to note that in many instances, a woman may need to terminate an otherwise very wanted pregnancy due to unexpected medical developments in her health or the fetus's health. In any event, a woman must ultimately decide whether the proper course for her pregnancy is an abortion. Unlike when providing a tonsillectomy or colonoscopy, a doctor cannot know all the details in a woman's life that motivate her to seek this procedure. Despite a general trend of liberal interpretation and respect for the woman's choice among physicians,[145] physicians still have the legal power to withhold an abortion that would have serious ramifications for their pregnant patient. The message conveyed by the present law in Great Britain is that abortion is a serious moral wrong when not carried out with medical approval.[146]

Beyond the physician's privileged position, the law's definition of categories of acceptable abortion is problematic because it requires a woman to show that she is deserving of the procedure. Un-

points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.

144. 42 U.S.C. § 300a-7 (1973).

145. Sheldon, *supra* note 76, at 355–56.

146. *Id.* at 356.

der this scheme, a woman bears the burden of proving that she meets the formal requirements of a category. But to win a physician's approval, she must simultaneously show that despite the fact that the procedure she seeks implicates criminal sanction, she is undeserving of the law's punishment.[147] To some extent these concerns do not reflect the abortion practices in Great Britain; the majority of people in Great Britain consider the abortion choice to be the woman's rather than her physician's.[148] Physicians tend to respect the woman's choice and liberally interpret the Abortion Act to allow her to terminate her pregnancy.[149]

While the practical realities of obtaining an abortion may deviate from the law's limited compartmentalization, the law is problematic in ways other than its paternalism and ennoblement of physicians. The Abortion Act's list of acceptable reasons for an abortion treats termination as a medical mishap rather than an affirmative decision that respects the medley of factors, some nonmedical, that culminate in a woman's decision to terminate her pregnancy. Defining the only acceptable bases as those that present health risks to the woman or the fetus obfuscates a woman's choice to terminate her pregnancy for reasons that may not be medical in nature. The law does not recognize a woman's motivations beyond her health and thus fails to affirm the concept that women have full control over their reproductive future.[150] To fully respect a woman's decision-making autonomy, the non-medical factors that have led her to seek an abortion should also be acknowledged and respected rather than ignored because of possible inconsistencies with the law.

The confluence of the lack of legal protection for abortion in Great Britain, the law's privileging of the physician, and the law's concealment of real non-medical considerations that lead a woman to decide to terminate her pregnancy makes Great Britain's criminalization of abortion more symbolically dangerous than New York's. The law creates a legal framework that undermines women, as it does not acknowledge or respect each woman's decision and instead bestows the final say on abortion to the physician. The result is a real digni-

147. Rebecca J. Cook, *Stigmatized Meanings of Criminal Abortion Law*, *in* ABORTION LAW IN TRANSNATIONAL PERSPECTIVE: CASES AND CONTROVERSIES 347, 358 (Rebecca J. Cook et al. eds. 2014).

148. *See id.* at 354.

149. Sheldon, *supra* note 76, at 345. *See also* Grubb, *supra* note 69, at 154.

150. Siegel, *supra* note 129, at 1882 (discussing how early abortion law liberalization through therapeutic exceptions rationalized doing so for women's health, rather than for women's equal standing as citizens and competency to make decisions about sex, parenting, and motherhood without control by the state).

tary harm, as the law not only implies that women are inept and unable to handle the implications of abortion but also robs them of the power to do so.

III. OUTSOURCING CRIMINALITY: STIGMA AND ABORTION

This section considers the meaning of abortion stigma and its relationship to criminal law. Part A analyzes the claim that abortion stigma is a consequence of criminalization by considering how abortion stigma is created by other forms of law. Part B considers what is meant by abortion stigma and considers how the law contributes to creating stigma associated with criminal convictions in the abortion context through a variety of legal mediums.

A. Considering Abortion Stigma and the Criminal Law

The decriminalization movements in New York and Great Britain claim that it is necessary to remove the regulation of abortion from the penal code because associating abortion with criminal law legally differentiates abortion from other medical procedures and stigmatizes abortion for both women and health care providers.[151] The argument maintains that, because criminalization isolates abortion from the regulation of other reproductive and medical practices, it sends a message that abortion is fundamentally unlike other health services.[152] Additionally, abortion's partial criminalization validates the belief that abortion is something that women should feel guilty about, as its placement in the criminal code renders pregnant women and their physicians more akin to murderers than patients and doctors participating in a lawful activity.[153] In this section, this Note evaluates claims that abortion stigma is caused by a jurisdiction's choice to regulate abortion in the criminal law and examines how non-criminal law and non-legal factors also facilitate abortion stigma. The aim is to question the effect and meaning of criminal regulation of abortion by identifying other types of abortion regulation and their stigmatic impacts.

---

151. For the U.K., see 623 Parl Deb HC (6th ser.) (2017) col. 26–32, https://hansard.parliament.uk/commons/2017-03-13/debates/D76D740D-2DDD-4CCB-AC11-C0DBE3B7D0D8/ReproductiveHealth(Access%20To%20Terminations) [https://perma.cc/B95W-SW3L]. For New York, see Bodde & Krueger, *supra* note 12, at 6–13.

152. Bodde & Kreuger, *supra* note 12; Sheldon, *supra* note 76, at 356–57; Cook, *supra* note 147, at 347–49.

153. Sheldon, *supra* note 76, at 356–57.

The claim that stigma is created by proximity to criminal law is not new. Stigma and shame are often considered an integral part of punishment and are an essential element of retributive justifications for punishment.[154] Abortion stigma is a widely reported phenomenon experienced by women terminating their pregnancies and the physicians who provide these medical services. However, abortion stigma does not require criminal law to exist, as it can be created by non-criminal laws and society.

Abortion stigma, like other stigmas, is a negative and "deeply discrediting"[155] perception of women who seek to terminate their pregnancies.[156] As Paula Abrams put succinctly, "abortion stigma is a gendered construction of deviance that taps into cultural archetypes about women and pregnancy."[157] Abortion stigma depicts abortion as an uncommon and aberrant practice[158] and portrays the woman terminating her pregnancy as "promiscuous, selfish, dirty, irresponsible, heartless or murderous."[159] It insinuates that women who have obtained or are seeking abortions have violated societal norms and values, are morally deficient, and have committed a blameworthy act.[160] These negative attributions mark women who have aborted pregnancies as inferior to a preconceived baseline of "normal" that is related to ideals of womanhood.[161] For example, single women who abort unwanted pregnancies face social condemnation for being "selfish" because they have flouted socially constructed expectations of maternity.[162] Abortion stigma is also easy to link to deficiencies in

154. *See generally* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION (1989); Nathan Springer, *Shame in Criminological Theory*, *in* ENCYCLOPEDIA OF CRIMINOLOGY AND CRIMINAL JUSTICE (Gerben Bruinsma & David Weisburd eds., 2014).

155. I am borrowing the description "deeply discrediting" from Erving Goffman's seminal and revolutionary book on stigma. He describes stigma as "a special kind of relationship between attribute and stereotype," going on to clarify that it is an "attribute that is deeply discrediting" that alters the identity of an individual from normal to one that is a "tainted, discounted one." Further, the term is "applied more to disgrace itself than to the bodily evidence of it." ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 2–4 (1963).

156. *See* Anuradha Kumar et al., *Conceptualising Abortion Stigma*, 11 CULTURE, HEALTH & SEXUALITY 625, 628 (2009).

157. Paula Abrams, *Abortion Stigma: The Legacy of Casey*, 35 WOMEN'S RTS. L. REP. 299, 307 (2014).

158. *Id.*

159. Kumar et al., *supra* note 156, at 629.

160. Hoggart, *supra* note 8, at 188.

161. *Id.*

162. Abrams, *supra* note 157, at 305; *see* Marcia A. Ellison, *Authoritative Knowledge and Single Women's Unintentional Pregnancies, Abortions, Adoption, and Single*

character deriving from religious sources. For example, an unwanted pregnancy necessitates sex and implies sex for purposes other than procreation, even though an unwanted pregnancy could have been a wanted one gone awry. Consequently, women seeking an abortion are often associated with sins of lust, gluttony, and desire.[163]

Abortion stigma, unlike some other stigmatized attributes, is an invisible or "concealable" stigma that is not visible to others unless a woman chooses to disclose it.[164] In a society that stigmatizes abortion, an abortion disclosure risks significant social repercussions and stigma.[165] The consequence is a culture of "abortion secrecy"[166] in which women are subject to a coercive cultural silence about their abortion, because any disclosure risks a response of shame.[167] This has resulted in a pervasive and deliberate phenomenon of nondisclosure about abortion to loved ones,[168] and even underreporting to data collectors.[169] To a large extent, as long as an abortion is kept a secret, the stigmatic harm that the woman experiences because of the abortion is one that she imposes on herself, rather than one that is imposed by others as they often do not know that she has aborted a pregnancy. Anuradha Kumar, a leading scholar on the topic of abortion stigma, describes the individual nature of abortion stigma: "[T]he penetration of abortion stigma into the psyche of individual women and men is common and perhaps the most destructive locus

---

Motherhood; Social Stigma and Structural Violence, 17 MED. ANTHROPOLOGY Q. 322, 336 (2003).

163. Joanna Erdman, *The Law of Stigma, Travel and the Abortion Free Island*, 33 COLUM. J. GENDER & L. 29, 31 (2016).

164. Brenda Major & Richard H. Gramzow, *Abortion as Stigma: Cognitive and Emotional Implications of Concealment*, 77 J. PERSONALITY & SOC. PSYCHOL. 735, 735 (1999). *See also* Alison Norris et al., *Abortion Stigma: A Reconceptualization of Constituents, Causes, and Consequences*, 21 WOMEN'S HEALTH ISSUES 49, 50 (2011) ("Abortion stigma is usually considered a 'concealable' stigma: It is unknown to others unless disclosed. . . . [T]hose stigmatized by abortion cope not only with the stigma once revealed, but also with managing whether or not the stigma will be revealed.").

165. Abrams, *supra* note 157, at 314.

166. *Id.*; SANGER, *supra* note 7, at 60–69.

167. Major & Gramzow, *supra* note 164, 735–36.

168. *Id.* at 736 ("[T]hat women who told a significant other about their abortion and who perceived that person as less than completely supportive of their decision were more distressed post-abortion than were women who kept their abortion a secret. Concealing an abortion may also preserve important interpersonal relationships that could be threatened if the abortion was known. Consequently, concealing an abortion may prevent the loss of important social networks and preserve social support."); SANGER, *supra* note 7, at 60–69.

169. Kumar et al., *supra* note 156, at 629 ("The invisibility of abortion stigma may have an impact on prevalence data. Only 35–60% of actual abortions are reported in surveys.").

of abortion stigma. Shame and guilt are the two most common manifestations of the internalized abortion stigma."[170] But the fact that stigmatization harms are self-imposed does not mean that the harms are not real; abortion secrecy is psychologically stressful and can have cognitive and physical repercussions.[171] Moreover, it leads to delays in arranging for abortions, which can result in greater health and legal problems, and can cause psychological problems related to self-hatred.[172]

Despite its apparent universality, the sources and strengths of abortion stigma vary across communities and societies and are very local in nature.[173] For example, perceptions of abortion stigma are lower in the Northeastern United States than in other regions.[174] Even within these larger regions, local community attitudes toward abortion affected the impact of the woman's experience of stigma.[175] A study conducted in Great Britain found that a woman's impression of her community's social support for her abortion decision affected the degree of stigma she experienced.[176]

Beyond community-based sources of stigma, the law itself operates as a medium through which stigma is created and reinforced and recognizes that stigma is a serious issue.[177] The U.S. Supreme Court, has a long history of dealing with stigma, and has recognized the law's role in generating or reinforcing stigma. The Court has dealt with stigma like a tangible disability that requires procedural due process before a state may impose it,[178] can have the effect of

---

170. *Id.* at 633.

171. Major & Gramzow, *supra* note 164, at 736, 741–42; Abrams, *supra* note 157, at 315.

172. Abrams, *supra* note 157, at 306.

173. Kumar et al., *supra* note 156, at 626; *see* Abrams, *supra* note 157, at 316 (noting the effect of geography).

174. Abrams, *supra* note 157, at 316.

175. *Id.*

176. Phillippa Goodwin & Jane Ogden, *Women's Reflections About Their Past Abortions: An Exploration of How and Why Emotional Reactions Change Over Time*, 22 PSYCHOL. & HEALTH 231, 242–48 (2007).

177. Abrams, *supra* note 157, at 317. For pieces that more critically engage with how the law creates and reinforces social norms, see generally Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

178. Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) ("[W]hether the label or characterization given a person by 'posting,' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such

foreclosing the ability to live within the structure of civic institutions,[179] and can be a constitutionally repugnant penalty.[180] For example, in *Lawrence v. Texas*, the Court stated that even if a law criminalizing sodomy was never enforced, the law would still have a stigmatizing effect.[181] Great Britain does not have quite as robust a legal discourse on stigma, but Parliament has recognized the detrimental effects of stigma as it relates to mental health stigma[182] and HIV stigma[183] in response to political advocacy campaigns.

But does partial criminalization of abortion in Great Britain and New York create abortion stigma? To a large extent, this seems logical, as criminal law is among a state's most coercive and draconian vehicles of exerting power. Criminal law is a medium that shapes and changes people's behavior through mechanisms of approval, sanction, and costs; stigma represents one example of such a mechanism.[184] The contention that criminalizing abortion generates its own stigma is undermined by the fact that the majority of people in both New York and Great Britain do not know that abortion is regulated in the penal code.[185] Yet there is abundant proof that women in New York and Great Britain still feel stigma, despite a likely unawareness about how the law has framed their decision. For example, support

---

that those requirements of procedural due process must be met.").

179. Plyler v. Doe, 457 U.S. 202, 223 (1982) ("The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.").

180. Lawrence v. Texas, 539 U.S. 558, 584 (2003) (citing *Plyler*, 457 U.S. at 238–39 (Powell, J. concurring)). Paula Abrams gives a more comprehensive discussion of the Supreme Court's jurisprudence on stigma and dignitary harm, and argues that while the Supreme Court recognizes and condemns state enforced stigmatization in other instances, in the case of abortion the Court itself stigmatizes the procedure. *See* Abrams, *supra* note 157, at 317, 321–25.

181. *Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

182. *Tackling Social Stigma on Mental Health: Key Issues for 2015 Parliament*, U.K. PARLIAMENT (2015), https://www.parliament.uk/business/publications/research/key-issues-parliament-2015/social-change/mental-health-stigma/ [https://perma.cc/F8KJ-8EY5].

183. 757 Parl Deb HL (6th ser.) (2014) col. 1105–07 (UK).

184. *See generally* Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991); Regina Austin, *"The Shame of it All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons*, 26 COLUM. HUM. RTS. L. REV. 173, 174–85 (2004); Reno v. ACLU, 521 U.S. 844, 872 (1997) (noting the "opprobrium and stigma of a criminal conviction").

185. Sheldon, *supra* note 76, at 356 n.121; Bodde & Kreuger, *supra* note 12.

movements intended to destigmatize abortion, like #ShoutYourAbortion in the United States,[186] and One in Three[187] in the United Kingdom are still able to resonate among women in New York and Great Britain. While ignorance of the law is rarely a valid defense to its enforcement, might widespread ignorance of the law suggest that it does not contribute to the social phenomenon of abortion stigma? A study performed in Victoria, Australia, a state that recently moved abortion regulation out of the penal code, suggests an affirmative answer to this question, as it found that the decriminalization of abortion does not affect the prevalence and intensity of abortion stigma.[188]

The law's creation of abortion stigma does not require the use of its penal power; the law can stigmatize abortion outside of the criminal context. For example, fetal personhood laws, often codified in Public Health sections of state codes,[189] stigmatize a woman by transforming the potential for life that prenatal life represents into a fully formed, extant life.[190] The result equates abortion with infanticide and creates the image that women getting abortions are killing their children.[191] "Protection" laws[192] send the message that a woman needs to be protected from her decision to terminate her pregnancy, implying that something about her decision was wrong and perhaps even dangerous. These laws take a variety of forms, most of which are also found outside the penal code,[193] and include waiting

186. SHOUT YOUR ABORTION, https://shoutyourabortion.com/ [https://perma.cc/B8WX-RLWB].

187. Imogen Goold, *1 in 3 Women in the UK Will Have an Abortion—So Why is it So Secret?*, UNIV. OF OXFORD FACULTY OF LAW (Oct. 12, 2017), https://www.law.ox.ac.uk/news/2017-10-12-1-3-women-uk-will-have-abortion-so-why-it-so-secret [https://perma.cc/YK9D-6RMM].

188. *See* Keogh et al., *supra* note 14, at 21–22.

189. *See, e.g.*, ARK. CODE ANN. § 20-16-1102 (West 2018) (Arkansas' Public Health and Welfare Code); S.D. CODIFIED LAWS §§ 34-23A-1, 34-23A-16 (2018) (South Dakota's Public Health and Safety Code); OKLA. STAT. TIT. 63 § 1 -738.10 (2018) (Oklahoma's Public Health and Safety Code); GA. CODE ANN. § 31-9A-4 (West 2017). *But see* IDAHO CODE ANN. § 18-601.

190. Abrams, *supra* note 157, at 317–18.

191. *Id.*

192. *Id.* at 318. Abrams uses this phrase to refer to laws that treat women paternalistically and restrict abortion access.

193. *See, e.g.*, ARIZ. REV. STAT. ANN. §36-2153 (West 2018) ("informed consent" provision in Public Health & Safety Code); OKLA. STAT. tit. 63, § 1-738.2 (2017) ("informed consent" provision in the Public Health Code); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2015) ("informed consent" provision in Health & Safety Code); IND. CODE ANN. §16-34-2-1.1 (West 2016) ("informed consent" provision in Health Code); LA. STAT.

periods, "informed consent" provisions, and mandatory ultrasounds.[194] Paula Abrams gives a particularly thorough rundown of how non-criminal laws stigmatize abortion,

> Specialized informed consent laws and waiting periods reflect cultural stereotypes about a woman's moral authority. Mandatory ultrasound laws presume a woman's decision to terminate a pregnancy can be changed by subjecting her to an emotionally stressful environment. Laws restricting abortion based on unsubstantiated claims of fetal pain deny women moral autonomy.[195]

As this excerpt details, these non-penal codes stigmatize women by implying that there is something wrong and harmful about the woman's decision, and seek to change it through legal, coercive stressors.

To some extent, although the U.S. Supreme Court has decried the law's imposition of stigma for other constitutionally protected rights, the Court has generally allowed states to impose laws that are intended to stigmatize abortion and has even used language in its opinions that indicates a moral disapproval of some abortion procedures.[196] These laws restrict access to abortion and are part of a cycle in which the law promotes and rationalizes abortion stigma, which in turn creates more restrictive laws.[197]

In Great Britain, the bulk of abortion's legal framework is in the criminal law and it is harder to identify other types of law regulating abortion. An amendment to the proposed Health and Social Care Bill in 2012 by Conservative MP Nadine Dorries sought to prevent private abortion providers from supplying pre-abortion counseling because they allegedly had a business interest in encouraging women to proceed with an abortion.[198] Dorries's amendment did not pass,

---

ANN. § 1061.17 (2016) ("informed consent" in the Public Health and Safety Code); MISS. CODE ANN. §§ 41-41-33, 41-41-35 (West 2017) ("informed consent" in Public Health Code); WIS. STAT. ANN. § 253.10 (West 2016) ("informed consent" in Health Code). *But see* UTAH CODE ANN. § 76-7-305 (mandatory wait time in Criminal Code).

194. Abrams, *supra* note 157, at 318–19.

195. *Id.* at 318.

196. *Id.* at 318–24. For a deeper discussion of how the Supreme Court's rhetoric stigmatizes abortion, *see* Paula Abrams, *The Scarlet Letter: The Supreme Court and the Language of Abortion Stigma*, 19 MICH. J. GENDER & L. 293 (2013).

197. Abrams, *supra* note 157, at 318.

198. *The Independence of Private Versus Public Abortion Providers: Implications for Abortion Stigma*, 38 J. FAM. PLAN. & REPROD. HEALTH CARE 262, 262 (2012) [hereinafter *Abortion Stigma U.K.*]. This article itself is also an example of abortion stigma; the author recounts her own abortion stories, and chooses to remain anonymous. Polly Curtis & Ben

but the paternalistic attitude it reflected was similar to "protection" laws in the United States because it implied that a counseling appointment that ends with a woman deciding to terminate her pregnancy is a bad outcome that should be discouraged.

Another example is the National Health Service's ("NHS") abortion consent forms. Rather than asking for the woman's name using the phrase "patient's name," or even perhaps the more obvious "name," the abortion consent form asks for the "mother's name."[199] Moreover, the NHS form describes fetuses as "baby/fetus" rather than the more accurate term, "fetus."[200] This language is also promoted in the Royal College of Obstetricians and Gynecologist ("RCOG") Guidelines.[201] The normalization of the fetus as a baby by official NHS forms and the RCOG Guidelines is similar to the fetal personhood laws in the United States, as it suggests that a woman terminating her pregnancy is actually a mother murdering her child.

Thus, while partial criminalization may contribute to abortion stigma, the legal sources of abortion stigma are not exclusive to criminal law. Rather, the key factor that causes abortion law to create abortion stigma is when the law restricts access or intends to discourage abortion, as these laws materially affect a woman's abortion experience by making the procedure difficult to obtain. By making abortion inaccessible, a jurisdiction implies that it does not want women to terminate their pregnancies and, thus, sends the message that the state objects to abortion. This governmental disapproval is stigmatizing. Consequently, where a state chooses to codify its abortion laws is less germane to the stigmatization of abortion when, at the time it was enacted, it was continuing the existing standards of the law. By contrast, if an enacted law is more restrictive or punitive than the norm when it was passed, then the law is an affirmative pronouncement of a jurisdiction's anti-choice attitude and may be a considerable factor in the creation of abortion stigma in that jurisdiction.

Quinn, *Abortion Rules Shakeup Could Set System Back 25 Years, Says GPs' Chief*, GUARDIAN (Aug. 29, 2011, 2:30 PM), https://www.theguardian.com/world/2011/aug/29/abortion-counselling-rules-shakeup-gps [https://perma.cc/9S62-R83T].

199. *Abortion Stigma U.K.*, *supra* note 198, at 263.

200. *Id.*

201. *Id.* (citing to ROYAL COLLEGE OF OBSTETRICIANS AND GYNAECOLOGISTS (RCOG), THE CARE OF WOMEN REQUESTING INDUCED ABORTION: SUMMARY (EVIDENCE-BASED CLINICAL GUIDELINE NO. 7) (2011)).

B. Considering Criminal Stigma and Abortion Law

While all stigmas are collectively conceived to be "deeply discrediting attributes" that negatively change the identity of an individual to a "tainted, discounted one,"[202] their visibility and the severity of their effects vary depending on the attribute being stigmatized. One of the most profound and debilitating stigmas in Great Britain and the United States is the stigma associated with a criminal conviction. Stigma is an intended component of the criminal conviction,[203] and the conviction is part of a process of "tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious the criminal element in society."[204] Conviction stigma broadcasts to others that the convicted individual engaged in deviant conduct. To some degree, like abortion stigma, criminal stigma is invisible and concealable because an individual does not physically bear the evidence of their conviction. However, unlike abortion, disclosure of former convictions is regularly mandated by employers and other societal institutions. Employment discrimination against persons with criminal records has been normalized to a large extent, as many occupations in a variety of sectors like those in the public sector, the legal sector, and even the real estate sector are immediately off-limits.[205] Beyond the jobs that immediately disqualify persons based on past convictions, many other employers are reluctant to hire former offenders.[206]

Aside from the tangible, externally imposed harms of loss of employment prospects, criminal convictions can also result in disenfranchisement. In the United States, states are free to deny voting rights to convicted criminal offenders, and most states do. In forty-six states and the District of Columbia, all convicted adults in prison are denied the right to vote.[207] Thirty-two states disenfranchise individuals on parole, and twenty-nine disenfranchise those on proba-

---

202. GOFFMAN, *supra* note 155, at 2–4.

203. *See generally* BRAITHWAITE, *supra* note 154; Note, *Shame Stigma and Crime: Evaluating the Efficacy of Shaming Sanctions in Criminal Law*, 116 HARV. L. REV. 2186 (2003).

204. David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 5 BYU L. REV. 1277, 1312 (2009).

205. *Id.*

206. *Id.*

207. Jamie Fellner, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United* States, HUMAN RIGHTS WATCH, https://www.hrw.org/legacy/reports98/vote/usvot98o.htm [https://perma.cc/A4CZ-83KZ].

tion.[208] In thirteen states, individuals who have fully served their sentences are barred for life from voting.[209]

In the United Kingdom, stigma from a past conviction can also restrict access to jobs, insurance, loans, and travel. Former criminal offenders are required to disclose their record to employers, insurers, landlords, financial services providers, educational institutions, visa applications, adoption agencies and others until their conviction has become "spent." Under the Rehabilitation of Offenders Act of 1974, the phrase "spent" refers to the law's finding that the offender has been rehabilitated, after a period of time has elapsed following their conviction.[210] Currently, this takes seven years for sentences of up to six months, and a decade for sentence of up to 2.5 years.[211] Sentences exceeding 2.5 years are never spent under the law.[212] However, under enhanced disclosure laws, even individuals with spent convictions must disclose a former criminal conviction for some jobs.[213] Employers discriminate against individuals who disclose a former conviction, resulting in lower job prospects[214] and a wage gap equivalent to around £60 a month.[215] Under the Represen-

208. *Id.*

209. *Id.* On November 6, 2018, Florida voters approved Amendment 4, restoring the voting rights of felons who completed their sentences. Frances Robles, *1.4 Million Floridians With Felonies Win Long-Denied Right to Vote*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html [https://perma.cc/36ND-8SFJ].

210. Rehabilitation of Offenders Act 1974 c. 53 https://www.legislation.gov.uk/ukpga/1974/53 [https://perma.cc/HYR8-TU5A].

211. Jessica Abrahams, *What Can't You Do with a Criminal Record?*, PROSPECT MAGAZINE UK (May 22, 2013), https://www.prospectmagazine.co.uk/magazine/criminal-record-chris-huhne-vicky-pryce-adam-johnson [https://perma.cc/6MYX-FNXZ].

212. *Id.*

213. DISCLOSURE AND BARRING SERV., A GUIDE TO ELIGIBILITY FOR STANDARD CERTIFICATES FOR REGISTERED BODIES AND EMPLOYERS (2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/753972/Standards_eligibility_guide_v1.0_051118.pdf [https://perma.cc/2G85-HFNU].

214. Jamie Doward, *Irrelevant criminal record checks harm ex-offenders' job hopes*, GUARDIAN (Nov. 25, 2017, 2:30PM), https://www.theguardian.com/uknews/2017/nov/25/irrelevant-criminal-record-checks-harm-job-hopes [https://perma.cc/E8FX-GM7L]; Richard Garside et al., *UK Justice Policy Review: Volume 6*, CTR. FOR CRIME AND JUST. STUD. 32 (June 26, 2017) https://www.crimeandjustice.org.uk/sites/crimeandjustice.org.uk/files/CCJS%20UKJPR6%2C%2026%20June%202017.pdf [https://perma.cc/6X6R-2E9P]; Kirstie Brewer, *After the Crime: Why Employers Should Give Ex-Offenders a Working Chance*, GUARDIAN (June 28, 2017), https://www.theguardian.com/careers/2017/jun/28/after-the-why-employers-should-give-ex-offenders-a-working-chance, [https://perma.cc/LDE5-HD74].

215. Christopher Stacey, *Looking Beyond Re-Offending: Criminal Records and*

tation of the People Act of 1983, the United Kingdom also disenfranchises convicted persons while they are in prison.[216]

By comparison, discussions surrounding abortion stigma suggest that abortion stigma lacks these visible, imposed disabilities. However, at times, the law's stigmatization of abortion in the United States and Great Britain appears more like a visible criminal stigma than it does a hidden abortion stigma. For example, there have been cases in the United States in which a prosecutor or opposing party tries to introduce evidence of a woman's abortion to make their case. Operating much like a past criminal conviction, evidence of the past abortion is intended to cast doubt on the woman's character or the credibility of her testimony.[217] In 2010, a Florida prosecutor tried to introduce evidence that a woman considered aborting her pregnancy during a trial about her child's death.[218] In family law cases, evidence of a woman's past abortion has led courts to conclude that a woman is unfit to have custody of her children.[219] Indeed, despite the law's deference to the reproductive choices a person chooses to make, there is evidence that employers discriminate against women who have chosen to abort a pregnancy.[220] Technically, the law in the United States does prohibit this, as Title VII bars an employer from discriminating on the basis of abortion,[221] and three cities and one state have passed ordinances to protect from workplace discrimination on the basis of reproductive choices. However, there are stories that indicate such discrimination is widespread.[222]

Poverty, CTR. FOR CRIME AND JUSTICE STUDIES, https://www.crimeandjustice.org.uk/publications/cjm/article/looking-beyond-re-offending-criminal-records-and-poverty, [https://perma.cc/89FF-LXGS].

216. Yujin Chun, *Comparing Felony Disenfranchisement in the U.K.*, CORNELL INT'L L. J. ONLINE (Nov. 25, 2013), http://cornellilj.org/comparing-felony-disenfranchisement-in-the-u-k/ [https://perma.cc/82DJ-85VP]; Ali Rickart, *Disenfranchisement: A Comparative Look at the Right of the Prisoner to Vote*, IUS GENTIUM (Feb. 6, 2015), https://ubaltciclfellows.wordpress.com/2015/02/06/disenfranchisement-a-comparative-look-at-the-right-of-the-prisoner-to-vote/ [https://perma.cc/7UFB-QYV8].

217. SANGER, *supra* note 7, at 65–66.

218. *Id*.

219. *Id*.

220. Mary Ziegler, *Choice at Work: Employment Discrimination and the Lost Potential of Choice* (conference paper presented at "A Revolutionary Moment: Women's Liberation in the late 1960s and early 1970s," Boston University, 2014).

221. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.003, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES § 1.A.4.c (2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [https://perma.cc/PR4H-XB9M].

222. Erin Heger, *For Many, Keeping a Job Means Hiding an Abortion*, REWIRE (Oct. 16, 2017), https://rewire.news/article/2017/10/16/many-keeping-job-means-hiding-abortion/

While criminal law may contribute to criminal stigma as it applies to abortion, this intense stigma is also caused by non-criminal laws. This Note, in discussing the many nuances of abortion stigma, considers the criminal prosecution of abortion in Great Britain and judicial bypass proceedings for minors in the United States. In the following sections, this Note looks at how the law recreates the stronger stigma of a criminal conviction in the context of abortion.

1. Criminal Stigma in the British Context

In Great Britain, abortion continues to be prosecuted when it deviates too far from the letter of the law.[223] Both individuals who provide medical abortifacients, like misoprostol, and women who self-abort have been convicted in recent history.[224] In 2015, two people were convicted of illegally supplying abortifacients; their sentences ranged from twelve months in prison with two-years suspension to twenty-seven months in prison.[225] Sentences for individuals who have self-aborted have ranged from a three-month jail sentence with a twelve-month suspension to eight-years imprisonment.[226]

While incarcerated, these individuals were disenfranchised under the aforementioned Representation of the People Act of 1983, which prohibits individuals in jail from voting.[227] Furthermore, because their actions resulted in a criminal conviction and record, they are required to disclose the details of their crime to future employers and landlords, among other individuals and institutions.[228] In these few cases, private abortion stigma literally becomes public criminal conviction stigma, as a past abortion, or abortion-proximity, is a crime rather than a medical service. Moreover, these individuals likely not only suffer from the tangible effects of criminal stigma, but also face an exacerbated sense of abortion stigma. Under the Rehabilitation of Offenders Act, women who are convicted of aborting unlawfully do not have the luxury of keeping their abortions secret.

[https://perma.cc/38X4-NT9A] (noting that St. Louis, Boston, Washington D.C., and Delaware are the only municipalities to prohibit discrimination based on reproductive choices).

223. BRITISH MED. ASS'N, *supra* note 88, at 11, 16–18.

224. *Id.*

225. *Id*.

226. *Id*. at 17.

227. Rehabilitation of Offenders Act 1974 c. 53, https://www.legislation.gov.uk/ukpga/1974/53 [https://perma.cc/HYR8-TU5A].

228. *See id.*

Based on the length of their sentences, they will be required to disclose their abortions to potential employers, among others, for at least ten years, if not forever.[229] Their conviction thus becomes a lawful basis for discrimination and stigmatization on two bases—the abortion and their status as a former offender.

2. Judicial Bypass Proceedings for Minors in the United States

In the United States, judicial bypass proceedings, often found in non-criminal codes,[230] are framed as alternatives for a state's requirement that a minor obtain parental consent or notification before terminating her pregnancy. While the laws requiring bypass proceedings are often located in non-criminal codes, the proceedings are structured in a manner similar to parole proceedings, which are intended to assess whether criminals have been rehabilitated during their incarceration. The many similarities between the two reinforce the idea that abortion is wrong and even a criminal act, and stigmatize the woman who seeks an abortion outside of the penal code.

Bypass proceedings are intended to assess whether the minor has shown she possesses the maturity to decide to terminate her pregnancy, and whether an abortion would be in her best interests.[231] Often, judges presiding over a bypass hearing will require a minor to display a sense of remorse and to prove that it will not happen again.[232] During the course of the bypass proceeding, the minor must lay bare some of the most intimate and personal details of her life, including the circumstances of the sex that resulted in her pregnancy and details of her family life that made it difficult for her to obtain their consent for an abortion. The task for the court, then, "is to assess whether the petitioner is mature and informed enough to credit

229. *Id*; Abrahams, *supra* note 211.

230. *See, e.g.*, ALA. CODE § 26-21-4 (1975) (codifying parental notification and judicial bypass provision in the Infants and Incompetents Code); ALASKA STAT. § 18.16.010 (2017) (codifying parental notification and judicial bypass provision in the Health, Safety, Housing, Human Rights, and Public Defender Code); COLO. REV. STAT. § 12- 37.5-101 (repealed 2018) (codifying parental notification and judicial bypass provision in the Professions and Occupation Code); FLA. STAT. § 390.01114 (2009) (codifying parental notification and judicial bypass provision in the Public Health Code); ILL. COMP. STAT. 70/1 (1995) (codifying parental notification and judicial bypass provision in the Families Code). *But see* IDAHO CODE §18-609A (2018) (codifying parental notification and judicial bypass provision in the Crimes and Punishment Code).

231. Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings and the Misuse of Law*, 18 COLUM. J. GENDER & L. 410, 473 (2009).

232. *Id.* at 420, 466.

the decision she has already made."[233]

This process of testifying is itself stigmatizing and shameful, as the young woman must engage in one of the most terrifying practices for victims of abortion stigma—disclosure—to an authority figure representing the state. Not only must she explain her desire for an abortion, which the state is withholding from her as though it were a forbidden fruit, but she must provide any information a judge may want, some of which may be stigmatizing in its own right. The process is humiliating for minors and is in and of itself a form of punishment.[234] It functions to facilitate retribution and protects against "recidivism." Indeed, repeat "offenders" who ask for a bypass more than once are regularly denied on their second attempt.[235] Thus, a previous abortion functions like a criminal history, such that minor petitioners may lawfully incur extra punishment from the state for a past "offense." Courts often require a showing of remorse as an element of the minor's necessary maturity, perhaps as evidence that she appreciates the gravity of the situation she is in, as well as her own role in creating it.[236] To some extent, it is unclear what exactly courts expect minors to feel apologetic about; is it that she had sex at a young age, had sex for non-procreative purposes, hid her sex and pregnancy from her parents, desired an abortion, or maybe even that she "murdered" a potential life?

The mechanisms of the judicial bypass proceeding also closely resemble the role of the parole board in criminal law, further engendering a sense of criminality and criminal stigma for the wanted abortion. Parole boards judge whether an incarcerated person should be released based on the severity of his or her crime, the length and seriousness of his or her criminal history, and the type of crime (i.e., non-violent or violent) for which he or she has been convicted.[237] The parole board evaluates whether the incarcerated person has been reformed and is fit to be released because he or she no longer poses a threat to society. In short, the parole board asks and attempts to answer, "How bad are you?"

Similar to bypass proceedings, parole boards require individuals to take responsibility for their crime, as well as exhibit remorse

233. *Id.* at 418.

234. *Id.*

235. *Id.* at 468.

236. *Id.* at 418.

237. Beth Schwatzapfel, *Life Without Parole*, MARSHALL PROJECT (July 10, 2015 2:15 PM), https://www.themarshallproject.org/2015/07/10/life-without-parole?ref=hp-1-100 [https://perma.cc/G42R-45VL].

for it.[238] The incarcerated person develops a narrative that he or she is normal and reformed by proving his or her rehabilitation through evidence of success in prison and letters and testimony from individuals who work for them.[239] There is also a lack of transparency surrounding parole board decisions; neither the public nor the incarcerated person is entitled to see how the parole board came to its conclusion. Some states have granted final authority to the parole board without the possibility of any form of administrative or judicial review.[240] Rates of early release on parole are at a historic low, as many parole boards refuse to release a person early because "[r]elease at this time would depreciate the seriousness of the present offense."[241]

There are many similarities between parole hearings and judicial bypass hearings. Both require petitioners to prove that they have reformed themselves in some way, either through displaying their maturity or their rehabilitation. Both require showings of "recovery plans"; for parole, petitioners must show that they have formulated a release plan,[242] while minors are asked to show how they will avoid an unwanted pregnancy in the future, which often requires testimony about future contraceptive use.[243] Both hearings are also very private, with very little meaningful appellate review. In the case of judicial bypass hearings, this is mostly due to the time limits imposed by pregnancy. Similarly, in both judicial bypass and parole hearings, a valid reason for denying petitions is that a grant would undermine the severity of the offense.

Finally, both hearings restrict access to forms of protected liberty. Parole boards are a blockade between the incarcerated per-

238. *Id.*

239. *Id.* It is important to note that the incarcerated person's statements do not constitute the full record from the parole board; letters from victims, prosecutors, and others who may have a stake in the individual's being freed from prison all make their way into the file. While a robust picture of an individual may be good, the problem with this system is that slanderous letters containing unverified information may be considered. Sometimes these letters accuse the potential parolee of other crimes and influence the parole board to decide against their release, so boards may deny parole based on crimes that were never prosecuted or facts that were never established before a judge or a jury. For example, in 2013, a Missouri parole board member accused Roosevelt Price of being involved in other murders for which he hadn't been charged. When asked why she believed that, the parole board member responded, "there's things in your file I know about that I think you don't know." *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. Sanger, *supra* note 231, at 468.

son and liberty in the form of freedom from bodily restrictions. Judicial bypass restricts a minor woman's liberty in that it forces her to be pregnant and give birth against her will—the pregnancy operates both as the young woman's crime and her potential punishment. If she were forced to carry to term, her pregnancy would be a punishment, the confines of which she would be unable to escape. Her punishment and physical incarceration would become increasingly visible and painful with time, rendering her person a visible spectacle of shame more reminiscent of Foucault's tortured criminal than the prisoner subject to hidden punishment.[244] Consequently, judicial bypass proceedings stigmatize women as though they were guilty of committing a crime through non-criminal law and can result in corporeal punishment not unlike imprisonment.

CONCLUSION

The current movements in Great Britain and New York to liberalize and modernize abortion regulation will both have beneficial effects in their respective jurisdictions. Beyond bringing the law into step with present abortion practice, the laws will send broader messages about Great Britain and New York's stances on the importance of women's decisional autonomy. However, as this Note shows, the effect of the reforms will not be uniform in both cases. The reform in Great Britain stands to have more consequential ramifications for the practice of obtaining an abortion, as the law currently treats abortion as a crime and fails to recognize the decisional autonomy that is integral to fostering respect and normalizing the procedure. In New York, however, *Roe* and its constitutional progeny mitigate the consequences of New York's partial criminalization of abortion. Thus, the more tangible effects of decriminalization may be primarily a consequence of the law's expansion of the instances in which a woman is able to procure a late term abortion.

Moreover, criminal law is not the exclusive medium for some of the harms often attributable to it. Other legal mediums and codes have replicated some of the most oppressive consequences of criminal law and reapplied them to their own abortion regulation. Thankfully, liberalization movements and activists are actively working to destigmatize and pass legislation that cures the defects and harms present in the ways that abortion is currently regulated so that abortion is legally and practically recognized for what it is: a medical

244. MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 3–31 (Alan Sheridan trans., Random House 1995).

procedure.

*Swara Saraiya**

* J.D. Candidate, Columbia Law School 2019; B.A. University of Chicago, 2016. I would like to thank Professor Carol Sanger for her support and feedback with the Note, as well as her generous mentorship throughout my time in law school. I owe special thanks to the staff and editors of the *Columbia Journal of Transnational Law* for their friendship and invaluable edits on this piece. Finally, I am eternally grateful to my friends and family for their encouragement and guidance.