STATE OF MICHIGAN
COURT OF APPEALS

JANE DOE AND NANCY DOE,

Plaintiffs-Appellants,

-vs-

PATRICK BABCOCK, DIRECTOR OF THE MICHIGAN DEPARTMENT OF SOCIAL SERVICES; et al., No. 116069

Defendants-Appellees,

and

RIGHT TO LIFE OF MICHIGAN, INC., et al.,

Intervening Defendants-Appellees

ON APPEAL FROM WAYNE COUNTY CIRCUIT COURT,
NO. 89 904749 CZ

BRIEF OF MICHIGAN SENATORS AND REPRESENTATIVES AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE

Amicus Curiae represent a bipartisan group of 32 Michigan State Senators and Representatives who support and voted for Proposal A, the restriction on public funding for abortion in the State of Michigan. The disposition of this appeal will directly, and perhaps permanently, affect the constitutional authority of the amicus curaie to legislate sound public policy for the State of Michigan on the question of abortion funding and will directly, and perhaps permanently, affect their ability to represent their constituents on the issue of abortion funding in the Michigan Legislature.

Senators:

James A. Barcia (D-34th)
Connie B. Binsfeld (R-36th)
Doug Carl (R-9th)
Harmin Cropsey (R-21st)
Doug Cruce (R-16th)
Frederick P. Dillingham (R-30th)
Christopher Dingell (D-7th)
William Faust (D-12th)
Ed Fredericks (R-23rd)
George Z. Hart (D-10th)
Jerome T. Hart (D-14th)
Rudy J. Nichols (R-8th)
Dick Posthumus (R-31st)
John J.H. Schwarz, M.D. (R-20th)
Norman D. Shinkle (R-11th)
Jack A. Welborn (R-13th)

Representatives:

Nick Ciaramitaro (D-73rd)
Walter J. De Lange (R-91st)
Robert A. DeMars (D-28th)
Joanne G. Emmons (R-99th)
Paul C. Hillegonds (R-54th)
Alvin J. Hoekman (R-95th)
David M. Honigman (R-24th)
Margaret O'Connor (R-52nd)
Lynn F. Owen (D-21st)
Sal Rocca (D-71st)
Kenneth R. Sikkema (R-94th)
Stanley Stopczynski (D-11th)
Claude A. Trim (R-20th)
Timothy L. Walberg (R-40th)
Paul Wartner (R-47th)
William J. Van Regenmorter (R-55th)

STATEMENT OF THE CASE

This is an appeal from the final judgment of the Wayne County Circuit Court upholding Proposal A, codified at MCL 400.109a, under the Michigan Constitution. Proposal A was passed as a referendum under Article II, sec. 9 of the Michigan Constitution, which gives the people of the State of Michigan the power to enact laws via initiative and to approve laws enacted by the Legislature by referendum. Proposal A prohibits state Medicaid funding for abortions unless "the life of the mother is threatened." See Appendix A for full text of Proposal A.

A 1987 Initiative Petition---which contained over twice the necessary number of signatures and expressly approved the Medicaid funding limitation at issue in this case---successfully passed both the House, on June 17, 1987, and the Senate, on June 23, 1987. The effective date of the initiated legislation, designated 1987 PA 59, was challenged on June 23, 1987. Frey v. Naftaly, File No. 87-59147-AW (Ingham Cty. Cir. Ct. (1987)).

The Michigan Supreme Court ruled that 1987 PA 59 would take effect on March 30, 1988. Frey v. Naftaly, 429 Mich 315, 414 NW2d 873 (1987). Prior to that date, a Referendum Petition was circulated to have 1987 PA 59 placed on the ballot for the approval of the Michigan people through a referendum election. The Petition was successful and 1987 PA 59 was placed on the November 8, 1988 general election ballot as Proposal A. Proposal A was

approved by a 57% majority and became legally effective ten days thereafter on December 12, 1988.

Appellants initiated this action on February 23, 1989, by filing suit in the Circuit Court for the County of Wayne challenging the constitutionality of Proposal A. On March 17, 1989, the circuit court judge denied Plaintiffs' Motion for Preliminary Injunction; pursuant to MCR 2.116(C)(10), dismissed Plaintiffs' claim as without merit; and granted Defendants' motion for Summary Judgment, finding that no genuine issue of material fact existed as to the constitutionality of MCL 400.109a.

Amici Curiae agree with the facts of the case as so stated by the Circuit Court. Order and Decision of the Court 1-3. Amici note that on March 17, 1989, Appellant Jane Doe had an abortion paid for by private contributions. See Plaintiffs-Appellants' Brief on Appeal (App. Br.) at 2, 17.

ARGUMENT

I.

INTRODUCTION

The Appellants challenge the constitutionality of Proposal A, MCL 400.109a, which prohibits public funding for abortions unless "the life of the mother is threatened." They contend that Proposal A violates the Due Process, Equal Protection, Anti-Discrimination Clauses, and "Privacy Component" of the Michigan Constitution. App.Br. at 24-26. Therefore, the ultimate question Appellants raise is whether the Michigan Constitution provides a right to a tax-funded abortion.

The Appellants contend that the Michigan Constitution independently contains such a right, even though the Federal Constitution does not. Harris v. McRae, 448 US 297 (1980); Williams v. Zbaraz, 448 US 358 (1980). App.Br. at 21. However, the courts of this State have consistently interpreted the Due Process and Equal Protection Clauses of the Michigan Constitution to be no broader than the same provisions in the Federal Constitution. See e.g., Fox v. Michigan Employment Sec. Commission, 379 Mich 579, 153 NW2d 644 (1967); Gauthier v. Campbell, Wyant & Cannon Foundry Co., 360 Mich 510, 104 NW2d 182 (1960); Mutchall v. City of Kalamazoo, 323 Mich 215, 35 NW2d 145 (1949); Palmer v. Bloomfield Hills Bd. of Education, 164 Mich App 573, 417 NW2d 505 (1987); Doster v. Estes, 126 Mich App 497, 337 NW2d 549 (1983). The thorough briefs filed by the Attorney General and by the

Intervening Defendants fully demonstrate the futility of Appellants' arguments.

Nevertheless, Appellants argue at length that the Michigan Constitution ought to be interpreted more broadly than the Federal Constitution---to encompass a right to a publicly-subsidized abortion. App.Br. 24-26, 27 & n.10. This argument is equally futile. Even if an independent analysis of the Michigan Constitution is undertaken, it is clear that the Constitution does not protect a right to a publicly-funded abortion. Before Appellants can assert that the Michigan Constitution protects a right to a publicly funded abortion, they must first demonstrate that the Michigan Constitution protects a right to abortion in and of itself. Most constitutional rights are not---and need not---be publicly funded. An individual interest cannot be of such fundamentality that it requires public subsidization unless it constitutes a constitutional right in and of itself. A review of the history of the Michigan Constitution and its construction by Michigan courts clearly confirms that the People of Michigan have never withdrawn abortion from the political process and enshrined it as a right in the Michigan Constitution. Rather, the public policy of this State has long proscribed abortion. Since abortion is not protected as a right under the Michigan Constitution, there can be no right to a publicly-subsidized abortion.

II.

THE DUE PROCESS CLAUSE OF THE MICHIGAN CONSTITUTION, ART. I, SEC. 17, DOES NOT PROTECT A RIGHT TO ABORTION

A. It Was No Purpose Of The 1963 Constitution To Protect A Right To Abortion.

The Michigan Due Process Clause provides, in relevant part, that "No person shall be . . . deprived of life, liberty or property, without due process of law." Mich. Const. 1963 art. I, sec. 17. In construing the provisions of the Michigan Constitution, the courts of this state---from the earliest times to the most recent---have consistently held that the Constitution must be interpreted with regard to the purpose of the framers and the contemporaneous understanding of the people. See e.g., Walker v. Wolverine Fabricating & Manufacturing Co., 425 Mich 586, 589, 391 NW2d 296, 297, 299 (1986); People v. Thompson, 424 Mich 118, 126, 379 NW2d 49, 52 (1985); Pfieffer v. Board of Education, 118 Mich 560, 564, 77 NW 250, 251 (1898); McPherson v. Blacker, 92 Mich 377, 383, 52 NW 469, 470-71 (1892); People v. Harding, 53 Mich 481, 485, 19 NW 155, 156 (1884); People ex rel. Bay City v. The State Treasurer, 23 Mich 499 (1871). In discerning the framers' purposes and the contemporaneous understanding of the people, Michigan courts have examined the legislative history of the constitutional provision, including the debates (Walker v. Wolverine, 425 Mich 586, 391 NW2d 469; People v. Thompson, 424 Mich 118, 379 NW2d 49), as well as the history of the times. McPherson v. Blacker, 92 Mich 377, 52 NW2d 469; People v. Harding, 53 Mich at 485, 19 NW at 156.

The framers of the constitution are presumed to be aware of the underlying state of the law at the time the provision is adopted. People v. Thompson, 424 Mich at 129, 279 NW2d at 53. The application of these canons of construction verifies that the Michigan Constitution does not protect a right to abortion.

During the Constitutional Debates surrounding the adoption of the 1963 Constitution, there was no discussion of a right to abortion under the Michigan Constitution. State of Michigan, Constitutional Convention Official Record (1961). In 1963, when the Michigan Constitution was adopted, abortion was treated as a crime, unless the abortion was necessary to save the life of the mother. MCL 750.323 (MS 28.555); MCL 750.14 (MS 28.204). There was no move at any point in the Debates to incorporate a right to abortion into the State Constitution. Instead, the discussion surrounding the Due Process Clause affirms that the Michigan Constitution provides no greater rights than were at that time included in the United States Due Process Clause. Id. at 739-752. In 1963, no right to an abortion had yet been engrafted onto the Federal Constitution. Such was the understanding of the people of this State when they adopted their constitution; an expansion of the state constitution to include a right not adopted by the Michigan citizenry is entirely unwarranted.[1]

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[1] In fact, an attempt to change the state abortion laws to "allow abortions under certain circumstances" (i.e. where the fetus was 20 or fewer weeks gestational age and the abortion was performed in an approved hospital) was expressly rejected by Michigan voters in 1972. Proposal B, as it was designated, was included as a referendum on the general election ballot on November 7, 1972. The proposal was rejected by a 61% majority opposed to

The courts have previously looked to the contemporary state of the law and the history of the times in addressing the specific question of abortion. Looking to the history of the law and public policy in Michigan, the Michigan Supreme Court, in People v. Bricker, 389 Mich 524, 208 NW2d 172 (1973), in an opinion by Chief Justice Kavanagh, unanimously affirmed that "it is the public policy of the state to proscribe abortion" and that no abortion right is protected independently under the Michigan Constitution. Id., 389 Mich at 529, 208 NW2d at 175.

> The public policy of this state is to be found in the declarations and deeds of its people. These find concrete expression in the constitution adopted by the Governor, the Attorney General, others exercising executive power, the decisions of our courts, and the vote of the people. Proponents of abortion reform took a case to the people last November and lost.
>
> It is the public policy of the state to proscribe abortion. This public policy must now be subordinated to Federal Constitutional requirements.

Id. It must be noted, as well, that the Michigan Constitution has not been since amended to create any right to abortion.

The Michigan Due Process Clause, like the Due Process Clause of the Fourteenth Amendment of the United States Constitution, protects those rights that are deemed fundamental. See e.g., Tillman v. Detroit Receiving Hospital, 138 Mich App 683, 360 NW2d 275 (1984); Matter of Dittrick Infant, 80 Mich App 219, 263 NW2d 37 (1977); People v. Hicks, 149 Mich App 737, 386 NW2d 657 (1986); In re Contempt of Stone, 154 Mich App 121, 397 NW2d 244 (1986);

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it. Michigan Official Canvas of Votes at 63.

Faler v. Lenawee County Sheriff, 161 Mich App 222, 409 NW2d 791 (1987). Accord, Snyder v. Massachusetts, 291 US 97 (1934); Palko v. Connecticut, 302 US 319 (1937); Meyer v. Nebraska, 262 US 390 (1923). Due process of law protects those rights which are so deeply rooted in our traditions and conscience as to be "implicit in the concept of ordered liberty." Tillman, 138 Mich App at 686, 360 NW2d at 277.

B. Abortion Is Not A Right Grounded In The History And Traditions Of Michigan.

Alternatively, for any right to be considered fundamental, it must be grounded in the history and traditions of our society and be basic to our civil and political institutions. See Detroit Free Press v. Oakland County Sheriff, 164 Mich App 656, 418 NW2d 124 (1987); Tillman v. Detroit Receiving Hospital, 138 Mich App 683, 360 NW2d 275 (1984). Accordingly, in State ex rel. Macomb County Prosecuting Attorney v. Mesk, 123 Mich App 111, 333 NW2d 184 (1983), the court refused to find within the right of privacy a right of unmarried individuals to engage in sexual relations for payment of money. The court reasoned that because prostitution has been considered a crime both at common law and under Michigan's statutes, the practice cannot be considered a fundamental right.

Likewise, Michigan courts have repeatedly rejected claims that the use of illicit drugs is entitled to protection under the right of privacy. People v. Pearson, 157 Mich App 68, 403 NW2d 498 (1987); People v. Williams, 135 Mich App 537, 355 NW2d 268 (1984); People v. Tate, 134 Mich App 682, 352 NW2d 297 (1984); People v.

Kirchoff, 120 Mich App 617, 327 NW2d 535 (1982). These decisions have relied, in part, on a social consensus that views drug abuse as unacceptable.

Abortion has never been protected under either the constitution of the laws of the State of Michigan. From the earliest date, the public policy of this State has condemned the practice of abortion and sought to eradicate it. The English common law, adopted by Michigan, treated abortion as a crime. The Michigan Legislature has consistently punished abortion as a serious criminal offense. At no time in this State's history, has abortion been regarded as a right. An activity condemned at common law and proscribed by statute cannot be considered a fundamental right firmly rooted in the traditions and conscience of the Michigan people and integral to our ordered liberty.

1. The English Common Law, As Adopted By Michigan, Treated Abortion As A Crime.

The Michigan Constitution specifically incorporates the English common law. Mich. Const. 1963 Art. III, sec. 7. Likewise, MCL 750.505 (MS 28.773) provides that common law crimes not defined by statute are to be carried forward as part of the law of Michigan and punished as felonies, regardless of their designation at common law. Accordingly, an understanding of the common law crime of abortion in England is essential to a proper analysis of abortion in Michigan.

At common law, abortion was treated as a serious crime from the earliest of times.[2] A review of the common law commentaries indicates consistent condemnation of abortion. The thirteenth century commentators Bracton and Fleta classified abortion as homicide if the fetus was "formed and animated." 2 H. Bracton, The Laws and Customs of England 279 (Twiss ed. 1879); 2 Fleta 60-61, Book I, ch. 23 (Seldon Soc. ed. 1955). The sixteenth and seventeenth century jurist, Sir Edward Coke, declared that abortion of a woman "quick with childe" was a "great misprision [a serious misdemeanor] and no murder" if the child died in the womb and a murder if the child died from injuries inflicted while in the womb after being born. E. Coke, Third Institute of the Laws of England at 50-52 (1644). If, however, "the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive." Id. Likewise, Blackstone held that killing a child in the womb, although not murder, was "a very heinous misdemeanor." 1 W. Blackstone, Commentaries on the Laws of England 126 (1765-1769).

The commentaries of Bracton, Fleta, Coke, Blackstone and other secondary authorities supported the criminality of abortion. By

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[2] For a comprehensive review of the history of abortion at common law, see Dellapenna, The History of Abortion: Technology, Morality, and the Law, 40 U. Pitt. L. Rev. 359 (1979). See also, Brief of Certain American State Legislators as amici curiae and Brief of The Association for Public Justice and The Value of Life Committee, Inc. as amici curiae in Webster v. Reproductive Health Services, No. 88-605 (US 1989), attached as Appendices B and C, respectively.

the early eighteenth century it was firmly established at common law that abortion was a crime. See e.g., Rex v. Sims, 75 Eng Rep 1075 (1601); Proprietary v. Lambrozo, 53 Md Archives 387-391 (1663). See also, Appendix C at 3-19. Courts had issued increasingly clear holdings that abortion was a crime. No decision indicated that any form of abortion was lawful. Id.

The common law on abortion cannot be understood without a clear understanding of the development of medical science. The early common law prohibited the abortion of a woman after "quickening," or after the point in a pregnancy at which the mother begins to detect fetal movement, commonly occurring at 16-18 weeks gestation. Larkin v. Wayne County Prosecutor, 389 Mich 533, 540, 208 NW2d 176, 179 (1973); Dorland's Illustrated Medical Dictionary (1985) at 1105. The quickening distinction found in the early common law commentaries and cases was solely a reflection of the primitive medical knowledge of the day. Byrn, An American Tragedy: The Supreme Court on Abortion, 44 Fordham L. Rev. 807, 816 (1973). As advances in medical technology revealed conception to be the point at which a biologically unique human being was formed, the quickening distinction was abandoned as medically obsolete.[3] The Maryland Court of Appeals observed the demise of the quickening distinction in the common law:

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[3] See Appendix B, at 8-29; Appendix C, at 23-26. Acknowledging the arbitrary nature of the quickening distinction, four courts recommended corrective legislation. See Mitchell v. Commonwealth, 78 Ky 204, 209-10 (1879); Commonwealth v. Parker, 50 Mass (9 Met.) 263, 268 (1845); State v. Emerich, 13 Mo App 492, 495 (1883); State v. Cooper, 22 NJL 52, 58 (1849).

> [A]s the life of the infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offence to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of pregnancy.

Lamb v. State, 67 Md 524, 533, 10 A 208 (1887)(emphasis added). State v. Slagle, 83 NC 630, 632 (1880); Mills v. Commonwealth, 13 Pa 630, 632-33 (1850). "[T]his evidentiary test was never intended as a judgment that before quickening the child was not a live human being." Byrn at 816. The well-settled criminal status of abortion at common law is aptly summarized in Rex v. Bourne, 1 KB 687 (1939):

> long before then [the enactment of the first English abortion statute of 1803], before even Parliament came into existence, the killing of an unborn child was by the common law of England a grave crime....The protection which the common law afforded to human life extended to the unborn child in the womb of its mother.

1 KB 687, 690.

The Michigan Supreme Court has clearly articulated its adoption of the English common law treatment of abortion as a serious crime. People v. Olmstead, 30 Mich 431 (1874); People v. Sessions, 58 Mich 594, 26 NW 291 (1886); People v. Abbot, 116 Mich 263 56 NW 862 (1898); People v. Stahl, 234 Mich 569, 208 NW 685 (1926). Implicit in these cases is the understanding that abortion was criminal at common law because it constituted the taking of human life. Thus, in People v. Sessions, 58 Mich 594, 26 NW 291 (1886), the Court explained:

> At common law life is not only sacred, but it is inalienable. To attempt to produce an abortion or miscarriage, except when necessary to save the life of the mother, under advice of medical men, is an unlawful act, and has always been regarded as fatal to the child and dangerous to the mother. To cause death of the mother in procuring or attempting to procure an abortion is murder at common law.

58 Mich at 596, 26 NW at 293.

The Michigan Supreme Court arrived at the same conclusion when asked to interpret the Michigan criminal abortion statute in light of the United States Supreme Court's decision in Roe v. Wade, 410 US 113 (1973). The Court declared "It [aborting an unborn quick child] is a serious crime both at common law and under our statutes because manslaughter involves the destruction of viable human life." Larkin v. Wayne County Prosecutor, 389 Mich 533, 540, 208 NW2d 176, 179 (1973). The Court's understanding in Larkin is especially noteworthy given Roe's contrary assertion that "abortion was never firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 US at 136 (emphasis added).[4] Scholarship available in 1973 and developed since then clearly and strongly supports the conclusion of the Larkin majority that abortion was never a right at common law at

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[4] The 1972 Court of Appeals decision in People v. Nixon, 42 Mich App 332, 201 NW2d 635, disputed the fetal protection element of the common law abortion rule. Like the Supreme Court in Roe v. Wade, Judge Van Valkenburg misapprehended the historical and medical context in which the common law of abortion evolved. The majority misinterpreted the quickening requirement to be a value judgment regarding fetal life instead of the evidentiary test it in fact was. Notwithstanding the majority's failure to find an interest in fetal life in the common law, it acknowledged that the abortion of a quickened fetus was a common law crime. 42 Mich App 332 at 335-37, 201 NW2d at 638.

any time. See e.g. Dellapenna, The History of Abortion: Technology, Morality, and Law, 40 U. Pitt. L.Rev. 359 (1979); Ely, The Wages of Crying Wolf, 82 Yale L.J. 920 (1973); Witherspoon, Reexamining Roe; Nineteenth Century Abortion Statutes and the Fourteenth Amendment, 17 St. Mary's L.J. 29 (1985).

2. Beginning In 1846, The Michigan Legislature Has Consistently Prohibited Abortion.

Having adopted the English common law while still a territory, Michigan enacted its first statutes proscribing abortion in 1846.[5] These statutes, like those currently in place but unenforced,[6] prohibited abortions, unless necessary to save the life of the

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[5] Rev. Stat. ch. 153, Sec. 32: The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter.

Rev. Stat. ch. 153, Sec. 33: Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter.

Rev. Stat. ch.153, Sec. 34: Every person who shall wilfully administer to any pregnant woman any medicine, drug or substance or thing whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

[6] The Michigan Legislature has not repealed the abortion statutes it enacted in 1846. Former MRS ch. 153, secs. 32; 33; and 34 are now codified at MCL 750.322 (MS 28.554); MCL 750.323 (MS 28.555); and MCL 750.14 (MS 28.204), respectively.

mother. The statutes enacted in 1846 contained a two-tiered punishment scheme, punishing abortions resulting in the death of a quick fetus more severely than abortions of unquickened fetuses. Under these laws the "wilful killing of an unborn quick child" was considered felonious homicide and was punished as manslaughter. MRS ch. 153, sec. 32 (1846)(emphasis added). Likewise, the law provided, "Every person who shall administer to any pregnant woman with a quick child, any medication...or shall employ any instrument...with the intent to destroy such child, unless the same shall have been necessary to preserve the life of such mother...shall, in case the death of such child or such mother be produced, be deemed guilty of manslaughter." MRS ch. 153, sec. 33 (1846)(emphasis added).

Section 34 focused on the act of abortion and the punishment was not tied to fetal death. Accordingly, section 34 proscribed abortions regardless of whether the fetus was killed and the stage of pregnancy. This provision made it a misdemeanor to "wilfully administer to any pregnant woman any medicine...or employ any instrument...with intent to procure the miscarriage of any such woman...unless the same shall have been necessary to save the life of such woman". MRS ch. 153, sec. 34 (1846)(emphasis added).

In 1869, the Legislature strengthened its anti-abortion policy by making it a criminal offense to publish or sell any publication advertising abortion-producing drugs. ML ch. 106, secs. 1 and 2 (1869).

The Legislature significantly amended the original 1846

abortion statutes in 1931. First and most importantly, the Legislature removed the common law quickening distinction insofar as it classified all wilful abortions as felonies. P.A. 1931, No. 328, sec. 14, effective Sept. 18, 1931, now codified at MCL 750.14 (MS 28.204).[7] This brought Michigan's abortion statutes into complete alignment with the common law as it had continued to evolve in England and many American jurisdictions as advances in medical understanding undermined the validity of the quickening distinction. Second, the proscription of abortifacients was expanded and treated in a section separate from the general immoral advertising law of 1869. MCL sec. 750.15 (MS 28.204)(1931). The statute further developed the sections criminalizing abortifacients, providing that to "advertise, publish, sell, or publicly expose for sale any pills, powder, drugs or combination of drugs designed expressly for the use of females for the purpose of procuring an abortion" would be punishable as a misdemeanor unless prescribed by a physician to save the mother's life. MCL sec. 750.15 (MS 28.205)(1931). Sections 750.34 and 750.40

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[7] As amended in 1931, the statute provided:

> Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in the case of the death of such woman be thereby produced, the offense shall be deemed manslaughter.
>
> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

contained additional bans on advertising abortifacients and abortion services.

Michigan retains statutes criminalizing abortion. The Legislature has not liberalized these laws in over 150 years. In fact, as the 1869 and 1931 amendments indicate, every time the Legislature amended the abortion statutes, it modified the laws to punish abortion more severely.[8] Notwithstanding the United States Supreme Court's decision in Roe v. Wade, the Michigan Legislature has refused to repeal its pre-Roe statutes. The longstanding public policy condemning abortion reflected in these statutes flatly contradicts Appellants' assertion that the Michigan Constitution protects the right to abortion. An activity that Michigan has consistently treated as criminal cannot be considered "so rooted in the traditions and conscience of our people as to be ranked as fundamental." Snyder v. Massachusetts, 291 US 97, 105 (1934).

3. Prior To Roe v. Wade, Michigan Courts Uniformly Declined To Recognize A Right To Abortion Under The Michigan Constitution.

There is no Michigan case declaring a state constitutional right to abortion. The reported pre-Roe abortion decisions fall into one or more of two categories. The majority of cases involves appeals from convictions under the abortion statutes and address

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[8] That this policy was consistent with the will of the Michigan people is evidenced by the rejection in 1972 of a referendum that would have changed the Michigan abortion law to allow abortions prior to viability. 1972 Michigan Official Canvas of Votes at 63.

solely evidentiary questions. The second class of cases, closely related to the first, concerns questions of criminal law and procedure.

The largest number of appellate abortion cases speak only to principles of evidence where the substance of the underlying crime of abortion is not addressed. In these cases, the courts focus their discussion on rules of evidence. See e.g., People v. Olmstead, 30 Mich 431 (1874)(competence to testify to certain facts); People v. McDowell, 63 Mich 229, 30 NW 68 (1886) (evidence of previous abortions by defendant relevant to current prosecution for abortion); People v. Kelsey, 303 Mich 715, 7 NW2d 120 (1943)(dying declarations); People v. Atwood, 188 Mich 36, 154 NW2d 112 (1915)(declaration in the nature of a verbal act). Abortion, to the extent it is mentioned, is only referred to as the crime necessitating the trial which gave rise to the evidentiary dispute. None of these cases declares abortion to be in any way a protected activity. Instead, the Michigan courts treated the criminality of abortion as a matter needing neither justification nor explanation.

The second category of abortion cases addresses questions of criminal law and criminal procedure. These two areas are treated together because they are often linked in the courts' discussions. In these cases, the courts would, for example, parse the abortion statutes to determine whether the corpus delicti had been satisfied, (People v. Bricker, 42 Mich App 352, 201 NW2d 647 (1972)); determine whether other counts could be properly joined,

(People v. Aiken, 66 Mich 460, 33 NW 821 (1887)); determine whether probable cause for prosecution existed, (People v. Sessions, 58 Mich 594, 26 NW 291 (1886)); determine whether the indictment was sufficiently specific, (People v. Dochstader, 274 Mich 238, 264 NW 356 (1936)); and decide matters of statutory construction when the statute was challenged as vague, (Gilchrist v. Mystic Workers of the World, 196 Mich 247, 163 NW 10 (1917); People v. Wellman, 6 Mich App 573, 149 NW2d 908 (1967)). The courts resolved the above questions and all other criminal law or procedure matters according to the statute at issue and/or general principles of criminal law and procedure. In none of these cases did the courts intimate that abortion was constitutionally protected.

Two cases in this second category warrant further examination. First, In re Vicker's Petition, 371 Mich 114, 123 NW2d 253 (1963), does not establish a woman's right to abortion. In Vicker's Petition, petitioner claimed she had been wrongly jailed for contempt of court when in an abortion prosecution she refused to answer questions that would have established that she went to the defendant's office to obtain an abortion. Petitioner refused to answer the questions on the ground that her answers might incriminate her. After being placed in jail for her refusal to answer, she brought a habeas corpus petition. The court ruled that Ms. Vicker's petition was properly denied because she could not have been charged under the statute with either conspiracy to commit abortion or abortion. Id., 371 Mich at 116, 123 NW2d at 254.

The holding in Vicker's Petition is very narrow. In deciding the issue before it, the court went no further than the language of the statute under which Ms. Vicker feared incrimination. Following Wharton's Rule, the court first dispensed with the conspiracy to commit abortion charge:

> Abortion involves concert of action between 2 persons, the perpetrator and the victim, the immediate effect of consummation reaching only the participants, as also in respect to adultery, bigamy, incest, or dueling, in which a charge of conspiracy to commit the offense will not lie against the 2 participants. This is because the conspiracy to commit them is in such close connection with the objective offense as to be inseparable from them.

Id., 371 Mich at 117, 123 NW2d at 254.

The court next found that under the Michigan abortion statute, MCL 750.14 (MS 28.204), a woman could not be charged with abortion. Id. The court went on to explain that at common law the woman could not be charged with abortion even though she performed the abortion upon herself. Id. Far from rooting an abortional right in Michigan law, the court in Vicker's Petition merely restated the well-established common law rule that treated the woman in the abortion context as a second victim, incapable of giving consent to what was deemed an assault on her person.[9] Moreover, the common

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[9] Abortion was treated as an assault at common law because---prior to the advent of modern medical techniques in the middle of the nineteenth century---most induced abortions were procured through crude physical batterings upon the mother (injury techniques) or the administration of "noxious potions"(ingestion techniques). Injury techniques ranged from physical beatings to inserting rough iron pipes through the cervix into the womb in order to directly traumatize the fetus to cutting open the woman's abdomen and removing the child. Ingestion techniques included both ineffective concoctions thought to hold supernatural powers and highly dangerous rat poisons. Not only was the pregnant woman

law and the Michigan abortion statute exempted the woman from prosecution for the practical reason that conviction of the abortionist often depended on the testimony of the aborted woman. See People v. Nixon, 42 Mich App 332, 343, 201 NW2d 635, 646 (1972)(Burns, J., concurring in part and dissenting in part).

A second case that requires particular examination is People v. Nixon, 42 Mich App 332, 201 NW2d 635 (1972). Contrary to Appellants' assertion, Nixon does not support Appellants' argument that the Michigan constitution incorporates the right to abortion. Nixon involved an appeal by a physician who had been convicted of the felony of abortion. Defendant Nixon had

> performed an abortion on [the woman] with little or no consultation as to the state of her health, either mental or physical. The abortion was performed in the defendant's office and was performed in a manner which, in the opinion of doctors who testified, was improper and conducive to inducing an infection.

Id., 42 Mich App at 341-42, 201 NW2d at 641. The Court of Appeals affirmed his conviction. Accordingly, the majority's discussion of the constitutionality of the statute is purely dicta and without precedential value.

In Nixon, Judge Van Valkenburg, joined in concurrence by Judge Danhof, stated in dicta, that the Michigan statute criminalizing non-therapeutic abortions was unconstitutional as it applied to abortions performed by a physician in the first trimester in an

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deemed incapable to consent to such abusive treatment, but before the discovery of effective anaesthesia, voluntary abortions were extremely rare. See Dellapenna, The History of Abortion: Technology, Morality, and Law, 40 Pitt. L. Rev. 359 (1979); Appendix B, at 12-17.

antiseptic environment. The majority, however, made no attempt to ground its discussion in the Michigan Constitution.

That Nixon does not create a right to an abortion under the Michigan Constitution is clear. First, as has been stated, the discussion of the statute's constitutionality is entirely dicta. The question before the court was whether the defendant Nixon was properly convicted. The court held that he was properly convicted and affirmed; the balance of the court's opinion is without precedential merit. Second, the court made no reference to the Michigan Constitution. In declaring the abortion laws unconstitutional, the court addressed at length the common law treatment of abortion and the purpose for the criminality of abortion.[10] However, as Judge Burns emphasized in his opinion, a law may not "be held unconstitutional merely because there has been a change in the conditions which impelled its enactment. Id., 42 Mich App at 349, 201 NW2d at 645 (Burns, J., concurring in part and dissenting in part). Third, the majority opinion in no way questioned the dissent's assumption "that the holding of unconstitutionality refer[red] to the United States Constitution." Id., 42 Mich App at 345, 201 NW2d at 643 (Burns, J., concurring in part, dissenting in part). Fourth, when the same panel of the Court of Appeals addressed this case on remand after Roe, it made

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[10] The flawed nature of the court's treatment of the common law is discussed supra at 11-16. However, even accepting the court's analysis as correct, Nixon does not support the proposition that the Michigan Constitution incorporates a right to abortion.

no reference to a state constitutional right, but rested its decision exclusively on the Supremacy Clause of the United States Constitution. People v. Nixon, 58 Mich App 38, 212 NW2d 797 (1973).

The court did state that "at least to some extent...the woman has a right to abort." 42 Mich App at 342, 201 NW at 641. The Court based this qualified "right" on In re Vicker's Petition, 371 Mich 114, 123 NW2d 253 (1963). The majority misunderstood the common law rule exempting the aborted woman from prosecution to be an affirmative right to abort, free from criminal sanctions. Vicker's Petition does not stand for this proposition and it creates no abortional right. Moreover, the court did not attempt to root in the Michigan Constitution the right which it viewed Vicker's Petition as creating.

In re Vicker's Petition and the Court of Appeals' 1972 decision in People v. Nixon, like all other cases Appellants cite to this court, fail to offer support for Appellants' claim that the Michigan Constitution protects abortion, independent of the right Roe established in the United States Constitution.

4. Since The United States Supreme Court Created A Right To Abortion Under The United States Constitution, Michigan Courts Have Relied Exclusively On The Supremacy Clause In Recognizing The Abortion Right.

After Roe v. Wade, 410 US 113, and Doe v. Bolton, 410 US 179, were decided on January 22, 1973, the Michigan Supreme Court decided two companion cases in light of the United States Supreme

Court's decisions. People v. Bricker, 389 Mich 524, 208 NW2d 172 (1973); Larkin v. Wayne Prosecutor, 389 Mich 533, 208 NW2d 176 (1973). The Court also remanded People v. Nixon to the Court of Appeals for a decision not inconsistent with the Court's holdings in Bricker and Larkin. 389 Mich 809, 387 NW2d 921 (1973). In none of these cases did the courts find a right to abortion under the Michigan Constitution. Instead, the courts bowed to the Supremacy Clause of the United States Constitution which required the courts to recognize the right to abortion created under the United States Constitution by Roe.[11]

In People v. Bricker, the Court's first abortion decision after Roe v. Wade was decided, the Michigan Supreme Court stressed that the Supremacy Clause dictated the result in that case. Bricker involved the conviction of a layman for conspiracy to commit an abortion. The Court interpreted Roe and Doe narrowly to preserve as much as the abortion statutes as possible. 389 Mich at 528, 208 NW2d at 176. The Court found that Roe and Doe created no constitutional barrier to the conviction and punishment of the defendant, who was not a licensed physician. Id., at 527-28, 208 NW2d at 174.

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[11] Chief Justice Kavanagh authored the opinion in People v. Bricker, 389 Mich 524, 208 NW2d 172 (1973). Associate Justice Brennan wrote the Larkin v. Wayne Prosecutor opinion. 389 Mich 533, 208 NW2d 176 (1973). These decisions were both without dissent. Both relied solely on the Supremacy Clause in recognizing the right to abortion. That the Michigan Supreme Court unanimously determined that the abortion right existed exclusively under the Federal Constitution and not under the Michigan Constitution powerfully refutes Appellants' argument that such a right is incorporated into the Michigan Constitution.

After affirming Bricker's conviction under the Michigan statute, the Court discussed the right to an abortion. In holding the Michigan abortion statute unconstitutional, the Court made clear that it was purely a "Federal constitutional right recognized in Roe and Doe", Id., at 528, 201 NW2d at 174, which the Michigan high court had to recognize but did not have to engraft onto the state constitution.

> Under the Supremacy Clause we are bound by the decisions of the United States Supreme Court in Roe v. Wade, [cit. omit.], and other cases. Under the principles enunciated therein, our criminal abortion statute (MCLA 750.14; MSA 28.204) cannot stand as related to abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in the exercise of his medical judgment.

Id., at 527, 201 NW2d at 174.

In addition to holding expressly that any right to an abortion existed solely under the United States Constitution and not under the Michigan Constitution, the Court emphasized that Michigan public policy opposed the right recognized in Roe and Doe.

> The central purpose of this legislation is clear enough -- to prohibit all abortions except those required to preserve the health of the mother. The Supreme Court now requires other exceptions....
>
> The public policy of this state is a mandate upon us. Our duty to enforce that mandate is as clear as our duty to comply with decisions of the United States Supreme Court construing the Federal Constitution.
>
> The public policy of this state is to be found in the declarations and deeds of its people. These find concrete expression in the constitution adopted by the people, the laws enacted by the Legislature, the acts of the Governor, the Attorney General, others exercising executive power, the decisions of our courts, and the votes of the people. Proponents of abortion reform took

a case to the people last November and lost.[12]

> It is the public policy of the state to proscribe abortion. This public policy must now be subordinated to Federal Constitutional requirements.

Id., at 529, 201 NW2d at 175.[13] As the Court's opinion repeatedly emphasizes, the Court recognized the right to an abortion created

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[12] On November 7, 1972, Michigan voters rejected Proposal B by a 61% vote. Proposal B was an attempt to liberalize the abortion laws of Michigan by public referendum. Proposal B, as it appeared on the ballot, provided:

> The proposed law would allow a licensed medical or osteopathic physician to perform an abortion at the request of the patient, if (1) the period of gestation has not exceeded 20 weeks, and (2) if the procedure is performed in a licensed hospital or other facility approved by the Department of Public Health.

The reform sought by Proposal B, and rejected by the Michigan public, is far more restrictive than the policy declared in Roe and Doe. See e.g. Akron v. Akron Center for Reproductive Health, 462 US 416 (1983).

[13] Other areas of the law also reflect that the public policy of Michigan is to protect the life of the unborn child to the fullest extent possible. In Womack v. Buckhorn, 384 Mich 718, 187 NW2d 218 (1971), the Michigan Supreme Court allowed a cause of action for prenatal injuries inflicted on the unborn child before viability (4 months). Early on, the Michigan Supreme Court recognized a wrongful birth claim for a viable unborn child. O'Neill v. Morse, 385 Mich 130, 188 NW2d 785 (1971). Recently, this Court allowed a cause of action for the wrongful death of a pre-viable (16 week) fetus. Fryover v. Forbes, 1989 WL 27430 (Mich App Mar. 20, 1989), petition for leave to appeal filed, No. 85718 (Mich Mar. 30, 1989). The Michigan courts have consistently rejected a wrongful life cause of action as being contrary to public policy. Profitt v. Bartolo, 162 Mich App 35, 412 NW2d 232 (1987), leave to appeal denied, No. 81538 (Mich Mar. 22, 1988); Strohmaier v. Associates in Obstetrics and Gynecology, 122 Mich App 116, 322 NW2d 432 (1982); Dorlin v. Providence Hospital, 118 Mich App 831, 325 NW2d 600 (1982); Eisbrenner v. Stanley, 106 Mich App 357, 366, 308 NW2d 209 (1981), leave to appeal denied, 414 Mich 875 (1982). Michigan courts have allowed a claim for wrongful birth, but only on the rationale that, under the Supremacy Clause, abortion is a legal option under Roe v. Wade. Profitt v. Bartolo, 162 Mich App at 46-47, 412 NW2d at 238.

in Roe v. Wade and Doe v. Bolton only because "[u]nder the Supremacy Clause [it was] bound by the decision of the United States Supreme Court". Id., at 527, 201 NW2d at 175. Bricker creates no right to an abortion under the Michigan Constitution; in fact, the Court expressly rejects such an inference. Id., at 527-529, 201 NW2d at 174-175.

In Larkin v. Wayne Prosecutor, 389 Mich 533, 208 NW2d 176 (1973), the companion case to People v. Bricker, the Court reviewed Michigan statutes regarding abortifacient advertising and sale; assaultive abortion; manslaughter by abortion; and unlawful medical conduct. As in Bricker, the Court found that any right to an abortion exists under the Federal Constitution and not under the Michigan Constitution. The Court interpreted the statutes to salvage their constitutionality under the United States Supreme Court's decisions. Where the Michigan statutes could not be reconciled with the Federal Constitution, the Supremacy Clause controlled the Court's decision.

The Larkin court first examined the statute regulating the advertising and sale of abortifacients. MCL 750.15 (MS 28.205). The Court did not review the provision making it a misdemeanor to advertise abortifacients as that issue was not before the Court. 389 Mich at 538, 208 NW2d at 178-179. The requirement that abortifacients be sold and distributed only pursuant to prescription was upheld as consistent with Roe's characterization of the abortion decision as a medical one. Id.

The Court next examined the provision that punished as

manslaughter the "wilful killing of an unborn quick child by an injury to the mother of such child which would be murder if it resulted in the death of such mother". MCL 750.322 (MS 28.554). The Court defined "quick" to mean viable; thus construed, the Court found "the act does not offend the Due Process Clause of the Fourteenth Amendment." 389 Mich at 539, 208 NW2d at 179 (emphasis added).

Third, the Court addressed the manslaughter by abortion statute that punished as manslaughter various acts intended to destroy an unborn quick child. MCL 750.323 (MS 28.555). Before directly assessing the constitutionality of this statute under the United States Constitution, the Court noted that:

> It [aborting a quick child] is a serious crime at common law and under our statutes because manslaughter involves the destruction of viable human life.
>
> There can be no manslaughter of an inanimate object. Neither can manslaughter be predicated upon the destruction of any form of life that is not human.
>
> It follows that statutes proscribing manslaughter by abortion are designed to protect human life and carry the necessary implication that that life, the destruction of which is punishable as manslaughter, is human life.

389 Mich at 540, 208 NW2d at 179.

Having found the intent of the statute to be to protect viable fetal life, the Court preserved the constitutionality of the statute by defining the terms of the statute consistent with the rules enunciated in Roe. "Our duty is to read the Michigan act to be consistent with the Federal Constitution, if such interpretation can be made without doing violence to the language used by the

Legislature." Id., at 541, 208 NW2d at 180. The Court found that the Legislature's use of the term "quick child" was not an attempt to define when life began. Id., at 540, 208 NW2d at 179. As quickening was "only evidence of life," Id., "quick" was only an adjective modifying "child". Id. The Court explained:

> [T]he noun "child", describes but does not define the subject of the offense of manslaughter.
>
> Thus, not every child in its mother's womb is protected by the act; only a quick child, a child causing discernable movement.
>
> But not every fetus discernably moving in utero is protected by the act, for it punishes only the killing of a quick child. By use of the word child, the Legislature has made clear that the offense consists of destroying human life.

Id., at 541, 208 NW2d at 180 (emphasis in original). The Court found that Roe conclusively presumed that the state could have no compelling interest in the life of the fetus until the point of viability. Id. Reading this determination into the statute, the Court concluded that the term "child" denoted only viable fetuses. Thus limited, the statute reaches only the non-therapeutic abortion of a viable fetus and as such, is constitutional under Roe. Id., at 542, 208 NW2d at 180.

Finally, the Court declared MCL 338.53 (MS 14.533), which included the performance of a criminal abortion as grounds for professional censure, constitutional. Id. As the Court had already described, criminal abortions were limited to the non-therapeutic abortion of a viable fetus. Even under Roe and Doe, the state could still properly proscribe such abortions.

Larkin preserved as much of the Michigan abortion statutes as Roe and Doe allowed. By consistently referring to the right to abortion as "a matter of Federal Constitutional law," 389 Mich at 542, 208 NW2d at 180 (emphasis added), and as one created under the "Due Process Clause of the Fourteenth Amendment," Id., at 539, 208 NW2d at 179 (empahasis added), the Michigan Supreme Court made clear that the Michigan Constitution does not incorporate the right created in Roe v. Wade and Doe v. Bolton.

The Michigan Supreme Court remanded People v. Nixon to the Court of Appeals to be decided in light of Bricker and Larkin. 389 Mich 809, 387 NW2d 921 (1973). As discussed above, Nixon involved the conviction of a licensed physician for performing a non-therapeutic abortion in the first trimester of pregnancy. The pre-Roe Court of Appeals decision in Nixon, 42 Mich App 332, 201 NW2d 635 (1972), had affirmed Nixon's conviction but stated that the Michigan abortion statute was unconstitutional. On remand, the same panel of the Court of Appeals, issued a brief per curiam opinion consisting almost entirely of an extended quote from People v. Bricker, where the Michigan Supreme Court stated:

> Under the Supremacy Clause we are bound by the decisions of the United States Supreme Court in Roe v. Wade, [cit. omit.], and other cases. Under the principles enunciated therein, our criminal abortion statute [cit. omit.] cannot stand as related to abortions in the first trimester of a pregnancy as authorized by the pregnant woman's attending physician in exercise of his medical judgment.

58 Mich App 38, 40, 212 NW2d 797, 798 (quoting People v. Bricker, 389 Mich 524, 527, 208 NW2d 172, 174 (1973)). On remand, the Court

of Appeals clarified that it decided this case "[o]n the authority of the Supreme Court's holding in Bricker" which rested its conclusion exclusively on the binding authority of the Supremacy Clause. Id.

People v. Bricker, Larkin v. Wayne Prosecutor, and People v. Nixon are the only Michigan decisions interpreting the state abortion statutes after the United States Supreme Court decided Roe v. Wade and Doe v. Bolton. There is no statement in any of these cases that the Michigan Constitution protects abortion. Rather, the courts pointedly expressed that the right to abortion was a right under the Federal Constitution, not under the state constitution. The Supremacy Clause required the courts to recognize this Federal right; the Supremacy Clause does not require the Michigan courts to incorporate this right into the state constitution. The courts of this state have refused to engraft such a right onto the Michigan Constitution. Accordingly, any claim that the Michigan Constitution protects abortion is without merit.

III. NEITHER THE EQUAL PROTECTION CLAUSE NOR THE ANTI-DISCRIMINATION CLAUSE IN THE MICHIGAN CONSTITUTION, ART. I, SEC. 2, PROTECTS A RIGHT TO ABORTION

Appellants base their assertion that MCL 400.109a violates the Equal Protection Clause of the Michigan Constitution, Mich. Const. 1963, art. I, sec. 2, and the Anti-Discrimination Clause incorporated into the Equal Protection Clause on the erroneous belief that these constitutional sections provide protection for

abortion that is independent from the right accorded under the Federal Constitution.[14] Article I, sec. 2, provides, in pertinent part, that

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin.

Id. However, no Michigan court has ever indicated that there is an independent right to abortion under the Michigan Constitution.[15] In addition, the Constitutional Debates surrounding the adoption of the 1963 Michigan Constitution make no reference to or in any way indicate that abortion is to be protected as a fundamental

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[14] As the reasoning in the District Court's Decision and Order demonstrates, and as Plaintiffs concede, MCL 400.109a violates no provision of the United States Constitution. In Beal v. Doe, 432 US 438 (1976); its companion case, Maher v. Roe, 432 US 464 (1976); and Harris v. McRae, 448 US 297 (1980), the United States Supreme Court expressly rejected Appellants' claims that the Equal Protection Clause of the Federal Constitution prohibited a state from subsidizing childbirth while not providing public funds for abortion. In fact, the United States Supreme Court has never based the abortion right on the Equal Protection Clause of the Federal Constitution. In Roe v. Wade, as in all the abortion cases the Supreme Court has subsequently decided, the right to an abortion was based on the Fourteenth Amendment's Liberty Clause. As the Due Process and Equal Protection Clauses of the Michigan Constitution have been consistently interpreted to be no broader than the United States Constitution, see e.g., Moore v. Spangler, 401 Mich 360, 370, 258 NW2d 34, 37 (1977); Fox v. Employment Security Commission, 379 Mich 579, 588; 153 NW2d 644, 647 (1967); Doster v. Estes, 126 Mich App 497, 512, 337 NW2d 549, 555-56 (1983); Roy v. Rau Tavern, Inc., 167 Mich App 664, 667, 423 NW2d 54, 56 (1988), the District Court properly rejected Appellants' arguments as being without merit.

[15] See infra, I. B. 3., and I. B. 4. at 19 and 26, respectively.

right.[16] Since the Michigan Constitution does not protect the right to abortion, Appellants cannot allege an unconstitutional injury under the Equal Protection and Anti-Discrimination Clauses of the Michigan Constitution.

IV. THE CONCEPT OF PRIVACY EMBODIED IN THE MICHIGAN CONSTITUTION DOES NOT PROTECT A RIGHT TO ABORTION

As Appellants concede, there is no explicit privacy right in the Michigan Constitution. App.Br. at 25. In their Brief, Appellants rely almost exclusively on Advisory Opinion 1975 PA 227, 396 Mich 465, 242 NW2d 3 (1976) to support their argument that the Michigan Constitution protects the right to abortion. App.Br. at 25-27. Appellants' reliance is ill-founded. An advisory opinion lacks the precedential authority of a decision in a true case or controversy. Likewise, an advisory opinion is unable to create constitutional rights. Any persuasive value normally accorded an advisory opinion is stripped away when the opinion conflicts with

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[16]. State of Michigan, Constitutional Convention Official Record, 739-752 (1961). In 1963, at the time of the Constitutional Debates, abortion was a crime in Michigan. If the Equal Protection and Anti-Discrimination Clauses were intended to incorporate a right to abortion, this abrupt change from the statutory law and the departure from settled public policy would have at least been mentioned. Cf. People v. Thompson, 424 Mich at 129, 379 NW2d at 53. The Constitutional Debates, however, include no discussion of including the right to abortion under these constitutional provisions. Appellants' argument that the Michigan Constitution inheres a right to abortion is sharply contradicted by the Constitution as it was understood and as it was adopted by the Michigan people.

clear, contrary holdings in a live case or controversy.[17]

In issuing advisory opinions, "the court does not act as a court"; rather, "such opinions are regarded as expressing the views of the justices and not a judicial determination of the questions by the court." Anway v. Grand Rapids Ry. Co., 211 Mich 592, 603, 179 NW 350, 354 (1920). As such, an advisory opinion is not precedential authority. In Cassidy v. McGovern, 415 Mich 483, 330 NW2d 22 (1982), the Michigan Supreme Court "emphasized 'the fact that an advisory opinion does not constitute a decision of the Court and is not precedentially binding in the same sense as a decision of the Court after a hearing on the merits.'" Id. at 495, 330 NW2d at 26 (quoting Advisory Opinion 1972 PA 294, 389 Mich 460, fn 1, 208 NW2d 469 (1973)).

The Michigan Supreme Court issued Advisory Opinion 1975 PA 227 pursuant to a request by the House of Representatives to evaluate the constitutionality of an act regulating political activity. The Court addressed nine questions in the opinion. The first question, which was dispositive as to the constitutionality of the act, had already been resolved in a separate opinion. Advisory Opinion on Constitutionality of 1975 PA 227 (Question 1),

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[17] Moreover, Appellants' reliance on Advisory Opinion 1975 PA 227 is further undermined by the fact that the opinion is entirely dicta. The Court resolved the question before it, whether PA 227 was constitutional, in a separate advisory opinion. Advisory Opinion of Constitutionality of 1975 227 (Question 1), 396 Mich 123, 240 NW2d 193 (1976). Chief Justice Kavanagh and Associate Justices Ryan and Levin dissented from the Court's advisory opinion dealing with questions 2-10 because the opinion on these questions was unnecessary. 396 Mich 465, 516, 240 NW2d 193, 196.

396 Mich 123, 240 NW2d 193 (1976). Appellants focus on language from certified question seven regarding the act's financial disclosure requirement for public officials. App.Br. at 25. The House of Representatives asked the Court to determine whether the financial disclosure requirement, among other things, constituted an invasion of privacy. The Court found that the public interest in such information outweighed the individual's interest in financial privacy. 396 Mich at 504-09, 242 NW2d at 11-12.

In reaching its conclusion, the Court indicated that privacy is a valued right. Id. (citing to De May v. Roberts, 46 Mich 160, 9 NW 146 (1881)). The Court continued by explaining that "the United States Supreme Court has recognized the presence of constitutionally protected 'zones of privacy'" in Griswold v. Connecticut, 381 US 479 (1965) and Roe v. Wade. Id. The Court then states that no one "suggests that right [Michigan Constitutional privacy right] to be of any less breadth than the guarantees of the United States Constitution." Id.

Contrary to this statement, Michigan's highest court made it very clear that notwithstanding the United States Supreme Court's decisions in Roe and Doe, the Michigan Constitution did not protect abortion. The dicta in the advisory opinion contravenes the earlier clear statements in People v. Bricker and Larkin v. Wayne Prosecutor.

Advisory Opinion 1975 PA 227 provides Appellants an insufficient foundation on which to build a right to abortion under the Michigan Constitution. The dicta Appellants cite as

establishing a state constitutional right to abortion contradicts earlier decisions of the Michigan Supreme Court where the Court unequivocally refused to root an abortion right in the state constitution. Moreover, as an advisory opinion entirely consisting of dicta, the persuasive authority of Appellants' argument is doubly undermined.

As Appellants acknowledge, no explicit right to privacy exists in the Michigan Constitution. App.Br. at 25. In fact, while the courts of this State have long recognized privacy to be a highly valued right, De May v. Roberts, 46 Mich 160, 9 NW 146 (1881), "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,'...are included in this guarantee of personal privacy." Roe v. Wade, 410 US 113, 152 (1973), quoting Palko v. Connecticut, 302 US 319, 325 (1937). For abortion to be deemed a "fundamental" right under the Michigan Constitution, as Appellants contend, the right to abortion must be so grounded in Michigan's history and traditions to be basic to its civil and political institutions. See Palko v. Connecticut, 302 US 319, 328 (1937), and Meyer v. Nebraska, 262 US 390, 400-02 (1923). However, "[i]t is the public policy of the state [of Michigan] to proscribe abortion." People v. Bricker, 389 Mich 524, 529, 208 NW2d 172, 175 (1973). The Bricker court's recognition that Michigan has at no time favored an abortional right belies Appellants' assertion that abortion is a fundamental right under the Michigan Constitution.

V. CONCLUSION

The Michigan Constitution provides no protection for abortion independent of that provided under the Federal Constitution. At no time in the history of this State has abortion been accorded legal protection. The English common law adopted by Michigan treated abortion as a serious crime. The Michigan Legislature consistently punished abortion. The Constitution adopted by the People of this State in 1963, does not incorporate the right to abortion. Even after the United States Supreme Court created the right to abortion under the Federal Constitution, the Michigan courts, Michigan Legislature, and People of Michigan have refused to incorporate a right to abortion into the Michigan Constitution.

Proposal A reflects the most recent statement from the Michigan voters that the Michgigan Constitution does not protect abortion. The Circuit Court properly rejected Appellants' claim to root a right to a tax-funded abortion in the Michigan Constitution. Accordingly, the Circuit Court should be affirmed.

Respectfully submitted,

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6. —— Maintenance-of-effort, nursing home services

In calculating amount of maintenance-of-effort payments county must make to state in reimbursement of additional amount county received in medicaid payments by inclusion of "institutional code days," which are days of care which must be paid by patient as a requisite to receipt of medicaid benefits, was proper. Berrien County v. State (1984) 357 N.W.2d 764, 136 Mich.App. 772.

7. —— Reimbursement by state, nursing home services

Formula used by the Department of Social Services to determine state reimbursement to county for skilled nursing care provided by county-operated hospital to persons entitled to medicaid, which formula would result in equal billings for hospital for care for medically needy and for categorically needy when the amount paid by patient was determined based on rate paid by state for categorically needy, was proper, and alternative calculation proposed by county would impermissibly result in disparate financial assistance from state for care of medically needy and categorically needy. Kent County v. Department of Social Services (1986) 386 N.W.2d 663, 149 Mich.App. 749.

8. Cost containment

The department of social services acted within its statutory authority when it implemented a cost containment program for the volume purchasing of eyeglasses for Medicaid recipients. Op.Atty.Gen.1981, No. 6011, p. 484.

9. Standing

Taxpayer and potential patient lacked standing to challenge medicaid reimbursement system implemented by State since taxpayer was not a medicaid recipient who had been adversely affected by implementation of the new provisions and he had failed to alleged with particularity how new system would cause him to suffer loss or damage as a taxpayer. Berrien County v. State (1984) 357 N.W.2d 764, 136 Mich.App. 772.

400.109a. Medical services; abortions; funding prohibition, exception

Section 109a. Notwithstanding any other provision of this act, an abortion shall not be a service provided with public funds to a recipient of welfare benefits, whether through a program of medical assistance, general assistance, or categorical assistance or through any other type of public aid or assistance program, unless the abortion is necessary to save the life of the mother. It is the policy of this state to prohibit the appropriation of public funds for the purpose of providing an abortion to a person who receives welfare benefits unless the abortion is necessary to save the life of the mother.

This act shall take immediate effect.

P.A.1939, No. 280, § 109a, added by P.A.1987, No. 59, § 1, Eff. March 30, 1988.

Historical Note

Compiler's note:

This added section was proposed by initiative petition pursuant to Const. Art 2, § 9. On June 17, 1987, the initiative petition was approved by an affirmative vote of the majority of the Senators elect and filed with the Secretary of State. On June 23, 1987, the initiative petition was approved by an affirmative vote of the majority of the Members elect of the House of Representatives and filed with the Secretary of State. The Legislature did not vote pursuant to Const. Art. 4, § 27 to give immediate effect to this enactment.

Cross References

Family planning services, see § 400.146.

Notes of Decisions

1. Effective date

This section proposed by initiative enacted by legislature without change or amended within 40 days went into effect 90 days after end of session at which it was passed, regardless of language in initiated law that it was to take immediate effect, where legislature failed to give law immediate effect by two-thirds vote

of members of each house. Frev v. Department of Management and Budget (1987) 429 Mich. 315, 414 N.W.2d 873.

Voters' legislative initiative (P.A.1987, No. 59), which outlawed state welfare-funded abortions, did not go into effect until 90 days after adjournment of session in which such initiative was enacted, despite text of initiative which provided for its immediate effective date; Const. Art. 4, § 27, which provides that all legislation enacted goes into effect 90 days after end of session in which it was enacted unless two thirds of each house in state legislature approves that legislation, applies to voters initiative. Frev v. Div. of Dept. of Social Services (1987) 413 N.W.2d 54, 162 Mich.App. 586.

400.110. Medical services for residents absent from state

Sec. 110. Services under this act may be provided to a resident of this state who is temporarily absent from the state. Out of state physicians and institutions in which service is received shall be licensed or approved by the appropriate standard-setting authority in the other state.

Historical Note

Source:

P.A.1939, No. 280, § 110, added by P.A.1966, No. 321, § 1, Eff. Oct. 1, 1966.
C.L.1948, § 400.110.
P.A.1967, No. 239, § 1, Imd. Eff. Aug. 1, C.L.1970, § 400.110.

For effective date provisions of P.A.1966, No. 321, see the Historical Note following § 400.35.

The 1967 amendment, in the second sentence, deleted "dentists" following "physicians".

400.111. Medical services; responsibility of state department

Sec. 111. (1) The state department is responsible for the proper handling of each medical case. The state department may transfer a recipient to some other medical institution for treatment better adapted to the recipient's needs, or take any other action to insure meeting the medical needs of the recipient.

(2) When the director has issued an order under section 111f [1] or taken an action authorized by section 111d(1)(b) or (c) [2] with respect to a residential health care facility, that is a hospital, nursing home, or other institution reimbursed for residential or patient care by the medical assistance program established pursuant to this act, the director shall discharge the responsibility under subsection (1) by doing 1 or more of the following:

(a) Arranging for a transfer authorized by subsection (1) and for payment for care rendered until the date of transfer.

(b) Requesting the director of the department of public health to take appropriate action under Act No. 368 of the Public Acts of 1978, as amended, being sections 333.1101 to 333.25211 of the Michigan Compiled Laws.

(c) Filing a petition with the circuit court to place the residential health care facility under the control of a receiver.

(d) Arranging, with the agreement of the affected provider, for the deposit of payments for care rendered a recipient by the residential health care facility in an escrow account.

(e) Using other appropriate means, which shall include assuring that payment is made for care rendered a recipient, that conform with state and federal law, regulation, and policy.

Amended by P.A.1980, No. 321, § 1, Imd. Eff. Dec. 12.

No. 88-605

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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February 28, 1989

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BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF APPELLANTS

INTEREST OF THE AMICI

Amici Curiae are more than 250 state senators and representatives.* *Amici* do not all share the same convictions regarding the manner and extent to which the practice of abortion should be regulated. But all are in agreement that the regulation of abortion is properly a matter for the legislative, not the judicial, branch of government, and that the States should have the constitutional authority to protect unborn human life throughout pregnancy. By virtue of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), however, that authority can no longer be exercised in any meaningful fashion.

The regulation of abortion poses difficult and complex legal, moral, social, medical, technological and political problems which the judiciary is uniquely ill-suited to resolve. From 1787 until 1973, these questions were raised, freely debated and answered in the public forums of the state legislatures, where the will of the people could be expressed through their popularly elected representatives. hat debate has been silenced and those forums have been closed for more than sixteen years. The voice of the people will not be heard until *Roe v. Wade* is overruled and the authority to regulate abortion is restored to the States.

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113 (1973), this Court held that "[the] right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. The Court acknowledged that "[t]he Constitution does not explicitly mention any right of privacy." *Id.* at 152. Nevertheless, "the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones

* See List of *Amici* in the attached Appendix.

of privacy, does exist under the Constitution." *Id.* However, "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.*

In determining that abortion is a "fundamental right," the Court in *Roe* discussed at length the treatment of abortion in English and American law. 410 U.S. at 129, 132-41, 147-52. Based upon that review, the Court came to the following conclusions:

> It is . . . apparent that at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

Id. at 140-41.

Amici Curiae respectfully submit that these conclusions, which are central to the Court's decision in *Roe*, are erroneous. The Court's historical excursus was seriously flawed and failed to take into account the medical and technological context in which the law of abortion evolved. As this brief attempts to demonstrate, both the English common law, as received by the American states, and the anti-abortion statutes enacted by state legislatures in the nineteenth century, sought to protect unborn human life to the extent that contemporary medical science could establish the existence of that life. This evidence undermines the foundations of *Roe* and suggests that abortion has never been regarded as a "right" in English or American law. Accordingly, abortion cannot be considered a "fundamental right" under the Constitution.

ARGUMENT

> Abortion is a hotly contested moral and political issue. Such issues, in our society, are to be resolved by the will of the people, either as expressed through legislation or through the general principles they have already incorporated into the Constitution they have adopted. *Roe v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe v. Wade.*

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 at 796-97 (1986) (White, J., dissenting).

I. ONLY FUNDAMENTAL RIGHTS, IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY AND HISTORICALLY AND TRADITIONALLY CONSIDERED BEYOND THE PROPER SCOPE OF GOVERNMENT REGULATION, ARE PROTECTED BY THE RIGHT OF PRIVACY.

This Court has recognized that there are certain fundamental rights protected by the Due Process Clause of the Fourteenth Amendment. Due process of law protects those rights which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934), or which are "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

For any right to be considered fundamental, it must be grounded in the history and traditions of our society and be basic to our civil and political institutions. *See Palko v. Connecticut*, 302 U.S. 319, 328 (1937), and *Meyer v. Nebraska*, 262 U.S. 390, 400-02 (1923). In *Duncan v. Louisiana*, 391 U.S. 145 (1968), for example, the Court, in holding that the right to jury trial is fundamental, emphasized the historical role of jury trials in the

"Anglo-American regime of ordered liberty." *Id.* at 149 n.14.

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court forcefully reiterated these principles in rejecting the claim that the Constitution confers a fundamental right upon homosexuals to engage in sodomy. The Court noted that "the Due Process Clauses of the Fifth and Fourteenth Amendments . . . have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription." *Id.* at 191. The Court has often recognized "rights that have little or no textual support in the constitutional language." *Id.* To guard against the danger of "the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection." *Id.*

Thus, in *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), the Court stated that this category of rights includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A broader formulation of fundamental liberties was set forth in Justice Powell's opinion in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 503 (Powell, J.). In *Roe v. Wade*, 410 U.S. 113 (1973), this Court acknowledged that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' . . . are included in this guarantee of personal privacy." *Id.* at 152.

In responding to the argument that homosexuals have a fundamental right to engage in acts of consensual sodomy, the Court in *Bowers* noted that "[s]odomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill

of Rights." 478 U.S. at 192. The Court noted further that in 1868, when the Fourteenth Amendment was ratified, "all but 5 of the 37 States in the Union had criminal sodomy laws." *Id.* at 192-93. Finally, the Court pointed out that until 1961, "all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults." *Id.* at 193-94. In light of the law's longstanding prohibition of sodomy, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty,' is, at best, facetious." 479 U.S. at 194.

In *Bowers*, the Court declined to take a more expansive view of its authority "to discover new fundamental rights imbedded in the Due Process Clause." 478 U.S. at 194.

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. . . . There should be . . . great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

478 U.S. at 194-95

When the well-established principles of constitutional analysis enunciated by this Court in *Bowers v. Hardwick* are applied to the question of abortion, it becomes clear that *Roe v. Wade* was wrongly decided. Contrary to the Court's conclusion in *Roe*, there was no "right" to an abortion at common law or under the statutes enacted by the State legislatures in the nineteenth century. The uniform and consistent condemnation of abortion as a crime in English and American law contradicts the

critical historical findings on which *Roe v. Wade* was based and calls for reappraisal and rejection of the "abortion right."

II. THE COMMON LAW OF ENGLAND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

An understanding of the development of the common law crime of abortion in England is essential to any analysis of the status of abortion in American law prior to the gradual replacement of common law crimes by statutory crimes in the nineteenth century. Those statutes were enacted because the English common law, as received by the American states, was unable to keep pace with the medical and technological advances in the nineteenth century. Although a comprehensive review of this history is beyond the scope of this brief, the following is offered as a summary.[1]

The thirteenth century commentators Bracton and Fleta classified abortion as homicide if the fetus was "formed and animated." 2 H. Bracton, *The Laws And Customs Of England* 279 (Twiss ed. 1879); 2 Fleta 60-61, Book I, ch. 23 (Selden Soc. ed. 1955). Neither Bracton nor Fleta expressly required that the child be born alive for the killing to constitute a homicide. The sixteenth and seventeenth century jurist, Sir Edward Coke, declared that, while not "murder," abortion of a woman "quick with childe" was a "great misprision." E. Coke, *Third Institute of the Laws of England* at 50 (1644). If, however, "the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive." *Id.* In his *Commentaries On The Laws Of England*, William Blackstone closely followed Coke:

> [T]he person killed must be *"a reasonable creature in being and under the king's peace,"* at the time of the killing . . . To kill a child in its mother's womb,

[1] The Court is referred to the brief of Value of Life Committee, *et al.*, as *amici curiae* in support of Appellants, for a fuller presentation of this history.

> is now no murder, but a great misprision; but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.

4 W. Blackstone, *Commentaries On the Laws Of England* 198 (emphasis in original). Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor." 1 W. Blackstone at 126.

"Quickening" (*i.e.*, the point in a pregnancy at which the mother begins to detect fetal movement) was used in the common law as a practical evidentiary test to determine whether the abortion had been performed upon a live human being in the womb and whether the abortion had caused the child's death. Byrn, *An American Tragedy: The Supreme Court On Abortion*, 44 Fordham L.Rev. 807, 815-16 (1973); Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms*, 21 Val. U.L. Rev. 563, 580-92 (1987). "[T]his evidentiary test was never intended as a judgment that before quickening the child was not a live human being." *Byrn* at 816.

In *Rex v. Bourne*, 1 K.B. 687 (1939), Justice Macnaghten recognized that "long before then [the enactment of the first English abortion statute of 1803], before even Parliament came into existence, the killing of an unborn child was by the common law of England a grave crime . . . . The protection which the common law afforded to human life extended to the unborn child in the womb of its mother." 1 K.B. 687, 690. A recent review of the English cases and commentaries concludes that "the common law prohibited abortion and did so predominantly for the protection of fetal life." J. Keown; *Abortion, doctors and the law: Some aspects of the legal regulation of abortion in England from 1803 to 1982* at 11 (Cambridge University Press 1988). This was the status of the common law crime of abortion in England at the time of the American Revolution.

III. THE AMERICAN COLONIES AND STATES ACCEPTED THE COMMON LAW OF ENGLAND AND PUNISHED ABORTION AFTER QUICKENING AS A CRIMINAL OFFENSE.

Notwithstanding the attempts of some scholars to disparage the authority of Coke and Blackstone (*see* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality* (pt. 1), 14 N.Y.L.F. 411 (1968); and 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)), what is important is that their views were accepted by American courts in the nineteenth century as accurate statements of the common law regarding the criminality of abortion. *See, e.g., Abrams v. Foshee*, 3 Iowa 274, 278-80 (1856); *Smith v. State*, 33 Me. 48, 55 (1851); *Lamb v. State*, 67 Md. 524, 533, 10 A. 208 (1887); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845); *People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886); *State v. Cooper*, 22 N.J.L. 52, 53-58 (1849).

In conformity with those views, state courts uniformly recognized abortion after quickening as a common law crime.[2] At least two state courts determined

[2] *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) (*dictum* in slander case); *State v. Reed*, 45 Ark. 333, 334-36 (1885) (reversing dismissal of indictment charging defendant with post-quickening abortion); *Eggart v. State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898) (*dictum* in case decided under statute abolishing quickening distinction); *Abrams v. Foshee*, 3 Iowa 274, 278-80 (1856) (*dictum* in slander case); *Mitchell v. Commonwealth*, 78 Ky. 204, 205-10 (1879) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Smith v. State*, 33 Me. 48, 55 (1851) (*dictum* in case decided under statute abolishing quickening distinction); *Lamb v. State*, 67 Md. 524, 532-34, 10 A. 208, 208-09 (1887) (*dictum* in case decided under statute abolishing quickening distinction); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264-68 (1845) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Commonwealth v. Bangs*, 9 Mass. 387, 387-88 (1812) (arresting judgment where indictment failed to allege that "the woman was quick with child"); *State v. Emerich*, 13 Mo. App. 492, 495-98 (1883) (*dictum* in case decided under statute); *State v. Cooper*, 22 N.J.L. 52, 54-58 (1849) (*dictum* in case upholding indictment charging defendant with assault); *Evans v. People*, 49 N.Y. 86, 88 (1872) (*dictum* in case reversing conviction under manslaughter statute).

Four of these decisions acknowledged the arbitrary nature of the quickening distinction and recommended corrective legislative action. *See Mitchell v. Commonwealth*, 78 Ky. 204, 209-10 (1879); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 268; *State v. Emerich*, 13 Mo. App. 492, 495 (1883); *State v. Cooper*, 22 N.J.L. 52, 58 (1849).

that abortion at any state of pregnancy was a common law crime. *State v. Slagle*, 83 N.C. 630, 632 (1880) (*dictum*); *Mills v. Commonwealth*, 13 Pa. 630, 632-33 (1850) (indictment need not allege that woman had become quick). The Maryland Court of Appeals may have had these cases in mind when it recorded widespread abandonment of the medically obsolete quickening distinction:

> [A]s the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offence to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime *at common law* without regard to the stage of pregnancy.

Lamb v. State, 67 Md. 524, 533, 10 A. 208, 208 (1887) (emphasis added).

These decisions, together with the dozens of abortion prosecutions reported in the Century Digest and each volume of the Decennial Digests, lay to rest the doubt expressed in *Roe* that "abortion was never firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 U.S. at 136. No

American court ever held that post-quickening abortion was not a crime at common law.

Moreover, there is evidence that abortion was prosecuted as a common law crime in the colonial period. Julia Cherry Spruill, in her study of women in the South, cites the 1652 case of Captain Mitchell, who "was accused of a number of crimes, among which was attempted abortion," and of Elizabeth Robins, who was accused of "taking medicine to destroy her child." J. Spruill, *Women's Life and Work in the Southern Colonies* at 325-26 (1938). Another historian, Lyle Koehler, records the case of Deborah Allen, who was indicted on September 4, 1683, by the "Gen. Attorney . . . for, fornication, and for Indeavoringe the Dithruction of the Child in her womb." L. Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* at 329, n.182 (1980).

Admittedly, there are few reported cases of prosecutions for abortions in America prior to the mid-nineteenth century. This was not because abortion was not regarded as a crime at common law, however, but because "[f]ew [women] tried to limit their pregnancies by birth control or abortion," (C. Scholten, *Childbearing In American Society 1650-1850* at 9 (1985)), and because primitive medical understanding prevented proof of abortion until after quickening and unless there were direct witnesses who would testify. J. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* at 72 (1978). Mohr notes that abortion after quickening, "late in the fourth or early in the fifth month," was a common law crime in the United States. *Id.* at 3. In *Evans v. People*, 49 N.Y. 86 (1872), the New York Court of Appeals confirmed the evidentiary basis of the quickening rule:

> But until the period of quickening there is no evidence of life; and whatever may be said of the foetus, the law has fixed upon this period of gestation as the time when the child is endowed with life, and for the reason that the foetal movements are the first clearly marked and well defined evidences of life.

Id. at 90.

Prior to the codification of common law crimes in the nineteenth century, regulations on midwives prohibited abortions. In 1716, for example, New York City adopted an ordinance directed at midwives which provided:

> You Shall not Give any Counsel or Administer any Herb Medicine or Potion, or any other thing to any Woman being with Child whereby She Should Destroy or Miscarry of that she goeth withall before her time.

Horan and Marzen, "Abortion and Midwifery: A Footnote in Legal History," in *New Perspectives on Human Abortion*, at 199 (T. Hilgers, D. Horan, and D. Mall, eds. 1981). Violation of this ordinance, which remained in effect at least until 1776, was punishable by fines, forfeiture or jail. *Id.* at 199-200. Virginia, in the seventeenth century, passed an ordinance by which "[m]idwives were pledged to expose infanticide, to summon other midwives in suspicious cases and not to induce abortion or charge exorbitantly." S. Massengill, *A Sketch of Medicine and Pharmacy* at 294 (2d ed. 1942).

The law could not prove pregnancy before quickening because of the primitive state of medical technology. But as a prophylactic measure it sought to prevent the induction of abortion throughout pregnancy by regulating the practices of midwives. This regulation is significant because well into the nineteenth century, midwives, not physicians, attended women during pregnancy and childbirth and performed most abortions. Horan and Marzen, "Abortion and Midwifery: A Footnote in Legal History," in *New Perspectives on Human Abortion*, at 200 (T. Hilgers, D. Horan, and D. Mall, eds. 1981).

Abortion was not a "right" at common law, either in England or America. Abortion was a crime and was punished accordingly.

IV. THE ABORTION STATUTES ENACTED BY THE STATE LEGISLATURES IN THE NINETEENTH CENTURY, WHICH ABOLISHED THE QUICKENING DISTINCTION AND PROHIBITED ABORTION THROUGHOUT PREGNANCY EXCEPT TO SAVE THE LIFE OF THE MOTHER, WERE INTENDED TO PROTECT UNBORN HUMAN LIFE.

In *Roe v. Wade*, the Court found that "the pre-existing English common law" of abortion remained in effect in this country "in all but a few States until [the] mid-19th century" and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law." 410 U.S. at 138-139. These findings do not appear to be supported by the historical record. By the end of 1849, eighteen of the thirty States had enacted statutes restricting abortion, and by the end of the Civil War, twenty-seven of the thirty-six States had done so.[3] By the end of 1868, the year in

[3] *See*, generally, Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 32 *et seq.* (1985). The following eighteen states adopted anti-abortion statutes before 1850: Alabama, Ala. Acts, ch. 6, sec. 2 (1840); Arkansas, Ark. Rev. Stat., ch. 44, div. III, art. II, secs. 5, 6 (1838); Connecticut, Conn. Stat., tit. 22, sec. 14 at 152 (1821) (in 1860 this statute was replaced by Conn. Pub. Acts, ch. LXXI, secs. 1, 2, p. 65 (1860), which made abortion at any stage of pregnancy a crime); Illinois, Ill. Rev. Crim. Code, div. 5, sec. 46, p. 131 (1833) (this statute was replaced by a subsequent enactment in 1867, Act of Feb. 28, 1867, Ill. Pub. Laws, p. 89 (1867)); Indiana, Ind. Rev. Stat., sec. 3 at 224 (1838) (by 1859, this statute had been superseded by a subsequent enactment, Ind. Laws ch. LXXXI, sec. 2 at 130-31 (1958)); Iowa (admitted to statehood Dec. 28, 1846), Iowa (Terr.) Rev. Stat. ch. 49, secs. 10, 13 at 167 (1843 (an act of March 15, 1858, made abortion at any stage of pregnancy a crime, Iowa Rev. Stat., sec. 4221 (1860)); Maine, Me. Rev. Stat., ch. 160, secs. 11-14 (1840); Massachusetts, Mass. Acts & Resolves, ch. 27 (1845); Michigan, Mich. Rev. Stat., ch. 153, secs. 32-34, p. 662 (1846); Mississippi, Miss. Code, ch. 64, secs. 8, 9, p. 958

which the Fourteenth Amendment was ratified, *thirty of the then thirty-seven States had enacted such statutes*, including twenty-five of the thirty-ratifying States,[4] to-

(1848); Missouri, Mo. Rev. Stat., art. II, secs. 9, 10, 36 at 168-69, 172 (1835); New Hampshire, N.H. Laws, ch. 743, sec. 1, p. 708 (1848); New Jersey, N.J. Laws, pp. 266-27 (1849); New York, N.Y. Laws, ch. 22, sec. 1, p. 19 (1846), N.Y. Laws, ch. 260, secs. 1-6 at 285-86 (1845); Ohio, Ohio Gen. Stat., ch. 35, secs. 111, 112 at 252 (1841); Vermont, Vt. Acts No. 33, sec. 1 (1846); Virginia, Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848); Wisconsin, Wis. Rev. Stat., ch. 133, secs. 10, 11 (1849) (by 1858, this statute had been superseded by a subsequent enactment, Wis. Rev. Stat., ch. 164, sec. 11, ch. 169, secs. 58, 59 (1858)).

The following nine states adopted such statutes between 1850 and 1865: California (admitted to statehood Sep. 9, 1850), Cal. Sess. Laws, ch. 99, sec. 45, p. 233 (1849-1850) (section 45 was amended by an act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588); Kansas (admitted to statehood Jan. 29, 1861), Kan. (Terr.) Stat., ch. 48, secs. 9, 10, 39 at 238, 243 (1855) (by 1859, this statute had been superseded by a subsequent enactment, Kan. (Terr.) Laws, ch. 28, secs. 9, 10, 37 (1859)); Louisiana, La. Crimes & Offences, sec. 24 at 188 (1856); Minnesota (admitted to statehood May 11, 1858), Minn. (Terr.) Rev. Stat. ch. 100, secs. 10, 11, p. 493 (1851); Nevada (admitted to statehood Oct. 31, 1864), Nev. (Terr.) Laws, ch. 28, div. 4, sec. 42, p. 63 (1861); Oregon (admitted to statehood Feb. 14, 1859), Act of Oct. 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); Pennsylvania, Pa. Laws No. 374, secs. 87-89 (1860), 1860 Pa. Laws 404-05; Texas, Tex. Gen. Stat. Dig., ch. VII, articles 531-536, p. 524 (Oldham & White 1959); West Virginia (admitted to statehood June 20, 1863), *see* Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848), W. Va. Const., art. XI, par. 8 (1863).

[4] In addition to the twenty-seven states listed in note 3, the following three states adopted anti-abortion statutes between 1865 and 1868: Florida, Fla. Acts, 1st Sess., ch. 1637, No. 13, ch. 3, secs. 10, 11, ch. 8, secs 9-11 (1868), 1868 Fla. Laws 64, 97; Maryland, Md. Laws, ch. 179, sec. 2, p. 315 (1868); Nebraska (admitted to statehood March 1, 1867), Neb. (Terr.) Stat., tit. 4, ch. 4, sec. 42 (1866). Of the thirty states ratifying the fourteenth amendment as of July 21, 1868, all but Georgia, North Carolina, Rhode Island, South Carolina and Tennessee had adopted such statutes.

gether with six of the ten federal territories.[5] The territorial enactments are significant because laws passed by territorial legislatures were subject to Congressional annulment. U.S. Const., art. IV, sec. III, cl. 2; *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880). No abortion statute enacted by any territorial legislature was ever nullified by Congress, including the 39th Congress which approved the Fourteenth Amendment in June 1866.

The widespread adoption of these laws prior to the ratification of the Fourteenth Amendment in 1868 undermines the Court's conclusion in *Roe* that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." 410 U.S. at 153. As Justice Rehnquist observed in dissent, "[t]o reach its result, the Court necessarily . . . had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment." *Id.* at 174 (Rehnquist, J., dissenting). After reciting the statutory history set out above, Justice Rehnquist stated:

> There apparently was no question concerning the validity of this provision [the Texas statute] or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter.

Id. at 177 (Rehnquist, J., dissenting).

[5] The following federal territories adopted anti-abortion statutes by the end of 1868: Arizona, Ariz. Code, ch. 10, div. 5, sec. 45 (1865); Colorado, Act of Nov. 5, 1861, div. 4, sec. 42, 1861 Colo. Laws 296-97, Colo. Rev. Stat., ch. XXII, sec. 42 (1868); Idaho, Act of Feb. 4, 1864, ch. 4, sec. 42, 1864 Idaho Laws 443; Montana, 1864 Mont. Laws 184; New Mexico, Act of Feb. 15, 1854, No. 28, ch. 3, secs. 10, 11, 1854 N.M. Laws 83; Washington, Wash. (Terr.) Stat., ch. 2, secs. 87, 88 at 81 (1854).

The Court dismissed the importance of this legislation, concluding that the nineteenth century statutory prohibitions of abortion were enacted not to protect prenatal life but to guard maternal health against the dangers of unsafe operations. 410 U.S. at 151-52. Three reasons were offered in support of this conclusion, all of which have been shown by "the lessons of experience and the force of better reasoning," (*Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandies, J., dissenting)), to be erroneous.

First, citing only one New Jersey decision, the Court stated that "[t]he few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus." 410 U.S. at 151 & n. 48, citing *State v. Murphy*, 27 N.J.L. 112 (1858). The Court not only misread the holding in *Murphy* (*see* Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment*, 63 Calif. L. Rev. 1250, 1273-74 (1975)),[6] but also overlooked eighteen decisions from thirteen jurisdictions expressly affirming that protection of the unborn was a purpose of their nineteenth century statutes,[7] and

[6] In *Murphy*, the court recited the common law rule that "the procuring of an abortion, or the attempt to procure an abortion, by the mother herself, or by another with her consent, was not indictable, unless the woman were quick with child." 27 N.J.L. at 114. The court noted that "[t]he act was purged of its criminality, so far as it affected the mother by her consent. It was an offence only against the life of the child. . . . [T]he *statute* does not make it criminal for the woman to swallow the potion, or to consent to the operation or other means to procure an abortion. . . . Her guilt or innocence remains as at common law. Her offence at the common law is against the life of the child." *Id.* at 114 (emphasis added). *See State v. Gedicke*, 43 N.J.L. 86 (1881), discussed in the text, and *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956).

[7] *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); *Dougherty v. The People*, 1 Colo. 514, 522-23 (1872); *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942); *Nash v. Meyer*,

twelve other decisions from ten additional jurisdictions strongly implying the same position.[8] In every decade since the 1840's, there has been at least one American state court decision recognizing this purpose.

Thus, in 1849, the Supreme Court of Vermont held that "the preservation of the life of the child" was one of the "important considerations" underlying the state's 1846 abortion statute. *State v. Howard*, 32 Vt. 380, 399 (1859).

In 1851, the Supreme Court of Maine explained that its 1840 abortion statute had abolished the common law quickening distinction:

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54 Idaho 283, 301, 31 P.2d 273, 280 (1934); *State v. Alcorn*, 7 Idaho 599, 613-14, 64 P. 1014, 1019 (1901); *Joy v. Brown*, 173 Kan. 833, 839-40, 252 P.2d 889, 893 (1953); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913); *State v. Watson*, 30 Kan. 281, 284, 1 P. 770, 771-72 (1883); *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956); *State of Gedicke*, 43 N.J.L. 86, 89-90, 96 (1881); *State v. Hoover*, 252 N.C. 113, 133, 135, 113 S.E.2d 281, 283 (1960); *State v. Tippie*, 89 Ohio St. 35, 39-40, 105 N.E. 75, 77 (1913); *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936); *State v. Ausplund*, 86 Ore. 121, 131-32, 167 P. 1019, 1022-23 (1917); *State v. Howard*, 32 Vt. 380, 399-401 (1859); *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950); *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949); *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938). But see *State v. Carey*, 76 Conn. 342, 352-53, 56 A. 632, 636 (1904); *People v. Nixon*, 42 Mich. App. 332, 335-41, 201 N.W.2d 635, 638-41 (1972); *State v. Jordan*, 227 N.C. 579, 580, 42 S.E.2d 674, 675 (1947); *Foster v. State*, 182 Wis. 298, 300, 196 N.W. 233, 234 (1923) (*contra*).

[8] *McClure v. State*, 214 Ark. 159, 170, 215 S.W.2d 524, 530 (1949); *Montgomery v. State*, 80 Ind. 338, 345 (1881); *State v. Moore*, 25 Iowa 128, 131-32, 135-36 (1868); *Abrams v. Foshee*, 3 Iowa 274, 278 (1856); *Smith v. State*, 33 Me. 48, 57-59 (1851); *Worthington v. State*, 92 Md. 222, 237-238, 48 A. 355, 356-57 (1901); *Lamb v. State*, 67 Md. 524, 532-33, 10 A. 208 (1887); *People v. Sessions*, 58 Mich. 594, 595-96, 26 N.W. 291, 292-93 (1886); *Edwards v. State*, 79 Neb. 251, 254-55, 112 N.W. 611, 612-13 (1907); *Bennett v. Hymers*, 101 N.H. 483, 484-85, 147 A.2d 108, 109-110 (1958); *State v. Powell*, 181 N.C. 515, 106 S.E.133 (1921); *State v. Crook*, 16 Utah 212, 216-17, 51 P. 1091, 1093 (1898).

> There is a removal of the unsubstantial distinction, that it is no offence to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

Smith v. State, 33 Me. 48, 57 (1851).

In 1868, the Supreme Court of Iowa affirmed a conviction of murder for causing the death of a woman by an illegal abortion under an 1858 anti-abortion statute, and approved of the following charge to the jury as an accurate statement of the law:

> To attempt to produce a miscarriage, except when in proper professional judgment it is necessary to preserve the life of the woman, is an unlawful act. It is known to be a dangerous act, generally producing one and sometimes two deaths,—I mean the death of the unborn infant and the death of the mother."

State v. Moore, 25 Iowa 128, 131-32 (1868).

In *Moore*, the court condemned abortion as "an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." *Id.* at 136.

In 1872, the Supreme Court of the Territory of Colorado held that its 1868 abortion statute was "intended specially to protect the mother and her unborn child from operations calculated and directed to the destruction of the one and the inevitable injury of the other." *Dougherty v. The People*, 1 Colo. 514, 522.

In 1881, the Supreme Court of New Jersey declared that its original 1849 abortion statute had been amended in 1872 "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die." *State v. Gedicke*, 43 N.J.L. 86, 89-90 (1881). The court described abortion as "a heinous

crime, which in almost every case endangers the life and health of the woman, and the destruction of the foetus or child, which may be quickened or instinct with the beginning of life." *Id.* at 90.

In 1898, the Supreme Court of Utah characterized abortion under its 1876 statute as "the criminal act of destroying the foetus at any time before birth." *State v. Crook*, 16 Utah 212, 217, 51 P. 1091, 1093 (1898).

In 1901, the Maryland Court of Appeals explained that American anti-abortion statutes had been strengthened and the penalties for their violation increased precisely because the medical procedures for inducing abortions had become safer:

> It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother . . . more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered, by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to the great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere found to prevent and punish this offense. The woman takes her life in her hands when she submits to an abortion . . . but her death is no necessary element in the procuring of an abortion, and the application of the harsh rule here contended for [that defendant should have been indicted for murder instead of manslaughter] would have no effect in the repression of that abhorrent crime, which can ony be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child.

Worthington v. State, 92 Md. 222, 237-38, 48 A. 355, 356-57 (1901).

In 1916, the Alabama Court of Appeals held that the "manifest purpose" of its anti-abortion statute, first adopted in 1840, was "to restrain *after conception* an unwarranted interference with the course of nature in the propagation and reproduction of human kind . . . ." *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916) (emphasis added). Quoting from the 1911 Transactions of the Medical Association of Alabama, the court asked, "'[D]oes not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'" *Id.* at 488, 73 So. at 836.

In a 1917 case, a defendant convicted under Oregon's 1864 abortion statute argued that he could not be prosecuted for performing an abortion on a woman prior to quickening because an abortion at that stage of pregnancy was not a crime at common law. After noting that common law crimes had been abolished in the State, the Oregon Supreme Court rejected this argument, stating:

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well. The Legislature did not waste time with refinements about quickening, but applied the law to all stages of pregnancy, and we would usurp its prerogative

if we read into the statute something not found there.

State v. Ausplund, 86 Ore. 121, 131-32, 167 P. 1019, 1022-23 (1917).

In 1921, the Supreme Court of North Carolina held that "[t]he essential fact charged [under an 1881 statute], is that the defendant advised the woman to take the drug, or other substance, with intent thereby to destroy the child." *State v. Powell*, 181 N.C. 515, 515, 106 S.E. 133, 133 (1921). The court added that the act "denounced by the statute" is the administration of a drug with the intent "to destroy the child." *Id.*

In 1934, the Supreme Court of Idaho determined that the state abortion statute, first adopted in 1854, was designed "not for the protection of the woman, but to discourage abortions because thereby the life of a human being, the unborn child, is taken." *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934). In 1936, the Oklahoma Supreme Court expressly held that "the anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and, through it, society." *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936). And in 1938, the Washington Supreme Court acknowledged that the state anti-abortion statute, first adopted in 1854, was "designed to protect the life of the mother as well as that of her child." *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938).

In 1942, the Supreme Court of Georgia declared that in enacting its anti-abortion statute in 1876, "the legislature was undertaking to provide by penal law appropriate penalties for the destruction of an unborn child." *Passley v. State*, 194 Ga. 327, 329, 21 S.E.2d 230, 232 (1942). In 1950, the Virginia Supreme Court of Appeals, interpreting its 1849 abortion statute, explained that the "[t]he intention of the lawmakers was to protect the health and lives of pregnant women and their unborn children from those who intentionally and not in good faith would thwart nature by performing or causing

abortion and miscarriage." *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75.

In 1953, the Kansas Supreme Court held that the next of kin of a woman who had died as a result of a negligently performed abortion could sue the abortionist for damages. *Joy v. Brown*, 173 Kan. 833, 252 P.2d 889 (1953). Rejecting the defendant's argument that the decendent's consent to an illegal act barred recovery, the court said, "[w]e are of the opinion that no person may lawfully and validly consent to any act the very purpose of which is to destroy human life." *Id.* at 839-40, 252 P.2d at 892. And in 1960, the Supreme Court of North Carolina declared that its abortion statute, which had remained essentially unchanged since it was first enacted in 1881, was "designed to protect the life of a child *in ventre sa mere*." *State v. Hoover*, 252 N.C. 133, 135, 113 S.E.2d 281, 283 (1960).

State court decisions affirming the protection of unborn human life as one purpose of their statutes prohibiting abortion continued to be handed down until *Roe v. Wade*. In the fifteen months before *Roe v. Wade* was decided, no less than six state courts upheld the constitutionality of their respective abortion statutes, expressly holding that their laws were intended to protect the lives of unborn children.[9]

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[9] *See Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. 142, 505 P.2d 580 (1973), *modified on rehearing* pursuant to *Roe*; *Cheaney v. State*, 259 Ind. 138, 140-47, 285 N.E.2d 265, 266-70 (1972), *cert. den. for want of standing of petitioner, sub nom. Cheaney v. Indiana*, 410 U.S. 991 (1973); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 900-04 (Ky. 1972), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Sasaki v. Kentucky*, 410 U.S. 951 (1973); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *Thompson v. State*, 493 S.W.2d 913, 917-20 (Tex. Cr. App. 1971), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Thompson v. Texas*, 410 U.S. 950 (1973); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972), *judgment vacated and cause remanded for further consideration in light of Roe v. Wade, sub nom. Munson v. South Dakota*, 410 U.S. 950 (1973). *But see People v. Belous*, 71 Cal.2d 954, 458 P.2d 194 (1969), *cert.*

In sum, more than thirty-five decisions from almost thirty States recognized that their abortion statutes were enacted primarily to protect unborn human life. These opinions forge an unbroken chain of precedent linking the 1840's to the early 1970's. Given this wealth of case authority, the Court's belief that state court decisions "focus[ed] on the State's interest in protecting the woman's health rather than in preserving the embryo and fetus," (410 U.S. at 151), is ill-founded.

Further evidence of the legislatures' intent to protect fetal life may be found in the report of the American Medical Association's Committee on Criminal Abortion to the Twelfth Annual Meeting of the AMA in 1859, from which the Court in *Roe* quoted extensively. 410 U.S. at 141-42. That report, and the subsequent action taken by the AMA, supports the view that in restricting the availability of abortions, the nineteenth century legislatures intended to recognize the humanity of unborn children and protect them from the violence of abortion.

The Committee on Criminal Abortion was appointed in 1857 to investigate criminal abortion "with respect to its general suppression." In its report, the Committee deplored abortion and its frequency and listed three causes of "this general demoralization":

> The first of these causes is a wide-spread popular ignorance of the true character of the crime—a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening.
>
> The second of the agents alluded to is the fact that the profession[s] themselves are frequently supposed careless of foetal life . . . .
>
> The third reason of the frightful extent of this crime is found in the grave defects of our laws, both

den., 397 U.S. 915 (1970), and *State v. Barquet*, 262 So.2d 431 (Fla. 1972) (striking down abortion statutes on vagueness grounds); and *People v. Nixon*, 42 Mich. App. 332, 201 N.W.2d 635 (1972) (holding that statute could not constitutionally be applied to a licensed physician performing an abortion before quickening in an antiseptic clinical environment).

> common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowleges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it, and to its life as yet denies all protection.

12 Trans. of the Am. Med. Assn. 75-76 (1859).

The American Medical Association adopted resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.* at 28, 78. The Committee submitted another detailed report in 1871 which concluded with the observation, "We had to deal with human life. In a matter of less importance we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less." 22 Trans. of the Am. Med. Assn. 258 (1871). In *Roe*, the Court acknowledged that "the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period." 410 U.S. at 141.

That the nineteenth century abortion statutes were enacted, at least in part, to protect the lives of unborn children is evident from the therapeutice exception to the absolute ban on abortions. Almost all of the States prohibited abortions except those that were necessary to save the life of the mother. 410 U.S. at 139. Abortions were not allowed for health reasons, unless the life of the mother was endangered. This narrow exception, which was consistent with the common law rule (*People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886)) suggests that the laws were not designed solely to guard women against the dangers of unsafe medical and surgical procedures:

> By prohibiting all abortions except those necessary or thought to be necessary to preserve the life of the mother, the state legislatures manifested their belief that no lesser beneficial consequence could justify the destruction of the unborn child. If the legislatures did not consider the child to be a person in the whole sense, undoubtedly they would not have required the mother to bear serious health risks and heavy burdens in order to preserve the life of the child. Furthermore, if the legislatures had not considered the child to be a "person," surely their overriding concern in regulating abortion would have been to protect the health of pregnant women. Legislatures would have defined the thereapeutic exception so as to minimize the number and gravity of injuries to women resulting from pregnancy, childbirth, and induced abortion. If it would have *reduced* the number and severity of such injuries to permit physicians, after due consultation, to perform abortions found necessary to prevent serious health injury to the woman, and not just those necessary to save her life, the legislatures would have done so.

Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 45-46 (1985) (emphasis in original).

As a second reason offered in support of its conclusion that the nineteenth century abortion statutes were intended solely to protect maternal health and not prenatal life, the Court in *Roe* observed that "[i]n many States . . . by statute or judicial interpretation, the pregnant women herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another." 410 U.S. at 151. The Court, however, failed to note that at least seventeen states enacted statutes which expressly incriminated the woman's participation in her own abortion.[10]

[10] Arizona, Ariz. Pen. Code, sec. 455 (1887); California, Act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588; Act of February 14, 1872, Cal. Pen. Code, sec. 275 (1872); Connecticut, Conn. Pub. Acts, ch. LXXI, sec. 3, pp. 65-66 (1860); Idaho, Idaho Rev. Stat., sec. 6795 (1887); Indiana, Act of April 14, 1881, ch. XXXVII, sec. 23, 1881 Ind. Laws 177; Minnesota, Act of March 10, 1873, ch. 9, 1873 Minn. Laws 117-19; Montana, Mont. Rev. Code, sec. 94-402 (1947); Nevada, Act of Feb. 16, 1869, ch. 22, sec. 1, 1869 Nev. Laws 64-65; Nev. Rev. Stat., sec. 200.220 (1959); New Hampshire, Act of Jan. 4, 1849, ch. 743, sec. 4, 1848 N.H. Laws 708-09; New York Act of May 13, 1845, ch. 260, sec. 3, 1845 N.Y. Laws 285-86; Act of April 6, 1872, ch. 181, sec. 2, 1872 N.Y. Laws 509-10; North Dakota, Dak. Pen. Code, sec. 338 (1877); Oklahoma, Okla. Stat., sec. 2188 (1890); Okla. Rev. Laws, sec. 2437 (1910); South Carolina, Act of March 24, 1883, No. 354, 1883 S.C. Acts 547-58; South Dakota, Dak. Pen. Code, sec. 338 (1877); Utah, Utah Code Ann., sec. 86-2-2 (1953); Wisconsin, Wis. Rev. Stat., ch. 169, sec. 59 (1859); Wyoming, ch. 78, sec. 32, 1890 Wyo. Laws 131.

Moreover, with respect to those States that did not criminalize the woman's conduct, the Court did not consider the reasons why the woman was exempt from prosecution. Traditionally, abortion was viewed as an assault upon the woman because she "was not deemed able to assent to an unlawful act against herself . . . ." *State v. Farnam*, 82 Ore. 211, 217, 161 P. 417, 419 (1916). As a result, the woman was seen as a victim, rather than an accomplice in, the abortion. *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864). Moreover, as a practical matter, conviction of the abortionist often depended upon the testimony of the aborted woman. Absent a grant of immunity, however, her testimony could not be compelled if she were regarded as an accomplice in the offense. *People v. Nixon*, 42 Mich. App. 332, 343, 201 N.W.2d 635, 646 (1972) (opinion of Burns, J., concurring in part and dissenting in part). In most States, a criminal conviction cannot be based on the uncorroborated testimony of an accomplice. Thus, for both principled and practical reasons, the woman who underwent an abortion was considered a victim, not a perpetrator, of the offense. *See*, Annot., *Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testimony*, 34 A.L.R.3d 858 (1970).

Finally, the Court stated that "most of [the] initial statutes dealt severely with abortion but were lenient with it before quickening." 410 U.S. at 139. The Court concluded that "adoption of the 'quickening' distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception." *Id.* at 151-52. Again, the history of the nineteenth century statutes restricting abortion calls this conclusion into question.

As of the end of 1868, thirty of the then thirty-seven States had enacted anti-abortion statutes. All but three of those States—Arkansas, Minnesota and Mississippi—prohibited abortions *at any stage of pregnancy*. Although seven of the twenty-seven States that prohibited abortions throughout pregnancy punished post-quickening abortions more severely than pre-quickening abortions, the other twenty States with such laws punished abortions equally, regardless of the stage of pregnancy.[11] By the end of 1883, twenty-seven of the thirty-six States that had enacted anti-abortion statutes had abolished any distinction between pre-quickening and post-quickening abortions in determining the range of possible penalties.[12]

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[11] The statutes are set forth in notes 3 and 4, *supra*.

[12] Alabama, Ala. Code, sec. 3605 (1867); California, Act of May 20, 1861, ch. DXXI, 1861 Cal. Stat. 588; Colorado, Colo. Rev. Stat. ch. XXII, sec. 42 (1868); Connecticut, Conn. Gen. Stat., tit. XII, ch. II, sec. 22-25 (1866); Delaware, Act of February 18, 1883, ch. 226, secs. 1, 2, 1883 Del. Laws 522; Georgia, Act of February 25, 1876, ch. CXXX, sec. I-III, 1876 Ga. Laws 113; Illinois, Act of February 28, 1867, sec. 1, 1867 Ill. Pub. Laws 89; Indiana, Ind. Laws, ch. LXXXI, sec. 2; Iowa, Act of March 15, 1858, sec. 1, Iowa Rev. Stat., sec. 4221 (1860); Louisiana, La. Crimes & Offences, sec. 24 at 188 (1856); Maine, Me. Rev. Stat., tit. XI, ch. 124, sec. 8, at 685 (1857); Maryland, Md. Laws, ch. 179, sec. 2, p. 315 (1868); Massachusetts, Mass. Gen. Stat., ch. 165, sec. 9-11 (1860); Minnesota, Act of March 10, 1873 Minn. Laws 117-19; Nebraska, Neb. Rev. Stat., tit. 4, ch. 4, sec. 42 (1866); Nevada, Nev. (Terr.) Laws, ch. 28, div. 4, sec. 42, p. 63 (1861); New Jersey, N.J. Laws 266-67 (1849); North Carolina, Act of March 15, 1881, ch. 361, 1881 N.C. Laws 434-35; Ohio, Act of April 13, 1867, 1867 Ohio Laws 135-36; Oregon, Act of October 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); South Carolina, Act of December 24, 1883, No. 354, secs. 1-3, 1883 S.C. Acts 547-58; Tennessee, Act of March 26, 1883, ch. CXL, 1883, ch. CXL, 1883 Tenn. Acts 188-89; Texas, Tex. Pen. Code arts. 531-536 (1856), 1858 Tex. Gen. Laws 172; Vermont, Act of Nov. 21, 1867, No. 57, secs. 1, 3 (1867), 1867 Vt. Acts 64-66; Virginia, Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848); West Virginia, Va. Acts, tit. II, ch. 3, sec. 9, p. 96 (1848); W. Va. Const., art. XI, par. 8 (1863); Wisconsin, Wis. Rev. Stat. ch. 164, sec. 11, ch. 169, secs. 58, 59 (1858).

Rather than the occurrence of quickening, "the crucial factor which determined the range of punishment applicable to an attempted abortion was whether the attempt caused the death of the child." Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment*, 17 St. Mary's L.J. 29, 36 (1985). Twenty of the thirty-six States that had enacted abortion statutes by the end of 1883 provided for a higher range of punishment if it were proved that the abortion caused the death of the unborn child.[13] This con-

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[13] Arkansas, Ark. Rev. Stat., ch. 44, div. III, art. II, secs. 5, 6 (1838); Act of Nov. 8, 1875, No. 4, 1875 Ark. Acts 5-6; Florida, Fla. Acts, 1st Sess., ch. 1647, no. 13, ch. 3, sec. 11, ch. 8, sec. 9, 1868 Fla. Laws 64, 97; Georgia, Act of Feb. 25, 1876, ch. CXXX, secs. I-III, 1876 Ga. Laws 113; Indiana, Act of April 14, 1881, ch. XXXVII, sec. 22, 1881 Ind. Laws 177; Maine, Me. Rev. Stat., tit. XI, ch. 124, sec. 8 at 165 (1857); Michigan, Mich. Rev. Stat., ch. 153, secs. 33-34 (1846); Minnesota, Act of March 10, 1873, ch. 9, 1873 Minn. Laws 117-19; Missouri, Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, secs. 10, 34 at 778-79, 781 (1866); Nebraska, Act of March 4, 1873, Neb. Gen. Stat., ch. 58, secs. 6, 39 at 720, 727-28 (1873); New Jersey, Act of March 25, 1881, CXCI, N.J. Gen. Pub. Laws, ch. CXCI at 240; New York, Act of July 26, 1881, N.Y. Pen. Code, ch. 676, tit. 9, ch. 2, secs. 191, 194, tit. 10, ch. 4, sec. 295, ch. 7, secs. 318-21, 3 N.Y. Rev. Stat., at 2478-80 (1881); Ohio, Act of April 13, 1867, 1867 Ohio Laws 135-36; Oregon, Act of Oct. 19, 1864, Ore. Gen. Laws, Crim. Code, ch. 43, sec. 509, p. 528 (1845-1864); Pennsylvania, Pa. Laws, No. 374, tit. 6, secs. 87-88, (1860), 1860 Pa. Laws 404-05; South Carolina, Act of Dec. 24, 1883, No. 354, secs. 1-3, 1883 S.C. Acts 547-58; Tennessee, Act of March 26, 1883, ch. CXL, 1883 Tenn. Acts 188-89; Texas, Tex. Pen. Code, arts. 531, 535 (1856), 1858 Tex. Gen. Laws 172; Virginia, Act of March 14, 1878,

tradicts the theory that the laws were passed only for reasons of maternal health.

> The death of the fetus is totally irrelevant to the health of the mother. If the state antiabortion statutes were intended solely to protect the health of the pregnant woman, there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus.

Id. at 36.

Witherspoon concludes that "[t]he only explanation of this element of these statutes is that the enacting legislatures attributed value to the life of the unborn child." *Id.*

Abortion can be regarded as a "fundamental right" only if it is "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition." Abortion, however, was a crime at common law and under the laws of all fifty States until *Roe v. Wade* was decided. Jesse Choper has noted that "[a]s recently as 1967, just six years before the foundational ruling in *Roe v. Wade*, no state in the nation permitted an abortion except to save the life of the mother." J. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* at 118 (1980). Although, prior to *Roe*, fourteen States had relaxed their restrictions on abortion and had adopted some form of the American Law Institute's Model Penal Code (*Roe v. Wade*, 410 U.S. at 140 & n.37), a clear majority of the States continued to prohibit all abortions except those necessary to save the life of the mother. *See* Note, *A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems*,

ch. 311, ch. 2, sec. 8, 1878 Va. Acts 281-82; West Virginia, ch. 118, sec. 8, 1882 W. Va. Acts; Wisconsin, Act of May 17, 1858, Wis. Rev. Stat., ch. 164, sec. 11, ch. 169, sec. 58 (1858). Of these states, only Arkansas, Florida, Michigan, Missouri, New York and Pennsylvania also required proof of quickening.

1972 U. Ill. L. Forum 177, 179-80 & nn. 21-30. And no State had adopted the "trimester" approach enunciated in *Roe*.

In his dissent in *Roe v. Wade*, Justice Rehnquist noted the significance of this uniform and consistent condemnation of abortion:

> The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortion for at least a century is a strong indication . . . that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

410 U.S. at 174 (Rehnquist, J., dissenting).

Abortion is not mentioned in the Constitution and there is no evidence that either the framers or ratifiers of the Fourteenth Amendment intended to incorporate a right of abortion into the Constitution. Under this Court's analysis in the Due Process Clause cases, culminating in *Bowers v. Hardwick*, abortion cannot be considered a "fundamental right." Accordingly, *Roe v. Wade* should be overruled and the authority to regulate the practice of abortion should be returned to the States.

CONCLUSION

Amici respectfully submit that *Roe v. Wade* was an unfortunate venture in substantive due process which should be recognized and discarded as constitutional error. By its decision, the *Roe* Court, without textual or historical support, reached out and struck down the abortion laws of all fifty States, thereby establishing as a constitutional right what had long been regarded in English and American law as a serious crime—the intentional destruction of unborn human life. The *Roe* Court misapprehended the development of the common law on abortion and, as this brief has attempted to demonstrate, misinterpreted the reasons underlying the enactment of the nineteenth century statutes prohibiting abortion. Those laws were passed to protect unborn human life. The Constitution does not deprive the people of their rightful authority, acting through their State legislatures, to restrict the practice of abortion. That authority should be restored to its legitimate source—the American people. *Roe v. Wade* should be overruled.

Respectfully submitted,

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(312) 786-9494
Counsel for *Amici Curiae*

* Counsel of Record

February 28, 1989

APPENDIX

APPENDIX

LIST OF *AMICI*

Delaware

Sen. Robert T. Connor	(R)	12th District
Sen. Ruth Ann Minner	(D)	18th District
Rep. Al O. Plant, Sr.	(D)	2nd District
Rep. Joseph G. DiPinto	(R)	4th District
Rep. Jeffrey G. Mack	(R)	17th District
Rep. Terry A. Spence Speaker of the House	(R)	18th District
Rep. Robert F. Gilligan	(D)	19th District
Rep. Steven C. Taylor	(R)	21st District
Rep. Richard F. Davis	(R)	26th District
Rep. G. Wallace Caulk	(R)	33rd District
Rep. Gerald A. Buckworth Majority Whip	(R)	34th District
Rep. V. George Carey	(R)	36th District
Rep. Clifford F. Lee	(R)	40th District
Rep. Charles P. West	(D)	41st District

Illinois

Sen. Forest D. Etheredge	(R)	21st District
Sen. Richard F. Kelly, Jr.	(D)	39th District
Sen. George Ray Hudson	(R)	41st District
Sen. William L. O'Daniel	(D)	54th District
Sen. Frank Watson	(R)	55th District
Rep. Ralph C. Capparelli	(D)	13th District
Rep. Jeremiah E. Joyce	(D)	14th District
Rep. John P. Daley	(D)	21st District
Rep. Andrew J. McGann	(D)	29th District
Rep. James R. Stange	(R)	44th District
Rep. Kathleen L. Wojcik	(R)	45th District
Rep. Donald N. Hensel	(R)	50th District
Rep. Bernard E. Pedersen	(R)	54th District
Rep. Penny Pullen	(R)	55th District
Rep. E.J. "Zeke" Giorgi	(D)	68th District
Rep. Marcel "Bob" DeJaegher	(D)	72nd District
Rep. Robert P. Regan	(R)	80th District
Rep. Thomas J. McCracken, Jr.	(R)	81st District
Rep. Edward Petka	(R)	82nd District
Rep. Larry Wennlund	(R)	84th District

Rep. Gerald C. "Jerry" Weller	(R)	85th District
Rep. J. Philip Novak	(D)	86th District
Rep. Gary Hannig	(D)	98th District
Rep. Michael D. Curran	(D)	99th District
Rep. Charles A. Hartke	(D)	107th District
Rep. Ron Stephens	(R)	110th District
Rep. David D. Phelps	(D)	118th District

Indiana

Sen. Richard W. Worman	(R)	14th District
Sen. Thomas J. Wyss	(R)	15th District
Sen. Richard A. Thompson	(R)	24th District
Sen. Joseph V. Corcoran	(R)	44th District
Sen. Lindel O. Hume	(D)	48th District
Rep. Philip T. Warner	(R)	4th District
Rep. Michael A. Dvorak	(D)	8th District
Rep. John S. Matonovich	(D)	11th District
Rep. Paul J. Hric	(D)	11th District
Rep. Jerome J. Reppa	(R)	15th District
Rep. Robert K. Alderman	(R)	19th District
Rep. Claire M. Leuck	(D)	25th District
Rep. Richard M. Dellinger	(R)	38th District
Rep. Frank Newkirk	(D)	65th District
Rep. David G. Cheatham	(D)	69th District

Kansas

Sen. James Francisco	(D)	26th District
Sen. Eric Yost	(R)	30th District

Kentucky

Sen. William L. Quinlan	(D)	7th District
Sen. Delbert S. Murphy	(D)	8th District
Sen. Arthur L. Schmidt	(R)	11th District
Sen. H. Edward O'Daniel, Jr.	(D)	14th District
Sen. David Williams	(R)	16th District
Rep. Louis E. Johnson	(D)	13th District
Rep. Richard A. Turner	(R)	22nd District
Rep. Mark O'Brien	(D)	31st District
Rep. Bob Heleringer	(R)	33rd District
Rep. Carl A. Nett	(D)	35th District

Rep. Tom Riner	(D)	41st District
Rep. James B. Yates	(D)	44th District
Rep. John Harper	(R)	49th District
Rep. Kenneth F. Harper	(R)	63rd District
Rep. Tom Kerr	(D)	64th District
Rep. James P. Callahan	(D)	67th District
Rep. Bill Donnermeyer	(D)	68th District
Rep. Tommy Todd	(R)	83rd District

Massachusetts

Sen. Francis D. Doris	(D)	Suffolk, Essex, Middlesex Counties
Rep. Marie J. Parente	(D)	10th District
Rep. Gregory W. Sullivan	(D)	12th District

Michigan

Sen. Jack Welborn	(R)	13th District
Sen. Ed Fredricks	(R)	23rd District
Sen. Fred Dillingham	(R)	30th District
Sen. James Barcia	(D)	34th District
Rep. Joseph Palamara	(D)	30th District
Rep. Michael Grffin	(D)	50th District
Rep. Margaret O'Connor	(R)	52nd District
Rep. William VanRegenmorter	(R)	55th District
Rep. Joanne Emmons	(R)	99th District

North Carolina

Rep. Frank Sizemore III	(R)	27th District
Rep. Paul Stam, Jr.	(R)	62nd District

Ohio

Sen. Ben M. Gaeth	(R)	1st District
Sen. Robert R. Cupp	(R)	12th District
Sen. Richard P. Schafrath	(R)	19th District
Sen. Robert Ney	(R)	20th District
Sen. Grace Drake	(R)	22nd District
Sen. Gary C. Suhadolnik	(R)	24th District
Sen. Scott W. Oelslager	(R)	29th District

Rep. William Thompson	(R)	1st District
Rep. William G. Batchelder	(R)	4th District
Rep. Randall Gardner	(R)	5th District
Rep. Rocco J. Colonna	(D)	7th District
Rep. Patrick A. Sweeney	(D)	9th District
Rep. Ronald Mottle, Sr.	(D)	10th District
Rep. Troy James	(D)	12th District
Rep. Suzanne Bergansky	(D)	17th District
Rep. Ronald J. Suster	(D)	19th District
Rep. Thomas A. Pottenger	(R)	20th District
Rep. Jerome F. Luebbers	(D)	21st District
Rep. Louis W. Blessing, Jr.	(R)	22nd District
Rep. Jacquelyn O'Brien	(R)	26th District
Rep. Dale N. VanVyven	(R)	27th District
Rep. E. J. Thomas, Jr.	(R)	28th District
Rep. Bill Schuck	(R)	35th District
Rep. Robert E. Hickey	(D)	39th District
Rep. Russell E. Guerra, Jr.	(R)	40th District
Rep. Barney J. Quilter	(D)	47th District
Rep. Charles Red Ash	(R)	49th District
Rep. David W. Johnson	(R)	51st District
Rep. John V. Bara	(D)	54th District
Rep. John A. Boehner	(R)	57th District
Rep. Daniel P. Troy	(D)	60th District
Rep. Raymond Sines	(R)	61st District
Rep. Samuel T. Bateman, Jr.	(R)	66th District
Rep. James G. Bucky	(R)	73rd District
Rep. Robert W. Clark	(R)	74th District
Rep. Joseph E. Haines	(R)	75th District
Rep. Steven O. Williams	(R)	78th District
Rep. Larry W. Manahan	(R)	79th District
Rep. Lynn R. Wachtmann	(R)	80th District
Rep. James D. Davis	(R)	81st District
Rep. John P. Stozich	(R)	82nd District
Rep. Corwin M. Nixon	(R)	84th District
Rep. Larry J. Adams	(R)	86th District
Rep. Michael C. Shoemaker	(D)	88th District
Rep. Richard E. Rench	(R)	90th District
Rep. Paul P. Mechling	(D)	91st District
Rep. Ronald D. Amstutz	(R)	93rd District
Rep. Thomas W. Johnson	(R)	96th District
Rep. Jerry Krupinski	(D)	98th District

Texas

Sen. Ted Lyon	(D)	2nd District
Sen. Gene Green	(D)	6th District
Sen. Bob McFarland	(R)	10th District
Sen. John Leedom	(R)	16th District
Sen. J.E. "Buster" Brown	(R)	17th District
Sen. Ken Armbrister	(D)	18th District
Rep. Bill Hollowel	(D)	5th District
Rep. Jerry Yost	(R)	7th District
Rep. L.B. Kubiak	(D)	13th District
Rep. Keith Valigura	(R)	16th District
Rep. Billy Clemons	(D)	17th District
Rep. Mark Stices	(D)	21st District
Rep. John Willy	(R)	28th District
Rep. Tom Uher	(D)	29th District
Rep. Robert Saunders	(D)	30th District
Rep. Phyllis M. Robinson	(D)	31st District
Rep. Steve Holzheauser	(R)	32nd District
Rep. M.A. Taylor	(R)	55th District
Rep. Jim Horn	(R)	59th District
Rep. Ben Campbell	(R)	61st District
Rep. Sam Johnson	(R)	60th District
Rep. Pat Haggerty	(R)	71st District
Rep. Tom Craddick	(D)	76th District
Rep. Bob Hunter	(R)	79th District
Rep. Warren Chisum	(D)	84th District
Rep. John Smithee	(R)	86th District
Rep. Carolyn Park	(R)	92nd District
Rep. Kent Grusendorf	(R)	94th District
Rep. Kim Brimer	(R)	96th District
Rep. Anna Mowery	(R)	97th District
Rep. Ken Marchant	(R)	99th District
Rep. Glenn Repp	(R)	104th District
Rep. Bill Blackwood	(R)	105th District
Rep. Bill Hammond	(R)	109th District
Rep. Fred Hill	(R)	112th District
Rep. A.R. Ovard	(R)	113th District
Rep. Barry Connelly	(R)	126th District
Rep. Dan Shelley	(R)	127th District
Rep. Tony Polumbo	(D)	128th District
Rep. Mike Jackson	(R)	129th District

Rep. Erwin W. Barton	(D)	144th District
Rep. Talmadge Heflin	(R)	149th District
Rep. Paul Hilbert	(R)	151st District

Washington

Sen. Leo Thoraness	(R)	11th District
Sen. Linda Smith	(R)	18th District
Sen. Ellen Craswell	(R)	23rd District
Sen. Brad Owen	(D)	35th District
Rep. Bill Day	(D)	3rd District
Rep. Charles R. Wolfe	(R)	4th District
Rep. Mike Padden	(R)	4th District
Rep. Duane Sommers	(R)	6th District
Rep. Steve Fuhrman	(R)	7th District
Rep. Clyde Ballard	(R)	14th District
Rep. Glyn Chandler	(R)	13th District
Rep. Jeannette Wood	(R)	21st District
Rep. John Beck	(R)	21st District
Rep. James Hargrove	(D)	24th District
Rep. Jim Youngsman	(R)	40th District
Rep. Michael E. Patrick	(R)	47th District

Wisconsin

Sen. Alan J. Lasee	(R)	1st District
Sen. John R. Plewa	(D)	7th District
Sen. Lloyd H. Kincaid	(D)	12th District
Sen. Timothy Weeden	(R)	15th District
Sen. Richard Kreul	(R)	17th District
Sen. Carol A. Buettner	(R)	18th District
Sen. Donald K. Stitt	(R)	20th District
Sen. Marvin J. Roshell	(D)	23rd District
Sen. Walter J. Chilsen	(R)	29th District
Sen. Jerome VanSistine	(D)	30th District
Sen. Brian D. Rude	(R)	32nd District
Rep. Larry J. Swoboda	(D)	1st District
Rep. Dale J. Bolle	(D)	2nd District
Rep. Alvin R. Ott	(R)	3rd District
Rep. Richard Grobschmidt	(D)	21st District
Rep. Thomas A. Hauke	(D)	23rd District
Rep. Margaret Krusick	(D)	24th District

Rep. Vernon W. Holschbach	(D)	25th District
Rep. Wilfrid J. Turba	(R)	27th District
Rep. Thomas D. Ourada	(R)	35th District
Rep. Robert G. Goetsch	(R)	39th District
Rep. Robert T. Welch	(R)	41st District
Rep. Charles W. Coleman	(R)	43rd District
Rep. Wayne W. Wood	(D)	44th District
Rep. Dale W. Schultz	(R)	50th District
Rep. Joseph E. Tregoning	(R)	51st District
Rep. Judith Klusman	(R)	56th District
Rep. Steven Loucks	(R)	58th District
Rep. Michael A. Lehman	(R)	59th District
Rep. Susan B. Vergeront	(R)	60th District
Rep. Cloyd A. Porter	(R)	66th District
Rep. Leo Richard Hamilton	(D)	67th District
Rep. Heron A. VanGorden	(R)	69th District
Rep. Donald W. Hasenohrl	(D)	70th District
Rep. David J. Lepak	(R)	83rd District
Rep. Marc Duff	(R)	84th District
Rep. Robert J. Larson	(R)	87th District
Rep. John Gard	(R)	88th District
Rep. Cletus Vanderperren	(D)	89th District
Rep. Terry M. Musser	(R)	92nd District
Rep. John D. Medinger	(D)	95th District
Rep. DuWayne Johnsrud	(R)	96th District
Rep. Margaret A. Farrow	(R)	99th District

Wyoming

Sen. James Applegate	(D)	Laramie County
Sen. Elizabeth Byrd	(D)	Laramie County
Sen. Jim Geringer	(R)	Platte County
Sen. Winifred Hickey	(D)	Laramie County
Sen. Allan Howard	(R)	Laramie County
Sen. Kelly Mader	(R)	Campbell & Johnson Counties
Sen. James Norris	(D)	Laramie County
Sen. John Turner	(R)	Sublette-Teton County
Rep. Douglas Chamberlain	(R)	Goshen County
Rep. Rory Cross	(R)	Converse County
Rep. Richard Honaker	(D)	Sweetwater County

Rep. Bill McIlvain	(R)	Laramie County
Rep. Ron Michell	(R)	Vinta County
Rep. Dorothy Perkins	(R)	Natrona County
Rep. Mary Kay Schwope	(D)	Laramie County
Rep. William Tibbs	(R)	Congress County
Rep. Clyde Wolfley	(R)	Lincoln County
Rep. Melvin L. ZumBrunnen	(R)	Niobrara County

No. 88-605

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM L. WEBSTER, *et al.*,
Appellants,

v.

REPRODUCTIVE HEALTH SERVICES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE ASSOCIATION FOR PUBLIC JUSTICE, AND THE VALUE OF LIFE COMMITTEE, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, WILLIAM L. WEBSTER

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February 28, 1989

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BRIEF OF THE ASSOCIATION FOR PUBLIC JUSTICE, AND THE VALUE OF LIFE COMMITTEE, INC. AS *AMICI CURIAE* IN SUPPORT OF APPELLANT, WILLIAM L. WEBSTER

INTEREST OF THE *AMICUS CURIAE*

This brief is filed under United States Supreme Court Rule 36, with the consent of the parties, on behalf of The Association for Public Justice and The Value of Life Committee, Inc., as *amici curiae* in support of Appellant, William Webster. Information about the *amici* is provided in an appendix. The Committee asks the Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973), or to reconsider its application in light of current medical technology.

SUMMARY OF THE ARGUMENT

The majority in *Roe v. Wade* appraised the values implicated in the case on an extended discussion of the history of abortion laws. The majority reached erroneous conclusions about the status of abortion under the common law, sharply breaking with established traditions and values embodied in the common law and our Constitution.

Although convictions for abortion before common law courts were rare before the Eighteenth Century, abortion was condemned by respected authorities on the common law from the earliest times. Parliament and the courts took strong steps through the centuries to prohibit the killing of unwanted children. Before the Nineteenth Century, such killing usually involved infanticide rather than abortion. The laws respecting abortion and infanticide were applied with full rigor in the United States from the opening of the colonial era. The development of new techniques for aborting lessened the danger to the mother from abortion. As abortion became more common than infanticide, legal institutions turned their attention to abortion.

Abortion has always been socially controlled in the interest of both the child and the mother. At all times, continuing changes in medical technology have been central to a proper resolution of controversies over abortion. Changes in abortion technologies altered the interests of mothers in the procedure, and developing reproductive technologies have reinforced increasing certainty that a conceptus is a "person" from the earliest stages of gestation.

The moral and legal implications of such technical developments are not merely medical questions; such implications raise questions of social policy and values which legislatures are better placed to resolve than are courts. State legislatures are better able to explore appropriate regulatory responses to changing reproductive technologies because they are better able to obtain the information necessary to assess the import of the changing data that affect a balancing of the interests created or reinforced by rapidly changing medical technologies of human reproduction. Courts are ill-suited to sit as boards of review for the implications of changing medical technologies. In the present state of flux, the model of states as laboratories for social policies is especially appropriate. For these reasons, *Roe v. Wade* should be overruled.

If *Roe v. Wade* survives in some form, application of its criteria must be reexamined in the light of new medical technology. Viability is a function of the technologies available to preserve the life of ever more premature infants, and must be reevaluated continually as medical technology advances. Increasing technical means to preserve fetal life reveal that the asserted right of a mother to be rid of an unwanted pregnancy must now be distinguished from a right to kill the fetus.

ARGUMENT

I. *Roe v. Wade* Was Based Upon Erroneous Notions Of The Historical Status Of Abortion Under The Common Law, And Thus Represents A Sharp Break With Long Established Traditions And Values Embodied In The Common Law And Our Constitution

More than half of the majority opinion in *Roe v. Wade*, 410 U.S. 113, 129-152, 156-162 (1973), was given to a history of abortion, using the history of abortion to inform the values at stake in the controversy before the Court. This Court regularly determines whether a claim of right not based on an explicit constitutional text is fundamental by examining the historical treatment of the relevant behavior. *Bowers v. Hardwick*, 478 U.S. 186 (1986). The point, expressed by Justice Powell in *Moore v. City of East Cleveland*, 431 U.S. 497, 503 (1977), is that fundamental rights are those "deeply rooted in this Nation's history and traditions."[1] The majority's historical errors, and the resulting flawed inferences they drew from those errors, thus seriously undermine the entire edifice built on *Roe v. Wade*.

The majority in *Roe v. Wade* concluded that "it now appear[s] doubtful that abortion was ever established as a common law crime", 410 U.S. at 136. The majority also concluded that abortion statutes in the United States were not generally adopted until after the Civil War (i.e., after the Fourteenth Amendment was adopted), *id.* at 139. Both conclusions are wrong.

While extensive research has not uncovered any common law record of actual punishment[2] for an abortion

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[1] Justice Powell wrote for a three-justice plurality, but his opinion has been frequently cited with approval. This precise language was quoted with approval in: *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

[2] Often the only records extant are terse notes of an indict[illegible] which do not indicate what happened at [illegible]

before 1732 *if* the abortion was voluntarily undertaken by a woman without serious injury to herself *or* without a live birth before the death of the child, indictments and appeals of tresspass[3] have been found back at least to 1200 for abortion without either aggravating factor.[4] Later, a woman was indicted for self-abortion; apparently, she was saved from punishment only by a general

ords do note a finding of "not guilty" rather than a dismissal of the proceeding. *See* note 10 *infra*.

[3] Many of the indictments and appeals in this brief have not previously been brought to the attention of an American court; often they have not been published in the United States. The most important unpublished cases are *R. v. Webb* (Q.B. 1602), *infra*, and *R. v. Beare* (Q.B. 1732), *infra*. I am grateful to Dr. John Keown, of the University of Leicester, for providing me with the text of these and some other early cases. *See generally* J. Keown, *Abortion, Doctors and the Law* (1988). Two American attorneys, Philip Rafferty of Los Angeles, and Richard Schmude of Tomball, Texas, also made their research available.

[4] *See, e.g., R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414, 57-58 (no. 24) (E. Kimball ed. 1959); *R. v. Botevylayn* (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306, 105, 126, 131 (nos. 576, 800, 854) (R. Pugh ed. 1978); *Maynard's Appeal* (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (C. Chadwyck-Healey ed. 1897); *Porte's Appeal* (1249), Just. 1/175, m.38; *Sauter's Appeal* (1221), Pleas of the Crown for Gloucester Cnty. 1221, 16 (no. 69) (F. Maitland ed. 1884); *R. v. le Petiprestre* (1244), The London Eyre of 1244, 48 (no. 116) (London Rec. Soc'y 1970); *Sibil's Appeal* (1203), 1 Selden Soc'y 32 (no. 73) (1887); *Agnes' Appeal* (1200), 1 Selden Soc'y 39 (no. 82) (1887). Abortion was covered by even earlier compilations of the common law, which required payment of a full *wergeld* (a money payment to relatives of a slain person to settle the claims for homicide) if the child were "living", and a half-*wergeld* if not "living". *Leges Henri Primi* c. LXX.14 (L.J. Downer ed. 1972). [This was a 12th Century compilation of sources on Anglo-Saxon law as modified by the early Norman kings.] Several of the cases noted here were settled by money payments, perhaps as *wergeld*. For the evolution of medieval trespass into both modern crimes and modern torts, *see* 2 W. Holdsworth, *A History of English Law* 364-365 (1938); 3 Holdsworth at 317-318, 609-611; 4 Holdsworth at 512-515; 2 F. Pollock & F. Maitland, *The History of English Law before the Time of Edward I* 510-524 (2d ed. 1898).

pardon. *R. v. Webb* (Q.B. 1602), Calendar of Assize Rec., Surrey Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980).[5] Less than 12 months earlier, a court had held a man for murder when an abortus died after being born alive. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601). Secondary authorities on the common law and judicial dicta also nearly unanimously condemned abortion.

Against that background, beginning with "Lord Ellenborough's Act" in 1803, 43 Geo. III, c. 59, criminal statutes expressly prohibiting abortion spread rapidly throughout the common law world. In the United States, 70% of the states (with 85% of the American population) had such statutes by 1861. By 1895 abortion was clearly a serious crime in every state.[6]

The majority in *Roe* relied heavily, and uncritically, on the work of Professor Cyril Means.[7] Means' history of abortion was neither objective nor accurate. Nor have these inadequacies been resolved by James Mohr's somewhat different history of abortion.[8]

[5] Whether the pardon came before or after conviction is unclear, although the editor of the records infers that Webb was convicted before the pardon, Keown, *supra* note 3 at 173 n.23.

[6] *See generally* Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359, 389-407 (1979); Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961); Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985).

[7] Means, *The Phoenix of Abortional Freedom: Is a Penumbral Right 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) (hereafter cited as Means II); Means, *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 (1968) (hereafter cited as Means I). The majority cited Means seven times during its depiction of the history of abortion—without noting that he was the general counsel of the National Association for the Reform of Abortion Laws (now the National Abortion Rights Action League).

[8] J. Mohr, *Abortion in America* (1978).

A. *Abortion Was Never Approved By A Common Law Court, And Was Consistently Condemned By Respected Authorities On The Common Law From The Earliest Times*

Indictments of abortionists at common law were far more common than was thought in 1973.[9] Common law indictments, and appeals of trespass, for abortion are recorded as early as 1200. While the terse records do not indicate any punishment, the many clear records of judgments of "not guilty" demonstrate that the indictments and appeals were valid under the common law.[10]

[9] Abortion was also punished by the ecclesiastical courts of the time, *Before the Bawdy Court* 81, 152, 172, 204, 238 (nos. 150, 369, 427, 531) (P. Hair ed. 1972); Keown, *supra* note 3 at 5; Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379, 380-381 (1975). That a crime was punished in ecclesiastical courts does not establish that it was not punishable at the common law, Keown, *supra;* Helmholz, *supra* at 386. Nor does ecclesiastical interest indicate that such prosecutions must be seen as religiously based: many modern legal topics that today are unquestionably secular, such as wills, slander, and enforcement of simple contracts, originated in the ecclesiastical courts, 1 Holdsworth, *supra* note 4 at 65-77, 455-457, 580-632; 3 Holdsworth at 408-428, 441-454, 534-536; 5 Holdsworth at 167-169, 197-218, 291-299; 8 Holdsworth at 301-307, 324-417; 15 Holdsworth at 198-208; Dellapenna, *supra* note 6 at 382-387. Also, in English legal theory both temporal and ecclesiastical courts derived their authority from the Crown, and thus both together represented the "law of England", 1 M. Hale, *History of the Pleas of the Crown*, preface (1685).

[10] *See R. v. Cokkes* (1415), 7 Calendar of Inquisitions Misc. (Ch.) Preserved in the Pub. Rec. Off. 1399-1422, 296 (no. 523) (1968); *Gras's Appeal* (1276?), The London Eyre of 1276, 73-74 (no. 261) (London Rec. Soc'y 1976); *Sorel's Appeal* (1276?), Eyre of 1276, 61 (no. 222); *Serlo's Appeal*, Eyre of 1276, 62-64 (nos. 157-158); *Cecily's Appeal* (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981); *Swayn's Appeal* (1249), Just. 1/859, m.36; *Palards's Appeal* (1249?), Just. 1/174, m.40d; *Orcherd's Appeal* (1249?), Just. 1/174, m.40d; *Gundewine's Appeal* (1247), Just. 1/274, m.14d; *Phina's Appeal* (1246), Just. 1/778, m. 57, summarized in Meekings, *supra* at 267; *Aubyn's Appeal*, The London Eyre of 1244, 50-51 (no. 124) (London Rec. Soc'y 1970); *Avener's Appeal* (1244), Eyre of 1244, 36 (no. 84); *Modi's Appeal* (1221), 59 Selden Soc'y 560-561 (no. 1336) (1940); *Burel's Appeal* (1202), 1 Selden Soc'y 11 (no. 26) (1887). At least once the proceeding was aborted by the ancient benefit of clergy, which precluded trial, *Philippa's Appeal* (1276?), Eyre of 1276, 51 (no. 187).

Means wrongly asserted that there were only two cases before 1600 dealing with abortion, and that both cases indicated doubt about whether abortion was a crime: *R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327) [dubbed by Means as *the Twinslayers' Case*]; and *R. v. Anonymous*, Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) [Y.B. Mich. 22 Edw. 3 (K.B. 1348), dubbed by Means as *the Abortionist's Case*]. In both cases, the court declined the prosecution because of uncertainty over whether the case was properly before the court, but for reasons that did not to preclude the criminality of abortion.[11] In *R. v. de Bourton*, defendant was charged with beating a woman, causing one twin to be born dead and the other to die shortly after birth. Defendant was released on bail to answer for an unspecified different charge. In *R. v. Anonymous*, defendant was indicted for killing a child in the mother's womb; he escaped conviction because the indictment failed to state a baptismal name for the deceased,[12] and because it was impossible to know if he had killed the child. These are procedural and evidentiary, not substantive, grounds.

Before 1500, the most influential commentators on the common law also declared that abortion after quickening was a criminal homicide. 2 H. Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); 1 *Fleta*

[11] *See generally* Dellapenna, *supra* note 6 at 368-370; Keown, *supra* note 3 at 4.

[12] This ignores the fact "murder", at least until 1340, meant a fine imposed on a district when no one could prove a deceased's identity as an Englishman. 1 Holdsworth, *supra* note 4 at 65-77, 580-632; 1 Pollock & Maitland, *supra* note 4 at 67-68, 545; 2 Pollock & Maitland at 480-486.

60-61 (Seldon Soc'y ed. 1955).[13] English courts confronted even more abortion cases after 1500.

In the first case of in the Sixteenth Century, a coroner's inquest ruled that death by abortion was "felonious suicide"; the man involved was released because an accessory then could not be tried without the principal. *R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505).[14] In another case, a man was indicted for giving a potion to a girl to induce an abortion; he died before trial. *R. v. Wodlake*, K.B. 9/513/m.23 (1530), K.B. 29/162/m.11d (1531).[15] Later, a woman was convicted of abortion by witchcraft. *R. v. Turnour*, Assize 35/23/29 (Essex 1581).[16] Accusing a woman of offering abortifacients to another supported an action for slander as such words were sufficient grounds for a court to require a bond for good behavior. *Cockaine v. Witnam*, Cro. Eliz. 49 (1586). Finally, a woman was "presented" by a coroner's jury for procuring her own abortion, but the outcome remains unclear. *R. v. Robynson*, Q/SR 110/68 (Coroner's Inquest 1589).

Curiously, two Sixteenth Century authorities on common law criminal pleadings denied that abortion was a felony. 1 W. Staunford, *Pleas of the Crown* ch. 13 (1557); W. Lambard, *Of the Office of the Justice of the*

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[13] *Britton*, at 95-96 (F. Morgen ed. 1901), disagreed because of the lack of a baptismal name for the victim.

[14] *See also R. v. Wynspere*, (Coroner's Inquest 1503), Pub. Rec. Off., ref: Ancient Indictments 434, 12. Both proceedings are quoted in Keown, *supra* note 3 at 6.

[15] *See also* 2 *Reports of Sir John Spelman* 306 (J. Baker ed.), 94 Selden Soc'y 306 (1978).

[16] Some have said that Turnour was executed for abortion, but as she was convicted of several acts of witchcraft, only one of which was abortion, the record is unclear as to why she was executed; even if abortion were why she died, the crime was witchcraft, and not criminal abortion or homicide as such. *See* Calendar of Assize Rec., Essex Indictments, Eliz. I 212 (no. 1225) (J. Cockburn ed. 1978).

Peace 217-218 (1st ed. 1581). Yet an early formbook, which went through four editions between 1506 and 1544, included a form indictment for abortion by physical assault on the mother, *Boke of the Justyces of the Peas* c. vi, fol. iii (1515).

Perhaps Staunford and Lambard only reflected the inconclusiveness of the better reported decisions; or perhaps they simply meant that abortion was a crime less than a felony; or perhaps they meant that abortion properly belonged before a court other than the Queen's Branch. Three centuries later Sir John Stephen concluded that they meant that abortion was properly brought only before ecclesiastical courts.[17] If so, they clearly were wrong.

Some part of the Sixteenth Century legal activity regarding abortion did represent a secularization of matters formerly left to the ecclesiastical domain. Activity by ecclesiastical courts directed at abortion declined during the Reformation,[18] and common law courts took full responsibility for abortion in a process[19] culminating in a series of decisions in the Seventeenth Century that clearly establish, if the cases already noted did not, that abortion was a serious crime.

In 1601 two Justices of the Queen's Bench held an abortion that kills a child after its live birth is murder. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601).[20] The Justices stated that the birth and subsequent death of the child permitted proof of the cause of death, eliminating

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[17] 1 J. Stephen, *A History of the Criminal Law of England* 51 (1883).

[18] R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979).

[19] Witchcraft became an indictable crime by the statute of 5 Eliz. 1, c.15 (1573); within eight years we find *R. v. Turnour*, *supra*.

[20] There were a number of possible precedents f... but *R. v. Sims* seems finally ...

the difficulty of proving the cause of death for a child delivered dead (which sometimes had been given as a reason for not prosecuting earlier indictments).[21] In 1602, in *R. v. Webb*, Calendar of Assize Rec., Surrey Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980), a woman apparently was convicted[22] and pardoned for self-abortion with rat poison. Finally, in 1670 Sir Matthew Hale held that the death of a mother from an abortion was a felony homicide. *R. v. Anonymous*, M. Hale, *History of Pleas of the Crown* 419-430 (1685).[23]

R. v. Sims was argued before the court by Sir Edward Coke as Attorney-General. He took up the case in E .Coke, *Third Institute* 50-51 (1644), generalizing from it a principle that abortion after quickening was "a great misprision [a serious misdemeanor], and no murder" if the child died in the womb, and a murder if the child were to die after its birth. The position of Coke (the "Father of the Common Law") was accepted virtually without question.[24]

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[21] For the primitive state of forensic medicine three centuries later, *see* Forbes, *Early Foreensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981).

[22] *See* note 5 *supra*.

[23] For other Seventeeth Century indictments without record of the outcome, *see Commonwealth v. Simpson* (1659), 6 N. Riding Q. Sess. Rec. 23 (J. Atkinson ed. 1888); *Commonwealth v. Foxall* (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50 (S. Ratcliff & H. Johnson eds. 1937); *R. v. Hodges* (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615, 345 (1936).

[24] 1 W. Blackstone, *Commentaries* 129-130 (1765); 4 Blackstone 198 (1769); R. Burn, *The Justice of the Peace and the Parish Officer* 380 (3d ed. 1756); 1 E. East, *A Treatise on the Pleas of the Crown* 227-230 (1803); M. Hale, *Pleas of the Crown* 53 (1682); 2 W. Hawkins, *Treatise on the Pleas of the Crown* 80 (1716); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 617-618, 796 (1819). Two books are attributed to Hale. The one cited here echoed Coke's views; a later book, Hale, *supra* note 9 at 433, denied that an abortion-induced death of a child born alive is a homicide. Which view truly represents Hale's opinion is not known. Courts cited Coke with approval in a variety of contexts and did

Coke cited only the inconclusive precedents of *R. v. de Bourton*, *supra*, and *R. v. Anonymous*, *supra*, for his conclusions.[25] Hale cited no precedents at all for his holding. [26] Means dismissed Coke's statement on abortion as a "masterpiece of perversion." [27] Yet Means found Hale's decision on the death of the mother to be "an act of Restoration gallantry." [28] Means did not indicate how one is to recognize the difference.

By the early Eighteenth Century, the criminality of abortion under the common law was well established. Courts had given increasingly clear holdings that abortion was a crime; there was no decision indicating that any form of abortion was lawful. Secondary authorities, especially after 1600, equally supported the criminality of abortion. Yet, few cases recorded punishment for any abortion, and none recorded punishment for a voluntary abortion without *either* death for the mother *or* death subsequent to live birth for the child.

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not follow the second Hale dictum. *See Miller v. Turner*, 1 Vesey 86 (K.B. 1748); *Beale v. Beale*, 24 Eng. Rep. 373 (K.B. 1713); Keown, *supra* note 3 at 10-11. *See generally* Dellapenna, *supra* note 6 at 379-389.

[25] *Cf. R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414 57-58 (no. 24) (E. Kimball ed. 1959).

[26] At least three earlier cases could be cited in support of Hale's ruling, *R. v. Adkyns*, (1600), Calendar of Assize Rec., Essex Indictments, Eliz. I 510 (no. 3054) (J. Cockburn ed. 1975); *R. v. Meadow* (1590), Calendar of Assize Rec., Sussex Indictments, Eliz. I 233 (no. 1212) (J. Cockburn ed. 1975); *R. v. Poope* (1589), Calendar of Assize Rec., Kent Indictments, Eliz. I 289 (no. 1751) (J. Cockburn ed. 1975). *See also Philippa's Appeal* (1276?), London Eyre of 1276, 51 (no. 187) (London Rec. Soc'y 1976) (defendant excaped trial due to benefit of clergy); *Orscherd's Appeal* (1249?), Just. 1/174, m.40d (not guilty).

[27] Means II, *supra* note 7 at 359. His view apparently was accepted by the majority in *Roe v. Wade*, 410 U.S. at 135 n.26.

[28] Means II, *supra*

B. *Parliament And Courts In England Took Strong Steps, Gradually Strengthened Through The Centuries, To Prohibit The Killing Of Unwanted Children By Their Parents*

The great majority of the cases thus far noted involved crude physical batterings of the mother—often to her serious injury or death (injury techniques).[29] The remaining abortions were induced by "noxious potions"—potions that appear to have been nearly as deadly as the batterings (ingestion techniques).[30] From these facts, one might infer that the law was directed at protecting the mother's life or health—if one assumes, as Means and Mohr[31] do, that abortion was always freely available through relatively safe means.

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[29] Injury techniques ranged from ineffective simple bodily manoeuvers up to savage assaults, such as cutting her open and removing the infant.

[30] Appeals or indictments for abortion by potion might have been rarer than for abortion by assault because a potion often was part of a magic ritual punishable as witchcraft even if ineffective, but only by an ecclesiastical court before Elizabeth I. Among medically primitive cultures, anthropologists have found injury techniques to be most common, if only because of the likelihood of success, G. Devereux, *A Study of Abortion in Primitive Societies* 30-35, 171-358 (1985). *See also* J. Bates & E. Zawadski, *Criminal Abortion* 87-88 (1964); A. McLaren, *Reproductive Rituals* 100-108 (1984); F. Taussig, *Abortion Spontaneous and Induced* 41-45 (1936).

[31] Mohr, *supra* note 8 at 6-19, lists various methods that he assumed were safe and effective, yet comparing his listed techniques with the research listed in this part of the brief shows that his assumption was unfounded. Even he acknowledged the poisonous nature of some of the his "abortifacients", *id.* at 71-73. For another historian who also assumed that workable techniques existed, although he recognized that his own catalogue included only the useless or the fatal, *see* E. Shorter, *A History of Women's Bodies* 177-191 (1982). Other historians have made the same assumption on even less evidence, A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* 67 (1982); McLaren, *supra* note 30 at 5-7, 107, 111-112; G. Quaife, *Wanton Wenches and Wayward Wives* 118-120 (1979). Compare note 35 *infra*.

Both the ingestion and injury techniques found in the cases could be effective only with great pain and at the risk of death or permanent injury; undergoing either cannot have been popular.[32] In fact, voluntary abortions are almost absent from reported cases before 1732[33] for a simple reason: techniques of the time were tantamount to suicide.[34] Thus abortion which was not a crime against the mother was rare.[35]

That injury techniques were not popular with women hardly needs demonstration. On the other hand, while we have no way of knowing all potions available in medieval England, surveys of the medical literature there and in similar medically primitive societies demonstrate that the potions ingested for an abortion were either ineffective (except for any suggestive powers to which a woman might be susceptible) or highly dangerous.[36] Savin oil

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[32] Even Shorter, *supra* note 31 at 177, concluded that until after 1880 only women who were truly desparate would risk abortion. Quaife, *supra* note 31 at 26, describes injury techniques in connection with his analysis of violence, and not with abortion, while he concedes that girls were rarely anxious to use ingestion techniques, Quaife at 118.

[33] The only voluntary abortions reported were *R. v. Wynspere*, *supra* note 14, and *R. v. Webb*, *supra* note 22. In some cases, assertions that a potion was given by trick, etc., might have been dissimulation by the mother; this seems unlikely in the numerous cases of abortion by savage physical attack.

[34] Devereux, *supra* note 30 at 149-150. *See generally* Dellapenna, *supra* note 6 at 372-376, 393-395.

[35] One attempt at a study of the incidence of abortion in the early modern period, based on searching church records (which do not distinguish between spontaneous and induced abortions), P. Laslett, *The World We Have Lost* 123 (1966), found abortions in Seventeenth Century England to amount to 6-7% of total births. As in the Twentieth Century spontaneous abortions range from 7.5-11% with our more advanced medical technicology, *id.* at 266, the Seventeenth Century figures reveal few, if any, induced abortions.

[36] Bates & Zawadski, *supra* note 30

was the "arbortifacient" most widely reported in medieval English sources. Modern tests have demonstrated that it works by undermining the woman's health generally so she could not sustain the pregnancy, all too often to enfeebling her to the point of death.[36] The dangers of these "abortifacient potions" was so great that in early English slang the term "poisoned" meant pregnant![38]

One cannot entirely rule out the possibility of a safe and effective drug escaping notice in the legal, medical, and popular literature of the day. Yet the fact remains that the Arabic medical texts which, upon translation into Latin, were standard medical references in the later middle ages escribed nothing more safe and effective

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Contraception 139-151 (1936); J. Noonan, *Contraception* 222-230 (1965); Shorter, *supra* note 31 at 179-188; Taussig, *supra* note 30 at 31-45, 352-357; Dellapenna, *supra* note 6 at 373-376. Examples of ineffective "abortifacients", available in England, include goat dung, raw eggs, hops, "ungrateful strong smells", and wine. Drugs the ingestion of which in massively dangerous quantities could bring on an abortion included caster oil, ergot of rye, hellebore, pennyroyal, rue, savin oil (juniper), tansy tea, thyme, and yarrow. Finally, a sufficiently desperate woman could ingest (or be made to ingest) a substance that could be lethal even in small quantities, such as aloes, arsenic, "ratsbane" (rat poison), snake venom, and various metallic salts.

[37] One modern study found that savin oil did induce an abortion in 10 of 21 women who consumed it: nine of the 10 "successful" ones died, as did four of the "unsuccessful" ones, Taussig, *supra* note 30 at 353. In fact, most modern poisons were discovered through vain searches for a safe dosage of "abortifacients", Bates & Zawadski, *supra note* 30 at 88. For a graphic description of a savin death, *see* Forbes, *supra* note 21. *See* generally Shorter, *supra* note 31 at 186-188.

[38] F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785); McLaren, *supra* note 30 at 102. Yet another historian, who optimistically presumes that knowledge of safe and effective abortifacients was widespread, also notes that lead-poisoning was "epidemic" because of the use of the abortifacients, J. Weeks, *Sex, Politics and Society* 72 (1981). Even Mohr, *supra* note 8 at 71-73, notes that savin poisoning was widespread from abortion.

than the potions listed here.[39] Nor do later works in English add anything significant.[40] Nor, given the general lack of inventiveness of pre-scientific societies, should one wonder about the lack of variation in abortion techniques over six centuries.

Singularly lacking from the literature is any mention of "intrusion techniques"—various techniques using an intrusion through the cervix into the uterus to induce abortion.[41] Given only primitive knowledge of a woman's reproductive anatomy,[42] intrusive intervention can rarely have been successful. The closest one finds to an intrusion technique are occasional mentions of a "pessary"—the insertion of a vaginal suppository, usually laced with "abortifacient drugs," that did not penetrate the cervix. Without such penetration, however, pessaries do not seem to have been effective.[43]

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[39] Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595); Rhazes, *Liber ad Almansorem* (1497). *See also* Himes, *supra* note 36 at 139-151.

[40] 1 *Compleat Herbal* 69-71, 94-95 (G. Swindells ed. 1787); M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* 563 (3d ed. 1712); J. Pechey, *Compleat Herbal of Physical Plants* 13 (1707). These and other texts describe "abortifacient" effects in language markedly different from their descriptions of other pharmacological effects. "Abortifacient" effects are always introduced with phrases such as "it is said", suggesting either uncertainty about the efficacy of the potion or unwillingness to be thought to favor the practice. McLaren, *supra* note 30 at 102-101, 123; Noonan, *supra* note 36 at 201-207, 217.

[41] Even Shorter, *supra note* 31 at 188-191, concedes that instrumental abortions were not a realistic possibility much before the Nineteenth Century. *See also* Devereux, *supra* note 30 at 28, 36-37.

[42] Consider contemporary views of how such portions functioned. Not only were potions often given in a belief that a woman had blocked menses rather than pregnancy, but the potions were given to prevent the uterus from rising in a woman's body to her throat to choke her! Shorter, *supra* note 31 at 180, 286-287.

[43] Devereux, *supra note* 30 at 97.

Many still persist in believing that medically primitive cultures, including medieval England and colonial America, had mysterious abortion techniques that were safe, effective, and perhaps even painless. If so, why did these presumed simple, safe, and effective folk medicines abruptly disappear in the Nineteenth Century to be replaced by the admittedly highly dangerous intrusion techniques that supposedly then made abortion so dangerous as to justify the widespread adoption of statutes proscribing abortion? The true explanation was expressed by Mary Kenny: before the Nineteenth Century, "[t]he traditional forms of abortion had been infanticide and abandonment." [44]

Infanticide was a crime under the early common law,[45] and Parliament reacted to its frequent occurence [46] by enacting ever stronger statutes prohibiting the practice. The royal courts were also actively engaged in punishing those found guilty of the crime.[47] All this occurred when

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of pessaries did not prevent doctors from swearing a Hippocratic Oath not to administer them, at least as the oath was before it was amended after *Roe v. Wade*, A. Castiglioni, *A History of Medicine* 148 (2d ed. 1947).

[44] M. Kenny, *Abortion: the Whole Story* 181 (1986).

[45] Infanticide was a crime in Anglo-Saxon law, J. Thrupp, *The Anglo-Saxon Home* 85 (1862). At least one early book (ca. 1300) states that infanticide within one year of birth was cognizable only by ecclesiastical courts, *Mirror of Justice* 139 (Selden Soc'y 1895). 2 Pollock & Maitland, *supra* note 4 at 478 n.1, dismissed this book as worthless. Staunford, *supra* at ch. 13, and Lambarde, *supra* at 217-218, cited a 1315 conviction as indicating that infanticide was a common law felony (in the same passages where they denied that abortion was a common law felony).

[46] Dead babies were a common sight in London streets well into the Nineteenth Century, Rolph, *A Backward Glance at the Age of 'Obscenity'*, 32 Encounter 23 (June 1969). *See also* D. Bakan, *The Slaughter of the Innocents* (1971); M. Piers, *Infanticide; Past and Present* (1974); Dellapenna, *supra* note 6 at 395-400; Helmholz, *supra* note 9; Langer, *Infanticide: A Historical Survey* 2 Hist. Childhood Q. 353 (1974).

[47] P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1984).

the incidence of true abortion and legal activity regarding it were both still rare.

The stringency of the law of infanticide is shown by *R. v. Parker*, 73 Eng. Rep. 410 (1580), where even benefit of clergy was denied and a clergyman was executed for the crime. The earliest regulations of midwives (1512) were designed to prevent the killing of infants.[48] The tightening of the law against infanticide culminated in "An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James 1, ch. 27, sec. 3 (1624), which conclusively presumed murder from concealment of the death of a child in order to conceal its birth.

Only the emergence of abortion as a real alternative to infanticide brought a decline in the incidence of infanticide and in the legal attention to it. The intimate relationship between abortion and infanticide was demonstrated by the fact that the next section of Lord Ellenborough's Act after the first English statutory prohibition of abortion reduced the penalty for concealment from death to a term of imprisonment. 43 Geo. 3 c.58, secs. 2-4 (1803).[49]

C. *Early In The Colonial Period, These Laws Were Received With Full Rigor In The United States*

The colonists from England brought the common law here with their first arrival. In just one colony, no less than three prosecutions for criminal abortion arose before 1660: *Proprietary v. Lambrozo*, 53 Md. Archieves 387-391 (1663); *Proprietary v. Brooks*, 10 Md. Archives 461-465, 486-488 (1656); *Proprietary v. Mitchell*, 10 Md.

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[48] J. Donnison, *Midwives and Medical Men* 18-20 (1988). These regulations were repeatedly strengthened. T. Forbes, *The Midwife and the Witch* 144-147 (1966). Wet-nurses could also have been characterized as a major population control device, J. Guillemeau, *The Nursing of Children*, preface (1612). *See generally* Dellapenna, *supra* note 6 at 396-397.

[49] For the last ...

Archives 171-186 (1652).[50] While these cases did not result in conviction, in two cases it was because, before trial, the defendant married (and thereby disqualified) the principal witness against him. Mitchell was convicted of attempted murder, apparently because the prosecutor could not prove the cause of the death of the stillborn child.

Other colonial prosecutions for abortion arose at similar early dates. In Rhode Island, a woman was given 15 lashes for fornication and attempted abortion. *Colony v. Allen*, Newport Cnty, Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.).[51] Other charges of abortion through violent physical assaults are recorded without indication of the outcome. *In re the Stillbirth of Agnita Hendricks' Bastard Child* (Del. 1679), Ct. Rec. of New Castle on Del. 1676-1681, 274-275 (1904); *Colony v. Powell* (Va. 1635), 7 Am. L. Rec. 43 (1954). Finally, a 1716 municipal ordinance in New York forbade midwives to aid or counsel abortion. 3 Min. of the Common Council of N.Y. 122.[52] Abortion simply was never accepted in American society, contrary to the bald assertions of Means and Mohr; nor is there any reason to believe that abortion was more readily available, or more frequently practiced, in the colonies than in England.

Infanticide in the colonies did have considerable legal activity against it.[53] The close empirical link of the con-

[50] *See also Proprietary v. Robins*, 41 Md. Archives 20 (1658); *Robins v. Robins*, 41 Md. Archives 85 (1658).

[51] Noted in L. Koehler, *A Search for Power: the "Weaker Sex" in Seventeenth-Century New England* 329, 336 n.132 (1980).

[52] M. Gordon, *Aesculapius Comes to the Colonies: the Story of the Early Days of Medicine in the Thirteen Original Colonies* 174-175 (1949). For reference to a similar ordinance in Virginia *see* S. Massengill, *A Sketch of Medicine and Pharmacy* 294 (2d ed. 1942).

[53] Hoffer & Hull, *supra* note 47 at 38-113. Statutes were enacted to punish concealment—of either the birth or the death of a child—as murder in eight colonies or states before they adopted an abortion statute, beginning with Massachusetts in 1696, *Charters &*

cealment statutes and abortion was again demonstrated by 11 states which enacted a concealment statute contemporaneously with the state's first abortion statute. Ultimately, 20 states codified the two statutes together.[54] Thus, from earliest times, colonial society prohibited the murder of an unwanted child by its parents, whether by abortion or by infanticide.

D. *Abortion Became More Common Than Infanticide Only With The Development Of The Technical Means Of Aborting A Woman With A Lessened Danger To Her Life; English And American Law Thereafter Emphasized Abortion As The Primary Evil*

The dramatic introduction of abortion statutes throughout the English speaking world in the Nineteenth Century has been amply documented.[55] The majority in *Roe v. Wade* was content to view this development, and the similarly dramatic increase in prosecutions, as a result of Victorian sexual attitudes, fears for maternal health, and concern for the life of the unborn child. 410 U.S. at 147-152. The majority offered no explanation why these reasons became weighty only in the Nineteenth Century.[56]

Means insisted that only the second reason applied.[57] He also did not attempt to explain why fear for maternal

Gen'l L. of the Colony & Prov. of Mass Bay 293 (Dane, Prescott, & Story eds. 1814). There was at least one prosecution for concealment even before a colonial statute was adopted, 2 J. Winthrop, *History of New England 1630-1649* 317-318 (Hosmer ed. 1908). Even the Salem Witchcraft Trials have been linked to infanticide. Hoffer & Hull, *supra* at 55-56.

[54] Dellapenna, *supra* note 6 at 399.

[55] *See* note 6 *supra*. This process occurred throughout most of the world during the same time, Kenny, *supra* note 44 at 183.

[56] The *Roe* majority also seriously understated the speed with which abortion statutes were adopted and the speed with which the quickening distinction was elimiated, 410 U.S. at 138-141.

[57] Means I, *supra* note 7 at 511-515, M
382-392

health should have come to the fore then and not earlier. Mohr, while recognizing distress over falling birthrates among the middle and upper classes and over a "moral prejudice" favoring the life of unborn children,[58] argued that the real reason was to assure the dominance of the newly organized American Medical Association over its less qualified competitors, especially midwives.[59] He did not explain why these concerns should be effective in winning public support, a glaring omission as he insisted that the public supported free availability of abortions. Such views simply beg the question of why abortion suddenly became a subject of significant legal and social concern in the Nineteenth Century, and seriously misconceive the legal, medical, and social import of the abortion statutes.

Voluntary surgery has nearly always been essentially a private matter between a patient and the attending physician. Until *Roe v. Wade*, voluntary abortion was never treated as a private matter between a patient and her physician. For example, in 1828 the New York legislature considered and rejected a proposal to ban all surgery unless "necessary for the preservation of life", but accepted another part of the same proposal that declared abortion to be a crime.[60] The different response is rooted in technological change.

Intrusion techniques first appeared in England sometime early in the Eighteenth Century.[61] The new technique turned up in a case in 1732: a woman was convicted and sentenced to be pilloried and to serve three

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[58] Mohr, *supra* note 8 at 35-36, 85-118, 128, 167-168, 175-176, 182-196.

[59] *Id.* at 32-37, 147-182. Mohr discounted concern for maternal health because he believed that abortion was safe, *id.* at 25-40.

[60] Means I, *supra* note 7 at 451.

[61] Shorter, *supra* note 31 at 188-208, places the invention of effective intrusion techniques as late in the Nineteenth Century. *See also* M. Potts, P. Diggory, & J. Peel, *Abortion* 170-188 (1977).

years in prison for aborting two women by inserting an iron rod into their wombs. *R. v. Beare*, 2 The Gentleman's Magazine 931 (Aug. 1732).[62] A similar case brought a conviction in 1781. *R. v. Tinckler* (1781), 1 E. East, *Pleas of the Crown* 354-356 (1806). A third case occurred in 1803. *R. v. Anonymous*, 3 J. Chitty, *Criminal Law* 798-801 (1816).

Abortion remained highly dangerous, with the inserted object (the forerunner of the "coathangers" of the Twentieth Century) serving as a highway to infection that could cause loss of the uterus or death, and was sufficiently painful (especially if the uterine wall was pierced) as to induce life-threatening shock.[63] Dangerous and painful as these procedures were, death was not as certain as with the injury and ingestion techniques. The intrusion techniques quickly became the techniques of choice, setting the stage for the various surgical and other intrusion techniques that account most abortions performed today. Lord Ellenborough himself seemed to reflect the resulting sudden upsurge in abortions in the preamble to his famous Act: it concerned "certain . . . heinous offenses . . . of late also frequently committed . . ." 43 Geo. III, c. 58 At this time fears of a threat to the health of the mother from abortion also appear for the first time in the legal and medical literature.[64]

In the early Nineteenth Century all surgery was highly dangerous for the same reasons as intrusive abortions: infection and shock. Only for abortion were social and

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[62] The case is analyzed in Keown, *supra* note 3 at 8 9.

[63] Bates & Zawadski, *supra* note 30 at 85-87. Apparently abortions killed one-third of the women undergoing them early in the Nineteenth Century, Dellapenna, *note* 6 at 400, 412.

[64] O. Bartley, *A Treatise on Forensic Medicine* 3, 5 (1815); J. Burns, *The Anatomy of the Gravid Uterus* 57-58 (1799); 1 East, *supra* note 25 at 230; G. Male, *An Epitome of Judicial or Forensic Medicine* 116-117 (1816); A. Taylor, *Manual of Medical Jurisprudence* 595 (1842). *See also State v. Murphy*, 27 N.J.L. 112, 114-115 (1858). *See generally* Keown, *supra* note

other pressures likely to induce one to undergo the procedure without prior risk to life or limb. Thus the abortion statutes were a response to the premature application of a new medical technology.[65] The statutes served to indicate that intrusive abortions were as criminal as abortions by injury or ingestion techniques. The statutes also settled the somewhat uncertain law governing abortion, and solemnly reaffirmed social policy in the face of changing social behavior. Eventually the statutes also made all abortions criminal regardless of the stage of pregnancy.

This last concern brings forth the second major motivation behind the Nineteenth Century abortion statutes: the protection of the life of the foetus. Many courts expressed this as the major purpose of the abortion statutes. *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Moore*, 25 Iowa 128 (1868); *People v. Sessions*, 58 Mich. 594, 26 N.W. 291 (1886); *State v. Gedicke*, 43 N.J.L. 86 (1881); *State v. Crook*, 16 Utah 212, 51 P. 1091 (1898); *State v. Howard*, 32 Vt. 380 (1859). Medical and religious leaders also supported this view.[66] Unless one is prepared to impugn the integrity of these social and professional leaders, one must concede that protection of unborn children from the rising numbers of abortions was at least as significant as the protecton of the life of the mother.

II. *Roe v. Wade* Should Be Overruled And The Authority To Resolve The Competing Claims Of Mothers And Their Offspring Should Be Returned To The Legislative Branches Of Government

That the historical nature of the abortion problem resulted from the intersection of the policies of protecting the mother and the child with changing medical technology argues that the balancing of the resulting claims of mother and child is best left to state legislative devel-

[65] *See generally* Keown, *supra* note 3 at 12-48.

[66] The majority in *Roe v. Wade*, 410 U.S. at 141-142, quoted representative samplings of such statements. *See also* Mohr, *supra* note 8 at 35-36, 175-176, 182-196.

opment[67] rather than by being dictated by courts. The argument was succinctly summed up by the late Professor Alexander Bickel, in commenting on the detailed trimester scheme of authority adopted by the majority in *Roe v. Wade*:

> "One is left to ask why. The Court never said. It refused the discipline to which its function is properly subject. It simply asserted the result it reached. If medical considerations only were involved, a satisfactory rational answer might be arrived at. But, as the Court acknowledged, they are not. Should not the question then have been left to the political process, which in state after state can achieve not one but many accommodations, adjusting them from time to time as attitudes change?"[68]

A. *Continuing Changes In Medical Technology Are Central To The Proper Resolution Of The Controversy Over Abortion*

From the beginning, the evolving medical technologies of abortion and of recognition of, and care for, an individual unborn child, has shaped the interests that frame the controversy over abortion. Until the Twentieth Century, both resulting sets of interests converged to demand the criminalizing of abortion. Now those interests have diverged, bringing controversy to an area where once all agreed that only evil could be found.[69]

Technical progress did not end with a crude insertion device.[70] Modern techniques of abortion have further

[67] We do not argue for preclusion of Congressional legislation under its power granted in section 5 of the Fourteenth Amendment.

[68] A. Bickel, *The Morality of Consent* 28 (1975). *See also Roe v. Wade*, 410 U.S. at 219-223 (J.J. Rehnquist & White dissenting).

[69] Even Margaret Sanger, founder of Planned Parenthood, originally found only evil in abortion, M. Sanger, *Motherhood in Bondage* 391-396 (1928).

[70] *See generally* Potts, Diggory, & Peal, *supra* note 61 at 178-188; Shorter, *supra* note 31 at 191-224; [illegible] at 411-414.

reduced the procedure's pain and the danger of injury to a uterus. General surgical advances have made abortion physically safe for the mother. Pain-killing drugs (beginning with morphine in 1806), anesthesia from the 1840's, antiseptics after 1867, and finally sulfa drugs in the 1930's and antibiotics (beginning with penicillin in 1940) have all dramatically reduced the risk of death or injury through shock or infection. Many women thus came to see abortion's prohibition, rather than its possibility, as the threat to their well-being.

Simultaneously, the perceived interests of society in unborn children were changed by new medical information and new medical technologies focused on human reproduction, illustrated by the demise of the antiquated distinction of "quickening". The distinction was found in English law at least as early as Bracton, *supra* at 341. With the application of cell theory to embryology at the opening of the Nineteenth Century, a revolution in our understanding human reproduction occurred.[71] Opinion leaders in all areas of society quickly, and by the end of the Nineteenth Century most people, had concluded that a new human life began at conception, and not at quickening.[72] Enactment or amendment of abortion statutes to remove any distinction based on quickening, beginning with The Offenses against the Persons Act, 7 Will. 4 & 1 Vict., c. 85 (1837),[73] underlined that the statutes were

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[71] *See generally* 3 *A History of Science* 456-483 (R. Taton ed. 1965); A. Meyer, *The Rise of Embryology* 28-120, 138-147, 170-194, 302-341 (1939); J. Needham, *A History of Embryology* 115-229 (1959).

[72] *Roe v. Wade*, 410 at 141-142; D. Callahan, *Abortion: Law, Choice and Mortality* 410-461 (1970); Mohr, *supra* note 8 at 35-36, 175-176, 182-196.

[73] Illinois had already removed the quickening distinction, but only for abortions by a "noxious substance", Ill. Rev. Code sec. 46 (1827), perhaps suggesting a concern to protect the mother and not the child. Maine adopted the first American statute to remove all distinctions based on quickening, Me. Rev. Stat., ch. 160, secs. 18, 14 (1840).

crafted to protect human life. An English court also interpreted the statutory term "quickening" to mean conception, rather than the felt movement of the child within the womb, reflecting again change in the understanding of when human life begins, and the function of the abortion statutes as protecting that life. *R. v. Wycherley*, 173 Eng. Rep. 486 (N.P. 1838).

Today an embryologist or fetologist can diagnose and treat an unborn child independently of treating the mother, including removing the child from its mother's womb for surgery, and then returning it to the womb to complete gestation. Facing such developments, one can hardly consider the child a mere extension of its mother. This fact was strikingly demonstrated by the odyssey of Dr. Bernard Nathanson from "Abortion King" of New York to anti-abortion activist, largely through his experiences as a fetologist.[74] For those who are not impressed by the claims of fetal personhood, the continuing prohibition of abortion in the face of the increasing safety of the procedure for mothers can only seem a serious intrusion into the liberty of women because of a "moral prejudice".[75] This ignores the unbroken tradition of the common law of protecting an unwanted child from aggression by its parents.

Reproductive technology remains one of the most rapidly advancing areas of medical research. Clearly, the majority in *Roe v. Wade* and *Doe v. Bolton* was deeply concerned about preserving physician's autonomy.[76]

[74] B. Nathanson, *Aborting America* (1979); B. Nathanson, *The Abortion Papers* (1983). *See generally* Dellapenna, *supra* note 6 at 414-416.

[75] Thus, in *Doe v. Bolton*, 410 U.S. 179, 193-194, 197-198, 199 (1973), the majority repeatedly stressed the lack of "any reason" for treating abortion differently than other minor surgery.

[76] *See* particularly *Doe v. Bolton*, where the majority accorded doctors standing as a class, 410 U.S. at 188-189, and the majority repeatedly adverted to the doctors' [illegible]

Without denying the unavoidable impact of professional opinion on these questions, and recognizing the virtue of professional autonomy if advances are to continue, the law still cannot be fashioned solely to protect the autonomy of the technicians.

Just as teachers are not allowed to determine the propriety of school prayer, the issues concerning abortion transcend mere technical competence. The controversy involves balancing the interests and values created or reinforced by changing medical technologies. In all areas of medical practice, except abortion, the state has broad authority to regulate the conduct of physicians. Even for abortion, the state, not the individual physician, should be the final arbiter of the propriety of conduct. *Simopolous v. Virginia*, 462 U.S. 506 (1983).

B. *State Legislatures Are Best Placed To Explore Appropriate Regulatory Responses To Changing Reproductive Technologies*

The central problem for this Court to resolve is which government institution is charged by the Constitution to balance the competing interests and values in the abortion controversy.[77] As Justice Stevens argued in his concurring opinion to *City of Richmond v. J.A. Croson Co.*, 57 L.W. 4132, 4144 (1989), legislatures are better suited to establishing policies for the future, leaving to the courts the primary responsibility for fashioning remedies for past wrongs. There is no reason why this conclusion should not apply to abortion. Ever since *Roe v. Wade* was decided, beginning with its companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), the Court has confronted a series of challenges to specific regulations of abortion that required the Court to resolve difficult ques-

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In *Roe v. Wade*, 410 U.S. at 125-127, they repeatedly referred to medical opinions, *id.* at 130-132, 141-146, 149-150, 159, 163, and they finally gave the physician decision-making power equal to the mother, *id.* at 153, 162-166. *See also Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759-765 (1986).

[77] *Cf.* A. Bickel, *The Least Dangerous Branch* 142 (1962).

tions of technical fitness and social acceptability.[78] Lacking the tools of inquiry available to a legislature, the Court is simply not suited to serve as a board of review for issues of medical technology. *City of Akron*, *infra* at 454-459 (J. O'Connor, dissenting).

The majority in *Roe v. Wade* itself recognized its inability to deal with the issues at stake when it was unable to decide when an individual human life (a "person") begins, 410 U.S. at 160. Yet such decisions of life and death are simply too important to be left to the technicians, especially when the one who makes the actual decision has an economic stake in deciding against life.

The government is called upon to answer difficult questions questions involves a balancing of interests rather than the application of neutral principles accepted by nearly all in our society.[79] Legislatures are best equipped to acquire, from time to time, the information necessary to assess the import of changing technologies that create or reinforce interests to be balanced in resolving the resulting controversies.

Legislatures are also better equipped to do the balancing because of their representative nature.[80] Women are not an insular minority whose interests are likely to be slighted by a legislature.[81] Nor need physicians fear such

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[78] *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986); *Simopolous v. Virginia*, 462 U.S. 506 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Harris v. McRae*, 448 U.S. 297 (1980); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

[79] *Cf.* A. Cox, *The Role of the Supreme Court in American Government* 113-114 (1976); Ely, *The Wages of Crying Wolf*, 82 Yale L.J. 920, 949 (1973).

[80] *Cf.* R. Dworkin, *Taking Rights Seriously* 22-28 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 297-310 (1973).

[81] *United States v. Carolene Prod. Co.*, 304 U.S. 144 (1938).

a legislative process. Legislatures have been consistently sensitive to the interests of the organized medical profession in regulating abortion.[82] There is no reason to expect this to change.

Finally, as Justice Brandeis argued in his dissent to *New State Ice Co. v. Liebman*, 285 U.S. 262, 309-311 (1932), to define federalism in terms of the states as great laboratories for social experiment is one of the best models for approaching questions of whether to preempt state competence. This Court unanimously affirmed in *Addington v. Texas*, 441 U.S. 418, 431 (1979), that the right of states to develop a variety of solutions, consistent with constitutionally-mandated minimum standards, was "the essence of federalism". In an area where the facts change faster than judicial procedures can cope with the resulting issues,[83] courts should defer to the state legislatures as better able to explore regulatory responses to the ensuing problems.

III. Even If *Roe v. Wade* Survives In Some Form, Application Of Its Criteria Must Be Reexamined In The Light Of New Medical Technology

Justice O'Connor pointed out in her dissent to *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-459 (1983), that if *Roe v. Wade* is to continue as the basis of the law of abortion, it is a decision "on a collision course with itself", *id.* at 456. To avoid contradicting the values announced in *Roe v. Wade*, the Court must reconsider the rules laid down in, or inferred from, the decision.

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[82] The sway of the organized physicians over legislatures was the theme of such books as B. Brookes, *Abortion in England 1900-1967* (1988); Donnison, *supra* note 48; Keown, *supra* note 3; Mohr, *supra* note 8.

[83] Note the changes in the facts between the trial and its review by this Court in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79, 95-99 (J. White dissenting, with C.J. Burger & J. Rehnquist), 101-102 (J. Stevens concurring) (1976).

A. *Application Of The Concept Of Viability Adopted In Roe v. Wade Is Technologically Based And Must Be Reevaluated As Medical Technology Advances*

The majority in *Roe v. Wade*, 410 U.S. at 163-164, found that a "compelling state interest" arose when the foetus became viable, an interest sufficient to justify banning abortions except where the life or health of the mother is at risk. The majority also concluded that viability began at 28 weeks of gestation even while recognizing that viability might begin as early as 24 weeks, *id.* at 160, 164-165.[84] The statute now before the Court presents an opportunity to reconsider whether the point of viability should correspond to the achievements of medical technology since *Roe v. Wade* was decided.[85]

B. *Increasing Technical Means To Preserve Fetal Life Reveal That The Asserted Right Of A Mother To Be Rid Of An Unwanted Pregnancy Must Now Be Distinguished From Any Implicit Right To Kill The Fetus*

Some have argued that the "freedom" protected by *Roe v. Wade* is not the freedom to be rid of an unwanted pregnancy, but the freedom to kill an unwanted child.[86] With the conviction of at least one physician for killing an aborted child after its birth alive, Philadelphia Inquirer, Sept. 29, 1983 at 14A, col. 2, we have come full circle to the early days when the desire to be rid of unwanted pregnancies was expressed as infanticide rather

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[84] The source cited in *Roe v. Wade* on this point already indicated that viability could be as early as 20 weeks, L. Hellman & J. Pritchard, *Williams Obstetrics* 493 (14th ed. 1971).

[85] Mangel, *Legal Abortion: the Impending Obsolescence of the Trimester Framework*, 14 Am. J.L. & Med. 69 (1988).

[86] Glanville Williams, often credited with opening the debate on abortion with lectures at Columbia University, defines abortion thusly: "For legal purposes, abortion means feticide: the *intentional* destruction of the fetus in the womb, or any untimely delivery brought about with intent to cause the death of the fetus.", G. Williams, *Textbook of Criminal Law* 290 (2d ed. 1983) (emphasis in the original).

than abortion. Today, concern to be rid of an unwanted pregnancy already does not always mean killing the unborn child.[57] To translate unnecessarily, in effect if not in form, the asserted right to be rid of a pregnancy into the right to kill a child is indefensible. It makes a mockery of all efforts to deal with child abuse. It strikes at the heart of the values of our form of government.

CONCLUSION

We live in a world in which law and values are increasingly reshaped by science and technology. Nowhere has this process been more dramatic than regarding medical science and technology relating to human reproduction. This case presents a court with the opportunity to return the central questions posed by this developing technology to the political branches of government—branches that can acquire and assess the rapidly changing data to weigh its impact on societal needs and values. For the reasons advanced in this brief, *Roe v. Wade* should be overruled. Failing that, the application of *Roe v. Wade* should be reconsidered, and the Missouri statute upheld as consistent with the values and policies expressed in that decision.

Respectfully submitted,

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[57] Kleiman, *When Abortion Becomes Birth*, N.Y. Times, Feb. 15, 1984 at B1, col. 1. This had actually become a problem before *Roe v. Wade* was decided, although the leaders of NARAL kept the fact from the Court, L. Lader, *Abortion II* 164-166 (1973).

APPENDIX

LISTING OF *AMICI*

The Association for Public Justice is a nationwide, non-profit, voluntary association of Christian citizens headquartered in Washington, D.C. From its earliest stages of development, even before formal organization in 1977, the Association's purpose has been to address questions of justice in the structure of political and legal institutions and in their processes and policy making.

The Association has been an *amicus curiae* before the Supreme Court, and before other courts, in seeking greater legal clarity and justice in relationships among families, schools, churches, and government. Its concern with what constitutes the structure of a just society reaches to many levels of national and international laws and policies.

The Association's concern with the identity and rights of the unborn and with the responsibility of parents and the medical profession toward the unborn began before 1977, and has continued to the present. Its interest in this case in particular has to do not only with the confusion about whether and when human life should be protected at each stage of its development, but also with the question of how different branches and levels of government ought properly to be related to establishing and enforcing justice in this context.

The Value of Life Committee, Inc., is a non-profit Massachusetts corporation organized in 1970 to affirm in the public domain the value of all human life from conception to natural death. The Committee is actively engaged in educational efforts relating to these issues, including both the collection and the dissemination of research and other information relevant to such issues. Its members include a broad spectrum of citizens from all walks of life, including numerous physicians.

As part of its educational effort, the Committee has sponsored public statements

sicians (including past-Presidents of the American College of Obstetrics and Gynecology). These statements have been referred to by the President and other public figures on such questions as the humanity of the unborn, the ability of a fetus to feel pain, and the propriety of using fetal tissue in research.

This, the first *amicus curiae* brief by the Committee before the Supreme Court, is an extension of its educational efforts. The Committee seeks by this to affirm the value of unborn humans, and to guide the debate over this question into fora better able to resolve the debate.

CERTIFICATE OF SERVICE

I, William J. Coughlin, an attorney, certify that I served one (1) copy of this Brief Amicus Curiae on each of the following counsel of record by First Class Mail on June 14, 1989:

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