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

BRIEF OF THE ATTORNEYS GENERAL OF THE STATES OF CALIFORNIA, COLORADO, MASSACHUSETTS, NEW YORK, TEXAS, AND VERMONT AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICI CURIAE*

The Attorneys General of California, Colorado, Massachusetts, New York, Texas, and Vermont submit this brief as *amici curiae* in support of appellees Reproductive Health Services, *et al.* They respond to appellants William Webster, *et al.*, and *amicus curiae* Solicitor General of the United States, who request this Court to overrule or to radically modify *Roe v. Wade*, 410 U.S. 113 (1973). *Amici* Attorneys General urge this Court not to reexamine *Roe* or, in the alternative, to reaffirm *Roe* as striking a proper balance between the fundamental constitutional privacy right of a woman to decide whether or not to bear a child and the state's compelling interests.

As the chief law enforcement officers of their respective states, and as representatives of state government, *amici* are charged with a number of duties and responsibilities which bear on the question presented. These include: (1) protecting the fundamental individual rights and liberties of the people of their state under the federal and state constitutions; (2) protecting the state's sovereign interests and role in our constitutional system; (3) protecting the health, safety and well-being of the people of their state; (4) enforcing state criminal and civil laws, including those that may regulate abortion; (5) enforcing state regulatory schemes involving health care and consumer protection; and (6) advising other branches of state government on the legality of state regulation of abortion, and defending any such regulation under *Roe* and its progeny.

Amici have a strong interest in the doctrine of *stare decisis*. It ensures stability in the law, prevents the relitigation of issues, and infuses citizens with confidence that laws will be interpreted and applied fairly, consistently, and objectively.

Amici also have a fundamental interest in protecting the most basic tenets of our constitutional form of government, namely, the reservation of certain powers and rights to the individual free from infringement by either the state or the national government, the allocation of powers not so reserved between the state and national governments, and the separation of powers among branches of government.

Because of their roles and responsibilities, *amici* believe they are compelled, and uniquely qualified, to address the question presented.[1]

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[1] Because of their involvement in two lower court cases challenging the validity of certain federal regulations promulgated under Title X of the Public Health Service Act of 1970, 42 U.S.C. 300, *et seq.*, *amici* Attorneys General of New York and Massachusetts, like the Solicitor General, also have an interest in the challenge to that part of the Missouri statute that forbids the expenditure of public funds "for the purpose of encouraging or counselling a women to have an abortion not necessary to save her life." Mo. Stat. § 188.205 (Vernon Supp. 1989). Solicitor General's Brief at 1-2, 25-29 [hereinafter S.G. Br.]. *See Massachusetts v. Bowen*, No. 88-1279 (1st Cir. argued July 28, 1988); *New York v. Bowen*, No. 88-701 (2nd Cir. argued Jan. 4, 1989). That issue is not addressed in this brief, however, because separate *amici curiae* briefs on the public funding issue are being submitted

(Footnote continued)

SUMMARY OF ARGUMENT

In *Roe v. Wade*, 410 U.S. 113, this Court properly recognized that a woman's decision whether to bear a child is encompassed in the fundamental constitutional right to privacy. For the past sixteen years, the states and countless individuals have relied on the rights secured by *Roe* and its progeny in structuring their affairs and lives. There have been no changes in the law or society to justify a reexamination of *Roe*. *Roe* established a predictable, workable framework within which abortion regulations may be reviewed by the courts. An overturning of *Roe*, or the substitution of a more deferential "rational basis" or "undue burden" standard will not end the abortion debate, but simply create new problems.

In our system of government, it is the courts and not the state legislatures that are the proper arbiters of individual rights and liberties. Fundamental rights cannot be left to the vagaries of public opinion. While federalism is a cornerstone of our constitutional system, states may not experiment with rights that are so central to the personality and dignity of the individual as the right to choose whether to bear a child.

Retreating from *Roe* and permitting the states to determine the parameters of the right to choose abortion will significantly jeopardize the public health and welfare. Experience shows that women seek abortion in substantial numbers regardless of the state of the law, exposing themselves to great risk in the process. A recriminalization of abortion will thus drive abortion back underground, resulting in an increase in maternal mortality and morbidity and an overburdening of state health care systems.

Allowing states to recriminalize abortion will also undermine law enforcement efforts, since such laws are extremely difficult to enforce and will divert resources from protecting the public from other crimes. History teaches that the attempt to enforce unpopular laws which are widely disobeyed only undermines the integrity of the criminal justice system.

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by the Amer. Civil Liberties Union and the Nat'l Ass'n of Pub. Hosps., among others, in support of the appellees.

ARGUMENT

I. NO CIRCUMSTANCES JUSTIFY REEXAMINING *ROE v. WADE*.

Sixteen years ago the Court held that the constitutional right of personal privacy recognized in a line of cases beginning at least fifty years before, "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. The Court reached its decision after considering the case with " special care": the case was briefed and argued one term, and then reargued with extensive briefing (including by a variety of *amici curiae*) the following term. *See City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 420 n.1 (1983) ("*Akron*"). The Court has adhered to the principle announced in *Roe* in a multitude of cases in the ensuing years.[2]

The consistency with which this Court and lower courts have followed *Roe* reflects the extent to which the right to privacy in procreative choice has become an integral part of the law, and of the lives, affairs, and expectations of individuals in our society. Twice before within the last six years, this Court has been asked to reexamine and overrule *Roe*. Both times this Court rightly has refused to do so, citing "especially compelling reasons for adhering to *stare decisis* in applying the principles of *Roe v. Wade*." *Akron*, 462 U.S. at 420 n.1. *See also Thornburgh*, 476 U.S. at 759. The Court again should refuse to reexamine *Roe*.

"Very weighty considerations underlie the principle that courts should not lightly overrule past decisions." *Moragne v. States Marine Lines*, 398 U.S. 375, 403 (1970). The principle

> ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion.

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[2] *See Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) ("*Thornburgh*"); *Akron*, 462 U.S. 416 (1983); *Simopoulos v. Virginia*, 462 U.S. 506 (1983); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Harris v. McRae*, 448 U.S. 297 (1980); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Colautti v. Franklin*, 439 U.S. 379 (1979); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Beal v. Doe*, 432 U.S. 438 (1977); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Connecticut v. Menillo*, 423 U.S. 9 (1975).

> [It] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.

Vasquez v. Hillery, 474 U.S. 254, 265-66 (1986) ("*Vasquez*"). *See also Phonetele v. AT&T*, 664 F.2d 716, 753 (9th Cir. 1981) (Kennedy, J., dissenting), *cert. denied*, 459 U.S. 1145 (1983) ("[W]e are first and foremost a nation of laws and the principle of *stare decisis* is the single most important key to the cohesiveness of our society"). Adhering to *stare decisis* makes it possible for citizens to "have confidence that the rules on which they rely in ordering their affairs ... are rules of law and not merely the opinions of a small group of men who temporarily occupy high office." *Florida Dep't of Health v. Florida Nursing Homes Ass'n*, 450 U.S. 147, 154 (1981) (Stevens, J., concurring). Respect for this Court's judgments depends as much upon the perception that they are the products of impartial decisionmaking as that they are right. *See Oregon v. Kennedy*, 456 U.S. 667, 691-92 n.34 (1982) (Stevens, J., concurring); *Green v. United States*, 355 U.S. 184, 215 (1957) (Frankfurter, J., dissenting).

Because of the important values served by *stare decisis*, a proponent of overruling a constitutional precedent bears "the heavy burden" of showing that "changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez*, 474 U.S. at 266. Thus, "any departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984).

The Court has identified a number of circumstances which can constitute "special justification". Among these are that the precedent is "unsound in principle", that there have been "changes in society or in the law", that the precedent is "unworkable in practice" and has led to inconsistent, unforeseen or anomalous results, or that it "disserves principles of democratic self-governance." *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546-47 (1985) ("*Garcia*"); *Vasquez*, 474 U.S. at 266.

Roe is not unsound in principle or an anomaly on the constitutional landscape. *Roe* falls squarely within this Court's understanding that the liberty secured under the due process clause is a

"continuum which ... includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). The constitutional terrain occupied by *Roe* centers on a "zone of privacy created by several fundamental constitutional guarantees," *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965), in matters of marital, familial, and personal privacy relating to child rearing, marriage, and procreation. As this Court stated in *Thornburgh*: "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." 476 U.S. at 772. *See also Roe*, 410 U.S. at 152-53; *Doe v. Bolton*, 410 U.S. 179, 209-15 (1973) (Douglas, J., concurring); *Thornburgh*, 476 U.S. at 772-82 (Stevens, J., concurring). The *Roe* Court carefully considered the constitutional principles involved, the rationales of the many preceding marital, familial, and personal privacy cases, and other factors before it reached its conclusion.[3]

The changes in the law or in society necessary to provide the "special justification" needed to overcome *stare decisis* are wholly lacking here. To the contrary, *Roe* is such an integral thread in our legal and social fabric that principles of *stare decisis* are especially compelling. As noted above, *Roe* was the logical expression of a solid line of marital, familial, and personal privacy decisions beginning at least fifty years earlier. Moreover, the right to choose abortion has become an important and settled expectation of men and women alike. To overrule *Roe* now would call into question the entire line of privacy cases, beginning at least with *Meyer v. Nebraska*, 262 U.S. 390 (1923) and extending to *Eisenstadt v. Baird*, 405 U.S. 438 (1972), and the parameters of the sphere of "liberty" under the due process clause. The "strong public interest in stability, and in the orderly conduct of our affairs,

[3] The Solicitor General argues that *Roe* represents a radical departure from older, more deeply rooted doctrine, as evidenced by the prevalence of state criminal abortion laws prior to 1973. S.G. Br. at 13. But the fact that a majority of states had criminal abortion laws on the books was addressed in *Roe*. In its careful analysis of then existing abortion law, the *Roe* Court concluded that most of these state laws were of relatively recent vintage, *i.e.* the latter part of the nineteenth century, 410 U.S. at 138-41, and that the primary concern underlying these statutes was not protection of unborn life, but rather protection of the health of the woman. *Id.* at 151.

that is served by a consistent course of constitutional adjudication" would thus be undermined. *Thornburgh*, 476 U.S. at 780-81 (Stevens, J., concurring).

Nor does *Roe* stand alone now. Since *Roe*, state and federal courts have founded a variety of decisions on *Roe's* privacy principles, for example, concerning the right to refuse treatment (including antipsychotic medication),[4] and the right to die.[5] These could all be called into question if *Roe* were overruled.

Roe has proven to be a workable, predictable framework within which governments can regulate abortion and courts can review such regulations.[6] While it is true that *Roe* has engendered many lawsuits, it is also true that the results have been fairly consistent and uniform. What appellants and the Solicitor General refuse to acknowledge is that the continuing litigation and debate about abortion arises not from any doctrinal or practical weakness in *Roe*, but rather from disagreement by some with the principle that a woman has a constitutionally protected right to decide whether or not to terminate her pregnancy. But, it "should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with

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[4] *See, e.g., Rogers v. Okin*, 478 F. Supp. 1342, 1366-68 (D. Mass.), *aff'd in part, rev'd in part, vacated in part*, 634 F. 2d 650 (1st Cir. 1980), *remanded sub nom. Mills v. Rogers*, 457 U.S. 291 (1982), *certified questions answered sub nom. Rogers v. Comm'r of Mental Health*, 390 Mass. 489, 458 N.E.2d 308 (1983), *remanded, Rogers v. Okin*, 738 F.2d 1 (1st Cir. 1984); *Guardianship of Roe*, 383 Mass. 415, 433 n.9, 421 N.E.2d 40, 51 n.9 (1981).

[5] *See, e.g., In Re Quinlan*, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976); *Superintendent of Belchertown v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417, 424 (1977).

[6] *Roe* held that the woman's privacy right could not be interfered with absent a showing of compelling state interests, and that the regulations are narrowly drawn to serve those interests. 410 U.S. at 155. Those state interests are: (1) protecting the health of the pregnant woman, which does not become compelling until the end of the first trimester of pregnancy; and (2) protecting potential life, which does not become compelling until the fetus is considered by the physician to be viable, which usually occurs around the end of the second trimester. *Id.* at 162-63. Therefore, until one of these interests becomes operative, a woman, in consultation with her physician, may effectuate her abortion decision free from interference by the state. *Id.* at 163.

them." *Thornburgh*, 476 U.S. at 759, *quoting Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

Neither appellants or the Solicitor General can point to circumstances justifying the adoption of a new standard of review. As discussed in Point III, *infra*, returning the law to its pre-*Roe* status would engender a public health and law enforcement crisis. The alternatives proposed by the appellants and the Solicitor General are no better. Downgrading the privacy right recognized in *Roe* to a mere "species" of liberty protected by the due process clause, and entitled to minimal scrutiny under a rational basis test, would similarly allow states to adopt widely varying laws, with the same ill effects. The adoption of an intermediate test, whether it be the "unduly burdensome" test articulated by Justice O'Connor in her dissenting opinions in *Akron*, 462 U.S. at 452-66, and *Thornburgh*, 476 U.S. at 814-33, or the Solicitor General's new "unduly burdensome" standard under which "[t]he relevant question would be whether a woman has been afforded a meaningful opportunity to avoid an unwanted pregnancy, taking into account all of the options available to her, including abstinence and contraception," S.G. Br. at 22 n.16, is similarly unacceptable. Such a test is inherently subjective, necessitating judicial value judgments about whether particular burdens are "undue." Individuals, government, and the medical profession all operate with the benefit of sixteen years of experience under *Roe*. Far from lessening litigation or dampening the controversy, a new standard would only increase litigation and fuel controversy.

Nor does *Roe* "disserve principles of democratic self-governance" through judicial usurpation of the role of the state legislatures. *E.g.*, Appellant's Br. at 18; S.G. Br. at 10, 20-24. Rather, as discussed in Point II, *infra*, *Roe* is a classic example of the Court fulfilling its "commission" to determine "when liberty is infringed." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943).

To overrule a decision so frequently reaffirmed, where nothing has changed but the members of the Court, also would undermine the Court's authority and legitimacy. *See generally Florida Dep't of Health*, 450 U.S. at 154 (Stevens, J., concurring). This is particularly true where the settled expectation of society is that a woman has a constitutional right to decide whether to terminate her pregnancy. Countless individuals and governments have relied

upon the rights recognized by *Roe* and its progeny in ordering their affairs and lives. By overruling or eroding *Roe* the Court would unnecessarily cause substantial social and institutional injury and chaos and frustrate justified and settled expectations, as discussed in Point III, *infra*.

II. COURTS, NOT STATE LEGISLATURES, ARE THE PROPER ARBITERS OF WOMEN'S FUNDAMENTAL RIGHTS AND THE STATE'S COMPELLING INTERESTS.

Individual liberties, federalism, and separation of powers are the cornerstones of our constitutional system. *E.g.*, *The Federalist No. 51*, at 323 (J. Madison) (Mentor ed. 1961); *Garcia*, 469 U.S. at 568-69 (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.). Appellants and the Solicitor General try to weaken these cornerstones by arguing that the issue of a woman's fundamental right to choose whether to terminate her pregnancy is one of social policy best resolved by the political process of compromise in state legislatures rather than one of balancing competing interests under the federal constitution best resolved by the courts.

The judiciary, not the legislature, is the branch of government that interprets and applies the Constitution. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).[7] The Court's role assures that the most fundamental aspects of people's lives — their personal sovereignty — are not interfered with by legislative bodies. *E.g.*, *West Virginia Bd. of Educ.*, 319 U.S. at 638:

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

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[7] *See also* F. Frankfurter, J. Landis, *The Business of Supreme Court: A Study In The Federal Judicial System* 65 (1927) (federal courts are "the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States").

See also Garcia, 469 U.S. at 565 n.8 ("One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process.") (Powell, J., dissenting, joined by Burger, C.J., Rehnquist and O'Connor, JJ.).[8]

Nevertheless, appellants and the Solicitor General argue that state legislatures are more competent than the Court to resolve the moral, religious, philosophical, social, political, and medical questions implicated by abortion regulation. Yet, there is no reason why state legislators are better suited to the task of determining the parameters of individual rights and liberties than the Court. To the contrary, the legislative branch may be a distinctly less reliable guarantor of individual rights and liberties than the courts.[9]

Moreover, it is well-recognized that the Court's duty to interpret and apply the Constitution does not "depend upon [its] possession of marked competence in the field where the invasion of rights occurs." *West Virginia Bd. of Educ.*, 319 U.S. at 639.

> True, the task of translating the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with problems of the twentieth century, is one to disturb self-confidence. . . But we act in these matters not by authority of our

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[8] The Solicitor General's reliance on a recent book which critically compares American and European abortion regulations is misplaced. *See* S.G. Br. at 23-24, *citing* M.A. Glendon, *Abortion and Divorce in Western Law; American Failures, European Challenges* (1987) [hereinafter Glendon, *Abortion and Divorce*]. For example, West German constitutional treatment of the abortion question arises out of a civil law culture with fundamentally different conceptions of the rights of individuals vis-a-vis the state. *See* Wessel and Segal, Book Review, 8 Prob. L.J. 349 (1988). [hereinafter Wessel and Segal]. *See also* Fineman, Book Review, 55 U. Chi. L. Rev. 1431, 1433, 1438, 1440-43 (1988).

[9] *See* Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 Geo. L. Rev. 789, 794 (1985) ("The judicial process may have its flaws, but it aspires to a degree of rationality, including analytical reasoning, that one does not associate with the legislative process. The limits of time, the pressures of lobbyists, the temptations of expediency, undue reliance on staff, and other distractions often have more to do with the final shape of legislation than any thinking about constitutional issues").

> competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties ... withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Id. at 639-40. Indeed, the history of the Court is filled with examples of instances where the Court carried out its duty despite such difficulties.[10]

While the complexities of abortion regulation undoubtedly make judicial resolution difficult, *see Roe*, 410 U.S. at 116, they do not relieve this Court of its constitutional duty. *Roe*, 410 U.S. at 116-17; *Thornburgh*, 476 U.S. at 771-72. Rather, the Court's duty reaches its zenith precisely when the issue, as here, is one of a "sensitive and emotional nature," generating heated public debate and controversy, "with vigorous opposing views" and "deep and seemingly absolute convictions." *Roe*, 410 U.S. at 116. For it is precisely then that majoritarian institutions such as state legislatures are the least reliable guarantors of individual rights and liberties. *E.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483; *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). The danger of leaving this type of decision to majoritarian institutions is strikingly illustrated by Governor Rockefeller's comments in 1972 when he vetoed the New York Legislature's repeal of its 1970 abortion law reform:[11]

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[10] *See, e.g., Lynch v. Donnelly*, 465 U.S. 668 (1984) (inclusion of Nativity scene in city's annual Christmas display in a park owned by a nonprofit organization does not violate First and Fourteenth Amendments); *Milliken v. Bradley*, 418 U.S. 717 (1974) (remedy which may be applied by federal court for single school district *de jure* school segregation); *Furman v. Georgia*, 408 U.S. 238 (1972) (death penalty statutes of Texas and Georgia violated Eighth and Fourteenth Amendments); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (Arkansas' "anti-evolution" statute violates First and Fourteenth Amendments); *Brown v. Bd. of Educ.*, 347 U.S. 483 (separate but equal schools for blacks and whites violate Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state law forbidding teaching of foreign language in school invades the liberty guaranteed by the Fourteenth Amendment). *See also Bd. of Educ. v. Pico*, 457 U.S. 853, 861 (1982) (referring to the "difficult terrain" which *Meyer*, *supra*, and *Epperson*, *supra*, traversed).

[11] *See* N.Y. Penal Law § 125.05(3) (McKinney 1987), permitting licensed physicians to provide abortions to consenting women less than twenty-four weeks pregnant.

> [t]he extremes of personal villification and political coercion brought to bear on members of the Legislature raise serious doubts that the votes to repeal the reforms represented the will of the majority of the people of New York State. The very intensity of this debate has generated an emotional climate in which the very truth about abortions and about the present State abortion law have become distorted almost beyond recognition.

Governor's Veto Messages, (1972), *reprinted in* N.Y.S. Legis. Annual-1972, at 423-24.

As chief law enforcement officers in their respective states, *amici* are interested in protecting the fundamental rights of the people. By respecting the role of the judiciary, the states help preserve a sphere of personal liberty for the people, free from encroachment by any government. *Amici* value and often advocate the virtues of federalism,[12] one of which is that states may serve as laboratories for experimenting with new social and economic ideas. *See, e.g., Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). But there is a critical difference between a state experimenting within a sphere of power ceded to government by the individual and the state usurping those powers and rights reserved to the individual.

Thus, a state law infringing a fundamental individual liberty interest under the Fourteenth Amendment cannot be upheld on federalism grounds. *See New State Ice*, 285 U.S. at 279-80. After all, "[t]here are limits to the extent to which a legislatively represented majority may conduct ... experiments at the expense of the dignity and personality" of the individual. *Skinner v. Oklahoma*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring). Because "[f]ew decisions are more personal and intimate, more properly private, or more basic to human dignity and autonomy, than a woman's decision ... whether or not to end her pregnancy," *Thornburgh*, 476 U.S. at 772, the matter should not be a candidate

[12] *See, e.g.*, brief *amici curiae* of California, *et al.* in *Garcia*, 469 U.S. 528, 529.

for state by state experimentation and should remain within the province of the Court.

III. A REVERSAL OR MODIFICATION OF *ROE v. WADE* WOULD JEOPARDIZE THE PUBLIC HEALTH, SAFETY AND WELFARE AND UNDERMINE STATE LAW ENFORCEMENT EFFORTS.

Countless individuals have relied upon the rights secured by *Roe v. Wade* and its progeny in ordering their affairs and lives. The liberalization of abortion laws has brought out of the shadows what was once a furtive and dangerous procedure, making it possible for women to exercise procreative choice safely, with minimal danger to their lives and health. Experience teaches that women who want abortions will not be deterred by restrictive laws. Thus, reversal of *Roe* will not end abortion, but drive it back underground, with all of the attendant adverse public health effects. Returning abortion to the individual states will result in the emergence of a patchwork of laws,[13] and the imposition of a tremendous burden on those states which would continue to allow women to choose abortion in the face of decisions by other states not to do so. After sixteen years of constitutional protection, judicial invalidation of a right which directly affects a woman in the most private aspect of her life will foster a nation of outlaws illicitly seeking and providing abortion services. Law enforcement officers such as the *amici* Attorneys General will be placed in the position of having to enforce virtually unenforceable laws.

A. *Health Consequences of a Reversal of Roe v. Wade*

The consequences for maternal health in this country will be devastating if the Court reverses *Roe v. Wade*.[14] Women living in

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[13] *See* J. Legge, *Abortion Policy: An Evaluation of the Consequences for Maternal and Infant Health* 118-19, Table 7.1 (1985) (hereinafter Legge) (describing eight types of pre-*Roe* abortion laws). In addition, post-*Roe* state court decisions may impose state constitutional requirements on abortion. *See, e.g., Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 417 N.E.2d 387 (1981) (woman has right under due process clause of Massachusetts constitution to choose to terminate her pregnancy).

[14] No country except Rumania, which legalized abortion in 1957 but severely restricted its availability in 1966, has reversed or effectively reversed a liberalized

(Footnote continued)

states which severely restrict abortion will not cease to obtain or attempt to obtain abortions; rather they will find ways to circumvent restrictive laws, thereby endangering their health and safety.[15] Abortion-related deaths, injuries and illnesses will surge.[16]

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abortion policy. Following that shift, Rumania experienced a sharp increase in abortion-related deaths and infant mortality. Legge, *supra* note 13, at 58-59, 70, 152.

[15] The immediate effect of legalization was not to significantly increase the numbers of women obtaining abortions, but rather to guarantee that the number of abortions previously clandestinely obtained, were instead obtained under safe, legal medical conditions. *See* Alan Guttmacher Institute, *Safe and Legal: 10 Years' Experience With Legal Abortion in New York State* 17, 23 (S. Henshaw, J. Van Vort, eds. 1980) [hereinafter Guttmacher]. Other states' statistics are similarly revealing. *Id.*; *see also People v. Belous*, 71 Cal. 2d 954, 965-966, 458 P.2d 194, 201 (1969), *cert. denied*, 397 U.S. 915 (1970) (prior to California's passage of Therapeutic Abortion Act of 1967, between 35,000 and 100,000 criminal abortions were performed annually in California); *People v. Barksdale*, 8 Cal. 3d 320, 330-31 nn. 7 & 8, 503 P.2d 257, 265 nn. 7 & 8 (1972) (by 1970, approximately 116,749 legal abortions were performed in California – about the same number of abortions, adjusted for population growth, that occurred before legalization). Similarly, only a 10% rise was reported for Oregon. Guttmacher at 23. Nationwide, an estimated one million illegal abortions were performed annually in the years before *Roe*, two-thirds of which were on married women. *See* The President's Comm'n on Law Enforcement & Admin. of Justice, Task Force Report: The Courts 105 (1967) [hereinafter Task Force Report]; Centers for Disease Control, Morbidity and Mortality Weekly Report, vol. 37, no. 47, "Abortion Surveillance: Preliminary Analysis – United States, 1984, 1985," 713-14 (Nov. 25, 1988), U.S. Dep't of Health and Human Serv./Pub. Health Serv. HHS Pub. No. (CDC) 89-8017 [hereinafter CDC].

[16] Legalization of abortion significantly reduced abortion-related deaths and illness. Studies in California and New York showed that criminal abortion was the leading cause of maternal deaths, the most common victims married women with several children who attempted to self-abort. H. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. Crim. L. and Criminology and Police Sci. 3 (1969) [hereinafter Ziff]. After abortion was legalized in New York State, deaths related to abortion declined sharply. Between 1967 and 1969, when abortion was illegal in New York, and 1970-1972, when it was legal, the average annual rate of abortion-related deaths fell by 51 percent. Legalization of abortion in New York State also reduced the number of women admitted for infected, incomplete and spontaneous abortions. *Id.* Similarly, following *Roe*, the number of abortion-related deaths nationwide dropped significantly. By 1982 the number of abortion-related deaths had dropped to 50 percent of those in 1972. Lebolt, Grimes, Cates, *Mortality From Abortion and Childbirth*, 248 J. A.M.A. 188, 191 (July 9, 1982).

Experience shows that poor and minority women will suffer the most.[17]

The adverse health consequences of a reversal of *Roe* would extend even to the residents of those states that continue to permit women to freely obtain abortions. As discussed below, the health-care systems of these states would be burdened by an influx of non-residents seeking to circumvent the restrictive laws in their own states. Moreover, limited state resources would be diverted to enforce laws protecting women from deceptive, health-endangering schemes that play on the desperation of women seeking to terminate unwanted pregnancies.

1. *States Where Abortion Remains Legal Can Expect An Influx of Out-Of State Residents Seeking Medical Services.*

An extraordinary burden will fall upon the states that continue to provide women with the right to choose to terminate their pregnancies. Such states can anticipate an influx of non-residents seeking the abortion or related medical services prohibited in their home states. New York State, for example, was flooded with non-residents seeking abortion services following its passage of a bill effective July 1, 1970 permitting licensed physicians to provide these services to consenting women less than twenty-four weeks pregnant. *See* N.Y. Penal Law § 125.05(3) (McKinney 1987).[18] Between

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[17] Studies during the 1960's in New York and California (before abortion was legal in either state), show that in New York twice as many abortion related fatalities occurred among nonwhites as among whites, while in California low income women were the most frequent abortion fatalities. Ziff, *supra* note 16, at 11. What was said in 1969 would be equally true in 1989: "This double standard, nurtured by present statutes, is incompatible with any notion of justice. It reflects poorly on the law's concern with the welfare of disadvantaged citizens at a time when millions of dollars are being spent to equalize the medical care available to all people in this country." *Id.*

[18] Patker, O'Hare, Nielson, Suigir, *Two Years' Experience in New York City with the Liberalized Abortion Law-Progress and Problems*, 63 Am. J. Pub. Health 524 (1973) [hereinafter Patker]. New York's experience between 1970 and 1973 is not unique; women throughout the world have attempted to circumvent abortion restrictions in their own jurisdictions. *See* R. Riddick, *Making Choices: The Abortion Experience of Irish Women* 11-14 (1988) [hereinafter Riddick]. Britain, for example, experienced an influx of foreign women seeking abortion services

(Footnote continued)

July 1970 and June 1972, 65.7% of the approximately 400,000 abortions performed in New York City were performed on non-residents.[19] This number dropped precipitously after *Roe*.[20] If the Court overturns *Roe*, an even greater number of out-of-state women can be expected to seek abortions in states that continue to allow it, given the settled expectations about legal abortion since *Roe* was decided, and its widespread acceptance.[21]

2. *The Burden on Health Care Systems*

The sheer numbers of non-resident women seeking abortions or related medical services in states where it remains legal will strain already overburdened health care systems.[22] Many out-of-

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following its liberalized abortion act in 1967. In the early to middle 1970's, an estimated 33% of all abortions in Britain were performed on foreign women from countries prohibiting abortions. Legge, *supra* note 13, at 79; *see, e.g.*, Riddick at 11 (nearly 4,000 women from the Republic of Ireland, in which abortion is illegal, obtained abortions in England in 1987).

[19] Patker, *supra* note 18, at 524. Statistics for all of New York State are comparable to those for New York City. According to statistics compiled by the N.Y.S. Department of Health, between 1971 and 1972 a total of approximately 538,000 women obtained abortions, of whom approximately 327,000 – or 60% percent – were non-residents.

[20] Less than half the number of non-residents who obtained abortions in New York State in 1972 obtained abortions in New York State in 1973. Moreover, between 1974 and 1987, non-residents averaged merely 9.8 percent of the total number of women obtaining abortions in New York State.

[21] Nationwide, the number of reported abortions increased from approximately 745,000 in 1973 to 1.58 million in 1981 to 1.6 million in 1985. *See* Alan Guttmacher Institute, *Abortion Services in the United States, Each State and Metropolitan Area, 1984-1985* 16 (S. Henshaw, J. Van Vort, ed. 1988) [hereinafter Guttmacher 1984]; CDC, *supra* note 15. *See also* N.Y. Times, Oct. 6, 1988, § B, at 18, col. 1 (between 1977 and 1987, nearly 3 out of every 100 American women 15 to 44 had an abortion).

[22] This Court has held that a state where abortion is legal may not deny an abortion, or related medical care, to a non-resident. *Doe v. Bolton*, 410 U.S. at 200. During 1970-71, almost 1000 non-residents were treated at New York City hospitals despite hospital residency requirements. Harris, O'Hare, Patker, Nielson, *Legal Abortion 1970-71 – The New York City Experience*, 63 Am. J. Pub. Health 409, 410 (1973). The influx of non-residents could be particularly problematic for a state like Massachusetts where abortion is legal under the state constitution's due process clause, *Moe v. Sec'y of Admin. & Fin.*, 382 Mass. 629, 417 N.E. 2d 387,

(Footnote continued)

state women will likely seek abortions late in their pregnancies due to their inability to obtain proper counseling in their home states or a lack of resources.[23] Fear of prosecution will likely also contribute to health-endangering delays. As a result, abortion providers will be faced with an increase in the number of late, more complicated, and thus more dangerous abortions.[24] States will also have to handle the emergency medical situations posed by injuries and illnesses suffered by women who attempt to self abort or seek the services of illegal abortionists.

3. *The Increased Burden on Enforcement and Regulatory Agencies*

If *Roe* is overturned, it can be anticipated that profiteers in states that permit abortions will exploit the desperation of women seeking abortions or related medical services. For example, after Britain began permitting abortion, taxi drivers in London exacted fees for referring and transporting foreign women to abortion facilities upon the women's arrival in London.[25] Similarly, following the

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and the state constitution has been interpreted to require public funding, *i.e.*, Medicaid, for abortions. *Compare Harris v. McRae*, 448 U.S. 297.

[23] Non-residents obtaining abortions in New York, for example, historically have been more likely to obtain abortions after twelve weeks than New Yorkers. Guttmacher, *supra* note 15, at 19. Inability to locate a provider and make arrangements to obtain an abortion are significant factors leading to delay. Torres, Forrest, *Why Do Women Have Abortions?* 20 Fam. Plan. Persp. 169, 174-75 (July/Aug. 1988). Delay also escalates costs, thereby resulting in even further delay. Guttmacher, *supra* note 15, at 19; *see also* Henshaw, Forrest, Blaine, *Abortion Services in the United States, 1981-1982*, 16 Fam. Plan. Persp. 119,126 (May/June 1984) (abortion fees are significantly higher for pregnancies past 12 to 14 weeks); Henshaw, Forrest, Van Vort, *Abortion Services in the United States, 1984 and 1985*, 19 Fam. Plan. Persp. 63 (Mar./Apr. 1987) [hereinafter cited as Henshaw].

[24] *See generally* J. Wilson, R. Carrington, E. Reid, *Obstetrics and Gynecology* 207 (8th ed. 1987); Grimes, *Second Trimester Abortions in the United States*, 16 Fam. Plan. Persp. 260, 263 (Nov./Dec. 1984) (the risk of death from abortions performed at 16 weeks is 24 times greater than from abortions performed at 8 weeks or earlier). Courts have uniformly recognized that "time, of course, is critical in abortion," *Doe v. Bolton*, 410 U.S. at 198; *see, e.g.*, *Akron*, 462 U.S. at 450-51.

[25] Legge, *supra* note 13, at 79.

adoption of New York's less restrictive abortion law, deceptive referral services multiplied in and out of the state.[26] Unaware of free referral services, including a clergy-run service which operated in twenty states, many women turned to profit-making referral agencies that promised not only referrals to reliable providers at the lowest cost, but transportation services and counseling, as well.[27] None disclosed the excessive portion of the fee the agency retained, or the availability of free referral services.[28]

Not only did the agencies realize exorbitant profits, but they often endangered the health of the women utilizing their services.[29] Personnel at referral agencies without medical training would essentially diagnose the woman — often through a telephone call — and then refer her to a provider, or alternatively, subcontract with a second agency that made the final arrangements with the providers.[30] The provider thus was often not informed of the woman's condition and sometimes was unprepared to assist her.[31]

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[26] *See generally* Edmiston, *Report on the Abortion Capital of the Country: New York City*, N.Y. Times, Apr. 11, 1971 (Magazine), at 11, 37-42 [hereinafter Edmiston]; L. Lader, *Abortion II: Making the Revolution* 164 (1973) [hereinafter Lader]; N.Y. Times, Feb. 10, 1971, at 20, 45, col. 1. The agencies advertised their services in various ways, including billboards, blimps and banners, on Florida beaches, and classified advertisements in local newspapers. Newsweek, July 19, 1971, at 51.

[27] Lader, *supra* note 26, at 164.

[28] A. Morton, *Enemies of Choice: The Right to Life Movement and its Threat to Abortion* 57 (1981) [hereinafter Morton]; N.Y. Times, Feb. 10, 1971, at 45, col. 1; Edmiston, *supra* note 26, at 42.

[29] Edmiston, *supra* note 26, at 42.

[30] *Id.* at 38. As a result of a lawsuit brought by New York's Attorney General, the New York courts found that one such agency was illegally engaged in the practice of medicine in violation of the New York Education Law, as well as illegal fee splitting. *State v. Abortion Info. Agency, Inc.*, 69 Misc.2d 825, 829 (Sup.Ct. N.Y. Co. 1971), *aff'd*, 37 A.D.2d 142, 145 (1st Dept. 1971), *aff'd*, 30 N.Y.2d 779, 285, N.E.2d 317 (1972).

[31] Edmiston, *supra* note 26, at 38. For example, a Michigan woman checked into a hospital near Kennedy airport in August of 1971 after payment of $900 to a referral agency advertised in a national magazine. The referral agency subcontracted the referral to a second agency but failed to advise the second agency that the woman required a saline abortion. Uninformed, the doctor performed an unnecessary hysterectomy. *Id.* at 38, 42.

Other women paid large fees to referral agencies only to be told by providers that the price was even greater than the payment already rendered.[32]

Although states which continue to allow women to obtain abortions can enact and enforce laws preventing fraudulent advertising and referral, an overturning of *Roe* would encourage such health-endangering chicanery.[33] In any event, notwithstanding the grave impact such schemes would have on the states that continue to permit abortion, they will have little or no ability to curb deception occurring outside their borders.

It can also be anticipated that a reversal of *Roe* will increase the demand for abortion services in those states that keep it legal, thus precipitating a proliferation of free-standing abortion clinics in those states.[34] To ensure the competence of these clinics and to safeguard the health and safety of the women relying on them, vigorous enforcement of regulatory requirements will be necessary.[35] Such increased regulation will significantly burden

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[32] *Id.* at 37, 42 (18 year old from Boston who had traveled to New York forced to sell blood, sleep in parks and beg after provider informed her that abortion would cost $275 more than she had already paid).

[33] *See, e.g.*, note 30, *supra* (discussing N.Y.S. Attorney General's enforcement of Education Law). It can further be expected that if *Roe* is reversed, states that continue to permit abortion will also experience an increase in deceptive advertising by clinics claiming to perform abortions, but which only provide antiabortion counseling, and do not so specify in their advertisements. *See, e.g., Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176 (N.D.), *aff'd*, 391 N.W.2d 627 (N.D.), *cert. denied*, 476 U.S. 1108 (1986).

[34] *See* Patker, *supra* note 18, at 525 (in the first year abortion was legalized in New York City, most non-residents received services from proprietary hospitals. In the second year, most obtained abortions from free-standing clinics). Today, free-standing clinics are the major providers of abortions nationwide, with hospitals responsible for only 13 percent of the procedures performed in 1985. Henshaw, *supra* note 23, at 63. Nevertheless, New York City's experience between 1970 and 1971 suggests that municipal and state hospitals may shoulder some of the increased need. *See* note 22, *supra*.

[35] Review and assurances of providers' competence will be particularly important if *Roe* is overturned, since medical personnel employed in states that permit abortion, but who were trained in hospitals and other medical facilities in states that prohibit abortion, may not receive adequate training in abortion procedures.

(Footnote continued)

limited state health regulatory resources. Moreover, to the extent that current state health planning and regulatory decisions are now predicated on *Roe*, continuity and effectiveness in future enforcement would be extremely difficult.[36] Women's health and safety may thus be further jeopardized.

Finally, at the same time that an overturning of *Roe* will cause the number of non-resident women seeking abortions in states that continue to permit the procedure to escalate, so too could it trigger an escalation in violent and illegal activity aimed at the clinics in these states that continue to perform abortions. *Amici* welcome peaceful and constitutionally protected expression of diverse views but they fear their states becoming focal points for illegal activities, such as bombings, arson and blockades, that courts in many states have deemed necessary to enjoin,[37] that require the expenditure

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Lack of training can pose grave risks to women's health. *See* N. Davis, *From Crime To Choice: The Transformation of Abortion in America* 86 n.4 (1985); *see also id.* at 77.

[36] *See, e.g., Westchester Women's Health Org. v. Whalen*, 475 F. Supp. 734 (S.D.N.Y. 1979) (state licensing regulations for ambulatory care clinics providing abortion services are within the guidelines enunciated by the Supreme Court); *Schulman v. New York City Health & Hosp. Corp.*, 38 N.Y.2d 234, 342 N.E.2d 501 (1975) (reporting requirements of the New York City Health Code within the strictures of *Roe v. Wade*).

[37] *See, e.g., New York State Nat'l Org. for Women v. Terry*, No. 88 Civ. 3071 (S.D.N.Y. 1989) (1989 WL 5742) (permanently enjoining antiabortion protestors from blockading clinic entrances and awarding $25,000 fines per day for violation of order, in addition to penalities to City of New York for increased costs for failure to notify city in advance of location of demonstration); *Nat'l Abortion Fed'n v. Operation Rescue*, No. 89-1189 AWT (BX)(C.D. Cal. March 15, 1989) (injunction); *Aradia Women's Health Center v. Operation Rescue*, No. C88-1539R (W.D. Wash. Jan. 10, 1989) (preliminary injunction); *Parkmed Co. v. Pro-Life Counselling*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1st Dept. 1982) (enjoining 11 demonstrators' interference with access to a clinic); *O.B.G.Y.N. Ass'n v. Birthright of Brooklyn & Queens, Inc.*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (2d Dept. 1978); *Bering v. Share*, 106 Wash. 2d 212, 721 P.2d 918 (1986), *cert. denied*, 479 U.S. 1050 (1987)(upholding injunction); *Moyal v. Thompkins*, No. 278465 (Super. Ct. Cal. May 16, 1986) (preliminary injunction against trespass, blocking access, harassment); *Oakland Feminist Women's Health Center v. Thompkins*, No. 276031 (Super. Ct. Cal. Aug. 16, 1985) (preliminary injunction against blocking access and harassment); *Finkel v. Birthright Center*, No. C-3266-83 (Super. Ct. N.J. Aug. 21, 1985); *Kugler v. Ryan*, 682 S.W.2d 47 (Mo. App. 1984); *Clinic for Women, Inc., v. Citizens for Life*, No. C83-2651 (Cir. Ct. Indiana, Marion Cty., Aug. 31, 1984).

of state funds to control, and that further jeopardize the health and safety of women.[38]

B. *The Burden On Law Enforcement Will Also Increase Where Abortion is Prohibited.*

The evidence from the pre-*Roe* period suggests that where abortion is illegal, substantial numbers of women seek the procedure in other states where it is legal, as discussed above, or procure illegal abortions or attempt the procedure themselves.[39] The latter alternatives resulted in a substantial number of maternal deaths and injuries in the pre-*Roe* period.[40] Compliance with new state laws severely restricting or prohibiting abortions may be expected to be even lower than before *Roe v. Wade* because in the intervening sixteen years women have been able to exercise control over their reproductive capacity.

While wealthier women may be able to seek legal abortions elsewhere, poorer women, a disproportionate share of whom are members of minority groups who do not have the option to travel or the luxury of private physicians, will risk death, mutilation, infections, sterility, and other serious complications at the hands

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[38] Bomb threats, arson attacks and blockades not only threaten the health and safety of clinic personnel and patients, passersby and neighbors, but have made it difficult, if not impossible, for clinics to obtain insurance coverage. *Abortion Clinics Find Insurance Difficult to Obtain*, Am. Bus. News, Feb. 8, 1985, at 20, col. 1; Bus. Ins., Jan. 21, 1985, at 3, col. 2.

[39] The experience in European countries, for example, demonstrates that the severity or leniency of a country's abortion law is unrelated to the frequency of abortion. *See* Wessel and Segal, *supra* note 8, at 353-54, Glendon, *Abortion and Divorce*, *supra*, note 8, at 14-15, 59-60. For example, irrespective of the legality or illegality of abortion, in the countries surveyed, women could obtain first trimester abortions. Wessel and Segal, *supra* note 8, at 353. In addition, the strictness of a country's law has little to do with rates of abortion. Thus the Netherlands, with a lenient statute, experiences a low rate of abortion, and Rumania with a very strict law, has a rate higher than the U.S. *Id.* at 353-54; Glendon, *Abortion and Divorce*, *supra* note 8, at 59-60.

[40] *See, e.g.*, Task Force Report, *supra* note 15, at 105-07; Ziff, *supra* note 16, at 6-8, 11; Schwartz, *Morals Offenses and the Model Penal Code*, 63 Colum. L. Rev. 682 (1963).

of illegal abortionists or at their own hands. Task Force Report at 105-07; Ziff at 6-9. The widespread demand for abortion will be met both by "some highly respectable physicians [who] regard the law as an injustice and want to protect their patients against incompetent abortionists," and by clandestine, swiftly operating, highly organized abortion "rings" or "mills" with people "ready to run the risk to earn the high fees." Task Force Report at 105; Ziff at 9.[41] Bans on abortion "tend to foster organized forms of criminality which, with alarming business efficiency and the use of systematic means of coercion, violence, and governmental corruption, continue to supply the persistent demand . . . with the loss of a substantial number of lives as a consequence." Task Force Report at 107.

Enforcement of restrictive abortion laws wi . be difficult for several reasons. Detection, surveillance, apprehension, and proof will be problematic because of the frequent absence of a complaining victim, the private, consensual nature of the crime, the federal and state constitutional privileges against self-incrimination,[42] and new abortifacients such as the morning after pill and R.U. 486.[43] Moreover, the reallocation of the resources necessary to attempt to enforce such laws will divert the resources of the police from protecting the public from other crimes, such as drug use and its attendant violence, and cause a "loss of morale and self-esteem among police who are obligated to engage in tasks which must seem to them demeaning or degrading or of little relevance to the mission of law enforcers." Task Force Report at 107.

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[41] The prevalence of abortion "mills" and "rings" once led police to consider criminal abortion the third largest illegal endeavor in the country, after only gambling and narcotics. *See* Schur, *Crimes Without Victims* 25 (1965), cited in Ziff, *supra*, note 16, at 5 n.30.

[42] Task Force Report, *supra* note 15, at 106; Ziff, *supra* note 16, at 8; Constitutional Aspects of the Right to Limit Childbearing, A Report of the United States Comm'r on Civil Rights, 94-95 (April 1975).

[43] *See generally* N.Y. Times, Sept. 29, 1988, § B, at 11, cols. 4-5 (describing drugs that induce abortion).

Given divided community opinion prevailing in many states, there may be a lack of uniform enforcement. Selective prosecution and inconsistent jury verdicts will undermine *amici*'s efforts to foster uniform, consistent law enforcement in their states. In addition, selective prosecution and inconsistent verdicts for violation of unpopular laws will foster "cynicism and indifference to the criminal law and its agencies of enforcement," Task Force Report at 106, and it will tend "to contribute to antagonism and resentment toward those who enforce the law." *Id.* at 105; *see also* Ziff, at 8-10.[44]

In sum, the heavy social costs of permitting states to recriminalize abortion would undermine the *amici*'s interests in protecting the public health, safety and welfare, and in preserving the integrity of state criminal justice systems.

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[44] Recent history teaches that laws regulating private behavior where no consensus exists create problems for those that have to enforce them. Finding widespread lawlessness and concluding that Prohibition was unenforceable, a Commission headed by George Wickersham, the U.S. Attorney General under President Taft, which included a former Secretary of War, a former state Chief Justice, a Circuit Judge, two District Judges, three practicing lawyers, the Dean of the Harvard Law School and the President of Radcliffe, wrote

> a law will be observed and may be enforced only when and to the extent that it reflects or is an expression of the general opinion of the normally law-abiding elements of the community, ... It is therefore a serious impairment of the legal order to have a national law upon the books theoretically governing the whole land, and announcing a policy for the whole land which public opinion in many important centers will not enforce.

Nat'l Comm'n on Law Observance and Enforcement, *Report on the Enforcement of the Prohibition Laws of the United States*, no. 722, 71st Cong., 1st Sess. (Jan. 7, 1931), *quoted in* Levane, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, 12 Cont. Drug Problems 63, 75-76 (Spring 1985).

CONCLUSION

For these reasons, the *amici* Attorneys General respectfully request this Court to decline to reexamine *Roe v. Wade*, or in the alternative, to reaffirm that decision.

Dated: New York, New York
March 30, 1989

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