Nos. 91-744, 91-902

In the Supreme Court of the United States

OCTOBER TERM, 1991

PLANNED PARENTHOOD OF
SOUTHEASTERN PENNSYLVANIA, ET AL.,
Petitioners and Cross-Respondents,

v.

ROBERT P. CASEY, ET AL.,
Respondents and Cross-Petitioners.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF CERTAIN AMERICAN STATE LEGISLATORS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS IN NO. 91-744, AND PETITIONERS IN NO. 91-902

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INTEREST OF THE AMICI *

Amici Curiae are a bipartisan group of more than 600 senators and representatives—men and women—from all fifty States. *Amici* also include the Governor of the Territory of Guam, the Honorable Joseph F. Ada, who is a defendant in the challenge to the Guam abortion law now pending in the United States Court of Appeals for the Ninth Circuit, Lt. Gov. Frank F. Blas, and legislators from Guam and Puerto Rico. *Amici* do not all share the same convictions regarding the manner and extent to which abortion should be regulated or prohibited. But all are in agreement that abortion is properly a matter for the legislative, not the judicial, branch of government, and that States have the constitutional authority to protect unborn human life throughout pregnancy. Because of this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), that authority can no longer be exercised.

The issue of abortion poses difficult and complex legal, moral, social, medical 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. That debate has been silenced and those forums have been closed for almost twenty years. The voice of the people will not be heard again until *Roe* is overruled and legislative authority over 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." *Id.* at 153. The

* The names of the *amici* appear in the appendix to this brief, which is filed with the consent of the parties.

Court acknowledged that "[t]he Constitution does not explicitly mention any right of privacy." *Id.* at 152. Nevertheless, "a right of personal privacy, or a guarantee of certain areas or zones 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 finding that there is a "fundamental right" to choose abortion, the Court in *Roe* reviewed the treatment of abortion in English and American law (410 U.S. at 129, 132-41, 147-52), and came to the following conclusions:

> [A]t 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, central to the Court's decision in *Roe*, are erroneous. The Court's examination of the history of abortion regulation was seriously flawed and failed to take into account the state of medical technology in which the law of abortion evolved. As this brief attempts to demonstrate, both the English common law, as received by the American colonies, and the 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 critical factual assumptions on which *Roe* was erected and suggests that English and

American law never recognized a right to choose abortion. Accordingly, *Roe v. Wade* should be overruled.[1]

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, 796-97 (1986) (White, J., dissenting).

In *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court, without support in the text, structure or history of the Constitution, reached out and struck down the abortion laws of all fifty States. The Court thereby established as a constitutional right what had long been viewed in English and American law as a serious crime—the intentional destruction of unborn human life. Contrary to the Court's reading of English and American legal traditions in *Roe*, there is no historical basis for concluding that the Due Process Clause of the Fourteenth Amendment, or the right of privacy that has been derived therefrom, embraces a right to choose abortion. Since nothing

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[1] The issue of whether *Roe* should be overruled is properly before this Court. The questions certified for review—whether the challenged provisions of the Pennsylvania Abortion Control Act of 1982, as amended, are constitutional—cannot be answered without first determining the appropriate standard of review applicable to the regulation of abortion. The selection of that standard directly implicates *Roe*. *See Webster v. Reproductive Health Services, Inc.*, 492 U.S. 490, 532-33 (1989) (Scalia, J., concurring in part and concurring in the judgment).

in the Constitution was intended to deprive the people of their rightful authority, acting through their state legislatures, to protect human life by restricting abortion, that authority should be restored to its legitimate source—the American people. *Roe v. Wade* should be overruled.

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 certain fundamental rights are 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 *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Court forcefully reiterated these principles of constitutional analysis 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. Some of these cases 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. City of East Cleveland*, 431 U.S. 494 (1977), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.* at 503 (opinion of Powell, J.). In *Roe*, 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." 410 U.S. at 152.

In rejecting 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." 478 U.S. at 194.[2]

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[2] The Court has continued to rely upon historical traditions in evaluating asserted claims of constitutional right not based upon an explicit constitutional text. *See, e.g., Michael H. v. Gerald D.*, 491

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 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.

Id. at 194-95.

When these principles are applied to the issue of abortion, it becomes clear that *Roe* was wrongly decided. Contrary to the Court's conclusions, there was no right to choose abortion at common law or under the statutes enacted by 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* was based.

Although petitioners attempt to defend the legitimacy of *Roe* on general privacy grounds (Br. at 22-27),[3] their brief is curiously silent regarding the history of abortion

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U.S. 110, 122 n.2, 120-29 (1989) (natural father of child conceived in adulterous relationship lacked protected liberty interest in asserting parental rights over the child).

[3] This effort ultimately fails because, as this Court noted in *Roe*, abortion is "inherently different" from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Griswold v. Connecticut*, 381 U.S. 479 (1965), *Stanley v. Georgia*, 394 U.S. 557 (1969), *Loving v. Virginia*, 388 U.S. 1 (1967), *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), were respectively concerned. 410 U.S. at 159. Abortion is different because it involves the intentional destruction of unborn human life.

regulation. Petitioners do not discuss whether abortion was a crime at common law, or when American legislatures enacted statutes prohibiting abortion or how those statutes were interpreted by state reviewing courts. This silence is all the more remarkable given the need to ground an asserted privacy right (in this case, the right to choose abortion) "in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. at 503 (opinion of Powell, J.). Only the "Historians' Brief" in support of petitioners even attempts to remedy these deficiencies. It fails to do so, however, because as both this brief and the brief *amicus curiae* of the American Academy of Medical Ethics demonstrate, it seriously distorts both the common law record and the pattern of nineteenth century legislative activity restricting abortion. Moreover, the "Historians' Brief," in asserting that "emphasis on the fetus became central to cultural and legal debate over abortion only in the late twentieth century," Br. at 26, simply ignores scores of judicial opinions from state courts which recognized that their nineteenth century abortion laws were enacted with the intention of protecting unborn human life.

II. THE COMMON LAW OF ENGLAND, AS RECEIVED BY THE AMERICAN COLONIES AND STATES, PROHIBITED AND 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. Although a comprehensive review of this history is beyond the scope of this brief,[4] the following is offered as a summary.

The thirteenth century commentators Bracton and Fleta classified abortion of a "formed and animated"

[4] The court is referred to the brief *amicus curiae* of the American Academy of Medical Ethics in support of Respondents in No. 91-744, and Petitioners in 91-902, and J. Keown, *Abortion, doctors*

fetus as homicide.[5] 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).[6] 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.*[7] In his classic *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, 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 is murder in such as administered or gave them.

4 W. Blackstone, *Commentaries On The Laws Of England* 198 (1769) (emphasis in original). Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor." 1 W. Blackstone, *Commentaries*, at 126 (1765).

"Quickening" (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

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and the law at 3-12 (Cambridge University Press 1988), for a fuller presentation of this history.

[5] 2 H. de Bracton (c. 1250), *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); Fleta (c. 1290), Bk. I, ch. XXIII, "Of Homicide," which appears in Vol. II of the translated works of Fleta, *Publications of the Selden Society*, Vol. 72, pp. 60-61 (1955).

[6] A "misprision," according to Coke, was "a heinous offense under the degree of felony." *Id.* at 139.

[7] Other leading authorities accepted Coke's declaration regarding the criminality of abortion at common law. *See* M. Hale, *Summary of the Pleas of the Crown* 53 (1678); 1 W. Hawkins, *A Treatise of the Pleas of the Crown* 80 (1716); 1 E. East, *A Treatise on the Pleas of the Crown* 227-30 (1803); 1 Wm. Russell, *A Treatise on Crimes and Misdemeanors* 617-18, 796 (1819).

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). This test "was never intended as a judgment that before quickening the child was not a live human being." *Id.* at 816.[8]

The views of Coke and Blackstone were accepted by American courts in the nineteenth century as accurate statements of the criminality of abortion at common law. *See, e.g., Abrams v. Foshee*, 3 Iowa 273, 278-80 (1856); *Smith v. State*, 33 Me. 48, 55 (1851); *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.[9] The courts of at least three States went

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[8] In *R. v. Bourne*, 1 K.B. 687 (1939), Judge Macnaghten observed that "long before then [the enactment of the first English abortion statute in 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." *Id.* at 690. English cases recognizing the criminality of abortion at common law are collected in the Brief *Amicus Curiae* of the American Academy of Medical Ethics.

[9] *Smith v. Gaffard*, 31 Ala. 45, 51 (1857) (*dictum* in slander case); *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 273, 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); *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), *aff'd*, 87 Mo. 110 (1885); *State v. Cooper*, 22 N.J.L. 52, 54-58 (1849) (*dictum* in case upholding indictment charging

further, holding that abortion at any stage of pregnancy was a common law crime. *State v. Reed*, 45 Ark. 333, 334 (1885); *State v. Slagle*, 82 N.C. 630, 632 ((1880); *Mills v. Commonwealth*, 13 Pa. 630, 632-33 (1850). The Maryland Court of Appeals may have had these cases in mind when it reported widespread judicial 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 (1887) (emphasis supplied). *See also Marmaduke v. People*, 45 Colo. 357, 361-62, 101 P. 337, 338 (1909).[10]

These decisions, together with the dozens of abortion prosecutions reported in the digests, lay to rest the doubt expressed in *Roe* that "abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus." 410 U.S. 113, 136 (1973). No American court ever held that abortion after quickening was not a criminal offense.

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defendant with assault); *Evans v. People*, 49 N.Y. 86, 88 (1872) (*dictum* in case reversing conviction under manslaughter statute); *Arnold v. Gaylord*, 16 R.I. 573, 576, 18 A. 177, 178-79 (1889) (*dictum* in loss of services case).

[10] Leading nineteenth-century commentators were in accord. *See Bishop on Statutory Crimes* (2d ed.), § 744, p. 447 (1883); F. Wharton, *American Criminal Law* (6th rev. ed.), §§ 1220-30, pp. 210-18 (1868) (criticizing quickening distinction and concluding that abortion was a crime at common law, regardless of the stage of pregnancy). *See R. v. Wycherly*, 8 Car. & P. 262, 173 Eng. Rep. 486 (N.P. 1838). Bishop and Wharton were "the two most frequently cited American writers" on substantive criminal law. Wm. Burdick, *Law of Crime*, Foreword at v (1946).

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 Rhode Island case of Deborah Allen, who was convicted and punished in 1683 for fornication and "Indeavoringe the dithuchion [destruction] of the Child in her womb." L. Koehler, *A Search For Power: The "Weaker Sex" in Seventeenth-Century New England* at 329 & n. 132 (1980).

Admittedly, there are few reported abortion prosecutions 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* 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. The decision to choose abortion was not a right at common law, in England or America. Abortion was a crime and was punished accordingly.

III. THE NINETEENTH CENTURY ABORTION STATUTES, WHICH ABOLISHED THE COMMON LAW QUICKENING DISTINCTION AND PROHIBITED ABORTION THROUGHOUT PREGNANCY EXCEPT TO SAVE THE LIFE OF THE MOTHER, WERE ENACTED WITH AN INTENT TO PROTECT UNBORN HUMAN LIFE.

The Court's assertions in *Roe* 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" are simply wrong. 410 U.S. at 138-139. By the end of 1849, eighteen of the thirty States had enacted statutes prohibiting abortion,[11] and by the

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[11] *See, generally,* Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment,* 17 St. Mary's L.J. 29, 32 *et seq.* (1985) (hereinafter *Witherspoon*). The following eighteen States adopted abortion statutes before 1850: *Alabama,* Ala. Pen. Code, ch. VI, § 2, p. 238 (Meek Supp. 1841), as amended, Ala. Code, § 3605, p. 690 (1866-67); *Arkansas,* Ark. Rev. Stat., ch. 44, div. III, art. II, § 6 (1838); *Connecticut,* Conn. Pub. Stat., tit. 22, § 14, p. 152 (1821), replaced by Conn. Pub. Acts, ch. LXXI, §§ 1-4, pp. 65-66 (1860), codified at Conn. Gen. Stat., tit. XII, ch. II, §§ 22-25, pp. 248-49 (1866), which made abortion at any stage of pregnancy a crime; *Illinois,* Act of Jan. 30, 1827, § 46, Ill. Rev. Laws, p. 131 (1827), repealed and replaced by an Act of Feb. 26, 1833, § 46, Ill. Rev. Laws, p. 179 (1833), which was replaced by an Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, p. 89 (1867); *Indiana,* Act of Feb. 7, 1835, ch. XLVII, § 3, Ind. Gen. Laws, p. 66 (1835), codified at Ind. Rev. Stat. ch. XXVI, p. 224 (1838), superseded by Ind. Gen. Laws, ch. LXXXI, § 2, pp. 130-31 (1859); *Iowa* (admitted to statehood Dec. 28, 1846), Act of Jan. 25, 1839, § 18, Iowa (Terr.) Stat., 1st Legis., 1st Sess., p. 145 (1838), superseded by an Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, p. 93 (1858), codified at Iowa Rev. Laws, pt. 4, tit. XXIII, ch. 165, art. 2, § 4221, pp. 723-24 (1860), which made abortion at any stage of pregnancy a crime (an Act of Feb. 16, 1843, penalized the intentional destruction of an unborn quick child as manslaughter, Iowa (Terr.) Rev. Stat., ch. 49, § 10, p. 167 (1843)); *Maine,* Me. Rev. Stat., ch. 160, §§ 13-14, p. 686 (1840), recodified, as amended, at Me. Rev. Stat., tit. 11, ch. 124, § 8, p. 685 (1857); *Massachusetts,* Mass. Acts & Resolves, ch. 27, p. 406 (1845), subsequently codified, as amended, at Mass. Gen. Stat., ch. 165, § 9, p. 818 (1860); *Michigan,* Mich. Rev. Stat., ch. 153, §§ 33-34, p. 662 (1846); *Mississippi,* Act of Feb. 15, 1839, tit. III, art. 1, § 9, Miss. Laws, p. 113 (1839), codified at Miss. Code, ch. LXIV, tit. III, § 9, p. 958 (1848), recodified at Miss. Rev. Code, ch. LXIV, art. 173, p. 601 (1857); *Missouri,* Mo. Rev. Stat., art. II, §§ 10, 36, pp. 168-69, 172 (1835), recodified, as amended, at Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, §§ 10, 34, pp. 778-79, 781 (1866); *New Hampshire,* Act of Jan. 4, 1849, N.H. Laws, ch. 743, §§ 1-4, pp. 708-09 (1848), codified at N.H. Comp. Stat., tit. XXVI, ch. 227, §§ 11-14, pp. 544-45 (1853); *New Jersey,* Act of Mar. 1, 1849, N.J. Laws, pp. 266-27 (1849); *New York,* Act of Dec. 10, 1828,

end of the Civil War, twenty-seven of the thirty-six States had done so.[12] By the end of 1868, the year in

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ch. 20, 4, N.Y. Laws, 51st Legis., 2nd Sess., p. 19 (1828), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, p. 661, and tit. VI, § 21, p. 694 (1828-29), as amended by an Act of Apr. 30, 1830, ch. 320, § 58, N.Y. Laws, p. 401 (1830), corified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, pp. 550-51, and pt. IV, ch. I, tit. VI, § 21, pp. 578-79 (1828-35), repealed and replaced by N.Y. Laws, ch. 260, §§ 1-3, 6, pp. 285-86 (1845), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, §§ 20-21, p. 779 (1846), and N.Y. Laws, ch. 22, § 1, p. 19 (1846), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. II, art. I, § 9, p. 750 (1846); *Ohio*, Act. of Feb. 27, 1834, §§ 1, 2, Ohio Laws, pp. 20-21 (1834), codified at Ohio Gen. Stat., ch. 35, §§ 111, 112, p. 252 (1841), as amended by an Act of Apr. 13, 1867, Ohio Laws, pp. 135-36 (1867), which made the death of the woman or of her unborn child at any stage of pregnancy a "high misdemeanor"; *Vermont*, Vt. Acts, No. 33, § 1, pp. 34-35 (1846), codified at Vt. Comp. Stat., tit. XXVIII, ch. 108, § 8, pp. 560-61 (1839-1850), as amended by an Act of Nov. 21, 1867, Vt. Acts, No. 57, §§ 1, 3, pp. 64-66 (1867); *Virginia*, Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860); *Wisconsin*, Wis. Rev. Stat., pt. IV, tit. XXX, ch. 133, § 11, pp. 683-84 (1849), superseded by Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIV, § 11, p. 930, and ch. CLXIX, §§ 58, 59, p. 969 (1858).

[12] In addition to the eighteen States listed in note 11, the following nine States adopted abortion statutes between 1850 and 1865: *California* (admitted to statehood Sep. 9, 1850), Cal. Sess. Laws, ch. 99, § 45, p. 233 (1849-1850), as amended by an Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); *Kansas* (admitted to statehood Jan. 29, 1861), Kan. (Terr.) Stat., ch. 48, §§ 10, 39, pp. 238, 243 (1855), superseded by Kan. (Terr.) Laws, ch. XXVIII, §§ 10, 37, pp. 232, 237 (Acts of 1859), codified at Kan. Comp. Laws, ch. XXXIII, §§ 10, 37, pp. 288, 293 (1862); *Louisiana*, La. Acts, Act. 120, § 24, pp. 132-33 (1855), codified at La. Rev. Stat., Crimes & Offenses, § 24, p. 138 (1856); *Minnesota* (admitted to statehood May 11, 1858), Minn. (Terr.) Rev. Stat. ch. 100, § 11, p. 493 (1851); *Nevada* (admitted to statehood Oct. 31, 1864), Nev. (Terr.) Laws, ch. XXVIII, div. IV, § 42, p. 63 (1861); *Oregon* (admitted to statehood Feb. 14, 1859), Act of Dec. 22, 1853, ch. III, § 13, Or. (Terr.) Stat., p. 187 (1853-54), superseded by an Act of Oct. 19, 1864, Or. Gen. Laws, Crim. Code, ch. 43, § 509, p. 528 (1845-1864); *Pennsylvania*, Pa. Laws, No. 374, tit. VI, §§ 87, 88, pp. 404-05 (1860); *Texas*, Act of Feb. 9, 1854, § 1, Tex. Gen. Laws, ch. XLIX,

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,[13] together with six of the ten federal territories.[14]

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§ 1, p. 58 (1854), superseded by an Act of Aug. 28, 1856, codified at Tex. Pen. Code of 1857, arts. 531-36, pp. 103-04, as amended by an Act of Feb. 12, 1858, ch. 121, pt. I, tit. 17, ch. 7, Tex. Gen. Laws, p. 172 (1858), codified at Tex. Gen. Stat. Dig., ch. VII, articles 531-536, p. 524 (Oldham & White 1859); *West Virginia* (admitted to statehood June 20, 1863), *see* Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860), and W. Va. Const., art. XI, ¶ 8 (1863).

[13] In addition to the twenty-seven States listed in notes 11 and 12, the following three States adopted abortion statutes beween 1865 and 1868: *Florida*, Act of Aug. 6, 1868, Fla. Acts, 1st Sess., ch. 1637 [No. 13], sub. ch. III, § 11, and sub. ch. VIII, § 9 (1868), pp. 64, 97 (1868); *Maryland*, Act of Mar. 20, 1867, Md. Laws, ch. 185, § 11, pp. 342-43 (1867), repealed and re-enacted by an Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, p. 315 (1868), codified at Md. Code, art. XXX, § 1, pp. 105-06 (1868 Supp.); *Nebraska* (admitted to statehood Mar. 1, 1867), Act of Feb. 12, 1866, Neb. (Terr.) Stat., pt. III, ch. IV, § 42, pp. 598-99 (1866-67). Of the thirty States ratifying the Fourteenth Amendment as of July 21, 1868, all but Georgia (1876), North Carolina (1881), Rhode Island (1896), South Carolina (1883) and Tennessee (1883) had enacted such statutes.

[14] The following territories adopted statutes restricting abortion by the end of 1868: *Arizona*, Ariz. (Terr.) Code, ch. X, div. 5, § 45, p. 54 (1865); *Colorado*, Colo. (Terr.) Laws, div. 4, § 42, pp. 296-97 (1861); Colo. (Terr.) Rev. Stat., ch. XXII, § 42, p. 202 (1868); *Idaho*, Act of Feb. 4, 1864, ch. IV, § 42, Idaho (Terr.) Laws, p. 443 (1863-64), repealed and re-enacted by an Act of Dec. 21, 1864, ch. III, pt. IV, § 42, Idaho (Terr.) Laws, p. 305 (1864); *Montana*, Mont. (Terr.) Laws, Criminal Practice Acts, ch. IV, § 41, p. 184 (1864); *New Mexico*, N.M. (Terr.) Laws, No. 28, ch. 3, § 11, p. 88 (1854), codified at N.M. Rev. Stat., art. XXIII, ch. LI, § 11, p. 320 (1865); *Washington*, Wash. (Terr.) Stat., ch. II, §§ 37, 38, p. 81 (1854).

These enactments are significant because laws passed by territorial legislatures were subject to Congressional annulment. U.S. Const., art. IV, § III, cl. 2; *National Bank v. County of Yankton*, 101 U.S. 129, 133 (1880). No territorial abortion statute was ever

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).

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. *Id.* at 151-52. Three reasons were offered in support of this conclusion, none of which withstands scrutiny.

First, 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." *Id.* at 151 & n.48, citing *State v. Murphy*, 27 N.J.L. 112 (1858). The Court not only misapprehended the holding in the single case cited for

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nullified by Congress, including the 39th Congress which approved the Fourteenth Amendment.

this proposition,[15] but also overlooked twenty-five decisions from sixteen jurisdictions expressly affirming that their nineteenth century statutes were intended to protect unborn human life,[16] and twenty-six other decisions from seventeen additional jurisdictions strongly implying the

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[15] The Court's reading of *Murphy* appears to be at odds with the New Jersey Supreme Court's understanding of its earlier opinion. *See State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956), and *Gleitman v. Cosgrove*, 49 N.J. 22, 41, 227 A.2d 689, 699 (1967) (Francis, J., concurring).

[16] *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); *Hall v. People*, 119 Colo. 141, 143, 201 P.2d 382, 383 (1948) ("offense described by the statute . . . is the criminal act of destroying the fetus at any time before birth"); *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*, 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, 892 (1953); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913) (statute "carries the facial evidence of the legislative intent to cover the criminal machinations and devices of the abortionist in order to protect the pregnant woman and the unborn child"); *State v. Watson*, 30 Kan. 281, 284, 1 P. 770, 771-72 (1883); *Rosen v. Louisiana Board of Medical Examiners*, 318 F. Supp. 1217, 1222-32 (E.D. La. 1970) (three-judge court), *vacated and remanded*, 412 U.S. 902 (1973) (interpreting Louisiana law); *State v. Siciliano*, 21 N.J. 249, 257-58, 121 A.2d 490, 495 (1956); *State v. Gedicke*, 43 N.J.L. 86, 89-90, 96 (1881); *People v. Lovell*, 40 Misc. 2d 458, 459, 242 N.Y.S.2d 958, 959 (1963); *State v. Hoover*, 252 N.C. 113, 133, 135, 113 S.E.2d 281, 283 (1960); *State v. Powell*, 181 N.C. 515, 106 S.E. 133 (1921); *but see State v. Jordon*, 227 N.C. 579, 580, 42 S.E.2d 674 (1947) (*contra* regarding pre-quickening abortion); *State v. Tippie*, 89 Ohio Stat. 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 Or. 121, 131-32, 167 P. 1019, 1022-23 (1917); *State v. Farnam*, 82 Or. 211, 217, 161 P. 417, 419 (1916) (pregnant woman could not lawfully consent to the homicide of her unborn child); *State v. Atwood*, 54 Or. 526, 531, 102 P. 295, 297 (1909), *aff'd on reh.*, 54 Or. 526, 104 P. 195 (1909); *State v. Steadman*, 214 S.C. 1, 7-8, 51 S.E.2d 91, 93 (1948) (statute prohibiting pre-quickening abortion was intended to change the common law rule and prevent "the destruction of a child before it has quickened"); *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.

same.[17] In every decade since the 1850's, there has been

67, 77, 84 P.2d 357, 361 (1938). *See also People v. Belous*, 71 Cal. 2d 954, 978, 458 P.2d 194, 209, 80 Cal. Rptr. 354, 369 (1969) (Burke, J., dissenting) (abortion statute "was designed to protect not only the mother's life but also that of the child").

[17] *McClure v. State*, 214 Ark. 159, 170, 215 S.W.2d 524, 530 (1949); *Scott v. State*, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955); *State v. Magnell*, 19 Del. (3 Penne.) 307, 308, 51 A. 606 (1901); *Urga v. State*, 155 Fla. 86, 90, 20 So.2d 685, 687 (1944) (approving jury instruction that "[t]he gist of the statutory offense is the intent to terminate the creation by nature of a child and the intent to bring about the miscarriage of a woman"); *Weightnovel v. State*, 46 Fla. 1, 7-8, 35 So. 856, 858-59 (1903); *but see Walsingham v. State*, 250 So.2d 857, 861 (Fla. 1971) ("[p]rotection of the mother from unsafe surgical procedures may well have been in the legislators' minds when they enacted the abortion statutes in 1868"); *Territory v. Young*, 37 Haw. 150, 159-60 (1945), *appeal dismissed*, 160 F.2d 289 (9th Cir. 1947); *Earll v. People*, 99 Ill. 123, 132 (1881) (abortion "a grave crime, involving the destruction of an unborn child"); *State v. Moore*, 25 Iowa 128, 131-32, 135-36 (1866); *Abrams v. Foshee*, 3 Iowa 273, 278 (1856); *State v. Rudman*, 126 Me. 177, 180, 136 A. 817, 819 (1927) (abortion law intended "to be an express and absolute prohibition" of "the destruction of unborn life for reasons . . . other than necessity to save the mother's life"); *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, 293 (1886); *People v. Olmstead*, 30 Mich. 431, 432-33 (1874); *but see People v. Nixon*, 42 Mich. App. 332, 335-40, 201 N.W.2d 635, 639-41 (1972), *on remand*, 50 Mich. App. 39, 212 N.W.2d 607 (1973) (*contra* regarding pre-quickening abortion); *Smith v. State*, 112 Miss. 802, 810, 73 So. 793, 794 (1916), *overruled on other grounds*, *Ladnier v. State*, 155 Miss. 348, 124 So. 432 (1929); *Hans v. State*, 147 Neb. 67, 72, 22 N.W.2d 385, 389 (1946), *on rehearing*, 147 Neb. 73, 25 N.W.2d 35 (1946); *Bennett v. Hymers*, 101 N.H. 483, 484-85, 147 A.2d 108, 109-110 (1958); *but see State v. Millette*, 112 N.H. 458, 464, 299 A.2d 150, 154 (1972) ("[e]arly proscription of the practice of abortion primarily sought to protect pregnant women from risks present in all surgical procedures at that time"); *State v. Bassett*, 26 N.M. 477, 480, 194 P. 867, 868 (1921); *Railing v. Commonwealth*, 110 Pa.St. 100, 104, 1 A. 314, 315 (1885); *Commonwealth v. W.*, 3 Pittbs. R. 462, 470-71 (1871) (charge to jury that abortion is "a crime against nature, closely allied to murder, and . . . deserving of severe and ignominious punishment"); *Sylvia v. Gobeille*, 101 R.I. 76, 77-78, 220 A.2d 222, 223 (1966); *State v. Crook*, 16 Utah 212,

at least one American state court decision recognizing this purpose.

In 1851, the Supreme Court of Maine explained that under its 1840 abortion statute, which abolished the common law quickening distinction, "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 1859, 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 1868, the Supreme Court of Iowa, affirming the defendant's conviction of murder for causing the death of a woman by an illegal abortion under an 1858 statute, condemned abortion as "an act highly dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child." *State v. Moore*, 25 Iowa 128, 136 (1868). 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 (1872).

In 1881, the Supreme Court of New Jersey declared that its original 1849 abortion statute had been amended

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216-17, 51 P. 1091, 1093 (1898); *Doe v. Rampton*, No. C-234-70, Slip. Op. at 7-8 (D. Utah 1971) (three-judge court), *vacated and remanded*, 410 U.S. 950 (1973) (interpreting Utah law); *Hatchard v. State*, 79 Wis. 357, 360, 48 N.W. 380, 381 (1891); *State v. Dickinson*, 41 Wis. 299, 309 (1877); *but see Foster v. State*, 182 Wis. 298, 196 N.W. 233 (1923) (*contra* regarding pre-quickening abortion but acknowledging that "[i]n a strictly scientific and physiological sense there is life in an embryo from the time of conception"). *See also Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943), where the District of Columbia Court of Appeals observed that "abortion is generally regarded as heinous in character," and held that "[t]he performance of an abortion for any of these reasons [*i.e.*, to avoid social disgrace or poverty or illegitimacy] is . . . offensive to our moral conception . . . ." *Id.* at 83.

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). 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 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.

Worthington v. State, 92 Md. 222, 237-38, 48 A. 355, 356-57 (1901). The court characterized abortion as an "abhorrent crime," which "can only be efficiently dealt with by severity in the enactment and administration of the law punishing the attempt upon the life of the unborn child." *Id.* at 38, 48 A. at 357.

In 1916, the Alabama Court of Appeals held that the "manifest purpose" of its abortion statute, first adopted in 1841, 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). 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 case decided in 1917, 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.

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

In 1921, the New Mexico Supreme Court described the offense of abortion under its statute, first enacted as a territorial law in 1854 and later codified in 1915, as "the *murder* of a quick child, still in its womb, accomplished by means of the use of drugs or instruments upon the

mother." *State v. Bassett*, 26 N.M. 477, 480, 194 P. 867, 868 (1921) (emphasis supplied).[18]

In 1934, the Supreme Court of Idaho determined that the state abortion statute, first adopted in 1864, 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).

In 1942, the Supreme Court of Georgia declared that in enacting its 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 1949, the Virginia Supreme Court of Appeals stated that its abortion statute—enacted in 1848 and codified in 1849—"was passed, not for the protection of the woman, but for the protection of the unborn child . . . ." *Miller v. Bennett*, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949).

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 defendant's argument that the decedent'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.

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[18] Seventeen States and the District of Columbia had statutes denominating acts causing the death of an unborn child (an abortion or other criminal act) as "manslaughter," "murder," or "assault with intent to murder." The statutes are collected in *Witherspoon*, 17 St.Mary's L.J. at 44 & n. 47.

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). And in 1963, a New York court observed that the State's abortion legislation was "designed to protect the natural right of unborn children to life." *People v. Lovell*, 40 Misc. 458, 459, 242 N.Y.S.2d 958, 959 (1963).

State court decisions affirming the protection of unborn human life as one purpose of their abortion statutes continued to be handed down until *Roe v. Wade*. In the fifteen months before *Roe* was decided, 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.[19]

In sum, at least fifty-seven decisions from thirty-nine States recognized that their nineteenth century abortion statutes were enacted with an intent to protect unborn human life. Given this wealth of case authority, dating back more than 120 years before *Roe v. Wade* was decided, the Court's conclusion in *Roe* 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" is insupportable.

As a second reason offered in support of its conclusion that the nineteenth century abortion statutes were intended solely to promote maternal health and not to protect prenatal life, the Court in *Roe* observed that "[i]n

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[19] *See Nelson v. Planned Parenthood Center of Tucson, Inc.*, 19 Ariz. App. 142, 144, 505 P.2d 580, 582 (1973), *modified on rehearing* pursuant to *Roe*; *Cheaney v. State*, 259 Ind. 138, 140-47, 285 N.E. 2d 265, 267-70 (1972); *Sasaki v. Commonwealth*, 485 S.W.2d 897, 901-03 (Ky. 1972), *vacated and remanded*, 410 U.S. 951 (1973); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *State v. Munson*, 86 S.D. 663, 667-72, 201 N.W.2d 123, 125-26 (1972); *vacated and remanded*, 410 U.S. 950 (1973); *Thompson v. State*, 493 S.W.2d 913, 917-20 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973).

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 nineteen States enacted statutes which expressly incriminated the woman's participation in her own abortion.[20] Although no prosecutions were reported under any of these statutes, their enact-

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[20] *Arizona*, Ariz. Pen. Code, § 455, p. 711 (1887), repealed and re-enacted, Ariz. Pen. Code, § 244, p. 1228 (1901); *California*, Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); Act of Feb. 14, 1872, codified at Cal. Pen. Code, § 275, p. 69 (1872); *Connecticut*, Conn. Pub. Acts, ch. LXXI, § 3, pp. 65-66 (1860), codified at Conn. Gen. Stat., tit. XII, ch. II, § 24, p. 249 (1886); *Delaware*, Act of July 6, 1972, § 1, Del. Laws, ch. 497, pp. 1611, 1664 (1972), Del. Code Ann., tit. 11, § 652 (1974 Rev.); *Idaho*, Idaho Rev. Stat., § 6795 (1887); *Indiana*, Ind. Laws, ch. XXXVII, § 23, p. 177 (1881), codified at Ind. Rev. Stat., § 1924, p. 358 (1881); *Minnesota*, Act of Mar. 10, 1873, Minn. Laws, ch. IX, § 3, p. 118 (1873); codified at Minn. Gen. Stat., ch. 94, § 18, p. 885 (1878), recodified at Minn. Gen. Stat., § 6546, p. 1751 (1894); *Montana*, Mont. Pen. Code, § 481 (1895), re-enacted and recodified at Mont. Rev. Code, § 94-402 (1947); *Nevada*, Act of Feb. 16, 1869, ch. XXII, § 1, Nev. Laws, pp. 64-65 (1869), superseded by an Act of Mar. 17, 1911, ch. 13, § 140 (Senate Bill 124, p. 43), codified at Nev. R.L. § 6405, p. 1836 (1912), recodified at Nev. Rev. Stat., § 200.220 (1963); *New Hampshire*, Act of Jan. 4, 1849, N.H. Laws, ch. 743, § 4, p. 709 (1848), codified at N.H. Comp. Stat., tit. XXVI, ch. 227, §§ 11-14, pp. 544-45 (1853); *New York*, N.Y. Laws, ch. 260, § 3, p. 286 (1845), codified at N.Y. Rev. Stat., pt. IV, ch. I, tit. VI, § 21, p. 779 (1846), superseded by N.Y. Laws, ch. 181, § 2, p. 509 (1872), codified at N.Y. Rev. Stat. pt. IV, ch. I, tit. II, art. I, sec. 10, p. 933 (1875); *North Dakota*, Dak. Pen. Code, § 338, p. 459 (1877), recodified at N.D. Rev. Codes, § 7178, p. 1272 (1895); *Oklahoma*, Okla. Stat., § 2188 (1890), codified at Okla. Rev. Laws, § 2437, p. 604 (1910); *South Carolina*, Act of Dec. 24, 1883, No. 354, § 3, S.C. Acts, p. 548 (1883), codified at S.C. Rev. Stat., Crim. Stat., § 138, p. 310 (1893); *South Dakota*, Dak. Pen. Code, § 338, p. 459 (1877), recodified at S.D. Ann. Stat., § 7798, p. 1919 (1899); *Utah*, Utah. Rev. Stat., § 4227, p. 903 (1898), recodified at Utah Code Ann., § 76-2-2 (1953); *Washington*, Wash. Laws, ch. 249, § 197, p. 948 (1909), codified at Rev. Code Wash., § 9.02.020 (1961); *Wisconsin*, Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIX, § 59, p. 969 (1858); *Wyoming*, Wyo. Laws, ch. 73, § 32, p. 131 (1890), codified as Wyo. Stat., § 6-78 (1957).

ment certainly casts doubt on the conclusion that women possessed a legal "right" to choose abortion, or that safeguarding maternal health was the sole intention of the lawmakers.

The majority of States did not criminalize the conduct of a woman who attempted to abort herself or who submitted to an abortion performed upon her by another. Women were exempt from criminal prosecution in these States, not because protection of women was the sole purpose of these laws, but for other reasons.

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 Or. 211, 217, 161 P. 417, 419 (1916). The woman was seen as a second victim of the abortion. *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864). Moreover, conviction of the abortionist often depended upon the testimony of the woman who underwent the abortion. Absent a grant of immunity, however, her testimony could not be compelled if she were regarded as an accomplice in the offense. And in most States, a criminal conviction cannot be based on the uncorroborated testimony of an accomplice. Thus, for reasons of both principle and practicality, the woman who underwent an abortion was considered a victim of the offense.[21]

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. From this premise, the Court drew the conclusion 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. The Court's premise, as well as its conclusion, was flawed.

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[21] *See, Annot., Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testmony*, 34 A.L.R.3d 858 (1970).

As of late 1868, thirty of the then thirty-seven States had enacted statutes restricting statutes. All but three of those States—Arkansas, Minnesota and Mississippi—prohibited abortion 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 abortion equally, regardless of the stage of pregnancy.[22] By the end of 1883, twenty-seven of the thirty-six States that had enacted abortion statutes had abolished any distinction between pre-quickening and post-quickening abortions in determining the range of possible penalties.[23]

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[22] The statutes are set forth in notes 11-13, *supra*.

[23] *Alabama*, Ala. Code, § 3605, p. 690 (1866-67); *California*, Act of May 20, 1861, Cal. Stat., ch. DXXI, p. 588 (1861); *Colorado*, Colo. (Terr.) Rev. Stat., ch. XXII, § 42, p. 202 (1868); *Connecticut*, Conu. Gen. Stat., tit. XII, ch. II, §§ 22-25, pp. 248-49 (1866); *Delaware*, Act of Feb. 13, 1883, ch. 226, §§ 1, 2, Del. Laws, p. 522 (1883), codified at Del. Rev. Stat., p. 930 (1893); *Georgia*, Act of Feb. 25, 1876, ch. CXXX, §§ II, III, Ga. Laws, p. 113 (1876), codified at Ga. Code, § 4337 (a)-(c), p. 1143 (1882); *Illinois*, Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, p. 89 (1867); *Indiana*, Ind. Gen. Laws, ch. LXXXI, pp. 130-31 (1859); *Iowa*, Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, p. 93 (1858), codified at Iowa Rev. Laws, pt. 4, tit. XXIII, ch. 165, art. 2, § 4221, pp. 723-24 (1860); *Louisiana*, La. Rev. Stat., Crimes & Offenses, § 24, p. 138 (1856); *Maine*, Me. Rev. Stat., tit. 11, ch. 124, § 8, 685 (1857); *Maryland*, Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, p. 315 (1868), codified at Md. Code, art. XXX, § 1, pp. 105-06 (1868 Supp.); *Massachusetts*, Mass. Gen. Stat., ch. 165, § 9, p. 818 (1860); *Minnesota*, Act of Mar. 10, 1873, Minn. Laws, ch. IX, §§ 1-3, pp. 117-18 (1873), codified at Minn. Gen. Stat., ch. 94, §§ 16-18, pp. 884-85 (1878); *Nebraska*, Neb. (Terr.), Stat., pt. III, ch. IV, 42, pp. 598-99 (1866-67); *Nevada*, Nev. (Terr.) Laws, ch. XXVIII, div. IV, § 42, p. 63 (1861); *New Jersey*, Act of Mar. 1, 1849, N.J. Laws, pp. 266-67 (1849); *North Carolina*, Act of Mar. 12, 1881, ch. 351, N.C. Laws, pp. 584-85 (1881), codified at N.C. Code, §§ 975, 976, p. 399 (1883); *Ohio*, Act of Apr. 13, 1867, Ohio Laws, pp. 135-36 (1867); *Oregon*, Or. Gen. Laws, Crim. Code, ch. 43, § 509, p. 528 (1845-1864); *South Carolina*, Act of Dec, 24, 1883, No. 354, §§ 1-3, S.C. Acts, pp. 547-48 (1883), codified at S.C. Rev. Stat., Crim. Law, §§ 122, 137, 138, pp. 305, 309-10 (1893); *Tennessee*, Act of Mar. 26, 1883, ch. CXL,

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*, 17 St. Mary's L.J. at 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.[24] As Witherspoon has observed, "[i]f the

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Tenn. Acts, pp. 188-89 (1883), codified at Tenn. Code, §§ 5371, 5372, p. 1031 (Milliken & Vertee's 1884); *Texas*, Tex. Pen. Code, arts. 531-36, pp. 103-04 (1857), as amended by an Act of Feb. 12, 1858, ch. 121, pt. I, tit. 17, ch. 7, Tex. Gen. Laws, p. 172 (1858), corifigd at Tex. Gen. Stat. Dig., ch. VII, arts. 531-36, p. 524 (Oldham & White 1859); *Vermont*, Act of Nov. 21, 1867, Vt. Acts, No. 57, § 1, pp. 64-65 (1867); *Virginia*, Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), codified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860); *West Virginia*, Act of Mar. 14, 1848, ch. 120, tit. II, ch. III, § 9, Va. Acts, p. 96 (1847-48), corified, as modified, at Va. Code, tit. 54, ch. CXCI, § 8, p. 724 (1849), recodified, Va. Code, tit. 54, ch. CXCI, § 8, p. 784 (1860), W. Va. Const., art. XI ¶ 8 (1863); *Wisconsin*, Wis. Rev. Stat., pt. IV, tit. XXVII, ch. CLXIV, § 11, p. 930, and ch. CLXIX, §§ 58, 59, p. 969 (1858).

[24] In addition to the statutes from Georgia, Maine, Minnesota, Ohio, Oregon, South Carolina, Tennessee and Wisconsin listed in n.23 may be added the following: *Arkansas*, Ark. Rev. Stat. ch. 44, div. III, art. 2, § 6 (1838); Act of Nov. 8, 1875, § 1, Ark. Acts., No. IV, p. 5 (1875); *Florida*, Act of Aug. 6, 1868, Fla. Acts, 1st Sess., ch. 1637 [No. 13], sub. ch. III, § 11, sub. ch. VIII, § 9, pp. 64, 97 (1868); *Indiana*, Ind. Rev. Stat. § 1923, p. 358 (1881); *Michigan*, Mich. Rev. Stat., ch. 153, §§ 33-34, p. 662 (1846); *Missouri* Mo. Gen. Stat., pt. IV, tit. XLV, ch. 200, § 10, 34 pp. 778-79, 781 (1866); *Nebraska*, Neb. Gen. Stat., ch. 58, §§ 6, 39, pp. 720, 727-28 (1873); *New Jersey*, Act of Mar. 25, 1881, N.J. Laws, ch. CXCI, p. 240 (1881); *New York*, Act of July 26, 1881, N.Y. Laws, ch. 676 (N.Y. Pen. Code), §§ 191, 194, 294, 295, pp. 45-46, 72-73 (1881), 3 N.Y. Rev. Stat. at 2478-80 (1881); *Pennsylvania*, Pa. Laws, No. 374, tit. VI, §§ 87, 88, p. 404-05 (1860); *Texas*, Tex. Pen. Code, arts. § 531, 535, pp. 103-04 (1857); *Virginia*, Act of Mar. 14, 1878, Va. Acts, ch. 311, (sub.) ch. II, § 8, pp. 281-82 (1878), codified at Va. Code, § 3670, p. 879 (1887); *West Virginia*, W. Va. Acts, ch. CXVIII, § 8, p. 335 (1882), codified at W. Va. Code ch. CXLIV, § 8,

state . . . 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. "The only explanation of this element of these statues," he concludes, "is that the enacting legislatures attributed value to the life of the unborn child." *Id.*

Abortion *before* quickening may not have been criminal at common law. And some of the early American abortion statutes did distinguish between pre- and post-quickening abortions. But this distinction simply reflected the lack of scientific knowledge regarding the nature of human reproduction, and cannot be regarded as a repudiation of the theory that life begins at conception or an implicit acknowledgment that abortion statutes were enacted *solely* to safeguard women from dangerous surgical procedures:

> Only in the second quarter of the nineteenth century did biological research advance to the point of understanding the actual mechanism of human reproduction and of what truly comprised the onset of gestational development. The nineteenth century saw a gradual but profoundly influential revolution in the scientific understanding of the beginning of individual mammalian life. Although sperm had been discovered in 1677, the mammalian egg was not identified until 1827. The cell was first recognized as the structural unit of organisms in 1839, and the egg and sperm were recognized as cells in the next two decades. These developments were brought to the attention of the American state legislatures and public by those professionals most familiar with their unfolding import—physicians. It was the new research findings which persuaded doctors that the old "quickening" distinction embodied in the common and some statutory law was unscientific and indefensible.[25]

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p. 677 (1890). Of these States, only Arkansas, Florida, Michigan, Missouri, New York and Pennsylvania also required proof of quickening.

[25] *The Human Life Bill: Hearings on S. 158 Before the Subcommittee on Separation of Powers of the Senate Committee on the*

As this Court noted in *Roe*, at 141-42, the newly-formed American Medical Association relied upon this greater understanding of human development in promoting legislation extending the protection of the law to all unborn children.

The foregoing review of the nineteenth century abortion statutes and the scores of cases interpreting them leads to one inescapable conclusion: they were enacted with an intent to protect unborn human life.

IV. IN VIEW OF THE LONG-STANDING CONDEMNATION OF ABORTION IN ENGLISH AND AMERICAN COMMON LAW, AND THE OVERWHELMING EVIDENCE THAT NINETEENTH CENTURY ABORTION STATUTES WERE ENACTED WITH AN INTENT TO PROTECT UNBORN HUMAN LIFE, THERE IS NO HISTORICAL BASIS FOR CONCLUDING THAT EITHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OR THE RIGHT OF PRIVACY WHICH HAS BEEN DERIVED THEREFROM ENCOMPASSES A FUNDAMENTAL RIGHT TO CHOOSE ABORTION.

The decision to choose abortion cannot be regarded as a fundamental right unless 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.[26] Justice Rehnquist noted the

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Judiciary, 97th Cong., 1st Sess. 474 (statement of Victor Rosenblum, Professor of Law, Northwestern University). *See also* Dellapenna, *The History of Abortion: Technology, Mortality, and Law*, 40 U. Pitt. L. Rev. 359, 402-04 (1979).

[26] Although, prior to *Roe*, thirteen States had relaxed their restrictions on abortion and had adopted some version of § 230.3 of the Model Penal Code (*Roe v. Wade*, 410 U.S. at 140 & n. 37) and four other States allowed abortion on demand for part of the gestational period, a clear majority of the States continued to prohibit all abortions except those necessary to save the life of the mother. *See* Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157, 158-61, 255-59 (Winter 1990). And no State allowed unrestricted abortion through-

significance of this consistent and widespread condemnation of abortion in his dissent in *Roe*:

> 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 ranged 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 thought that they were incorporating a right to choose abortion into the Constitution. Under this Court's analysis in the Due Process Clause cases, culminating in *Bowers v. Hardwick* and *Michael H. v. Gerald D.*, the decision to choose abortion cannot be considered a "fundamental right." Accordingly, *Roe v. Wade* should be overruled and legislative authority over abortion should be returned to the States.[27]

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out pregnancy, which the Court, because of its expansive definition of "health" in *Doe v. Bolton*, 410 U.S. 179, 192 (1973), effectively mandated for every State. *See, e.g., Margaret S. v. Edwards*, 488 F.Supp. 181, 196 (E.D. La. 1980), and *Schulte v. Douglas*, 567 F.Supp. 522 (D. Neb. 1981), *aff'd per curiam, sub nom. Women's Servs., P.C. v. Douglas*, 710 F.2d 465 (8th Cir. 1983), striking down statutes intended to limit post-viability abortions. In *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3rd Cir. 1984), *aff'd*, 476 U.S. 747 (1986), the Third Circuit, noting that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus," stated in *dicta* that had Pennsylvania attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have violated *Doe v. Bolton*, 410 U.S. 179, 192 (1973). *Id.* at 298-99.

[27] Although the overruling of *Roe* would allow States to regulate or prohibit abortion, it would not restore the *status quo ante* of January 22, 1973. Thirty States have expressly repealed their pre-*Roe* laws, and several others may have repealed them by implication. None of these laws would be revived by an overruling decision. New laws would have to be enacted, as they have been

CONCLUSION

For the foregoing reasons, the judgment in No. 91-744 should be affirmed, and the judgment in No. 91-902 should be reversed.

Respectfully submitted,

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in Louisiana and Utah. Moreover, many of the unrepealed pre-*Roe* laws allow abortion on demand throughout at least some stage of pregnancy (Alaska, Hawaii, New York) or under a very broad range of circumstances, including mental health (California, Colorado, Delaware, Kansas, Massachusetts (by judicial decision) and New Mexico). Furthermore, several States have recognized a right to abortion (or public funding) on state constitutional grounds. *See, e.g., Committee to Defend Reproductive Rights v. Myers*, 29 Cal.3d 252, 172 Cal.Rptr. 866, 625 P.2d 779 (1981); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); *Moe v. Secretary of Admin. and Finance*, 382 Mass. 629, 417 N.E.2d 387 (1981); *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); *Beecham v. Leahy*, 130 Vt. 164, 287 A.2d 836 (1972). Thus, the immediate impact of an overruling decision upon abortion practice in the overwhelming majority of the States would be modest and readily ascertainable. *See* Linton, *Enforcement of State Abortion Statutes after Roe: A State-by-State Analysis*, 67 U. Det. L. Rev. 157 (1990).