Nos. 91-744 and 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 THE AMERICAN ACADEMY OF MEDICAL ETHICS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND CROSS-PETITIONERS ROBERT P. CASEY, ET AL.

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SUMMARY OF ARGUMENT

In order to determine the proper standard of review with which to judge the Pennsylvania statutes in issue in this case, the Court must reconsider the continuing validity of *Roe v. Wade*, 410 U.S. 113 (1973), as the source of the standard. The majority in *Roe*, following established traditions of constitutional interpretation, analyzed the case through extended discussion of the history of abortion laws. Influenced by deliberately distorted presentations of that history, the Court erroneously concluded that abortion was not a common law crime. The Court's historical errors caused it to break sharply with the traditional values of the common law and our Constitution.

The historical record shows that abortion and other killings of unwanted children were condemned by all respected legal authorities in England from the start of the common law, and those laws were applied with full rigor in the United States during the colonial era. Early on, infanticide was frequently punished; when, with new medical technologies, abortion became more common than infanticide, legal institutions turned their attention from infanticide to abortion.

The common law has always socially controlled abortion in the interest of mother and child, interests that changed as medical technologies developed. Changing abortion technologies affected the desire of some mothers for the procedure while developing medical knowledge reinforced a growing certainty that a conceptus is a person from early stages of gestation, leading to a widely shared consensus in the nineteenth century on the moral worth of the unborn child. The consensus was then shared by even the most militant feminists and opposed only by professional abortionists.

Legislatures are better at assembling the information necessary to assess the import of the changing technologies and at balancing the interests created or reinforced by those technologies. Courts are ill-suited to be boards of review for the implications of changing medical technologies. In the present flux, recourse to states as labora-

tories for social policies is particularly appropriate. The Court should uphold all provisions of the Pennsylvania statute and should overrule *Roe v. Wade*.

ARGUMENT

I. THE CONSTITUTIONAL STATUS OF ABORTION MUST BE DETERMINED BY EXAMINING THE DEEPLY-ROOTED TRADITIONS OF ANGLO-AMERICAN SOCIETY AS EMBODIED IN THE COMMON LAW AND THE CONSTITUTION

The rule of law requires judicial decisions to have a basis other than the judge's personal predilections. We find that basis in historical traditions regarding the relevant behavior. *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991); *Burnham v. Superior Court*, 110 S. Ct. 2105 (1990); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 400-05 (1819). Even those who reject the original intent as controlling constitutional interpretation have sought to anchor constitutional decisions in evolving national traditions.[1] Only by denying the relevance of anything other than one's own personal vision of a better society can one deny the relevance of historical traditions to constitutional interpretation.

The historical record on abortion is sparse, but the record is clear that abortion and other killings of unwanted

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[1] See, e.g., *Coker v. Georgia*, 433 U.S. 584, 592, 595-97 (1977): A. Bickel, *The Least Dangerous Branch* 109-10 (2d ed. 1986); L. Tribe & M. Dorf, *On Reading the Constitution* 13-19, 33, 52-53, 59-60, 70-71, 97-99 (1991). Appeal to an aspirational tradition is at least implicit in appeals to community for social and legal norms if the "community" appealed is to refer to any actual community, as opposed to an "ideal community" wholly a product of one's own imagination. *See, e.g.*, R. Dworkin, *Law's Empire* (1986); Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 Yale L.J. 1013 (1984); R. Cover, *Violence and the Word*, 95 Yale L.J. 1601 (1986); P. Kahn, *Community in Contemporary Constitutional Theory*, 99 Yale L.J. 1 (1989). *See also* O. W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897): "Law is the witness and external deposit of our moral life."

children were always prohibited in the common law tradition, and, as this Court itself recognized in *Roe v. Wade*, 410 at 159, abortion has always been and now is treated differently from other issues of reproductive privacy. Because of this difference, the precise historical tradition toward abortion alone is relevant to the constitutional power of states to regulate or prohibit abortion.

II. *ROE v. WADE*, THROUGH ERRONEOUS READING OF THE HISTORICAL STATUS OF ABORTION UNDER THE COMMON LAW, BROKE SHARPLY WITH THE TRADITIONAL VALUES OF THE COMMON LAW AND OUR CONSTITUTION

More than half of the majority opinion in *Roe*, 410 at 129-152, 156-162, was given to a history of abortion, used to inform the values at stake in the controversy. The majority concluded that "it now appear[s] doubtful that abortion was ever . . . a common law crime", 410 U.S. at 136, and that American abortion statutes were not generally adopted until after the Fourteenth Amendment was adopted, *id.* at 139. Both conclusions are wrong.

Extensive research since *Roe* has found indictments or appeals of felony for abortions dating back eight centuries.[2] This evidence indicates that abortion, even before quickening, was a crime at common law, a conclusion that was unquestioned (at least for abortions after quickening) until abortion activists adopted a deliberate strategy of challenging it. The nineteenth-century abor-

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[2] Many of the indictments and appeals cited in this brief have not been published except as appendixes to briefs similar to this. In addition to my research, Mr. Philip Rafferty of the Los Angeles bar made his extensive research available, as have Dr. J.H. Baker of Cambridge University and Dr. John Keown of the University of Leicester. *See generally* J. Keown, *Abortion, Doctors and the Law* (1988). Dr. Baker's text, *An Introduction to English Legal History* (3d ed. 1990), is a leading text on the topic.

tion statutes served to affirm social policy in the face of technologically-based social change.

A. Courts, from *Roe v. Wade* on, Have Relied on a Deliberately Distorted History of Abortion

The majority in *Roe* relied uncritically on the work of Cyril Means, Jr., who was then general counsel for the National Association for the Repeal of Abortion Laws (NARAL, now the National Abortion Rights action League).[3] Means' distorted doctrinal history of abortion precedents and statutes ignored the larger social and technological context in which those decisions were grounded.[4] Abortion advocates now usually rely on the work of historian James Mohr, as expressed in the "Historians' Briefs" in *Webster v. Reproductive Health Services* and in this case.[5]

These histories of abortion are advocacy pieces with a highly selective examination of the evidence to support a partisan and distorted history of abortion. Mohr and the authors of the "Historians' Briefs" view the law of abor-

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[3] C. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) ("Means II"); C. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) ("Means I"). The majority cited Means seven times for the history of abortion—without noting that he was the NARAL's general counsel. On Mean's relation to abortion advocacy groups, see M. Faux, *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal* 289-92, 297-98 (1988).

[4] *See generally* J. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. Pitt. L. Rev. 359 (1979).

[5] J. Mohr, *Abortion in America* (1978); *Amicus* Brief of 281 American Historians, *filed in* Webster v. Reproductive Health Services, 492 U.S. 490 (1989) ["*Webster* Brief"]; *Amicus* Brief of 250 Historians, *filed in* Planned Parenthood of S.E. Pa. v. Casey ["*Casey* Brief"].

tion as a story of oppressors and oppressed, shifting their focus from the increasingly clear history of the law of abortion to less determinate questions of the "true" social attitudes toward abortion in our history. Their project of recovering "lost voices" [6] enables them to discount attitudes with which they disagree as aberrations, not truly representative statements, either in favor of similar records of more agreeable attitudes or in favor of presumed but unrecorded opinions of historically mute classes. Their story of oppression is far from a complete history.

Recovering "lost voices" permits one to infer, at will, what the "true" attitudes were. Yet, if the public attitudes of formal, legal institutions did not represent the true values of our society, why did those institutions express themselves in such terms, and why did those unrepresentative terms continue through major changes in social and political structures spanning more than seven centuries? Nor does the "lost voices" project recognize that the Constitution is a legal document. Ultimately, legal traditions must inform the Constitution: Social, medical, and moral contexts usefully illuminate legal traditions, but they are not an independent source of right. Finally, troubling public admissions by the authors of the *Webster* Brief of deliberate distortions of the historical record to achieve more effective advocacy emphasizes the shallowness of their arguments.[7]

Sylvia Law, Counsel of Record on the *Webster* Brief, candidly lamented the authors' "serious deficiencies as truth-tellers." [8] James Mohr does not "consider the brief to be history, as I understand the craft." [9] His-

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[6] *See* Casey Brief, *supra* note 5, at 4. *See also* Law, *Conversations Between Historians and the Constitution*, 12 The Pub. Historian 11, 14 (1990).

[7] *Cf.* A. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122 n.13, 144 (decrying "law office history").

[8] Law, *supra* note 6, at 14-16.

[9] J. Mohr, *Historically Based Legal Briefs: Observations of a Participant in the* Webster *Process*, 12 The Pub. Historian 19, 25 (1990).

torian Estelle Freedman, who also worked on the brief, signed the brief despite knowing that her own research demonstrated a very different story, explaining her decision in a passage of remarkable frankness:

> As an historian, my primary difficulty with the earlier versions of the brief had to do with the selective view of evidence, or lack of evidence, to show continuity rather than change, in order to support a particular legal argument about original intent. . . . Yet I realize that for the practical purposes of writing this brief, it was necessary to suspend certain critiques to make common cause and to use the legal and political grounds that are available to us. . . .[10]

The difficulties these admissions present are not resolved simply by asserting, as do the other two lawyers on the *Webster* Brief, that all discourse is necessarily political and that any distinction between scholarship and distortion is illusory.[11] The "Historians' Brief" filed in this case (the "*Casey* Brief") was written by the same attorneys relying on the same historians with only small changes of emphasis. The Historians' Briefs hinge on the twin claims that abortion has always been a common social practice and was a "common law liberty" prior to the Civil War—both of which are demonstrably false.

B. In England, from the Beginning of the Common Law, Courts and Other Respected Authorities Consistently Condemned Abortion

Common law indictments and appeals of felony for abortion are recorded as early as 1200. While the terse records often do not indicate the outcome of the pro-

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[10] E. Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the* Webster Amicus *Brief*, 12 The Pub. Historian 27, 32 (1990). Her entire talk makes clear that the problems she addressed were not resolved in the version filed with the Court.

[11] Larson & Spillenger, *"That's Not History": The Boundaries of Advocacy and Scholarship*, 12 The Pub. Historian 33 (1990).

ceedings,[12] the many clear records of punishment[13] and judgments of "not guilty" (rather than dismissal)[14] prove that the indictments and appeals were valid under the common law. Means was simply wrong to assert that

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[12] *R. v. Cokkes* (1415), 7 Calendar of Inquisitions Misc. (Ch.) Pres'd in the Pub. Rec. Off. 1399-1422, at 296 (no. 523) (1968); *R. v. Portere* (K.B. 1400), The Shropshire Peace Role 1400-1414, at 57-58 (no. 24) (1959); *R. v. Houdydoudy* (Coroner's Inquest 1326), Calendar of Coroner's Rolls of the City of London A.D. 1300-1378, at 166 (1913); *R. v. Botevylayn* (K.B. 1305), Wiltshire Gaol Delivery & Trailbaston Trials 1275-1306, at 105, 126, 131 (nos. 576, 800, 854) (1978); *Boleheved's Appeal*, JUST 1/112, m.9d (Cornwall Eyre 1284); *R. v. le Petiprestre*, The London Eyre of 1244, at 48 (no. 116) (London Rec. Soc'y 1970); *Sauter's Appeal*, Pleas of the Crown for Gloucester Cnty. 1221, at 16 (no. 69) (1884); *Sibil's Appeal* (1203), 1 Selden Soc'y 32 (no. 73) (1887); *Agnes's Appeal* (1200), 1 Selden Soc'y, *supra* at 39 (no. 82) [see App. C, at 12a].

[13] HANGING: *R. v. Haule*, JUST 1/547A, m.20d (London Eyre 1321) [see App. C, at 15a]; *R. v. Kyltavenan* (Cork, Ireland 1311), Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 193 (Dublin Stationary Off., n.d.). IMPRISONMENT: *R. v. Code*, JUST 1/789, m.1 (Hampshire Eyre 1281) [see App. C, 14a]. OUTLAWRY: *R. v. Ragoun*, JUST 1/547A, m.55d (London Eyre 1310); *R. v. Eppinge*, JUST 1/547A, m.46 (ms. dated 1321) (London Eyre 1304); *R. v. Hervy*, JUST 1/547A, m.40d (1300, ms. dated 1321); *R. v. Hokkestere*, JUST 1/547A, m.3 (London Eyre 1298, ms. date 1321); *R. v. Scot*, JUST 1/547A, m.22 (1291, ms. dated 1321); *R. v. Dada*, JUST 1/547A, m.19d (1290, ms. dated 1321); *R. v. Cliston*, JUST 1/1011, m.62 (Wiltshire Eyre 1288); *R. v. Mercer*, JUST 1/710, m.45 (Oxford Eyre 1285) [see App. C, at 14a]; *R. v. Brente*, JUST 1/186, m.30 (Devon Eyre 1281); *R. v. Code*, JUST 1/789, m.1 Hampshire Eyre 1281) [see App. C, at 14a]; *R. v. Scharp*, The London Eyre of 1276, at 23 (no. 76) (London Rec. Soc'y 1976); *Juliana's Appeal* (1256?), Somerset Pleas (Civ. & Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (1897) [see App. C, at 13a]; *Erneburga's Appeal*, JUST 1/175, m.38 (1249). *See also Leges Henri Primi* ch. LXX.14 (L.J. Downer ed. 1972) (a 12th-century compilation of Anglo-Saxon law as modified by the early Norman kings).

[14] *R. v. Mondson*, JUST 1/527, m.11d (Lincolnshire Gaol Delivery 1361-62); *R. v. Skotard*, JUST 1/169, m.25 (Derbyshire Eyre 1330); *R. v. Cobbeham*, JUST 1/547, m.19d (London Eyre 1321); *R. v.*

only two cases dealt with abortion before 1600 and that the courts in both cases doubted whether abortion was a crime: *R. v. de Bourton*, Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327); and *R. v. Anonymous* (K.B. 1348), Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516) [see App. C, at 16a].

Godesman, JUST 1/383, mm.18d, 96 (Kent Eyre 1313); *R. v. le Raggede* (Dublin, Ireland 1311), Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 216 (Dublin Stationary Off., n.d.); *Rokaf's Appeal*, JUST 1/544, m.55d (Middlesex Eyre 1294); *R. v. Skel*, JUST 1/1098, pt.2, m.79 (Yorkshire Eyre 1293); *R. v. Wyntercote*, JUST 1/303, m.69d (Hereford Eyre 1292); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292); *R. v. Hore*, JUST 1/1011, m.56 (Wiltshire Eyre 1289); *Agnes's Appeal*, JUST 1/1011, m.59d (Wiltshire Eyre 1289); *R. v. Reeve*, JUST 1/924, m.60 (Sussex Eyre 1288); *R. v. Neubyr'* JUST 1/924, m.73 (Sussex Eyre 1288); *Beatrix's Appeal*, JUST 1/579, m.10d (Norfolk Eyre 1286); *Mill's Appeal*, JUST 1/579, m.72 (Norfolk Eyre 1286); *la Neweman's Appeal*, JUST 1/833, m.7 (Suffolk Eyre 1286); *Alexandra's Appeal*, JUST 1/833, m.23d (Suffolk Eyre 1286); *Hervest's Appeal*, JUST 1/789, m.26d (Hampshire Eyre 1281); *R. v. Benetley*, JUST 1/789, m.3 (Hampshire Eyre 1281); *de Pekering's Appeal*, JUST 1/369, m.36 (Kent Eyre 1279); *R. v. le Gaoeler*, JUST 1/369, m.37d (Kent Eyre 1279); *R. v. Surgeon*, JUST 1/369, m.37d (Kent Eyre 1279); *Joan's Appeal*, JUST 1/921, m.23 (Sussex Eyre 1279); *Gras's Appeal*, The London Eyre of 1276, at 73-74 (no. 261) (London Rec. Soc'y 1976); *Sorel's Appeal*, The London Eyre of 1276, at 61 (no. 222); *Isabel's Appeal*, The London Eyre of 1276, at 62-64 (nos. 157, 158); *Cecily's Appeal* (1249), C. Meekings, *Studies in 13th Century Justice and Administration* 257 (no. 562) (1981); *Swayn's Appeal*, JUST 1/359, m.36 (1249); *Margaret's Appeal*, JUST 1/174, m.40d (1249?); *Orscherd's Appeal*, JUST 1/174, m.40d (1249?); *Alice's Appeal*, JUST 1/176, m.27d (1249); *Amice's Appeal*, JUST 1/274, m.14d (1247) [see App. C, at C—]; *Phina's Appeal*, JUST 1/778, m.57 (1246), summarized in Meekings *supra* at 267; *Sarah's Appeal*, The London Eyre of 1244, at 50-51 (no. 124) (London Rec. Soc'y 1970); *St. Alban's Appeal* (1244), The London Eyre of 1244, at 36 (no. 84); *Modi's Appeal* (1221), 59 Selden Soc'y 560-61 (no. 1336) ((1940); *Burel's Appeal* (1202), 1 Selden Soc'y 11 (no. 26) (1887). BENEFIT OF CLERGY PRECLUDED TRIAL: *Mabel's Appeal*, JUST 1/741, m.33 (Shropshire Eyre 1292) (damaged roll); *Philippa's Appeal* (1276?), The London Eyre of 1276, at 51 (no. 187).

Means (and the *Roe* majority) relied on a faulty text of *R. v. de Bourton* [see App. B, at 2a]. Even their faulty text did not support Means' highly partisan analysis of the case.[15] The faulty text of *R. v. de Bourton* at most demonstrates that courts declined abortion prosecutions if uncertain whether the case was properly before the court for reasons other than the criminality of abortion. The defendant was charged with beating a woman, causing one twin to be born dead and the other to die shortly after birth; the defendant apparently was released on bail to answer for an unspecified different charge. The full record reveals the case actually to have been a dispute over whether the offense was bailable, and not over its criminality. In the end, de Bourton was pardoned; the charges were not dismissed.

In *R. v. Anonymous*, the defendant escaped conviction for killing a child in the mother's womb for the dubious reason that the indictment failed to state a baptismal name for the victim,[16] and because it was impossible to know if the defendant had killed the child. In both *de Bourton* and *Anonymous*, the issues were procedural and evidentiary, not substantive. Early commentators on the common law also declared abortion after quickening to be criminal homicide. 2 H. de Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968); 1 *Fleta* 60-61 (Selden Soc'y ed. 1955).[17]

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[15] Keown, *supra* note 2, at 4; S. Gavigan, *The Criminal Sanction as It Relates to Human Reproduction: The Genesis of the Statutory Prohibition of Abortion*, 5 J. Leg. Hist. 20, 22-29 (1984). Dellapenna, *supra* note 4, at 368-70.

[16] "Murder", at least until 1340, meant a fine imposed on a district when no one could prove a deceased's identity as an Englishman. 1 W. Holdsworth, *A History of English Law* (1938), at 65-77, 580-632; 1 F. Pollock & F. Maitland, *The History of English Law Before the Time of Edward I* 67-68, 545 (2d ed. 1898); 2 Pollock & Maitland at 480-86. This usage was still common in the Inns of Courts nearly two centuries later. *See* Selected Readings on the Law of Murder, in App. C, at 16a.

[17] Britton disagreed because of the lack of a baptismal name for the victim. 1 *Britton* 114 (F.M. Nichols ed. 1865).

The sixteenth-century cases clearly held voluntary abortions to be crimes. A coroner's inquest held death by abortion to be "felonious suicide"; the man involved was released as an accessory then could not be tried without the principal. *R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505) [see App. C, at 18a].[18] A man died before trial for providing a potion to induce an abortion. *R. v. Wodlake*, K.B. 9/513/m.23 (1530), K.B. 29/162/m.11d (1531) [see App. C, at 19a]. Accusing a woman of offering abortifacients to another supported an action for slander as such words were sufficient grounds to require a judicial bond for good behavior. *Cockaine v. Witnam* (1577), Cro. Eliz. 49 (1586) [see App. C, at 21a]. A woman was executed for abortion by witchcraft. *R. v. Turnour*, Assize 35/23/29 (Essex 1581) [see App. C, at 22a].[19] A woman was "presented" by a coroner's jury for procuring her own abortion. *R. v. Robynson*, Q/SR 110/68 (Coroner's Inquest 1589).

Two sixteenth-century writers on criminal pleadings denied, however, that abortion was a felony. 1 W. Staunford, *Pleas of the Crown* ch. 13 (1557); W. Lambard, *Of the Office of the Justice of the Peace* 217-218 (1st ed. 1581). Yet a formbook, with four editions from 1506 and 1544, included a form indictment for abortion by physical assault on the mother. *Boke of the Justyces of the Peas* ch. vi, fol. iii (1515). Perhaps Staunford and Lambard reflected the inconclusiveness of the more widely, albeit faultily, reported decisions; or perhaps they meant that abortion was a crime less than a felony or that abortion properly belonged before a court other than the Queen's Bench. They clearly were wrong.

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[18] *See also R. v. Wynspere*, (Coroner's Inquest 1503), Pub. Rec. Off., ref: Ancient Indictments 434, 12; Keown, *supra* note 2, at 6.

[19] The record is not entirely clear as to why she was executed; Turnour was convicted of several acts of witchcraft, only one of which involved abortion, but the abortion was the only witchcraft which would have been a capitol offense. *See* Calendar of Assize Rec., Essex Indictments, Eliz. I, at 212 (no. 1225) (J. Cockburn ed. 1978).

Sixteenth-century legal activity directed at abortion did involve the secularization of ecclesiastical jurisdiction.[20] Ecclesiastical judicial activity directed at abortion declined during the Reformation and common law courts then took full responsibility for abortion.[21] In 1601, two Justices of the Queen's Bench held an abortion in which a child dies after its live birth to be murder on grounds that the birth and subsequent death of the child permitted proof of the cause of death. *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601) [see App. C, at 23a].[22] In

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[20] *Before the Bawdy Court* 81, 152, 172, 204, 238 (nos. 150, 369, 427, 531) (P. Hair ed. 1972); Keown, *supra* note 2, at 5; Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379, 380-81 (1975). Ecclesiastical and legal jurisdiction often were concurrent. Keown, *supra*; Helmholz, *supra* at 386. In English legal theory both temporal and ecclesiastical courts derived their authority from the Crown, and thus both together represented the "law of England." 1 M. Hale, *History of the Pleas of the Crown*, preface (1736). Many modern bodies of law that today are unquestionably secular originated in ecclesiastical courts, including wills, slander, and simple contracts. 1 Holdsworth, *supra* note 16, at 65-77, 455-57, 580-632 (1938); 3 Holdsworth at 408-28, 441-54, 534-36; 5 Holdsworth at 167-69, 197-218, 291-99; 8 Holdsworth at 301-07, 423-417; 15 Holdsworth at 198-208; Dellapenna, *supra* note 4, at 382-87.

[21] R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979). Witchcraft became an indictable crime by the statute of 5 Eliz. I, ch. 15 (1573); within eight years we find *R. v. Turnour*, *supra*.

[22] Failure of proof was occasionally given as a reason for not prosecuting earlier indictments. On the primitive state of forensic medicine even three centuries later, *see* Forbes, *Early Forensic Medicine in England: the Angus Murder Trial*, 36 J. Hist. Med. 296 (1981). *R. v. Sims* seems to have settled the matter: *R. v. Senior*, 168 Eng. Rep. 1298 (K.B. 1832); *R. v. Lewis*, OB/SP/April 1786, nos. 67, 86 (K.B. 1786). *Sims* was an action in trespass, which then was still a hybrid action combining criminal and civil elements; for the evolution of medieval trespass into modern crimes and torts, *see* 2 Holdsworth, *supra* note 16, at 364-65: 3 Holdsworth, at 317-18, 609-11; 4 Holdsworth at 512-15; 2 Pollock & Maitland, *supra* note 16, at 510-24.

1602, in *R. v. Webb*, Calendar of Assize Rec., Surrey Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980) [see App. C, at 24a], a woman apparently was saved from punishment for self-abortion only by a general pardon. The pardon covered entire classes of felony; whether the pardon was before or after her conviction is unclear. Finally, Sir Matthew Hale held that the death of a mother from an abortion was a felony homicide. *R. v. Anonymous* (Bury Assizes 1670), M. Hale, *History of Pleas of the Crown* 429-30 (1736) [see App. C, at 25a].[23]

Sir Edward Coke had argued *R. v. Sims* as Attorney-General and took the case up in his *Third Institute* 50-51 (1644) [see App. C, at 25a], generalizing from it a principle that abortion after quickening was "a great mis-

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[23] There were many other 17th-century cases. MISDEMEANOR CONVICTIONS: *R. v. Hallibred*, ERO (Chelmsford) O/S/R 236/102 (1622), 19B Calendar of Essex Cnty. Rec. 1611-1624, at 474 (no. 102); *R. v. Berry*, MJ/GSR/SF79 (1617), 4 (N.S.) Cnty. of Middlesex Calendar of the Sess. Rec. 1615-1616, at 292; *R. v. Rastone*, MJ/SR/552/135 MJ/SBP/1, f. 75 (Middlesex 1616), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 277; *R. v. Whalley*, MJ/SR/552/136 (1616), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 277; *R. v. Robinson* (Middlesex 1615), 3 (N.S.) Cnty. of Middlesex Calendar, *supra*, at 175. ACQUITTALS: *R. v. Squire*, Gaol Del., ref: MJ/SR/1720 (1687); *Commonwealth v. Carter* (1652), Calendar of Assize Rec.: Kent Indictments, 1649-1659, at 96 (nos. 534, 535) (1989). INDICTMENTS WITHOUT RECORD OF THE OUTCOME: *R. v. Willson*, ERO (Chelmsford) QSR/459/1 (1688), 25 Calendar of Essex Cnty. Quarter Sess. Rec. 30; *R. v. Rolfe*, ERO (Chelmsford) QSR/405/64, 160, 184, QSR/406/43, 110, 112-13 (1665), 23 Calendar of Essex Cnty. QSR 65, 74, 76; *Commonwealth v. Simpson* (1659), 6 N. Riding Q. Sess. Rec. 23 (1888); *Commonwealth v. Foxall* (1651), 3 Warwick Cnty. Rec., Q. Sess. Order Book 50; *R. v. Lagott*, SRO (Somerset) Q/S 62 (1629), 2 Quarter Sess. Rec. for the Cnty. of Somerset, Charles I, 1625-1639, at 228 (no. 16); *R. v. Fookes*, ERO (Chelmsford), Q/S/R 222/73 (1618), 19 Calendar of Essex Cnty. Rec., *supra*, at 328 (no. 73); *R. v. Hodges* (1615), 2 Calendar of Middlesex Cnty. Sess. Rec. 1614-1615, at 345 (1936); *R. v. Turner*, MJ/SR/543/143 (f. MSR 111.51), MJ/SR/544/44, MJ/SBR/2 (1615), 3 (N.S.) Cnty of Middlesex Calendar, *supra*, at 51.

prision [serious misdemeanor], and no murder" if the child died in the womb, and murder if the child died after its birth. Coke's proposition was accepted virtually without question.[24] Neither Coke nor Hale cited the precedents available for their conclusions.[25] Means dis-

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[24] Coke, often called the "Father of the Common Law," was followed relative to abortion by: 1 W. Blackstone, *Commentaries* 129-30 (1765); 4 Blackstone 198 (1769); R. Burn, *The Justice of the Peace and the Parish Officer* 380 (3d ed. 1756); 1 E. East, *A Treatise on the Pleas of the Crown*, 227-30 (1803); M. Hale, *Pleas of the Crown* 53 (1678); 1 W. Hawkins, *Treatise on the Pleas of the Crown* 80 (1716); 1 W. Russell, *A Treatise on Crimes and Misdemeanors* 617-18, 796 (1819). Two books are attributed to Hale, one that echoed Coke's views and a later book, Hale, *supra* note 20, at 433 [see App. D, at 26a], that denied that an abortion-induced death of a child born alive is murder. Which view truly represents Hale's opinion cannot now be established. On Coke's life and stature, see Baker, *supra* note 2, at 125-26, 164-69, 210, 217-18.

[25] PRECEDENTS FOR *R. v. Sims*: *R. v. Cokkes* (Somerset 1415) (outcome unknown), 7 Calendar of Inquisitions Misc. (Ch.) Pres'd in the Pub. Rec. Off. 1399-1422, at 296 (no. 523) (1968); *R. v. Portere* (K.B. 1400) (convicted), The Shropshire Peace Role 1400-1414, at 57-58 (no. 24) (1959); *R. v. Eppinge*, JUST 1/547A, m.46 (London Eyre 1321) (convicted); *R. v. Scot*, JUST 1/547A, m.22 (London Eyre 1321) (convicted); *R. v. Haule*, JUST 1/547A, m.20d (London Eyre 1321) (convicted) [see App. C, at C—]; *R. v. Dada*, JUST 1/547A, m.19d (London Eyre 1321) (convicted); *R. v. Cobbeham*, JUST 1/547A, m.19d (London Eyre 1321) (acquitted); *R. v. Skel*, JUST 1/1098, pt. 2, m.79 (Yorkshire Eyre 1293) (conviction); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292) (acquitted); *Agnes's Appeal*, JUST 1/1011, m.59d (Wiltshire Eyre 1289) (appeal of felony not permitted if infant born alive; *R. v. Hore*, JUST 1/1011, m.56 (Wiltshire Eyre 1289) (acquitted); *R. v. Cheney*, JUST 1/323, m.47d (Hertfordshire Eyre 1278) (trespass for accidentally killing child in the womb; child died after live birth). PRECEDENTS FOR *Hale's R v. Anonymous: Commonwealth v. Carter* (1652), Calendar of Assize Rec.: Kent Indictments, 1649-1659, at 96 (nos. 534, 535) (1989) (acquitted); *R. v. Adkyns*, ASS. 35/43/1, m.1 (1600) (convicted), reprinted in Calendar of Assize Rec., Essex Indictments, Eliz. I, at 510 (no. 3054) (1975); *R. v. Meddowe*, Ass. 35/32, m.34 (1591) (convicted), Calendar of Assize Rec., Sussex Indictments, Eliz. I, at 233 (no. 1212) (1975); *R. v. Poope* (1589) (convicted), Calendar

missed Coke's statement on abortion as a "masterpiece of perversion," he found Hale's decision to be "an act of Restoration gallantry." [26] Means did not explain how to recognize the difference.

C. English Law Always Prohibited Parents from Killing Unwanted Children, and Parliament and the Courts Took Strong Steps, Gradually Strengthened over Centuries, to Punish Such Acts

Most cases before 1700 involved crude physical batterings of the mother—often to her serious injury or death (injury techniques).[27] The remaining abortions were induced by "noxious potions" that were nearly as deadly as the batterings (ingestion techniques).[28] One might

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of Assize Rec., Kent Indictments, Eliz. I, at 289 (no. 1751) (1975); *R. v. Skotard*, JUST 1/169, m.25 (Derbyshire Eyre 1330) (acquitted); *R. v. Houdydoudy* (Coroner's Inquest 1326) (outcome unknown), Calendar of Coroner's Rolls of the City of London, A.D. 1300-1378, at 166 (1913); *R. v. Godesman*, JUST 1/383, mm.18, 96 (Kent Eyre 1313) (acquitted); *R. v. Boleye*, JUST 1/303, m.69d (Shropshire Eyre 1292) (acquitted); *R. v. Cliston*, JUST 1/1011, m.62 (Wiltshire Eyre 1288) (convicted); *R. v. Reeve*, JUST 1/924, m.60 (Sussex Eyre 1288) (convicted); *R. v. Brente*, JUST 1/186, m.30 (Devon Eyre 1281) (convicted); *Philippa's Appeal*, London Eyre of 1276, at 51 (no. 187) (London Rec. Soc'y 1976) (benefit of clergy; defendant not tried); *Orscherd's Appeal*, JUST 1/174, m.40d (1249?) (acquitted).

[26] Means II, *supra* note 3, at 359, 363.

[27] Injury techniques ranged from ineffective simple bodily maneuvers to savage assaults, such as cutting the mother and removing the infant.

[28] Appeals or indictments for abortion by potion might have been rarer than for abortion by assault because a potion was part of a magic ritual punishable as witchcraft even if ineffective, but only by an ecclesiastical court before Elizabeth I. Among traditional cultures, anthropologists have found injury techniques to be most common—because of the likelihood of success, G. Devereux, *A Study of Abortion in Primitive Societies* 30-35, 171-358 (1955). *See also* J. Bates & E. Zawadski, *Criminal Abortion* 87-88 (1964); A. McLaren, *Reproductive Rituals* 100-08 (1984); F. Taussig, *Abortion Spontaneous and Induced* 41-45 (1936).

therefore infer that the law was protecting maternal life or health—if one assumes that abortion was always available through relatively safe means.[29] Ingestion and injury techniques then used could be effective only with intense pain and at the risk of death or permanent injury; undergoing either cannot have been popular.[30] Voluntary abortions, abortions that were not crimes against the mother, were rare when the techniques available were tantamount to suicide.[31]

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[29] Mohr, *supra* note 9, at 6-19, lists various methods that he assumed were safe and effective, yet research shows that his assumption was unfounded; even he acknowledged the poisonous nature of at least some of the his "abortifacients", *id.* at 9, 21-22, 55-58, 71-73. For another historian who also assumed that workable techniques existed while recognizing that his own catalogue included only the useless or the fatal, see E. Shorter, *A History of Women's Bodies* 177-191 (1982). Other historians have made the same assumption on even less evidence. A. Eccles, *Obstetrics and Gynaecology in Tudor and Stuart England* 67 (1982); L. Gordon, *Women's Body, Women's Right: A Social History of Birth Control in America* 35-39 (1976); McLaren, *supra* note 28, at 5-7, 107, 111-112; R. Petchesky, *Abortion and Women's Choice* 27-34 (1984); G. Quaife, *Wanton Wenches and Wayward Wives* 118-120 (1979). *See also infra* note 30.

[30] Shorter, *supra* note 29, at 177, concluded that before 1880 only the truly desperate would risk abortion. Quaife describes injury techniques with his analysis of violence, and not with abortion, while conceding that girls were rarely anxious to use ingestion techniques. Quaife, *supra* note 29, at 26, 118. *See also Gordon, supra* note 29, at 39; Petchesky, *supra* note 29, at 30, 49-55.

[31] Devereux, *supra* note 28, at 149-150. *See generally* Dellapenna, *supra* note 4, at 372-76, 393-95. One study of the incidence of abortion in the earlier times, based on church records which do not distinguish between spontaneous and induced abortions, P. Laslett, *The World We Have Lost* 123 (1966), found that abortions in 17th century England amounted to 6-7% of total births; as spontaneous abortions in the 20th century range from 7.5-11% with our more advanced medical technology, *id.* at 266, 17th century figures reveal few, if any, induced abortions. Some assertions in legal proceedings that a potion was given by trick, etc., might have been dissimulation by the mother; this seems unlikely for abortion by savage physical attack.

The unpopularity of injury techniques with women hardly needs demonstration. And, while we cannot know all potions available in medieval England, surveys of the medical literature there and in medically similar societies show that the potions ingested for an abortion were either ineffective (except for possible placebo effects) or highly dangerous.[32] Savin was the "abortifacient" most widely reported in medieval English sources; modern tests have shown that it works by undermining the woman's health generally so she cannot sustain the pregnancy, all too often enfeebling her to the point of death.[33] Perhaps this is why in early English slang "poisoned" meant pregnant![34]

Possibly a safe and effective drug escaped all notice in the legal, medical, and popular literature of the day. Yet

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[32] Bates & Zawadski, *supra* note 28, at 14-23, 85-91; Devereux, *supra* note 28, at 36-43, 249, 279; N. Himes, *Medical History of Contraception* 139-151 (1936); J. Noonan, *Contraception* 222-230 (1965); Shorter, *supra* note 29, at 179-188; Taussig, *supra* note 28, at 31-45, 352-357; Dellapenna, *supra* note 4, at 373-376. Ineffective "abortifacients" included goat dung, raw eggs, hops, "ungrateful strong smells", and wine. Drugs, the ingestion of which in dangerous quantities could bring on an abortion, included caster oil, ergot of rye, hellebore, pennyroyal, rue, savin (juniper), tansy tea, thyme, and yarrow. A sufficiently desperate woman could ingest (or be made to ingest) a substance lethal even in small quantities, such as aloes, arsenic, ratsbane (rat poison), snake venom, and various metallic salts. Nineteenth-century courts were well aware of the dangers these potions still posed. *See, e.g., Commonwealth v. W.M.W.*, 3 Pitt. Rep. 462 (1871); *Moore v. State*, 49 S.W. 287 (Tex. Crim. 1897).

[33] One modern study found that savin induced an abortion in 10 of 21 women who consumed it: 9 of the 10 "successful" one died, as did 4 of the "unsuccessful" ones. Taussig, *supra* note 28, at 353. In fact, most modern poisons were discovered in a vain search for safe dosages of "abortifacients." Bates & Zawadski, *supra* note 28, at 88. For a graphic description of a savin death, *see* Forbes, *supra* note 22. *See generally* Mohr, *supra* note 5, at 71-73: Gordon, *supra* note 29, at 37; Shorter, *supra* note 29, at 186-188. *See also* J. Weeks, *Sex, Politics and Society* 72 (1981) (lead-poisoning "epidemic" because of its use as an abortifacient).

[34] F. Grose, *A Classical Dictionary of the Vulgar Tongue* (1785).

the Arabic medical texts which in Latin translation were standard medical references in the later middle ages described no technique safer or more effective, and later works in English add nothing significant.[35] Given the general lack of inventiveness of pre-scientific societies, the lack of variation in abortion techniques over six centuries is hardly surprising.

Singularly lacking is any mention of "intrusion techniques"—techniques involving intruding an instrument through the cervix into the uterus to induce abortion. With only primitive knowledge of women's reproductive anatomy,[36] intrusive intervention can rarely have been successful. The closest one finds to an intrusion technique are "pessaries"—vaginal suppositories, uually laced with "abortifacient drugs," that did not penetrate the

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[35] ARABIC TEXTS: Avicenna, *Libri Canonis Medicine* (Gerard of Cremona trans. 1595); Rhazes, *Liber ad Almansorem* (1497); Himes, *supra* note 32, at 139-151. ENGLISH TEXTS: 1 *Compleat Herbal* 69-71, 94-95 (G. Swindells ed. 1787); M. Etmullerus, *Description of All Diseases Incident to Men, Women and Children* 563 (3d ed. 1712); J. Pechey, *Compleat Herbal of Physical Plants* 13 (1707). The texts also describe "abortifacient" effects in markedly different terms from other pharmacological effects: "Abortifacient" effects are always introduced with phrases such as "it is said," suggesting either uncertainty about the efficacy of the potion or unwillingness to be thought to favor the practice. McLaren, *supra* note 28, at 103-104, 123; Noonan, *supra* note 32, at 201-207, 217.

[36] Not only were potions often given in a belief that a woman had blocked menses rather than pregnancy, but potions were sometimes given to prevent a uterus from rising in a woman's body to her throat to choke her! Shorter, *supra* note 29, at 286-287. Shorter, *supra* at 188-191, conceded that instrumental abortions were not a realistic possibility before the 19th century. *See also* Devereux, *supra* note 28, at 28, 36-37. Gordon, *supra* note 29, at 37-38, believes intrusion techniques are of ancient lineage, but is reduced to asking her readers to disregard part of a long description of an Eskimo intrusion technique when the informant tells us that the purpose was to puncture the uterus.

cervix. Without penetration, however, pessaries were not effective.[37]

Many still believe that medically primitive cultures, including medieval England and colonial America, had mysterious abortion techniques that were safe and effective. If so, why would such folk medicines abruptly disappear in the nineteenth century in favor of highly dangerous intrusion techniques that supposedly made abortion so dangerous as to justify the statutes proscribing abortion? The answer is that before the nineteenth century, traditional forms of abortion had been infanticide and abandonment.[38]

Infanticide was a frequent crime when abortion was still rare.[39] Royal courts actively punished those convicted of infanticide and denied benefit of clergy to one accused of the crime. *R. v. Parker*, 73 Eng. Rep. 410 (1580). The earliest known regulations of midwives (1512) were adopted to prevent the killing of infants.[40] Parliament enacted ever more stringent statutes pro-

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[37] Devereux, *supra* note 28, at 37; McLaren, *supra* note 28, at 101-102; Taussig, *supra* note 28, at 355-356.

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

[39] One early book (ca. 1300) stated that infanticide within one year of birth was cognizable only by ecclesiastical courts, *Mirror of Justices* 139 (Selden Soc'y 1895). 2 Pollock & Maitland, *supra*, note 16 at 478 n.1, dismissed this book as worthless. Staunford, *supra* at ch. 13; and Lambard, *supra* at 217-18, cited a 1315 conviction as indicating that infanticide was a common law felony (in the same passages where they denied that abortion was a common law felony). Dead babies remained a common sight in London streets into the 19th century. C. H. Rolph, *A Backward Glance at the Age of 'Obscenity'*, 32 Encounter 23 (June 1969). *See also* J. Boswell, *The Kindness of Others: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1989); Gordon, *supra* note 29, at 32-35; P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1981); Dellapenna, *supra* note 4, at 395-400; Helmholz, *supra* note 21.

[40] J. Donnison, *Midwives and Medical Men* 18-20 (1988). These regulations were repeatedly strengthened. T. Forbes, *The Midwife*

hibiting infanticide, culminating in "An Act to Prevent the Destroying and Murdering of Bastard Children", 21 James I, ch. 27, § 3 (1624), that conclusively presumed murder from concealment of the death of a child in order to conceal its birth.

Only the emergence of abortion as a real alternative to infanticide reduced the incidence of infanticide, making it a minor legal problem. This intimate relationship between abortion and infanticide was demonstrated by Lord Ellenborough's Act which in the next section after the first English statutory prohibition of abortion reduced the penalty for concealment from death to a term of imprisonment. 43 Geo. III ch. 58, §§ 2-4 (1803).[41]

D. These Laws Were Applied Rigorously in the American Colonies

The English colonists brought the common law here of abortion with them. Inadequately reported colonial court records support this view. In just one colony, no less than three prosecutions for criminal abortion arose before 1660: *Proprietary v. Lambrozo*, 53 Md. Archives 387-391 (1663); *Proprietary v. Brooks*, 10 Md. Archives 464-465, 486-488 (1656); *Proprietary v. Mitchell*, 10 Md. Archives 171-186 (1652) [see App. D, at 34a].[42] Defendants escaped conviction in two of the cases because, before trial, they married (and thereby disqualified) the principal witness against them. Mitchell was convicted of attempted murder, apparently because of a failure to prove the cause of death for the stillborn child.

Prosecutions for abortion arose in other colonies. A Rhode Island woman received 15 lashes for fornication

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and the Witch 144-147 (1966). Wet-nurses were also seen as a major population control device, J. Guillemeau, *The Nursing of Children* preface (1612). *See also* J. Sharp, *The Midwives Book* 38 (1671).

[41] For the legislative history, *see* Keown, *supra* note 2 at 12-21.

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

and attempted abortion. *Colony v. Allen*, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.).[43] Indictments survive from *In re the Stillbirth of Agnita Hendricks' Bastard Child* (1679), Ct. Rec. of New Castle on Del. 1676-1681, at 274-275 (1904), and *Colony v. Powell* (Va. 1635), 7 Am. L. Rec. 43 (1954). A 1716 New York municipal ordinance forbade midwives to aid or counsel abortion. 3 Min. of the Common Council of N.Y. 122 [see App. D, at 37a].[44]

While abortion and infanticide were not common in colonial America,[45] more colonial legal activity, just as in England, was directed against infanticide than abortion.[46] Still, colonial jurist James Parker, in one of the few secondary sources on the common law as applied in a colony, correctly concluded that the common law of abortion was part of the law applied in New York. J. Parker, *Conductor Generalis: Or, the Office, Duty, and*

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

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

[45] J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* 26, 65 (1988); Gordon, *supra* note 29, at 33, 49-51; C. Scholten, *Childbearing in American Society 1650-1850* 9 (1985).

[46] Hoffer & Hull, *supra* note 39, at 33-113. Concealment statutes were enacted in eight colonies or states before an abortion statute, beginning with Massachusetts in 1696, *Charters & Gen'l L. of the Colony & Prov. of Mass. Bay* 293 (Dane, Prescott, & Story eds. 1814). At least one woman was prosecuted for concealment before a colonial statute was adopted, 2 J. Winthrop, *History of New England 1630-1649* 317-318 (J. Hosmer ed. 1908). Even the Salem Witchcraft Trials have been linked to infanticide, Hoffer & Hull, *supra* at 55-56. The close empirical link of the concealment statutes and abortion was demonstrated by the 11 states that enacted a concealment statute contemporaneously with the state's first abortion statute and by the 20 states that codified the two statutes together. Dellapenna, *supra* note 4, at 399.

Authority of Justices of the Peace 216-17 (1764) [see App. D, at 38a].

E. When Abortion Became More Common than Infanticide with the Development of Technical Means with a Lessened Danger to the Mother's Life, English and American Law Came to Emphasize Abortion as the Primary Evil

Abortion statutes were enacted throughout the nation and the world in the nineteenth century.[47] *Roe's* majority viewed this, and the accompanying increase in prosecutions, as resulting from Victorian sexual attitudes, fears for maternal health, and concern for fetal life. 410 U.S. at 147-152. Means insisted that only fear for maternal health applied.[48] They never explained why these reasons became weighty only in the nineteenth century. Mohr and his associates, while recognizing a "moral prejudice" favoring the life of unborn children,[49] argued that the central reason for the statutes was to assure the dominance of the newly organized allopathic physicians over competitors, especially midwives, and to a lesser degree concern to reverse falling birthrates among the native-born middle classes and to assure paternal dominance in the household.[50] These reasons, they claimed,

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[47] *See generally* Dellapenna, *supra* note 4, 389-407; Quay, *Justifiable Abortion—Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961); J. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985).

[48] Means I, *supra* note 3, at 511-15; Means II, *supra* note 3, at 382-92.

[49] Mohr, *supra* note 5, at 35-36, 87, 104, 110-11, 140, 143-44, 147-59, 164-70, 196-99, 207, 214, 216-17, 261-63; *Casey Brief*, *supra* note 5, at 11, 15, 26-28; *Webster* Brief, *supra* note 5, at 11, 16, 25-28.

[50] Mohr, *supra* note 5, at 32-37, 86-122, 128-31, 134-35, 147-82, 166-70, 187-90, 202, 204, 207-16, 226-29, 237-40, 256-60; *Casey Brief*, *supra* note 5, at 13-21; *Webster* Brief, *supra* note 5, at 13-21. Mohr discounted concern for maternal health because he believed that abortion was safe. Mohr, *supra*, at 25-40.

were sufficient, without concern over fetal life, to overcome strong public support—among men as well as women [51]—for the free availability of abortions.

The actual reasons are quite different. Until *Roe*, voluntary abortion, unlike voluntary surgery generally, was never treated as a private matter between a patient and her physician.[52] The different legislative response is rooted in technological change.

The first report of an intrusion technique in England was in a case in 1732: [53] A woman was sentenced to the pillory and to three years in prison for inserting an iron rod into a second woman's womb, inducing an abortion at less than 14 weeks of gestation (well before quickening).[54] *R. v. Beare*, 2 The Gentleman's Magazine 931 (Aug. 1732) [see App. C, at 27a]. Similar prosecutions arose in 1781 and 1803. *R. v. Anonymous*, 3 J. Chitty, *Criminal Law* 798-801 (1816); *R. v. Tinckler* (1781), 1 E. East, *Pleas of the Crown* 354-356 (1806) [see App. C, at 31a].

Abortion remained highly dangerous; the inserted object served as a highway for ready infection, and often

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[51] *See, e.g.*, Mohr, *supra* note 5, at 108-10, 115-18; *Casey* Brief, *supra* note 5, at 22-23.

[52] Consider the decision of the New York legislature in 1828 to reject a ban on all surgery unless "necessary for the preservation of life," but to accept another part of the same proposal that declared abortion a crime [see App. D, at 39a].

[53] The earliest mention of an intrusion procedure anywhere was in a description in Diderot's *Encyclopedie* [at 452 (1766)] which described an evidently bizarre experiment in Nurnberg in 1714. Shorter, *supra* note 29, at 188-208, places the invention of effective intrusion techniques late in the 19th century.

[54] Another case, four centuries earlier, resulted in the imprisonment of three men for the abortion of an unborn child of one month's gestation. *R. v. Code* (Hampshire Eyre 1281), JUST 1/789, m.1 [see App. C, at 14a].

was sufficiently painful to induce life-threatening shock.[55] Death was not as certain, however, as with injury and ingestion techniques. Intrusion quickly became the technique of choice, setting the stage for the surgical and other intrusion techniques that account for most abortions performed today. Lord Ellenborough himself spoke to the resulting sudden upsurge in abortions in the preamble to his famous Act: It concerned "certain . . . heinous offenses . . . of late also frequently committed . . ." 43 Geo. III, ch. 58. The drafters of the first Pennsylvania abortion statute made a similar observation. *Pa. Daily Legis. Rec.* No. 19, at 151 (1860). The Maryland Court of Appeals made the point even more directly in *Worthington v. State*, 48 A. 355, 356-57 (Md. 1901):

> 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, doubtless, 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 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 . . . .

With the introduction of intrusion techniques, fears for the health risks to mothers of abortion first appeared in the legal literature.[56]

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[55] Bates & Zawadski, *supra* note 28, at 85-87. Apparently abortions killed one-third of the women undergoing them early in the 19th century. Dellapenna, *supra* note 4, at 400, 412.

[56] *State v. Murphy*, 27 N.J.L. 112, 114-115 (1858); O.W. Bartley, *A Treatise on Forensic Medicine* 3, 5 (1815); T.R. Beck & J. Beck, *Elements of Medical Jurisprudence* 276-77 (1823); J. Burns, *The Anatomy of the Gravid Uterus* 57-58 (1799); 1 East, *supra*

That abortion statutes almost invariably were adopted in the general codification of common law crimes [57] itself suggests that the statutes were not thought to change the law. Moreover, all nineteenth-century surgery was dangerous for the same reasons as for intrusive abortions (infection and shock), yet only for abortion were social or other pressures likely to induce one to undergo the procedure without prior risk to life or limb. Abortion statutes responded to premature application of new medical technologies,[58] indicating that intrusive abortions were as criminal as injury or ingestion abortions and that abortions were criminal regardless of the stage of pregnancy. The statutes settled the somewhat uncertain law of abortion,[59] uncertainty that suggests that abortion had not

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note 24, at 230; G. Male, *An Epitome of Judicial or Forensic Medicine* 116-117 (1816); A. Taylor, *Manual of Medical Jurisprudence* 595 (1842). *See generally* Keown, *supra* note 2, at 35-38.

[57] Lord Ellenborough's Act, officially the "Offenses Against the Person Act," was the first comprehensive criminal statute in English law. 11 Holdsworth, *supra* note 16, at 537.

[58] *Worthington v. State*, 48 A. 355, 356-57 (Md. 1901); *Moore v. State*, 40 S.W. 287 (Tex. Crim. 1897). *See generally* Keown, *supra* note 2, at 12-48.

[59] Nineteenth-century cases split over whether pre-quickening abortion was a common-law crime. CRIME: *State v. Reed*, 45 Ark. 333 (1885); *Lamb v. State*, 10 A. 208 (Md. 1887); *State v. Slagle*, 83 N.C. 630 (1880); *Mills v. Commonwealth*, 13 Pa. 630, (1850). NO CRIME: *Mitchell v. Commonwealth*, 78 Ky. 204 (1879); *Smith v. State*, 33 Me. 48, 57 (1851); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845); *Commonwealth v. Bangs*, 9 Mass. 387 (1812); *State v. Cooper*, 22 N.J.L. 52 (1848). Dicta in other cases also split on the question. The nineteenth-century's two leading treatises on American criminal law both concluded that, notwithstanding the several cases recently decided to the contrary, pre-quickening abortion was a common-law crime. 1 J.P. Bishop, *Criminal Law* § 386 (2d ed. 1858); 1 F. Wharton, *The Criminal Law of the United States* §§ 1220-1230 (5th rev. ed. 1861) [see App. D, at 45a]. The "Historians' Briefs" simply assert, without any discussion of the evidence, that abortion was not a crime at common law. *Casey* Brief, *supra* note 5, at 5; *Webster* Brief, *supra* note 5, at 4.

been a common practice, solemnly reaffirming social policy in the face of changing social behavior.

F. The Shift of Emphasis from Infanticide to Abortion as the Social Evil Represented a Widely-Shared Consensus on the Value of Fetal Life, a Consensus that Included Nineteenth-Century Feminists and Thus Can Hardly Be Characterized as a Conspiracy by Male Physicians and Others to Suppress Women

The nineteenth-century saw a steady broadening of abortion statutes to reach all abortions regardless of technique or stage of pregnancy and to include (in a number of states) punishment for the mother.[60] This broadening suggests, as contemporary courts generally held, that protection of fetal life was the major purpose of the statutes. *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Lee*, 37 A. 75 (Conn. 1897); *State v. Moore*, 52 Iowa 128 (1868) [see App. D, at 48a]; *State v. Watson*, 1 P. 770 (Kan. 1883); *Smith v. State*, 33 Me. 48 (1851); *People v. Sessions*, 26 N.W. 291 (Mich. 1886); *State v. Gedicke*, 43 N.J.L. 86 (1881); *State v. Crook*, 51 P. 1091 (Utah 1898); *State v. Howard*, 32 Vt. 380 (1859).[61] Many religious and social leaders also supported treating abortion as a crime.[62] Only by impugning the integrity

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[60] The broadening is illustrated by the New York abortion statutes [see App. D, at 39a.] In 1845, New York made it a misdemeanor for a woman to seek or procure an abortion, raising it to a felony in 1872. Both "Historians' Briefs" flatly assert that women were never subject to punishment for abortion. *Casey* Brief, *supra* note 5, at 1; *Webster* Brief, *supra* note 5, 1.

[61] The "Historians' Briefs" mentioned only one case, and that to the contrary. *Casey* Brief, *supra* note 5, at 27-28; *Webster* Brief, *supra* note 5, at 26. They omit even mention of a later case from the same court, *State v. Gedicke*, cited in the text.

[62] *See, e.g.*, The Resolution of the Medical Society of the State of New York, 1867 N.Y. Assembly J. 443-44 (Feb. 28, 1867) [see App. D, at 44a]. The *Roe* majority quoted other representative statements, 410 U.S. at 141-142. *See also* Mohr, *supra* note 9, at 35-36, 175-76, 182-196; M. Olasky, *The Press and Abortion, 1838-1988* 17-53 (1988).

of innumerable social and professional leaders can one argue that protection of unborn children from the rising numbers of abortions was not a significant concern.

Historians favoring abortion rights would have us believe that nineteenth-century abortion statutes were adopted in struggles between doctors and midwives for markets, or between husbands and wives for dominance in homes, or of men to use women to prevent "race suicide." [63] If so, why were nineteenth-century feminists, even the most militant, adamantly opposed the legality of abortion? [64] This attitude continued into the twentieth century, with Margaret Sanger advancing abhorrence of abortion as a major reason for founding Planned Parenthood Federation.[65]

The authors of the *Casey* Brief, see feminist opposition to abortion based on Victorian hostility to sexuality or to "male license." [66] The sharp contrast—even among

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[63] *See* the text *supra* at notes 47-51.

[64] D'Emilio & Freedman, *supra* note 45, at 150-67; Gordon, *supra* note 29, at 106-20, Mohr, *supra* note 5, at 109-14. *See, e.g.*, E. Duffy, *The Relations of the Sexes* 274-75 (1876); A. Stockham, *Tokology* 246-50 (1887); (Susan B.) Anthony, *Marriage and Maternity*, 4 The Revolution 4 (July 8, 1869); (Elizabeth Cady) Stanton, *Child Murder*, 1 The Revolution 146-47 (March 12, 1868). *See generally* D'Emilio & Freedman, *supra* at 64; Gordon, *supra* at 129; Mohr, *supra* at 113. Note also that the penalties for abortion were harsher than for contraception. Only professional abortionists defended the social propriety of the procedures. Mohr, *supra* at 62-65, 76-79; Olasky, *supra* note 62, at 3-17.

[65] M. Sanger, *Motherhood in Bondage* 394-96 (1928). Petchesky decried Sanger's stand on abortion as a sell-out to male doctors. Petchesky, *supra* note 29, at 89-95. D'Emilio & Freedman described the politics of Margaret Sanger's work for birth control without mentioning her opposition to abortion. D'Emilio & Freedman, *supra* note 45, at 243-46.

[66] *Casey* Brief, *supra* note 9, at 18-19. Note that they do not mention the virtually unanimous condemnation of abortion by nineteenth-century feminists, seeking to link support for contraception to support for abortion. Mohr, at least, admits the "anomaly." *Mohr, supra* note 9, at 110-14.

women who had had abortions—between the horror feminists expressed for abortion and their accepting attitude to contraception suggests that their attitude was focused on abortion rather than on sex or men.[67] The story of the early feminists suggests again that nineteenth-century legislatures responded to a widely shared consensus that abortion was the taking of human life and far different from contraception.

III. LEGISLATURES ARE THE PROPER FORA TO RESOLVE THE COMPETING CLAIMS OF MOTHERS AND THEIR OFFSPRING

The historical nature of the abortion problem as the intersection of policies protecting mothers and children with changing medical technology suggests that the balancing of the resulting claims is best left to legislative rather than judicial development.[68]

A. Changes in Medical Technology Are Central to Proper Resolution of the Controversies over Abortion

Evolving medical technologies for performing abortions and for recognizing and caring for unborn children have shaped the interests in the controversy over abortion. Until the twentieth century, both sets of interests converged to criminalize abortion. Now those interests have diverged, bringing controversy to an area where once all agreed that only evil could be found.

Technical progress continued. Pain-killing drugs (beginning with morphine in 1806), anesthesia (from the 1840's), antiseptics (after 1867), sulfa drugs and antibiotics (from the 1930's) dramatically reduced the risk of maternal death or injury. Many women thus came to see abortion's prohibition, rather than its possibility, as the threat to their well-being.

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[67] *See, e.g.*, D'Emilio & Freedman, *supra* note 51, at 50-63, 64-65.

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

Simultaneously, the perceived interests of society in unborn children changed as new medical information and technologies emerged with a focus on human reproduction. Consider the demise of the ancient distinction of "quickening." Application of cell theory to embryology at the opening of the nineteenth century revolutionized our understanding human reproduction[69] and was promptly followed by abortion statutes removing distinctions based on quickening.[70] An English court promptly interpreted the earlier statutory term "quick with child" to mean conception, rather than the felt movement of the child within the womb, returning to the original understanding of that term. *R. v. Wycherley*, 173 Eng. Rep. 486 (N.P. 1838).[71] The changes underlined that the statutes were crafted to protect human life.

Today, embryologists or fetologists can diagnose and treat an unborn child independently of the mother, including removing the child from its mother's womb for surgery and then returning it to the womb to complete gestation. Facing such developments, one can hardly consider the child a mere extension of its mother.[72] For

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[69] 3 *A History of Science* 456-483 (R. Taton ed. 1965); A. Meyer, *The Rise of Embryology* 28-120, 138-147, 170-194, 302-341 (1939); J. Needham, *A History of Embryology* 115-229 (1959).

[70] Illinois had already removed the quickening distinction, but only for abortions by a "noxious substance.' Ill. Rev. Code § 46 (1827). Maine adopted the first American statute removing all distinctions based on quickening. Me. Rev. Stat., ch. 160, §§ 13, 14 (1840). *See also* The offenses against the Persons Act, 7 Will. IV & 1 Vict., ch. 85 (1837).

[71] Philip Rafferty's research has persuaded the Oxford English Dictionary to change its definition of "quick with child" to conform to the *Wycherley* definition, according to a letter, date 23 Nov. 1990, from J.A. Simpson, co-editor of the Dictionary, to Mr. Rafferty (copy in my possession). The phrase apparently became confused with the phrase "with quick child." *But see State v. Cooper*, 22 N.J.L. 53, 57 (1849).

[72] Consider the odyssey of Dr. Bernard Nathanson from "Abortion King" of New York to anti-abortion activist through his ex-

one who does not accept fetal personhood, the continuing prohibition of abortions that are increasingly safe for mothers can only seem a serious intrusion into the liberty of women because of a "moral prejudice". This view ignores the unbroken common law tradition of protecting unwanted children as far as possible from aggression by their parents.

Reproductive technology remains one of the most rapidly advancing areas of medical research; hoping not to impede this progress, this Court has sought to preserve physicians' autonomy.[73] While professional autonomy promotes continuing medical advances, law cannot be fashioned solely to protect the autonomy of the technicians: Issues relating to abortion transcend mere technical competence. In balancing the interests and values created or reinforced by changing medical technologies, states need the same broad authority to regulate the conduct of physicians performing abortions as for other medical procedures.

B. Legislatures Are Best Placed to Explore Appropriate Regulatory Responses to Changing Reproductive Technologies

To resolve this controversy, we must escape the language of rights and the atomistic vision of society it entails:[74] we must balance concern for the dignity of women and the needs of poor and working mothers with

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periences as a fetologist. B. Nathanson, ***Aborting America*** (1979); B. Nathanson, *The Abortion Papers* (1983).

[73] In *Doe v. Bolton*, the majority accorded doctors standing as a class, 410 U.S. at 188-189, and repeatedly adverted to the doctors' privacy interest, *id.* at 192-193, 196-201. Although the majority denied standing to a specific doctor in *Roe v. Wade*, 410 U.S. at 125-127, they repeatedly referred to medical opinions, *id.* at 130-132, 141-146, 149-150, 159, 163, and they finally gave the physician decision-making power equal to the mother, *id.* at 153, 162-166. *See also Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 759-765 (1986).

[74] M. Glendon, *Abortion and Divorce in Western Law* 131 (1987); Veltri, *Book Rev.*, 18 Oh. N.U.L. Rev. 257, 272 (1991).

the welfare of unborn children, all in a context continually reshaped by changing medical technologies.[75] To address these concerns adequately, the abortion question must be returned to the political processes, primarily in the states.

Legislatures are better at establishing policies for the future, leaving courts to fashion remedies for past wrongs.[76] A legislature can fund programs to reduce the need for abortion and can accurately reflect the prevailing sentiments of the community on this divisive issue. Courts can only issue injunctions; they are simply not suited to serve as a board of review for issues of medical technology, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 454-459 (1983) (O'Connor, J., dissenting), as the court in *Roe* recognized when it was unable to decide when an individual human life (a "person") begins, 410 U.S. at 160. Yet such decisions of life and death are simply too important to be left to the technicians, especially when the technicians have an economic stake in deciding against life. Finally, as Justice Brandeis argued in his dissent to *New State Ice Co. v. Liebman*, 285 U.S. 262, 309-311 (1932), for such morally and socially unsettled problems, the states should serve as laboratories for social experiment. *See also Addington v. Texas*, 441 U.S. 418, 431 (1979).

CONCLUSION

Roe v. Wade should be overruled. Failing that, the application of *Roe v. Wade* should be reconsidered and the Pennsylvania statutes should be upheld as consistent with the values and policies expressed in that decision.

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[75] Note the factual changes between the trial and its review by this Court in *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-79, 95-99 (White, J., disenting, with Burger, C.J., & Rehnquist, J.), 101-102 (Stevens, J., concurring) (1976). *See generally* Mangel, *Legal Abortion: The Impending Obsolescence of the Trimester Framework*, 14 Am. J.L. & Med. 69 (1988).

[76] *City of Richmond v. J.A. Croson Co.*, 469 U.S. 469, 513-14 (1989) (Stevens, J., concurring).

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