PLANNED PARENTHOOD V. CASEY: THE FLIGHT FROM REASON IN THE SUPREME COURT

PAUL BENJAMIN LINTON*

"... a judicious reconsideration of precedent cannot be as threatening to public faith in the judiciary as continued adherence to a rule unjustified in reason."

— *Moragne v. States Marine Lines*, 398 U.S. 375, 405 (1970) (opinion of Justice Harlan).

INTRODUCTION

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[1] a bare majority of the Supreme Court reaffirmed *Roe v. Wade*.[2] Although *Roe* was not directly implicated by any of the statutes challenged in *Casey*,[3] all of which could have been upheld without overruling *Roe*,[4] the Justices agreed to reexamine *Roe* because of the uncertainty regarding its continued viability and the need to provide guidance to state and federal courts and state legislatures.[5] The result of this reexamination, however, was a badly divided Court that could not muster a majority in support of any standard of re-

---

* B.A. History (Honors), J.D., Loyola University of Chicago, Associate General Counsel for Litigation, Americans United for Life. The author gratefully acknowledges the assistance of Mary Kate Connolly, B.A. History (Honors), Boston College, 1988, J.D. candidate, Columbus School of Law, Catholic University of America, May 1994, and Jay W. Stein, Ph.D., Columbia University, (Public Law and Government), in the research of this article.

1. 112 S. Ct. 2791 (1992).
2. 410 U.S. 113 (1973).
3. At issue in *Casey* were five provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989—the definition of medical emergency, 18 PA. CONS. STAT. § 3203 (1990), and provisions requiring informed consent and a 24-hour waiting period, *id.*, § 3205, spousal notice, *id.*, § 3209, informed parental consent (subject to a judicial bypass), *id.*, § 3206, and recordkeeping and reporting, *id.*, §§ 3207(b), 3214(a), 3214(f).
4. *Casey*, 112 S. Ct. at 2803.
5. *Id.* at 2803-04 (Joint Opinion), 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

view and whose opinion is virtually certain to exacerbate the political and social tensions created by *Roe* and intensify the national debate over the Court's claimed authority to impose a regime of abortion upon the American people.

In a Joint Opinion co-authored by Justices O'Connor, Kennedy, and Souter, the Court reaffirmed what it variously described as the "central" or "essential" holding of *Roe v. Wade*—that viability marks the constitutional frontier between lawful and unlawful prohibitions of abortion.[6] The Court concluded, "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[7] But while adhering to the viability distinction, the Joint Opinion discarded the remainder of the trimester framework constructed in *Roe*, [8] opting instead for a variation of the "undue burden" standard previously espoused by Justice O'Connor.[9] Under this standard, as modified by *Casey*, regulation of abortion before viability is permissible so long as the regulation in question does not have "the purpose or effect of placing a substantial obstacle

---

6. *Id.* at 2804, 2808, 2809, 2810, 2811, 2812, 2813, 2816, 2817, 2818, 2821.

7. *Id.* at 2821. The Joint Opinion also reaffirmed *"Roe's* holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'" *Id.* at 2821 (quoting *Roe*, 410 U.S. at 164-65). *But see* note 45, *infra.*

8. *Id.* at 2817-20. Under that framework, "almost no regulation at all is permitted during the first trimester of pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake." *Id.* at 2817-18 (citing *Roe*, 410 U.S. at 163-66). The Joint Opinion also rejected the strict scrutiny standard of review. *Casey*, 112 S. Ct. at 2817. Under that standard, "any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." *Id.* (citing City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 427 (1983) (*Akron Center I*), ("restrictive state regulation of the right to choose abortion, as with other fundamental rights subject to searching judicial examination, must be supported by a compelling state interest") (citing *Roe*, 410 U.S. at 155)). In *Roe*, the Court held that "[w]here certain 'fundamental rights' are involved, . . . regulation limiting these rights may be justified only by a 'compelling state interest,'" and "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." 410 U.S. at 155 (citations omitted).

9. *Casey*, 112 S. Ct. at 2819-20 (citing, *inter alia*, Hodgson v. Minnesota, 110 S. Ct. 2926, 2949-51 (1990) (O'Connor, J., concurring in part and concurring in the judgment); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 828-29 (1986) (O'Connor, J., dissenting); *Akron Center I*, 462 U.S. at 461-66 (O'Connor, J., dissenting)).

in the path of a woman seeking an abortion of a nonviable fetus."[10] Applying this standard to the statutes in question, the Joint Opinion upheld four of the five provisions,[11] and struck down one of them—spousal notice.[12] Both Justice Blackmun and Justice Stevens dissented from the Joint Opinion's abandonment of *Roe's* trimester framework and the strict scrutiny standard of review.[13] Chief Justice Rehnquist, joined by Justices White, Scalia, and Thomas, dissented from the reaffirmation of *Roe*, arguing that the rational basis standard should be applied to all regulation of abortion.[14]

In reaffirming the "essential holding" of *Roe v. Wade*, the Joint Opinion considered "the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity and the rule of *stare decisis*."[15] Whether any of these considerations, individually or collectively, supports the Court's decision to reaffirm *Roe* is the subject of this article.

I. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT CONFER A RIGHT TO ABORTION?

> 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*

---

10. *Casey*, 112 S. Ct. at 2820; *see also id.* at 2821.

11. *Id.* at 2822 (medical emergency definition); *id.* at 2823-26 (informed consent and 24-hour waiting period); *id.* at 2832 (parental consent); *id.* at 2832-33 (recordkeeping and reporting). The votes to uphold these provisions were 9-0, 7-2, 7-2 and 8-1, respectively. *See* 112 S. Ct. at 2843 (Stevens, J., concurring in part and dissenting in part); *id.* (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2855 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

12. *Id.* at 2829-30.

13. *Id.* at 2843, 2846 ("[o]ur precedents and the joint opinion's principles require us to subject all non-*de minimis* abortion regulations to strict scrutiny"); *id.* at 2847 ("[t]he Court has held that limitations on the right of privacy are permissible only if they survive 'strict' constitutional scrutiny—that is, only if the governmental entity imposing the restriction can demonstrate that the limitation is both necessary and narrowly tailored to serve a compelling governmental interest"); *id.* at 2847-50 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2839-43 (Stevens, J., concurring in part and dissenting in part).

14. *Id.* at 2855 ("[w]e would adopt the approach of the plurality in *Webster v. Reproductive Health Services,"* 492 U.S. 490 (1989)); *id.* at 2867 ("[a] woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion in ways rationally related to a legitimate state interest") (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

15. *Id.* at 2804.

> *v. Wade* implies that the people have already resolved the debate by weaving into the Constitution the values and principles that answer the issue. As I have argued, I believe it is clear that the people have never—not in 1787, 1791, 1868, or at any time since—done any such thing. I would return the issue to the people by overruling *Roe v. Wade.*

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

In barely eight columns of text taking up less than five pages out of an opinion of more than thirty pages, the authors of the Joint Opinion attempt to construct a defense of *Roe v. Wade* by appealing to the liberty language of the Due Process Clause of the Fourteenth Amendment.[16] This effort ultimately fails for a variety of reasons, not the least of which is the Joint Opinion's own tentativeness regarding *Roe* and its refusal to endorse *Roe* as a proper interpretation of the Constitution.

A. The Misgivings of the Court

Concluding its analysis of the liberty interest a woman has in obtaining an abortion, the Joint Opinion states:

> While we appreciate the weight of the arguments made on behalf of the State in the case before us, arguments which in their ultimate formulation conclude that *Roe* should be overruled, the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis.*[17]

What this implies, of course, is that the Joint Opinion's "explication of individual liberty" might not, standing alone, support a right to abortion before viability or require reaffirmation of *Roe.* This is confirmed by other passages in the Joint Opinion. In its discussion of *stare decisis,* the Court leaves open the question as to whether "the central holding of *Roe* was in error."[18] More revealingly, four pages later the Court asserts that "a decision to overrule should rest on some special reason over and above the belief that a prior case was

---

16. *Id.* at 2804-08 (Part II of the Joint Opinion).

17. *Id.* at 2808. A moral ambiguity about abortion pervades the Joint Opinion. "Some of us as individuals find abortion offensive to our most basic principles of morality." *Id.* at 2806. "[T]he stronger argument is for affirming *Roe's* central holding, with whatever degree of personal reluctance any of us may have, not for overruling it." *Id.* at 2812.

18. *Id.* at 2810.

wrongly decided."[19] And concluding its discussion of institutional integrity, the Court opines that "[a] decision to overrule *Roe's* essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law."[20]

If the authors of the Joint Opinion in *Casey* were actually convinced that *Roe* had been correctly decided as a matter of original constitutional interpretation, it would have been an easy matter for them to have said so.[21] But they did not, which leaves a reader of the opinion with the nagging sense that a majority of the Court reaffirmed *Roe,* even though a differently constituted majority (the four dissenters plus one or more of the authors of the Joint Opinion) believed *Roe* to have been wrongly decided. That sense does not promote respect for the judiciary, especially in a case where the stakes were so high. And that sense is only reenforced by the Court's statement that "the basic decision in *Roe* was based on a constitutional analysis which we cannot *now* repudiate."[22] Finally, in evaluating the weight to be given to the "interest of the State in the protection of potential life,"[23] the authors of the Joint Opinion state:

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly 20 years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.[24]

In light of the Court's refusal to decide whether *Roe* was correctly decided as "an original matter," its "explication of individual liberty" strikes one as superfluous, perhaps even pretextual. Nevertheless, that explication warrants close scrutiny.

---

19. *Id.* at 2814.
20. *Id.* at 2816.
21. As, in fact, they did in referring to the contraception cases (Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Carey v. Population Services International, 431 U.S. 678 (1977)). "We have no doubt as to the correctness of those decisions." 112 S. Ct. at 2807.
22. *Id.* at 2807 (emphasis added).
23. *Id.* at 2817.
24. *Id.*

B. The Court's Understanding of Liberty

Unlike the opinion in *Roe*, which derived a right to abortion from an implied right of privacy found nowhere in the text, structure or history of the Constitution,[25] the Joint Opinion grounds the right to abortion in the express language of the Due Process Clause of the Fourteenth Amendment.[26] That clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[27] The Due Process Clause, as the Court observes, has been interpreted to apply "'to matters of substantive law as well as to matters of procedure.'"[28] Continuing to quote from Justice Brandeis' concurring opinion in *Whitney v. California*, the Joint Opinion states that "'all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States.'"[29] Curiously, however, the Joint Opinion never characterizes the right to abortion as "fundamental."[30] Although "the Due Process Clause of the Fourteenth Amendment incorporates most of the Bill of Rights against the States,"[31] the Court "has never accepted [the] view" that "liberty encompasses no more than those rights already guaranteed to the individual against federal interference by the express provisions of the first eight amendments to the Constitution."[32]

Tacitly conceding that a right to abortion cannot be derived from our history and traditions, the Court rejects the argument, attributed to Justice Scalia, that "the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified,"[33] and concludes that "[n]either the

---

25. 410 U.S. at 152-53.

26. *Casey*, 112 S. Ct. at 2804. In its exposition of the liberty interest in obtaining an abortion (Part II of the Joint Opinion), the Court does not once refer to the right of privacy. In fact, the word "privacy" appears only four times in the entire Joint Opinion, *id.* at 2823, 2324, 2830 and 2832, and three of those references are in quoted material.

27. U.S. CONST., amend. XIV, § 1.

28. *Casey*, 112 S. Ct. at 2804 (quoting Whitney v. California, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring)).

29. *Id.* (quoting *Whitney*, 274 U.S. at 373 (Brandeis, J., concurring)).

30. The Joint Opinion's selection of the "undue burden" standard does not clarify the nature of the right at stake. "[T]he undue burden standard begs the question at issue (namely, whether there is a fundamental right to abortion) and does not provide a meaningful guide for assessing the weight of the competing interests." Brief of the United States as *amicus curiae*, in support of Respondents at 6 n.2, *Casey*, 112 S. Ct. 2791 (Nos. 91-744 and 91-902) (1992).

31. *Casey*, 112 S. Ct. at 2804.

32. *Id.* at 2805.

33. *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989)).

Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limit of the substantive sphere of liberty which the Fourteenth Amendment protects."[34] "[A]djudication of substantive due process claims," the Joint Opinion explains, requires the Court "to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."[35] Quoting Justice Frankfurter, the Court denies that "'this judicial exercise of judgment could be avoided by freezing "due process of law" at some fixed stage of time or thought, ...'"[36] The trouble with the Joint Opinion, however, is that it does not identify *any* "stage of time or thought" (prior to *Roe*) when abortion *was* regarded as a "right" or a protected "liberty interest," or even a socially tolerated practice.[37] A proper understanding of the meaning of

---

Whether this actually represents Justice Scalia's views is debatable. In his opinion in *Casey*, Justice Scalia disputed the Court's reading of his opinion in *Michael H.* v. *Gerald D.*, and said that *Michael H.* "merely observes that, in defining 'liberty,' we may not disregard a specific, 'relevant tradition protecting, or denying protection to, the asserted right.'" *Id.* at 2874 (Scalia, J., concurring in the judgment in part and dissenting in part) (quoting Michael H. v. Gerald D., 491 U.S. at 127 n.6). In response to the Joint Opinion's suggestion that a restricted historical reading of the protection afforded by the Due Process Clause would allow laws banning interracial marriage (which "was illegal in most States in the 19th century," *id.* at 2805), Justice Scalia stated that "[a]ny tradition in that case was contradicted *by a text*—an Equal Protection Clause that explicitly establishes racial equality as a constitutional value." *Id.* at 2874 n.l (Scalia, J., concurring in the judgment in part and dissenting in part) (citing Loving v. Virginia, 388 U.S. 1, 9 (1967) (emphasis in original); *id.* at 13 (Stewart, J., concurring in the judgment). By contrast, "[t]he enterprise launched in *Roe* . . . sought to *establish*—in the teeth of a clear, contrary tradition—a value found nowhere in the constitutional text." *Id* (emphasis in original).

34. *Casey*, 112 S. Ct. at 2805.

35. *Id.* at 2806.

36. *Id.* at 2806 (quoting Rochin v. California, 342 U.S. 165, 171-72 (1952) (opinion of Frankfurter, J.)).

37. Conspicuous by its absence from the Joint Opinion is any attempt to root a right to abortion in American law and culture. This is all the more remarkable when it is considered that Justice Blackmun devoted more than twenty pages of his lengthy opinion in *Roe* to exploring ancient, medieval and modern philosophical, moral, religious, medical and legal attitudes toward abortion.' *Roe*, 410 U.S. at 129-47, 159-62. Based upon that review, Justice Blackmun concluded that "at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect," and that "[a]t least with respect to the early stages 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." *Id.* at 140-41. Although the limited, and in many respects inaccurate, historical survey sketched in *Roe* did not support Justice Blackmun's conclusions (*see id.* at 174-77 (Rehnquist, J., dissenting); *see also infra* note 44, and Appendix A), those conclusions were critical to his finding that for most of our legal history, "a woman enjoyed a substantially broader right

"liberty" must be firmly anchored in our history and traditions. Unless the Court intends to cut those lines and set itself adrift on a sea of philosophical abstractions,[38] its failure to identify a practice of allowing abortion must be regarded as fatal to its conclusion that abortion is a "protected liberty."

In its exposition of substantive due process claims, the Court

---

to terminate a pregnancy than she does in most States today [*i.e.*, in 1973]." *Roe*, 410 U.S. at 140. *See also, id.* at 158 ("throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today"). It was only because the Court had made this finding—that there was a "broad[] right to terminate a pregnancy" until late in the last century—that it was able to hold that a right to choose abortion belonged to the limited category of "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.* at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)). The authors of the Joint Opinion did not challenge the dissenters' statements that there was no generally recognized historical or contemporary right to abortion prior to *Roe.* 112 S. Ct. at 2859-60 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part); *id.* at 2874 n.l (Scalia, J., concurring in the judgment in part and dissenting in part). Nor, for that matter, did Justice Blackmun, the author of *Roe*, who now views abortion restrictions as violative of the Equal Protection Clause of the Fourteenth Amendment, as well as the Due Process Clause. *Id.* at 2846-47 n.4 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part). For critiques of the equal protection argument, *see* David Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQUETTE L. REV. 975, 995-1001 (Summer 1992) (hereinafter *"Smolin");* David Smolin, *Why Abortion Rights are not Justified by Reference to Gender Equality: A Response to Professor Tribe*, 23 JOHN MARSHALL L. REV. 621 (Summer 1990); James Bopp, Jr., *Will There Be a Constitutional Right to Abortion After the Reconsideration of Roe* v. *Wade?*, 15 J. CONTEMP. L. 131, 136-41 (1989); James Bopp, Jr., *Is Equal Protection a Shelter for the Right to Abortion? in* ABORTION, MEDICINE AND THE LAW 160-80 (J. Butler & D. Walbert eds., 4th ed. 1992).

38. According to the Court, the right to an abortion inheres in "liberty" because it is among "a person's most basic decision[s]," *Casey*, 112 S. Ct. at 2806; it involves a "most intimate and personal choice[]," *id.* at 2807; it is "central to personal dignity and autonomy," *id.;* it is "too intimate and personal" to allow interference by the State, *id.;* it involves "intimate relationships," and notions of "personal autonomy and bodily integrity," *id.* at 2810; and it concerns a particularly "'important decision[].'" *Id.* at 2811 (quoting *Carey*, 431 U.S. at 684-85). But as Justice Scalia noted in dissent:

> [I]t is obvious to anyone applying "reasoned judgment" that the same adjectives can be applied to many forms of conduct that this Court . . . has held are *not* entitled to constitutional protection—because, like abortion, they are forms of conduct that have long been criminalized in American society. These adjectives might be applied, for example, to homosexual sodomy, polygamy, adult incest, and suicide, all of which are equally "intimate" and "deep[ly] personal" decisions involving "personal autonomy and bodily integrity," and all of which can constitutionally be proscribed because it is in our unquestionable constitutional tradition that they are proscribable.

Id. at 2876 (emphasis in original) (Scalia, J., concurring in the judgment in part and dissenting in part).

cites and quotes extensively from Justice Harlan's justly famous dissent in *Poe v. Ullman,*[39] but overlooks his apparent endorsement of laws forbidding abortion[40] and disregards his warning that the Court must exercise "judgment and restraint" in fashioning new substantive due process rights.[41] Justice Harlan referred to "the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society."[42] Elaborating upon this balance, he said:

> The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.[43]

It was precisely the "tradition" of prohibiting abortion, first at common law and later under statutes enacted in all of the States, which the Court seriously misread in *Roe* and completely ignored in *Casey.*[44] In recognizing a constitutional right to abortion for any reason *before* viability, and for virtually any reason *after* viability,[45]

---

39. 367 U.S. 497, 539-55 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds); *see* 112 S. Ct. at 2805, 2806.

40. 367 U.S. at 547.

41. *Id.* at 542.

42. *Id.*

43. *Id.*

44. That tradition is set forth in Appendix A to this article.

45. Summarizing its holdings, the Court held that after viability, "the State in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." 410 U.S. at 164-65. In the companion case of *Doe v. Bolton,* 410 U.S. 179 (1973), the Court defined the scope of the health exception, relying upon its earlier opinion in *United States v. Vuitch,* 402 U.S. 62 (1971): "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health." *Doe,* 410 U.S. at 192. Given this expansive definition of health, it may be questioned whether *any* statute attempting to limit postviability abortions would be constitutional.

In *Margaret S. v. Edwards,* 488 F. Supp. 181 (E.D. La. 1980), the court struck down a Louisiana statute prohibiting abortion after viability unless the procedure was necessary "to prevent permanent impairment to [the woman's] health." The court stated that "[preserving maternal health means more than preventing permanent incapacity," and "[a] rape or incest victim may not be able to prove that her mental health will be *permanently* impaired if she is forced to bear her attacker's child, but she might be able to show that it is necessary to preserve her immediate mental health." *Id.* at 196 (emphasis in original). And in *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), the court

the Court in *Roe* "radically depart[ed]" from our legal and social traditions. That, it is submitted, explains why the decision remains controversial twenty years later and why, despite the efforts and desires of the authors of the Joint Opinion, legalized abortion remains and will continue to remain a highly visible and divisive public issue.

At the time *Roe* was decided, thirty States allowed abortion only to save the life of the mother;[46] two States and the District of Co-

---

declared unconstitutional a statute that prohibited abortion after viability unless the procedure was "necessary to preserve the woman from an imminent peril that substantially endangers her life or health." In *American College of Obstetricians & Gynecologists v. Thornburgh*, 737 F.2d 283 (3d 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 postviability abortions performed for psychological or emotional reasons, such a limitation would have been unconstitutional under *Doe v. Bolton*. *Id.* at 298-99.

In *Thornburgh*, the Court struck down a requirement that a physician performing a post-viability abortion use the technique that "would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique, ..." 18 PA. CONS. STAT. ANN. § 3210(b) (1982). Justice White dissented, saying:

> The Court's ruling in this respect is not even *consistent* with its decision in *Roe v. Wade*. In *Roe*, the Court conceded that the State's interest in preserving the life of a viable fetus is a compelling one, and the Court has never disavowed that concession. The Court now holds that this compelling interest cannot justify *any* regulation that imposes a quantifiable medical risk upon the pregnant woman who seeks to abort a viable fetus: if attempting to save the fetus imposes any additional risk of injury to the woman, she must be permitted to kill it. This holding hardly accords with the usual understanding of the term "compelling interest," which we have used to describe those governmental interests that are so weighty as to justify substantial and ordinarily impermissible impositions on the individual—impositions that, I had thought, could include the infliction of some degree of risk of physical harm.

Thornburgh, 476 U.S. at 808-09 (White, J., dissenting) (emphasis in original).

46. ARIZ. REV. STAT. ANN. §§ 13-211, 13-212 (1956); CON. GEN. STAT. ANN. § 53-29 *et seq.* (West Supp. 1972); IDAHO CODE §§ 18-601, 18-602 (Supp. 1972); ILL. REV. STAT. ch. 38, ¶23-1 (1971); IND. CODE ANN. §§ 35-1-58-1, 35-1-58-2 (Burns 1971); IOWA CODE § 701.1 (1950); KY. REV. STAT. ANN. § 436.020 (Michie/Bobbs Merrill 1962); LA. REV. STAT. ANN. § 14:87 (West 1964); ME. REV. STAT. ANN. tit. 17, § 51 (West 1964); MICH. COMP. LAWS ANN. § 750.14 (West 1968); MINN. STAT. ANN. §§ 617.18, 617.19 (West 1971); MO. ANN. STAT. § 559.100 (Vernon 1969); MONT. CODE ANN. §§ 94-401, 94-402 (1969); NEB. REV. STAT. §§ 28-404, 28-405 (1964); NEV. REV. STAT. §§ 200.220, 201.120 (1967); N.H. REV. STAT. ANN. §§ 585:12, 585.13 (1955); N.J. STAT. ANN. § 2A:87-1 (West 1969); N.D. CENT. CODE §§ 12-25-01, 12-25-02, 12-25-04 (1970); OHIO REV. CODE ANN. § 2901.16 (Baldwin 1953); OKLA. STAT. ANN. tit. 21, §§ 714, 861, 862 (West 1971); PA. STAT. ANN. tit. 18, §§ 4718,

lumbia allowed abortion to save the life or preserve the health of the mother;[47] one State allowed abortion to save the mother's life or to terminate a pregnancy resulting from rape;[48] thirteen States had adopted Section 230.3 of the American Law Institute's Model Penal Code[49] or some variant thereof,[50] allowing abortion under specified

---

4719 (1963); R.I. GEN. LAWS § 11-3-1 (1956); S.D. CODIFIED LAWS ANN. §§ 22-17-1, 22-17-2 (1967); TENN. CODE ANN. §§ 39-301, 39-302 (Supp. 1956); TEX. PENAL CODE ANN. § 1191 *et seq.* (West 1961); UTAH CODE ANN. §§ 76-2-1, 76-2-2 (1953); VT. STAT. ANN. § 101 (1958); W. VA. CODE § 61-2-8 (1966); WIS. STAT. § 940.04 (1969); WYO. STAT. §§ 6-77, 6-78 (1957).

In New Jersey, the statute prohibited abortions performed "maliciously or without lawful justification." The precise boundaries of this language were not well-marked. *See* State v. Moretti, 244 A.2d 499, 504 (N.J. 1968). The Pennsylvania statutes prohibited "unlawful" abortions, a term not defined in statutory or case law. The Louisiana abortion statute allowed no exceptions; however, given the requirement of a specific criminal intent, *State* v. *Sharp*, 182 So. 2d 517, 518 (La. 1966), an abortion to save the life of the mother probably was lawful, though there are no reported cases. This interpretation would be consistent with another statute that barred disciplinary action against a physician who performed an abortion to save the life of the mother. LA. REV. STAT. ANN. § 37:1285(6) (West 1964). *See* Rosen v. La. Bd. of Medical Examiners, 318 F. Supp. 1217, 1225 (E.D. La. 1970), *vacated and remanded*, 412 U.S. 902 (1973) (construing LA. REV. STAT. ANN. §§ 14:87 and 37:1285(6) (West 1964) *in pari materia*).

47. ALA. CODE tit. 14, § 9 (1958) (the health exception was added by statute in 1951, 1951 Ala. Acts 1630; MASS. GEN. LAWS ANN. ch. 272, § 19 (West 1968) (the health exception was adopted by judicial decision, *see* Kudish v. Bd. of Registration in Medicine, 248 N.E.2d 264, 266 (Mass. 1969), and cases cited therein); D.C. CODE ANN. § 22-201 (1967) (the health exception has been part of the Code since it was adopted in 1901, 31 Stat. 1322 (1901)).

48. MISS. CODE ANN. § 2223 (Supp. 1966). The rape exception was added in 1966. 1966 Miss. Laws ch. 358 § 1.

49. Section 230.3 provides:

> (1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.
>
> (2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes that there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]
>
> (3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be per-

formed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

(4) Self-Abortion. A woman whose pregnancy has continued beyond the twenty-sixth week commits a felony of the third degree if she purposely terminates her own pregnancy otherwise than by a live birth, or if she uses instruments, drugs or violence upon herself for that purpose. Except as justified under Subsection (2), a person who induces or knowingly aids a woman to use instruments, drugs or violence upon herself for the purpose of terminating her pregnancy otherwise than by a live birth commits a felony of the third degree whether or not the pregnancy has continued beyond the twenty-sixth week.

(5) Pretended Abortion. A person commits a felony of the third degree if, representing that it is his purpose to perform an abortion, he does an act adapted to cause abortion in a pregnant woman although the woman is in fact not pregnant, or the actor does not believe she is. A person charged with unjustified abortion under Subsection (1) or an attempt to commit that offense may be convicted thereof upon proof of conduct prohibited by this Subsection.

(6) Distribution of Abortifacients. A person who sells, offers to sell, possesses with intent to sell, advertises, or displays for sale anything specially designed to terminate a pregnancy, or held out by the actor as useful for that purpose, commits a misdemeanor, unless:

(a) the sale, offer or display is to a physician or druggist or to an intermediary in a chain of distribution to physicians or druggists; or

(b) the sale is made upon prescription or order of a physician; or

(c) the possession is with intent to sell as authorized in paragraphs (a) and (b); or

(d) the advertising is addressed to persons named in paragraph (a) and confined to trade or professional channels not likely to reach the general public.

(7) Section Inapplicable to Prevention of Pregnancy. Nothing in this Section shall be deemed applicable to the prescription, administration or distribution of drugs or other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at or immediately after fertilization.

50. ARK. CODE ANN. § 41-303 *et seq.* (Michie 1969); CAL. PENAL CODE §§ 187, 274, 275 (West Supp. 1971) & Calif. Health & Safety Code § 25950 *et seq.* (West Supp. 1971); COLO. REV. STAT. § 40-6-101 *et seq.* (Perm. Supp. 1971); DEL. CODE ANN. tit. 11, §§ 222(22), 651-654, and *id.* tit. 24, §§ 1766(b), 1790-1793 (various dates); FLA. LAWS 608, ch. 72-196 (1972); GA. CODE ANN. § 26-1201 *et seq.* (1971); KAN. STAT. ANN. § 21-3407 (1971); MD. ANN. CODE art. 43, §§ 129A, 137-139 (Supp. 1972); N.M. STAT. ANN. § 40A-5-1 *et seq.* (Michie 1972); N.C. GEN. STAT. § 14-44 *et seq.* (Supp. 1971); OR. REV. STAT. § 435.405 *et seq.* (1969); S.C. CODE ANN. § 16-82 *et seq.* (Law. Co-op. Supp. 1971); VA. CODE ANN. § 18.1-62 *et seq.* (Michie Supp. 1971).

Allowing for certain variations in language and scope, these statutes generally permitted abortions to save the life or preserve the physical or mental health of the mother, to end pregnancies resulting from rape or, except in Maryland, incest, and, except in California, to end pregnancies where there was a substantial risk that the unborn child would be born with a physical or mental disability. In those States that adopted ALI-type statutes, most abortions were performed for

circumstances; and four States allowed abortion on demand, but set limits in terms of the age of the fetus.[51] No State allowed unrestricted abortion throughout pregnancy, as *Roe* effectively does.

The authors of the Joint Opinion relied heavily on the writings of Justice Harlan in developing their theory of substantive due process. It cannot be known with certainty what weight Justice Harlan would have given to the widespread and longstanding prohibition of abortion had he been on the Court when *Roe* was decided. What is known, however, is that it was only the lack of a comparable tradition barring the *marital use* of contraceptives (as opposed to their sale or distribution) that ultimately persuaded him that such laws are unconstitutional. In a passage from his opinion in *Poe v. Ullman*, not cited by the Court in *Casey*, Justice Harlan said:

> But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.[52]

Justice Harlan did not question the authority of the States to legislate on moral matters—he freely and openly acknowledged that authority.[53] What troubled him about the Connecticut contraception laws was the uniqueness of those laws, directed at the *use*, not merely the sale or distribution, of contraceptives, and their potentially devastating impact on the privacy of the marital relationship had they been enforced (which they had not). But unlike the contraception laws ultimately struck down in *Griswold*, the abortion laws reviewed in *Roe v. Wade* and *Doe v. Bolton* were typical of the laws on the books (and often enforced) in nearly all of the States at the time those cases were decided. And the Texas laws were representative of

---

asserted mental health reasons. *See, e.g.*, People v. Barksdale, 503 P.2d 257, 265 (Cal. 1972).

51. ALASKA STAT. § 11.15.060 (1970) (prior to viability); HAW. REV. STAT. § 453-16 (Supp. 1971) (prior to viability); N.Y. PENAL LAW § 125.00 *et seq.* (McKinney Supp. 1971) (twenty-four weeks); WASH. REV. CODE ANN. § 9.02.010 *et seq.* (West Supp. 1971) (before quickening and not more than four lunar months after conception).

52. Poe v. Ullman, 367 U.S. at 554-55 (Harlan, J., dissenting from dismissal on jurisdictional grounds) (emphasis in original). *See also Griswold*, 381 U.S. at 499 (Harlan, J., concurring in the judgment).

53. 367 U.S. at 545-554. As the Court has on subsequent occasions. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 319 (1980); Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

laws that had been on the books for more than 150 years before *Roe* was decided. Entirely apart from the obvious difference between contraception and abortion (one prevents a life from beginning, the other ends a life that already has begun), this legal and societal consensus against abortion strongly suggests that the methodology employed by Justice Harlan in evaluating substantive due process claims would not have yielded the same results claimed for it by the authors of the Joint Opinion.[54]

---

54. *Casey*, 112 S. Ct. at 2804-08. The existence of longstanding traditions protecting specific interests in family decisionmaking and marital privacy, and the absence of any countervailing tradition *denying* protection to those interests, distinguishes all of the substantive due process cases relied upon in the Joint Opinion from the right to abortion first recognized in *Roe.*

In *Meyer v. Nebraska*, 262 U.S. 390 (1923), for example, the Court struck down a law forbidding the teaching of any subject in any language other than English, or the teaching of modern languages other than English below the eighth grade. The Court emphasized the importance of education in American society and held that the liberty guaranteed by the Due Process Clause "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399. Two years later the Court, relying upon *Meyer*, held invalid a law mandating public education of children between the ages of eight and sixteen because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925). Noting that "[a]ppellees are engaged in a kind of undertaking not inherently harmful [parochial education], but long regarded as useful and meritorious," the Court held that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

In invalidating, on equal protection grounds, a law requiring sterilization of certain recidivists, the Court, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), said, "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541. In *Griswold*, the Court struck down laws banning the use of contraceptives, even by married persons. In his opinion for the Court, Justice Douglas noted that "[w]e deal with a right of privacy [*i.e.*, the marriage relationship] older than the Bill of Rights—older than our political parties, older than our school system." *Id.* at 486. Separately concurring, Justice Goldberg referred to "a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage," *id.* at 491 (Goldberg, J., concurring), and observed that "[t]he Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home." *Id.* at 493. But he also cautioned that "[i]n determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions," but "must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] ... as to be ranked as fundamental.'" *Id.* at 493 (quoting Snyder v.

Massachusetts, 291 U.S. 97, 105 (1934)). As Justice Harlan noted four years earlier in his dissent in *Poe v. Ullman*, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds), "the intimacy of husband and wife is necessarily an essential and accepted feature of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected."

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Court declared unconstitutional a municipal ordinance forbidding first cousins from residing in the same household with their grandmother. Noting the ordinance's "unusual" definitional section that recognized as a "family" only a few categories of related individuals, *id.* at 496, a four-justice plurality said that "the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-04 (opinion of Powell, J.). Justice Powell's opinion continued:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition. Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family. Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home. Decisions concerning child rearing . . . long have been shared with grandparents or other relatives who occupy the same household—indeed who may take on major responsibility for the rearing of the children. Especially in times of adversity, such as the death of a spouse or economic need, the broader family has tended to come together for mutual sustenance and to maintain or rebuild a secure home life.

Id. at 504-05 (opinion of Powell, J.). Dismissing Justice White's concern that "recourse to history and tradition will 'broaden enormously the horizons of the [Due Process] Clause,'" *id.* at 549-50 (White, J., dissenting), Justice Powell wrote that "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko v. Connecticut*, 302 U.S. 319 (1937), and apparently suggested as an alternative." *Id.* at 504 n.12.

In *Loving v. Virginia*, 388 U.S. 1 (1967), the Court struck down Virginia's anti-miscegenation statutes, primarily on equal protection grounds, and only secondarily on substantive due process grounds (right to marry). The Court said that the "freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men," and is "one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)). *See also* Turner v. Safley, 482 U.S. 78, 95 (1987) (same).

It is important to note that each of the foregoing cases relied upon a specific and long-standing tradition of protecting the very right asserted, whether it be the right to marry, to privacy in the marital bedroom, to procreate, to educate one's children, or to live together in a common household with other rela-

Without being able to identify a specific legal tradition of protecting abortion, or even a social practice of tolerating it, the Joint Opinion falls back on more general notions of personal autonomy and bodily integrity and analogizes *Roe* to the contraception cases.[55] But neither attempt to justify *Roe* persuades. The comparison to contraception fails because, as the Court itself admits, "[a]bortion is a unique act."[56] It is unique because abortion "involves the purposeful termination of potential life."[57] The Court acknowledges that *"Roe . . .* was an extension of those cases [*Griswold* and *Eisenstadt*]*"*[58] and agrees that *Roe* could be classified as *"sui generis."*[59] Indeed, the very fact that the States have been allowed to

---

tives. Unlike any of these rights, however, there was no tradition protecting a right to abortion prior to *Roe.* None of the other cases cited in the Joint Opinion supports a methodology of recognizing unenumerated rights without regard for (much less in defiance of) those traditions. In *Eisenstadt,* for example, the Court declared unconstitutional a ban on the distribution of contraceptives to unmarried individuals but implicitly acknowledged the State's authority to prohibit "extramarital and premarital sexual relations." 405 U.S. at 448. *Eisenstadt* was based on the Equal Protection Clause, not the Due Process Clause, *id.* at 443, 446-55, and was decided when *Roe* was under advisement by the Court. *Carey,* a post-*Roe* opinion, simply applied the earlier contraception decisions to minors. But, as in *Eisenstadt,* the Court did not purport to recognize a right to engage in premarital or extramarital sexual activity. 431 U.S. at 688 n.5, 694, & 694 n.17. *See also id.* at 702 (White, J., concurring in part and concurring in the judgment), *id.* at 713 (Stevens, J., concurring in part and concurring in the judgment).

Winston v. Lee, 470 U.S. 753 (1985) (under the Fourth Amendment, suspect could not be compelled to submit to dangerous surgical procedure to remove evidence of a shooting), and *Rochin v. California,* 342 U.S. 165 (1952) (Due Process Clause forbade stomach pumping to obtain proof of intoxication), were both search and seizure cases and to the extent they, along with *Washington v. Harper,* 494 U.S. 210 (1990) (forcible administration of anti-psychotic drugs implicates liberty interest of Due Process Clause), also cited by the Joint Opinion, 112 S. Ct. at 2806, stand for the proposition that there is a liberty interest in refusing unwanted medical treatment, that specific interest has long been protected by the law. *See, e.g.,* Union Pacific R. Co. v. Botsford, 141 U.S. 250, 251 (1891); Schloendorff v. Society of New York Hospital, 105 N.E. 92, 93 (N.Y. 1914); Jacobson v. Massachusetts, 197 U.S. 11, 24-30 (1905).

In short, none of the cases cited by the Joint Opinion supports a "generalized constitutional right of privacy," *Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261, 279 n.7 (1990), and none purports to recognize a substantive due process liberty interest apart from a tradition supporting that interest. For a thoughtful and incisive critique of the Court's treatment of privacy as autonomy, *see Smolin, supra* note 37.

55. *Casey,* 112 S. Ct. at 2807-08, 2810.

56. *Id.* at 2807. On the same page, the Court notes that "the liberty of the woman is at stake in a sense unique to the human condition and so unique in the law." *Id. See also infra* note 291.

57. Harris v. McRae, 448 U.S. 297, 325 (1980).

58. *Casey,* 112 S. Ct. at 2808.

59. *Id.* at 2810. As *Roe* itself recognized:

regulate abortion before viability and (at least in theory) prohibit abortion after viability in a manner that would not be accepted if those same measures were directed at contraception suggests that the Court's comparison of *Roe* to *Griswold, Eisenstadt,* and *Carey* is deeply flawed.

Nor does the Court's appeal to personal autonomy and bodily integrity fare any better.[60] The Court itself expresses doubt as to whether *Roe* may be regarded as a guarantor of either interest.[61] To characterize some or all of the cases on which the Court relies in reaffirming *Roe* as standing for an abstract right to "personal autonomy" simply creates an artificial common denominator among a very disparate and largely unrelated group of cases while at the same time denying what makes abortion unique.[62] Though the Court has decid-

---

> The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, ... The situation, therefore, is *inherently different* from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold, Stanley* [*v. Georgia*, 394 U.S. 557 (1969)], *Loving, Skinner,* and *Pierce* and *Meyer* were respectively concerned.

410 U.S. at 159 (emphasis added). *See also Thornburgh,* 476 U.S. at 792 (White, J., dissenting) (the decision to abort "must be recognized as *sui generis* different in kind from the others that the Court has protected under the rubric of personal or family privacy or autonomy").

60. Like *Roe,* 410 U.S. at 153, the Court in *Casey* noted the physical and psychological burdens of pregnancy. 112 S. Ct. at 2807. *See also id.* at 2846 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part). While these burdens should not be discounted or minimized, they should not be offered to explain why women seek abortions, either. In a survey taken by the Alan Guttmacher Institute, more than 90% of the women interviewed gave socio-economic reasons as their principal reasons for having an abortion but only 3% said that problems relating to their health were most important. Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortion?,* 20 FAM. PLAN. PERSP. 169, 170 & Table 1 (July/Aug. 1988). And only 7% of the women surveyed even mentioned health as one of the factors that entered into their decision to have an abortion. *Id.* The Joint Opinion admits that abortions performed to preserve the mother's life or health are "rare," 112 S. Ct. at 2806, alludes to familial and other reasons for abortion, *id.* at 2808, and recognizes that most abortions are sought because birth control was not used, or failed, *id.* at 2809 ("[a]bortion is customarily chosen as an unplanned response to the consequences of unplanned activity or to the failure of conventional birth control"). *See also id.* at 2808 (noting concerns present "when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant"), *id.* at 2809. Abortion is a medical *procedure* but seldom represents a medical *judgment.*

61. *"Roe* . . . may be seen not only as an exemplar of *Griswold* liberty, but as a rule (*whether or not mistaken*) of personal autonomy and bodily integrity ...." 112 S. Ct. at 2810 (emphasis added).

62. One aspect of personal autonomy which the Court stresses is family decisionmaking. According to the Court, "the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and

ed a number of cases that, taken together, could be said to recognize an interest in "bodily integrity,"[63] it is not at all clear how a law *forbidding* abortion (as opposed to one *mandating* abortion) contravenes that interest.[64] "[C]ases recognizing limits on governmental power to mandate medical treatment or bar its rejection,"[65] have little, if anything, to do with the power to *prohibit* a given medical procedure. Moreover, it is difficult to reconcile either a generalized right of personal autonomy or bodily integrity with the well-established authority of the State to require medical vaccinations, even though such vaccinations entail a statistical risk of death or serious

---

parenthood," 112 S. Ct. at 2806, and protects "personal decisions relating to ... family relationships." *Id.* at 2807. *See also id.* at 2824 (referring to "the right to make family decisions"). It is difficult to see how a specific right to abortion can be derived from these broad generalizations. As Justice White said in his dissent in *Thomburgh:*

> That the abortion decision, like the decisions protected in *Griswold, Eisenstadt* and *Carey,* concerns childbearing (or, more generally, family life) in no sense necessitates a holding that the liberty to choose abortion is "fundamental." That the decision involves the destruction of the fetus renders it different in kind from the decision not to conceive in the first place. This difference does not go merely to the weight of the state interest in regulating abortion; it affects as well the characterization of the liberty interest itself.

476 U.S. at 792 n.2 (White, J, dissenting). It is also difficult to square the Court's concern to protect "family relationships" with its decisions striking down laws requiring parental notice or consent, and spousal notice or consent. *See* Hodgson v. Minnesota, 110 S. Ct. 2926, 2945-47 (1990) (two-parent notice without judicial bypass); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67-75 (1976) (parental consent (without a judicial bypass mechanism), spousal consent); *Casey,* 112 S. Ct. at 2826-31 (spousal notice). *See Smolin, supra* note 37.

63. *See, e.g.,* Riggins v. Nevada, 112 S. Ct. 1810 (1992); Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990); Washington v. Harper, 494 U.S. 210 (1990); Vitek v. Jones, 445 U.S. 480 (1980); Youngberg v. Romeo, 457 U.S. 307 (1982); Parham v. J.R., 442 U.S. 584 (1979); Winston v. Lee, 470 U.S. 753 (1985); Rochin v. California, 342 U.S. 165 (1952). The holdings in these cases are discussed in note 54, *supra,* and note 337, *infra.*

64. The Court, however, sees no difference between the two. "If indeed the woman's interest in deciding whether to bear and beget a child had not been recognized as in *Roe,* the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." *Casey,* 112 S. Ct. at 2811. To suggest, as the Joint Opinion does, that retaining a right to abortion is necessary to protect a right *not* to have an abortion "shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor. It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death." *Id.* at 2874 n.l (Scalia, J., concurring in the judgment in part and dissenting in part). *See infra* note 349 regarding coerced abortions.

65. *Casey,* 112 S. Ct. at 2810.

illness,[66] or the power of the Federal Government to draft men and women into the armed forces where their "personal autonomy" is severely restricted and their "bodily integrity" may be gravely jeopardized.[67] As the Court said in *Jacobson v. Massachusetts,*

> The liberty secured by the Fourteenth Amendment . . . consists, in part, in the right of a person "to live and work where he will," *Allgeyer v. Louisiana,* 165 U.S. 578 [1897]; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense.[68]

In light of the holdings in these cases, it cannot be said that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."[69]

In his concurring opinion in *Griswold v. Connecticut,* Justice Harlan said:

> Judicial self-restraint … in the "due process" area … will be achieved … only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.[70]

In first creating and later confirming a right to abortion, the Supreme Court in *Roe* and *Casey* failed to exercise the "self-restraint" of which Justice Harlan so eloquently spoke. The Court ignored "the teachings of history" that abortion has always been regarded as a serious crime in English and American law, rejected "the

---

66. Jacobson v. Massachusetts, 197 U.S. 11, 36 (1905) (upholding compulsory vaccination law).

67. Selective Draft Cases, 245 U.S. 366 (1918); Cox v. Wood, 247 U.S. 3 (1918).

68. 197 U.S. at 29. Based upon this language, and the principle set forth in *Jacobson,* Justice White concluded that "a compelling state interest may justify the imposition of some physical danger upon an individual, ..." Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 809 (1986) (White, J., dissenting). Of course, as the Joint Opinion itself notes, circumstances are rare "in which the pregnancy is itself a danger to [the woman's] life or health, ..." *Casey,* 112 S. Ct. at 2806. The author is unaware of any reported case in which the law was invoked to deny a woman an abortion that was necessary to save her life. It should also be noted that, with two exceptions which did not result in conviction, women have never been prosecuted, much less convicted, for undergoing abortions or for self-abortion. *See* Paul Benjamin Linton, *Enforcement of State Abortion Statutes after Roe: A State-by-State Analysis,* 67 U. DET. L. REV. 157, 163 n.31 (1990).

69. *Casey,* 112 S. Ct. at 2810.

70. 381 U.S. at 501 (opinion of Justice Harlan, concurring in the judgment).

basic values that underlie our society" that human life should be protected at all stages of development, and violated "the doctrines of federalism and separation of powers," by withdrawing from the States their rightful authority to restrict the practice of abortion. The Court's most recent effort to persuade the American people that *Roe* was anything other than "an exercise of raw judicial power"[71] is ultimately unconvincing.

II. DOES THE RULE OF *STARE DECISIS* REQUIRE REAFFIRMATION OF ROE?

"... the doctrine of *stare decisis* .... is not ... an imprisonment of reason."

— *United States v. International Boxing Club of New York*, 348 U.S. 236, 250 (1955) (Frankfurter, J., dissenting).

A. What the Joint Opinion Left Behind

After sketching its "explication of individual liberty," the Joint Opinion takes up consideration of the rule of *stare decisis*.[72] Does that rule, properly understood, require reaffirmation of *Roe*? The Court's answer to this question, that *Roe* must be reaffirmed, is seriously undermined by its near total abandonment of *Roe*. A chart summarizing the principal respects in which *Casey* differs from *Roe* is set forth below. Briefly stated, *Roe* was based on an implied right of privacy,[73] whereas *Casey* is based on the liberty language of the Due Process Clause of the Fourteenth Amendment.[74] *Roe* sought support for its ruling from our history and traditions;[75] *Casey* eschews recourse to such sources, relying instead upon "reasoned judgment."[76] *Roe* described the right to choose abortion as "fundamental;"[77] *Casey* does not characterize the nature of the right at all.[78] *Roe* identified governmental interests in preserving maternal health and protecting the "potentiality of human life," which interests become "compelling" at various stages of pregnancy,[79] whereas *Casey*

---

71. Doe v. Bolton, 410 U.S. 179, 222 (White, J., dissenting).
72. *Casey*, 112 S. Ct. at 2808-14 (Parts III(A) and (B) of the Joint Opinion).
73. 410 U.S. at 152-53.
74. 112 S. Ct. at 2804-08.
75. 410 U.S. at 140-41.
76. 112 S. Ct. at 2804-06.
77. 410 U.S. at 152-53.
78. *But see supra* note 30.
79. 410 U.S. at 162-64.

downgrades these interests to "legitimate" and "substantial."[80] *Roe* held that regulation limiting the exercise of the right of abortion had to be "narrowly drawn to express only the legitimate state interests at stake;"[81] *Casey* holds that such regulation, if otherwise valid, need only be "reasonably related" to those interests.[82] *Roe* effectively employed the "strict scrutiny" standard of review;[83] *Casey* substitutes the "undue burden" standard.[84] *Roe* divided pregnancy into trimesters;[85] *Casey* divides pregnancy into "bi-mesters" (before and after viability).[86] The Joint Opinion also overruled, in part, two earlier Supreme Court decisions applying *Roe*.[87]

---

80. 112 S. Ct. at 2804 ("the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child"), *id.* at 2808, 2817-18, 2820 ("there is a substantial state interest in potential life throughout pregnancy").

81. 410 U.S. at 155.

82. 112 S. Ct. at 2821.

83. 410 U.S. at 155.

84. 112 S. Ct. at 2817, 2820-21.

85. 410 U.S. at 162-65.

86. 112 S. Ct. at 2821.

87. *Id.* at 2823-24 (overruling, in part, *Akron Center I*, and *Thornburgh*).

Comparison of *Roe v. Wade* with *Planned Parenthood v. Casey*

	Roe	*Casey*
theory:	Privacy	liberty
source:	history and tradition	"reasoned judgment"
nature of right:	fundamental	not indicated
weight of countervailing interests:	compelling	substantial
requirement of "fit":	narrowly tailored	reasonably related
standard of review:	strict scrutiny	undue burden
division of pregnancy:	trimesters	"bi-mesters"

Considering the Joint Opinion's rejection of major portions of *Roe* (as well as *Akron Center I* and *Thornburgh*), it is hard to give much credence to its pronouncements on the importance of precedent.[88] The authors of the Joint Opinion, however, try to finesse this difficulty by repeatedly referring to the viability distinction as "essential" or "central"[89] and "reject[ing] the trimester framework which we do not consider to be part of the essential holding of *Roe*."[90] By characterizing the viability distinction as "central" and "essential," the Joint Opinion in effect dismisses the rest of the trimester structure as "peripheral" and "superfluous." That characterization, however, strikes one as arbitrary.[91] There is no reason to believe that the Court in

88. "The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand new standard for evaluating state regulation of a woman's right to abortion—the 'undue burden' standard." *Casey*, 112 S. Ct. at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

89. *Id.* at 2804, 2808, 2809, 2810, 2811, 2812, 2813, 2816, 2817, 2818, 2821.

90. *Id.* at 2818.

91. As Justice Scalia said in dissent, "I must . . . confess that I have al-

Roe regarded any one element of the trimester scheme as more important than any other. In light of the Joint Opinion's "selective disdain for precedent,"[92] its appeal to the rule of *stare decisis* almost appears contrived. That appearance is strengthened by the Joint Opinion's freehanded treatment of the "undue burden" standard previously articulated by Justice O'Connor.[93]

There are two key differences between Justice O'Connor's previous formulations of the "undue burden" standard and the Joint Opinion's (which she co-authored). First, in earlier opinions, Justice O'Connor stated that a statute imposes an "undue burden" only if it imposes *"absolute* obstacles or *severe* limitations on the abortion decision."[94] Under the Joint Opinion's reformulation of this standard, an "undue burden" exists even if the statute imposes only a "substantial" obstacle to the effectuation of the abortion decision.[95] Second, in earlier opinions, Justice O'Connor expressed the view that a regulation of abortion that imposes an "undue burden" may be upheld if it "reasonably relate[s] to the preservation and protection of maternal health"[96] or "reasonably relates" to "the State's compelling interests in maternal physical and mental health and protection of fetal life."[97] Under the Joint Opinion's reformulation of the standard, "undue burdens" imposed before viability are never constitutional.[98] Finally, it is ironic that the authors of the Joint Opinion tenaciously cling to the one part of the trimester framework—viability—which one of them so severely criticized in earlier dissents.[99]

---

ways thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains." 112 S. Ct. at 2881 (Scalia, J., concurring in the judgment in part and dissenting in part).

92. Michael P. Gerhardt, *The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases,* 10 CONST. COMMENTARY 67, 77 (1993).

93. Despite the Joint Opinion's effort to give the "undue burden" standard a legal pedigree (112 S. Ct. at 2819-20), it remains a foundling. The standard has never been employed by a majority of the Court in any abortion case (*see id.* at 2876-79 nn.3, 4 (Scalia, J., concurring in the judgment in part and dissenting in part)), but was "largely created out of whole cloth by the authors of the joint opinion." *Id.* at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

94. *Akron Center I,* 462 U.S. at 464 (O'Connor, J., dissenting) (emphasis added). *See also Thornburgh,* 476 U.S. at 828 (O'Connor, J., dissenting).

95. *Casey,* 112 S. Ct. at 2804, 2820-21, 2829, 2833.

96. Planned Parenthood Ass'n of Kansas City v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in the judgment in part and dissenting in part) (second trimester hospitalization requirement).

97. *Akron Center I,* 462 U.S. at 473-74 (O'Connor, J., dissenting) (24-hour waiting period requirement).

98. *Casey,* 112 S. Ct. at 2820-21.

99. *See Akron Center I,* 462 U.S. at 453-61 (O'Connor, J., dissenting);

B. The Court's Understanding of Precedent

Having stripped *Roe v. Wade* of all but the viability rule, the Joint Opinion devotes several pages of its opinion to explaining why principles of *stare decisis* require its reaffirmation.[100] On any account, that explanation is unconvincing. Notably absent from the Court's *stare decisis* discussion is any claim that *Roe* (or what remains of it) was correctly decided as a matter of original constitutional interpretation.

1. The Viability Rule in *Roe*

In Part IV of the Joint Opinion, which holds onto the viability rule while letting go of the rest of the trimester framework, the authors of the Joint Opinion assert that *Roe's* selection of viability as the point in pregnancy when the State may prohibit abortion was "a reasoned statement, elaborated with great care," and "twice reaffirmed."[101] But this simply is not accurate.

The Texas statutes challenged in *Roe* prohibited abortion except to save the life of the mother. They did not distinguish among different stages of pregnancy. And the State of Texas did not argue that its interest in protecting prenatal life was more substantial at viability than it was at conception. Rather, Texas "argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest."[102] Jane Roe, on the other hand, did not admit that the State's interest became compelling at viability. She "claim[s] an absolute right that bars any state imposition of criminal penalties in this area."[103] Neither of the parties in *Roe* briefed, argued or attached any significance to viability. The Court's reference to viability as the point at which abortion could be prohibited, therefore, was unnecessary to a determination of whether Texas could prohibit virtually all abortions as provided by statute.[104]

Ashcroft, 462 U.S. at 505 (O'Connor, J., concurring in the judgment in part and dissenting in part); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting). Justice O'Connor's critique of viability is set forth below, *see infra* note 109 and accompanying text.

100. *Casey*, 112 S. Ct. at 2808-14. It is, perhaps, worth noting that the discussion of *stare decisis* in the Joint Opinion comes before, not after, the abandonment of the trimester framework.

101. *Id.* at 2816 (citing *Akron Center 1*, and *Thornburgh*).

102. *Roe*, 410 U.S. at 156.

103. *Id.*

104. The majority opinions in *Akron Center I* and *Thornburgh* reaffirmed *Roe*

Moreover, the Court's treatment of viability in *Roe* was very abbreviated. After acknowledging that the State has an "important and legitimate interest in protecting the potentiality of human life,"[105] the Court stated that this interest "grows in substantiality as the woman approaches term and, at a point during pregnancy, . . . becomes 'compelling.'"[106] No satisfactory explanation as to *why* this might be so can be found in *Roe.*[107] The full extent of the explanation for choosing viability as the point when the State's interest becomes compelling is contained in three short sentences in *Roe:*

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.[108]

Perhaps the most trenchant criticism of the "logical and biological justifications" of *Roe's* viability concept may be found in Justice O'Connor's dissent in *Akron Center I:*

> In *Roe,* the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At

---

on the basis of *stare decisis* but neither opinion defended the rationale upon which the choice of viability had been made. *See Akron Center I, 462* U.S. at 419-20 & n.1; *Thornburgh,* 476 U.S. at 759. This is not surprising since none of the parties in either case asked the Court to reconsider or overrule *Roe. See Akron Center I,* 462 U.S. at 452 (O'Connor, J., dissenting); *Thornburgh,* 476 U.S. at 828 (O'Connor, J., dissenting).

105. *Roe,* 410 U.S. at 162.

106. *Id.* at 162-63.

107. In his concurring opinion in *Thornburgh,* Justice Stevens attempted to provide some greater explanation by stating that it is "obvious that the State's interest in the protection of an embryo increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day." 476 U.S. at 778 (Stevens, J., concurring). Three of the four "capacities" mentioned—to feel pain, to experience pleasure, and to react to its surroundings—do not coincide with viability, its capacity "to survive." Justice Stevens' proposal that the State's interest in protecting the unborn child's life must increase as he or she develops cannot be correct. It if were correct, then the State's interest in protecting the newborn as well as the mentally incompetent and disabled would be less than its interest in protecting competent adults who are arguably better capable of interacting with society, experiencing pleasure and reacting to their surroundings. Such a notion is clearly contrary to existing laws and principles of equality under the law.

108. 410 U.S. at 163. As one early critic of *Roe* noted, this argument "mistakes a definition for a syllogism." J. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973).

> any stage of pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," [*Roe*, 410 U.S.] at 159, the Court chose the point of viability—when the fetus is *capable* of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.[109]

2. The Court's *Stare Decisis* Criteria

Part III of the Joint Opinion sets forth four separate criteria for determining whether the doctrine of *stare decisis* precludes reconsideration of *Roe*.[110] Careful examination of each of these criteria suggests that they do not.

a. workability

The first of these criteria is "workability."[111] The Court dismisses concerns about the "workability" of *Roe* in a single sentence, saying that *Roe* represents "a simple limitation beyond which a state law is unenforceable."[112] But the Court does not examine the concept of *viability* under this criterion, nor does it explain how viability is a workable concept. As discussed below, viability does not appear to be "workable," either as a legitimate choice for balancing the competing interests of the woman and the State, or for purposes of enforcement.

As a practical matter, whether a particular unborn child is "viable" depends not only upon advances in neonatal care, but also upon advances in medical technology that enable physicians to assess accurately fetal age, weight, and lung maturity—factors that must be taken into consideration in estimating the child's chances of survival if removed from the womb.[113] In addition, viability presumably depends on the availability of such technology within a particular com-

---

109. 462 U.S. at 460-61 (O'Connor, J., dissenting) (emphasis in original). "[T]he State possesses compelling interests in the protection of potential human life and in maternal health throughout pregnancy, ..." *Id.* at 461.

110. *Casey*, 112 S. Ct. at 2809-12.

111. *Id.* at 2809.

112. *Id.* Needless to say, the Court's defense of the "workability" of *Roe* is made easier by the Joint Opinion's abandonment of the trimester framework. *See, e.g., id.* at 2856-58 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (detailing the problems experienced in applying the trimester standard).

113. *Webster*, 492 U.S. at 530-31 (O'Connor, J., concurring in part and concurring in the judgment).

munity. Finally, it also depends on the skill of those utilizing such techniques. For example, the accuracy of an ultrasound determination of gestational age may depend on the quality of the machine, as well as the skill of the technician. In sum, whether a particular child is "viable" depends on all of these factors and also on the skill of the physician who must use his best medical judgment based upon the available medical technology and data to *estimate* the child's chances for survival. Even with due diligence, a significant margin of error can be expected.[114] Thus, the determination of whether a particular unborn child is "viable" is, at best, an imprecise medical judgment.

Reliance on viability as the constitutional benchmark for balancing the woman's liberty interest and the State's interest in protecting the child's life is wholly arbitrary from the perspective of the woman, the child, and the State.[115] This is true because the determination of whether an unborn child is or is not "viable" may differ solely as a result of the skill of the examining physician whom the woman chooses and the technology available in the community where the abortion is sought. The woman's liberty interest would not be protected where a *nonviable* child is erroneously determined to be viable. And the interests of both the State and the child would be violated where a *viable* child is erroneously determined to be nonviable. Thus, viability appears to be arbitrary and, therefore, unworkable.

In addition, if the Court in *Roe* had simply selected a specific point in pregnancy (*e.g.*, twenty-four weeks, which corresponds roughly with its choice of viability), after which States could prohibit abortion, its ruling would have been "more workable" for purposes of enforcement. However, as it stands, the Court has prevented the States from relying on any "bright lines" regarding viability.[116] Thus, they have been deprived from adopting any statutory cutoff for abortion that is subject to meaningful enforcement capability.[117]

---

114. *Id.* at 516 ("there may be a 4-week error in estimating gestational age") (opinion of Rehnquist, C.J.).

115. The Court refers to the viability line as "seem[ingly] somewhat arbitrary." *Casey,* 112 S. Ct. at 2816. The Court also states that "there is no line other than viability which is *more workable" id.* at 2817 (emphasis added), implying, at least, that viability is not entirely workable.

116. *See* Colautti v. Franklin, 439 U.S. 379, 388-89 (1979) (States may not rely on any single factor to determine viability).

117. Prosecutions under this basically standardless definition of viability have proven to be virtually impossible. In order to enforce a prohibition of abortion after viability, the State must generally prove that the abortionist acted in bad faith, not simply negligently, in erroneously determining gestational age. For insight into other prosecutorial problems, *see* Floyd v. Anders, 440 F. Supp. 535, 537 (D. S.C. 1977), *vacated and remanded,* 440 U.S. 445 (1979) (state prosecut-

Another potential problem with the "workability" of the viability definition is raised in the Joint Opinion itself. The Court notes the possibility that viability may occur "at some moment even slightly earlier in pregnancy [than twenty-three to twenty-four weeks], ... if fetal respiratory capacity can somehow be enhanced in the future."[118] Ten years earlier, Justice O'Connor suggested that "fetal viability in the first trimester of pregnancy may be possible in the not too distant future."[119] What does that development portend for a woman's "liberty" interest in obtaining an abortion? Or, in view of the *Doe* mandated exception for "life and health,"[120] does it make any difference when viability occurs?

b. reliance

"Reliance" is the second criterion set forth in the Joint Opinion for determining whether the rule of *stare decisis* requires reaffirmation of *Roe*.[121] "The inquiry into reliance," the Court explains, "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application."[122] The Court readily acknowledges that reliance interests weigh heavily in the commercial context "where advance planning of great precision is most obviously a necessity."[123] And the Court apparently concedes that any specific reliance interest in the availability of abortion (following a pregnancy resulting from unplanned intercourse or a failure of conventional birth control) would be *de minimis*, because "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[124]

---

ing attorney enjoined from attempting to prosecute a physician for performing an abortion on a woman who was twenty-five weeks pregnant where the child survived for twenty days and the abortion was sought because the pregnant woman wished an abortion because her pregnancy interfered with her hopes and plans to go to college).

118. *Casey*, 112 S. Ct. at 2811.

119. *Akron Center I*, 462 U.S. at 457 (O'Connor, J., dissenting).

120. *See supra* note 45.

121. *Casey*, 112 S. Ct. at 2809-10.

122. *Id.* at 2809.

123. *Id.* (citing Payne v. Tennessee, 111 S. Ct. 2597, 2610 (1991)).

124. *Id.* Contrary to what some may think (and the Court may believe), the "sudden restoration of state authority to ban abortions" would not return the United States to the legal *status quo ante* of 1973. *See generally* Linton, *supra* note 68. More than 30 States have repealed their pre-*Roe* laws and only a handful of these States have enacted post-*Roe* laws which, if enforced, would prohibit most abortions (Arkansas, Louisiana, Rhode Island, South Dakota, and Utah). Of the States that have not repealed their pre-*Roe* laws, several allow abortion on demand through an advanced stage of pregnancy (Alaska, Hawaii, and New

In what is probably the key passage to the entire Joint Opinion, the Court denies that "cognizable reliance" on the availability of abortion can be limited to "specific instances of sexual activity."[125]

> [T]o do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[126]

This, it is suggested, is the heart of the Joint Opinion and the real reason the Court did not overrule *Roe v. Wade* in *Casey*. There are, however, several problems with the Court's reasoning. First, having effectively conceded that there is no reliance interest in the availability of abortion in *"specific* instances of sexual activity," it is difficult to perceive how there could be any *general* reliance interest, either. Second, the Court apparently attributes to *Roe* "two decades of economic and social developments," a claim unsupported by any facts. As Chief Justice Rehnquist said in dissent:

> Surely, it is dubious to suggest that women have reached their "places in society" in reliance upon *Roe,* rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved for men.[127]

Much of the "economic and social developments" to which the Court refers have resulted from a nationwide commitment to equal rights for women that has little to do with abortion. As two authors have observed recently:

York), or under a broad range of circumstances, including mental health (Colorado, Delaware, and New Mexico), and others could not enforce their pre-*Roe* laws because of state constitutional impediments (California, Massachusetts, and Vermont). Overall, barely one-fourth of the States would have enforceable laws on the books prohibiting most abortions if *Roe* were overruled (Alabama, Arizona, Arkansas, Louisiana, Michigan, Mississippi, New Hampshire, Oklahoma, Rhode Island, South Dakota, Texas, Utah, West Virginia, and Wisconsin). Bills to repeal the remaining pre-*Roe* laws are introduced in many of these States on a regular basis.

125. *Id.* at 2809. *See also id.* at 2844-45 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part).

126. *Id.* If *Roe* were overruled, women would not lose their ability to control their "reproductive lives." Even if abortion laws were enacted and enforced, abstinence, contraception and sterilization would remain options legally available to them.

127. *Id.* at 2862 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

> *Roe* is rarely cited as a precedent for women's rights in any area other than abortion. Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from *Roe* v. *Wade.*[128]

Whatever progress has been made in the law in combatting sex discrimination is attributable to other, independent constitutional doctrines[129] or to Congressional[130] or state action,[131] rather than to

---

128. Paige C. Cunningham & Clarke D. Forsythe, *Is Abortion the "First Right" for Women?: Some Consequences of Legal Abortion, in* ABORTION, MEDICINE AND THE LAW 154 (J. Butler & D. Walbert eds., 4th ed. 1992).

129. *See, e.g.,* Reed v. Reed, 404 U.S. 71 (1971) (invalidating state law giving preference to men in issuing letters of administration to probate estate) (decided under Equal Protection Clause of Fourteenth Amendment); Frontiero v. Richardson, 411 U.S. 677 (1973) (striking down federal laws requiring dependents of servicewomen, but not servicemen, to prove their dependence to receive quarters allowances and medical and dental benefits) (equal protection component of Due Process Clause); Cleveland Board of Education v. LeFleuer, 414 U.S. 632 (1974) (mandatory pregnancy leave policy for public school teachers violated Due Process Clause because policy had no valid relationship to State's interest in preserving continuity of instruction and was based upon an impermissible irrebuttable presumption that every teacher who is four or five months pregnant is physically incapable of continuing her duties); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (striking down provisions of Social Security Act that allowed benefits to be paid to widow and minor children of deceased husband and father covered by the Act but only to minor children and not widower of deceased wife and mother) (Due Process Clause of Fifth Amendment); Stanton v. Stanton, 421 U.S. 7 (1975) (striking down state law establishing different ages of majority for males and females) (Equal Protection Clause); Craig v. Boren, 429 U.S. 190 (1976) (same, with respect to statutes setting different ages at which men and women could purchase beer); Califano v. Goldfarb, 430 U.S. 199 (1977) (provision of Social Security Act denying benefits to widower who could not prove that he was receiving at least one-half of his support from his deceased wife but did not require same evidence of dependency from widow violated Equal Protection Clause of the Fourteenth Amendment); Caban v. Mohammed, 441 U.S. 380 (1979) (statute which required consent of natural mother, but not natural father, to adoption of child born out-of-wedlock and never legitimized violated Equal Protection Clause); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (striking down, on equal protection grounds, state statute that allowed husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent).

130. Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000 *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, and the Pregnancy Discrimination in Employment Act amendments of 1978, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982)) (discrimination in public and private employment); 5 U.S.C. § 201 (mandating anti-discrimination policy in federal employment); Public Works and Economic Development Act Amendments of 1971, 42 U.S.C. § 3123 (discrimination in federally-funded public works projects); 23 U.S.C. § 324 (forbidding discrimination in federal aid to

any particular reliance on *Roe.*[132]

---

highways); 5 U.S.C. § 2302(b)(l) (anti-discrimination in personnel policies); Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d), as amended by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. § 206(d) (1988) (mandating equal pay); Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (forbidding discrimination on account of pregnancy in granting unemployment compensation benefits); Civil Rights Act of 1964, Title VIII, 42 U.S.C. § 3604, as amended (discrimination in sale or rental of housing); 20 U.S.C. § 1221e(a) (mandating anti-discrimination policy in educational institutions receiving federal funds), *id.,* § 1681 *et seq.* (discrimination in education). *See also* Newport News Shipbuilding and Drydock Co. v. Equal Employment Opportunity Commission, 462 U.S. 669 (1983) (interpreting amendments to Title VII); Int'l Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991) (interpreting Pregnancy Discrimination in Employment Act). 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1982).

131. Seventeen States have included equal rights provisions in their state constitutions: ALASKA CONST. art. 1, § 3 (1972); COLO. CONST. art. II, § 29 (1973); CONN. CONST. art. I, § 20 (1974); HAW. CONST. art. I, §§ 3, 5 (1972); ILL. CONST. art. I, § 18 (1970); LA. CONST. art. I, § 3 (1974); MD. CONST. art. XLVI (1972); MASS. CONST. part 1, art. CVI [§ 252] (amending § 2) (1976); MONT. CONST. art. II, § 4 (1973); N.H. CONST. part 1, art. II (1974); N.M. CONST. art. II, § 18 (1973); PA. CONST. art. I, § 28 (1971); TEX. CONST. art. I, § 3a (1972); UTAH CONST. art. IV, § 1 (1896); VA. CONST. art. I, § 11 (1971); WASH. CONST. art. XXXI, § 1 (1972); WYO. CONST. art. I, §§ 2, 3 & art. VI, § 1 (1890). Many States also have "mini-EEOC" laws that prohibit discrimination on account of sex. Other significant state laws against sex-based discrimination are cited in Cunningham & Forsythe, *supra* note 128, at 155-56 & nn.347-56.

132. *Roe* has been cited in several pregnancy discrimination cases but was dispositive in none. *Compare* Buchanan v. Demong, 654 F. Supp. 139, 143 (D. Mass. 1987) (teachers denied unemployment compensation benefits because they had been on unpaid maternity leave were not discriminated against on account of pregnancy); Sokol v. Smith, 671 F. Supp. 1243, 1245-47 (W.D. Mo. 1987) (same with respect to persons working for private employers); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 940-41 (D. Neb. 1986) (upholding girls club rule forbidding continued employment of unmarried staff members who either became pregnant or caused pregnancy), *aff'd,* 834 F.2d 697 (8th Cir. 1987); Brown v. Bathke, 416 F. Supp. 1194, 1199-1200 (D. Neb. 1976) (rejecting challenge to school board decision to terminate plaintiff's contract as first year probationary teacher for becoming pregnant out-of-wedlock), *rev'd on other grounds,* 566 F.2d 588 (8th Cir. 1977), *with* Crawford v. Cushman, 531 F.2d 1114, 1124 (2d Cir. 1976) (striking down former Marine Corps regulation mandating discharge of woman Marine who became pregnant) (decided on constitutional grounds); Buckley v. Coyle Public School System, 476 F.2d 92, 96 n.3 (10th Cir. 1973) (questioning mandatory maternity leave policy—school teachers); In re National Airlines, Inc., 434 F. Supp. 249, 258 (S.D. Fla. 1977) (striking down mandatory maternity leave policy—flight attendants) (decided under Title VII); Driessen v. Freborg, 431 F. Supp. 1191, 1195 (D. N.D. 1977) (same—school teacher); Ponton v. Newport News School Bd., 632 F. Supp. 1056, 1061-62 (E.D. Va. 1986) (same); Lewis v. Delaware State College, 455 F. Supp. 239, 248-49 (D. Del. 1978) (college could not refuse to renew employee's contract because she bore child out-of-wedlock) (impermissible irrebuttable presumption); Brown v. Porcher, 502 F. Supp. 946, 956 n.19 (D. S.C. 1980), *aff'd,* 660 F.2d 1001 (1981), *cert. denied,* 459 U.S. 1150 (1983) (women could not be denied state unemployment benefits because they left their most recent work due to pregnancy) (decided

Third, and most importantly, the Court seems to suggest that women can be made "equal" to men only if they are given the right to destroy their own children through abortion. But it is an offensive and sexist notion that women must *deny* what makes them unique as women (their ability to conceive and bear children), in order to be treated "equally" with (or by) men.[133] Genuine equality between the sexes will be reached on that day when women can *affirm* what makes them unique as women *and* still be treated fairly by the law and society. By not overruling *Roe,* the *Casey* Court has delayed the arrival of that day.

c. change in law

The third criterion of the Joint Opinion's *stare decisis* discussion requires an examination of the "evolution of legal principle."[134] The Court asks whether *"Roe's* doctrinal footings" are "weaker [now] than they were in 1973," and whether any "development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking."[135]

In light of the Joint Opinion's refusal to place its judicial imprimatur on *Roe,* these questions come as a surprise. If the authors of the Joint Opinion cannot bring themselves to say that *Roe* was correctly decided as a matter of original constitutional interpretation,[136] what possible difference can it make whether *Roe* has been undermined by later decisions? Another peculiarity about this criterion is its unstated assumption that only a decision that becomes *less* defensible over time is left unprotected by the rule of *stare decisis.* As Chief Justice Rehnquist said in dissent:

> [s]urely there is no requirement, in considering whether to depart from *stare decisis* in a constitutional case, that a decision be more wrong now than it was at the time it was rendered. If that were true, the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered.[137]

---

under Federal Unemployment Tax Act), *but see* Wimberly v. Labor and Industrial Relations Comm'n, 479 U.S. 511 (1987) (rejecting holding in *Porcher*)*;* Kewin v. Bd. of Educ. of Melvindale Northern Allen Park Pub. Sch., 237 N.W.2d 514, 519 (Mich. Ct. App. 1976).

133. This argument is developed is much greater detail in *Smolin, supra* note 37, at 1001-13 and in his article appearing in this Symposium issue. *See also* Cunningham & Forsythe, *supra* note 128, at 100-58.

134. *Casey,* 112 S. Ct. at 2810.

135. *Id.*

136. *Id.* at 2817.

137. *Id.* at 2861 (Rehnquist, C.J., concurring in the judgment in part and

Justice White made the same point six years earlier in his dissent in *Thornburgh*,

> [I]f an argument that a constitutional decision is erroneous must be novel in order to justify overruling that precedent, the Court's decisions in *Lochner v. New York*, 198 U.S. 45 (1905), and *Plessy v. Ferguson*, 163 U.S. 537 (1896), would remain the law, for the doctrines announced in those decisions were nowhere more eloquently or incisively criticized than in the dissenting opinions of Justices Holmes (in *Lochner*) and Harlan (in both cases). That the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it.[138]

But the law has changed. By focusing narrowly on constitutional law,[139] the Court manages to avoid viewing the broader legal landscape which, with regard to the protection of the unborn child, has changed dramatically since *Roe*. Judicial and legislative developments in areas outside of abortion have increasingly recognized that neither viability nor live birth is a relevant factor in defining public wrongs (criminal law) or redressing private injuries (tort law). These developments cast doubt on the reasonableness of the choice of viability as an appropriate constitutional standard.

For example, in a trend *Roe* missed[140] and *Casey* overlooked, a majority of state courts (twenty-eight) have expressly or impliedly rejected viability as an appropriate cutoff point for determining liability for nonfatal prenatal injuries and allow actions to be brought for such injuries without regard to the stage of pregnancy when they were inflicted.[141] Many of these decisions were handed down before

---

dissenting in part). As the Chief Justice noted, the Joint Opinion abandons the trimester framework for "failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy," even though "there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception." *Id.*

138. *Thornburgh*, 476 U.S. at 788 (White, J., dissenting).

139. *Casey*, 112 S. Ct. at 2811.

140. 410 U.S. at 161 ("[i]n most States, recovery [for prenatal injuries] is said to be permitted only if the fetus was viable, or at least quick"). *See* James Bopp, Jr. & Richard Coleson, *The Right to Abortion: Anomalous, Absolute, and Ripe for Reversal*, 3 B.Y.U. J. PUB. L. 181, 246-282 (1989), for a review of *Roe's* errors in reading the law of prenatal injuries.

141. Wolfe v. Isbell, 280 So. 2d 758, 761 (Ala. 1973) (express statement in context of wrongful death action); Walker by Pizano v. Mart, 790 P.2d 735, 739 (Ariz. Ct. App. 1990) (*dictum* in wrongful life action); CAL. CIV. CODE, § 29 (West 1982); Keleman v. Superior Court, 186 Cal. Rptr. 566, 568 (Ct. App. 1982) (prenatal injury); Endo Laboratories, Inc. v. Hartford Ins. Group, 747 F.2d 1264 (9th Cir. 1984) (applying California law); Empire Cas. v. St. Paul Fire & Marine, 764 P.2d 1191, 1195-97 (Colo. 1988) (by implication in recognizing preconception tort action); Simon v. Mullin, 380 A.2d 1353, 1357 (Conn. 1977)

Roe. A minority of jurisdictions (twelve States and the District of Columbia) recognize a cause of action for prenatal injuries sustained after viability but have not yet decided whether the action will lie for injuries suffered before viability.[142] An even smaller minority of

---

(prenatal injury); Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560, 562 (Fla. Dist. Ct. App. 1976) (same); Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727 (Ga. 1956) (prenatal injury); Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1252-53 (Ill. 1977) (express statement in recognizing cause of action for preconception tort); Cowe by Cowe v. Forum Group, Inc., 541 N.E.2d 962, 967-68 (Ind. Ct. App. 1989), *transfer granted*, 575 N.E.2d 630, 636-37 (Ind. 1991) (prenatal injury); Humes v. Clinton, 792 P.2d 1032, 1037 (Kan. 1990) (*dictum* in wrongful death action); Danos v. St. Pierre, 402 So. 2d 633 (La. 1981) (by implication in wrongful death action); Group Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198, 1206-07 (Md. 1983) (express statement in context of wrongful death action); Torigian v. Watertown News Co., 225 N.E.2d 926 (Mass. 1967) (by implication in wrongful death action); Payton v. Abbott Laboratories, 437 N.E.2d 171, 182-85 (Mass. 1982) (prenatal injury); Womack v. Buchhorn, 187 N.W.2d 218 (Mich. 1971) (same); Bergstresser v. Mitchell, 448 F. Supp. 10, 14-15 (E.D. Mo. 1977), *aff'd*, 577 F.2d 22, 25-26 (8th Cir. 1978) (by implication in recognizing cause of action for pre-conception tort); Miller v. Duhart, 637 S.W.2d 183, 186 (Mo. Ct. App. 1982) (*dictum*); Weaks v. Mounter, 493 P.2d 1307, 1309 (Nev. 1972) (prenatal injury); White v. Yup, 458 P.2d 617, 620-21 (Nev. 1969) (express statement in context of wrongful death action); Bennett v. Hymers, 147 A.2d 108 (N.H. 1958) (prenatal injury); Smith v. Brennan, 157 A.2d 497, 502 (N.J. 1960) (same); Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (N.Y. App. Div. 1953) (same); Hughson v. St. Francis Hosp. of Port Jervis, 459 N.Y.S.2d 814, 815 (N.Y. App. Div. 1983) (same); Stetson v. Easterling, 161 S.E.2d 531, 533-34 (N.C. 1968) (express statement in context of wrongful death action); Gay v. Thompson, 146 S.E.2d 425, 429 (N.C. 1966) (by implication in wrongful death action); Hopkins v. McBane, 359 N.W.2d 862, 864 (N.D. 1985) (adopting § 869(1) of the RESTATEMENT (SECOND) OF TORTS (1979)); Evans v. Olson, 550 P.2d 924, 927 (Okla. 1976) (express statement in context of wrongful death action); Sinkler v. Kneale, 164 A.2d 93, 96 (Pa. 1960) (prenatal injury); Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966) (same); Delgado v. Yandell, 468 S.W.2d 475 (Tex. Crim. App. 1971), *writ ref'd n.r.e. per curiam*, 471 S.W.2d 569 (Tex. 1971) (prenatal injury); Kalafut v. Gruver, 389 S.E.2d 681, 683-84 (Va. 1990) (adopting § 869(1) of the RESTATEMENT (SECOND) OF TORTS); Seattle-First National Bank v. Rankin, 367 P.2d 835, 837-38 (Wash. 1962) (prenatal injury); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 495 (Wash. 1983) (*dictum* in wrongful life case); Puhl v. Milwaukee Auto. Ins. Co., 99 N.W.2d 163, 169-71 (Wis. 1959) (*dictum* in prenatal injury case); Kwaterski v. State Farm Mut. Auto Ins. Co., 148 N.W.2d 107, 109 (Wis. 1967) (express statement in context of wrongful death action), *overruled on other grounds*, In re Estate of Stromsten, 299 N.W.2d 226 (Wis. 1980).

142. Worgan v. Greggo & Ferrara, Inc., 128 A.2d 557 (Del. Super. Ct. 1956) (express statement in context of wrongful death action); Luff v. Hawkins, 551 A.2d 437, 438 n.l (Del. Super. Ct. 1988) (same); Greater Southeast Community Hospital v. Williams, 482 A.2d 394, 396 & n.2 (D.C. 1984) (same); Jones v. Howard University, Inc., 589 A.2d 419, 423 n.8 (D.C. 1991) (same) (*dictum*); Volk v. Baldazo, 651 P.2d 11, 13 (Idaho 1982) (same); Mitchell v. Couch, 285 S.W.2d 901 (Ky. 1955) (by implication in wrongful death action); Verkennes v. Corniea, 38 N.W.2d 838 (Minn. 1949) (same); Rainey v. Horn, 72 So. 2d 434

States (ten) have not yet been asked to recognize a cause of action for prenatal injuries.[143] No state court has rejected a cause of action for prenatal injuries in twenty-five years.[144] And where prenatal injuries result in death after live birth the modern cases appear to reject any requirement of viability as a condition of recovery under wrongful death statutes.[145]

Roe also minimized the emerging case law allowing wrongful death actions for stillborn children.[146] The overwhelming majority of jurisdictions (thirty-six States and the District of Columbia) now allow recovery under wrongful death statutes for prenatal injuries that result in stillbirth where the injury causing death (or at least the death itself) occurs after viability.[147] (Few of those jurisdictions,

---

(Miss. 1954) (express statement in wrongful death action); Davila v. Bodelson, 704 P.2d 1119 (N.M. Ct. App. 1985) (prenatal injury); Williams v. Marion Rapid Transit, Inc., 87 N.E.2d 334 (Ohio 1949) (prenatal injury); Mallison v. Pomeroy, 291 P.2d 225 (Or. 1955) (same); Hall v. Murphy, 113 S.E.2d 790 (S.C. 1960) (express statement in context of wrongful death action); Shousha v. Matthews Drivurself Service, Inc., 358 S.W.2d 471, 476 (Tenn. 1962) (same); Vaillancourt v. Medical Center Hospital of Vermont, Inc., 425 A.2d 92, 94-95 (Vt. 1980) (by implication in wrongful death action); Baldwin v. Butcher, 184 S.E.2d 428, 431-32 (W. Va. 1971) (express statement in context of wrongful death action).

143. There are no reported prenatal injury cases in Alaska, Arkansas (*but see* Graham v. Sisco, 449 S.W.2d 949 (Ark. 1970) (recognizing action for injuries inflicted in course of Caesarean section)), Iowa (*see* Weitl v. Moes, 311 N.W.2d 259, 272 n.8 (Iowa 1981); *but see Kilker* by and through Kilker v. Mulry, 437 N.W.2d 1, 2 (Iowa Ct. App. 1988) (apparently recognizing existence of cause of action for prenatal injuries); Oswald v. LeGrand, 453 N.W.2d 634 (Iowa 1990) (medical malpractice in attending pregnant woman); Lambert v. Sisters of Mercy Health Corp., 369 N.W.2d 417 (Iowa 1985) (same)); Hawaii, Maine, Montana (*see* Kuhnke v. Fisher, 683 P.2d 916, 919 (Mont. 1984)), Nebraska (*see* Drabbels v. Skelly Oil Co., 50 N.W.2d 220, 232 (Neb. 1951); *but see* Miles v. Box Butte County, 489 N.W.2d 829 (Neb. 1992) (affirming substantial damage award for prenatal injuries sustained shortly before delivery)); South Dakota (*see In re* Certification of Question of Law from United States District Court, 387 N.W.2d 42, 45 (S.D. 1986)), Utah, or Wyoming.

144. *See* Lawrence v. Craven Tire Co., 169 S.E.2d 440 (Va. 1969); Marlow v. Krapek, 174 N.W.2d 172 (Mich. Ct. App. 1969).

145. *See, e.g.*, Wolfe v. Isbell, 280 So. 2d 758 (Ala. 1973); Simon v. Mullin, 380 A.2d 1353 (Conn. Super. Ct. 1977); Greater Southeast Community Hosp. v. Williams, 482 A.2d 394 (D.C. 1984); Group Health Ass'n v. Blumenthal, 453 A.2d 1198 (Md. 1983); Torigian v. Watertown News Co., Inc., 225 N.E.2d 926 (Mass. 1967); Hudak v. Georgy, 634 A.2d 600, 602 (Pa. 1993) ("no jurisdiction accepts the . . . assertion that a child must be viable at the time of birth in order to maintain an action in wrongful death"); Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820 (Tex. 1967); Kalafut v. Gruver, 389 S.E.2d 681 (Va. 1990).

146. 410 U.S. at 162.

147. In addition to the cases cited *supra* in notes 141-42, from Delaware, the District of Columbia, Idaho, Kentucky, Louisiana, Minnesota, Mississippi, Nevada, North Dakota, Oklahoma, Vermont, West Virginia, and Wisconsin, are *Eich v.*

however, have allowed recovery where both the injury and the death occur before viability.[148]) A minority of States (ten) have denied wrongful death actions for prenatal injuries unless the death followed a live birth.[149] And a handful of States (four) have not yet decided

---

Gulf Shores, 300 So. 2d 354 (Ala. 1974); *Summerfield v. Superior Court*, 698 P.2d 712 (Ariz. 1985); *Espadero v. Feld*, 649 F. Supp. 1480 (D. Colo. 1986); *Rottman* v. *Krabloonik, Inc.*, 834 F. Supp. 1269 (D. Colo. 1993); *Gorke v. Leclerc*, 181 A.2d 448 (Conn. Super. Ct. 1962); *Porter v. Lassiter*, 87 S.E.2d 100 (Ga. Ct. App. 1955); *Wade v. United States*, 745 F. Supp. 1573 (D. Haw. 1990); *Chrisafogeorgis v. Brandenberg*, 304 N.E.2d 88 (Ill. 1973); *Britt v. Sears*, 277 N.E.2d 20 (Ind. Ct. App. 1971); *Hale v. Manion*, 368 P.2d 1 (Kan. 1962); *State ex rel. Odham v. Sherman*, 198 A.2d 71 (Md. 1964); *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916 (Mass. 1975); *O'Neill v. Morse*, 188 N.W.2d 785 (Mich. 1971); *Jarvis v. Providence Hosp.*, 444 N.W.2d 236, 238 (Mich. Ct. App. 1989); *O'Grady* v. *Brown*, 654 S.W.2d 904 (Mo. 1983); *Polinquin v. MacDonald*, 135 A.2d 249 (N.H. 1957); *Salazar v. St. Vincent Hosp.*, 619 P.2d 826 (N.M. Ct. App. 1980); *DiDonato v. Wortman*, 358 S.E.2d 489, *reh'g denied*, 361 S.E.2d 73 (N.C. 1987); *Werling v. Sandy*, 476 N.E.2d 1053 (Ohio 1985); *Libbee v. Permanente Clinic*, 518 P.2d 636, *reh'g denied*, 520 P.2d 361 (Or. 1974); *Amadio v. Levin*, 501 A.2d 1085 (Pa. 1985); *Presley v. Newport Hosp.*, 365 A.2d 748 (R.I. 1976); *Fowler v. Woodward*, 138 S.E.2d 42 (S.C. 1964); *In Re Certification of Question of Law from United States District Court*, 387 N.W.2d 42 (S.D. 1986); TENN. CODE ANN. §20-5-106(c) (Supp. 1991) (legislatively overruling Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); *Moen v. Hanson*, 537 P.2d 266 (Wash. 1975).

148. Eight States have rejected a wrongful death action for a nonviable stillborn child after previously accepting such an action for a viable stillborn child. *See* Gentry v. Gilmore, 613 So. 2d 1241 (Ala. 1993); Lollar v. Tankersley, 613 So. 2d 1249 (Ala. 1993); Humes v. Clinton, 792 P.2d 1032 (Kan. 1990); Fryover v. Forbes, 446 N.W.2d 292 (Mich. 1989); Rambo v. Lawson, 799 S.W.2d 62 (Mo. 1990); Wallace v. Wallace, 421 A.2d 134 (N.H. 1980); Guyer v. Hugo Pub. Co., 830 P.2d 1393 (Okla. Ct. App. 1991); Coveleski v. Bubnis, 634 A.2d 608 (Pa. 1993); Miccolis v. Arnica Mut. Ins. Co., 587 A.2d 67 (R.I. 1991). *See also In re* Air Crash Disaster at Detroit Metro. Airport, 737 F. Supp. 427 (E.D. Mich. 1989) (applying Michigan law); Rottman v. Krabloonik, Inc., 834 F. Supp. 1269, 1272 n.8 (D. Colo. 1993) (*dictum* in case arguably involving a *viable* child) (applying Colorado law).

Four States—by statute or case law—have allowed a wrongful death action for a nonviable stillborn child. *See* Porter v. Lassiter, 87 S.E.2d 100 (Ga. Ct. App. 1955) (quickening); ILL. COMP. STAT. ANN., ch. 740, § 180/2.2 (1992) (any time during pregnancy) (legislatively overruling Green v. Smith, 377 N.E.2d 37 (Ill. 1978); Johnson v. S. New Orleans Light & Traction Co., No. 9048 (Orleans Dec. 10, 1923) (unreported) (rejecting viability standard for wrongful death of unborn child); Danos v. St. Pierre, 402 So. 2d 633, 639 (La. 1981) (approving *Johnson's* rejection of viability); Danos v. St. Pierre, 383 So. 2d 1019, 1027 (La. Ct. App. 1980), *aff'd*, 402 So. 2d 633 (La. 1991) (Lottinger, J., concurring); S.D. CODIFIED LAWS ANN. § 21-5-1 (1987) (amending wrongful death statute to include "an unborn child" without regard to gestational age).

149. Justus v. Atchison, 565 P.2d 122 (Cal. 1977); Stokes v. Liberty Mut. Ins. Co., 213 So. 2d 695 (Fla. 1968); Stern v. Miller, 348 So. 2d 303 (Fla. 1977); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Simon v. United States, 438 F. Supp. 759, 761 (S.D. Fla. 1977) (applying Florida law); McKillip

whether a wrongful death action will lie for prenatal injuries resulting in stillbirth.[150]

Both the common law action for prenatal injuries and the statutory action for the wrongful death of an unborn child recognize a duty of care that is owed *to the unborn child.*[151] Duties, of course, are owed only to *persons.* Neither *Roe* nor *Casey* displayed any familiarity with the sustained critique of viability in the reported cases on prenatal injuries and wrongful death. As early as the 1920's, courts began to question its relevance in civil cases.

In an unreported decision from 1923, the Louisiana Court of Appeals refused to read either a live birth or a viability requirement into the wrongful death statute:

> The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe that the infant is a child from the moment of conception, although life may be in a state of suspended animation, the subject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.[152]

---

v. Zimmerman, 191 N.W.2d 706 (Iowa 1971); Milton v. Gary Medical Ctr., 538 A.2d 252 (Me. 1988); Kuhnke v. Fisher, 683 P.2d 916 (Mont. 1984); Drabbels v. Skelly Oil Co., 50 N.W.2d 229 (Neb. 1951); Egbert v. Wenzl, 260 N.W.2d 480 (Neb. 1977); Smith v. Columbus Community Hosp., Inc., 387 N.W.2d 490 (Neb. 1986); Graf v. Taggart, 204 A.2d 140 (N.J. 1964); Endresz v. Friedberg, 248 N.E.2d 901, (N.Y. 1969); Witty v. American Gen. Capital Distribs., Inc., 727 S.W.2d 503 (Tex. 1987); Lawrence v. Craven Tire Co., 169 S.E.2d 440 (Va. 1969). Two of these States, while denying a cause of action under the wrongful death statutes to the representative of the unborn child, have granted the parents a right to recover for the child's wrongful death. *See* Weitl v. Moes, 311 N.W.2d 259 (Iowa 1981) (by court rule); Giardina v. Bennett, 545 A.2d 139 (N.J. 1988) (common law).

150. Alaska (*but see* Mace v. Jung, 210 F. Supp. 706 (D. Alaska 1962) (denying cause of action for nonviable unborn child)); Arkansas (*see* Carpenter v. Logan, 662 S.W.2d 808, 810 (Ark. 1984) (not deciding issue)); Utah (*see* Nelson v. Peterson, 542 P.2d 1075, 1077 (Utah 1975) (same)); and Wyoming.

The Court in *Roe* added gratuitously that the wrongful death action allowed in such circumstances, "would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life." *Roe*, 410 U.S. at 162. Wrongful death actions can benefit *only* survivors, not the deceased, regardless of age. And the actions are brought in the name of the deceased or his estate, not the parent.

151. "All writers who have discussed the problem have joined in condemning the old rule, in maintaining that the unborn child in the path of an automobile is as much a person in the street as the mother, and in urging that recovery should be allowed upon proper proof." W. PROSSER, LAW OF TORTS 336 (4th ed. 1971).

152. Johnson v. S. New Orleans Light & Traction Co., No. 9048 (Orleans Dec. 10, 1923) (unreported), *writ refused*, No. 266,433 (1923) (quoted with ap-

In 1942, the New Jersey Court of Errors and Appeals refused to recognize a cause of action for prenatal injuries because the child was not viable at the time the injuries were sustained.[153] Chief Justice Brogan wrote a strong dissent joined by five other members of the court:

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.[154]

In 1953, the New York Supreme Court, Appellate Division, rejected a viability requirement in recognizing a cause of action for prenatal injuries, stating that "legal separability should begin where there is biological separability" and "separability begins at conception."[155]

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, postnatal as well as pre-natal.[156]

Other courts quickly began to follow suit and reject a requirement of viability in prenatal injury actions. In 1956, the Georgia Supreme Court rejected a viability requirement in prenatal injury cases, stating, "If a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover."[157] Two years later, the New Hampshire Supreme Court also discarded viability, adopting the opinion that "the

---

proval in Danos v. St. Pierre, 402 So. 2d 633, 639 (La. 1981)).

153. Stemmer v. Kline, 26 A.2d 489 (N.J. 1942).

154. *Id.* at 687 (Brogan, C.J., dissenting).

155. Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (N.Y. App. Div. 1953).

156. *Id.* at 697.

157. Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727, 728 (Ga. 1956).

fetus from the time of conception becomes a separate organism and remains so throughout its life."[158] In 1959, the Wisconsin Supreme Court, in *dicta,* questioned the viability distinction:

> The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and non-viability, and fails to recognize the biological fact there is a living human being before viability. A child is no more a part of its mother before it becomes viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.[159]

In 1960, the New Jersey Supreme Court, after quoting extensively from Chief Justice Brogan's dissent in *Stemmer v. Kline*[160] and noting that "[m]edical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body,"[161] also abandoned viability:

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. In the first place, age is not the sole measure of viability, and there is no real way of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application .... In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress.[162]

In the same year, the Pennsylvania Supreme Court recognized a cause of action for prenatal injuries, regardless of when inflicted.[163] The court observed that viability has "little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception."[164] In 1966, the

---

158. Bennett v. Hymers, 147 A.2d 108, 110 (N.H. 1958).

159. Puhl v. Milwaukee Auto Ins. Co., 99 N.W.2d 163, 170 (Wis. 1959), *overruled on other grounds,* In re Estate of Stromsted, 299 N.W.2d 226 (Wis. 1980).

160. *See supra* note 153.

161. Smith v. Brennan, 157 A.2d 497, 502 (N.J. 1960).

162. *Id.* at 504.

163. Sinkler v. Kneale, 164 A.2d 93 (Pa. 1960).

164. *Id.* at 96.

Rhode Island Supreme Court followed suit.[165] The court noted "the medical fact that a fetus becomes a living human being from the moment of conception" and rejected viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence."[166] The trend continued with the Texas Supreme Court's rejection of viability in 1971,[167] and the Alabama Supreme Court's rejection of viability in 1973,[168] the latter court stating:

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based on viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.[169]

In 1976, the Florida District Court of Appeals criticized retention of a viability requirement in prenatal injury cases:

> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.[170]

In the same year, the Rhode Island Supreme Court rejected a live birth requirement in the wrongful death of a viable unborn child.[171] In *dicta*, a plurality of the Court also sharply criticized the viability rule:

> [V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. If it seems that if live birth is to be characterized, as it so frequently has been, as an

---

165. Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966).
166. *Id.* at 223-24.
167. Delgado v. Yandell, 468 S.W.2d 475 (Tex. Civ. App.), *writ ref'd n.r.e. per curiam*, 471 S.W.2d 569 (Tex. 1971).
168. Wolfe v. Isbell, 280 So. 2d 758 (Ala. 1973).
169. *Id.* at 761.
170. Day v. Nationwide Mut. Ins. Co., 328 So. 2d 560, 561 (Fla. Dist. Ct. App. 1976).
171. Presley v. Newport Hosp., 365 A.2d 748 (R.I. 1976).

> arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur*.[172]

The following year the Connecticut Superior Court rejected a viability requirement in wrongful death cases where death occurs after a live birth: "The development of the principle of law that now permits recovery by or on behalf of a child born alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law."[173]

In 1980 the Louisiana Court of Appeals rejected a live birth requirement in an action for the wrongful death of a viable unborn child.[174] In his concurring opinion, Justice Lottinger added that viability is an arbitrary basis for denying recovery:

> Viability has not been the controlling factor in some previous Louisiana cases allowing recovery [for the wrongful death of a stillborn child], and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cutoff point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable.[175]

Both state and federal judges have recognized that the rule limiting recovery to post-viability injury resulted from the law's conservatism in gradually moving away from a rule that had denied *all* recovery for such injuries.[176] The lead case denying recovery was Justice Oliver Wendell Holmes' opinion for the Massachusetts Supreme Judicial Court in *Dietrich v. Inhabitants of Northampton*.[177] In *Dietrich,* a wrongful death action, the decedent was a nonviable child injured *in utero* who was born alive, lived a few minutes, then died. Justice Holmes wrote that no civil duty was owed to an unborn child.[178] The holding was based on the lack of any common law precedent allowing such an action, the remoteness of the injury from the negligent conduct, and the Court's view that an unborn child was still a part of its mother.[179]

---

172. *Id.* at 753-54 (*disapproved* Miccolis v. Amica Mut. Ins. Co., 587 A.2d 67 (R.I. 1991).).

173. Simon v. Mullin, 380 A.2d 1353, 1357 (Conn. Super. Ct. 1977).

174. Damos v. St. Pierre, 383 So. 2d 1019 (La. Ct. App. 1980), *aff'd,* 402 So. 2d 633 (La. 1991).

175. *Id.* at 1027 (Lottinger, J., concurring).

176. *See* Smith v. Brennan, 157 A.2d 497 (N.J. 1960), and Todd v. Sandidge Construction Co., 341 F.2d 75 (4th Cir. 1964), discussed below, *infra* notes 180-85 and accompanying text.

177. 138 Mass. 14 (1884).

178. *Id.* at 245.

179. *Id.* at 243, 245.

In repudiating the viability rule in 1960, the New Jersey Supreme Court commented on the durability of the *Dietrich* rule:

> Although the viability distinction has no justification, it is explainable historically. The *Dietrich* case announced a theory that an unborn child was part of its mother. The first dissent from this proposition, by Justice Boggs in the *Allaire* case [*Allaire v. St. Luke's Hospital*, 56 N.E. 638 (Ill. 1900)], pointed out that an unborn child who could sustain life apart from its mother could not be considered part of her. The logical appeal of Justice Boggs' approach, coupled with the understandable conservatism of the earlier courts who broke with the *Dietrich* theory, resulted in a rule of recovery limited by the viability distinction.[180]

These sentiments were forcefully echoed by Judge Haynsworth in his dissent in *Todd v. Sandidge Construction Co.*[181] Judge Haynsworth criticized the selection of viability as an appropriate line of demarcation for prenatal injuries:

> What in reason then has viability at the time of injury [citation omitted] got to do with the problem? The answer, plainly, is nothing. To one so concerned with the foreclosure of all possibility of fictitious claims as to feel compelled to draw arbitrarily an arbitrary line, the notion of viability at the time of injury as a limiting requirement might have some appeal, but quickness would be much more useful for his purpose. The mother knows and tells when the child quickens, but its attainment of viability is an event which passes unnoticed, and, unless birth follows soon after, cannot be later determined. Relevance of viability at the time of injury can rest only upon a peg of arbitrariness, and that not even the more manageable one. Use of viability at the time of injury as the touchstone of decision is without support in reason. It flies in the face of social considerations which cry for the allowance of a recovery for the benefit of a child born to go through life as a cripple.[182]

Viability, as Judge Haynsworth observed, does not have a recognized pedigree in the law:

> Attributing relevance to viability at the time of injury is not only unreasoned; it is wholly without ancient precedent. Whether or not a fetus was quick when intentionally destroyed once bore upon the nature and degree of the crime, but for purposes of estates and inheritances the common law regarded the child as a person in being from the moment of conception, if in the child's interest to do so, but only if there followed a live birth. Viability, historically and in reason, is an irrelevance; viability, that is, at the time of injury or of another's

---

180. *Smith v. Brennan*, 157 A.2d at 504.
181. 341 F.2d 75 (4th Cir. 1964).
182. *Id.* at 78-79 (Haynsworth, J., dissenting).

death or of any other event than the live birth of the child.[183]

Judge Haynsworth's explanation for the persistence of the viability rule closely followed that of the New Jersey Supreme Court in *Smith v. Brennan:*

> Treatment of viability at the time of injury as significant is a relic of a relatively modern misunderstanding. When Mr. Justice Holmes wrote for the Supreme Judicial Court of Massachusetts in 1884 [in the *Dietrich* case] he advanced as one reason for not allowing recovery for prenatal injuries the notion that, until birth, the child was a part of its mother. That notion was inconsistent with what common law precedents there were and with medical facts as they are known today. Its expression, however, led those taking the first hesitant steps away from *Dietrich* to say with understandable restraint that a viable child, at least, was not a part of its mother. Since we now know that a child is no more a part of its mother before viability than after, this relic of an invalid notion does not deserve preservation. Our steps away from *Dietrich* need no longer be hesitant. Indeed, it has been observed that no court which has allowed recovery for prenatal injury to a viable fetus has later declined to allow such a recovery when the injury occurred before the child became viable.[184]

Concluding his critique of viability, Judge Haynsworth said:

> It thus seems to be evident that limiting recovery in these cases to injuries suffered after the child becomes viable is a social perversion without support in reason or historical precedent. Viability of the child at the time of injury ought to be recognized as the imposter it is and sheared of all further influence upon our judgments.[185]

Commentators agree that "[a]s a test for the courts' use, viability has proven unsatisfactory in several respects."[186]

> The first and perhaps most basic problem is that it often proves unworkable. In borderline factual circumstances there is no effective way of determining whether a fetus was viable at the time of the injury. Secondly, such a requirement is simply unrealistic, for it means that certain entire classes of prenatal injury will *by definition* be completely excluded from potential recovery. This is unsatisfactory since from a biological or medical standpoint much of the potential risk of injury faced by a fetus inherently lies in that period of development prior to viability.[187]

---

183. *Id.* at 79.
184. *Id.*
185. *Id.*
186. Michael Morrison, *Torts Involving the Unborn—A Limited Cosmology,* 31 BAYLOR L. REV. 131, 141 (Spring 1979).
187. *Id.* at 141-42 (emphasis in original).

More recently, the leading authorities on the law of torts have offered their views on the viability distinction:

> Viability . . . does not affect the question of the legal existence of the unborn, and therefore of the defendant's duty, and it is therefore a most unsatisfactory criterion, since it is a relative matter, depending on the health of the mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and logic is in favor of ignoring the stage at which the injury occurs. With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether.[188]

The criminal law also has evolved in favor of providing more protection for unborn children where the changes, for the most part, have been effected by legislation, not judicial decision, departing from the common law born alive rule. Thirty-three jurisdictions have held that an unborn child is not a "person," a "human being," or "another" within the meaning of their murder, vehicular homicide, or manslaughter statutes, absent an express direction from the legislature.[189] In so ruling, state courts have relied upon the common law born alive rule, the rule of strictly construing criminal statutes against the State, a reluctance to extend the reach of criminal statutes by judicial decision, the legislative history of the particular homicide statute in question, and due process concerns regarding the retroactive application of an unforeseeable judicial enlargement of a criminal statute.[190] Many of these opinions, however — especially

---

188. PROSSER & KEATON, PROSSER & KEATON ON THE LAW OF TORTS & 369 (5th ed. 1984).

189. *See* Vo v. Superior Court, 836 P.2d 408, 416 (Ariz. Ct. App. 1992), and the cases cited therein (recently, one of the cases cited in *Vo* in support of the born-alive rule, *State v. Harbert*, 758 P.2d 826 (Okla. Ct. Crim. App. 1988) was overruled by the Oklahoma Court of Criminal Appeals, *see Hughes v. State*, P.2d (Okla. Ct. Crim. App. 1994) Docket No. F-92-1083, Jan. 24, 1994, 1994 WL 18484, thus reducing the number of jurisdictions that follow the born-alive rule to thirty-three); State v. Brewer, 826 P.2d 783, 804-05 (Ariz. 1992); Williams v. People, 158 P.2d 447 (Colo. 1945); State v. Winthrop, 43 Iowa 519 (Iowa 1876) (*dictum);* State v. Green, 781 P.2d 678 (Kan. 1989); Taylor v. State, 66 So. 321 (Miss. 1914); People v. Haymer, 96 N.E.2d 23 (N.Y. 1949); State v. Sogge, 161 N.W. 1022 N.D. 1917); Commonwealth v. Brown, 6 Pa. D. & C. 3d 627 (Pa. Commw. Ct. 1978); State v. McKee, 1 Add. 1 (Pa. 1791); Morgan v. State, 256 S.W. 433 (Tenn. 1923); State v. Oliver, 563 A.2d 1002 (Vt. 1989).

190. *See generally* Clarke D. Forsythe, *Homicide of the Unborn Child: The Born-Alive Rule and Other Legal Anachronisms,* 21 VAL. U. L. REV. 563 (Spring 1987). The due process concerns posed by a judicial opinion abandoning the born-alive rule could be obviated by giving the opinion prospective effect only. *See* the cases cited in note 194 *infra.*

the more recent ones — have been issued over strong dissents sharply criticizing the born alive rule (the principal basis for these decisions) as a relic of the common law that should be discarded,[191] and none has denied the biological fact that human life begins at conception[192] or that States have the authority to define as homicide intentional, knowing, reckless, or negligent conduct causing the death of an unborn child.[193] And notwithstanding strong resistance to

---

191. Meadows v. State, 722 S.W.2d 584, 588 (Ark. 1987) (4-1 decision) (Hays, J., dissenting); Keeler v. Superior Court, 470 P.2d 617, 630 (Cal. 1970) (5-2 decision) (Burke, J., joined by Sullivan, Acting C. J., dissenting); People v. Greer, 402 N.E.2d 203, 213, 215 (Ill. 1980) (5-2 decision) (Clark, J., dissenting) (Moran, J., dissenting); Hollis v. Commonwealth, 652 S.W.2d 61, 66 (Ky. 1983) (5-2 decision) (Wintersheimer, J., joined by Stephens, C.J., dissenting); State v. Gyles, 313 So. 2d 799, 802 (La. 1975) (6-1 decision) (Summers, J., dissenting); State v. Soto, 378 N.W.2d 625, 630 (Minn. 1985) (5-1 decision) (Yetka, J., dissenting); State v. Harbert, 758 P.2d 826, 828 (Okla. Crim. App. 1988) (2-1 decision) (Bussey, J., dissenting); State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807, 812, 813 (W. Va. 1984) (3-2 decision) (McGraw, J., dissenting) (McHugh, J., dissenting).

192. Vo v. Superior Court, 836 P.2d 408, 412 (Ariz. Ct. App. 1992) (court "not embarking upon a resolution of the debate as to 'when life begins'"); Keeler v. Superior Court, 470 P.2d 617, 624 (Cal. 1970) (granting that "the common law requirement of live birth to prove the fetus had become a 'human being' who may be the victim of murder is no longer in accord with scientific fact"); State v. McCall, 458 So. 2d 875, 877 (Fla. Dist. Ct. App. 1984) (not holding "that a viable fetus is not alive [or] that a person should not be punished for causing its death"); State v. Green, 781 P.2d 678, 683 (Kan. 1989) (not deciding "when life begins"); Hollis v. Commonwealth, 652 S.W.2d 61, 61 (Ky. 1983) (same); State v. Gyles, 313 So. 2d 799, 802 (La. 1975) (acknowledging that "[o]ur decision does not at all question the undoubted existence of the unborn child for civil purposes"); People v. Guthrie, 293 N.W.2d 775, 780 (Mich. Ct. App. 1980), *petition for leave to appeal denied*, 334 N.W.2d 616 (Mich. 1983) (commenting that the born alive rule is "archaic and should be abolished"); *In re A.W.S.*, 440 A.2d 1144, 1146 (N.J. Super. Ct. 1981) (admitting that, at least after viability, "emergence from the mother's body should no longer be the determinative factor in classifying the fetus as a human being for purposes of criminal homicide"); People v. Vercelleto, 514 N.Y.S.2d 177, 178 (N.Y. County Ct. 1987) (court not holding whether seven month old fetus "was a person in any philosophical, religious or even medical sense").

193. Vo v. Superior Court, 836 P.2d 408, 419 (Ariz. Ct. App. 1992); Keeler v. Superior Court, 470 P.2d 617, 625 & n.16 (Cal. 1970); State v. Anonymous, 516 A.2d 156, 159 (Conn. Super. Ct. 1986); State v. McCall, 458 So. 2d 875, 877 (Fla. Dist. Ct. App. 1984); People v. Greer, 402 N.E.2d 203, 209 (Ill. 1980); State v. Green, 781 P.2d 678, 682 (Kan. 1989); State v. Trudell, 755 P.2d 511, 516-17 (Kan. 1989); State v. Brown, 378 So. 2d 916, 917-18 (La. 1980); State v. Gyles, 313 So. 2d 799, 802 (La. 1975); People v. Guthrie, 293 N.W.2d 775, 780-81 (Mich. 1980), *petition for leave to appeal denied*, 334 N.W.2d 616 (Mich. 1983) (recommending legislative action); State v. Soto, 378 N.W.2d 625, 630 (Minn. 1985); *In re A.W.S.*, 440 A.2d 1144 (N.J. Super. Ct. 1981) (recommending legislative action); State v. Willis, 652 P.2d 1222, 1223 (N.M. Ct. App. 1982); People v. Vercelleto, 514 N.Y.S.2d 177, 180 (N.Y. County Ct. 1987)

abandon the born alive rule, three state courts have rejected the rule by judicial decision.[194]

Of greater significance, however, is that more than one-third of the States have defined by statute the killing of an unborn child (outside the context of abortion) as a form of homicide (or feticide), and nearly half of these statutes make it a crime to take the life of an unborn child at any stage of pregnancy.[195] These laws have

---

(recommending legislative action); State v. Dickinson, 275 N.E.2d 599, 602 (Ohio 1971); Commonwealth v. Brown, 6 Pa. D. & C. 3d 627, 660 n.22 (Pa. Commw. Ct. 1978); State v. Amaro, 448 A.2d 1257, 1260 (R.I. 1982); State v. Beale, 376 S.E.2d 1, 4 (N.C. 1989); State v. Evans, 745 S.W.2d 880, 884 (Tenn. Crim. App. 1987); State v. Larsen, 578 P.2d 1280, 1282 (Utah 1978); State v. Oliver, 563 A.2d 1002, 1005 (Vt. 1989); State *ex rel.* Atkinson v. Wilson, 332 S.E.2d 807, 812 (W. Va. 1984).

194. Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984) (vehicular homicide); Commonwealth v. Lawrence, 536 N.E.2d 571, 575-76 (Mass. 1989) (involuntary manslaughter); Hughes v. State, _____ P.2d ___ (Okla. Ct. Crim. App. 1994) Docket No. F-92-1083, Jan. 24, 1994, 1994 WL 18484 (first degree manslaughter) (overruling State v. Harbert, 758 P.2d 826 (Okla. Ct. Crim. App. 1988)); State v. Horne, 319 S.E.2d 703 (S.C. 1984) (homicide).

195. Nine States define the killing of an unborn child as a form of homicide, regardless of the stage of pregnancy: ARIZ. REV. STAT. ANN. § 13-1103(A)(5) (1989) (manslaughter); CAL. PEN. CODE § 187(a) (1988) (murder) (an early decision of the California Court of Appeals reading a viability requirement into the statute, *People v. Smith*, 129 Cal. Rptr. 498 (Ct. App. 1976), has been rejected recently by another Court of Appeals decision, *see* People v. Davis, 19 Cal. Rptr. 2d 96 (Ct. App. 1993) *appeal allowed;* ILL. COMP. ANN. ch. 720, para. 5/9-1.2, 5/9-2.1, 5/9-3.2 (1992) (murder, manslaughter); IND. CODE ANN., § 35-42-1-6 (Burns 1985) (feticide); LA. REV. STAT. ANN. §§ 14:2(7), 14:32.5-14:32.8 (West 1986 & 1992 Supp.) (murder, feticide); MINN. STAT. ANN. §§ 609.266, 609.2661-609.2665, 609.268(1) (West 1987 & 1992 Supp.) (murder, manslaughter); MO. ANN. STAT. §§ 1.205, 565.024 (Vernon 1986) (involuntary manslaughter), as construed by the Missouri Supreme Court in *State v. Knapp*, 843 S.W.2d 345 (Mo. 1992); N.D. CENT. CODE §§ 12.1-17.1-01 to 12.1-17-04 (1991 Supp.) (murder, manslaughter); UTAH CODE ANN. § 76-5-201 *et seq.* (1990 & 1992 Supp.) (any form of homicide).

Six States define the killing of an unborn child after quickening as a form of homicide: FLA. STAT. ANN. § 782.09 (West 1992) (manslaughter); OFF. GA. CODE ANN. § 16-5-80 (1992) (feticide); MICH. COMP. LAWS ANN. § 750.322 (West 1968) (manslaughter) (limited by judicial decision to viability, *see* Larkin v. Cahalan, 208 N.W.2d 176 (Mich. 1973)); Miss. CODE ANN. § 97-3-37 (1972) (manslaughter); OKLA. STAT. ANN. tit. 21, § 713 (West 1983) (manslaughter); WASH. REV. CODE ANN. § 9A.32.060(l)(b) (West 1986) (manslaughter).

Three States define the killing of an unborn child after viability as a form of homicide: IOWA CODE ANN. § 707.7 (West 1979) (feticide); TENN. CODE ANN., § 39-13-214 (1991) (criminal homicide); R.I. GEN. LAWS, § 11-23-5 (1981) manslaughter).

One State defines the killing of an unborn child after the twenty-fourth week of pregnancy as a form of homicide: N.Y. PENAL LAW, § 125.00 (McKinney 1987) (homicide) (limited to acts performed in the course of an abortion by *People v. Joseph*, 496 N.Y.S.2d 328 (N.Y. County Court 1985), *but see*

withstood constitutional challenge.[196] Even in those States which continue to follow the born alive rule and have not enacted fetal homicide statutes, courts have recognized, in conformity with the common law rule,[197] that a person may be convicted of homicide for causing prenatal injuries that result in death after a live birth, without apparent regard to whether the injuries were inflicted before or after viability.[198] The Joint Opinion betrays no awareness of these developments or whether they suggest that a distinction increasingly rejected in other areas of law should be retained as part of our constitutional jurisprudence.[199] Nor does it take cognizance of how

---

In re Gloria C., 476 N.Y.S.2d 991 (Fam. Ct. 1984) (*contra*)).

In addition to the foregoing nineteen States, four States define as criminal assaults attacks on pregnant women causing miscarriage or stillbirth: ARK. CODE ANN., § 5-13-201(A)(5) (Michie 1991 Supp.); IOWA CODE ANN. § 707.8 (West 1979); N.M. STAT. ANN. §§ 30-3-7, 66-8-101.1 (Michie 1987); WYO. STAT., § 6-2-502(a)(iv) (Supp. 1988). And three States define nonfatal attacks on an unborn child as criminal offenses: ILL. COMP. STAT., ch. 720, §§ 5/12-3.2, 12-4.4 (1992); MINN. STAT. ANN., §§ 609.266, 609.267, 609.2671, 609.2672, 609.268(2) (West 1987); N.D. CENT. CODE, §§ 12.1-17.1-01, 12.1-17.1-05, 12.1-17.1-06 (1987).

196. *See* People v. Bunyard, 756 P.2d 795, 827-30 (Cal. 1988); People v. Apodaca, 142 Cal. Rptr. 830, 835 (Ct. App. 1978); People v. Henderson, 275 Cal. Rptr. 837, 853-54 (Ct. App. 1990); People v. Davis, 19 Cal. Rptr. 2d 96, 101-03 (Ct. App. 1993); Brinkley v. State, 322 S.E.2d 49 (Ga. 1984); Smith v. Newsome, 815 F.2d 1386 (11th Cir. 1987); People v. Ford, 581 N.E.2d 1189, 1197-1202 (Ill. Ct. App. 1991); People v. Campos, 592 N.E.2d 83, 97 (Ill. App. Ct. 1992); State v. Merrill, 450 N.W.2d 318 (Minn. Ct. 1990); State v. Bauer, 471 N.W.2d 363, 365-66 (Minn. App. 1991); State v. Knapp, 843 S.W.2d 345 (Mo. 1992).

197. Regina v. Sims, 75 Eng. Rep. 1075 (Q.B. 1601).

198. United States v. Spencer, 839 F.2d 1341 (9th Cir. 1988) (murder) (duration of pregnancy not mentioned) (child survived for 10 minutes); Huskey v. Smith, 265 So. 2d 596 (Ala. 1972) (*dictum*)*;* Clarke v. State, 23 So. 2d 671 (Ala. 1898) (second degree murder) (duration of pregnancy, length of time child survived not mentioned); Ranger v. State, 290 S.E.2d 63 (Ga. 1982) (murder) (six to seven months pregnant) (12 hours); State v. Hammett, 384 S.E.2d 220 (Ga. Ct. App. 1989) (homicide by vehicle) (35 weeks pregnant) (11 hours); People v. Bolar, 440 N.E.2d 639 (Ill. Ct. App. 1982) (reckless homicide) (eight months pregnant) (a few minutes); Abrams v. Foshee, 3 Iowa 274, 278 (1856) (*dictum*)*;* Jones v. Commonwealth, 830 S.W.2d 877 (Ky. 1992) (second degree manslaughter) (32 weeks pregnant) (14 hours); Williams v. State, 561 A.2d 216 (Md. 1989) (manslaughter) (nine months pregnant) (17 hours); Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 267 (1845) (*dictum*)*;* State v. Anderson, 343 A.2d 505, 509 (N.J. Super. Ct. Law Div. 1975), *rev'd on other grounds*, 413 A.2d 611 (N.J. Super Ct. App. Div. 1980) (murder) (seven months pregnant) (twins born alive, one died three hours after delivery, the other after 15 hours) (twins "were persons within the meaning of the homicide laws ... on ... the date of the alleged homicide"); People v. Hall, 557 N.Y.S.2d 879 (N.Y. App. Div. 1990 (manslaughter) (28-32 weeks pregnant) (36 hours); State v. Cornelius, 448 N.W.2d 443 (Wis. 1989) (homicide) (seven months pregnant) (two days).

199. There is an emerging legal consensus that human life—*actual*, not *potential*—begins at conception. *See* Appendix B to this article. That consensus is

Roe has interfered with the rights of unborn children *outside* the context of abortion.

While, as previously noted,[200] *Roe* has had only a minor effect on women's rights (outside of abortion), it has had a major impact on the law's recognition of the rights of unborn children. The Court's decision has influenced many state courts not to abandon the outdated common law born alive rule[201] and to reject or limit wrongful death actions brought on behalf of unborn children who died *in utero* from the negligent or reckless acts of others,[202] even

---

in complete accord with the known scientific and medical facts of human conception and development.

The final report of the Subcommittee on Separation of Powers of the Senate Judiciary Committee on S. 158, the Human Life Bill, stated that "contemporary scientific evidence points to a clear conclusion: the life of a human being begins at conception, the time when the process of fertilization is complete." S. REP. NO. 158, 97th Cong., 1st Sess. 7 (1981). The report dismissed contrary testimony as "misleading semantic[s]," *id.* at 12, explaining that "[t]hose witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question [whether the life of an unborn child has intrinsic worth and equal value with other human beings] rather than the scientific question [whether an unborn child is a human being, in the sense of a living member of the human species]. No witness challenged the scientific consensus that unborn children are 'human beings,' insofar as the term is used to mean living beings of the human species." *Id.* at 11.

200. *See supra* notes 128-32 and accompanying text.

201. Vo v. Superior Court, 836 P.2d 408, 414, 419 (Ariz. Ct. App. 1992); People v. Smith, 129 Cal. Rptr. 498, 502 (Ct. App. 1976); State v. McCall, 458 So. 2d 875, 876 (Fla. Dist. Ct. App. 1984); Billingsley v. State, 360 S.E.2d 451, 452 (Ga. Ct. App. 1987); People v. Greer, 402 N.E.2d 203, 208 (Ill. 1980); Hollis v. Commonwealth, 652 S.W.2d 61, 62-63 (Ky. 1983); State v. Brown, 378 So. 2d 916, 918 (La. 1979); State v. Gyles, 313 So. 2d 799, 802 (La. 1975); State v. Amaro, 448 A.2d 1257, 1259 (R.I. 1982); State v. Evans, 745 S.W.2d 880, 881 (Tenn. Crim. App. 1987); Showery v. State, 690 S.W.2d 689, 692 (Tex. Crim. App. 1985) (*dicta*). *See also* Larkin v. Cahalan, 389 Mich. 533, 208 N.W.2d 176 (1973) (limiting application of statute criminalizing willful killing of an unborn "quick" child to the killing of a *viable* child). The pre-*Roe* decision of the California Supreme Court in *Keeler v. Superior Court*, 470 P.2d 617 (Cal. 1970), has also exerted substantial influence over state court decisions in this area.

202. Gentry v. Gilmore, 613 So. 2d 1241, 1244 (Ala. 1993); Kilmer v. Hicks, 529 P.2d 706, 707 (Ariz. Ct. App. 1974), *holding disapproved*, Summerfield v. Superior Court, 698 P.2d 712, 724 (Ariz. 1985) (*en banc*); Justus v. Atchison, 565 P.2d 122, 126 n.7 (Cal. 1977) (*en banc*); Hernandez v. Garwood, 390 So. 2d 357, 359 (Fla. 1980); Weitl v. Moes, 311 N.W.2d 259, 271 (Iowa 1981); Tom v. Goree, 237 N.E.2d 297, 301 (Mich. Ct. App. 1975); State *ex rel* Hardin v. Sanders, 538 S.W.2d 336, 338 (Mo. 1976), *overruled*, O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983); Wallace v. Wallace, 421 A.2d 134, 137 (N.H. 1980); DiDonato v. Wortman, 341 S.E.2d 58, 60 (N.C. Ct. App. 1986), *rev'd*, S.E.2d 489 (N.C. 1987), *reh'g denied*, 361 S.E.2d 73 (N.C. 1987); Werling v. Sandy, 476 N.E.2d 1053, 1056 (Ohio 1985); Coveleski v. Bubnis, 571 A.2d 433, 434 (Pa. Super. Ct. 1990), *aff'd*, 634 A.2d 608 (Pa. 1993); Miccolis

though *Roe* itself says nothing about the power of the States to treat the killing of an unborn child (outside the context of an abortion) as a crime or a tort.[203] *Roe* may have influenced courts to limit exercise of their equitable and statutory powers to intervene on behalf of unborn children in emergency situations.[204] More directly, *Roe* has

---

v. Amica Mut. Ins. Co., 587 A.2d 67, 70 (R.I. 1991); Hamby v. McDaniel, 559 S.W.2d 774, 777-78 (Term. 1977), *legislatively overruled*, TENN. CODE ANN., § 20-5-106(c) (Supp. 1991).

203. Reproductive Health Services v. Webster, 851 F.2d 1071, 1085 (8th Cir. 1988) (Arnold, J., concurring in part and dissenting in part), *rev'd on other grounds*, 494 U.S. 490 (1989); Gentry v. Gilmore, 613 So. 2d 1241, 1246-47 (Ala. 1993) (Maddox, J., dissenting); Summerfield v. Superior Court, 698 P.2d 712, 722-23 (Ariz. 1985); People v. Davis, 19 Cal. Rptr. 2d 96, 102 (Ct. App. 1993) ("[i]n our view *Roe's* teachings do not apply to a situation where a third party kills a fetus without the mother's consent") (appeal allowed); Brinkley v. State, 322 S.E.2d 49, 53 (Ga. 1984); Smith v. Newsome, 815 F.2d 1386, 1388 n.2 (11th Cir. 1977); People v. Ford, 581 N.E.2d 1189, 1198-1200 (Ill. App. Ct. 1991); Group Health Ass'n, Inc. v. Blumenthal, 453 A.2d 1198, 1206-07 (Md. 1983); Commonwealth v. Lawrence, 536 N.E.2d 571, 583-84 (Mass. 1989) (Abrams, J., concurring); State v. Merrill, 450 N.W.2d 318, 321-22 (Minn. 1990) ("[t]he defendant who assaults a pregnant woman causing the death of the fetus she is carrying destroys the fetus without the consent of the woman. This is not the same as the woman who elects to have her pregnancy terminated by one legally entitled to perform the act"); Wallace v. Wallace, 421 A.2d 134, 140 (N.H. 1980) (Douglas, J., dissenting) ("[i]n whatever manner the United States Supreme Court chooses to define 'persons' for fourteenth amendment purposes, it is *not* binding on this Court with regard to [statutory] death actions") (emphasis in original); Lobdell v. Tarrant County Hosp. Dist., 710 S.W.2d 811, 813-14 (Tex. Ct. App. 1986), *rev'd*, 726 S.W.2d 23 (Tex. 1987). As one court stated, *Roe* "should not preclude ' ... the states of the power to grant legal recognition to the unborn in non-14th Amendment situations.'" [Citation omitted]. *In re* Smith, 492 N.Y.S.2d 331, 334 (N.Y. Fam. Ct. 1985).

204. *Compare* Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981) (ordering Caesarian section over objections of mother who op posed operation and blood transfusions on religious grounds); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964), *cert., denied*, 377 U.S. 985 (1964) (ordering blood transfusion of pregnant woman who objected to transfusion on religious grounds); *In re* Jamaica Hosp., 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985) (blood transfusion for woman who was 18 weeks pregnant); Crouse v. Irving Memorial Hosp., Inc., 485 N.Y.S.2d 443 (N.Y. Sup. Ct. 1985) (blood transfusion), *and In re* Gloria C., 476 N.Y.S.2d 991 (N.Y. Fam. Ct. 1984) (enjoining husband from physically assaulting pregnant wife) *with In re* D.K., 497 A.2d 1298, 1301-02 (N.J. Super. Ct. 1985) (denying appointment of guardian *ad litem* for unborn child of incompetent woman); Matter of Fletcher, 533 N.Y.S.2d 241, 243 (N.Y. Fam. Ct. 1988) (denying authority of juvenile court to exercise jurisdiction over pregnant woman who may have been ingesting illegal drugs harmful to her unborn child); *and* Cox v. Ct. of Common Pleas of Franklin County, 537 N.E.2d 721, 726 (Ohio Ct. App. 1988) (Whiteside, P.J., concurring) (same). *See also In re* A.C., 573 A.2d 1235 (D.C. 1990) (*en banc*) (reversing order authorizing Caesarian section where there was no clear evidence of mother's consent to procedure); *In re* Klein, 145 A.D.2d 145, 147, 538 N.Y.S.2d 274, 275 (1989) (nonviable unborn child not a "person" for whom guardian could

been cited in support of numerous decisions rejecting civil rights actions brought on behalf of unborn children under 42 U.S.C. § 1983.[205] The Court in *Casey* shows no familiarity with any of these developments in the law, which certainly reveal a divergence between *Roe's* understanding of the constitutional rights of unborn children and the rights they have been accorded by criminal and tort law.

d. change of fact

The fourth *stare decisis* criterion the Court identifies is "changes of fact."[206] The Court acknowledges that viability occurs earlier now than it did in 1973 when *Roe* was decided[207] but denies that that change "render[s] its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed."[208] "[V]iability," according to the Court, still "marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions."[209] And "[t]he soundness or unsoundness of that constitutional judgment in no sense turns" on when viability occurs.[210] In his dissent, Chief Justice Rehnquist dismissed this factor as of no consequence, noting that "what might be called the basic facts which gave rise to *Roe* have remained the same—women become pregnant, there is a point somewhere, depending upon medical technology, where a fetus becomes viable, and women give birth to children."[211] But this comment

---

be appointed); Brady v. Doe, 598 S.W.2d 338, 339 (Tex. Civ. App. 1980) (same). One national survey indicated that as of mid-1987, fifteen court orders for Caesarian sections had been sought in eleven different States, and that court orders were granted in thirteen instances, most of which were unreported. *See* Kolder, Gallagher & Parsons, *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1193 (1987).

205. *See* Reed v. Gardner, 986 F.2d 1122, 1127-28 (7th Cir. 1993); Poole v. Endsley, 371 F. Supp. 1379, 1382 (N.D. Fla. 1974), *modified and remanded on other grounds*, 516 F.2d 898 (5th Cir. 1975); LaPlaca v. Johnson, No. 87-20479 1990 WL 304323 (N.D. Ill. Nov. 21, 1990); Green v. State, 451 F. Supp. 567, 569-70 (N.D. Ind. 1978); Harman v. Daniels, 525 F. Supp. 798, 800-01 (W.D. Va. 1981); Ruiz Romero v. Gonzalez Caraballo, 681 F. Supp. 123, 124-26 (D.P.R. 1988); *see also* Guyton v. Phillips, 606 F.2d 248, 250 (9th Cir. 1979) (*dictum*), *cert. denied*, 445 U.S. 916 (1980); Silkwood v. Kerr McGee Corp., 637 F.2d 743 (10th Cir. 1980) (*dictum*). *But see* Douglas v. Hartford, 542 F. Supp. 1267 (D. Conn. 1982) (*contra* regarding viable fetus).

206. *Casey*, 112 S. Ct. at 2809, 2811.

207. *Id.* at 2811.

208. *Id.* at 2809.

209. *Id.* at 2811.

210. *Id.*

211. *Id.* at 2861 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

overlooks the real reason the Court even mentioned "changes in fact" as a criterion of *stare decisis.*

The one-paragraph discussion of "changes of fact" in Part III(A)(4) of the Joint Opinion is key to the development of the theme in Part III(B) that only a change in fact (or perceived fact) justifies overruling an earlier precedent.[212] Because, according to the Court, there has been no material change in fact since 1973, overruling *Roe* would be inappropriate.[213] This theme, most implausibly, is based on two landmark decisions of the Supreme Court *overruling* prior precedents.[214] The thrust of the Joint Opinion is that the Court overruled *Plessy* and *Lochner* only because of the discovery of new "facts" in the interim that demonstrated that *laissez-faire* economics does not work and that racial segregation adversely affects the mental health of school children who are subjected to discrimination.[215] As Chief Justice Rehnquist said in dissent, "[t]his is at best a feebly supported, *post hoc* rationalization for those decisions."[216]

In *West Coast Hotel,* the Court did refer to "recent economic

---

212. *Id.* at 2812-14. The Court's reliance on Justice Brandeis' dissent in *Burnet v. Coronado Oil Gas Co.,* 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), *see* 112 S. Ct. at 2809, for this proposition is misplaced. Justice Brandeis distinguished cases "applying" the Constitution, where "[t]he controversy is ... over the application to existing conditions of some well-recognized constitutional limitation," from those "interpreting" it, where the controversy is over the meaning of the Constitution itself. 285 U.S. at 410. The distinction, as Justice Brandeis understood it, was between "the determination of what in legal parlance is called a fact," and what is called a "declaration of a rule of law." *Id.* at 410-11. In the case of the former, "[w]hen the underlying fact has been found, the legal result follows inevitably." *Id.* at 411. According to Justice Brandeis, decisions of the Supreme Court that turn upon a "determination of fact" are not entitled to the same deference as those which are based upon a "declaration of law," because "the decision of the fact [may] have been rendered upon an inadequate presentation of the existing conditions," or "the conditions may have changed meanwhile." *Id.* The *Casey* Court's appeal to Justice Brandeis' dissent for a principle that a "declaration of a rule of law," even if erroneous, should not be overturned unless the "facts" supporting that rule have changed stands that dissent on its head. Nowhere in his dissent did Justice Brandeis argue that the Court must find a "change of facts" before overruling an error in a "declaration of law."

213. It may be asked what "changes in fact" since *Roe* justified abandonment of the trimester framework.

214. *Casey,* 112 S. Ct. at 2812-14 (citing West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *overruling,* Adkins v. Children's Hosp. of the Dist. of Columbia, 261 U.S. 525 (1923), and, by necessary implication, Lochner v. New York, 198 U.S. 45 (1905), and Brown v. Bd. of Educ., 347 U.S. 483 (1954), *overruling* Plessy v. Ferguson, 163 U.S. 537 (1896)).

215. *Casey,* 112 S. Ct. at 2812-13.

216. *Id.* at 2864 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

experience" and the then-current Great Depression,[217] but this was only in the last paragraph of the opinion, which simply held that the Court had been mistaken when it embraced "freedom of contract" in *Lochner*.[218] *Brown* did discuss the psychological impact of racial segregation upon minorities,[219] but so did Justice Harlan's dissent in *Plessy*.[220] The actual holding of the Court in *Brown* was that the Equal Protection Clause forbids racial segregation, regardless of the public's views of segregation or integration. The Court cited and relied upon cases decided shortly after the Reconstruction Amendments were ratified interpreting the Fourteenth Amendment "as proscribing all state imposed discrimination against the Negro race."[221] And cases decided subsequent to *Brown* left little doubt that *Brown* was based on the straightforward proposition that racial segregation is unconstitutional, and not on any newly discovered insight into the psychological impact of racial discrimination on school-age children.[222] Contrary to the implications in the Joint Opinion,[223] the errors of *both Lochner* and *Plessy* were identified in dissents in both cases.[224]

Concluding its discussion of *stare decisis*, the Court cites the *dissenting* opinions of Justice Stewart in *Mitchell v. W.T. Grant*,[225]

---

217. 300 U.S. at 399.

218. *Id.* at 391-99.

219. 347 U.S. at 492-94 & nn.10-11.

220. 163 U.S. at 562 (Harlan, J., dissenting).

221. *Brown*, 347 U.S. at 490 & n.5 (citing Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873); Strauder v. West Virginia, 100 U.S. 303 (1880) (striking down state law excluding blacks from serving on grand juries and petit juries)).

222. That *Brown* did not ultimately turn on the emotional effect of "separate but equal" educational facilities upon impressionable children is evidenced by the Court's subsequent invalidation of segregated public beaches, Mayor & City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) (*per curiam*), golf courses, Holmes v. Atlanta, 350 U.S. 879 (1955) (*per curiam*), public parks, New Orleans City Park Imp. Ass'n v. Detiege, 358 U.S. 54 (*per curiam*), *aff'g*, 252 F.2d 122, 123 (5th Cir. 1958) (rejecting city's request to remand the case "to determine whether such psychological considerations [that were present in *Brown*] are present in the denial of access" to public parks), and courtrooms, Johnson v. Virginia, 373 U.S. 61, 62 (1963) (*per curiam*) ("it is no longer open to question that a State may not constitutionally require segregation of public facilities"). As Robert Bork has noted, "[r]acial segregation by order of the state was unconstitutional under all circumstances and had nothing to do with the context of education or the psychological vulnerability of a particular age group." R. BORK, THE TEMPTING OF AMERICA 76 (1990).

223. *Casey*, 112 S. Ct. at 2812-13.

224. Plessy v. Ferguson, 163 U.S. at 552 (Harlan, J., dissenting); Lochner v. New York, 198 U.S. at 65 (Harlan, J., dissenting), *id.* at 74 (Holmes, J., dissenting).

225. 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

and of Justice Harlan in *Mapp v. Ohio,*[226] for the proposition that "a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided."[227] Is one to infer from the citations to *Mitchell* and *Mapp* that the *Casey* Court *would* have struck down the Louisiana sequestration statute upheld in *Mitchell* or that it would *not* have applied the exclusionary rule to the States as the Court did in *Mapp*? Indeed, Justice Blackmun, who joined the Joint Opinion's discussion of *stare decisis,* was one of the justices who *concurred* in *Mitchell.*[228] Although a "change in fact" may justify a departure from precedent, there is no principle that *requires* proof of such a change as a condition to overruling.[229] As Justice Black said more than fifty years ago, "[a] constitutional interpretation that is wrong should not stand."[230]

3. Reason and Fairness

The Court notes that at viability, there is a "realistic possibility" that the unborn child can survive if removed from the womb.[231] It then suggests that due to "the independent existence of the second life" at viability, "reason and all fairness" support recognition of the State's interest in protecting prenatal life at this stage in pregnancy."[232] Yet neither "reason" nor "fairness" supports the destruction of unborn children up until the time when they are adjudged to be "viable" but not thereafter.

First, the concept of viability appears entirely irrelevant in the context of abortion. The child's capacity to survive outside the womb is undoubtedly relevant when one is contemplating *removing* the child from the womb and one is concerned about the safety of the child if this is done. That capacity seems entirely irrelevant, however, when the point of viability marks only the time at which the child can no longer be removed from the womb. Second, when viability is reached, the child presumably will not have "independent existence,"

---

226. 367 U.S. 643, 677 (1961) (Harlan, 1, dissenting).

227. *Casey*, 112 S. Ct. at 2814.

228. 416 U.S. at 601. As Justice Powell observed in Mitchell, "It is ... not only our prerogative but also our duty to reexamine a precedent where its reasoning is fairly called into question." *Id.* at 627-628 (Powell, J., concurring),

229. The Court has overruled its own interpretations of the Constitution on almost 150 occasions. *See infra* note 273. Few of those decisions turned on "changes of fact" (or perceived facts).

230. Conn. Gen. Life Ins. Co. v. Johnson, 303 U.S. 77, 86 (1938) (Black, J., dissenting).

231. *Casey*, 112 S. Ct. at 2817.

232. *Id.* Whether this interest is actually strong enough to forbid most postviability abortions is doubtful. *See supra* note 45.

because the abortion (assuming that there is an enforceable law prohibiting post-viability abortions) cannot take place. Thus, the viable unborn child is as physically dependent upon her mother for the same nourishment as is the unborn child who is not yet viable. Accordingly, adherence to viability is not supported by "reason."

Moreover, the viability concept does not appear to be at all "fair" to the many children who are killed through abortion. Nor is it "fair" to those children who survive abortion but are damaged by the procedure—either by having their limbs severed[233] or being blinded by the caustic solutions that are intended to cause death but fall short of doing so.[234] Presumably, these children, once aborted, would be considered "persons" who are entitled to protection from further abuse. But why they were not considered sufficiently worthy of protection when their injuries were inflicted upon them is beyond all reason.

C. Is the Undue Burden Standard "Workable"?

As previously noted,[235] the Court identifies the "workability" of a rule of law as one of the criteria determining whether that rule should be followed or abandoned. Does the "undue burden" standard adopted by the Joint Opinion pass this test?

The Court holds that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure,"[236] but the authors of the Joint Opinion then vote to uphold a parental consent requirement,[237] which most assuredly places a "substantial obstacle" in the path of a minor who seeks an abortion. If the minor is unwilling to notify one of her parents of her decision to have an abortion and is unable to persuade a judge that she is mature enough to make that decision or that an abortion is in her best interests, she cannot obtain one. The Joint Opinion thus sustains the constitutionality of a statute that imposes an "undue burden" before viability.

The authors of the Joint Opinion distinguish their decision to

---

233. As in the case of Ana Rosa Rodriguez, who survived an attempted abortion, albeit without one of her arms which was severed during the procedure. Lisa Belkin, *State Suspends Manhattan Doctor Accused of Botching Abortions,* N.Y. TIMES, Nov. 26, 1991, at A12.

234. As in the case of children who survive instillation abortion techniques (*e.g.*, saline amnio-centesis).

235. *Casey,* 112 S. Ct. at 2809.

236. *Id.* at 2804.

237. *Id.* at 2832.

uphold the parental consent requirement from their decision to strike down the spousal notice requirement by saying that "[t]hese enactments [mandating parental notice or consent], and our judgments that they are constitutional, are based on the quite reasonable assumption that minors will benefit from consultation with their parents and that children will often not realize that their parents have their best interests at heart. We cannot adopt a parallel assumption about adult women."[238] "This may or may not be a correct judgment," Chief Justice Rehnquist noted in his dissent, "but it is quintessentially a legislative one," and "the 'undue burden' inquiry does not in any way supply the distinction between parental consent and spousal [notice] which the joint opinion adopts."[239]

Both Justice Blackmun and Justice Scalia characterize the "undue burden" test as "manipulable."[240] This assessment appears to be accurate for several reasons. First, under the "undue burden" standard, a court must decide in what circumstances the challenged law is "relevant."[241] Is the relevant group all persons to whom the law applies? Or only those persons who would not do what the law requires absent the law's compulsion? Or an even smaller set of persons who do not want to obey the law and for whom the law provides no exceptions? The Joint Opinion appears to give inconsistent answers to these questions.[242]

Second, the court must decide what is a "large fraction" of the relevant group. In striking down the Pennsylvania spousal notice provision, the Court "found" that the law (which had never gone into effect) would impose an "undue burden" on a "large fraction" of women "who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement."[243] This would include women who feared re-

---

238. *Id.* at 2830.

239. *Id.* at 2866 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

240. *Id.* at 2848 (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part) ("the *Roe* framework is far more administrable, and far less manipulable, than the 'undue burden' standard adopted by the joint opinion"); *id.* at 2877 (Scalia, J., concurring in the judgment in part and dissenting in part) ("the standard is inherently manipulable and will prove hopelessly unworkable in practice").

241. *Id.* at 2829-30.

242. In the case of the spousal notice provision, the "relevant" group is married women who would not otherwise notify their husbands of their intention to obtain an abortion and who fall within no statutory exception. 112 S. Ct. at 2829. But in the case of the parental consent provision, the "relevant" group appears to be *all* pregnant minors who may seek an abortion. *Id.* at 2830 (assuming that minors "will benefit from consultation with their parents"), *id.* at 2832.

243. *Id.* at 2829-30.

porting physical abuse or spousal sexual assault (two of the exceptions to the requirement of notice, but only if reported) or who feared psychological abuse or child abuse at the hands of their husbands if they told them of their intention to get an abortion (not within any exception).[244] But in the context of this facial challenge, where the law had never taken effect, it was sheer speculation to suggest that a "large fraction" of women desiring not to notify their husbands would fear such consequences. It would be equally plausible to believe that a woman would not want to notify her husband "because of perceived economic constraints or her husband's previously expressed opposition to abortion."[245] As Judge Alito observed in dissenting from the Third Circuit's invalidation of the spousal notice provision, "The Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems—such as economic constraints, future plans, or the husband's 'previously expressed' opposition—that may be obviated by discussion prior to the abortion."[246]

The danger in relying upon such speculation is that a constitutional law may be struck down on the basis of a hypothetical scenario that may never take place. In marked contrast to the "parade of horribles" advanced against the Pennsylvania spousal notice law,[247] which never went into effect, is the experience of Utah, which enforced a similar law for almost twenty years without a single documented case of spousal abuse or any evidence that the law had prevented any woman from obtaining an abortion.[248]

A related problem with the "large fraction" of cases approach is that it tends to undermine the Court's well-established facial challenge rule. Under that rule, it is not enough to show that a given law "might operate unconstitutionally under some conceivable set of circumstances."[249] Rather, it must be shown that "no set of circumstances exists under which [the law] would be valid,"[250] a standard to which Justice O'Connor formerly subscribed.[251] The facial chal-

---

244. *Id.* at 2828-29.

245. *Id.* at 2870 n.2 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

246. 947 F.2d 682, 726 (3d Cir. 1991) (Alito, J., concurring in part and dissenting in part).

247. *Casey*, 112 S. Ct. at 2826-31.

248. Jane L. v. Bangerter, 809 F. Supp. 865, 876-77 (D. Utah. 1992) (striking down law on authority of *Casey*).

249. United States v. Salerno, 481 U.S. 739, 745 (1987).

250. *Id. See also* Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 796 (1984).

251. *See Webster*, 492 U.S. at 524 (O'Connor, J., concurring in part and

lenge rule has been applied in a wide range of abortion cases including *Webster*,[252] *Rust v. Sullivan*[253] and *Ohio v. Akron Center for Reproductive Health*.[254] Although three lower federal courts have applied the facial challenge rule in considering attacks on abortion regulations after *Casey*,[255] Justices O'Connor and Souter have indicated their view that the rule no longer applies in abortion litigation and have said that the relevant test is whether, "'in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion.'"[256] But neither in *Casey* nor in the concurring opinion in *Schafer* does any member of the Joint Opinion define what constitutes a "large fraction" of cases. Is ten percent a "large fraction" of the "relevant" group? What about twenty percent? Or thirty percent? The Court does not say. This repudiation of a neutral principle of law (i.e., the facial challenge rule) will, if adopted by a majority of the Court, work a major change in how abortion cases are decided.

Third, under the "undue burden" standard, the court must speculate as to whether the law will create a "substantial obstacle" on the "large fraction" of the "relevant" group. What determines whether an obstacle is "substantial"? May the court simply examine the face of the statute itself? Or is it required to assess whether factors over which the State has no control (*e.g.*, political, demographic, or economic) create a "substantial obstacle" to the effectuation of the abortion decision? Again, the Joint Opinion does not say.

The three-pronged analysis required by the "undue burden" test (defining the "relevant" group, deciding what is a "large fraction" of that group, and determining what is a "substantial obstacle") suggests

---

concurring in the judgment).

252. 492 U.S. 490 (restrictions on the use of public facilities for abortion services).

253. 111 S. Ct. 1759, 1767 (1991) (prohibition of abortion referrals and abortion counseling at Title X clinics).

254. 110 S. Ct. 2982, 2980-81 (parental notice law).

255. Barnes v. Moore, 970 F.2d 12 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 656 (1992) (upholding Mississippi's informed consent and 24-hour waiting period law); Jane L. v. Bangerter, 809 F. Supp. 865 (D. Utah 1992) (upholding Utah's prohibition of nontherapeutic post-twenty week abortions); Fargo Women's Health Org. v. Schafer,

256. ___F.3d __ (8th Cir. 1994), Docket 93-1579, Feb. 10, 1994, slip op. at 2-3, 1994 WL 34980. *But see* Casey v. Planned Parenthood of Southeastern Pennsylvania, __ F.3d __, No. 93-1503 (3d Cir. Jan. 14, 1994), slip op. at 25 n.21 (facial challenge rule inapplicable to review of abortion regulations); Utah Women's Clinic, Inc. v. Leavitt, __ F.Supp.__, No. 93-C-4078 (Dt. Utah Feb. 1, 1994), slip op. at 14-17 (same).

256. *See* Fargo Women's Health Org. v. Schafer, 113 S. Ct. 1668, 1669 (1993) (order denying stay of enforcement of North Dakota informed consent and 24-hour waiting period law) (O'Connor, J., concurring) (quoting *Casey*, 112 S. Ct. at 2830).

a fact-intensive inquiry which is more appropriate in an as-applied, not a facial, challenge.[257] To apply the undue burden test in a facial challenge will simply yield inconsistent results among different States even if their laws are identical on their face.[258]

The undue burden test, then, is an uncertain guide and will make it virtually impossible for state legislatures to assess rationally the constitutionality of proposed abortion regulations that do not, on their face, impose an undue burden.[259] The test is not susceptible of principled, even-handed application.[260]

III. DO PRINCIPLES OF INSTITUTIONAL INTEGRITY REQUIRE REAFFIRMATION OF *ROE*?

"the goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which the Constitution puts beyond the reach of the democratic process and that which it does not."

— *Webster v. Reproductive Health Services,* 492 U.S. 490, 521 (opinion of Chief Justice Rehnquist)

---

257. In voting to uphold various provisions of the Pennsylvania Abortion Control Act, the Joint Opinion repeatedly qualifies its rulings by commenting on the "state of the record." 112 S. Ct. at 2824, 2825, 2826, 2833. This, of course, simply invites further litigation to challenge the facial validity of the statutes in question. *See id.* at 2879-80 (Scalia, J., concurring in the judgment in part and dissenting in part).

258. A twenty-four-hour waiting period requirement might pass constitutional muster in a small State like Connecticut but might be invalidated in a much larger State with fewer abortion providers.

259. Although the Court acknowledged that the "need for such review [*i.e.*, "judicial assessment of state laws affecting the exercise of the choice guaranteed against government infringement"] will remain as a consequence of today's decision," 112 S. Ct. at 2809, it turned down an opportunity to clarify whether the States (or territories) can enforce an abortion prohibition *after* viability, where the prohibition allowed exceptions for the life or health of the mother. *See* Ada v. Guam Society of Gynecologists and Obstetricians, 113 S. Ct. 633 (1992) (order denying petition for *certiorari*), *id.* at 633-34 (Scalia, J., dissenting from denial of *certiorari*).

260. 'The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as 'undue'—subject, of course, to the possibility of being reversed by a Circuit Court or Supreme Court that is as unconstrained in reviewing his decision as he was in making it." *Casey,* 112 S. Ct. at 2880 (Scalia, J., concurring in the judgment in part and dissenting in part).

In Part III(C) of the Joint Opinion, the Court undertakes to explain why the institutional integrity of the Supreme Court requires reaffirmation of *Roe v. Wade.*[261] But the reasons advanced in support of this conclusion would seem to point in an opposite direction.

The Court acknowledges that "a decision without principled justification would be no judicial act at all," and that "even when justification is furnished by apposite legal principle, something more is required."[262] "Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute."[263] In light of the Joint Opinion's refusal to endorse *Roe* (or what remains of *Roe*—the viability rule) as a proper understanding of the Constitution, the Court itself apparently does not regard *Roe's* reading of the Constitution as "beyond dispute."[264] That in itself suggests that overruling *Roe,* not reaffirming it, would have been the appropriate course in *Casey.*

The Court, however, expresses concern that overruling might be viewed as a "compromise with social and political pressures,"[265] and "a surrender to political pressure."[266] The difficulty with this line of reasoning is that the Court has been subjected to "political pressure" on *both* sides of the abortion issue, with marches and demonstrations by both opponents *and* proponents of *Roe.* The Joint Opinion candidly admits that "[w]hether or not a new social consensus is developing on that issue [i.e., "governmental power to limit

---

261. *Casey,* 112 S. Ct. at 2814-16.
262. *Id.* at 2814.
263. *Id.*
264. Nor do many constitutional scholars. *See, e.g.,* A. BICKEL, THE MORALITY OF CONSENT 27-29 (1975); Robert A. Burt, *The Constitution of the Family,* 1979 SUP. CT. REV. 329, 371-73; A. COX, THE COURT AND THE CONSTITUTION 322-38 (1987); J. ELY, DEMOCRACY AND DISTRUST—A THEORY OF JUDICIAL REVIEW 2-3, 247-48 & n.52 (1980); Richard Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases,* Sup. CT. REV. 159 (1973); Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots, and Prospects,* WASH. U. L.Q. 817, 819 (1979); Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication,* 83. YALE L.J. 221, 297-311 (1973). As one commentator said,

> Rarely does the Supreme Court invite critical outrage as it did in *Roe* by offering so little explanation for a decision that requires so much. The stark inadequacy of the Court's attempt to justify its conclusions . . . suggests to some scholars that the Court, finding no justification at all in the Constitution, unabashedly usurped the legislative function .... Even some who approve of *Roe's* form of judicial review concede that the opinion itself is inscrutable.

Richard Morgan, Roe v. Wade *and the Lesson of the Pre-*Roe *Case Law,* 77 MICH. L. REV. (unpaginated preceding 1569 (1979)).
265. *Casey,* 112 S. Ct. at 2814.
266. *Id.* at 2815.

personal choice to undergo abortion"], its divisiveness is no less today than in 1973, and pressure to overrule the decision, *as well as pressure to retain it,* has grown only more intense."[267] Given that *any* decision on *Roe*—to overrule or to reaffirm—could be viewed, rightly or wrongly, as "political," perhaps the Court should have been less concerned with *how* its decision would be viewed and more concerned with making the *right* decision.[268]

The Court recognizes that "the country can accept some correction of error without necessarily questioning the legitimacy of the Court."[269] But "[i]n two circumstances ... the Court would almost certainly fail to receive the benefit of the doubt."[270]

> There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.[271]

The Court describes this first circumstance as "hypothetical."[272] The distinct impression left by this passage is that decisions of the Supreme Court overruling earlier decisions on matters of constitutional interpretation are rare and thus should not be too readily emulated, lest the "legitimacy" of the Court be called into question. But this impression is wrong. On more than 200 occasions, the Court has overturned previous decisions, and in nearly three-fourths of those cases, the Court overruled because the earlier decision had wrongly interpreted the Constitution.[273] What does this remarkable track re-

---

267. *Id.* at 2816 (emphasis added).

268. In this connection, the Joint Opinion's selection of the decision in *West Coast Hotel* as one in which the Court was justified in departing from precedent seems peculiar. *West Coast Hotel* was decided while President Roosevelt's "court-packing" scheme was being considered in Congress. Upholding state minimum wage legislation (which signalled a less hostile view toward the legislative program of the New Deal) certainly could have been viewed as "political" and therefore inappropriate under the Joint Opinion's standards.

269. *Casey,* 112 S. Ct. at 2815.

270. *Id.*

271. *Id.*

272. *Id.*

273. An exhaustive study of the Supreme Court's decisions by Rutgers University Professor Emeritus Albert P. Blaustein and Carl Willner has yielded a total of 214 implicit and explicit overrulings to date, almost three-fourths of

cord of "judicial correction" mean? At the very least, that the "legitimacy" of the Court is not affected by its acknowledgement of prior error, even when that error involved an intepretation of the Constitution. Indeed, as in *Brown* and *West Coast Hotel*, the Court has often *enhanced* its credibility by overruling decisions that were wrong when originally decided. One more overruling decision, if otherwise appropriate, could not reasonably be expected to damage that credibility.

The second circumstance in which the Court's "legitimacy" would be damaged by overruling prior precedent is much rarer, according to the Court.

> Where, in the peformance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenver the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.[274]

This has happened, according to the Court, only twice — in *Roe* in 1973 and in *Brown v. Board of Education* in 1954.[275] The Court does not specify the criteria by which one may ascertain whether an

---

which involved interpretations of the Constitution. *See* A. BLAUSTEIN & C. WILLNER, STARE DECISIS(work in progress). Copies of the chart illustrating the overruling decision, the overruled precedent, the Court's rationale, and vote breakdown for each case were lodged with the Office of the Supreme Court Clerk in support of a Brief *Amicus Curiae* on behalf of Certain Members of Congress in the *Webster* case. *See also* Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 494-96 (listing 47 constitutional decisions overturned 1960-1979); Albert P. Blaustein & Andrew H. Field, *"Overruling" Opinions in the Supreme Court*, 57 MICH. L. REV. 151, 167, 184-94 (1958) (identifying 60 constitutional decisions among 90 overrulings of prior Supreme Court decisions); CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION, 2115-27 & Supp. (1987) (184 overrulings through 1986); Payne v. Tennessee, 111 S. Ct. 2597, 2610-11 n.l (1991) (identifying 33 constitutional decisions overruled in whole or in part since 1971).

274. Notwithstanding her expressed concern about overfrequent overrulings, Justice O'Connor, one of the authors of the Joint Opinion, has acknowledged that "'when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment and not upon legislative action, this Court throughout its history has freely exercised its powers to reexamine the basis of its constitutional decisions.'" City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458-59 (1983) (O'Connor, J., dissenting) (quoting Smith v. Allwright, 321 U.S. 649, 665 (1944)).

275. *Id.*

issue is "intensely divisive" and thus, presumably, beyond subsequent constitutional correction.[276] Is not the debate over the constitutional rights of homosexuals "intensively divisive"? Or the debate over the validity of the death penalty? The Court does not say. This special category of constitutional decisions that are beyond the pale of criticism (or later correction) seems to have been invented for the occasion. Having said that a "conscientious claim of principled justification" must be "beyond dispute,"[277] which *Roe* most assuredly is not, the Court then insulates that precedent from reconsideration by tying its "legitimacy" to continued adherence to *Roe.*

That the Supreme Court believes that its credibility with the American people is dependent upon its fealty to *Roe v. Wade* is a sad commentary on the Court's self-image. But the Court's belief that our image of ourselves stands or falls with the Court's image of itself[278] is very disturbing. There is a profoundly anti-democratic

---

276. Unlike *Brown v. Bd. of Educ.* which, after initial resistance in some quarters, was rapidly accepted throughout the country as a legally and morally defensible repudiation of state-mandated segregation, *Roe v. Wade,* whose legitimacy has never been accepted by large segments of the population, remains intensely controversial more than 20 years after it was decided. In fact, by preventing the political branches from acting, the Court *created* the very division it claims to have *healed.* Although it is too early to judge whether *Casey* has laid the abortion issue to rest, the first returns are not encouraging. In the same week *Casey* was decided, proponents of the proposed Freedom of Choice Act (H.R. 25, 103rd Cong., 1st Sess.) (1993), which would overturn much of the regulatory legislation the Court upheld in *Casey*, pushed the bill through a House Committee. *See also* S. 25, 103rd Cong., 1st Sess. (1993)). Barely two weeks later, the Territory of Guam filed a petition for *certiorari* with the Court asking it to reevaluate the viability standard that it had just reaffirmed. 61 U.S.L.W. 3165 (U.S. SEPT. 8, 1992). As of the date of this writing (winter 1993), there is no indication that anyone on either side of the issue had heeded the Court's invitation to "end their national division." 112 S. Ct. at 2815.

277. *Id.* at 2814.

278. After Justice O'Connor had announced the Court's ruling in *Casey,* Justice Souter declared, "To overrule [*Roe*] would subvert the Court's legitimacy beyond any reasonable question. If the Court were undermined, the country would also be so." Jeanne Cummings, *Supreme Court Upholds Most of Pennsylvania Abortion Law*, ATLANTA J. CONST., June 29, 1992, at Al. And in its opinion, the Court said: "[The American people's] belief in themselves as ... a people ["who aspire to live according to the rule of law"] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country in its very ability to see itself through its constitutional ideals." 112 S. Ct. at 2816. Of course, the Supreme Court would have *no* ability "to decide [our] constitutional cases and speak before all other for [our] constitutional ideals" if Congress had not conferred upon the Court appellate jurisdiction.

Was the Supreme court "speak[ing] before all others for [our] constitutional ideals" when it held that blacks were not citizens and could not bring suit in

tone to the Court's opinion,[279] which refers to those who will be "tested by following"[280] and to a Nation which must "earn" its character.[281] But "the American people love democracy and the American people are not fools."[282] Ultimately, they will reclaim the authority which the Supreme Court has wrongfully usurped.

IV. WHAT HATH *ROE* WROUGHT?

"... the present decision will turn out to be an isolated deviation from the strong current of precedents — a derelict on the waters of the law."

— *Lambert v. People of Cal.*, 355 U.S. 226, 232 (1957) (Frankfurter, J., dissenting).

The impact *Roe v. Wade* has had on the abortion policies of the United States is so great that it tends to obscure the relatively modest effect *Roe* has had in other areas of the law. But in determining whether a precedent should be overturned, it is useful to consider the difference an overruling decision would have on the law generally. Part IV of this article undertakes to make this survey, which required reviewing more than 100 Supreme Court opinions and orders in which *Roe* was cited and more than 2300 state and lower federal court decisions citing *Roe*. To the author's knowledge, no such survey has been published previously.

A. *Roe* in the Supreme Court

Through the end of the 1992 Term, *Roe v. Wade* had been cited in 108 Supreme Court opinions and orders. Almost one-half of these dispositions (forty-six) concerned abortion statutes, ordinances, administrative regulations, and policies.[283] Another twenty cited *Roe* on a

---

federal court to vindicate their claims of freedom? *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Or when it said that Japanese-Americans could be forcibly resettled into concentration camps without any evidence of their disloyalty? *See* Korematsu v. United States, 323 U.S. 214 (1944). The Court makes mistakes and its judgments may be wrong. They should not be perpetuated.

279. *Id.* at 2814 ("[t]he root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court").

280. *Id.* at 2815.

281. *Id.* at 2816.

282. *Id.* at 2884 (Scalia, J., concurring in the judgment in part and dissenting in part).

283. Doe v. Rampton, 410 U.S. 950 (1973); Sasaki v. Kentucky, 410 U.S. 951 (1973); Markle v. Abele, 410 U.S. 951 (1973); Munson v. South Dakota,

variety of procedural points.[284] *Roe* has been cited in dissents from the denial of *certiorari* in five cases (outside of abortion)[285] and in

---

410 U.S. 950 (1973); Byrn v. New York City Health & Hosp. Corp., 410 U.S. 949 (1973); Crossen v. Attorney Gen. of Kentucky, 410 U.S. 950 (1973); Kruze v. Ohio, 410 U.S. 951 (1973); Thompson v. Texas, 410 U.S. 950 (1973); Corkey v. Edwards, 410 U.S. 950 (1973); Heffernan v. Doe, 410 U.S. 950 (1973); Hanrahan v. Doe, 410 U.S. 950 (1973); Rodgers v. Danforth, 410 U.S. 949 (1973); Cheaney v. Indiana, 410 U.S. 991 (1973); Rosen v. L. State Bd. of Medical Examiners, 412 U.S. 902 (1973); Nassau County Medical Ctr. v. Klein, 412 U.S. 925 (1973); Comm'r of Social Serv. of New York v. Klein, 412 U.S. 925 (1973); Bigelow v. Virginia, 413 U.S. 909 (1973); Poe v. Gerstein, 417 U.S. 281 (1974); Gerstein v. Coe, 417 U.S. 279 (1974); L. State Bd. of Medical Examiners v. Rosen, 419 U.S. 1098 (1975); Bigelow v. Virginia, 421 U.S. 809 (1975); Connecticut v. Menillo, 423 U.S. 9 (1975); Greco v. Orange Memorial Hosp. Corp., 423 U.S. 1000 (1975); Singleton v. Wulff, 428 U.S. 106 (1976); Bellotti v. Baird, 428 U.S. 132 (1976); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976); Sendak v. Arnold, 429 U.S. 589 (1976); Beal v. Doe, 432 U.S. 438 (1977); Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Colautti v. Franklin, 439 U.S. 379 (1979); Anders v. Floyd, 440 U.S. 445 (1979); Williams v. Zbaraz, 442 U.S. 1309 (1979) (denial of stay); Bellotti v. Baird, 443 U.S. 622 (1979); Harris v. McRae, 448 U.S. 297 (1980); H.L. v. Matheson, 450 U.S. 398 (1981); Simopoulos v. Virginia, 462 U.S. 506 (1983); Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476 (1983); City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983); Thornburgh v. Am. College of Obstetricians & Gynecologists, 476 U.S. 747 (1986); Webster v. Reproductive Health Serv., 492 U.S. 490 (1989); Ohio v. Akron Center for Reprod. Health, 497 U.S. 502 (1990); Hodgson v. Minnesota, 497 U.S. 417 (1990); Rust v. Sullivan, 111 S. Ct. 1759 (1991); Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992); Ada v. Guam Society of Obstetricians & Gynecologists, 113 S. Ct. 633 (1992). These include summary dispositions of state and federal abortion cases pending when *Roe* was decided on January 22, 1973.

284. White v. Regester, 412 U.S. 755, 761 (1973); Gilligan v. Morgan, 413 U.S. 1, 14 (1973) (Blackmun, J., concurring); Steffel v. Thompson, 415 U.S. 452, 457 n.8 (1974); Super Tire Eng'g Co. v. McCorkle, 416 U.S. 115, 121 (1974); De Funis v. Odegaard, 416 U.S. 312, 319 (1974); Allee v. Medrano, 416 U.S. 802, 818 n.12 (1974); Richardson v. Ramirez, 418 U.S. 24, 34 (1974); Preiser v. New York, 422 U.S. 395, 401 (1975); Warth v. Seldin, 422 U.S. 490, 509 n.19 (1975); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976); United States v. New York Tel. Co., 434 U.S. 159, 165 n.6 (1977); Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 8 (1978); United States Parole Comm'n v. Geraghty, 445 U.S. 388, 416 n.9 (1980) (Powell, J., dissenting); Edgar v. MITE Corp., 457 U.S. 624, 655 (1982) (Marshall, J., dissenting); Firefighters Local Union No. 1784 v. Stotts, 476 U.S. 561, 593 (1984) (Blackmun, J., dissenting); Boston Firefighters Union Local 718 v. Boston Chapter NAACP, Inc., 468 U.S. 1206, 1208-09 (1984) (Blackmun, J., dissenting); Allen v. Wright, 468 U.S. 737, 790 n.8 (1984) (Stevens, J., dissenting); Daniels v. Williams, 474 U.S. 327, 338 n.ll (1986); Honig v. Doe, 484 U.S. 305, 318 (1988); Republic Nat. Bank of Miami v. United States, 113 S. Ct. 554, 564 (1992).

285. *In re* Goalen, 414 U.S. 1148, 1150 (1974) (Stewart, J., dissenting from the denial of *certiorari*)*;* Watson v. Kenlick Coal Co., Inc., 422 U.S. 1012, 1018 (1975) (Douglas, J., dissenting from the denial of *certiorari*)*;* Bykofsky v. Borough of Middletown, 429 U.S. 964, 965 (1976) (Marshall, J., dissenting from the

two other cases as part of a general discussion of *stare decisis*[286] or retroactivity.[287] *Roe* has been cited in another ten majority opinions, concurrences, and dissents for miscellaneous reasons.[288]

On only one occasion has the Supreme Court relied on *Roe* in recognizing a new substantive due process right. In *Moore v. City of East Cleveland, Ohio*,[289] the Court cited *Roe*, along with numerous other authorities, in holding that a municipality could not prohibit first cousins from residing in the same household with their grandmother.[290] It is apparent from even a casual reading of the plurality opinion in *Moore*, however, that *Roe* did not control the outcome of the case. Other than this single opinion, the Court has never relied on *Roe* in recognizing any new constitutional right.[291]

---

denial of *certiorari*); Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052, 1055 (1978) (Marshall, J., dissenting from the denial of *certiorari*); Whisenhunt v. Spradlin, 464 U.S. 965, 971 (1983) (Brennan, J., dissenting from the denial of *certiorari*).

286. Payne v. Tennessee, 111 S. Ct. 2597, 2623 (1991) (Marshall, J., dissenting).

287. Solem v. Stumes, 465 U.S. 638, 653 n.4 (1984).

288. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 760 (1976) (citation to *Roe* in commercial speech case); United States v. Watson, 432 U.S. 411, 443 (1976) (Marshall, J., dissenting) (longstanding practice of allowing warrantless arrests in nonexigent circumstances does not render practice immune from constitutional challenge); United States v. Santana, 427 U.S. 38, 46 n.l (1976) (Marshall, J., dissenting) (same with respect to Congressional power to authorize warrantless arrests); Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 401 n.4 (1978) (Brennan, J., dissenting) (privileges and immunities); Baker v. McCollan, 443 U.S. 137, 147 (1979) (Blackmun, J., concurring) (passing reference to *Roe* in case involving unlawful detention); Whalen v. Roe, 445 U.S. 684, 689 n.3 (1980) (recognizing limits to legislative authority "to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them"); City of Mobile v. Bolden, 446 U.S. 55, 113-14 & n.9 (1980) (Marshall, J., dissenting) (reference to *Roe* in equal protection challenge to at-large voting); Parratt v. Taylor, 451 U.S. 527, 545 (1981) (Blackmun, J., concurring) (Due Process Clause protects more than procedural fairness); Mills v. Rogers, 457 U.S. 291, 299 (1982) (referring to *Roe* in remanding case challenging involuntary medication policy to the Massachusetts Supreme Judicial Court for possible resolution on state law grounds); County of Riverside v. McLauglin, 111 S. Ct. 1661, 1671 (1991) (Scalia, J., dissenting) (objecting to Court's willingness to accept rights without a textual basis in Constitution while denying those rooted in the Constitution).

289. 431 U.S. 494 (1977).

290. *Id.* at 499.

291. *Roe* was also cited in *Zablocki v. Redhail*, 434 U.S. 374, 385 (1978). In *Redhail*, the Court struck down a state statute forbidding, without court approval, remarriage of noncustodial parents who had support obligations to minor children. The decision was squarely based on the Equal Protection Clause of the Fourteenth Amendment, not the Due Process Clause. *Id.* at 382. The Court placed particular reliance on its pre-*Roe* decision in *Loving v. Virginia*, 388 U.S. 1 (1967), declaring unconstitutional Virginia's anti-miscegenation laws. *Redhail*, 434

Far more commonly, the Court has declined to enlarge the category of substantive due process rights, notwithstanding the arguments of parties (or of dissenting justices) that a contrary result was required by *Roe*. The Court, for example, has refused to recognize as "fundamental" asserted rights to engage in acts of homosexual sodomy,[292] to refuse medical treatment,[293] to visitation with the child born of an adulterous relationship,[294] to exhibit obscene material commercially,[295] to special accommodations or contact visits (for pretrial detainees),[296] to continued public employment,[297] to a particular style of personal grooming (police department),[298] to public education,[299] to continued enrollment in a state university degree program,[300] to an unfettered choice of household companions

---

U.S. at 383-85. Justice Stewart would have decided the case under the Due Process Clause, *id.* at 391-96 (Stewart, J., concurring in the judgment), and said that "to embrace the essence of that doctrine [substantive due process] under the guise of equal protection serves no purpose but obfuscation." *Id.* at 395-96. *Roe* was frequently cited in *Carey v. Population Servs. Int'l,* 431 U.S. 678 (1977). In *Carey,* the Court struck down limits on the sale and distribution of contraceptives. *Carey* rested on the Supreme Court's pre-*Roe* contraception cases. *See Griswold,* 381 U.S. 479; *Eisenstadt,* 405 U.S. 438. As the Court acknowledged in *Casey,* 112 S. Ct. at 2811, those authorities would not be threatened by an overruling of *Roe* (*"Roe's* scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases"). Finally, *Roe* was cited in *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 640 (1974). In *LaFleur,* the Court declared unconstitutional a mandatory pregnancy leave policy for school teachers. Under that policy, pregnant women could not work past the fourth month of their pregnancy and could not return to work until at least three months after they had given birth. The Court invalidated the policy on the ground it created irrational and arbitrary presumptions regarding the work abilities of pregnant women and women who had recently given birth. The theory of the case, that "irrebuttable presumptions" are unconstitutional, was later severely criticized by the Court. *See* Michael H. v Gerald D., 491 U.S. 110, 120-21 (1989); Weinberger v. Salfi, 422 U.S. 749, 767-774 (1975).

292. Bowers v. Hardwick, 478 U.S. 186, 189-91 (1986), *id.* at 199-200, 204-06, 210 (Blackmun, J., dissenting).

293. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277-79 & n.7 (1990) (recognizing "liberty interest" but not "fundamental" right to refuse unwanted medical treatment), *id.* at 340-42 & n.12 (Stevens, J., dissenting).

294. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

295. Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-66 & n.13 (1973), *id.* at 109 (Brennan, J., dissenting).

296. Bell v. Wolfish, 441 U.S. 520, 534 (1979); Block v. Rutherford, 468 U.S. 576, 597-98 (1984) (Marshall, J., dissenting).

297. Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 198 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 & n.3 (1976).

298. Kelley v. Johnson, 425 U.S. 238, 244 (1976).

299. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 & n.76 (1973).

300. Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 229-30

(contrary to local ordinance),[301] to informational privacy,[302] or not to be hospitalized for psychiatric treatment.[303] The Court also has implicitly rejected *Roe* as authority for overturning immigration rules[304] and has expressly questioned whether there is a "liberty interest" in "the foster family as an institution."[305] Finally, the Court has held that the right of privacy does not permit parents to send their children to private schools that discriminate on the basis of race[306] and has refused to characterize opposition to abortion as evidence of a "class-based" animus for purposes of the Ku Klux Klan Act of 1871.[307]

It would be difficult to identify a single Supreme Court doctrine that depends upon *Roe,* other than the right to abortion itself. Of course, only a small fraction of cases interpreting the Constitution ever reaches the High Court. Thus, in measuring *Roe's* impact on the law (outside of abortion), it is important not to overlook how it has been viewed by other courts.

B. *Roe* in the lower courts

A Westlaw search disclosed more than 2300 state and lower federal court decisions citing *Roe* through the summer of 1993.[308] Many of these decisions dealt with abortion or one of the procedural issues considered in *Roe* (*e.g.,* standing, mootness) but few courts have relied on *Roe* to resolve substantive issues outside the area of abortion.

Roe has been cited in cases challenging laws forbidding obsceni-

---

(1985) (Powell, J., concurring).

301. Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshall, J., dissenting).

302. Paul v. Davis, 424 U.S. 693, 712-13 (1976); Whalen v. Roe, 429 U.S. 589, 598-600 & nn.23, 26 (1977), *id.* at 609 (Stewart, J., concurring); *see also* Whalen v. Roe, 423 U.S. 1313, 1315 (1975) (order of Marshall, J., denying stay); California Bankers Ass'n v. Schultz, 416 U.S. 21, 85-86 n.7 (1974) (Douglas, J., dissenting).

303. Parham v. J.R., 442 U.S. 584, 624 n.6 (1979) (Stewart, J., concurring in the judgment).

304. *See* Fiallo v. Bell, 430 U.S. 787, 810 (1977) (Marshall, J., dissenting) (dissent, citing *Roe,* from decision upholding INS rules precluding fathers from obtaining "preferred status" for their illegitimate children, and illegitimate children from obtaining "preferred status" for their alien fathers).

305. *See* Smith v. Org. of Foster Families for Equality and Reform, 431 U.S. 816, 842-47 & n.46 (1977).

306. *See* Runyon v. McCrary, 427 U.S. 160, 177-78 (1976).

307. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993) (construing 42 U.S.C. § 1985(3)).

308. This number does not include those cases in which *Roe* was cited to, but not by, the court.

ty and child pornography,[309] public indecency,[310] fornication,[311]

309. Statutes and ordinances outlawing obscenity or child pornography were upheld in the following cases: Red Bluff Drive-in, Inc. v. Vance, 648 F.2d 1020, 1028 (5th Cir. 1981); Literature, Inc. v. Bloom, 482 F.2d 372, 374-75 (1st Cir. 1973); United States v. Kuennen, 901 F.2d 103, 105-06 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 385 (1990); Harper v. Lindsay, 454 F. Supp. 597, 603 (S.D. Tex. 1978) (massage parlor), *aff'd in part, rev'd in part*, 616 F.2d 849 (5th Cir. 1980); Bloom v. Mun. Court for Inglewood Judicial Dist. of Los Angeles County, 545 P.2d 229, 247 (Cal. 1976) (Tobriner, J., dissenting); *In re* Duncan, 234 Cal. Rptr. 877, 881 n.2 (Ct. App. 1987); Commonwealth v. 707 Main Corp., 357 N.E.2d 753, 758 (Mass. 1976); State v. Shapiro, 300 A.2d 595, 602 (N.J. 1973); State v. Meadows, 503 N.E.2d 697, 712 n.3 (Ohio 1986) (Wright, J., concurring); State v. Stover, No. M8504-CRB-007715, 1985 WL 6438, at *1 (Ohio Mun. Sept. 3, 1985); State v. Leisieure, 404 A.2d 457, 463 n.4 (R.I. 1979); Yorko v. State, 690 S.W.2d 260, 262 (Tex. Crim. App. 1985), *id.*, at 266-68 (Clinton, J., dissenting), *id*. at 272 (Teague, J., dissenting). *See also* Walker v. City of Kansas City, Missouri, 911 F.2d 80, 95-96 (8th Cir. 1990) (upholding ordinance banning nude "go-go" dancing in bar).

Obscenity laws were struck down in the following cases on the grounds indicated: People v. Seven Thirty-Five East Colfax, Inc., 697 P.2d 348, 369 (Colo. 1985) (overbreadth, vagueness); State v. Kam, 748 P.2d 372, 378 (Haw. 1988) (state privacy grounds); State v. Hughes, 792 P.2d 1023, 1031 (Kan. 1990) (overbreadth); Wheeler v. State, 380 A.2d 1052, 1057 (Md. 1977) (equal protection).

No court—state or federal—has invalidated an obscenity law on the authority of *Roe.* This is not surprising, however, because only five months after *Roe* v. *Wade* was decided, the Supreme Court held that the right of privacy recognized in *Roe* and *Stanley* v. *Georgia*, 394 U.S. 557 (1969) (right to view obscene material in the privacy of one's own home) did not extend to the commercial exhibition or interstate transportation of obscene material. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-67 (1973); United States v. Orito, 413 U.S. 139, 141-44 (1973).

310. United States v. Biocic, 928 F.2d 112, 116 (4th Cir. 1991) (affirming conviction for public indecency); People v. Hollman, 500 N.E.2d 297, 302 (N.Y. 1986) (same); Kirtley v. State, 585 S.W.2d 724, 725 n.3 (Tex. Crim. App. 1979) (same).

311. Doe v. Duling, 603 F. Supp. 960, 966-69 (E.D. Va. 1985) (striking down part of Virginia fornication statute), *vacated*, 782 F.2d 1202 (4th Cir. 1986); State v. Saunders, 381 A.2d 333 (N.J. 1977) (striking down New Jersey fornication statute on state and federal constitutional grounds). *See also* Shawgo v. Spradlin, 701 F.2d 470, 482-83 (5th Cir. 1983) (police department regulation, prohibiting cohabitation of police officers did not infringe their right of privacy), *cert. denied sub nom.* Whisenhunt v. Spradlin, 464 U.S. 965 (1983); Hoffman v. McNamara, 630 F. Supp. 1257, 1262 (D. Conn. 1986) (probationary police officer could be dismissed from training course and terminated from employment for engaging in sexual relations with another trainee while residing in the police academy dormitory); Lile v. Hancock Place Sch. Dist., 701 S.W.2d 500, 507-08 (Mo. Ct. App. 1986) (affirming dismissal of school teacher for having sexual relations with daughters of woman with whom he lived); Futrell v. Ahrens, 540 P.2d 214, 218 (N.M. 1975) (upholding state university rule prohibiting visitation by persons of opposite sex in bedrooms of residence hall); Roberts v. Roberts, 657 P.2d 153, 158 (Okla. 1983) (Sims, V.C.J., dissenting) (rejecting privacy challenge to statute allowing alimony to be terminated when former spouse volun-

adultery,[312] bigamy,[313] sodomy,[314] prostitution,[315] spousal

---

tarily cohabits with another person); Pattberg v. Pattberg, 497 N.Y.S.2d 251, 255 (N.Y. Sup. Ct. 1985) (same). *But see* Swope v. Bratton, 541 F. Supp. 99, 108 (W.D. Ark. 1982) (male police sergeant could not be disciplined for having sexual relationship with female police dispatcher outside of regular work hours); Owens v. City of Jennings Mun. Fire & Police Civil Serv. Bd., 454 So. 2d 426, 428-29 (La. Ct. App. 1984) (police officer could not be discharged for becoming pregnant out-of-wedlock); Duckworth v. Sayad, 670 S.W.2d 88, 91 n.l (Mo. Ct. App. 1984) (police officer could not be discharged solely by reason of his having had sexual relations with woman to whom he was not married).

The Supreme Court has not yet decided whether public employees may be disciplined for private, consensual sexual conduct. *See* City of North Muskegon v. Briggs, 473 U.S. 909 (1985) (White, J., dissenting from denial of *certiorari*); Whisenhunt v. Spradlin, 464 U.S. 965 (1983) (Marshall, J., dissenting from denial of *certiorari*); Hollenbaugh v. Carnegie Free Library, 439 U.S. 1052 (1978) (Marshall, J., dissenting from denial of *certiorari*).

312. Commonwealth v. Stowell, 449 N.E.2d 357, 359 (Mass. 1983) (affirming conviction for adultery). *See also* Fugate v. Phoenix Civil Serv. Bd., 791 F.2d 736, 738-40 (9th Cir. 1986) (police officers did not have constitutionally protected right of privacy to engage in sexual relations with prostitutes while on duty); Andrade v. City of Phoenix, 692 F.2d 557, 564 (9th Cir. 1982) (*per curium*) (Wallace, J., concurring) (police officers could be suspended for committing acts of adultery); Hollenbaugh v. Carnegie Free Library, 436 F. Supp. 1328, 1333-34 & n.8 (W.D. Pa. 1977) (library employees could be discharged for living in open, adulterous relationship), *aff'd mem. op.*, 578 F.2d 1374 (3rd Cir. 1978), *cert. denied*, 439 U.S. 1052 (1978); Johnson v. San Jacinto Junior College, 498 F. Supp. 555, 573-76 (S.D. Tex. 1980) (junior college employee had no fundamental right to engage in extra-marital relationship); Krzyzewski v. Metro. Gov't of Nashville, 14 Fair Empl. Prac. Cas. (BNA) 1024, 1029-30 (M.D. Tenn. 1976) (discharge of unmarried probationary police officer for committing adultery with married officer did not violate her right of privacy); Fabio v. Civil Serv. Comm'n of City of Philadelphia, 414 A.2d 82, 89 (Pa. 1980) (police officer properly discharged for adultery); State v. Dunton, 450 N.W.2d 189, 193-94 (Minn. Ct. App. 1990) (religious counselor had no privacy right to engage in consensual sexual relations with patient). *But see* Major v. Hampton, 413 F. Supp. 66, 70 n.2 (E.D. La. 1976) (married IRS agent could not be disciplined for clandestine acts of adultery); *In re* Pons, No. 91AP-746, 1991 WL 245003, at *6 (Ohio Ct. App. 1991) (obstetrician-gynecologist could not be disciplined for entering into adulterous relationship with patient in the absence of a specific ethical rule barring such conduct).

Although the Supreme Court has not yet squarely decided whether there is a constitutional right to engage in premarital or extramarital heterosexual conduct, *see Carey*, 431 U.S. at 688 n.5, 694 & n.l7, *id.*, at 702-03 (White, J., concurring in part and concurring in the judgment), *id.* at 713 (Stevens, J., concurring in part and concurring in the judgment), it has strongly intimated that such conduct is *not* entitled to the protection of the Constitution. *See* Bowers v. Hardwick, 478 U.S. 186, 191 (1986) ("any claim that these cases [concerning child rearing and education, family relationships, procreation, marriage, contraception or abortion] . . . stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable"), *id.* at 195-96 (were Court to recognize right to engage in "voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed

to prosecution adultery, incest, and other sexual crimes even though they are committed in the privacy of the home. We are unwilling to start down that road"), *id.*, at 209 n.4 (Blackmun, J., dissenting) (no right of privacy to engage in adultery or incest), *id.* at 217 (Stevens, J., dissenting) (no right to commit adultery); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 & n.15 (1973) ("for us to say that our Constitution incorporates the proposition that conduct involving consenting adults only is always beyond state regulation, is a step we are unable to take," citing, *inter alia*, laws against fornication and adultery); *Eisenstadt*, 405 U.S. at 448 (tacitly admitting State's authority to prohibit "extramarital and premarital sexual relations"); *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring) ("[t]he State of Connecticut does have statutes, *the constitutionality of which is beyond doubt*, which prohibit adultery and fornication") (emphasis added), *id.* at 498-99 ("it should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct"); Poe v. Ullman, 367 U.S. 497, 545-48, 552-55 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds) (recognizing authority of State to prohibit fornication, adultery, homosexuality and incest); McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (Florida fornication and adultery statutes "express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not"); Southern Surety Co. v. Oklahoma, 241 U.S. 582, 586 (1916) ("[a]dultery is an offense against the marriage relation, and belongs to the class of subjects which each state controls in its own way").

313. Potter v. Murray City, 585 F. Supp. 1126, 1140 (D. Utah 1984), *aff'd*, 760 F.2d 1065, 1070-71 & n.9 (10th Cir. 1985) (upholding suspension of police officer for his practice of "plural marriage"). *See generally,* Reynolds v. United States, 98 U.S. 145 (1878) (upholding law banning polygamous marriages); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973) ("[statutes making bigamy a crime surely cut into an individual's freedom to associate, but few seriously claim such statutes violate the First Amendment or any other constitutional provision").

314. Privacy challenges to sodomy laws were rejected in the following federal cases: Dronenburg v. Zech, 741 F.2d 1388, 1391-98 (D.C. Cir. 1984) (military regulations); Lovisi v. Slayton, 539 F.2d 349, 351 & n.4 (4th Cir. 1976) (*en banc*), *cert. denied*, 429 U.S. 977 (1976); United States v. Lemons, 697 F.2d 832, 834 (8th Cir. 1983); Beller v. Middendorf, 632 F.2d 788, 807-12 & n.18 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981) (military regulations); Woodward v. United States, 871 F.2d 1068, 1074-75 (Fed. Cir. 1989) (same); Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199, 1203-05 (E.D. Va. 1975) (Mehrige, J., dissenting), *sum. aff'd*, 425 U.S. 901 (1976); Berg v. Claytor, 436 F. Supp. 76, 79-80 (D. D.C. 1977) (military regulations); United States v. Brewer, 363 F. Supp. 606, 607-09 & n.6 (M.D. Pa. 1973); United States v. Henderson, 34 M.J. 174, 176-78 (C.M.A. 1992) (military regulations); United States v. Sargeant, 29 M.J. 812, 815-17 (A.C.M.R. 1989) (same); United States v. McFarlin, 19 M.J. 790, 792 (A.C.M.R. 1985) (same); United States v. Jones, 14 M.J. 1008, 1013 (A.C.M.R. 1982) (same) (Badami, J., dissenting). *See also* Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (reserve sergeant could be barred from reenlistment on grounds that she was an admitted homosexual); Steffan v. Cheney, 780 F. Supp. 1 (D. D.C. 1991) (Navy midshipman could be denied right to graduate from Naval Academy upon his admission that he was a homosexual even in the absence of evidence that he had engaged in any homosexual conduct), *rev'd sub nom.* Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993), *reh'g en banc allowed*, __F.3d__ (D.C. Cir. Jan. 7, 1994); Acanafora v.

Bd. of Educ. of Montgomery County, 359 F. Supp. 843, 850 (D. Md. 1973) (school board could refuse to reinstate or renew contract of teacher who flaunted his homosexuality), *aff'd,* 491 F.2d 498 (4th Cir. 1974), *cert. denied,* 419 U.S. 836 (1974); Childers v. Dallas Police Dep't, 513 F. Supp. 134, 145-46 (N.D. Tex. 1981) (upholding police department's refusal to hire homosexual).

All three federal decisions citing Roe in support of a right to engage in homosexual sodomy were later reversed. *See* Baker v. Wade, 553 F. Supp. 1121, 1134-35, 1137 & n.35 (N.D. Tex. 1982), *opinion supplemented,* 106 F.R.D. 526 (1985), *appeal dismissed,* 743 F.2d 236 (5th Cir. 1984), *rev'd on reh'g,* 769 F.2d 289 (5th Cir. 1985) (*en banc*), *reh'q denied,* 774 F.2d 1285 (5th Cir. 1985), *cert. denied,* 478 U.S. 1022 (1986), *reh'q denied,* 478 U.S. 1035 (1986); Hardwick v. Bowers, 760 F.2d 1202, 1211-13 (llth Cir. 1985), *rev'd,* 486 U.S. 186 (1986); United States v. Fagg, 33 M.J. 618, 619-21 (A.F.C.M.R. 1991), *rev'd,* 34 M.J. 179 (C.M.A. 1992), *cert. denied,* 113 S. Ct. 92 (1992).

Privacy challenges to sodomy laws were also rejected in the following state cases: State v. Bateman, 547 P.2d 6, 9-10 (Ariz. 1976) (*en banc*), *id.,* at 10-11 (Gordon, J., dissenting); People v. Santibanez, 154 Cal. Rptr. 74, 75-76 (Ct. App. 1979); United States v. Buck, 342 A.2d 48, 49 n.l (D.C. 1975); Harris v. United States, 315 A.2d 569, 574 n.l4 (D.C. 1974) (*en banc*); Neville v. State, 430 A.2d 570, 574-79 (Md. 1981); Kelly v. State, 412 A.2d 1274, 1275 (Md. Ct. App. 1980), *aff'd sub nom.* Neville v. State, 430 A.2d 570 (Md. 1981); Schochet v. State, 541 A.2d 183, 186-87, 192, 199 n.3 (Md. Ct. App. 1988), *rev'd,* 580 A.2d 176 (Md. 1990); People v. Penn, 247 N.W.2d 575, 578-79 (Mich. Ct. App. 1976); People v. Gunnett, 404 N.W.2d 627, 631 (Mich. Ct. App. 1987); State v. Gray, 413 N.W.2d 107, 111 (Minn. 1987); State v. Walsh, 713 S.W.2d 508, 509-12 (Mo. 1986); State v. Worthington, 582 S.W.2d 286, 288-90 (Mo. Ct. App. 1979); State v. Santos, 413 A.2d 58, 66-68 (R.I. 1980); State v. Leavitt, 371 A.2d 596, 599 n.4 (R.I. 1977). Two lower state court decisions recognizing a constitutional right to engage in sodomy were later reversed on appeal. *See* State v. Elliott, 539 P.2d 207, 209-15 (N.M. Ct. App. 1975), *rev'd,* 551 P.2d 1352 (N.M. 1976); People v. Rice, 363 N.Y.S.2d 484, 487, *rev'd,* 383 N.Y.S.2d 799 (N.Y. Sup. Ct. 1976).

Some state courts read *Roe v. Wade,* incorrectly as it turned out, *see* Bowers v. Hardwick, 478 U.S. 186 (1986), as supporting a constitutional right of adults to engage in consensual, noncommercial sodomy in private. *See* State v. Pilcher, 242 N.W.2d 348, 356-59 (Iowa 1976); People v. Onofre, 424 N.Y.S.2d 566, 568 (N.Y. App. Div. 1980), *aff'd,* 415 N.E.2d 936, 939-42 (N.Y. 1980); Post v. State, 715 P.2d 1105, 1109 (Okla. Crim. App. 1986). After *Bowers,* at least two state reviewing courts based a right to engage in homosexual activity in private on state constitutional grounds. *See* Commonwealth v. Wasson, 842 S.W.2d 487, 507 (Ky. 1992) (Lambert, J., dissenting); State v. Morales; 826 S.W.2d 201 (Tex. Ct. App. 1992). *See also* Schochet v. State, 580 A.2d 176, 184 (Md. 1990) (construing statute not to apply to "consensual, noncommercial, heterosexual activity between adults in private" to avoid constitutional question); Commonwealth v. Balthazar, 318 N.E.2d 478, 480 n.2 (Mass. 1974) (dicta) (construing statute not to apply to private, consensual conduct of adults).

315. Only one court has cited *Roe* in support of a ruling recognizing a right to prostitution and that ruling was reversed on appeal. *See In re* P., 400 N.Y.S.2d 455, 462-69 (N.Y. Fam. Ct. 1977) (decided on state grounds), *rev'd sub nom. In re* Dora P., 418 N.Y.S.2d 597, 603-04 (N.Y. App. Div. 1979). All other courts have held that there is no right to engage in prostitution and that *Roe* does not support such a right. *See* Blake v. State, 344 A.2d 260, 262 (Del. Super. Ct. 1975); State v. Hicks, 360 A.2d 150, 151 (Del. Super. Ct. 1976),

rape,[316] sexual exploitation of children,[317] marriage of minors without parental consent,[318] possession or delivery of marijuana or other drugs,[319] manufacture, transfer, or possession of guns,[320] and

---

aff'd per curiam, 373 A.2d 205 (Del. 1977); Lutz v. United States, 434 A.2d 442, 445 (D.C. 1981); State v. Gaither, 224 S.E.2d 378, 379 (Ga. 1976) (Hall, J., specially concurring); State v. Mueller, 671 P.2d 1351, 1353-56 (Haw. 1983); People v. Johnson, 376 N.E.2d 381, 386 (Ill. App. Ct. 1978); State v. Price, 237 N.W.2d 813, 817-18 (Iowa), *appeal dismissed*, 426 U.S. 916 (1976); State v. Henderson, 269 N.W.2d 404, 406 (Iowa 1978); City of Junction City v. White, 580 P.2d 891 (Kan. Ct. App. 1978); State *ex rel* Macomb Prosecuting Attorney v. Mesk, 333 N.W.2d 184, 188 (Mich. Ct. App. 1983); Caesar's Health Club v. St. Louis County, 565 S.W.2d 783, 786-88 & n.3 (Mo. Ct. App. 1978); Princess Sea Industries, Inc. v. State, 635 P.2d 281, 283 (Nev. 1981) (advertising); Cherry v. Koch, 491 N.Y.S.2d 934, 941-42 (1985); Commonwealth v. Dodge, 429 A.2d 1143, 1147-49 (Pa. Super. Ct. 1981); Tisdale v. State, 640 S.W.2d 409, 412-14 (Tex. Ct. App. 1982); City of Madison v. Schultz, 295 N.W.2d 798, 805-05 (Wis. 1980). The Supreme Court has suggested that laws against prostitution are constitutional. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 68 n.15 (1973).

316. Commonwealth v. Shoemaker, 518 A.2d 591, 593 (Pa. 1986) (upholding spousal sexual assault statute). *But see* State v. Smith, 426 A.2d 38, 46-47 (N.J. 1981) (citing *Roe* in support of ruling that rape statute could be applied to man who sexually assaulted his wife).

317. Nelson v. Moriarity, 484 F.2d 1034, 1035-36 (1st Cir. 1973) (*per curiam*) (statutory rape prosecution) ("nothing in the [Supreme] Court's recent decisions clarifying the scope of procreational privacy . . . suggests that a state may no longer place the risk of mistake as to the prosecutrix's age on the person engaging in sexual intercourse with a partner who may be young enough to fall within the protection of the statute"); Goodrow v. Perrin, 403 A.2d 864, 865-66 (N.H. 1979) (same); Commonwealth v. Arnold, 514 A.2d 890, 892 (Pa. Super. Ct. 1986) (that sexual abuse of a child was not a "fundamental right" falling under cloak of family intimacies or privacy enjoying protection of Constitution); Kruger v. State, 623 S.W.2d 386, 390 (Tex. Crim. App. 1981) (Clinton, J., dissenting) (statutory rape); Scadden v. State, 732 P.2d 1036, 1039 (Wyo. 1987) (high school coach had no privacy right to engage in unconsented sexual relations with minor student victim). *See also* Fleisher v. City of Signal Hill, 829 F.2d 1491, 1497-99 (9th Cir. 1987) (probationary police officer's right of privacy did not extend to his sexual conduct with a minor); Jones v. State, 619 So. 2d 418 (Fla. Dist. Ct. App. 1993) (rejecting state privacy claim to engage in consensual sexual relations with a minor). In *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464 (1981), the Supreme Court held that the California statutory rape statute did not violate the Equal Protection Clause even though it applied only to men.

318. Moe v. Dinkins, 533 F. Supp. 623, 628-30 (S.D.N.Y. 1981), *cert. denied sub nom.* Coe v, Axelrod, 459 U.S. 827 (1982) (rejecting constitutional challenge).

319. Only one court has recognized a constitutional right to possess marijuana. *See* Ravin v. State, 537 P.2d 494, 497 n.4 (Alaska 1975) (decided on state constitutional grounds); *but see* Gray v. State, 525 P.2d 524, 528 n.ll (Alaska 1974) (no right to sell marijuana). All other courts that have considered such arguments have rejected them, notwithstanding the claim that possession (or delivery) of marijuana or other drugs is protected by *Roe. See* United States v. Kieffer, 477 F.2d 349, 352 (2d Cir. 1973) (possession of marijuana with intent to

the unlicensed practice of medicine.[321] As the accompanying notes

---

distribute), *cert. denied*, 414 U.S. 831 (1973); United States v. Perry, 788 F.2d 100, 112 (3d Cir. 1986) (conspiracy to possess heroin), *cert. denied*, 479 U.S. 864 (1986); United States v. Horsley, 519 F.2d 1264, 1265 (5th Cir. 1975) (possession and distribution of hashish oil), *cert. denied*, 424 U.S. 944 (1976); United States v. Maiden, 355 F. Supp. 743, 746 (D. Conn. 1973) (distribution of and possession with intent to distribute marijuana); Nat'l Org. for the Reform of Marijuana Laws (NORML) v. Bell, 488 F. Supp. 123, 130-34 (D.D.C. 1980) (possession of marijuana); United States v. Castro, 401 F. Supp. 120, 126 (N.D. Ill. 1975) (distribution of cocaine); Louisiana Affiliate of the Nat'l Org. for the Reform of Marijuana Laws (NORML) v. Guste, 380 F. Supp. 404, 406-408 (E.D. La. 1974) (possession of marijuana); State v. Murphy, 570 P.2d 1070, 1073 (Ariz. 1977) (*en banc*) (same); State v. Anonymous, 355 A.2d 729, 742 n.69 (Conn. Super. Ct. 1976) (striking down classification of marijuana), *rev'd sub nom.* State v. Rao, 370 A.2d 1310 (Conn. 1976); Kreisher v. State, 319 A.2d 31, 32 (Del. 1974) (possession of marijuana); Laird v. State, 342 So. 2d 962, 963-64 (Fla. 1977) (same), *id.*, at 966 (Adkins, J., dissenting); State v. Baker, 535 P.2d 1394, 1401 (Haw. 1975) (same); Illinois NORML, Inc. v. Scott, 383 N.E.2d 1330, 1332 (Ill. App. Ct. 1978) (same); State v. Chrisman, 364 So. 2d 906, 907 (La. 1978) (same); Marcoux v. Attorney General, 375 N.E.2d 688, 690 (Mass. 1978) (same); People v. Santiago, 379 N.Y.S.2d 843, 853 (N.Y. App. Div. 1975) (possession of cocaine); People v. Shepard, 409 N.E.2d 840, 845-46 (N.Y. 1980) (possession of marijuana) (Fuchsberg, J., dissenting); People v. Hoffman, 351 N.Y.S.2d 87, 90 (N.Y. Sup. Ct. 1973) (possession of cocaine); Cavaness v. State, 581 P.2d 475, 477 (Okla. Crim. App. 1978) (possession of marijuana); State v. Anderson, 558 P.2d 307, 309 (Wash. Ct. App. 1976) (same), *aff'd sub nom.* State v. Smith, 610 P.2d 869, 879-81 (Wash. 1980). *See also* Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 485 F. Supp. 400, 409-10 (N.D. Ill. 1980) (sale of drug paraphernalia), *rev'd*, 639 F.2d 373 (7th Cir. 1981), *rev'd*, 455 U.S. 491 (1982); Casbah, Inc. v. Thone, 512 F. Supp. 474, 486-87 (D. Neb. 1980) (same), *aff'd in part, rev'd in part*, 651 F.2d 551 (8th Cir. 1981), *cert. denied*, 455 U.S. 1005 (1983); Record Revolution No. 6, Inc. v. City of Parma, Ohio, 492 F. Supp. 1157, 166 (N.D. Ohio) (same), *rev'd*, 638 F.2d 916 (6th Cir. 1980), *vacated and remanded*, 456 U.S. 968 (1982), *aff'd*, 709 F.2d 534 (6th Cir. 1983). *Compare* Hartz v. Bensinger, 461 F. Supp. 431, 433 (E.D. Pa. 1978) (no right to obtain marijuana to alleviate pain) *with* State v. Diana, 604 P.2d 1312, 1316 (Wash. Ct. App. 1979) (*contra*). *See* Stanley v. Georgia, 394 U.S. 557, 568 n.ll (1969) (acknowledging authority of state and federal governments "to make possession of ... narcotics ... a crime"); Bowers v, Hardwick, 478 U.S. 186, 195 (1986) *"Stanley* itself recognized that its holding offered no protection to the possession in the home of drugs, firearms, or stolen goods").

320. Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1183 (N.D. Ill. 1981), *aff'd*, 695 F.2d 261 (7th Cir.), *cert. denied sub nom.* Stengl v. Village of Morton Grove, 464 U.S. 863 (1983) (rejecting challenge to ordinance forbidding possession of handguns); Fresno Rifle and Pistol Club, Inc. v. Van de Kamp, 746 F. Supp. 1415, 1419-20 (E.D. Cal. 1990), *aff'd*, 965 F.2d 723 (9th Cir. 1992) (rejecting attack on statute banning the manufacture and transfer of "assault weapons").

321. Mitchell v. Clayton, 995 F.2d 772, 775-76 (7th Cir. 1993) (no privacy right to practice acupuncture in violation of medical practice act); Thompson v. Texas State Bd. of Medical Examiners, 570 S.W.2d 123, 127-28 (Tex. Civ. App. 1978) (same); *but see* Andrews v. Ballard, 498 F. Supp. 1038, 1044-57 (S.D. Tex. 1980) (*contra*); Bowland v. Municipal Court for the Santa Cruz County

indicate, most of these challenges failed, and the few that succeeded did not ultimately depend upon *Roe*. *Roe* also has been cited in a handful of cases attacking mandatory seat belt laws and laws requiring the wearing of motorcycle helmets.[322] None of these challenges succeeded, either. Moreover, with a single exception, later reversed, *Roe* has not influenced courts to strike down mandatory drug testing laws or policies.[323] Notwithstanding parties' reliance on *Roe*, courts have held that the right of privacy does not prevent obtaining blood samples in criminal prosecutions or paternity cases.[324] Although *Roe*

Judicial District of Santa Cruz County, 556 P.2d 1081, 1089 (Cal. 1977) (no privacy right to practice midwifery in violation of medical practice act); People v. Rosburg, 805 P.2d 432, 437 (Colo. 1991) (same); Leigh v. Bd. of Registration in Nursing, 481 N.E.2d 1347, 1354 (Mass. 1985) (same), *after remand*, 506 N.E.2d 91, 93-94 (Mass. 1987). *See also* Rutherford v. United States, 616 F.2d 455, 456-57 (10th Cir. 1980), *rev'g* 438 F. Supp. 1287, 1299-1301 (W.D. Okla.) (no privacy right to use laetrile); People v. Privitera, 591 P.2d 919, 921-22 & n.2 (Cal. 1979) (*en banc*) (same), *id.* at 930, 931-36 (Bird, C.J., dissenting); *In re* Custody of a Minor, 393 N.E.2d 836, 844 (Mass. 1979) (same); *but see* Rizzo v. United States, 432 F. Supp. 356, 358 (E.D.N.Y. 1977) (*contra*); Suenram v. Society of Valley Hosp., 383 A.2d 143, 148 (N.J. Super. Ct. 1977) (same). *See also*, Pharmaceutical Soc'y of New York, Inc. v. Lefkowitz, 454 F. Supp. 1175, 1181 (S.D.N.Y. 1978) (rejecting challenge to state generic drug statutes).

322. *See* Picou v. Gillum, 874 F.2d 1519, 1520-21 (llth Cir. 1989) (motorcycle helmet) (opinion of Justice Powell); People v. Thomas, 206 Cal. Rptr. 84, 86 (Ct. App. 1984) (child restraint); People v. Kohrig, 498 N.E.2d 1158, 1160-61 (Ill. 1986) (seat belts), *appeal dismissed sub nom.* Kohrig v. Illinois, 479 U.S. 1073 (1987); State v. Hartog, 440 N.W.2d 852, 854 (Iowa 1989) (same); State v. Fazekas, 569 A.2d 913, 914 (N.J. Super. Ct. 1989) (same); Wells v. State, 495 N.Y.S.2d 591, 595 (N.Y. Sup. Ct. 1985); Richards v. State, 757 S.W.2d 723, 727 (Tex. Crim. App. 1988) (same) (Teague, J., dissenting); State v. Eighth Judicial Dist. Court, 708 P.2d 1022, 1024 (Nev. 1985) (same); People v. Bennett, 391 N.Y.S.2d 506, 509 (Justice Court 1977) (motorcycle helmet). *See also* Pacific Legal Found. v. Dep't of Transportation, 593 F.2d 1338, 1347 n.72 (D.C. 1979) (upholding authority of Secretary of Transportation to require passive restraints in automobiles).

323. Railway Executives' Ass'n v. Burnley, 839 F.2d 575, 591-92 (9th Cir. 1988), *rev'd on other grounds sub nom.* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) (random drug testing does not offend privacy interest of *Roe*); Amalgamated Tran. Union, Local 1277, AFL-CIO v. Sunline Transit Agency, 663 F. Supp. 1560, 1571-72 (C.D. Cal. 1987) (same); Poole v. Stephens, 668 F. Supp. 149, 156 n.5 (D. N.J. 1988) (same); Smith v. White, 666 F. Supp. 1085, 1090 (E.D. Tenn. 1987), *aff'd mem. op.*, 857 F.2d 1475 (6th Cir. 1988) (same). *But see* Nat'l Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 389 (E.D. La. 1986) (*contra*), *vacated without discussion of this point*, 816 F.2d 170, 181 (5th Cir. 1987), *aff'd in part, vacated in part and remanded*, 489 U.S. 656 (1989); Luedtke v. Nabors Alaska Drilling, 768 P.2d 1123, 1128 (Alaska 1989); McCloskey v. Honolulu Police Dep't, 799 P.2d 953, 956 (Haw. 1990); Doe v. City and County of Honolulu, 816 P.2d 306, 318 (Haw. Ct. App. 1991).

324. Williams v. State, 243 S.E.2d 614, 616 (Ga. Ct. App. 1978) (Deen, P.J., dissenting); Sudwischer v. Estate of Hoffpauir, 589 So. 2d 474, 477-78 (La. 1991) (Dennis, J., dissenting); *In re* J.M., 590 So. 2d 565, 568 (La. 1991).

occasionally has been cited in support of decisions recognizing a right not to disclose highly personal data,[325] far more frequently it

---

325. *See* United States v. Hubbard, 650 F.2d 293, 304-05 & n.38 (D.C. 1980) (privacy interest in maintaining confidentiality of church records); Thorne v. City of El Segundo, 726 F.2d 459, 468-71 (9th Cir. 1983) (city could be sued under 42 U.S.C. § 1983 for requiring an applicant for a police department position to reveal highly personal sexual history information in a polygraph examination), *cert. denied*, 469 U.S. 979 (1984); Eastwood v. Oklahoma Dep't of Corrections, 846 F.2d 627, 630-31 (10th Cir. 1988) (Dep't of Corrections employee could be sued in his individual capacity for damages where he forced another employee to reveal facts about her sexual history); Shuman v. City of Philadelphia, 470 F. Supp. 449, 458 (E.D. Pa. 1979) (police officer not required to answer questions regarding private sexual activities which had no bearing on his job performance); Drake v. Covington County Bd. of Educ., 371 F. Supp. 974, 979 (M.D. Ala. 1974) (teacher could not be discharged for becoming pregnant out-of-wedlock where information on which school board acted was a confidential physician's record); Hawaii Psychiatric Soc'y, Dist. Branch of the Am. Psychiatric Ass'n v. Ariyoshi, 481 F. Supp. 1028, 1037-38 (D. Haw. 1979) (preliminary injunction issued to enjoin enforcement of state statute that authorized issuance of administrative inspection warrants to search records of Medicaid providers); Carter v. Broadlawns Med. Center, 667 F. Supp. 1269, 1283 (S.D. Iowa 1987) (chaplains at public county hospital were not entitled to unrestricted access to patient medical records), *cert. denied*, 109 S. Ct. 1569 (1989); United States v. Benlizar, 459 F. Supp. 614, 619 n.ll (D.D.C. 1978) (ordering expungement of arrest record); City of Pepper Pike v. Doe, 421 N.E.2d 1303, 1306 (Ohio 1981) (right to expunge arrest record under unusual circumstances); Doe v. Borough of Barrington, 729 F. Supp. 376, 382-85 (D. N.J. 1990) (privacy rights violated where municipality disclosed fact that arrestee had AIDS); Yeager v. Hackensack Water Co., 615 F. Supp. 1087, 1092 (D. N.J. 1985) (privacy right in names of members of household); Roe v. Ingrahm, 403 F. Supp. 931, 935 (S.D.N.Y. 1976), *rev'd sub nom.* Whalen v. Roe, 429 U.S. 589 (1977) (discussed below *infra* note 326); Advocates for Children of New York, Inc. v. Blum, 529 F. Supp. 422, 424 (S.D.N.Y. 1982) (preliminary injunction prohibiting city and state agencies from compelling plaintiffs to turn over "uniform case records" of clients); Berch v. Stahl, 373 F. Supp. 412, 423-24 (W.D.N.C. 1974) (recognizing privacy interest in prisoners' correspondence with friends and relatives); *In re* Agosto, 553 F. Supp. 1298, 1310-12 (D. Nev. 1983) (citing *Roe* in support of ruling recognizing parent-child testimonial privilege); Jones v. Super. Ct. for the County of Alameda, 174 Cal. Rptr. 148, 157 (Ct. App. 1981) (recognizing state and federal constitutional right of privacy in medical history, subject to need to obtain information to defend against strict liability action); Meerwarth v. Meerwarth, 319 A.2d 779, 781 (N.J. Super. Ct. 1974), *aff'd*, 347 A.2d 804 (N.J. 1976) (divorced woman could not compel former husband to submit to medical examination for purposes of buying insurance on his life); Rasmussen v. South Florida Blood Serv., 467 So. 2d 798, 801-02 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533, 535-36 (Fla. 1987) (recognizing, on state and federal constitutional grounds, qualified privacy interest of blood donors in avoiding disclosure of their names to accident victim who died after being transfused with AIDS-infected blood); Lemann v. Mut. Life Ins. Co. of New York, 523 So. 2d 948, 951 (La. Ct. App. 1988) (*dictum* in case affirming denial of claim under medical insurance policy that insurer does not have "absolute right to receive a diagnosis in order to pay a medical claim"); Doe v. Roe, 345 N.Y.S.2d 560, 562 (N.Y. App. Div. 1973), and Doe v. Roe, 400 N.Y.S.2d 668, 675 (N.Y. Sup. Ct. 1977) (citing *Roe* in opinion recognizing

has been rejected as a controlling precedent where informational privacy claims were being advanced.[326]

---

common law cause of action for invasion of privacy for unauthorized disclosure of information obtained in the course of psychiatric treatment); Doe v. Coughlin, 697 F. Supp. 1234, 1237 n.8 (N.D.N.Y. 1988) (invalidating prison policy of isolating inmates who had tested positive for HIV to separate dormitory); Merriken v. Cressman, 364 F. Supp. 913, 917-19 (E.D. Pa. 1973) (school program designed to identify "potential drug abusers" violated privacy rights of parents and their children); Wilson v. Patton, 551 N.E.2d 625, 629 (Ohio Ct. App. 1988) (former prisoner stated cause of action under 42 U.S.C. § 1983 for unauthorized disclosure of confidential medical records), *after remand*, 583 N.E.2d 410 (Ohio Ct. App. 1990) (affirming dismissal of action).

326. *See, e.g.*, Borucki v. Ryan, 827 F.2d 836, 839-49 (1st Cir. 1987) (no privacy interest violated by disclosure of criminal defendant's psychiatric report of his fitness to stand trial), *rev'g* 658 F. Supp. 325, 327 (D. Mass. 1986); McNally v. Pulitzer Pub. Co., 532 F.2d 69, 76-78 (8th Cir. 1976) (same); Rosenberg v. Martin, 478 F.2d 520, 524-25 (2d Cir. 1983) (complaint alleging that former police inspector had deliberately given the news media false information to slander and influence the courts, people and the public against him failed to state a cause of action under the Civil Rights Act for violation of prisoner's constitutional right of privacy); Tibbets v. Crossroads, Inc., 411 N.W.2d 535, 537-38 (Minn. Ct. App. 1987) (no cause of action against police officer for limited disclosure to adoption agency of information regarding applicant's history of sexual conduct with minors); Reilly v. Leonard, 459 F. Supp. 291, 299-300 (D. Conn. 1978) (no privacy violation in disclosure of investigative report identifying murderer); Dixon v. Pennsylvania Crime Comm'n, 67 F.R.D. 425, 431-32 (M.D. Pa. 1975) (right of privacy not violated by adverse publicity surrounding state crime commission investigation); Tosh v. Buddies Supermarkets, Inc., 482 F.2d 329, 332 (5th Cir. 1973) (privacy right not violated by dissemination of arrest records); Hammons v. Scott, 423 F. Supp. 618, 622-23 (N.D. Cal. 1976) (same); Town of South Padre Island v. Jacobs, 736 S.W.2d 134, 138-39 (Tex. Ct. App. 1987) (same); Jones v. Palmer Media, Inc., 478 F. Supp. 1124, 1130 (E.D. Tex. 1979) (disclosure of political candidate's arrest in a foreign country failed to state constitutional privacy claim); White v. Thomas, 660 F.2d 680, 686 (5th Cir. 1981) (no privacy right in nondisclosure of an expunged arrest); J.P. v. DeSanti, 653 F.2d 1080, 1085-91 (6th Cir. 1981) (right of privacy not violated by post-adjudication dissemination of juveniles' social histories to governmental, social and religious agencies); Monroe v. Tielson, 525 P.2d 250, 258 (Wash. 1974) (Finley, J., concurring in part and dissenting in part) (no right to expungement of juvenile records); Doe v. Commander, Wheaton Police Dep't, 329 A.2d 35, 41-42 (Md. 1974) (*Roe* does not require expungement of arrest records); *In re* R.L.F., 256 N.W.2d 803, 807 (Minn. 1977) (same); State v. Howe, 308 N.W.2d 743, 747-48 (N.D. 1981) (same); Flynn v. Gordon, 775 F.2d 1551, 1553 (llth Cir. 1985) (right of privacy does not protect one from injury to reputation caused by sexual harassment complaint); Davis v. City of Vancouver, 891 F.2d 294 (9th Cir. 1989) (unpublished opinion) (no informational privacy interest in not having complaint about sexual harassment repeated); DiGuiseppe v. Ward, 698 F.2d 602, 604-05 (2d Cir. 1983) (limited reading of prisoner's diary did not violate right of privacy); Rose v. Dep't of the Air Force, 495 F.2d 261, 267-68 (2d Cir. 1974) (FOIA request for case summaries of Honor and Ethics Code adjudications at service academy with cadets' names deleted was proper); Lora v. Bd. of Educ. of City of New York, 74 F.R.D. 565, 569-74 (E.D.N.Y. 1977) (right of privacy did not preclude discovery of randomly selected anonymous student files in civil rights action); Fifth

Avenue Peace Parade Comm. v. Gray, 480 F.2d 326, 333-34 (2d Cir. 1973) (Oakes, J., dissenting) (FBI investigation into anti-war demonstration and dissemination of FBI reports failed to present justiciable controversy absent showing of any specific harm); Daury v. Smith, 842 F.2d 9, 13-15 (1st Cir. 1988) (no constitutional right to refuse to submit to psychiatric examination by employer); Fraternal Order of Police Lodge 92 v. Freeman, 372 So. 2d 945, 948 (Fla. Dist. Ct. App. 1979) (same); Redmond v. City of Overland Park, 672 F. Supp. 473, 481-84 (D. Kan. 1987) (probationary police officer had no constitutional right to privacy as to disclosures made by consulting psychiatrist to police department where officer had signed release allowing such disclosure); Walls v. City of Petersburg, 895 F.2d 188, 192-94 (4th Cir. 1990) (no violation of right of privacy in discharge of employee who refused to answer background questionnaire); Wilson v. Moss, 537 F. Supp. 281, 286-88 (S.D. Ohio 1982) (intrusion into professor's private activities did not state claim for violation of constitutional right of privacy); Gutierrez v. Lynch, 826 F.2d 1534, 1539 (6th Cir. 1987) (ordinance requiring public employees to provide medical information was valid); Smith v. Shimp, 562 F.2d 423, 425 (7th Cir. 1977) (no privacy interest in pre-trial detainees' nonprivileged mail); Hill v. Sands, 403 F. Supp. 1368, 1371 (N.D. Ill. 1975) (no privacy interest in receiving personal mail at place of employment); United States v. Allis-Chalmers Corp., 498 F. Supp. 1027, 1029-31 (E.D. Wis. 1980) (National Institute for Occupational Safety and Health subpoena directing employer to produce medical records it maintained on its employees in connection with health hazard evaluation did not violate right to privacy); St. Michael's Convalescent Hosp. v. California, 643 F.2d 1369, 1374-75 (9th Cir. 1981) (no constitutional right of privacy violated by public disclosure of cost information of health care providers); Family Life League v. Dep't of Public Aid, 493 N.E.2d 1054, 1057 (Ill. 1986) (no protectible privacy interest in preventing disclosure of names of physicians performing publicly-funded abortions); State *ex rel.* Stephen v. Harder, 641 P.2d 366, 376 (Kan. 1982) (same); Minnesota Medical Soc'y v. State, 274 N.W.2d 84, 91-94 (Minn. 1978) (same); Shaffer v. Wilson, 383 F. Supp. 554, 560 (D. Colo. 1974) (business records not protected by right of privacy); Hearn v. Internal Revenue Agents, 623 F. Supp. 263, 268 (N.D. Tex. 1985) (no privacy interest in business records seized by IRS); United States v. Ginsburg, 376 F. Supp. 714, 716-17 (D. Conn. 1974) (reporting of bank transactions to detect tax fraud not violative of right of privacy); Jaffess v. Secretary, Dep't of Health, Educ. & Welfare, 393 F. Supp. 626, 629 (S.D.N.Y. 1975) (right of privacy "does not include within its compass the right of an individual to prevent disclosure by one governmental agency to another of matters obtained in the course of the transmitting agency's regular functions"); Greater Cleveland Welfare Rights Org. v. Bauer, 462 F. Supp. 1313, 1318-19 (N.D. Ohio 1978) (same); Provenza v. Rinaudo, 586 F. Supp. 1113, 1116 (D. Md. 1984) (no privacy interest in bank records); Sneirson v. Chemical Bank, 108 F.R.D. 159, 161-63 (D. Del. 1985) (same); *In re* Bell & Beckwith, 44 B.R. 661, 662 (N.D. Ohio 1984) (no right of privacy in nondisclosure of payments to be made to creditors of bankrupt brokerage); *In re* Sept. 1975 Special Grand Jury, 435 F. Supp. 538, 546 (N.D. Ind. 1977) (privacy right does not protect communications between husband and wife in business relationship); *In re* Hawkins, No. 3430, 1983 WL 4091, at *3 (Ohio Ct. App. May 11, 1983) (no right of privacy in parent-child communications); United States *ex rel.* Edney v. Smith, 425 F. Supp. 1038, 1040-45 (E.D.N.Y. 1976) (no right of privacy in communications between prisoner and psychiatrist who examined defendant at defense counsel's request); R.S. v. State, 459 N.W.2d 680, 689 (Minn. 1990) (state statute allowing reports of child abuse to be investigated without notice to or the consent of parents did not violate

right of privacy); *In re* N.H., 569 A.2d 1179, 1184 n.9 (D.C. 1990) (no privacy interest violated in allowing information obtained in medical examination to be used as evidence in child neglect proceeding); People v. Battaglia, 203 Cal. Rptr. 370, 373 (Ct. App. 1984) (same with respect to child abuse prosecution); Hall v. Post, 372 S.E.2d 711, 713 (N.C. 1988) (no cause of action for public disclosure of private facts); Colegio Puertorriqueno v. Pesquera de Busquets, 464 F. Supp. 761, 765-68 (D.P.R. 1979) (upholding requirement that licensed private schools answer informational questionnaires); Int'l Union v. Garner, 601 F. Supp. 187, 189 (M.D. Tenn. 1985) (physical surveillance of persons who attended union meetings held in a public place did not violate right of privacy); Caesar v. Mountains, 542 F.2d 1064, 1066-70 (9th Cir. 1976) (patient-psychiatrist privilege did not bar disclosure of communications in civil action brought by patient); Miller v. Colonial Refrigerated Transp., Inc., 81 F.R.D. 741, 746 (M.D. Pa. 1979); Pagano v. Oroville Hosp., 145 F.R.D. 683, 696-97 (E.D. Cal. 1993) (privacy interest in medical records did not preclude their discovery, subject to protective order, in civil action alleging conspiracy to eliminate physician's competitor); United States v. IBM Corp., 83 F.R.D. 92, 95 (S.D.N.Y. 1979) (right of privacy subject to need to obtain discovery in civil antitrust action); Morales v. Superior Court of Kern County, 160 Cal. Rptr. 197 (Ct. App. 1980) (right of privacy did not preclude discovery of husband's extramarital affairs in determining damages for wrongful death of wife); Ms. B. v. Montgomery County Emergency Serv., Inc., 799 F. Supp. 534, 537-40 (E.D. Pa. 1992) (disclosure to law enforcement personnel and patient's supervision of threats she had made during course of treatment did not violate right of privacy); State v. Miller, 709 P.2d 225, 238 n.10 (Or. 1985) (no federal privacy right in nondisclosure of statements made by patient to medical personnel); Commonwealth v. Platt, 404 A.2d 410, 426 (Pa. Super. Ct. 1979) (same); Watson v. Medical Univ. of South Carolina, No. 9:88-2844-18 1991 WL 406979, at *5 (D.S.C. Feb. 7, 1991) (no privacy interest in nondisclosure of circumstances surrounding donation of possibly AIDS-tainted blood); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 678-79 (Tex. Ct. App. 1987) *en banc* (same); Gulf Coast Reg. Blood Ctr. v. Houston, 745 S.W.2d 557, 563 (Tex. Civ. App. 1988) (Keltner, J., concurring) (same); Mason v. Regional Medical Ctr. of Hopkins County, 121 F.R.D. 300, 302-03 (W.D. Ky. 1988) (same with respect to taking deposition of AIDS-infected donor); Plante v. Gonzalez, 575 F.2d 1119, 1127-30 & nn. 12, 16 (5th Cir. 1978), *aff'g* 437 F. Supp. 536, 539-40 (E.D. Wis. 1977) (upholding financial disclosure law); Slevin v. City of New York, 551 F. Supp. 917, 927-34 (S.D.N.Y. 1982) (same); Gideon v. Alabama State Ethics Comm'n, 379 So. 2d 570, 572 n.l (Ala. 1980) (same); *In re* Kading, 235 N.W.2d 409, 417 (Wis. 1976) (same); Illinois State Employees Ass'n v. Walker, 315 N.E.2d 9, 22 (Ill. 1974) (Ryan, J., dissenting) (same); Snider v. Thornburgh, 436 A.2d 593, 598-99 (Pa. 1981) (same); Flanagan v. Munger, 890 F.2d 1557, 1570-71 (10th Cir. 1989) (no privacy violation in disclosure of police department reprimands); Mangels v. Pena, 789 F.2d 836, 839-40 (10th Cir. 1986) (no privacy violation in disclosure of internal police report indicating that discharged firefighters had used contraband drugs); Toledo Police Patrolman's Ass'n v. City of Toledo, 716 F. Supp. 300, 303 n.3 (N.D. Ohio 1988) (constitutional right of privacy not violated by city's failure to keep confidential information obtained in course of internal police investigations); Guernieri v. Weinberger, No. 86-0530, 1987 WL 17857, at *3 (D.D.C. Sept. 22, 1987) (right of privacy not violated by temporarily including misinformation in confidential personnel file); City of Grand Forks v. Grand Forks Herald, Inc., 307 N.W.2d 572, 578-79 (N.D. 1981) (no privacy right in municipal personnel files open to public inspection); *In re* Roger B., 407 N.E.2d 884, 887 (Ill. App. Ct.

Apart from allowing wrongful birth and wrongful life claims[327] in States where, prior to *Roe*, abortion was illegal,[328] *Roe's* princi-

---

1980), *id.*, at 889 n.l (Rizzi, J., dissenting) (1980), *qff'd*, 418 N.E.2d 751, 753 (Ill. 1981) (rejecting asserted privacy right to obtain adoption records, absent proof of good cause); *In re* Application of Maples, 563 S.W.2d 760, 762-63 (Mo. 1978) (*en banc*) (same); *In re* Application of George, 625 S.W.2d 151, 157 (Mo. Ct. App. 1981) (same); Mills v. Atlantic City Dep't of Vital Statistics, 372 A.2d 646, 650-51 (N.J. Super. Ct. 1977) (same); *In re* Linda, 409 N.Y.S.2d 638, 643-47 (N.Y. Surrogate Ct. 1978) (same); Copley Press, Inc. v. San Diego County Superior Court, 273 Cal. Rptr. 22, 26, *vacated and remanded*, 801 P.2d 1040 (Cal. 1990), *on remand*, 278 Cal. Rptr. 443, 449-50 (Ct. App. 1991) (rejecting asserted privacy right in nondisclosure of jury questionnaires); *In re* Green, 553 A.2d 1192, 1197-98 (Del. 1989) (right of Board of Bar Examiners to disclose information gathered in connection with application for bar admission to appropriate state, federal and military authorities for possible criminal prosecution or other appropriate action).

"[T]he confidentiality interest ... has not fared as well as that of autonomy." Snyder v. Mekhjian, 593 A.2d 318 (N.J. 1991). This, perhaps, is not surprising in view of the Supreme Court's post-*Roe* decisions rejecting informational privacy claims. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 713 (1976) (rejecting privacy claim that "the State may not publicize a record of an official act such as an arrest"); Whalen v. Roe, 429 U.S. 589, 591 (1977) (State may "record, in a centralized computer file, the names and addresses of all persons who had obtained pursuant to a doctor's prescription certain drugs for which there is both a lawful and an unlawful market"); Nixon v. Adm'r of Gen. Serv., 433 U.S. 425 (1977) (upholding statute requiring archivists to review presidential papers, including those pertaining to the President's personal affairs).

327. One court has succinctly defined the difference between these two causes of action: "In a wrongful life action, an abnormal, unhealthy infant, or the parents on the infant's behalf, claim that but for the physician's negligent advice or treatment the child would not have been born to experience the pain and suffering associated with life in an impaired condition." Haymon v. Wilkerson, 535 A.2d 880, 883 (D.C. 1977). "In a wrongful birth action," on the other hand, "a parent of an abnormal, unhealthy child claims that the physician's negligent advice or treatment deprived the parent of the right to decide whether to avoid the birth of the child with congenital defects." *Id.*

328. *Roe* has been cited often in support of decisions recognizing a cause of action for wrongful birth or wrongful life. *See* Robak v. United States, 658 F.2d 471, 474-76 (7th Cir. 1981) (applying Alabama law) (wrongful birth); Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477, 483, 487 (Ct. App. 1980) (wrongful life), *holding disapproved*, Turpin v. Sortini, 643 P.2d 954, 958-64 (Cal. 1982) (limiting recovery in wrongful life cases to special damages only); Foy v. Greenblott, 190 Cal. Rptr. 84, 90 (Ct. App. 1983) (same); Call v. Kezirian, 185 Cal. Rptr. 103, 105 (Ct. App. 1982) (same); Hayman v. Wilkerson, 535 A.2d 880, 882-83 (D.C. 1987) (wrongful birth); Blake v. Cruz, 698 P.2d 315, 318 (Idaho 1984) (same); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 704-05 (Ill. 1987) (same); Arche v. United States Department of the Army, 798 P.2d 477, 480 (Kan. 1990) (same); Eisbrenner v. Stanley, 308 N.W.2d 209, 212 (Mich. Ct. App. 1981) (same); Proffitt v. Bartolo, 412 N.W.2d 232, 235-38 (Mich. Ct. App. 1987) (same); Smith v. Cote, 513 A.2d 341, 343-44 (N.H. 1986) (same); Berman v. Allen, 404 A.2d 8, 13-14 (N.J. 1979) (same); Procanik by Procanick v. Cillo, 478 A.2d 755, 759 (N.J. 1984) (wrongful life); Becker v. Schwartz, 386 N.E.2d 807, 812-13 (N.Y. 1978) (wrongful birth); Gallagher v.

Duke Univ., 638 F. Supp. 979, 982 (M.D.N.C. 1986) (applying North Carolina law) (same), *aff'd in part, vacated in part and remanded*, 852 F.2d 773 (4th Cir. 1988); Speck v. Finegold, 439 A.2d 110, 114 (Pa. 1981) (same); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 695-96 (E.D. Pa. 1978) (applying Pennsylvania law) (same); Phillips v. United States, 508 F. Supp. 544, 550 (D. S.C. 1981) (applying South Carolina law) (same); Jacobs v. Theimer, 519 S.W.2d 846, 847-48 (Tex. 1975) (same); Naccash v. Burger, 290 S.E.2d 825, 828, n.2 (Va. 1982) (same); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 491 (Wash. 1983) (wrongful birth, wrongful life).

Most of these decisions, as well as the many wrongful birth and wrongful life cases that do not cite *Roe,* were based on common law negligence principles. Some cases seem to suggest that recognition of wrongful birth or wrongful life claims is required by *Roe.* See Proffitt v. Bartolo, 412 N.W.2d at 238 ("[a]s long as abortion remains an option allowed by law, the physician owes a duty to furnish patients with adequate information for them to be able to decide whether to choose that course of action. Those who would eliminate such right of recovery must first abolish the right to have an abortion"); *Smith v. Cote,* 513 A.2d at 346-48; *Speck* v. *Finegold,* 439 A.2d at 114 ("[w]ere the plaintiff merely free to seek the abortion but unable to seek a remedy at law for injuries consequent upon the negligent performance of that abortion, the right would be hollow indeed"); *Jacobs v. Theimer,* 519 S.W.2d at 848. This, however, appears to be a misreading of *Roe,* as other cases have understood. See, e.g., Campbell v. United States, 962 F.2d 1579, 1581-84 (llth Cir. 1992) (denial of wrongful birth cause of action under Georgia law does not constitute "state action" violative of woman's right to choose abortion); Turpin v. Sortini, 174 Cal. Rptr. 128, 133 (Ct. App. 1981) (allowing wrongful birth action, denying wrongful life action) (wrongful life action "is [not] a necessary or even logical extension of Roe v. Wade .... There is nothing whatsoever in *Roe v. Wade* intimating that the ... [C]ourt had the intention of conferring a substantive right to sue theretofore nonexistent), *rev'd and remanded,* 643 P.2d 954 (Cal. 1982); Hickman v. Group Health Plan, 396 N.W.2d 10, 13-14 (Minn. 1986) (upholding statute barring wrongful birth, wrongful life actions); Dansby v. Thomas Jefferson Univ. Hosp., 623 A.2d 816, 818-19 (Pa. Super. Ct. 1993) (same); Bianchini v. N.K.D.S. Assoc., Ltd., 7, 616 A.2d 700, 703, n.7 (Pa. Super. Ct. 1992) (same); Edmonds v. W. Pennsylvania Hosp. Radiology Assoc., 607 A.2d 1083, 1086-88 (Pa. Super. Ct. 1992) (same); Ellis v. Sherman, 478 A.2d 1339, 1344, n.7 (Pa. Super. Ct. 1984) ("*Roe v. Wade* and its progeny do not require that states provide for recovery in or recognition of a cause of action for 'wrongful life'"), *aff'd,* 515 A.2d 1327 (Pa. 1986). See also Justice Nix's dissenting opinion in *Speck v. Finegold,* 439 A.2d at 120-21 ("[T]here can be no question that refusal to create new tort liability does not constitute governmental interference with the constitutionally protected access to abortion. The right to seek an abortion is neither predicated upon the existence of a negligence cause of action, nor is it deterred by the absence of such a cause of action.") (Nix, J., dissenting). In addition to Minnesota and Pennsylvania, at least five other States have enacted statutes banning wrongful birth and/or wrongful life actions. See IDAHO CODE, § 5-334 (1990); ME. REV. STAT. ANN. TIT. 24, § 2931 (WEST 1990); MO. STAT. § 188.130 (VERNON 1993 SUPP.); S.D. CODIFIED LAWS ANN. §§ 21-55 (1987); UTAH CODE ANN., § 78-11-24 (1992).

Wrongful birth and wrongful life actions must be distinguished from "wrongful conception" or "wrongful pregnancy" actions where the gravamen of the complaint is negligence in the performance of a sterilization or abortion procedure. *Roe* has often been cited in such cases. *See,* e.g., Martinez v. Hartford

pal impact outside the law of abortion has been on the right to refuse medical treatment.[329] But even here the influence of *Roe* has been far more modest than is generally realized. *Roe* has been cited in support of decisions recognizing a "right-to-die" in eight States.[330] Most of these decisions, however, were also based on in-

---

Hosp., No. 33-81-96 1991 WL 88085, at *5 (Conn. Super. Ct. May 31, 1991) (wrongful pregnancy); Hartke v. McKelway, 707 F.2d 1544, 1551-53 (D.C. Cir. 1983) (applying District of Columbia law) (wrongful conception); Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653, 654 (Ga. 1984) (wrongful conception, wrongful birth); Cockrum v. Baumgartner, 425 N.E.2d 968, 970 (Ill. App. Ct. 1981) (wrongful conception), *rev'd*, 447 N.E.2d 385 (Ill. 1983), *cert. denied sub nom.* Raja v. Michael Reese Hosp. & Med. Center, 464 U.S. 846 (1983); Wilczynski v. Goodman, 391 N.E.2d 479, 482-84 (Ill. App. Ct. 1979) (wrongful pregnancy); Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1154 (La. 1988) (wrongful conception); Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 175 (Minn. 1977) (same); Kingsbury v. Smith, 442 A.2d 1003, 1005-06 (N.H. 1982) (same); Betancourt v. Gaylor, 344 A.2d 336, 339 (N.J. Super. Ct. 1975) (same); Lovelace Medical Ctr. v. Mendez, 805 P.2d 603, 612 (N.M. 1991) (same); Ziemba v. Sternberg, 357 N.Y.S.2d 265, 268-69 (N.Y. App. Div. 1974) (wrongful pregnancy); Jackson v. Bumgardner, 321 S.E.2d 541, 543-44 (N.C. Ct. App. 1984) (wrongful conception, wrongful pregnancy), *aff'd in part, rev'd in part*, 347 S.E.2d 743 (N.C. 1986); Miller v. Johnson, 343 S.E.2d 301, 304 (Va. 1986) (wrongful conception). These actions were allowed even before *Roe*. *See, e.g.*, Custodio v. Bauer, 59 Cal. Rptr. 463 (Ct. App. 1967), Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971), *leave to appeal denied*, 385 Mich. 753 (1971), and the cases cited therein.

As in the case of some wrongful birth and wrongful life decisions, there are occasional suggestions that recognition of wrongful conception or wrongful pregnancy actions is required by *Roe*. *See, e.g.*, Ochs v. Borrelli, 445 A.2d 883, 885 (Conn. 1982) (wrongful conception) ("public policy cannot support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right"); Jones v. Malinowski, 473 A.2d 429, 437 n.5 (Md. 1984) (same) (by implication); Bowman v. Davis, 356 N.E.2d 496, 499 (Ohio 1976) (wrongful conception) ("[f]or this court to endorse a policy that makes physicians liable for the foreseeable consequences of all negligently performed operations *except* those involving sterilizations would constitute an impermissible infringement of a fundamental right") (emphasis in original); *accord*, Bell v. Presler, No. 51202, 1986 WL 12381 (Ohio Ct. App. Oct. 30, 1986). But other courts have held that *Roe* does not mandate recognition of either cause of action. *See* Johnston v. Elkins, 736 P.2d 935, 939 (Kan. 1987) ("[t]he constitutional principles enunciated in [*Griswold, Eisenstadt*, and *Roe*] do not determine the issues here"); Szekeres by Szekeres v. Robinson, 715 P.2d 1076, 1078 (Nev. 1986) ("[o]ur refusal to recognize the birth of a normal, health child as a compensable wrong does not in any way interfere with a person's ostensible right to avoid conception or, per *Roe v. Wade*, to abort a fetus").

329. *See, e.g.*, Runnels v. Rosendale, 499 F.2d 733, 735 (9th Cir. 1974) (prisoner stated cause of action for violation of his right to bodily integrity where medical officials performed operation upon him without his consent); Norwood Hosp. v. Munoz, 564 N.E.2d 1017, 1021 (Mass. 1991) (right to refuse blood transfusion).

330. *See* Rasmussen v. Fleming, 741 P.2d 667, 670-71 (Ariz. Ct. App. 1986), *aff'd in part, rev'd in part*, 741 P.2d 674, 681-82 (Ariz. 1987); Severens v.

dependent state grounds—constitutional or common law.[331] And later decisions in three of these States appear to have retreated from their earlier reliance on federal privacy doctrine, preferring instead to base their holdings on state grounds.[332] Courts in at least seven other States have expressly declined to rely on federal constitutional principles in postulating a right to die,[333] and most "right-to-die"

Wilmington Med. Ctr., 421 A.2d 1334, 1342-43 (Del. 1980); Satz v. Perlmutter, 362 So. 2d 160, 163 & n.3 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 160, 163 n.3 (Fla. 1980); Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977); *In re* Quinlan, 355 A.2d 647, 663 (N.J. 1976); Leach v. Akron Gen. Med. Ctr., 426 N.E.2d 809, 813-14 (Ohio Misc. 1980); *In re* Doe, 45 Pa. D. & C. 3d 371, 381-82 (Pa. Commw. Ct. 1987); *In re* Colyer, 660 P.2d 738, 741-42 (Wash. 1983).

331. *Rasmussen*, 741 P.2d at 671 ("[t]he right of privacy is protected by both the federal constitution and the Arizona Constitution"), *id.* at 683 ("[w]e hold that the Arizona Constitution also provides for a right to refuse medical treatment"), *id.*, ("[w]e hold that the doctrine of informed consent—a doctrine borne of the common-law right to be free from nonconsensual physical invasions—permits an individual to refuse medical treatment"); *Saikewicz*, 370 N.E.2d at 424 (common law right to refuse medical treatment); *see also* Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 633 (Mass. 1986) ("[t]he right of a patient to refuse medical treatment arises both from the common law and the unwritten and penumbral constitutional right to privacy"); *Quinlan*, 355 A.2d at 663 ("[n]or is such right of privacy forgotten in the New Jersey Constitution"); *see also In re* Farrell, 529 A.2d 404, 410 (N.J. 1987) ("a patient's right to refuse medical treatment . . . is primarily protected by the common law"); *In re* Doe, 45 Pa. D. & C. 3d at 381 ("the right of a competent individual to refuse medical care or to have it withdrawn is a right under the common law doctrine of self-determination and a constitutional right of privacy"); *Colyer*, 660 P.2d at 742 ("[s]upport for this holding is also found in our state constitution"), *id.*, at 121, 660 P.2d at 743 ("[t]he common law right to be free from bodily invasion is an alternative basis for the right to refuse life-sustaining treatment"). As the Supreme Court noted later, "[s]tate courts have available to them for decision a number of sources—state constitutions, statutes, and common law—which are not available to us." Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277 (1990).

332. *See* John F. Kennedy Mem. Hosp. v. Bludworth, 432 So. 2d 611, 618-19 (Fla. Dist. Ct. App. 1983) (basing right to refuse medical treatment on recently adopted privacy amendment to state constitution), *certified question answered in the negative*, 452 So. 2d 921 (1984); *In re* Guardianship of Barry, 445 So. 2d 365, 370 (Fla. Dist. Ct. App. 1984) (same); Corbett v. D'Alessandro, 487 So. 2d 368, 370 (Fla. Dist. Ct. App. 1986) (same); *In re* Guardianship of Browning, 568 So. 2d 4, 10 (Fla. 1990) (same); *In re* Conroy, 486 A.2d 1209, 1222-23 (N.J. 1985) ("[w]hile this [constitutional] right of privacy might apply in a case such as this, we need not decide that issue since the right to decline medical treatment is, in any event, embraced within the common-law right to self-determination"); *In re* Jobes, 529 A.2d 434, 454, n.3 (N.J. 1987) (Handler, J., concurring) ("[t]he *Quinlan* court may have been mistaken in its choice to base the decision on constitutional grounds"); *In re* Guardianship of Crum, 580 N.E.2d 876, 880-81 (Ohio Misc. 1991) (statutory grounds).

333. McConnell v. Beverly Enterprises-Connecticut, Inc., 553 A.2d 596, 600-02 & n.7 (Conn. 1989); DeGrella by and through Parrent v. Elston, 858 S.W.2d 698, 708 (Ky. 1993); *In re* Estate of Longeway, 549 N.E.2d 292, 296-97 (Ill.

cases do not even cite *Roe*. Three lower federal courts cited *Roe* in recognizing a federal constitutional right to refuse medical treatment,[334] but when the Supreme Court acknowledged that such a right exists, it did so without mentioning *Roe* and refused to rest its decision on privacy grounds.[335] *Roe* also has been cited in support of several state and federal opinions forbidding the forcible administration of psychotropic drugs or involuntary psychosurgery,[336] but none of those decisions depends upon *Roe*.[337]

1989); *In re* Rosebush, 491 N.W.2d 635 & n.l (Mich. Ct. App. 1992); Cruzan v. Harmon, 760 S.W.2d 414, 417-18 (Mo. 1988), *aff'd sub nom.* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261 (1990); *In re* Storar, 420 N.E.2d 64, 70 (N.Y. 1981); *In re* Fiori, No. 00737, 1993 WL 471460 (Pa. Super. Ct. Nov. 16, 1993).

334. Tune v. Walter Reed Army Med. Hosp., 602 F. Supp. 1452, 1454 (D. D.C. 1985); Deel v. Syracuse Veterans Admin. Med. Center, 729 F. Supp. 231, 233-34 (N.D.N.Y. 1990); Gray by Gray v. Romeo, 697 F. Supp. 580, 584-86 (D.R.I. 1988).

335. Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277-79 & n.7 (1990).

336. United States v. Charters, 829 F.2d 479, 491 & n.l8 (4th Cir. 1987); Mackey v. Procunier, 477 F.2d 877, 878 n.3 (9th Cir. 1973); Bee v. Greaves, 744 F.2d 1387, 1392 (10th Cir. 1984); Osgood v. District of Columbia, 567 F. Supp. 1026, 1030 (D. D.C. 1983); Rogers v. Okin, 478 F. Supp. 1342, 1362 n.14 (D. Mass. 1979); Rennie v. Klein, 462 F. Supp. 1131, 1142-43 (D. N.J. 1978); Davis v. Hubbard, 506 F. Supp. 915, 925-37 (N.D. Ohio 1980); Woodland v. Angus, 820 F. Supp. 1497 (D. Utah 1993); Goedecke v. Colorado, Dep't of Institutions, 603 P.2d 123, 125 n.7 (Colo. 1979) (decided on statutory and common law grounds); Clites v. State, 322 N.W.2d 917, 921-22 (Iowa Ct. App. 1982); *In re* Mental Health of K.K.B., 609 P.2d 747, 750 n.ll (Okla. 1980). *See also* Scott v. Plante, 532 F.2d 939, 946 n.9 (3d Cir. 1976) (*dictum*). One court cited *Roe* in support of a decision recognizing the right of a competent adult to undergo shock treatment. *See* Aden v. Young, 129 Cal. Rptr. 535, 546, 549 (Ct. App. 1976).

337. In *Riggins v. Nevada*, 112 S. Ct. 1810 (1992), the Supreme Court held that forcing medication to render a defendant competent to stand trial requires an "overriding justification and a determination of medical appropriateness." *Id.* at 1815. The Court relied principally on its decision in *Washington v. Harper*, 494 U.S. 210 (1990), where it held that a person "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment," *id.* at 221-22, and that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty." *Id.* at 229. *Harper*, in turn, relied on the Court's earlier decisions in *Vitek v. Jones*, 445 U.S. 480 (1980) (involuntary transfer of prisoner to mental hospital implicates a liberty interest protected by the Due Process Clause of the Fourteenth Amendment) (procedural due process), *Youngberg v. Romeo*, 457 U.S. 307 (1982) (involuntarily committed mental patients have right to safe conditions and freedom from bodily constraint) (substantive due process); *Parham v. J.R.*, 442 U.S. 584 (1979) (setting standards for voluntary admission of minor children to mental hospitals by parents or guardians) (procedural due process); *Winston v. Lee*, 470 U.S. 753 (1985) (state could not compel defendant to undergo surgery under general anesthetic to re-

Roe has been cited in a handful of decisions recognizing a limited right of arrestees or inmates not to be viewed or photographed in a nude or semi-nude state or strip-searched by members of the opposite sex.[338] But *Roe* does not support the right of a prisoner to starve himself to death.[339]

Along with *Griswold v. Connecticut,*[340] *Eisenstadt v. Baird* [341], and *Skinner v. Oklahoma,*[342] *Roe* has been cited in opinions forbidding involuntary sterilization[343] and allowing voluntary steriliza-

---

move bullet lodged in his chest which could constitute evidence of crime) (Fourth Amendment); and *Schmerber v. California,* 384 U.S. 737 (1966) (permissibility of withdrawing blood sample to determine intoxication of driver) (Fourth Amendment). Significantly, neither *Riggins* nor *Harper* nor any of the cases on which they relied cited *Roe v. Wade.*

338. *See* Cumbey v. Meachum, 684 F.2d 712, 714 (10th Cir. 1982); Travis v. City of Joliet, No. 84-C-3837, 1985 WL 2725 at *3 (Sept. 23, 1985); Bowling v. Enomoto, 514 F. Supp. 201, 203 (N.D. Cal. 1981); Braasch v. Gunter, Nos. CV83-L-459, 682, 1985 WL 3530, at *9-10 (D. Neb. July 15, 1985); *In re* Long, 127 Cal. Rptr. 732, 734 (Ct. App. 1976); Sterling v. Cupp, 607 P.2d 206, 209 n.3 (Or. Ct. App. 1980), *aff'd on other grounds,* 625 P.2d 123 (Or. 1980). Such cases antedated *Roe v. Wade. See, e.g.,* York v. Story, 324 F.2d 450 (9th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964). *But see* Smith v. Fairman, 678 F.2d 52, 54-55 (7th Cir. 1982) (*contra* with respect to "pat-down" search of male inmates by female guards, excluding the genital area); Grummett v. Rushen, 779 F.2d 491, 493-95 (9th Cir. 1985) (limited observation of male inmates by female guards); Smith v. Chrans, 629 F. Supp. 606, 610 (C.D. Ill. 1986) (occasional viewing of male inmates by female correctional personnel).

339. Van Holden v. Chapman, 450 N.Y.S.2d 623, 625 (N.Y. App. Div. 1982); State *ex rel.* White v. Narick, 292 S.E.2d 54, 57 n.2 (W. Va. 1982). *See also In re* Caulk, 480 A.2d 93 (N.H. 1984) (same). *But see* Thor v. Superior Court, 855 P.2d 375 (Cal. 1993) (*contra* without citing *Roe*); Zant v. Prevette, 286 S.E.2d 715 (Ga. 1982) (same).

340. 381 U.S. 479 (contraception—married couples).

341. 405 U.S. 438 (contraception—unmarried individuals).

342. 316 U.S. 535 (1942) (sterilization of recidivists).

343. *See* Downs v. Sawtelle, 574 F.2d 1, 11 (1st Cir. 1978); Avery v. County of Burke, 660 F.2d 111, 115 (4th Cir. 1981); Ruby v. Massey, 452 F. Supp. 361, 365-66 (D. Conn. 1978); Relf v. Weinberger, 372 F. Supp. 1196, 1201 (D. D.C. 1974), *vacated,* 565 F.2d 722 (D.C. Cir. 1977); Hudson v. Hudson, 373 So. 2d 310, 311-12 (Ala. 1979); *In re* Guardianship of Tulley, 146 Cal. Rptr. 266, 270-71 (Ct. App. 1978), *cert. denied,* 440 U.S. 967 (1979); P.S. by Harbin v. W.S., 443 N.E.2d 67, 72 (Ind. Ct. App. 1982); *In re* Application of A.D., 394 N.Y.S.2d 139, 140 (N.Y. Surrogate's Ct. 1977), *qff'd on other grounds,* 408 N.Y.S.2d 104 (N.Y. App. Div. 1978); *In re* Truesdell, 304 S.E.2d 793, 799-801 (N.C. Ct. App. 1983); *In re* Guardianship of Eberhardy, 294 N.W.2d 540, 544 & n.8 (Wis. Ct. App. 1980). *See also* Peck v. Califano, 454 F. Supp. 484, 487 n.2 (D. Utah 1977) (upholding federal moratorium on sterilization services for minors); *In re* Matter of Guardianship of Hayes, 608 P.2d 635, 639 (Wash, 1980) (recognizing right of privacy).

Roe, however, also has been cited in support of decisions recognizing the right of parents and guardians to sterilize minors and incompetents. *See* North Carolina Ass'n for Retarded Children v. North Carolina, 420 F. Supp. 451, 458

tion.[344] It is doubtful, however, that any of these cases would have been decided differently without *Roe.* Finally, *Roe* has been cited in support of a number of decisions protecting family relationships.[345]

(M.D.N.C. 1976); *In re* Conservatorship of Valerie N., 219 Cal. Rptr. 387, 398-401 (Ct. App. 1985); *In re* A.W., 637 P.2d 366, 369 (Colo. 1981); Wentzel v. Montgomery Gen. Hosp., Inc., 447 A.2d 1244, 1249 (Md. 1982); *In re* Matter of Welfare of Hillstrom, 363 N.W.2d 871, 875 (Minn. Ct. App. 1985); *In re* Grady, 405 A.2d 851, 857-58 (N.J. Super. Ct. 1979), *aff'd,* 426 A.2d 467, 471-74 (N.J. 1981). It certainly may be questioned whether a decision to sterilize a minor or an incompetent represents an exercise of personal autonomy ("self-rule").

344. *See* Hathaway v. Worcester City Hosp., 475 F.2d 701, 705 n.2 (1st Cir. 1973); Coble v. Texas Dep't of Corrections No. H-77-707, 1982 WL 1578, at **9-10 (S.D. Tex. Dec. 20, 1982); Doe v. Temple, 409 F. Supp. 899, 903 (E.D. Va. 1976); Ponter v. Ponter, 342 A.2d 574, 576 (N.J. Super. Ct. 1975).

345. *Roe* is occasionally cited in cases challenging termination of parental rights or deprivation of custody. *See* Delgado v. Fawcett, 515 P.2d 710, 718 n.12 (Alaska 1973); *In re* Appeal in Cochise County Juvenile Action No. 5666-J, 650 P.2d 462 (Ariz. Ct. App. 1982); Helvey v. Rednour, 408 N.E.2d 17, 21 (Ill. App. Ct. 1980); *In re* Gross, 425 N.Y.S.2d 220, 222 (N.Y. Fam. Ct. 1980); State *ex rel.* Heller v. Miller, 399 N.E.2d 66, 68 (Ohio 1980); *In re* McCrary, 600 N.E.2d 347, 352 (Ohio Ct. App. 1991); *In re* Interest of LaRue, 366 A.2d 1271, 1274 (Pa. Super. Ct. 1976); Roe v. Conn, 417 F. Supp. 769, 777, 779 (M.D. Ala. 1976) (striking down Alabama's repealed child neglect law); Alsager v. District Court of Polk County, Iowa, 406 F. Supp. 10, 16, 21-22 (S.D. Iowa 1975) (striking down state parental termination of rights statutes), *aff'd mem. op.,* 545 F.2d 1137 (8th Cir. 1976). These opinions often cite the Court's decisions in Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925), Skinner v. Oklahoma, 316 U.S. 535 (1942), Stanley v. Illinois, 405 U.S. 645 (1972), Moore v. City of East Cleveland, 431 U.S. 494 (1977), and Santosky v. Kramer, 455 U.S. 745 (1982).

See also Rodriguez v. State, 378 So. 2d 7, 8 n.2 (Fla. Dist. Ct. App. 1979) (vacating condition of probation that defendant not marry or become pregnant); Wiggins v. State, 386 So. 2d 46, 47 n.l (Fla. Dist. Ct. App. 1980) (vacating condition of probation that defendants not engage in sexual relations outside of marriage); People v. Pointer, 199 Cal. Rptr. 357, 364-65 (Ct. App. 1984) (same); Franz v. United States, 707 F.2d 582, 595 n.51 (D.C. Cir. 1983) (divorced father stated cause of action against officials of federal Witness Protection Program who relocated and changed identities of government informant, his wife and three children by a former marriage), *on remand,* 591 F. Supp. 374 (D. D.C. 1984) (suit dismissed on grounds of qualified immunity); Smith v. Jones, 587 N.Y.S.2d 506, 510 (Fam. Ct. 1992) (court could not compel parents to allow children to have contact with grandparents); Emanuel S. v. Joseph E., N.Y.S.2d 211, 213 (N.Y. App. Div. 1990) (same); Schmidt v. Schmidt, 459 A.2d 421, 422-23 (Pa. Super. Ct. 1983) (severely retarded adult who had not been adjudicated incompetent could not be forced to visit her father); Drollinger v. Milligan, 552 F.2d 1220, 1227 (7th Cir. 1977) (recognizing constitutionally protected interest in nurturing and development of a child or grandchild); Littlejohn v. Rose, 768 F.2d 765, 768 (6th Cir. 1985) (school board could not refuse to rehire nontenured teacher because she got divorced between school terms), *cert. denied,* 475 U.S. 1045 (1986); Stough v. Crenshaw County Bd. of Educ., 579 F. Supp. 1091, 1095 (M.D. Ala. 1983) (striking down school board policy requiring teachers to send their children to public schools); Halet v. Wend Investment Co., 672

Roe was not controlling in any,[346] and has been rejected in others.[347]

F.2d 1305, 1210-11 (9th Cir. 1982) (voiding adults only policy in apartment complex); Timberlake v. Kenkel, 369 F. Supp. 456, 463 (E.D. Wis. 1974) (striking down municipal ordinance barring four or more persons from occupying a single family residence unless they were related by blood, marriage or adoption), *vacated and remanded mem. op.*, 510 F.2d 976 (7th Cir. 1975); Franklin v. White Egret Condominium, Inc, 358 So. 2d 1084, 1089 n.4 (Fla. Dist. Ct. App. 1978) (striking down condominium association articles forbidding children under 12 years of age from residing with their parents in condominium complex); Myres v. Rask, 602 F. Supp. 210, 211 (D. Colo. 1985) (parents had cause of action against police officers who shot and killed their son for violation of their right to family association); Greene v. City of New York, 675 F. Supp. 110, 113 (S.D.N.Y. 1987) (same, with respect to claim of child that state actors had deprived him of right to family association with father); Boyd v. Village of Wheeling, No. 83-C-4768, 1985 WL 2564, at *14 (N.D. Ill. Sept. 12, 1985) (illegal detention of juvenile while parents were prevented from seeing him stated cause of action under 42 U.S.C. § 1983); Wilkinson v. Ellis, 484 F. Supp. 1072, 1089 (E.D. Pa. 1980) (police threat to take custody of son from mother if she did not implicate her husband in firebombing stated cause of action under Civil Rights Act); *In re* Phillip B., 156 Cal. Rptr. 48, 50 (Ct. App. 1979) (right of parents to refuse to allow cardiac surgery to be performed on retarded child); Sydney v. Pingree, 564 F. Supp. 412, 413 (S.D. Fla. 1982) (striking down statute requiring child born in wedlock to be given father's surname); Jech v. Burch, 466 F. Supp. 714, 719 (D. Haw. 1979) (same); Brill v. Hedges, 783 F. Supp. 333, 336 (S.D. Ohio. 1991) (striking down statute requiring child born out-of-wedlock to be given mother's surname); Jones v. McDowell, 281 S.E.2d 192, 194 (N.C. Ct. App. 1981) (same).

346. The Supreme Court appears not to have placed any emphasis on *Roe* in deciding such cases, either. In *Santosky v. Kramer*, 455 U.S. 745 (1982), the Court held that in proceedings to terminate parental rights, the "clear and convincing" evidence standard is required. Without citing *Roe*, the Court said that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Id.* at 753. Other Supreme Court opinions involving family relationships have cited *Roe* along with many other cases. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 385-86 (1978) (right to remarry while supporting minor children); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (state regulation of housing for extended families) (plurality opinion). *See supra* notes 54, 289-90 and accompanying text for a discussion of *Redhail* and *Moore*. The landmark cases recognizing the constitutional rights of the family are *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state interference with education of children), and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (same), discussed *supra* in note 54.

347. *See* Henne v. Wright, 904 F.2d 1208, 1212-15 (8th Cir. 1989) (upholding statute requiring children born in wedlock to be given father's surname); Vance v. Rice, 524 F. Supp. 1297, 1299-1300 (S.D. Iowa 1981) (pretrial detainee could be prevented from marrying, and thereby disqualifying, material witness until after criminal prosecution was completed); Wolfe v. N.M. Dep't of Human Serv., 575 F. Supp. 346, 351-52 (D. N.M. 1982) (no constitutional right to "a permanent, stable adoptive home"); *In re* Adoption of Kay C., 278 Cal. Rptr. 907, 910-13 (Ct. App. 1991) (same); People v. Sambo, 554 N.E.2d 1088 (Ill. App. Ct. 1990) (right of family integrity did not preclude conviction of parents for battery in disciplining their teenage daughter); People v. R.G., 546 N.E.2d

In sum, the Supreme Court's decision in *Roe v. Wade* has had a limited impact on the law outside of abortion. *Roe* has had no discernable effect on any of the three areas on which the Court in *Casey* relied in reaffirming *Roe*—personal autonomy, bodily integrity, and family decisionmaking. As a precedent, *Roe* has been rejected far more often than it has been accepted. Indeed, it would be difficult to identify a single legal doctrine or principle that is dependent upon *Roe*, other than the right to abortion itself. The Joint Opinion in *Casey* tacitly admitted as much when it cited only *two* cases (out of more than 2300) on why *Roe* should be retained.[348] Both involved coerced or fraudulently induced surgical procedures, which would be illegal with or without *Roe* on a multitude of federal and state constitutional, statutory, and common law grounds.[349] Neither the Supreme Court nor any other court appears to have placed any particular reliance on *Roe v. Wade* in deciding any case not involving abortion. This, in turn, strongly suggests that former Solicitor General

---

533, 540-46 (Ill. 1989) (rejecting privacy challenge to statute allowing state to intervene on behalf of endangered minors); Doe v. Norton, 365 F. Supp. 65, 73-74 (D. Conn. 1973), *vacated and remanded sub nom.* Roe v. Norton, 422 U.S. 391 (1974) (no right of privacy in nondisclosure of identity of father in proceeding to determine paternity); Burdick v. Miech, 385 F. Supp. 927, 929 (E.D. Wis. 1974) (same).

348. *Casey*, 112 S. Ct. at 2811, citing Arnold v. Bd. of Educ. of Escambia County, Alabama, 880 F.2d 305, 311 (llth Cir. 1989) (relying upon *Roe* and concluding that government officials violate the Constitution by coercing a minor to have an abortion); Avery v. County of Burke, 660 F.2d 111, 115 (4th Cir. 1981) (county agency inducing teenage girl to undergo unwanted sterilization on the basis of misrepresentation that she had sickle cell trait). *See also* People in Interest of S.P.B., 651 P.2d 1213, 1216 (Colo. 1982) (natural father of illegitimate child not excused from paying child support by his offer to pay for abortion); *In re* Mary P., 444 N.Y.S.2d 545, 546-47 (Fam. Ct. 1981) (parents could not have minor daughter declared in need of supervision for refusal to have an abortion). The Court also cited a third case, *In re* Quinlan, 355 A.2d 647 (N.J. 1976), the landmark "right-to-die" case, as evidence of *Roe's* influence in the law. *Casey*, 112 S. Ct. at 2811. The citation seems peculiar. Although *Quinlan* was decided on both state and federal constitutional grounds, in later cases the New Jersey Supreme Court appeared to rest the right to refuse medical treatment on state grounds alone. *See supra* note 332 and accompanying text. Moreover, the Supreme Court itself, in recognizing the right of a competent person to refuse medical treatment, neither cited nor relied upon *Roe*. *See* Cruzan v. Director, Missouri Dep't of Health, 497 U.S. 261, 277-79 (1990).

349. Depending upon the circumstances and the relationship of the actors to the Stat, performance of a coerced abortion (or sterilization) could constitute an unconstitutional seizure of the person, a deprivation of liberty without due process, an invasion of privacy, battery or malpractice (lack of informed consent) and professional misconduct. If the abortion was performed for reasons not allowed by the state abortion statutes, it could also constitute a criminal act. *See also supra* note 64.

Charles Fried was correct when he argued in *Webster*[350] that the Supreme Court could "pull this one thread" (abortion) without "unravel[ing] the fabric of unenumerated and privacy rights" the Court has recognized.[351]

CONCLUSION

Ultimately, then, *Roe* v. *Wade* was reaffirmed, not because it was correctly decided as a matter of original constitutional interpretation, or because the rule of *stare decisis* requires it, or because the integrity of the Court demands it, or because other legal doctrines depend upon its continued viability, but because the Supreme Court simply could not imagine an America without legalized abortion. After more than twenty years of abortion on demand and almost thirty million abortions, it is clear that unborn children cannot live with abortion. The challenge to opponents of *Roe* is to demonstrate to the American people and to the Supreme Court that the rest of us can live without it.

---

350. Webster v. Reproductive Health Serv., 492 U.S. 490 (1989).

351. *Transcript of Oral Arguments Before Court on Abortion Case*, N.Y. TIMES, Apr. 27, 1989, at B12.

Appendix A

The Tradition of Prohibiting Abortion

In *Roe v. Wade*, the Supreme 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."[1] The Court acknowledged that "[t]he Constitution does not explicitly mention any right of privacy."[2] Nevertheless, "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution."[3] 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."[4]

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[5] 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.[6]

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. 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.

1. 410 U.S. at 153.
2. *Id.* at 152.
3. *Id.*
4. *Id.*
5. *Id.* at 129, 132-41, 147-52.
6. *Id.* at 140-41.

The thirteenth-century commentators Bracton and Fleta classified abortion of a "formed and animated" fetus as homicide.[7] 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."[8] 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."[9] 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.[10]

Blackstone held that the killing of a child in the womb was "a very heinous misdemeanor."[11]

"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 human being in the womb, and whether the abortion had caused the child's death.[12] This test "was never intended as a judgment that before quickening the child was not a live human being."[13]

7. 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).

8. E. COKE, THIRD INSTITUTE OF THE LAWS OF ENGLAND 50 (1644). A "misprision," according to Coke, was "a heinous offense under the degree of felony." *Id.* at 139.

9. *Id.* at 50. Other leading authorities accepted Coke's declaration regarding the criminality of abortion at common law. *See* M. HALE, PLEAS OF THE CROWN: A METHODICAL SUMMARY 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).

10. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 198 (1769) (emphasis in original).

11. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 126 (1765).

12. Robert M. Byrn, *An American Tragedy: The Supreme Court On Abortion*, 44 Fordham L. Rev. 807, 815-16 (1973).

13. *Id.* at 816. 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

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.[14] In conformity with those views, state courts uniformly recognized abortion after quickening as a common law crime.[15] The courts of at least three States went further, holding that abortion at any stage of pregnancy was a common law crime.[16] 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

---

which the common law afforded to human life extended to the unborn child in the womb of its mother." *Id.* at 690. Comprehensive treatments of the English common and statutory law of abortion may be found in JOHN KEOWN, ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE REGULATION OF ABORTION IN ENGLAND FROM 1803 TO 1982 (1988); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality and the Law,* 40 U. PITT. L. REV. 359 (1979); and Professor Dellapenna's Brief *Amicus Curiae* on behalf of the American Academy of Medical Ethics in support of Respondents in *Planned Parenthood of Southeastern Pennsylvania v. Casey.* These materials present extensive documentation, including voluminous cases dating back to the year 1200, that abortion was a crime at common law.

14. *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, 26 N.W. 291, 293 (Mich. 1886); State v. Cooper, 22 N.J.L. 52, 53-58 (N.J. 1849).

15. Smith v. Gaffard, 31 Ala. 45, 51 (1857) (*dictum* in slander case); Eggart v. State, 25 So. 144, 145 (Fla. 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, 55-57 (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 defendant with assault); Evans v. People, 49 N.Y. 86, 88 (1872) (*dictum* in case reversing conviction under manslaughter statute); Arnold v. Gaylord, 18 A. 177, 178-79 (R.I. 1889) (*dictum* in loss of services case).

Four of these decisions acknowledged the arbitrary nature of the quickening distinction and, where appropriate, recommended corrective legislative action. *See* Mitchell v. Commonwealth, 78 Ky. 204, 209-10 (1879); Commonwealth v. Parker, 50 Mass. (9 Met.) 263, 268 (1845); State v. Emerich, 13 Mo. App. 492, 495 (1883), *aff'd,* 87 Mo. 110 (1885); State v. Cooper, 22 N.J.L. 52, 58 (N.J. 1849).

16. State v. Reed, 45 Ark. 333, 334 (1885); State v. Slagle, 83 N.C. 630, 632 (1880); Mills v. Commonwealth, 13 Pa. 630, 632-33 (1850).

> 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.* [17]

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."[18] No American court ever held that abortion after quickening was not a criminal offense.

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."[19] 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."[20]

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,"[21] and because primitive medical understanding prevented proof of abortion until after quickening and unless there were direct witnesses who would testify.[22] Mohr notes that abortion after quickening, "late in the fourth or early in the fifth month," was

---

17. Lamb v. State, 10 A. 208, 208 (Md. 1887) (emphasis supplied). See also Marmaduke v. People, 101 P. 337, 338 (Colo. 1909). Leading nineteenth-century commentators were in accord. *See* BISHOP, COMMENTARY ON THE LAW OF STATUTORY CRIMES (2d ed.), § 744, p. 447 (1883); F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES (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).

18. 410 U.S. at 136.

19. J. SPRUILL, WOMEN'S LIFE AND WORK IN THE SOUTHERN COLONIES at 325-26 (1938).

20. L. KOEHLER, A SEARCH FOR POWER: THE "WEAKER SEX" IN SEVENTEENTH-CENTURY NEW ENGLAND at 329 & n. 132 (1980).

21. C. SCHOLTEN, CHILDBEARING IN AMERICAN SOCIETY 1650-1850 at 9 (1985).

22. J. MOHR, ABORTION IN AMERICA at 72 (1978).

a common law crime in the United States.[23] The decision to choose abortion was not a right at common law, in England or America. Abortion was a crime and was punished accordingly.

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.[24] By the end of 1849, eighteen of the thirty States had enacted statutes prohibiting abortion,[25] and by the end of the Civil War, twenty-seven of the

---

23. *Id.* at 3.

24. 410 U.S. at 138-139.

25. *See, generally,* James S. Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes And The Fourteenth Amendment,* 17 ST. MARY'S L.J. 29 (1985). The following 18 States adopted abortion statutes before 1850: ALA. PEN CODE ch. 6, § 2, p. 238 (Meek Supp. 1841) (as amended, ALA. CODE § 3605, p. 690 (1866-67)); ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); CONN. PUB. STAT. tit. 22, § 14, p. 152 (1821) (replaced by Conn. Pub. Acts ch. 71, §§ 1-4, pp. 65-66 (1860) (codified at CONN. GEN. STAT., tit. 12, ch. 2, §§ 22-25, pp. 248-49 (1866), which made abortion at any stage of pregnancy a crime); 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)); Act of Feb. 7, 1835, ch. 47, § 3, Ind. Gen. Laws, p. 66 (1835) (codified at IND. REV. STAT., ch. 26, p. 224 (1838), superseded by Ind. Gen. Laws, ch. 81, § 2, pp. 130-31 (1859)); Act of Jan. 25, 1839, § 18, IOWA (TERR.) STAT. 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. 23, 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)) (admitted to statehood Dec. 28, 1846); 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)); Mass. Acts & Resolves, ch. 27, p. 406 (1845) (subsequently codified, as amended, at MASS. GEN. STAT. ch. 165, § 9, p. 818 (1860)); MICH. REV. STAT. ch. 153, §§ 33-34, p. 662 (1846); Act of Feb. 15, 1839, tit. 3, art. 1, § 9, Miss. Laws, p. 113 (1839) (codified at MISS. CODE ch. 64, tit. 3, § 9, p. 958 (1848), recodified at MISS. REV. CODE ch. 44, art. 173, p. 601 (1857); MO. REV. STAT. art. 2, §§ 10, 36, pp. 168-69, 172 (1835) (recodified, as amended, at MO. GEN. STAT. pt. 4, tit. 45, ch, 200, §§ 10, 34, pp. 778-79, 781 (1866)); Act of Jan. 4, 1849, N.H. Laws, ch. 743, §§ 1-4, pp. 708-09 (1848) (codified at N.H. COMP. STAT. tit. 26, ch. 227, §§ 11-14, pp. 544-45 (1853)); Act of Mar. 1, 1849, N.J. Laws, pp. 266-67 (1849); Act of Dec. 10, 1828, ch. 20, § 4, N.Y. Laws, p. 19 (1828) (codified at N.Y. REV. STAT., pt. 4, ch. 1, tit. 2, art. 1, § 9, p. 661, and tit. 6, § 21, p. 694 (1828-29), (as amended by an Act of Apr. 30, 1830, ch. 320, § 58 N.Y. Laws, p. 401 (1830)), (codified at N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 9, pp. 550-51, and pt. 4, ch. 1, tit. 6, § 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. 4, ch. 1, tit. 6, §§ 20-21, p. 779 (1846), and N.Y. Laws, ch. 22, § 1, p. 19 (1846)), (codified at N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 9, p. 750 (1846)); Act of Feb. 27,

thirty-six States had done so.[26] By the end of 1868, the year in 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,[27] together with six of the ten federal territories.[28]

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"); Vt. Acts, No. 33, § 1, pp. 34-35 (1846) (codified at VT. COMP. STAT. tit. 28, 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)); Act of Mar. 14, 1848, ch. 120, tit. 2, ch. 3, § 9, Va. Acts, p. 96 (1847-48) (codified, as modified, at VA. CODE tit. 54, ch. 191, § 8, p. 724 (1849), recodified, VA. CODE tit. 54, ch. 191, § 8, p. 784 (1860)); WIS. REV. STAT. pt. 4, tit. 30, ch. 133, § 11, pp. 683-84 (1849) (superseded by WIS. REV. STAT. pt. 4, tit. 27, ch. 164, § 11, p. 930, and ch. 169 §§ 58, 59, p. 969 (1858)).

26. In addition to the 18 States listed in note 25, the following 9 States adopted abortion statutes between 1850 and 1865: Cal. Sess. Laws, ch. 99, § 45, p. 233 (1849-1850) (as amended by an Act of May 20, 1861, CAL. STAT. ch. 521, p. 588 (1861)) (admitted to statehood Sep. 9, 1850); KAN. (TERR.) STAT. ch. 48, §§ 10, 39, pp. 238, 243 (1855) (superseded by Kan. (Terr.) Laws, ch. 28, §§ 10, 37, pp. 232, 237 (Acts of 1859), codified at KAN. COMP. LAWS ch. 33, §§10, 37, pp. 288, 293 (1862)) (admitted to statehood Jan. 29, 1861); La. Acts, Act. 120, § 24, pp. 132-33 (1855) (codified at LA. REV. STAT. Crimes & Offenses, § 24, p. 138 (1856)); MINN. (TERR.) REV. STAT. ch. 100, § 11, p. 493 (1851) (admitted to statehood May 11, 1858); Nev. (Terr.) Laws, ch. 28, div. 4, § 42, p. 63 (1861) (admitted to statehood Oct. 31, 1864); Act of Dec. 22, 1853, ch. 3, § 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)) (admitted to statehood Feb. 14, 1859); Pa. Laws, No. 374, tit. 6, §§ 87, 88, pp. 404-05 (1860); Act of Feb. 9, 1854, § 1, Tex. Gen. Laws, ch. 49, § 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. 1, tit. 17, ch. 7, Tex. Gen. Laws, p. 172 (1858), codified at TEX. GEN. STAT. DIG. ch. 7, arts. 531-536, p. 524 (Oldham & White 1859); Act of Mar. 14, 1848, ch. 120, tit. 2, ch. 3, § 9, VA. ACTS p. 96 (1847-48) (codified, as modified, at VA. CODE tit. 54, ch. 191, § 8, p. 724 (1849), recodified, VA. CODE tit. 54, ch. 191, § 8, p. 784 (1860), and W. VA. CONST. art. XI, ¶8 (1863) (admitted to statehood June 20, 1863).

27. In addition to the 27 States listed in notes 25 and 26, the following 3 States adopted abortion statutes between 1865 and 1868: Act of Aug. 6, 1868, Fla. Acts, No. 13, ch. 1637, sub ch. 3, § 11, and sub ch. 8, § 9 (1868), pp. 64, 97 (1868); 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. 30, § 1, pp. 105-06 (1868 Supp.)); Act of Feb. 12, 1866, NEB. (TERR.) STAT. pt. 3, ch. 4, § 42, pp. 598-99 (1866-67) (admitted to statehood Mar. 1, 1867). Of the 30 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.

28. The following territories adopted statutes restricting abortion by the end

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."[29] As then 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."[30] 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.[31]

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.[32] 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."[33] The Court not only misapprehended the holding in the single case cited for this proposition,[34]

---

of 1868: ARIZ. (TERR.) CODE ch. 10, div. 5, § 45, p. 54 (1865); Colo. (Terr.) Laws, div. 4, § 42, pp. 296-97 (1861), COLO. (TERR.) REV. STAT. ch. 22, § 42, p. 202 (1868); Act of Feb. 4, 1864, ch. 4, § 42 Idaho (Terr.) Laws, p. 443 (1863-64) (repealed and re-enacted by an Act of Dec. 21, 1864, ch. 3, pt. 4, § 42, Idaho (Terr.) Laws, p. 305 (1864)); Mont. (Terr.) Laws, Criminal Practice Acts, ch. 4, § 41, p. 184 (1864); N.M. (Terr.) Laws, No. 28, ch. 3, § 11, p. 88 (1854) (codified at N.M. REV. STAT. art. 23, ch. 51, § 11, p. 320 (1865)); WASH. (TERR.) STAT. ch. 2, §§ 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, § 3, cl. 2; National Bank v. County of Yankton, 101 U.S. 129, 133 (1880). No territorial abortion statute was ever nullified by Congress, including the 39th Congress, which approved the Fourteenth Amendment.

29. *See* 410 U.S. at 153.
30. *Id.* at 174 (Rehnquist, J., dissenting).
31. *Id.* at 177 (Rehnquist, J., dissenting).
32. *Id.* at 151-52.
33. *Id.* at 151 & n.48 (citing State v. Murphy, 27 N.J.L. 112 (1858) (N.J. 1858)).
34. The Court's reading of *Murphy* appears to be at odds with the New

but also overlooked thirty-one decisions from seventeen jurisdictions expressly affirming that their nineteenth-century statutes were intended to protect unborn human life,[35] and twenty-seven other decisions from seventeen additional jurisdictions strongly implying the same.[36]

Jersey Supreme Court's understanding of its earlier opinion. *See* State v. Siciliano, 121 A.2d 490, 495 (N.J. 1956), and Gleitman v. Cosgrove, 227 A.2d 689, 699 (N.J. 1967) (Francis, J., concurring).

35. Trent v. State, 73 So. 834, 836 (Ala. Civ. App. 1916); Hall v. People, 201 P.2d 382, 383 (Colo. 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, 21 S.E.2d 230, 232 (Ga. 1942); Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934); State v. Alcorn, 64 P. 1014, 1019 (Idaho 1901); Joy v. Brown, 252 P.2d 889, 892 (Kan. 1953); State v. Miller, 133 P. 878, 879 (Kan. 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, 1 P. 770, 771-72 (Kan. 1883); Rosen v. La. Bd. 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, 121 A.2d 490, 495 (N.J. 1956); State v. Gedicke, 43 N.J.L. 86, 89-90, 96 (N.J. 1881); Endresz v. Friedberg, 248 N.E.2d 901, 904 (N.Y. 1969); People v. Lovell, 242 N.Y.S.2d 958, 959 (N.Y. Oneida County Ct. 1963); State v. Hoover, 113 S.E.2d 281, 283 (N.C. 1960); State v. Powell, 106 S.E. 133 (N.C. 1921); *but see* State v. Jordon, 42 S.E.2d 674 (N.C. 1947) (*contra* regarding pre-quickening abortion); Williams v. Marion Rapid Transit, 87 N.E.2d 334, 336 (Ohio 1949); State v. Tipple, 105 N.E. 75, 77 (Ohio 1913); Bowlan v. Lunsford, 54 P.2d 666, 668 (Okla. 1936); Mallison v. Pomeroy, 291 P.2d 225, 228 (Or. 1955) ("[i]n Oregon we have recognized by statute the separate entity of an unborn child by protecting him . . . against criminal conduct"); State v. Ausplund, 167 P. 1019, 1022-23 (Or. 1917); State v. Farnam, 161 P. 417, 419 (Or. 1916) (pregnant woman could not lawfully consent to the homicide of her unborn child); State v. Atwood, 102 P. 295, 297 (Or. 1909), *aff'd on reh'g.*, 104 P. 195 (Or. 1909); State v. Steadman, 51 S.E.2d 91, 93 (S.C. 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, 58 S.E.2d 72, 75 (Va. 1950); Miller v. Bennett, 56 S.E.2d 217, 221 (Va. 1949); State v. Cox, 84 P.2d 357, 361 (Wash. 1938); Puhl v. Milwaukee Auto Ins. Co., 99 N.W.2d 163, 170 (Wis. 1959); Hatchard v. State, 48 N.W. 380, 381 (Wis. 1891); State v. Dickinson, 41 Wis. 299, 309 (1877); *but see* Foster v. State, 196 N.W. 233, 235 (Wis. 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* People v. Belous, 458 P.2d 194, 209 (Cal. 1969) (Burke, J., dissenting) (abortion statute "was designed to protect not only the mother's life but also that of the child").

36. McClure v. State, 215 S.W.2d 524, 530 (Ark. 1949); Scott v. State, 117 A.2d 831, 835-36 (Del. 1955); State v. Magnell, 51 A. 606 (Del. 1901); Urga v. State, 20 So.2d 685, 687 (Fla. 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, 35 So. 856, 858-59 (Fla. 1903); *but see* Walsingham v. State, 250 So.2d 857, 861 (Fla. 1971) ("[p]rotection of the mother from unsafe surgical procedures

In every decade since the 1850's, there has been 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."[37] 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.[38]

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

---

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); Amann v Faidy, 114 N.E.2d 412, 416 (Ill. 1953) ("the law recognizes the separate existence of an unborn child ... to protect him against criminal conduct"); 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, 136 A. 817, 819 (Me. 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, 48 A. 355, 356-57 (Md. 1901); Lamb v. State, 10 A. 208, 208 (Md. 1887); Keyes v. Construction Service, Inc., 165 N.E.2d 912, 914 (Mass. 1960) ("the law protects an unborn child . . . in the enforcement of criminal law"); People v. Sessions, 26 N.W. 291, 293 (Mich. 1886); People v. Olmstead, 30 Mich. 431, 432-33 (1874); *but see* People v. Nixon, 201 N.W.2d 635, 639-41 (Mich. Ct. App. 1972), *on remand*, 212 N.W.2d 607 (Mich. Ct. App. 1973) (*contra* regarding pre-quickening abortion); Rainey v. Horn, 72 So.2d 434, 439 (Miss. 1954); Smith v. State, 73 So. 793, 794 (Miss. 1916), *overruled* on other grounds, Ladnier v. State, 124 So. 432 (Miss. 1929); Hans v. State, 22 N.W.2d 385, 389 (Neb. 1946), *vacated on reh'g*, 25 N.W.2d 35 (Neb. 1946); Bennett v. Hymers, 147 A.2d 108, 109-110 (N.H. 1958); *but see* State v. Millette, 299 A.2d 150, 154 (N.H. 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, 194 P. 867, 868 (N.M. 1921); Railing v. Commonwealth, 1 A. 314, 315 (Pa. 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, 220 A.2d 222, 223 (R.I. 1966); State v. Crook, 51 P. 1091, 1093 (Utah 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). *See also* Williams v. United States, 138 F.2d 81-83 (D.C. Cir. 1943) (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 . . . .")

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

38. State v. Howard, 32 Vt. 380, 399 (1859).

dangerous to the mother, and generally fatal, and frequently designed to be fatal, to the child."[39] 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."[40]

In 1881, the Supreme Court of New Jersey declared that its original 1849 abortion statute had been amended in 1872 "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die."[41] 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."[42]

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.[43]

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."[44]

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 . . . ."[45]

---

39. State v. Moore, 25 Iowa 128, 136 (1868).
40. Dougherty v. The People, 1 Colo. 514, 522 (1872).
41. State v. Gedicke, 43 N.J.L. 86, 89-90 (1881).
42. State v. Crook, 51 P. 1091, 1093 (Utah 1898).
43. Worthington v. State, 48 A. 355, 356-57 (Md. 1901).
44. *Id.* at 357.
45. Trent v. State, 73 So. 834, 836 (Ala. Civ. App. 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 extra-uterine life?"'[46]

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.[47]

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."[48]

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."[49] 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."[50]

In 1942, the Supreme Court of Georgia declared that in enacting its abortion statute in 1876, "the legislature was undertaking to pro-

---

46. *Id.* at 836.

47. State v. Ausplund, 167 P. 1019, 1022-23 (Or. 1917).

48. State v. Bassett, 194 P. 867, 868 (N.M. 1921) (emphasis supplied). 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". Witherspoon, *supra* note 25, at 44 & n.47.

49. Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934).

50. Bowlan v. Lunsford, 54 P.2d 666, 668 (Okla. 1936).

vide by penal law appropriate penalties for the destruction of an unborn child."[51] 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 . . . ."[52]

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.[53] Rejecting the 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."[54] In 1959, the Wisconsin Supreme Court, in recognizing a cause of action for prenatal injuries, said "if a child is not a living entity, why should abortion be illegal? .... [The] public policy [of the criminal law] is based on the belief that it is wrong to deprive a living fetus of its right to be born."[55]

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."* [56] 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."[57]

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 v. Wade* 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.[58]

---

51. Passley v. State, 21 S.E.2d 230, 232 (Ga. 1942).
52. Miller v. Bennett, 56 S.E.2d 217, 221 (Va. 1949).
53. Joy v. Brown, 252 P.2d 889 (Kan. 1953).
54. *Id.* at 892.
55. Puhl v. Milwaukee Auto Ins. Co., 99 N.W.2d 163, 170 (Wis. 1959) *overrulled on other grounds,* In re Strensted, 299 N.W.2d 226 (Wis. 1980).
56. State v. Hoover, 113 S.E.2d 281, 283 (N.C. 1960).
57. People v. Lovell, 242 N.Y.S.2d 958, 959 (N.Y. Oneida County Ct. 1963).
58. *See* Nelson v. Planned Parenthood Ctr. of Tucson, Inc., 505 P.2d 580, 582 (Ariz. Ct. App. 1973), *modified on reh'q* pursuant to *Roe;* Cheaney v. State, 285 N.E.2d 265, 267-70 (Ind. 1972), *cert. denied,* 410 U.S. 991 (1973); 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, 201 N.W.2d 123, 125-26 (S.D. 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).

In sum, at least sixty-four decisions from forty States have 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"[59] 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 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."[60] The Court, however, failed to note that at least nineteen States enacted statutes that expressly incriminated the woman's participation in her own abortion.[61] Although no prosecutions were reported under any of these statutes, their enactment certainly casts doubt on the conclusion that women possessed a legal "right" to

---

59. 410 U.S. at 151.

60. *Id.*

61. ARIZ. PEN. CODE § 455, p. 711 (1887) (repealed and re-enacted, ARIZ. PEN CODE § 244, p. 1228 (1901)); Act of May 20, 1861, CAL. STAT. ch. 521, p. 588 (1861); Act of Feb. 14, 1872 (codified at CAL. PEN CODE § 275, p. 69 (1872)); Conn. Pub. Acts, ch. 71 § 3, pp. 65-66 (1860)), (codified at CONN. GEN. STAT. tit. 12, ch. 2, § 24, p. 249 (1866)); Act of July 6, 1972, § 1, Del. Laws, ch. 497, pp. 1611, 1664 (1972), DEL. CODE ANN. tit. 11, § 652 (1974 Rev.); IDAHO REV. STAT. § 6795 (1887); Ind. Laws, ch. 37, § 23, p. 177 (1881) (codified at IND. REV. STAT. § 1924, p. 358 (1881)); Act of Mar. 10, 1873, Minn. Laws, ch. 9, § 3, p. 118 (1873) (codified at MINN. GEN. STAT. ch. 94, § 18, p. 885 (1878), recodified at MINN. GEN. STAT. § 6546, p. 1751 (1894)); MONT. PEN. CODE § 481 (1895) (re-enacted and recodified at MONT. REV. CODE § 94-402 (1947)); Act of Feb. 16, 1869, ch. 22, § 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)); Act of Jan. 4, 1849, N.H. Laws, ch. 743, § 4, p. 709 (1848) (codified at N.H. COMP. STAT. tit. 26, ch. 227, § 11-14, pp. 544-45 (1853)); N.Y. Laws, ch. 260, § 3, p. 286 (1845) (codified at N.Y. REV. STAT. pt. 4, ch. 1, tit. 6, § 21, p. 779 (1846), superseded by N.Y. Laws, ch. 181, § 2, p. 509 (1872), codified at N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, sec. 10, p. 933 (1875)); DAK. PEN. CODE § 338, p. 459 (1877) (recodified at N.D. REV. CODES § 7178, p. 1272 (1895); OKLA. STAT. § 2188 (1890), codified at Okla. Rev. Laws, § 2437, p. 604 (1910)); 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)); DAK. PEN. CODE. § 338, p. 459 (1877) (recodified at S.D. ANN. STAT. § 7798, p. 1919 (1899)); UTAH. REV. STAT. § 4227, p. 903 (1898), (recodified at UTAH CODE ANN. § 76-2-2 (1953)); Wash. Laws, ch. 249, § 197, p. 948 (1909) (codified at REV. CODE WASH. § 9.02.020 (1961); WIS. REV. STAT. pt. IV, tit. 27, ch. 169, § 59, p. 969 (1858); Wyo. Laws, ch. 73, § 32, p. 131 (1890) (codified as WYO. STAT. § 6-78 (1957)).

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 perform the abortion 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 . . . ."[62] The woman was seen as a second victim of the abortion.[63] 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.[64] 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.[65]

Finally, the Court stated that "most of [the] initial statutes dealt severely with abortion but were lenient with it before quickening."[66] 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."[67] The Court's premise, as well as its conclusion, was flawed.

As of late 1868, thirty of the then thirty-seven States had enacted statutes restricting abortion. 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

---

62. State v. Farnam, 161 P. 417, 419 (Or. 1916).

63. State v. Murphy, 27 N.J.L. 112, 114-15 (N.J. 1858); Dunn v People, 29 N.Y. 523, 527 (1864).

64. People v. Nixon, 201 N.W.2d 635, 646 (Mich. Ct. App. 1972) (Burns, J. concurring in part and dissenting in part), *on remand,* 212 N.W.2d 607 (Mich. Ct. App. 1973).

65. *See,* Annotation, *Woman Upon Whom Abortion Is Committed As Accomplice For Purposes Of Rule Requiring Corroboration Of Accomplice Testimony,* 34 A.L.R.3d 858 (1970).

66. 410 U.S. at 139.

67. *Id.* at 151-52.

the stage of pregnancy.[68] By the end of 1883, twenty-seven of the thirty-six States that had enacted abortion statutes had abolished any distinction between pre- and post-quickening abortions in determining the range of possible penalties.[69]

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."[70] 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.[71] As

---

68. See statutes cited in *supra* notes 25-27.

69. ALA. CODE § 3605, p. 690 (1866-67); Act of May 20, 1861, CAL. STAT. ch. 521, p. 588 (1861); COLO. (TERR.) REV. STAT. ch. 22, § 42, p. 202 (1868); CONN. GEN. STAT. tit. 12, ch. 2, §§ 22-25, pp. 248-49 (1866); Act of Feb. 13, 1883, ch. 226, §§ 1, 2, Del. Laws, p. 522 (1883) (codified at DEL. REV. STAT. p. 930 (1893); Act of Feb. 25, 1876, ch. 130, §§ 2, 3, Ga. Laws, p. 113 (1876) (codified at GA. CODE § 4337 (a)-(c), p. 1143 (1882); Act of Feb. 28, 1867, §§ 1-3, Ill. Pub. Laws, p. 89 (1867); Ind. Gen. Laws, ch. 81, pp. 130- 31 (1859); Act of Mar. 15, 1858, Iowa Laws, ch. 58, § 1, p. 93 (1858) (codified at Iowa Rev. Laws, pt. 4, tit. 23, ch. 165, art. 2, § 4221, pp. 723-24 (1860); LA. REV. STAT. Crimes & Offenses, § 24, p. 138 (1856); ME. REV. STAT. tit. 11, ch. 124, § 8, p. 685 (1857); Act of Mar. 28, 1868, Md. Laws, ch. 179, § 2, p. 315 (1868) (codified at MD. CODE art. 30, § 1, pp. 105-06 (1868 Supp.)); MASS. GEN. STAT. ch. 165, § 9, p. 818 (1860); Act of Mar. 10, 1873, Minn. Laws, ch. 9, §§ 1-3, pp. 117-18 (1873) (codified at MINN. GEN. STAT. ch. 94, §§ 16-18, pp. 884-85 (1878)); NEB. (TERR.). STAT. pt. 3, ch. 4, § 42, pp. 598-99 (1866-67); Nev. (Terr.) Laws, ch. 28, div. 4, § 42, p. 63 (1861); Act of Mar. 1, 1849, NJ. Laws, pp. 266-67 (1849); Act of Mar. 12, 1881, ch. 351, N.C. Laws, pp. 584-85 (1881) (codified at N.C. CODE §§975, 976, p. 399 (1883)); Act of Apr. 13, 1867, Ohio Laws, pp. 135-36 (1867); Or. Gen. Laws, Crim. Code, ch. 43, § 509, p. 528 (1845-1864); 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); Act of Mar. 26, 1883, ch. 140, Tenn. Acts, pp. 188-89 (1883) (codified at TENN. CODE §§ 5371, 5372, p. 1031 (Milliken & Vertree's 1884); TEX. PEN CODE arts. 531-36, pp. 103-04 (1857) (as amended by an Act of Feb. 12, 1858, ch. 121, pt. 1, tit. 17, ch. 7, Tex. Gen. Laws, p. 172 (1858), codified at TEX. GEN. STAT. DIG. ch. 7, arts. 531-36, p. 524 (Oldham & White 1859)); Act of Nov. 21, 1867, Vt. Acts, No. 57, § 1, pp. 64-65 (1867); Act of Mar. 14, 1848, ch. 120, tit. 2, ch. 3, § 9, Va. Acts, p. 96 (1847-48) (codified, as modified, at VA. CODE tit. 54, ch. 191, § 8, p. 724 (1849), recodified, VA. CODE tit. 54, ch. 191, § 8, p. 784 (1860); Act of Mar. 14, 1848, ch. 120, tit. 2, ch. 3, § 9, Va. Acts, p. 96 (1847-48) (codified, as modified, at VA. CODE tit. 54, ch. 191, § 8, p. 724 (1849), recodified, VA. CODE tit. 54, ch. 191, § 8, p. 784 (1860), W. VA. CONST. art. XI, p (1863)); WIS. REV. STAT. pt. 4, tit. 27, ch. 164, § 11, p. 930, and ch. 169, §§ 58, 59, p. 969 (1858).

70. Witherspoon, *supra* note 25, at 36.

71. In addition to the statutes from Georgia, Maine, Minnesota, Ohio, Oregon, South Carolina, Tennessee and Wisconsin listed in note 69 may be added the following: ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); Act of Nov. 8, 1875, § 1, Ark. Acts., No. 4, p. 5 (1875); Act. of Aug. 6, 1868, Fla. Acts,

Witherspoon has observed, "If the 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."[72] "The only explanation of this element of these statutes," he concludes, "is that the enacting legislatures attributed value to the life of the unborn child."[73]

Abortion *before* quickening may not have been criminal at common law. And a few 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.[74]

1st Sess., No. 13, ch. 1637, sub ch. 3, § 11, sub ch. 8, § 9, pp. 64, 97 (1868); IND. REV. STAT. § 1923, p. 358 (1881); MICH. REV. STAT. ch. 153, §§ 33-34, p. 662 (1846); Mo. GEN. STAT. pt. 4, tit. 45, ch. 200, §§ 10, 34, pp. 778-79, 781 (1866); NEB. GEN. STAT. ch. 58, §§ 6, 39, pp. 720, 727-28 (1873); Act of Mar. 25, 1881, N.J. Laws, ch. 191, p. 240 (1881); Act of July 26, 1881, N.Y. Laws, N.Y. PEN CODE ch. 676, §§ 191, 194, 294, 295, pp. 45-46, 72-73 (1881), 3 N.Y. REV. STAT. at 2478-80 (1881); Pa. Laws, No. 374, tit. 6, §§ 87, 88, pp. 404-05 (1860); TEX. PEN. CODE arts. 531, 535, pp. 103-04 (1857); Act of Mar. 14, 1878, Va. Acts, ch. 311, sub ch. 2, § 8, pp. 281-82 (1878) (codified at VA. CODE § 3670, p. 879 (1887)); W. Va. Acts, ch. 128, § 8, p. 335 (1882) (codified at W. VA. CODE ch. 154, § 8, p. 677 (1890)). Of these states, only Arkansas, Florida, Michigan, Missouri, New York and Pennsylvania also required proof of quickening.

72. Witherspoon, *supra* note 25, at 38.

73. *Id.*

74. *The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong., 1st

As the Supreme Court noted in *Roe,*[75] 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.

The decision to choose abortion cannot be regarded as a fundamental right unless if it is "implicit in the concept of ordered liberty"[76] or "deeply rooted in this Nation's history and tradition."[77] Abortion, however, was a crime at common law and under the laws of all fifty States until *Roe v. Wade* was decided.[78] Justice Rehnquist noted the 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 ranked as fundamental," *Snyder v. Massachusetts,* 291 U.S. 97, 105 (1934).[79]

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. Accordingly, the decision to choose abortion cannot be considered a "fundamental right."

Sess. 474 (testimony of Victor Rosenblum, Prof, of Law, Northwestern University). *See also* Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law,* 40 U. PITT. L. REV. 359, 402-04 (1979).

75. 410 U.S. at 141-42.

76. Palko v. Connecticut, 302 U.S. 319, 325 (1937).

77. Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 503 (1977) (opinion of Powell, J.).

78. Prior to *Roe,* 13 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 4 other States allowed abortion on demand for part of the gestational period. But a clear majority of the States continued to prohibit all abortions except those necessary to save the life of the mother. *See* Paul Benjamin Linton, *Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis,* 67 U. DET. L. REV. 157, 158-61, 255-59 (1990).

79. 410 U.S. at 174 (Rehnquist, J., dissenting).

Appendix B

The Legal Consensus on the Beginning of Life

Alabama:

Trent v. State, 73 So. 834, 836 (Ala. Civ. App. 1916) (interpreting state abortion law) ('"does 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 extra-uterine life?'") (quoting from the 1911 Transactions of the Medical Association of Alabama).

Wolfe v. Isbell, 280 So.2d 758, 761 (Ala. 1973) (rejecting viability requirement in wrongful death action where death occurs after live birth):

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based on viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.

Alabama Constitutional Convention Call (S.J. Res. 9, 1980 Ala. Acts 396):

> [A]pplies to the Congress ... to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution that would protect the lives of all human beings including unborn children at every stage of their biological development and providing that neither the United States nor any state shall deprive any human being, from the moment of fertilization, of the right to life without due process of law, nor shall any state deny any human being, from the moment of fertilization, the equal protection of the laws, except where pregnancy results from rape or incest; or where abortion is necessary to save the life of the mother; or where testing revealed abnormality or deformity of the fetus.

Arizona:

Nelson v. Planned Parenthood Ctr. of Tucson, 505 P.2d 580, 586 (Ariz. Ct. App. 1973) (construing state abortion law):

> One cannot gainsay a legislative determination that an embryonic or fetal organism is "life." Once begun, the inevitable result is a human being, barring prior termination of the pregnancy.

ARIZ. REV. STAT. ANN., § 13-1103(A)(5) (1989) (defining offense of manslaughter to include "[k]nowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder

if the death of the mother had occurred").

Arkansas:

ARK. CONST. amend. 68, § 2 ("[t]he policy of Arkansas is to protect the life of every unborn child from conception until birth, ...").

Arkansas Constitutional Convention Call (Res. of Feb. 17, 1977, H.R.J. Res. 2):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right of life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

California:

CAL. PENAL CODE, § 187(a) (West 1988) ("[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought").

CAL. CIV. CODE, § 29 (West 1982) ("[a] child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth")

Scott v. McPheeters, 92 P.2d 678, 681 (Cal. App. 1939) (it is "an established and recognized fact by science and by everyone of understanding" that "an unborn child is a human being separate and distinct from its mother").

Connecticut:

CONN. GEN. STAT. ANN. § 53-3l(a) (West 1985) ("[t]he public policy of the state and the intent of the legislature is to protect and preserve human life from the moment of conception") (rep. by P.A. 90-113, §4 (1990)).

Simon v. Mullin, 380 A.2d 1353, 1357 (Conn. Supp. 1977) (rejecting viability requirement in wrongful death action where death occurs after live birth) ("[t]he development of the principle of law that now permits recovery by or on behalf of a child born alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law").

Delaware:

Scott v. State, 117 A.2d 831, 835-36 (Del. 1955) (characterizing abortion law as one that defines an offense against the lives and persons of individuals).

Delaware Constitutional Convention Call (Res. of May 23, 1978,

H.R. Con. Res. 9):

> Requests Congress to call a convention to propose a constitutional amendment that would protect the lives of all human beings, including unborn children at every stage of their biological development.

District of Columbia:

Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946) (recognizing cause of action for prenatal injuries) ("[f]rom the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact").

Florida:

Day v. Nationwide Mut. Ins. Co., 328 So.2d 560, 561 (Fla. Dist. Ct. App.2d Dist. 1976) (rejecting viability requirement in case of prenatal injuries) (quoting with approval WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §55, at 336 (4th ed. 1971)):

> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending on the health of mother and child and many other matters in addition to the stage of development. Certainly the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.

Georgia:

Hornbuckle v. Plantation Pipe Line Co., 93 S.E.2d 727, 728 (Ga. 1956) (rejecting viability requirement in case of prenatal injuries) ("[i]f a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover") (a dissent characterized majority opinion as holding, in effect, "that an infant becomes a 'person' from the moment of conception, with the right to sue for a tortious injury after its birth"); *id.* at 729.

Morrow v. Scott, 7 Ga. 535, 537 (1849) ("[i]n . . . general, a child is to be considered as *in being,* from the time of its conception, where it will be for the benefit of such child to be so considered").

Idaho:

Nash v. Meyer, 31 P.2d 273, 280 (Idaho 1934) (construing state abortion law) (criminal abortion statute intended "to discourage abortions because thereby the life of a human being, the unborn child, is taken").

Blake v. Cruz, 698 P.2d 315, 323 (Idah 1984) (Bistline, J., concurring in part and dissenting in part) ("[t]his Court recently committed itself to the proposition that an unborn child is a person

in being," citing Volk v. Baldazo, 651 P.2d 11 (Idaho 1982) (rejecting live birth requirement in wrongful death action where death occurs after viability)).

Idaho Constitutional Convention Call (S. Con. Res. 132, 45th Legis. 2d Sess., 1980 Idaho Sess. Laws 1005):

> [R]equest[s] that the Congress . . . call a constitutional convention for the specific and exclusive purpose of proposing an amendment . . . [to provide that]:
> (a) From the moment of conception a person shall be guaranteed all personal rights extended to all individuals under the constitution and laws of the United States of America and the state or states of residence and only under extreme circumstances shall it be otherwise; namely, to save the life of the mother, or other extenuating circumstances where at least two consulting physicians, one not having previously been involved in the case, and after due and thorough consultation with all persons having the legal right to be involved, find it is necessary and just that the life of the unborn shall be terminated.
> (b) Provide that the several states shall have the power to enforce such an amendment, and establish priority of life by appropriate legislation.

Illinois:

720 ILL. COMP. STAT. ANN. § 510/1 (Smith-Hurd 1993)(preamble to Illinois Abortion Law of 1975):

> [T]he General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State.

740 ILL. COMP. STAT. ANN. § 180/2.2 (Smith-Kurd 1993) (amending wrongful death statute to allow wrongful death action to be brought on behalf of an unborn child without regard to the stage of pregnancy when the child is injured or whether there is a live birth).

720 ILL. COMP. STAT. ANN. § 5/9-1.2(b)(l) (Smith-Hurd 1993) (defining "unborn child" as "any individual of the human species from fertilization until birth").

720 ILL. COMP. STAT. ANN. §§ 5/9-1.2, 5/9-2.1, 519-3.2, 5/12-3.2, 5/12-4.4 (Smith-Hurd 1993) (amending criminal CODE to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age).

Indiana:

Cheaney v. State, 285 N.E.2d 265, 268 (1972) *cert. denied*, 410 U.S. 991 (1973) (construing state abortion law) ("[i]t is now established that some sort of independent life begins at conception," rejecting quickening and viability as outdated and arbitrary distinctions).

Kansas:

City of Wichita v. Tilson, Case No. 91 MC 108 (Sedgwick County Court, July 21, 1991) (accepting necessity defense) (slip op. at 22) ("the medical and scientific communities ... are of the opinion that life in homo sapiens begins at conception"), *appeal sustained without discussion of this point*, 855 P.2d 911, 918 (Kan. 1993), *cert. denied*, Nov. 16, 1993, 62 U.S. L.W. 3348 (Docket 93-467).

State v. Harris, 136 P. 264, 267 (Kan. 1913) (construing state abortion law):

> The arbitrary refusal of the common law to regard the foetus as alive . . . until quick[ening] was based on no sound physiological principle . . . . [T]he movement recognized by the mother, and which is supposed to prove that her unborn child is alive, is merely one evidence of life, whereas unless life had existed long before the most disastrous consequences to the mother must have already been suffered . . . .
>
> For many purposes the law regards the infant as alive from its conception.

Kentucky:

KY. REV. STAT. ANN, § 311.710(5) (Michie/Bobbs-Merrill 1990):

> If . . .the United States constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.

KY. REV. STAT. ANN. §§ 311.720(5), (6) (Michie/Bobbs-Merrill 1990) (abortion regulations) (defining "fetus" as "a human being from fertilization until birth" and "human being" as "any member of the species homo sapiens from fertilization until death").

Hollis v. Commonwealth, 652 S.W.2d 61, 66-67 (Ky. 1983) (Wintersheimer, J., dissenting) (noting that "[b]iologically speaking, human life begins at the moment of conception" and that "[m]edical authority has long recognized that the child is in existence from the moment of conception").

Kentucky Constitutional Convention Call (H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401):

> [R]equest[s] the Congress ... to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution . . . :
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> Section 2. No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Louisiana:

LA. REV. STAT. ANN. § 14:2(7) (West 1986) (defining "person" for purposes of criminal code to include "a human being from the moment of fertilization and implantation").

LA. REV. STAT. ANN. §§ 14:32.5-32.8 (West 1992 Supp.) (defining fetal homicide offenses).

Danos v. St. Pierre, 383 So. 2d 1019, 1027 (La. Ct. App. 1980), *aff'd*, 402 So. 2d 633 (La. 1981) (Lottinger, J., concurring):

> This definition [LA. REV. STAT. ANN. § 14:2(7) (West 1986)] added to the Criminal Code in 1976, reflects a legislative intent to classify an unborn child as a "person" for purposes of violent criminal conduct like homicide and battery. The definition reveals an express recognition by the legislature that life begins at the moment of conception and that this form of life can indeed be the victim of a harm, i.e., a murder or battery.

1991 La. Acts. § 1, No. 26 (amending state abortion law):

> It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

Johnson v. New Orleans Light and Traction Co., Docket 9048 (La. App. Orl. Dec. 10, 1923) (rejecting live birth and viability requirements in cause of action for wrongful death) (quoted with approval in Danos v. St. Pierre, 402 So. 2d 633, 639 (La. 1981)):

> The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe the infant is a child from the moment of conception although life may be in a state of suspended animation, the sub-

> ject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.

Danos v. St. Pierre, 383 So. 2d 1019, 1029 (La. Ct. App. 1980), *aff'd*, 402 So. 2d 633 (La. 1981) (rejecting live birth requirement in action for wrongful death of a viable unborn child) (Lottinger, J., concurring):

> Viability has not been the controlling factor in some previous Louisiana cases allowing recovery [for wrongful death of a stillborn child], and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cutoff point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable.

Louisiana Constitutional Convention Call (Res. of July 16, 1976, S. Con Res. 70):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; requests state legislative bodies to apply to Congress to call a convention to propose this constitutional amendment; grants Congress and the states the power to enforce the amendment.

Maryland:

Damasiewicz v. Gorsuch, 79 A.2d 550, 559 (Md. 1951) (recognizing cause of action for prenatal injuries) ("from a medical point of view, a child is alive within the mother before the time arrives when it can live apart from her"), *Id.* at 560 (theory that "an unborn child is a part of the mother" is "an outworn point of view, now rejected by modern medicine").

Group Health Ass'n v. Blumenthal, 453 A.2d 1198, 1207 (Md. 1983) ("a cause of action lies for the wrongful death of a child born alive who dies as a result of injuries sustained while *en venire sa mere*") (rejecting viability requirement).

Massachusetts:

Commonwealth v. Cass, 467 N.E.2d 1324, 1325 (Mass. 1984) (viable fetus is a "person" within meaning of vehicular homicide statute):

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered

> to be other than a human being, and therefore a person, first within, and then in the normal course outside, the womb . . . . By the use of the term[] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

Torigian v. Watertown News Co., 225 N.E.2d 926, 927 (Mass. 1967) (rejecting viability requirement in wrongful death action where death follows live birth).

Massachusetts Constitutional Convention Call (Act of June 8, 1977, H.R. 5984):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Michigan:

Womack v. Buchhorn, 187 N.W.2d 218, 222 (Mich. 1971) (recognizing cause of action for prental injuries and rejecting viability requirement because "a child has a legal right to begin life with a sound mind and body").

O'Neill v. Morse, 188 N.W.2d 785 (Mich. 1971) (recognizing cause of action for wrongful death of a viable stillborn child).

Larkin v. Cahalan, 208 N.W.2d 176, 179 (Mich. 1973) (construing state abortion law) ("statutes proscribing manslaughter by abortion are designed to protect human life and carry the necessary implication that that life, the destruction of which is punishable as manslaughter, is human life").

Minnesota:

MINN. STAT. ANN. §§ 609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (West 1987 & 1992 Supp.) (amending criminal code to include a broad range of crimes, including homicide, that can be committed against an unborn child, regardless of gestational age).

Verkennes v. Corniea, 38 N.W.2d 838, 840 (Minn. 1949) (rejecting live birth requirement in wrongful death action) (quoting with approval federal district court opinion in Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D.D.C. 1946), where court said "[f]rom the viewpoint of the civil law and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception—which it is in fact").

Missouri:

MO. ANN. STAT. § 1.205.1(1) (Vernon Supp. 1992) (preamble to Missouri Abortion Law) ("[t]he life of each human being begins at conception").

MO. ANN. STAT. § 188.015(6) (Vernon Supp. 1992) (abortion regulations) (defining "unborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development").

Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. 1972) (construing criminal abortion law) (accepting stipulation that "unborn children have all the qualities and attributes of adult human persons differing only in age or maturity" and that "[m]edically, human life is a continuum from conception to death").

Missouri Constitutional Convention Call (Res. of Apr. 24, 1975, S. Con. Res. 7):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function, or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Montana:

MONT. CODE ANN. § 50-20-102 (1993) (statement of legislative purpose and intent—abortion regulations):

> The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extend the protection of the laws of Montana in favor of all human life.

MONT. CODE ANN. § 41-1-103 (1993) ("[a] child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth").

Nebraska:

NEB. REV. STAT. § 28-325 (1989) (legislative findings in statutes regulating abortion) (legislators "deplore the destruction of the unborn human lives which has and will occur ... as a consequence of the United States Supreme Court's decision," and lament their inability "to protect the life, health, and welfare of pregnant women and unborn human life").

Hans v. State, 22 N.W.2d 385, 389, (Neb. 1946) *vacated on reh'g* 25 N.W.2d 35 (Neb. 1946) (statute defining offense of "foeti-

cide" meant "the unlawful destruction of an unborn child, in ventre sa mere, at any stage of gestation").

Nebraska Constitutional Convention Call (Res. of Apr. 21, 1978, Legis. Res. 152):

> Legislature . . . petition[s] . . . Congress ... to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution of the United States . . . .
>
> ARTICLE
>
> *Section 1.* With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, inlcuding their unborn offpsring at every stage of their biological development.
>
> *Section 2.* No unborn child shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> *Section 3.* The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Nevada:

White v. Yup, 458 P.2d 617, 623 (Nev. 1969) (recognizing cause of action for prenatal injuries and for the wrongful death of a viable, stillborn child) (proposition that "[a]n unborn child is a part of its mother until birth and thus has no juridical existence" "has no scientific or medical basis in fact").

Nevada Constitutional Convention Call (S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014):

> [L]egislature requests . . . Congress . . . to call a convention limited to proposing an amendment to the Constitution . . . to protect human life by restricting abortion [subject to exceptions in cases where the pregnancy results from rape or incest and where continuation of the pregnancy would seriously endanger the life of the mother].

New Hampshire:

Bennett v. Hymers, 147 A.2d 108, 110 (N.H. 1958) (rejecting viability requirement in cause of action for prenatal injuries) ("[w]e adopt the opinion that the fetus from the time of conception becomes a separate organism and remains so throughout its life").

Wallace v. Wallace, 421 A.2d 134, 136 (N.H. 1980) (wrongful death action) ("[t]o deny a nonviable fetus a [wrongful death] cause of action is not to deny that life begins with conception").

New Jersey:

Smith v. Brennan, 157 A.2d 497, 502 (N.J. 1960) (rejecting viability requirement in cause of action for prenatal injuries)

("[m]edical authorities have long recognized that a child is in existence from the moment of conception, and not merely a part of its mother's body"):

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of separate existence. In the first place, age is not the sole measure of viability, and there is no real way of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application . . . . In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore, should be given the same opportunity for redress.

Id. at 504.

Gleitman v. Cosgrove, 227 A.2d 689, 696 n.3 (1967) (Francis, J., concurring) (rejecting cause of action for wrongful life) ("[i]t was noted 30 years ago that the increase in knowledge of embryology had revealed that the child has separate existence from the moment of conception"), *overruled,* Bermarr v. Allan, 404 A.2d 8 (NJ. 1979) (reorganizing action).

New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

New York:

New York City Health and Hosp. Corp., 286 N.E.2d 887, 888 (N.Y. 1972), *appeal dismissed,* 410 U.S. 949 (1973) (rejecting challenge to pre-Roe abortion law which allowed abortion on demand through the twenty-fourth week of gestation but recognizing that human life begins at conception):

> It is not effectively contradicted, if it is contradicted at all, that modern biological disciplines accept that upon conception a fetus has an independent genetic "package" with potential to become a full-fledged human being and that it has an autonomy of development and character although it is for the period of gestation dependent upon the mother. It is human, if only because it may not be characterized as not

> human, and it is unquestionably alive.

Kelly v. Gregory, 125 N.Y.S.2d 696, 697 (N.Y. App. Div. 1953) (rejecting viability requirement in cause of action for prenatal injuries) ("legal separability should begin where there is biological separability" and "separability begins at conception"):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions exist, of course, that have that result at every stage of its life, postnatal as well as prenatal.

Id. at 697.

North Carolina:

DiDonato v. Wortman, 358 S.E.2d 489, 496 (N.C. 1987) (recognizing cause of action for wrongful death of a viable unborn child) ("[t]he public policy of this state as expressed by the legislature in our statutes recognizes that an unborn infant is a person") (Martin, J., concurring in part and dissenting in part).

Corkey v. Edwards, 322 F. Supp. 1248, 1252 (W.D.N.C. 1971), *vacated and remanded,* 410 U.S. 950 (1973) (construing criminal abortion statute):

> Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosones. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

North Dakota:

N.D. CENT. CODE §§ 12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age).

Statute providing that "[a] child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth" was intended "to ensure and to protect the interests of a child subsequent to its conception but prior to its birth," Hopkins v. McBane, 359 N.W.2d 862, 864 (N.D. 1984).

Ohio:

Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law) (holding that human life is entitled to federal constitutional protection from conception) ("a new life comes into being with the union of human egg and sperm cells" and "[s]uch terms as 'quick' or 'viable', which are frequently encountered in legal discussion, are scientifically imprecise and without recognized medical meaning").

Williams v. Marion Rapid Transit, 87 N.E.2d 334, 340 (Ohio 1949) (recognizing cause of action for prenatal injuries):

> To hold that the plaintiff in the instant case [a viable unborn child] did not suffer an injury in her person would require this court to announce that as a matter of law the infant is part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right [to a remedy] conferred by the [Ohio] Constitution upon all persons, by the application of a time worn fiction not founded on fact and within common knowledge untrue and unjustified.

The court also quoted with approval WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 31, 189 (1941). Professor Prosser stated, "So far as duty is concerned, if existence at the time [of injury] is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and for many purposes its existence is recognized by the law." *Id.* at 339.

Oklahoma:

OKLA. STAT. ANN. tit. 63, § 1-730(2) (West 1984) (abortion regulations) (defining "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth . . . .").

Evans v. Olson, 550 P.2d 924, 926 (Okla. 1976) (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions) ("there is no medical or scientific basis" for the proposition that "an unborn child has no judicial existence apart from its mother").

Oregon:

State v. Ausplund, 167 P. 1019, 1022-23 (Or. 1917) (construing criminal abortion law):

> 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.

Mallison v. Pomeroy, 291 P.2d 225, 228 (Or. 1955) (recognizing cause of action for prenatal injuries) ("[i]n Oregon we have recognized by statute the separate entity of an unborn child by protecting him in his property rights and against criminal conduct . . . .").

Libbee v. Permanente Clinic, 518 P.2d 636 (Or. 1974) (recognizing cause of action for the wrongful death of a viable stillborn child).

Pennsylvania:

18 PA. CONS. STAT. ANN. § 3203 (1992 Supp.) (abortion regulations) (defining "unborn child" and "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth").

Amadio v. Levin, 501 A.2d 1085, 1087 (Pa. 1985) (rejecting live birth requirement in wrongful death actions) ("a child en ventre sa mere is a separate individual from the moment of conception").

Sinkler v. Kneale, 164 A.2d 93, 96 (Pa. 1960) (rejecting viability requirement in cause of action for prenatal injuries) (viability has "little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception").

Pennsylvania Constitutional Convention Call (H.R. 71, 1978 Gen. Assembly, 1978 Pa. Laws 1431):

> [A]pplication to the Congress . . . to call a convention for drafting and proposing an amendment to the Constitution . . . to guarantee the right to life to the unborn fetus by doing the following:
>
> (a) With respect to the right to life guaranteed in the United States Constitution, provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life.
>
> (b) Provide that Congress and the several states shall have concurrent powers to enforce such an amendment by appropriate legislation.
>
> * * *
>
> (d) Nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Rhode Island:

R.I. GEN. LAWS § 11-3-4 (1981) (1973 R.I. Pub. Laws 68-70, ch. 15, §2) (criminal abortion statute):

> It shall be conclusively presumed in any action concerning the construction, application or validity of sec. 11-3-1 [prohibiting abor-

> tion], that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the Constitution . . . .

Sylvia v. Gobeille, 220 A.2d 222, 223-24 (R.I. 1966) (rejecting viability requirement in cause of action for prenatal injuries) (noting "the medical fact that a fetus becomes a living human being from the moment of conception" and rejecting viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence").

Presley v. Newport Hosp., 365 A.2d 748, 751 (R.I. 1976) (rejecting live birth requirement in wrongful death of a viable unborn child) (citing with approval the civil law proposition that "from the moment of conception a separate organism with its own identity comes into existence" and the medical proposition that "an ovum, once it is fertilized, is a separate living entity"):

> [V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. It seems that if live birth is to be characterized, as it so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable *non sequitur.*

Id. at 753-54 (*dicta* in plurality opinion) (*disapproved* Miccolis v. Arnica Mutual Ins. Co., 587 A.2d 611 (R.I. 1991)).

Rhode Island Constitutional Convention Call (Act. of Apr. 21, 1977, H.R. 5150):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent power to enforce such an amendment.

South Dakota:

State v. Munson, 201 N.W.2d 123, 126 (S.D. 1972), *vacated and remanded,* 410 U.S. 950 (1973) (construing criminal abortion law) (citing with approval holding in Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970), that human life is entitled to federal constitutional protection from conception).

S.D. CODIFIED LAWS ANN. § 21-5-1 (1987) (amending wrongful

death statute to include "an unborn child" without regard to gestational age).

S.D. CODIFIED LAWS ANN. § 22-17-6 (1988) ("[a]ny person who intentionally kills a human fetus by causing an injury to its mother ... is guilty of a Class 4 felony").

S.D. CODIFIED LAWS ANN. § 26-1-2 (1992) ("[a] child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth").

Texas:

Thompson v. State, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) *vacated and remanded*, 410 U.S. 950 (1973) (construing criminal abortion law):

> The State of Texas is committed to preserving the lives of its citizens so that no citizen "shall be deprived of life, . . . except by the due course of the law of the land." [Citation omitted]. [The Texas abortion law] is designed to protect fetal life . . . and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.

Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth), *rev'g* 413 S.W.2d 825 (Tex. Civ. App. 1967) (denying cause of action) and *app'g* dissenting opinion of Justice Cadena, 413 S.W.2d at 828 ("medical science . . . consider[s] that life begins at conception"), *id.* at 829 ("legalistic concept that the unborn child is but a part of its mother" is "contrary to scientific fact and common sense").

Witty v. Am. Gen. Capital Distrib., Inc., 727 S.W.2d 503, 505 (Tex. 1987) (denying cause of action for wrongful death of viable child who was stillborn but recognizing "the fetus as having an existence separate from its mother").

Delgado v. Yandell, 468 S.W.2d 475 (Tex. Civ. App. 1971), *writ ref'd n.r.e.* 471 S.W.2d 569 (Tex. 1971) (per curiam) (rejecting viability requirement in cause of action for prenatal injuries).

Utah:

UTAH CODE ANN. § 76-7-301.1(1) (1992) (preamble to Utah abortion law):

> It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Sections 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by

> the state of Utah pursuant to the provisions of the Utah Constitution.

§ 76-7-301.1(2):

> The state of Utah has a compelling interest in the protection of the lives of unborn children.

§ 76-7-301.1(3):

> It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.

UTAH CODE ANN. § 76-5-201(1) (1992 Supp.) (defining offense of criminal homicide as causing "the death of another human being, including an unborn child").

Utah Constitutional Convention Call (H.R.J. Res. 28, 42nd Legis., Reg. Sess., 1977 Utah Laws 1317, 1318):

> [A]pplies to the Congress ... to call a convention for the purpose of drafting and submitting for ratification by the states, ... an amendment to the Constitution that will guarantee to every human life, from the moment of fertilization throughout its natural existence, in every state, territory, and possession of the United States, the full protection of all laws respecting life, excepting an unborn child whose mother's life would otherwise be lost.

Virginia:

Kalafut v. Gruver, 389 S.E.2d 681, 683-84 (Va. 1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth) (noting "developments in medical science, especially in the field of embryology," court held that "an action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established").

Wisconsin:

WIS. STAT. ANN. § 940.04(6) (West 1982) (criminal abortion statute defining "unborn child" as "a human being from the time of conception until it is born alive")

Puhl v. Milwaukee Auto. Ins. Co., 99 N.W.2d 163, 170 (Wis. 1959) (rejecting viability requirement in cause of action for prenatal injuries), *overruled on other grounds, In re* Estate of Stromsted, 299 N.W.2d 226 (Wis. 1980):

> The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and nonviability, and fails to recognize the biological fact there is a living human being before viability. A child is no more a part of its mother before it becomes

> viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.

Kwaterski v. State Farm Mut. Auto. Ins. Co., 148 N.W.2d 107, 111 (Wis. 1967) (rejecting born alive requirement in wrongful death actions) (assertion that "[a] child has no juridical existence apart from its mother" has "no scientific or medical basis in fact").