

# NOTES

## CRIMINAL ABORTION REVISITED

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I haven't sorted out the penalties . . . I'm for the sanctity of life, and once that illegality is established, then we can come to grips with the penalty side . . .<sup>1</sup>

I think what the Vice President is saying is that he's prepared to brand a woman a criminal for making this decision.<sup>2</sup>

Frankly, [the Vice President] thinks that a woman in a situation like that would be more properly considered an additional victim, perhaps the second victim. That she would need help and love and not punishment.<sup>3</sup>

### INTRODUCTION

In contrast to 1988, when abortion played a minor role in the presidential campaign, 1989 was the year of abortion in American politics.<sup>4</sup> In the summer of 1989, after fifteen years of invalidating the strictest of state abortion regulations,<sup>5</sup> the Supreme Court upheld Missouri's highly

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\* Dedicated to George C. Buell (1930-1989) who said not to lose my moral compass in the law.

<sup>1</sup> Transcript of First T.V. Debate Between Bush and Dukakis, N.Y. Times, Sept. 26, 1988, at A16 (remarks of Vice-President George Bush).

<sup>2</sup> Id. at A17 (response of Governor Dukakis).

<sup>3</sup> Boyd, Bush Camp Offers a Clarified Stand About Abortions, N.Y. Times, Sept. 27, 1988, at A1 (remarks of Bush Campaign Chairman James Baker).

<sup>4</sup> See Bronner, With Richer Backers, Rights Groups Cash In, Boston Globe, Dec. 30, 1989, at 1 (discussing increased contributions in 1989 to groups supporting and opposing abortion rights); Crane, Pro-Choicers Aim to Strike Down '68 Maryland Law, Wash. Times, Dec. 6, 1989, at B3 (describing campaign in Maryland to pass abortion-rights law); Wicker, The Voters' Choices, N.Y. Times, Nov. 7, 1989, at A23 (discussing significance of abortion in New Jersey and Virginia gubernatorial elections); Berke, Joining Battle, The Abortion-Rights Movement Has Its Day, N.Y. Times, Oct. 15, 1989, § 4, at 1 (describing vigorous battles over abortion legislation in various states); Hinds, Pennsylvania Under Abortion Spotlight, N.Y. Times, Sept. 20, 1989, at A16 (describing intense lobbying efforts concerning Pennsylvania legislation); Edsall, State Legislators Vent Anxiety Over Abortions, Wash. Post, Aug. 10, 1989, at A4 (describing national meeting of state legislators supporting abortion rights); Szegedy-Maszak, Calm, Cool and Beleaguered, N.Y. Times, Aug. 6, 1989, § 6 (Magazine), at 17 (profile of Faye Wattleton, President of Planned Parenthood Federation of America); Yost, As Abortion Rights Groups Rally Support, Foes Set Legislative Drive in 4 States, Wash. Post, July 5, 1989, at A10 (describing growing abortion battles in several states).

<sup>5</sup> See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 759-71 (1986) (invalidating Pennsylvania law requiring physicians to: (1) inform woman of risks of abortion, availability of prenatal care, and agencies willing to assist in pregnancy; (2) report information about woman seeking abortion; and (3) attempt to preserve life of fetus); Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 433-51 (1983) (invalidating Ohio law requiring: (1) that all abortions after first trimester be performed in hospital; (2)

restrictive abortion law in *Webster v. Reproductive Health Services*.<sup>6</sup> Our national abortion debate, which had been prominent since the Court's 1973 recognition of a woman's constitutional right to abortion in *Roe v. Wade*,<sup>7</sup> intensified and grew more urgent. Both those supporting and those opposing abortion rights sensed an approaching critical point in the Court's abortion jurisprudence that might lead to a new resolution of the battle initiated by *Roe*. In part, the two sides even cast *Webster* as decisive of the constitutional question<sup>8</sup>—as returning abortion to the states. Massive resources were brought to bear in an effort to influence both the Court's and state legislatures' treatment of abortion.<sup>9</sup>

This national debate, both at its loudest in 1989 and as it continued through 1990 and 1991,<sup>10</sup> has been nothing less than "a clash of abso-

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parental consent or court order for abortions for woman under 15; (3) that physician inform woman of viability of fetus, risks of abortion, and availability of state assistance; and (4) 24-hour waiting period between woman's consent and abortion); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67-84 (1976) (invalidating sections of Missouri law requiring: (1) spouse's written consent unless abortion necessary to preserve woman's life; (2) parental consent for woman under 18; (3) use of procedure other than saline amniocentesis after 12 weeks; and (4) physician's effort to preserve fetus); text accompanying notes 148-62 *infra* (discussing Court's treatment of Post-*Roe* regulation).

<sup>6</sup> See 492 U.S. 490, 522 (1989).

<sup>7</sup> See 410 U.S. 113, 154 (1973).

<sup>8</sup> See Estrich & Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. Pa. L. Rev. 119, 119 (1989) (noting that both sides viewed *Webster* as victory for prolife movement and defeat for prochoice advocates).

<sup>9</sup> See sources cited in note 4 *supra*; see also Toner, 200,000 Demonstrate Against Abortion, N.Y. Times, Apr. 29, 1990, at 26 (describing antiabortion rally in Washington, D.C.); Bronner, Throngs Rally in D.C. to Keep Abortion Legal, Boston Globe, Apr. 10, 1989, at 1 (describing prochoice rally in Washington, D.C.).

<sup>10</sup> The debate in 1990 and 1991 focused primarily on the views of President Bush's nominees for the Supreme Court, Justices Souter and Thomas. For evidence of the intense focus on Justice Souter's possible abortion views, see Marcus, Souter Questions Federal Defense of Abortion Counselling Limits, Wash. Post, Oct. 31, 1990, at A9 (describing recently confirmed Justice's questions from bench in abortion case); Lewis, 2 Groups Oppose Souter at Hearing, N.Y. Times, Sept. 19, 1990, at A24 (describing opposition of National Abortion Rights Action League and Planned Parenthood to nominee); Weyrich, Feminist Pro-Choicers Assail Souter, Wash. Times, Sept. 19, 1990, at A3 (describing opposition of prochoice forces to nominee); Bronner, Souter Says His Mind Open on *Roe v. Wade*, Boston Globe, Sept. 15, 1990, at 1 (nominee testifies on abortion). For similar evidence with respect to Justice Thomas, see Loth, A GOP Split on Abortion, Boston Globe, July 14, 1991, at 69 (describing conflict within Republican Party); Women's Caucus Opposes Thomas, Wash. Post, July 14, 1991, at A6 (describing National Women's Political Caucus's opposition to nominee); Shipp, Feminists Oppose Nominee to Court, N.Y. Times, July 6, 1991, at A7 (describing National Organization for Women's disapproval of nomination); Mann, Thomas' Abortion Views, Wash. Post, July 5, 1991, at D3 (criticizing antiabortion views of nominee); Farrell, Abortion Rights Group is Opposed to Thomas Nomination, Boston Globe, July 3, 1991, at 1 (describing National Abortion Rights Action League's opposition); Lewis, Court Nominee is Linked to Anti-Abortion Stand, N.Y. Times, July 3, 1991, at A1 (describing nominee's past praise of article arguing that *Roe* was immoral and violated natural law); Ceol, Pro-Choice Group Slams Thomas, Wash. Times, July 3, 1991, at A6 (describing opposition of prochoice forces to nominee).

lutes, of life against liberty.”<sup>11</sup> Opponents of abortion rights denounce the killing of innocent children, while supporters of free access to abortion depict a return to back-alley, coat-hanger abortions.<sup>12</sup> The power of both the rhetoric and the deeply held beliefs that motivate it has captured the discussion of abortion in America. With no compromise conceivable between the two sides, each seems to have cast the Supreme Court as the final arbiter of absolute moral truth on the abortion question. Indeed, while many strive to influence the outcome in their favor, some seem to be looking to the Justices to resolve an issue perceived as confounding.<sup>13</sup> Consequently, the nation now holds a great magnifying glass over the Court in an attempt to discern the slightest change in the shape of the constitutional right to privacy.<sup>14</sup>

The cost of this intense focus on the Supreme Court and the morality of abortion rights has been the neglect of both the history of state abortion laws and the practical and theoretical implications of making abortion a crime.<sup>15</sup> Americans in general and lawmakers in particular

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<sup>11</sup> L. Tribe, *Abortion: The Clash of Absolutes* 3 (1990).

<sup>12</sup> See Johnson, *Foes of Abortion View “Right to Die” as Second Battle Over Life and Death*, N.Y. Times, July 31, 1990, at A8 (discussing how some abortion opponents now oppose right-to-die movement); Balz & Marcus, *In Year Since Webster, Abortion Debate Defies Predictions*, Wash. Post, July 3, 1990, at A1 (discussing abortion rights activists’ efforts to cast issue as state intrusion into matters of personal choice); Levin, *With Thin Staff and Thick Debt, Anti-Abortion Group Faces Struggle*, N.Y. Times, June 11, 1990, at A16 (quoting abortion opponents talking about murder of babies); Toner, *supra* note 9, at 26 (same); McNamara, *Taking Stock of the Struggle*, Boston Globe, Dec. 31, 1989, at 1 (giving extensive profiles of various figures on both sides of debate); Price, *Pro-Lifers Plan to Take “Cemetery” Across U.S.*, Wash. Times, Nov. 10, 1989, at B4 (describing plan of abortion opponents to take “cemetery of the innocents” on tour across country).

<sup>13</sup> See generally Brief of Amici Curiae on Behalf of 608 State Legislators from 32 States, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (imploping Court not to force legislatures to resolve difficult conflict between states’ interests and women’s rights).

<sup>14</sup> See *Roe v. Wade*, 410 U.S. 113, 152-54 (1973) (holding constitutional right of privacy includes abortion decision); *Griswold v. Connecticut*, 381 U.S. 479, 483-86 (1965) (giving first thorough explication of constitutional right of privacy); see also sources cited in note 10 *supra* (discussing close scrutiny of Justices Souter’s and Thomas’s views of constitutional right of privacy).

<sup>15</sup> The prospect of a new era of criminal-abortion laws in the United States poses a host of vital questions—legal, political, and moral—demanding serious attention. Among the most pressing issues are: whether the criminal law can operate effectively in the area of abortion; whether it ought to operate in this area at all; what such legislation would look like if enacted; how and against whom criminal-abortion laws would be enforced; and whether our society has considered the implications of and is prepared to impose this dramatic legal sanction. Thorough treatment of all these issues is beyond the scope of this Note.

Of the many important problems not covered in this Note, the most significant is the question how to treat the conduct of the doctor or other individual who performs the abortion. Abortionists, as the providers of abortion were known, were the focus of the states’ enforcement efforts prior to *Roe* and are the focus of the new abortion laws as well. See J. Bates & E. Zawadzki, *Criminal Abortion 35-99* (1964) (describing pre-*Roe* abortionist and state efforts to

have not considered fully the legal implications of a serious reformulation or wholesale destruction of *Roe*. If the day does come when such a decision is handed down, Americans, whether they commiserate or celebrate, will have to wake up the next morning and decide what to do. And one need look no further than our state legislatures, which in response to *Webster* have enacted legislation strikingly similar to pre-*Roe* law,<sup>16</sup> to realize the impact of such a Supreme Court ruling.

This Note focuses on the issue that tripped up then-Vice-President Bush in the 1988 campaign debate: the state's application of the criminal law as a sanction against women who choose to have abortions. History reveals that pre-*Roe* criminal-abortion law—both by its terms and in its application—expressed an incoherent attitude toward the culpability of these women.<sup>17</sup> While criminal-abortion laws treated the abortionist as a serious felon, sending him to prison for up to twenty years,<sup>18</sup> the same

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prosecute him); N. Davis, *From Crime to Choice* 89 (1985) (describing pre-*Roe* abortionist); text accompanying notes 199-257 *infra* (discussing post-*Webster* laws). For discussions of modern problems involving the law's treatment of doctors and abortion, see *Colautti v. Franklin*, 439 U.S. 379, 394-401 (1979); *People v. Belous*, 71 Cal. 2d 954, 972-73, 458 P.2d 194, 206, 80 Cal. Rptr. 354, 366 (1969), cert. denied, 397 U.S. 915 (1970); Asaro, *The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions: The Use and Abuse of Medical Discretion*, 6 Harv. Women's L.J. 51, 51-93 (1983); Note, *Special Project: Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 Vand. L. Rev. 597, 697-708 (1986); Note, *Criminal Liability of Physicians: An Encroachment on the Abortion Right?*, 18 Am. Crim. L. Rev. 591, 591-92, 594-615 (1981); Note, *Viability and Fetal Life in State Criminal Abortion Laws*, 72 J. Crim. L. & Criminology 324, 338-43 (1981).

<sup>16</sup> See text accompanying notes 199-257 *infra*. The Rehnquist Court has made clear that Congress and the state legislatures will bear increasing responsibility for settling the issues of our day. Many of the Court's recent decisions, perhaps more so than those of earlier Courts, invite not further constitutional argument, but rather the rough-and-tumble arguments of state legislative policy. See, e.g., *Harmelin v. Michigan*, 111 S. Ct. 2680, 2701-02 (1991) (declining to find unconstitutional as cruel and unusual punishment Michigan sentence of life imprisonment without parole for drug possession); *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2429 (1991) (declining to apply first amendment to prevent New York libel action for fabricated quotations); *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043-44 (1991) (declining to find certain Alabama punitive damage awards per se violative of due process); *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705-08 (1990) (denying first amendment challenge to Ohio libel action for certain statements of opinion); *Osborne v. Ohio*, 110 S. Ct. 1691, 1695-1703 (1990) (upholding Ohio child pornography legislation); *Employment Div., Dept. of Human Resources v. Smith*, 494 U.S. 872, 890 (1990) (sustaining application of Oregon drug law against religious peyote use in face of first amendment challenge); see also *Oregon Peyote Law Leaves 1983 Defendant Unvindicated*, N.Y. Times, July 9, 1991, at A14 (Oregon passed statute in wake of *Smith* decision to provide exception for peyote use for religious purposes).

<sup>17</sup> See text accompanying notes 24-133 *infra*.

<sup>18</sup> Every state, until the 1960s, made the performance of an abortion—by instrument or through the supply of abortifacient substances—a felony. See generally J. Mohr, *Abortion in America* 3-226 (1978) (describing hegemony of criminal-abortion laws by end of nineteenth century). The penalty could be as stiff as 20 years. See Note, *Criminal Law—Abortion*, 23 S. Cal. L. Rev. 523, 523 (1950).

statutes either did not cover the woman seeking an abortion,<sup>19</sup> or, if the statutes did deem her a criminal, prosecutors and courts refused or neglected to hold her liable criminally.<sup>20</sup> The law instead cast women as victims of the criminal conduct of others and sometimes, paradoxically, of themselves.<sup>21</sup> This Note's project, therefore, is to document the progression of criminal-abortion laws and, by providing a moving picture over time, to demonstrate the implications of recriminalizing abortion today.<sup>22</sup>

A law that punishes only the physician but not the woman who seeks an abortion is incoherent and lacks any sound policy justification. This incoherence is a distinctive characteristic of both nineteenth-century criminal-abortion laws and their modern counterparts. One can explain the anomalous treatment of the woman's conduct as reflecting our culture's history of persistent denial of female autonomy and as perpetuating a now-dated perception of a woman who seeks an abortion as a victim, incapable of making moral decisions where her own body is concerned. In this way, abortion law threatens to remain in Victorian times, when the law's treatment of women in other areas has moved forward decisively.

This Note anticipates the Supreme Court placing the abortion issue squarely and finally in the political arena and responds to the invitation to advance political argument on abortion by beckoning those who would support criminal-abortion laws to join a debate. If criminal-abortion laws exempt women from their ambit because of a deeply rooted paternalism<sup>23</sup> that denies women the status of fully autonomous citizens,

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<sup>19</sup> See text accompanying notes 40-76 *infra*.

<sup>20</sup> See text accompanying notes 77-101 *infra*.

<sup>21</sup> See *id.*

<sup>22</sup> Glanville Williams wrote over thirty years ago:

[T]he introduction of criminal sanctions brings in moral problems distinct from the evaluation of the conduct in question. The true issue is not whether abortion is immoral but whether women who procure their own abortion and qualified surgeons who perform it for them should be punished through the instrumentality of the law of the land.

G. Williams, *The Sanctity of Life and the Criminal Law* 232-33 (1957).

<sup>23</sup> This Note uses paternalism in its pejorative, not its narrower, sense. The Supreme Court has recognized this distinction in meaning:

The law must often adjust the manner in which it affords rights to those whose status renders them unable to exercise choice freely and rationally. Children, the insane, and those who are irreversibly ill with loss of brain function, for instance, all retain "rights," to be sure, but often such rights are only meaningful as they are exercised by agents acting with the best interests of their principals in mind. It is in this way that paternalism bears a beneficent face, paternalism in the sense of a caring, nurturing parent making decisions on behalf of a child who is not quite ready to take on the fully rational and considered task of shaping his or her own life.

*Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (citation omitted). As this Note's argument will make clear, however, abortion laws are paternalistic in the pejorative sense. Here, government acts paternalistically but also is being patronizing: it legislates to protect a

as this Note demonstrates through historical analysis and argument, then the supporters of those laws must make a hard choice. They can embrace that paternalism as their own, thereby exposing their project both as wed to legislative motives our society no longer tolerates and as lacking the compelling claim about fetal life that these activists name as their sole inspiration. Or they can alter their strategy and hold the woman fully responsible to the criminal law, thereby leaving paternalism behind as well as consistently maximizing their professed goal of protecting fetal life. The second option, however, as President Bush and his campaign handlers well know, is a political impossibility, for the majority of Americans will not tolerate jailing women for exercising reproductive choices. Thus, criminal-abortion statutes, once exposed to the light of political debate that the Supreme Court soon might invite, ought to perish. If they instead live on in their incoherent state, and abortion law remains frozen in time, one is left to question the wisdom of believing that majoritarian politics will produce a just result when it comes to abortion.

Part I of this Note examines the history of the criminal law's treatment of women in the context of abortion. It first covers the common law's approach to the issue and then turns to the development of statutory abortion laws in the nineteenth century. By first describing the social dynamics leading to adoption of these statutes and next examining the jurisprudence of criminal abortion after the advent of statutory law, this Part documents the emergence and persistence of paternalistic treatment of women seeking abortions. Part I then turns to the twentieth century discussing a long dormant period in the abortion debate in the first half of the century and then a period of reform of the nineteenth-century statutory law beginning in the 1950s and leading up to the *Roe* decision.

Part II of this Note brings the issue of criminal abortion up to date by examining the status of abortion law since *Roe*. By demonstrating how the erosion of the principle set down in *Roe* commenced almost immediately after the decision and reached its apex with the recent adoption of new criminal-abortion laws in several states, this Part, when viewed against the background of Part I, reveals the *Roe* era to be a brief interlude in a remarkably consistent history of the legal treatment of women and abortion in our society. Part II first reviews the constitutional status of abortion laws in the decisions of the Supreme Court leading up to and including *Webster*. It then examines statutory developments since the *Webster* decision and the current status of those new

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group because of an erroneous assumption, grounded in stereotype, that members of that group cannot act in their own "best interests." Women acquire the legal status of "[c]hildren, the insane, and those who are irreversibly ill." See text accompanying notes 280-302 *infra*.

laws in the courts.

Part III of this Note joins the history of criminal abortion with the current state of the law to explore the implications for the present debate of our past experience with abortion law. This Part first discusses the persistence of the anomalous treatment of the woman's conduct as the most prominent feature of criminal-abortion laws, both in the past and today. It then poses the political dilemma that confronts the supporters of abortion statutes today. Next, it considers and rejects a variety of potentially sound justifications for the anomalous treatment of the woman's conduct that those supporters might advance. Finally, this Note concludes that if the proponents of criminal abortion cannot successfully portray their legislative schemes as coherent, anything less than a wholesale rejection of criminal-abortion laws represents a return to a legal regime that embraces and perpetuates the paternalistic and patronizing treatment of women.

## I

### THE HISTORY OF CRIMINAL ABORTION

#### A. *The Common Law*

While the brief history of the constitutional abortion right established by *Roe* seems dwarfed by over 130 years of criminalized abortion in America, illegal abortion is the true anomaly when compared to the scarcity of criminal sanctions for abortion at any time before the early 1800s. Abortion appears to have been practiced widely and condoned by societies dating at least to the ancient Greeks.<sup>24</sup> And this acceptance of abortion largely persisted through the era of the common law in England and the United States.

Two aspects of the common law's treatment of abortion are remarkable: most abortions were not criminal at common law, and those few that were criminal were viewed, in contrast to their later statutory counterparts, as crimes against the fetus, not the woman. Courts and commentators have given varying accounts of the precise common-law status of abortion, but all agree that the point of "quickening" was the critical stage with which the law was concerned.<sup>25</sup> Prior to quickening, the common law deemed abortion to be no crime at all for any party concerned,<sup>26</sup>

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<sup>24</sup> See J. Mohr, *supra* note 18, at 4 n.2.

<sup>25</sup> Quickening is the point at which the pregnant woman first feels the fetus move; while varying from woman to woman and from pregnancy to pregnancy in any given woman, the onset of quickening usually falls between the sixteenth and eighteenth week of pregnancy. See Means, *The Law of New York Concerning Abortion and the Status of the Fetus: A Case of (Cessation) of Constitutionality, 1664-1968*, 14 N.Y.L.F. 411, 412 (1968).

<sup>26</sup> See *Evans v. People*, 49 N.Y. 86, 90 (1872); G. Williams, *supra* note 22, at 149-52.

and American courts that adjudicated prosecutions for abortion at common law consistently adhered to this view.<sup>27</sup> Courts in several states dissented but acknowledged their contravention of the common law.<sup>28</sup> Furthermore, although abortionists were prosecuted for performing post-quickening abortions, no American case reports a common-law prosecution of a woman for procuring an abortion, either pre- or postquickening; dicta, however, runs both for and against the woman's liability.<sup>29</sup>

As do the courts, academic commentators agree that the common law did not view abortion prior to quickening as a crime.<sup>30</sup> One scholar goes further to argue that abortion was not a common-law crime even after quickening.<sup>31</sup> According to this view, American courts and commentators mistakenly relied on Coke's claim<sup>32</sup> that abortion after quickening was a "misprision" or common-law misdemeanor. A look beyond

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<sup>27</sup> See *Smith v. State*, 33 Me. 48, 55 (1851) ("If, before the mother has become sensible of its motion in the womb, [abortion] was not a crime; if afterwards, when it was considered by the common law, that the child had a separate and independent existence, it was held highly criminal."); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 265-66 (1845) (Shaw, C.J.) ("[N]o indictment will lie, for attempts to procure abortion with the consent of the mother, until she is quick with child."); *Commonwealth v. Bangs*, 9 Mass. 387, 388 (1812) ("[T]he averment that the woman was quick with child at the time is a necessary part of the indictment."); *State v. Cooper*, 22 N.J.L. 52, 58 (1849) ("[T]he procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law . . ."); see also *Eggart v. State*, 40 Fla. 527, 532, 25 So. 144, 145 (1898) (observing in dicta that quickening was operative stage under common law of abortion); *Lamb v. State*, 67 Md. 524, 533, 10 A. 208, 208 (1887) (same); *Edwards v. State*, 79 Neb. 251, 252, 112 N.W. 611, 612 (1907) (same); *In Re Vince*, 2 N.J. 443, 449, 67 A.2d 141, 144 (1949) (same); *State v. Hyer*, 39 N.J.L. 598, 599-600 (1877) (same); *Gray v. State*, 77 Tex. Crim. 221, 178 S.W. 337, 338 (1915) (same); Means, *supra* note 25, at 426-27 (eighteen jurisdictions agreed as to common-law view of abortion).

<sup>28</sup> See *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850) (quickening "is not . . . the law in Pennsylvania, and never ought to have been the law anywhere"); see also *Peoples v. Commonwealth*, 87 Ky. 487, 490, 9 S.W. 509, 510 (1888) (claiming that authority is divided but leaning toward quickening distinction); *Mitchell v. Commonwealth*, 78 Ky. 204, 206-10 (1879) (approving reasoning in *Mills* but feeling constrained to hold that woman must be quick with child); *State v. Slagle*, 83 N.C. 630, 632 (1880) (approving *Mills* and holding that common-law abortion crime may be committed at any stage of pregnancy).

<sup>29</sup> Compare *Smith*, 33 Me. at 55 (criminal acts may include those of mother herself) and *Vince*, 2 N.J. at 449, 67 A.2d at 144 (woman chargeable if child was quick) with *State v. Carey*, 76 Conn. 342, 351, 56 A. 632, 636 (1904) (woman not indictable as principal or accomplice at common law) and *In Re Vickers*, 371 Mich. 114, 118, 123 N.W.2d 253, 254 (1963) (common law did not hold woman liable for abortion).

<sup>30</sup> See N. Davis, *supra* note 15, at 42; L. Tribe, *supra* note 11, at 28; G. Williams, *supra* note 22, at 28; Means, *supra* note 25, at 412; Note, A Functional Study of Existing Abortion Laws, 35 Colum. L. Rev. 87, 87 n.2 (1935) [hereinafter Note, A Functional Study]; Note, Changing Abortion Laws in the United States, 7 J. Family L. 496, 505 (1967) [hereinafter Note, Changing Abortion Laws].

<sup>31</sup> Means, *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth Amendment Right About to Arise From the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?*, 17 N.Y.L.F. 335, 336-62 (1971).

<sup>32</sup> See E. Coke, *Third Institute* 50-51 (London 1648).



Coke's claim and into the case law itself, this argument maintains, reveals that abortion was an ecclesiastical crime in England and that, dicta notwithstanding, no English case held that abortion after quickening was even a common-law misdemeanor or "misprision."<sup>33</sup>

To the extent that it governed abortion at all, then, the common law appears to have focused primarily on the protection of life, with the quickening concept embodying a generally accepted notion of when life began.<sup>34</sup> Thus, the criminal law's intrusion after the point of quickening was seen as punishment for an offense against the fetus and a means of preserving fetal life.<sup>35</sup> This motivating principle, however, must not obscure the common law's general laissez-faire approach. Abortion was no crime at all in roughly the first four months of pregnancy; it may not have been one even after that; and, dicta notwithstanding, courts did not see the woman's conduct as deserving of punishment.<sup>36</sup> The only circumstance in which the common law punished abortion prior to quickening was if the abortion resulted in the woman's death,<sup>37</sup> which suggests a secondary purpose of the common law: deterrence of conduct that endangered women's lives.<sup>38</sup>

The common criminal law of abortion thus found a way to announce a moral principle about life *and* to recognize—perhaps even protect—women's widespread practice of abortion. Such an accommodation was unique to its era. Today, the law must contend with more sophisticated and scientifically justified views about when life begins and with the availability of safe abortion procedures. Modern opponents of abortion no longer are satisfied with the common-law distinction of "animation" or quickening but rather claim that protection of life, actual or potential, must begin at the moment of conception.<sup>39</sup> Because of modern

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<sup>33</sup> See Means, *supra* note 31, at 345-55. Means argues this point to show that abortion rights existed at the time the ninth amendment was enacted. See *id.* at 359; see also *Roe v. Wade*, 410 U.S. 113, 135-36 (1973) (agreeing with Means that it appears "doubtful that abortion was ever firmly established as a common-law crime even with respect to the destruction of a quick fetus").

<sup>34</sup> See *Evans v. People*, 49 N.Y. 86, 90 (1872) (" 'Quick' is synonymous with 'living,' and both are the opposite of 'dead.' The woman is not pregnant with a living child until the child has become quick."); Means, *supra* note 25, at 411-12 (discussing concept of when life began in Middle Ages and at common law).

<sup>35</sup> See *Smith v. State*, 33 Me. 48, 55 (1851); *State v. Loomis*, 89 N.J.L. 8, 9, 97 A. 896, 896 (1916), *aff'd*, 90 N.J.L. 216, 100 A. 160 (1917); *State v. Murphy*, 27 N.J.L. 112, 114 (1858); Note, *supra* note 18, at 523. But see *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850) ("It is not the murder of a living child which constitutes the offence, but the destruction of gestation by wicked means and against nature.").

<sup>36</sup> Cf. text accompanying notes 77-101 *infra* (discussing similar approach of courts applying statutory abortion law).

<sup>37</sup> See Means, *supra* note 25, at 437-38.

<sup>38</sup> See *id.*

<sup>39</sup> See text accompanying notes 221, 242, 252 *infra*. The Supreme Court in *Roe v. Wade*,

medicine, our society can neither protect the fetus while allowing free abortion nor justify restrictions on abortion as promoting women's health.

### *B. The Emergence of Criminal-Abortion Statutes*

By the end of the nineteenth century, abortion was a statutory crime everywhere in the United States. This section tells the story of state legislatures adopting criminal-abortion statutes and nineteenth- and early twentieth-century courts applying those laws. The picture that emerges is of a deeply incoherent view of the abortion crime. While the earliest legislation actually stemmed from concern about women's health and safety, that motivation largely became moot by the late nineteenth century with the emergence of safer medical procedures. Yet society's condemnation of abortion grew stronger over time, in large part because of the powerful influence of the medical profession over the process of abortion legislation.

At the same time, however, society consistently refused to condemn women's participation in the abortion crime. Many statutes expressly exempted women from liability; where the statutes were silent, the courts constructed exemptions for women. Both the legislatures and the courts expressed a view of the woman seeking an abortion as a victim of her own moral weakness who required the state's protection from the consequences of her own decisions. Thus, nineteenth-century criminal-abortion laws were an exercise in paternalism. This section first traces the development of abortion statutes in the nineteenth century, from the earliest statutes growing out of health and safety concerns to the later, more widespread laws resulting from physicians' lobbying efforts. It then describes the courts' treatment of criminal abortion over the same period and demonstrates the pervasive paternalism in the approach of the courts that matched the attitudes embodied in the statutory law.

#### *1. Nineteenth-Century Statutes*

*a. The First Criminal-Abortion Statutes: Protecting Women.* In 1821, Connecticut became the first state to criminalize abortion by statute; however, this early prohibition merely codified the common-law dis-

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410 U.S. 113, 154, 163-64 (1973), distinguished among stages of pregnancy in terms of the strength of the claim for protecting life, but that decision accommodated views about both abortion rights and protection of fetal life. Opponents of *Roe* reject its trimester framework and any attempts to "value" life according to the stage of pregnancy. Cf. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 532-37 (1989) (Scalia, J., dissenting) (urging abandonment of *Roe* approach); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting) (criticizing trimester framework).

inction between noncriminal prequickening abortion and criminal postquickening abortion.<sup>40</sup> Illinois adopted the first statute criminalizing prequickening abortion in 1827.<sup>41</sup> And New York adopted its first statute in 1829, elevating postquickening abortion from a misdemeanor to a felony.<sup>42</sup> Over the next sixty years, other states adopted abortion legislation and increasingly restrictive amendments. By the end of the nineteenth century, every state had criminalized abortion by statute and, with three exceptions, had prohibited it during all phases of pregnancy.<sup>43</sup>

While each state followed a unique progression of adoption and amendment, the final results were remarkably uniform. The typical early abortion statute punished the provision of abortifacients or the use of instruments to induce abortion, unless necessary to preserve the woman's life, by imprisonment of between one and twenty years.<sup>44</sup> The story of New York's statutory experience has been particularly well-documented and is illustrative of the progression of abortion law over the course of the nineteenth century.<sup>45</sup> New York was the first state to include a therapeutic exception in its statute, and one scholar, Cyril Means, uses this information to argue that New York's legislature was motivated primarily by concern for the woman's life.<sup>46</sup> In the late 1860s and 1870s, attitudes toward abortion in New York grew increasingly intolerant as the

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<sup>40</sup> See Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 *Geo. L.J.* 395, 435 (1961). The first version of the Connecticut statute prohibited only the use of abortifacients, as part of a general effort to pass poison-control laws. See J. Mohr, *supra* note 18, at 21-22. In 1830, the Connecticut legislature amended the statute to cover the use of instruments or surgery to produce abortion. See *id.* at 25.

<sup>41</sup> See Means, *supra* note 25, at 450. Until amended in 1867, the Illinois statute covered only potional abortion. See Quay, *supra* note 40, at 435-36.

<sup>42</sup> See Means, *supra* note 25, at 441.

<sup>43</sup> Arkansas's, Mississippi's, and North Carolina's statutes retained the quickening requirement. See Note, *A Functional Study*, *supra* note 30, at 87; Note, *Recent Decisions, Criminal Law—Abortion*, 26 *Colum. L. Rev.* 101, 101 (1926); Note, *Changing Abortion Laws*, *supra* note 30, at 505; Note, *supra* note 18, at 523 & n.37.

<sup>44</sup> For a comprehensive collection of excerpts charting the statutory development in all 50 states, see Quay, *supra* note 40, at 447-520. As this study shows, most states broadened their statutes over the course of the 1800s, stiffening the penalties and adding amendments to cover mere attempts at abortion. See *id.* At the same time, most states also added exceptions for abortions necessary to save the life of the woman. See *id.*; see also Note, *Abortion Reform in Michigan*, 14 *Wayne L. Rev.* 1006, 1008 (1968) (describing development of Michigan's statute as typical of other experiences around nation).

<sup>45</sup> See Means, *supra* note 25, at 441-515.

<sup>46</sup> See *id.* at 450-52. Means notes that the New York legislature was so concerned about the danger of surgery in 1830 that it nearly enacted a law prohibiting *all* surgery unless necessary to save the patient's life. See *id.* at 452. One commentator claims that while Means is right to emphasize the prominence of medical issues in this early abortion legislation, he over-emphasizes the importance of abortion's linkage to broader legislation. See J. Mohr, *supra* note 18, at 29-31. Ultimately, Mohr argues, the legislation treated abortion separately because, while viewed as dangerous, it was seen as a less serious procedure than other types of surgery. See *id.* at 30.

New York press widely publicized sensational cases of deaths from unskilled abortionists.<sup>47</sup> The legislature increased the penalty for abortion in 1872 to between four and twenty years imprisonment.<sup>48</sup>

As for the woman's culpability, most states did not address the issue explicitly, choosing instead to leave her out of the crime, at least as a matter of statutory law. In 1845, New York placed itself in the minority of states by adopting a section bringing the woman within the abortion prohibition and prescribing a sentence of three months to one year.<sup>49</sup> Ultimately, the legislatures of fifteen states declared that a woman who solicited or submitted to an abortion had committed a criminal act.<sup>50</sup> However, no reported cases reflect the actual enforcement of these provisions against women.<sup>51</sup> All states except Louisiana eventually adopted therapeutic exceptions for abortions necessary to save the life of the woman.<sup>52</sup>

In addition, many states penalized attempted abortion without regard to the existence of or consequences to the fetus.<sup>53</sup> One motivation

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<sup>47</sup> See Means, *supra* note 25, at 464-83 (describing many graphic press reports).

<sup>48</sup> See *id.* Some New Yorkers called for imposition of a life sentence for abortion. See *id.* at 482-83.

<sup>49</sup> See *id.* at 454 & n.101.

<sup>50</sup> See George, *Current Abortion Laws*, 17 *Case W. Res. L. Rev.* 371, 381-82 (1965); Note, *Changing Abortion Laws*, *supra* note 30, at 498-99 & n.15; see also *People v. Buffum*, 40 *Cal. 2d* 709, 719-25, 256 *P.2d* 317, 322-26 (1953) (describing California's statutory scheme, including special statute requiring corroboration of woman's testimony). The 15 states were: Arizona, California, Connecticut, Idaho, Indiana, Minnesota, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming. See George, *supra*, at 382 n.68. Utah appears to have had a bifurcated scheme at one point, punishing the woman under a separate statute. See *State v. Cragun*, 85 *Utah* 149, 153, 38 *P.2d* 1071, 1072-73 (1934).

<sup>51</sup> See text accompanying notes 77-80 *infra*.

<sup>52</sup> See Sands, *The Therapeutic Abortion Act*, 13 *UCLA L. Rev.* 285, 288 (1966); Ziff, *Recent Abortion Law Reforms*, 60 *J. Crim. L. & Criminology* 3, 3-4 (1969); see also Comment, *Is Legalized Abortion the Solution to Criminal Abortion?*, 37 *U. Colo. L. Rev.* 283, 285-86 & nn.22-26 (1965) (describing status of therapeutic exceptions as of early 1960s). A few states added a therapeutic exception by judicial construction rather than by statute. See George, *supra* note 50, at 375-76.

<sup>53</sup> See *Peckham v. United States*, 226 *F.2d* 34, 34-35 (D.C. Cir.) (use of term "any woman" rather than "any pregnant woman" manifests intent to punish attempt), cert. denied, 350 *U.S.* 912 (1955); *Eggart v. State*, 40 *Fla.* 527, 532-33, 25 *So.* 144, 146 (1898) (statute designed to punish attempts); *Commonwealth v. Tibbetts*, 157 *Mass.* 519, 521, 32 *N.E.* 910, 911 (1893) (same); *State v. Moretti*, 52 *N.J.* 182, 188-90, 244 *A.2d* 499, 503-04 (doctrine that there can be no offense of attempt where substantive offense could not be committed (impossibility) of no help to defendant in abortion prosecution), cert. denied, 393 *U.S.* 952 (1968); Quay, *supra* note 40, at 435-38 (discussing various states which amended statutes to punish attempt); cf. *People v. Phelps*, 133 *N.Y.* 267, 270, 30 *N.E.* 1012, 1012 (1892) (holding woman actually must take abortifacient drug, otherwise mere giving of advice regarding abortion could amount to attempt); *Commonwealth v. Willard*, 179 *Pa. Super.* 368, 371-73, 116 *A.2d* 751, 752-53 (1955) (attempt is punishable but gathering instruments and telling woman to lie down are preparatory acts only).

for punishing this inchoate crime may have been to deter future wrongful conduct, but another was to further protection of the woman's safety.<sup>54</sup> The majority of states appear to have left the problem of a woman dying as a result of abortion to their homicide statutes, but several state abortion laws included increased penalties for causing death.<sup>55</sup> As to the classification of abortion statutes, states varied in placing the offense under "homicide," "offenses against the person," "crimes against chastity, morality and decency," and "miscellaneous sex crime."<sup>56</sup>

In speculating on what caused the birth of these early nineteenth-century abortion statutes, commentators and courts—with some disagreement—have concluded that, unlike the common law which at least nominally sought to protect life,<sup>57</sup> legislators initially viewed their mission as promoting the safety and health of women. Abortion, it seems, tacitly was considered a crime against the woman, despite the woman's consent to the procedure. While Means's study of the New York experience contains the most detailed look at early legislative motivation,<sup>58</sup> the majority of other twentieth-century writers have reached the same conclusion about the early nineteenth-century experience.<sup>59</sup> Likewise, courts that have inquired into early nineteenth-century legislative intent have explained the advent of abortion statutes as a reaction to heightened awareness of the risks of abortion to women.<sup>60</sup> Indeed, in

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<sup>54</sup> See Sands, *supra* note 52, at 295-96; Note, *supra* note 18, at 528.

<sup>55</sup> See George, *supra* note 50, at 380-81.

<sup>56</sup> See Note, A Functional Study, *supra* note 30, at 87 n.2 (three states chose first classification, 24 the second, five the third, and one the fourth).

<sup>57</sup> See text accompanying notes 24-39 *supra*.

<sup>58</sup> See Means, *supra* note 25, at 441-515.

<sup>59</sup> See, e.g., L. Tribe, *supra* note 11, at 29-34 (early abortion laws concerned women's health and resulted from physicians' lobbying efforts); G. Williams, *supra* note 22, at 154 (chief evil of abortion became injury to women by unskilled abortionists); Sands, *supra* note 52, at 295 (therapeutic exception and punishment of attempt constitute evidence that greater importance was placed on woman than fetus); Note, Abortion Reform, 21 Case W. Res. L. Rev. 521, 527-29 (1970) [hereinafter Note, Abortion Reform] (rigidity of early abortion statutes reflected shift from English concern for life of child to serious concern with danger to woman); Note, Changing Abortion Laws, *supra* note 30, at 506 (nineteenth-century abortion statutes part of government endeavor to protect health of people); Note, *supra* note 18, at 528 (exempting women from culpability evidences greater concern with their health than with care of fetuses); Note, *supra* note 44, at 1012 (therapeutic exception and punishment of attempt evidence purpose to protect woman). But see Quay, *supra* note 40, at 399-435 (arguing that history shows unwavering application of natural law against abortion); Note, Criminal Law: A Call for Statutory Abortion Law Reform in Oklahoma, 24 Okla. L. Rev. 243, 244 (1971) [hereinafter Note, Criminal Law] (four possible motivations for nineteenth-century statutes: protect women, encourage population growth, codify religious view that fetus was human being, and enforce puritanical views about sex).

<sup>60</sup> See, e.g., *Steinberg v. Brown*, 321 F. Supp. 741, 751-56 (N.D. Ohio 1970) (Green, J., dissenting) (examining history of Ohio statute and concluding risk of death motivated enactment); *People v. Belous*, 71 Cal. 2d 954, 964-67, 458 P.2d 194, 200-02, 80 Cal. Rptr. 354, 360-61 (1969) (danger to women motivated original statute), cert. denied, 397 U.S. 915 (1970);

*Roe v. Wade*,<sup>61</sup> which includes a considerable foray into nineteenth-century criminal-abortion statutes, Justice Blackmun leaned toward accepting the view that health concerns were the strongest force behind adoption of these statutes.<sup>62</sup> A few judicial opinions have reached other conclusions, but these opinions lack support for their assertions and therefore may be attributing twentieth-century views to nineteenth-century actors.<sup>63</sup>

*b. The Second Stage: Doctors Dominate Abortion Law.* As the nineteenth century progressed, abortion grew both safer and much more widely practiced.<sup>64</sup> At the same time, almost every state adopted laws criminalizing abortion at all stages of pregnancy.<sup>65</sup> The idea that the new abortion laws were meant to protect women's health appears to lose its power during the second half of the nineteenth century. Abortion gradually grew less dangerous, and at some point became safer than childbirth.<sup>66</sup> Abortion laws continued to portray the woman as a victim, but any health-based claim that abortion indeed victimized her eventually lost support.

In addition, the forces—overt and hidden—driving the later and largest wave of abortion legislation were new. Overemphasizing the importance of health concerns, courts and commentators have ignored deeper, underlying forces: the various goals of doctors as members of an emerging profession and society's broader attitudes about the proper role for women. The medical profession, in the midst of its broad push to-

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Walsingham v. State, 250 So. 2d 857, 861 (Fla. 1971) (unsafe surgical procedures were likely consideration in enacting abortion laws); State v. Alcorn, 7 Idaho 599, 613-14, 64 P. 1014, 1019 (1901) (seriousness of abortion crime partially caused by potential harm to woman's life); Commonwealth v. Brunelle, 361 Mass. 6, 11 & n.9, 277 N.E.2d 826, 830 & n.9 (1972) (dangers of surgery and infection were motivations for enacting abortion statute); Gleitman v. Cosgrove, 49 N.J. 22, 54-55, 227 A.2d 689, 706 (1967) (Jacobs, J., dissenting) (describing statute as designed to protect woman), overruled on other grounds, 80 N.J. 421, 404 A.2d 8 (1979); *id.* at 60, 227 A.2d at 709 (Weintraub, C.J., dissenting in part) (same); State v. Loomis, 89 N.J.L. 8, 9, 97 A. 896, 896 (1916) (statute enacted largely to protect life and health of mother), *aff'd*, 90 N.J.L. 216, 100 A. 160 (1917); State v. Murphy, 27 N.J.L. 112, 114-15 (1858) (offense of abortionist primarily is against woman); State v. Jordon, 227 N.C. 579, 580, 42 S.E.2d 674, 675 (1947) (two statutes, one to protect woman, other to protect fetus); State v. Tippie, 89 Ohio St. 35, 39, 105 N.E. 75, 77 (1913) (statute concerns life of woman as well as fetus).

<sup>61</sup> 410 U.S. 113 (1973).

<sup>62</sup> See *id.* at 129-51.

<sup>63</sup> See *Gleitman*, 49 N.J. at 33-40, 227 A.2d at 695-99 (Francis, J., concurring) (arguing that change from common-law quickening distinction to statute was meant to embody new view that life begins at conception); State v. Ausplund, 86 Or. 121, 131-33, 167 P. 1019, 1022-23 (1917) (same); Miller v. Bennett, 190 Va. 162, 169, 56 S.E.2d 217, 221 (1949) (declaring without explanation that statute enacted for protection of unborn child, not woman).

<sup>64</sup> See J. Mohr, *supra* note 18, at 46-80.

<sup>65</sup> See *id.* at vii, 200-25.

<sup>66</sup> See Means, *supra* note 31, at 383.

ward professionalization, virtually monopolized the process of abortion legislation. Even the earliest abortion statutes, explicitly adopted with the intent of regulating a dangerous medical practice, were motivated in part by the medical profession's desire to drive out their nonprofessional or "irregular" competitors.<sup>67</sup>

During the period from 1840 to 1880, abortion became much more widely practiced and visible than it had been before, chiefly among upper-class Protestant women.<sup>68</sup> During this same period, doctors—particularly through the newly formed American Medical Association—came to dominate the process of abortion legislation in a virtual crusade to outlaw the practice at all stages of pregnancy.<sup>69</sup> The doctors' rallying cry was a moral claim about fetal life, which perhaps stemmed from their knowledge that the quickening distinction had no basis in science.<sup>70</sup> The motivations behind the physicians' crusade, though, surely were more numerous and probably included: the desire to eliminate their nonprofessional competition; the drive to develop a legal code of ethics to further the process of professionalization; the desire to attain status as an important policymaking group; the desire to promote racial purity by fighting the increase in abortion among wealthy, white women; and the tendency to perpetuate a paternalistic social order that pushed women into the childbearing role.<sup>71</sup> The latter two goals likely resulted simply from physicians being members of a society and class that shared certain views of women and minorities.

Several factors might account for the success and widespread acceptance of the physicians' crusade in the second half of the nineteenth century. Most generally, the legislative process at that time was pliable in the hands of small but influential groups.<sup>72</sup> If a small group of men decided that society must protect women from abortionists and that restricting abortion would be in women's best interests, women or others would have had little input into that decision. The emergence of a Re-

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<sup>67</sup> See J. Mohr, *supra* note 18, at 37-43; see also N. Davis, *supra* note 15, at 4 (doctors were responsible for assault on nineteenth-century abortion).

<sup>68</sup> See J. Mohr, *supra* note 18, at 46-113.

<sup>69</sup> See K. Luker, *Abortion and the Politics of Motherhood* 16-18 (1984); J. Mohr, *supra* note 18, at 147-225.

<sup>70</sup> See K. Luker, *supra* note 69, at 14; J. Mohr, *supra* note 18, at 164-65.

<sup>71</sup> See L. Gordon, *Woman's Body, Woman's Right* 59-60 (1977); K. Luker, *supra* note 69, at 28-39; J. Mohr, *supra* note 18, at 160-68; see also Brief of 281 American Historians as Amici Curiae Supporting Appellees at 13-21, *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) (No. 88-605) (discussing connection between doctors' campaign and nineteenth-century views about gender and ethnicity).

<sup>72</sup> See T. Lowi, *The End of Liberalism* 3-41 (1979) (describing emergence of vast, modern liberal state in contrast to relatively simple political system that came before). See generally J. Mohr, *supra* note 18 (describing development of nineteenth-century abortion legislation and influence of small groups over process).

publican Party increasingly committed to using the power of the state further contributed to the ease with which physicians influenced the process.<sup>73</sup> Doctors also were able to capitalize on the growing tendency of society to place great faith in those holding themselves out as having scientific expertise.<sup>74</sup> This deference to science and experts was particularly strong where maintenance of existing social structures was at stake.<sup>75</sup> The highly visible and effective physicians' campaign, with its moral and scientific claims about life, combined with growing media coverage of the abortion issue to produce widespread public acceptance of the great wave of criminal-abortion laws.<sup>76</sup> By the end of the nineteenth century, criminal-abortion laws were pervasive in the United States.

## 2. *The Jurisprudence of Criminal Abortion*

The explosion of criminal-abortion statutes in the nineteenth century was a remarkable phenomenon. In the course of roughly seventy years, abortion was transformed from a virtually noncriminal act into one strictly prohibited by every state. Nineteenth-century Americans, on balance, viewed abortion as a crime both by abortionists against women's health and by women against the moral strictures of at least a portion of society. Even more remarkable, however, was the courts' reluctance to condemn women for committing what legislatures were so ready to call a crime. Running alongside a theme of paternalism in the history and development of criminal-abortion statutes was a similar theme in the application of those statutes by the courts.

Viewed against the backdrop of the roughly one million annual criminal abortions by the 1960s, records reveal a scarce few abortion indictments and even fewer convictions.<sup>77</sup> Indeed, a primary impediment to the enforcement of abortion statutes was probably the fact that the

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<sup>73</sup> See J. Mohr, *supra* note 18, at 203-04.

<sup>74</sup> See *id.*

<sup>75</sup> See generally B. Ehrenreich, *For Her Own Good* (1978) (arguing that experts, particularly medical practitioners, dictated "natural life plan" for women that was accepted as authoritative by society); see also H. Kaye, *The Social Meaning of Modern Biology* 11-43 (1986) (discussing views of various nineteenth-century social theorists who drew upon theories of Darwin and other scientists).

<sup>76</sup> See J. Mohr, *supra* note 18, at 171-77.

<sup>77</sup> See, e.g., J. Bates & E. Zawadzki, *supra* note 15, at 5-6 (few abortion convictions because effort required of law enforcement not justified in light of ambivalent attitude toward laws); O. Pollak, *The Criminality of Women* 44-45 (1950) (abortion is offense that occurs most frequently and is prosecuted least); L. Tribe, *supra* note 11, at 35 (noting 100 indictments, 31 convictions in Minnesota during 1911-1930; 156 indictments, 40 convictions in Michigan during 1893-1932); G. Williams, *supra* note 22, at 207 ("remarkable" lack of enforcement of abortion laws); Ziff, *supra* note 52, at 8 (40 prosecutions and five convictions in Alabama during 1892-1935); Note, *A Functional Study*, *supra* note 30, at 90-91 & n.18 (negligible number of abortion prosecutions and convictions); Note, *Changing Abortion Laws*, *supra* note 30, at 499-500 (handful of prosecutions compared to number of illegal abortions).



woman, as the potential complainant, did not consider herself a victim of a crime.<sup>78</sup> Women who procured abortions virtually were immune from prosecution, and no reported case deals with a woman convicted for procuring abortion.<sup>79</sup> The few prosecutions that were pursued primarily targeted notorious or unusually large abortion "rings" or "mills."<sup>80</sup>

When judges did confront abortion cases, they did not have the luxury available to the public and prosecutors of ignoring the statutes or applying them selectively. Theirs was a jurisprudence that, while attempting to give effect to the laws in some theoretically sound fashion, reflected the complex attitudes of a society that wanted to call abortion criminal without punishing one major participant in the act. The Connecticut Supreme Court perhaps best expressed this quandary in 1904:

The public policy that underlies this legislation is based largely on protection due to the woman, protection against her own weakness as well as the criminal lust and greed of others. The criminal intent and moral turpitude involved in the violation, by a woman, of the restraint put upon her control over her own person is widely different than that which attends the man who, in clear violation of the law, and for pay and gain of any kind, inflicts an injury on the body of a woman endangering health and perhaps life.<sup>81</sup>

While the court here surely considered itself to be advancing a clear statement of the law, its opinion reads, in retrospect, as a strange brew of compassion, contempt, and confusion.

Courts, confronted by laws that explicitly called abortion criminal, and a public that apparently accepted and even sympathized with a woman's choice to seek a dangerous abortion, consistently characterized the woman as one, or the sole, victim of the conduct proscribed by statute. The New Jersey Supreme Court said of the woman: "Her guilt or innocence remains at common law. Her offence at the common law is against the life of the child. . . . The statute regards her as the victim of the crime, not as the criminal, as the object of protection, rather than of punishment."<sup>82</sup> Similarly, the Minnesota Supreme Court reasoned:

As a first impression, it may seem to be an unsound rule that one who solicits the commission of an offense, and willingly submits to its being

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<sup>78</sup> See Sands, *supra* note 52, at 291.

<sup>79</sup> See O. Pollak, *supra* note 77, at 45; L. Tribe, *supra* note 11, at 122; Means, *supra* note 25, at 492; Sands, *supra* note 52, at 295-96; Ziff, *supra* note 52, at 17; Note, A Functional Study, *supra* note 30, at 90-91.

<sup>80</sup> See J. Bates & E. Zawadzki, *supra* note 15, at 35-75 (discussing prosecution of notorious abortionists and abortion "mills"); Means, *supra* note 25, at 464-73 (describing well-publicized prosecution of individual abortionist); Note, *supra* note 44, at 1010 & n.30 (noting legitimate doctors rarely prosecuted).

<sup>81</sup> *State v. Carey*, 76 Conn. 342, 352-53, 56 A. 632, 636 (1904).

<sup>82</sup> *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858).

committed upon her own person, should not be deemed an accomplice, while those whom she has thus solicited should be deemed principal criminals in the transaction. But in cases of this kind the public welfare demands the application of this rule, and its exception from the general rule seems to be justified by the wisdom of experience. The wife, then, in this case, was not, within the rules of the law, an accomplice. She was the victim of the cruel act which resulted in her death. Misguided by her own desires, and mistaken in her belief, she, by the advice of the defendant, submitted to his treatment, willingly, it may be; but the desire of one, and the criminal act of the other, resulted in the death of one, and the imprisonment of the other.<sup>83</sup>

Consider, also, the Ohio Supreme Court's language: "The reason and policy of the statute is to protect women and unborn babes from dangerous criminal practice, and to discourage secret immorality between the sexes, and a vicious and craven custom amongst married pairs who wish to evade the responsibilities and burdens of rearing offspring."<sup>84</sup>

Interestingly, courts sometimes took a much harsher view of a woman's conduct in cases involving civil suits to recover damages on behalf of a woman injured during an abortion.<sup>85</sup> In one such suit, the District of Columbia Circuit Court of Appeals reversed the trial court for applying the court of appeals's earlier holding, in the criminal context, that the woman was to be regarded as the victim of abortion. The court of appeals said that it had not intended "to suggest that she had any immunity in civil actions from the legal consequences of her participation in illegal or immoral acts."<sup>86</sup> The opinions of other courts deciding both criminal and civil abortion cases evidenced a similar clash among views of the woman as a criminal, moral transgressor, victim, and patient.<sup>87</sup>

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<sup>83</sup> *State v. Pearce*, 56 Minn. 226, 252-53, 57 N.W. 652, 652-53 (1894), overruled on other grounds, 212 Minn. 158, 2 N.W.2d 833 (1942).

<sup>84</sup> *State v. Tipple*, 89 Ohio St. 35, 40, 105 N.E. 75, 77 (1913).

<sup>85</sup> See, e.g., *Hunter v. Wheate*, 289 F. 604, 606 (D.C. Cir. 1923) (recovery denied); *Reno v. D'Javid*, 55 A.D.2d 876, 877, 390 N.Y.S.2d 421, 422 (no recovery in illegal pre-*Roe* abortion), aff'd, 42 N.Y.2d 1040, 369 N.E.2d 766, 399 N.Y.S.2d 210 (1977); *Jarquín v. State*, 155 Tex. Crim. 140, 144, 232 S.W.2d 736, 738-40 (1950) (recovery denied).

<sup>86</sup> *Hunter*, 289 F. at 606.

<sup>87</sup> See, e.g., *Thompson v. United States*, 30 App. D.C. 352, 362 (1908) (trial court instructed jury to consider that woman is morally implicated in crime in evaluating testimony); *State v. Alcorn*, 7 Idaho 599, 614, 64 P. 1014, 1019 (1901) (woman guilty of serious felony and ought to be punished if she survives); *State v. Crofford*, 133 Iowa 478, 480, 110 N.W. 921, 922 (1907) (since pregnant woman is element of statutory offense, legislature views her as victim); *State v. Smith*, 99 Iowa 26, 34, 68 N.W. 428, 430 (1896) (woman never subject to punishment); *Peoples v. Commonwealth*, 87 Ky. 487, 489, 9 S.W. 509, 510 (1888) (woman seen as victim rather than cooffender); *Meno v. State*, 117 Md. 435, 437-38, 83 A. 759, 760 (1912) (woman regarded as victim); *Commonwealth v. Brown*, 121 Mass. 69, 81-82 (1876) (jury properly told to consider woman's complicity in unlawful act in evaluating testimony); *In Re Vickers*, 371 Mich. 114, 117-18, 123 N.W.2d 253, 254 (1963) (woman cannot plead self-incrimination be-

Two doctrinal issues in the criminal law—accomplice and conspiratorial liability—exposed the incoherence, resulting from a paternalistic approach toward women, in the courts' attempts to apply abortion statutes and in the statutes themselves. Standard criminal-law doctrine would consider the woman procuring an abortion to be an accomplice of the violator of the typical nineteenth-century abortion statute, since she participated in the inducement of abortion with the intent that it succeed.<sup>88</sup> The courts, however, were no more willing to view women as legal accomplices than they were to view them as principals.<sup>89</sup> In states that had separate statutes covering the women's conduct, courts simply observed that the legislature could not have intended to punish women under both statutes.<sup>90</sup> In states that did not explicitly cover women by statute, courts fell back on rhetoric about women being the victims of or not nearly as culpable as abortionists<sup>91</sup> and used their powers of judicial

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cause neither statute nor common law makes her guilty); *In Re Vince*, 2 N.J. 443, 450-51, 67 A.2d 141, 144-45 (1949) (woman not chargeable under abortion statute, but falls within definition of person causing abortion in statute compelling testimony of such persons); *Dunn v. People*, 29 N.Y. 523, 527 (1864) (law regards woman as victim, not perpetrator); *State v. Shaft*, 166 N.C. 407, 409, 81 S.E. 932, 932-33 (1914) (woman is accomplice "only in a moral and not in a legal sense"); *Wells v. New England Mut. Life Ins. Co.*, 191 Pa. 207, 214, 43 A. 126, 127 (1899) (woman cannot collect on insurance because she was engaged in violation of criminal law); *Mills v. Commonwealth*, 13 Pa. 631, 633 (1850) (abortion is flagrant crime against nature); *Commonwealth v. Willard*, 179 Pa. Super. 368, 373-74, 116 A.2d 751, 753-54 (1955) (abortion requires not only assent but also participation of woman); *Commonwealth v. Bricker*, 74 Pa. Super. 234, 239 (1920) (woman is victim rather than offender); *Smartt v. State*, 112 Tenn. 539, 553, 80 S.W. 586, 589 (1903) (woman is victim); *Watson v. State*, 9 Tex. Crim. 237, 244 (1880) (same); *State v. Cragun*, 85 Utah 149, 155, 38 P.2d 1071, 1073 (1934) (woman morally at fault but not guilty of offense); *Miller v. Bennett*, 190 Va. 162, 171, 56 S.E.2d 217, 221 (1949) (statute does not cover woman, but her estate cannot collect because she is guilty of moral turpitude and participated in violation of statute).

<sup>88</sup> See W. LaFave & A. Scott, *Criminal Law* § 6.7 (2d ed. 1986) (discussing accomplice liability); see also Model Penal Code § 2.06 (1962) (accomplice liability provision). The woman also would be guilty of solicitation under the Model Penal Code. See *id.* § 5.02.

<sup>89</sup> See text accompanying notes 77-87 *supra*.

<sup>90</sup> See *People v. Clapp*, 24 Cal. 2d 835, 837-39, 151 P.2d 237, 239-40 (1944) (Traynor, J.); *People v. Miner*, 96 Cal. App. 2d 43, 53, 214 P.2d 557, 564 (1950); *People v. Stone*, 89 Cal. App. 2d 853, 867-70, 202 P.2d 333, 342-43 (1949); *State v. Tennyson*, 212 Minn. 158, 161-64, 2 N.W.2d 833, 835-36 (1942); *People v. Vedder*, 98 N.Y. 630, 631-32 (1885); *People v. Lovell*, 40 Misc. 2d 458, 459-60, 242 N.Y.S.2d 958, 959-60 (Oneida County Ct. 1963); *State v. Cragun*, 85 Utah 149, 152-57, 38 P.2d 1071, 1072-74 (1934).

<sup>91</sup> See *Thompson*, 30 App. D.C. at 363; *State v. Carey*, 76 Conn. 342, 350-53, 56 A. 632, 635-36 (1904); *Gullatt v. State*, 14 Ga. App. 53, 54, 80 S.E. 340, 341 (1913); *Peoples*, 87 Ky. at 490, 9 S.W. at 510; *Meno*, 117 Md. at 437-38, 83 A. at 760; *State v. Pearce*, 56 Minn. 226, 230-31, 57 N.W. 652, 652-53 (1894); *Vince*, 2 N.J. at 450-51, 67 A.2d at 144; *State v. Hyer*, 39 N.J.L. 598, 601 (1877); *Dunn*, 29 N.Y. at 527; *Shaft*, 166 N.C. at 409, 81 S.E. at 932-33; *Wilson v. State*, 36 Okla. Crim. 148, 252 P. 1106, 1108 (1927); *Commonwealth v. Sierakowski*, 154 Pa. Super. 321, 327, 35 A.2d 790, 793 (1944); *Smartt*, 112 Tenn. at 553-54, 80 S.W. at 589; *Watson*, 9 Tex. Crim. at 244; see also George, *supra* note 50, at 381 (woman who submits to abortion usually not considered accomplice); Note, *supra* note 43, at 101-02 (because woman is seen as victim, she is not held to be accomplice).

construction to absolve women of accomplice liability.<sup>92</sup> Courts in a few states departed from this approach and described women in dicta as indictable,<sup>93</sup> though no case reports a woman being prosecuted on a theory of accomplice liability.<sup>94</sup> Indeed, because of the importance of the woman's testimony and her right, in many cases, to refuse self-incrimination, a prosecutor who charged women procuring abortion with accomplice liability would not have convicted many abortionists. Courts, legislatures, and prosecutors all contributed to the absolution of the woman because it was a key step toward getting at the abortionist.<sup>95</sup> At the same time, this reluctance to prosecute secondary offenders reinforces what statutory drafting and primary liability in this area have shown—that perceptions about who should be prosecuted for a crime somehow depended upon societal attitudes toward the offenders and not accepted criminal-law doctrine.

Similarly, in theory a woman procuring an abortion would be held liable for conspiracy under the criminal law. From her intentional submission to an abortion, one easily could infer the woman's agreement with the abortionist to violate the law.<sup>96</sup> Conspiratorial liability would seem even easier to apply than accomplice liability; after all, the theory of criminal guilt in conspiracy is founded on punishing an agreement to violate the law as opposed to the conduct of procuring abortion itself.<sup>97</sup>

No prosecution of a woman for conspiracy to commit abortion is reported, though.<sup>98</sup> As in the accomplice-liability context, some courts simply found the woman not to be a conspirator as a matter of judicial construction.<sup>99</sup> Others observed that the woman theoretically would be a

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<sup>92</sup> See *State v. Stafford*, 145 Iowa 285, 288, 123 N.W. 167, 168 (1909); *State v. Smith*, 99 Iowa 26, 34, 68 N.W. 428, 430 (1896); *Commonwealth v. Boynton*, 116 Mass. 343, 345 (1874); *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85, 93 (1858); *In Re Vickers*, 371 Mich. 114, 117-18, 123 N.W.2d 253, 254 (1963).

<sup>93</sup> See, e.g., *Steed v. State*, 27 Ala. App. 263, 170 So. 489, 489 (1936) (woman who knowingly consents to abortion, unless she thinks it necessary to save her life, is guilty of aiding and abetting); *State v. McCoy*, 52 Ohio St. 157, 160, 39 N.E. 316, 316 (1894) (woman subject to indictment as aider, abettor, or procurer of principal offender).

<sup>94</sup> See text accompanying notes 77-80 *supra*.

<sup>95</sup> See George, *supra* note 50, at 382 & nn. 70-73 (many legislatures provided statutory grant of immunity in order to secure woman's testimony, thereby effectively deeming women to be noncriminal).

<sup>96</sup> See W. LaFave & A. Scott, *supra* note 88, § 6.4 (discussing conspiracy); see also Model Penal Code § 5.03 (conspiracy provisions).

<sup>97</sup> See *United States v. Feola*, 420 U.S. 671, 693-94 (1975).

<sup>98</sup> See text accompanying notes 77-80 *supra*. But see *Commonwealth v. Fisher*, 398 Pa. Super. 237, 240-41, 157 A.2d 207, 209-12 (1960). In *Fisher*, the only case found with any mention of a conspiracy prosecution, the court reversed a woman's contempt conviction for refusing to incriminate herself on the grounds that she had an indictment for conspiracy to commit abortion pending against her in another county.

<sup>99</sup> See *People v. Buffum*, 40 Cal. 2d 709, 722-23, 256 P.2d 317, 324 (1953); *People v. Stone*, 89 Cal. App. 2d 853, 867-70, 202 P.2d 333, 343 (1949); *In Re Vince*, 2 N.J. 443, 450-51, 67

coconspirator with the abortionist, but they did so only in dicta.<sup>100</sup> The judicial approach to the conspiracy issue bears some similarity to the approach of courts to the issue of whether a woman could conspire in her own transportation across state lines in violation of the Mann Act.<sup>101</sup> In both cases, courts refuse to view the woman as a conspirator, regardless of how overt her culpability may be, because they read the statute as designed for her protection.

### C. *Criminal-Abortion Laws in the Twentieth Century*

The story of criminal-abortion statutes in the United States takes place, for the most part, in the nineteenth century. This section explains how the issue of criminal abortion receded from public view in the first half of the twentieth century and then reemerged in the 1960s in the form of a brief flurry of reform activity, which soon was rendered moot by the *Roe v. Wade* decision. For a significant time, it appears, the country lived comfortably with the legislative products of the nineteenth century, including their incoherent treatment of the woman's conduct. When a modest effort was made to reform and "modernize" those statutes—an undertaking that, like the legislative efforts of the early nineteenth century, grew out of concern for women's health—that reform movement was overwhelmed and rendered moot by the push for fully legal abortions culminating in the Supreme Court's decision in *Roe*.

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A.2d 141, 145 (1949); *Commonwealth v. Bricker*, 74 Pa. Super. 234, 240 (1920).

<sup>100</sup> See *Solander v. People*, 2 Colo. 48, 62-63 (1873); *State v. Gilmore*, 151 Iowa 618, 620, 132 N.W. 53, 54 (1911); *State v. Crofford*, 133 Iowa 478, 480-81, 110 N.W. 921, 922 (1907); *Fields v. State*, 107 Neb. 91, 99-100, 185 N.W. 400, 403 (1921); *People v. Davis*, 56 N.Y. 95, 102-03 (1874); *State v. Mattson*, 53 N.D. 486, 488-89, 206 N.W. 778, 778 (1925); *Kraut v. State*, 228 Wis. 386, 398-99, 280 N.W. 327, 333 (1938); see also *People v. Candib*, 129 N.Y.S.2d 176, 182 (Kings County Ct. 1954) (theoretically possible to view woman as coconspirator but question not reached); Note, *supra* note 43, at 101-02 (woman may be convicted for conspiracy to commit with others abortion upon herself).

<sup>101</sup> See, e.g., *Gebardi v. United States*, 287 U.S. 112, 116-23 (1932) (woman not guilty of violating or of conspiring to violate Mann Act when she merely agrees to, rather than assists in, her own transportation); *United States v. Holte*, 236 U.S. 140, 144-45 (1915) (citing to minority view in abortion cases and holding that woman theoretically could conspire to violate Mann Act); Note, *The White Slave Traffic Act*, 72 Geo. L. J. 1111, 1120-22 (1984) (discussing history of Mann Act); see also text accompanying notes 288-95 *infra* (discussing woman's liability under Mann Act). The abortion case also poses the possibility of applying Wharton's Rule, a doctrine sometimes applied in criminal cases holding that there can be no conspiracy to commit a crime, such as dueling or bigamy, which, by definition, takes two to commit. See *In Re Vickers*, 371 Mich. 114, 117-18, 123 N.W.2d 253, 254 (1963) (no conspiracy to commit abortion since it involves "concert of action" between two people); *Commonwealth v. Bricker*, 74 Pa. Super. 234, 240 (1920) (woman cannot conspire to commit abortion since there can be no "conspiracy to commit a crime when the concerted action of the defendants is part of the criminal act"); *State v. Wells*, 249 S.C. 249, 256-58, 153 S.E.2d 904, 907-09 (1967) (noting possible application of Wharton's Rule in abortion context but declining to decide issue).

### 1. *The First Half of the Twentieth Century*

The intensive legislative activity regarding abortion in the nineteenth century was followed by an equally remarkable period of inactivity. Until just over ten years prior to *Roe*, the abortion statutes enacted in the nineteenth century were subjected to cosmetic amendment only.<sup>102</sup> Legislatures and the public apparently felt no pressing need to reevaluate nineteenth-century decisions about how and why to regulate abortion. This laissez-faire attitude toward abortion statutes dovetailed with the day-to-day treatment of the abortion crime in the courts.<sup>103</sup> Twentieth-century courts deciding abortion cases exhibited the same tendencies of their nineteenth-century counterparts<sup>104</sup> to view the woman as a victim and to refuse to find her culpable in the abortion crime.<sup>105</sup>

One can explain the virtual disappearance of abortion from the public realm between 1880 and the 1950s by the medical profession's "ownership" of the abortion issue as a result of the nineteenth-century statutes.<sup>106</sup> The therapeutic exceptions in most of the statutes meant that doctors controlled access to abortion, and they granted that access with some frequency.<sup>107</sup> Victorian mores deemed abortion inappropriate for anything but the most private discussions, such as those in the doctor's office.<sup>108</sup> As a result, the practice of abortion—when and how it occurred—was kept out of the public eye, as well as out of the courts and legislatures. Although criminal-abortion statutes remained on the books, they were enforced sparingly, so few complaints arose.<sup>109</sup>

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<sup>102</sup> See, e.g., Means, *supra* note 25, at 491-92 (no significant change in New York statute from 1881 to 1967); Quay, *supra* note 40, at 447-520 (charting development of abortion statutes over time in all states).

<sup>103</sup> See text accompanying notes 77-80 *supra*.

<sup>104</sup> See notes 77-101 and accompanying text *supra*.

<sup>105</sup> See, e.g., *Meno v. State*, 117 Md. 435, 437-38, 83 A. 759, 760 (1912) (woman regarded as victim); *Vickers*, 371 Mich. at 117-18, 123 N.W.2d at 254 (woman cannot plead self-incrimination because neither statute nor common law makes her guilty); *In Re Vince*, 2 N.J. 443, 450-51, 67 A.2d 141, 144-45 (1949) (woman not chargeable under abortion statute, but falls within definition of person causing abortion in statute compelling testimony of such persons); *State v. Shaft*, 166 N.C. 407, 409, 81 S.E. 932, 932-33 (1914) (woman is accomplice only in "moral sense"); *Commonwealth v. Bricker*, 74 Pa. Super. 234, 239 (1920) (woman is victim rather than offender); *State v. Cragun*, 85 Utah 149, 155, 38 P. 1071, 1073 (1934) (woman morally at fault but not guilty of offense); *Miller v. Bennett*, 190 Va. 162, 169-71, 56 S.E.2d 217, 221 (1949) (statute does not cover woman, but her estate cannot collect because she is guilty of moral turpitude and participated in violation of statute).

<sup>106</sup> See K. Luker, *supra* note 69, at 39-42.

<sup>107</sup> See *id.* at 46.

<sup>108</sup> See *id.* at 54.

<sup>109</sup> See *id.* at 53 (nine convictions in Arkansas during 1921-1932; five convictions in Alabama during 1894-1932); see also notes 77-80 and accompanying text *supra*.

## 2. *Reform and the Model Penal Code*

The inertia of the early twentieth century finally gave way in the late 1950s and early 1960s. Small groups of professionals—doctors and, later, lawyers—were able to initiate and control a process of “liberalizing” abortion laws because the women’s movement of the late 1960s and 1970s, which otherwise naturally would have influenced such a process, had not yet taken hold, and the general public remained detached from the abortion issue.<sup>110</sup> Somewhat akin to its early nineteenth-century counterpart, this legislative effort was professionally influenced and aimed at refining state regulation in the name of women’s health. Abortion still was viewed as criminal, but the statutes no longer were seen as sufficiently protective of women.

The American Law Institute’s Model Penal Code (Code) exerted great influence on statutory abortion reform,<sup>111</sup> as it did throughout the criminal law, although from a post-*Roe* perspective even the Model Penal Code looks very antagonistic to the practice of abortion. The Code dictated, “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.”<sup>112</sup> Justifiable abortions were deemed those in which a licensed physician believed there was “substantial risk” that the pregnancy would “gravely impair” the physical or mental health of the mother, that the child would be born with a “grave physical or mental defect,” or that the pregnancy resulted from rape, incest, or other “felonious intercourse.”<sup>113</sup> Two physicians were required to attest to the existence of the circumstances that justified the abortion.<sup>114</sup> As for the woman, the Code deemed her a felon of the third degree only if she was over twenty-six weeks pregnant and “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.”<sup>115</sup> The statute also imposed criminal sanctions for inducing or aiding a woman to commit self-abortion, pretending to commit abortion, and selling or possessing abortifacients with intent to sell, except to physicians.<sup>116</sup>

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<sup>110</sup> See *id.* at 66-67.

<sup>111</sup> See text accompanying notes 130-32 *infra*; cf. W. LaFare & A. Scott, *supra* note 88, § 1.1(b) (discussing general influence of Code).

<sup>112</sup> Model Penal Code § 230.3(1).

<sup>113</sup> *Id.* § 230.3(2).

<sup>114</sup> *Id.* § 230.3(3).

<sup>115</sup> *Id.* § 230.3(4).

<sup>116</sup> *Id.* § 230.3(4)-(6).

The drafters of the Model Penal Code described their abortion policy as one "of cautious expansion of the categories of legal abortion."<sup>117</sup> They stated that by limiting the offense to termination of the pregnancy of "another," they were limiting the woman's potential liability to the provision covering self-abortion late in pregnancy. In explaining their approach to the woman's conduct, the drafters said:

[C]riminal liability of the woman for an abortion committed on herself was not useful in suppressing self-abortion, but instead offered a possible stumbling block to effective enforcement against the professional abortionist or served as an escape from civil liabilities for insurance companies. . . . The prospect of prosecution is unlikely to deter the unhappy woman who is not restrained by morality, physical danger, expense, and ignominy. Further, actual imposition of sentence of imprisonment on a woman with other dependent children, for example, or an otherwise law-abiding woman for whom jail could only function as a cause rather than a preventive of further anti-social behavior, is plainly undesirable. Also, exemption is the honest statement of present and foreseeable law enforcement, so that district attorneys and other responsible officials should not face the problem of the woman's liability as one of discretion.<sup>118</sup>

The drafters' commentary is strikingly akin to the jurisprudence of the nineteenth-century courts applying abortion statutes.<sup>119</sup> The discussion of the problem of the woman's conduct acknowledges her criminal guilt, points to her moral transgression, portrays her as a victim, and concedes the unenforceability of abortion statutes, particularly against women. Even the "enlightened" reformers of the 1960s, who acted in the name of women's interests, perpetuated the fundamentally incoherent conception of the woman seeking an abortion that was crafted by their nineteenth-century predecessors.

A desire to stop the dangerous practice of abortion by criminalizing the abortionist's conduct originally motivated the nineteenth-century adoption of abortion statutes.<sup>120</sup> Similarly, the 1960s reforms sought to protect more women from the dangerous practices of the illegal abortionist by widening the circumstances in which safe, hospitalized abortion would be available.<sup>121</sup> Criminalizing abortion had not halted dangerous practices but simply had criminalized them, driving them underground,

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<sup>117</sup> Id. § 230.3 comment at 427.

<sup>118</sup> Id. § 230.3 comment at 438. It would seem, though, that the Code's accomplice liability provision, id. § 2.06, which requires only that the actor have a purpose to promote or facilitate the offense, might cover the woman. See text accompanying notes 88-95 *supra*.

<sup>119</sup> See notes 77-101 and accompanying text *supra*.

<sup>120</sup> See text accompanying notes 40-63 *supra*.

<sup>121</sup> See Model Penal Code § 230.3 comment at 426-41; Note, *supra* note 18, at 528-29.



with grave consequences for women's health.<sup>122</sup> At the time legislatures began reforming the laws, estimates showed that one in five pregnancies in America terminated in an illegal abortion, amounting to as many as one million illegal abortions annually.<sup>123</sup> No criminal law had been so widely disregarded since prohibition.<sup>124</sup> Doctors and hospitals knowingly violated the law,<sup>125</sup> often making the difference between obtaining an illegal or a legal abortion not legal justification but rather money. In this environment, a mere expansion of the therapeutic exceptions could not possibly deal adequately with the problem of dangerous illegal abortions.<sup>126</sup> Indeed, the statutes initially enacted with the idea of furthering safety remained, even in their reformed state, the very cause of women's plight because they still forced many women to seek out the only type of abortions that still were unsafe—illegal abortions.<sup>127</sup> The arrival, long before, of the possibility of safe abortions had obviated the justification for the nineteenth-century statutes.<sup>128</sup> By promoting the business of the illegal abortionist, the statutes alone perpetuated the original justification for their existence.<sup>129</sup>

In the late 1960s, several states followed the lead of the Model Penal Code and expanded the therapeutic exceptions to their abortion statutes.<sup>130</sup> Just prior to *Roe*, Hawaii and then New York became the first

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<sup>122</sup> See H. Packer, *The Limits of the Criminal Sanction* 343-44 (1968); see also Note, A Functional Study, *supra* note 30, at 92-93 (estimating one in 87 abortions resulted in death, as opposed to one in 20,000 in Soviet Union).

<sup>123</sup> See N. Davis, *supra* note 15, at 98; Sands, *supra* note 52, at 285; Ziff, *supra* note 52, at 5; Comment, *supra* note 52, at 285.

<sup>124</sup> See Sands, *supra* note 52, at 285; Note, *Changing Abortion Laws*, *supra* note 30, at 510; see also Ziff, *supra* note 52, at 5 (discussing extent to which law was disregarded).

<sup>125</sup> See Ziff, *supra* note 52, at 9-11.

<sup>126</sup> One commentator estimated that a Code-type reform might have legalized between two and four percent of all abortions. *Id.* at 12.

<sup>127</sup> See Means, *supra* note 31, at 388 ("[Enforcement of the abortion law] denies its intended beneficiaries (pregnant women) the very right to protect their lives from death which the law originally imposed on them as a duty!"). Because of rapid advances in medicine, the actual medical indications for therapeutic abortions might have been shrinking at the time that a widening of therapeutic exceptions was seen as the answer to statutory deficiencies. See Comment, *supra* note 52, at 288.

<sup>128</sup> See text accompanying notes 40-63 *supra*.

<sup>129</sup> See Means, *supra* note 31, at 388; Means, *supra* note 25, at 503-04.

<sup>130</sup> New York amended its statute in 1965 to widen the therapeutic exceptions. See Means, *supra* note 25, at 498-500. California adopted the most progressive abortion reform in 1967 to close a perceived gulf between the legal and medical standards concerning justifications for abortion. See George, *supra* note 50, at 393-402 (discussing perceived gulf); Sands, *supra* note 52, at 286-88 (same); Note, *Abortion Reform*, *supra* note 59, at 530-34 (discussing California legislation); Note, *Survey of Abortion Reform Legislation*, 43 *Wash. L. Rev.* 644, 644-54 (1968) (discussing California legislation in comparison with Colorado, North Carolina, and Great Britain legislation). Then Governor Reagan signed the bill only after the legislature eliminated a provision permitting abortion of a greatly deformed child. See Note, *Changing Abortion Laws*, *supra* note 30, at 496-97. Arkansas, Colorado, Georgia, Maryland, New Mex-

states effectively to decriminalize abortion by removing all requirements of justification; their statutes required only that a licensed physician perform the operation in an accredited hospital.<sup>131</sup> Had the constitutional debate not swallowed the issue so soon, this reform process might have spread to more states.<sup>132</sup> In 1973, the Supreme Court, in *Roe*, told the states that they no longer could regulate abortion in the first trimester of pregnancy and would be limited in their ability to regulate it thereafter.<sup>133</sup> Nineteenth-century abortion statutes, which had been left alone for almost one hundred years, had been reformed and then destroyed in just ten years. The Supreme Court deemed these statutes, even the ones that were somewhat adapted to modern concerns, constitutionally intolerable. However, as Part II of this Note demonstrates, the *Roe* era itself proved to be a relatively short interlude and the tide is now turning back toward highly restrictive criminal-abortion laws.

## II

### CRIMINAL ABORTION AFTER *ROE*

Part I demonstrated a fundamental incoherence in the law since the early 1800s. State legislatures and courts branded abortion a crime yet were reluctant to see the woman who initiated the criminal act as acting deliberately and responsibly. Rather, they viewed her as a victim, deserving special protection by society, incapable of making "right" decisions or of controlling her own impulsive behavior. This Part describes how criminal-abortion statutes and their corresponding doctrinal inconsistencies, after a brief seventeen-year hiatus, are once again upon us. Legislators in many states are engaged anew in the same drafting exercise that every state had conducted by the end of the nineteenth century.<sup>134</sup> The courts may not be far behind in facing the same abortion issues that confronted their nineteenth- and early twentieth-century counterparts.

Seventeen years after *Roe v. Wade*<sup>135</sup> launched the "noncriminal

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ico, North Carolina, and Oregon also adopted reforms, some following the Model Penal Code, and most, like California's, including more detailed procedures to guide the medical decision regarding therapeutic abortion. See Ziff, *supra* note 52, at 3-4; Note, Abortion Reform, *supra* note 59, at 521 n.2, 530 & n.55; Comment, Abortion, Oregon Style, 49 Or. L. Rev. 302, 302-07 (1970); Note, *supra*, at 644; Note, *supra* note 44, at 1007 & n.8. No state followed the Model Penal Code exactly. See Note, Abortion Reform, *supra* note 59, at 530.

<sup>131</sup> See Note, Abortion Reform, *supra* note 59, at 544 (discussing Hawaii); Note, Criminal Law, *supra* note 59, at 245 (discussing New York and Hawaii).

<sup>132</sup> But see L. Tribe, *supra* note 11, at 49-51 (suggesting other possibilities and trends: availability in some states draining impetus for reform in others; energy for reform dying once wealthy got what they wanted; repeal measures defeated in several states just prior to *Roe*).

<sup>133</sup> See *Roe v. Wade*, 410 U.S. 113, 154-64 (1973).

<sup>134</sup> See text accompanying notes 40-76 *supra*.

<sup>135</sup> 410 U.S. 113 (1973). As a matter of constitutional law, abortion's "noncriminal era" may not be over. See text accompanying notes 137-80 *infra*. However, in the roughly 17 years

era" of abortion law, the Supreme Court's decision in *Webster v. Reproductive Health Services*<sup>136</sup> may serve as both the catalyst for the return of criminal-abortion laws and as the best available indicator of the future constitutional status of those laws. This Part describes the constitutional era of abortion law, first after *Roe* and then after *Webster*. It then closely examines the criminal-abortion statutes that states have adopted since *Webster* and concludes with a discussion of the current and likely future status of those laws.

### A. *The Constitutional Era of Abortion Law*

The Supreme Court's 1973 decisions in *Roe v. Wade*<sup>137</sup> and *Doe v. Bolton*<sup>138</sup> created a constitutional regime for abortion, fencing off, as a matter of constitutional law, much of the ground on which state abortion laws had tread for over one hundred years. These decisions affected state abortion legislation in two ways. First, while not prohibiting all criminal sanctions for abortion, they removed abortion, for all practical purposes, from the realm of criminal conduct. Second, while the Court ended the era of criminal abortion, it also left the door open for the states to promulgate regulations concerning abortion, ushering in a new era.

*Roe*'s landmark holding declared that the fundamental constitutional right to privacy includes the right to have an abortion and that any state legislation limiting that right must be justified by a compelling state interest.<sup>139</sup> In particular, the *Roe* Court found that Texas's abortion statute, typical of the nineteenth-century criminal-abortion laws, violated that fundamental right.<sup>140</sup> In *Doe*, the Court declared that Georgia's statute, a typical 1960s "reformed" law patterned after the Model Penal Code, also violated the newly established constitutional right.<sup>141</sup> As a result, the Court had rendered virtually every abortion statute passed since Connecticut started the enterprise in 1821<sup>142</sup> unconstitutional. For practical purposes, criminal abortion was dead. While states retained considerable regulatory leeway, abortion no longer could be branded a crime, at least for the first and probably also the second trimester of pregnancy.<sup>143</sup>

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between *Roe* and *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), states ceased to legislate or enforce criminal prohibitions on abortion, at least in the early stages of pregnancy, an enterprise to which they have now returned. See text accompanying notes 199-257 *infra*.

<sup>136</sup> 492 U.S. 490 (1989).

<sup>137</sup> 410 U.S. 113 (1973).

<sup>138</sup> 410 U.S. 179 (1973).

<sup>139</sup> See *Roe*, 410 U.S. at 154-55.

<sup>140</sup> See *id.* at 164.

<sup>141</sup> See *Doe*, 410 U.S. at 201.

<sup>142</sup> See text accompanying notes 40-63 *supra*.

<sup>143</sup> Some states have continued to make late-pregnancy abortions nominally criminal. See,

*Roe* also recognized, however, that states retained a compelling interest in the health of the mother after the first trimester.<sup>144</sup> The Court further acknowledged a compelling state interest in fetal life as of the third trimester.<sup>145</sup> States, then, were free to pass laws reasonably related to the furtherance of those interests.<sup>146</sup> While states theoretically could have responded to the Court's instructions by enacting new criminal laws barring "unhealthy" abortions in the second trimester and all abortions after viability, for the most part they did not do so.<sup>147</sup> The longstanding criminal-abortion statutes had been deemed unconstitutional because they flatly violated a fundamental right. The entire enterprise of criminalizing conduct related to abortion thus was called into question by the Supreme Court's rulings. To criminalize at certain stages of pregnancy the very conduct declared constitutionally protected at other stages of pregnancy would have challenged too directly the new understanding of abortion advanced by the Court. Instead, states wishing to limit the exercise of abortion rights launched a new enterprise, one which *Roe* explicitly invited: they restricted access to abortion by strictly regulating it rather than by branding it criminal.

### 1. *Post-Roe Abortion Regulation*

The Court, in the years following *Roe*, policed the constitutional abortion right by declaring which of these new state regulations exceeded the leeway granted in *Roe* and which did not. Some regulations carried criminal penalties, but no state attempted to ban abortion altogether at any stage of pregnancy. Instead, states used regulations to construct obstacle courses that women had to navigate before they could exercise their constitutionally protected abortion right.

The Court, however, declared that certain regulations impermissibly infringed on the constitutional right. It held that a state could not require spousal consent to abortion or prohibit a particular method of abortion in the first trimester.<sup>148</sup> It refused to allow states to require hospitalization for all second-trimester abortions or to require that a woman listen to a "parade of horrors" about abortion before she ob-

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e.g., N.Y. Penal Law §§ 125.05, .40, .45, .50, .55 (McKinney 1987) (felony to perform and misdemeanor to submit to unjustified abortion after 24 weeks of pregnancy). However, actual prosecutions under these laws have been even rarer than under pre-*Roe* statutes. See Belkin, 7 More Patients Accuse Doctor of Botching Their Abortions, N.Y. Times, Nov. 21, 1991, at B1 (reporting unusual prosecution of abortionist for botched late-term abortion, after which woman gave birth to deformed girl).

<sup>144</sup> See *Roe*, 410 U.S. at 162-63.

<sup>145</sup> See *id.* at 154, 163-64.

<sup>146</sup> See *id.* at 163.

<sup>147</sup> But see note 143 *supra* (describing exception).

<sup>148</sup> See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 69, 78-81 (1976).

tained one.<sup>149</sup> And the Court refused to allow states to require doctors to exercise a prescribed degree of care to save the fetus in postviability abortions and to require that two doctors be present during postviability abortions.<sup>150</sup>

Nonetheless, the Court did approve a variety of regulations governing the practice of abortion. It held that the states were free to define "viability" and to require recordkeeping and reporting of abortions.<sup>151</sup> The Court permitted Congress and the states to discriminate against abortion in the dispensation of medical funding to the poor by denying funding for abortions.<sup>152</sup> The Court permitted states to require parental consent for abortions sought by minors so long as the minor had access to an alternative judicial consent procedure.<sup>153</sup> Finally, the Court permitted states to require the presence of two doctors at third-trimester abortions except in emergency situations and to require the submission of a pathology report for all abortions.<sup>154</sup>

These cases all involved state attempts to burden, rather than to bar, the exercise of the constitutional abortion right.<sup>155</sup> In every one of these cases, at least a plurality of the Court declared continued allegiance to the right established in *Roe*.<sup>156</sup> One case, however, *Colautti v. Franklin*,<sup>157</sup> did squarely confront a criminal-abortion law. Pennsylvania's Abortion Control Act included a provision that subjected a doctor to criminal liability for failing to use a statutorily prescribed abortion technique when the fetus was "viable" or when there was "sufficient reason to believe the fetus may be viable."<sup>158</sup> The Court found two constitutional faults in this statute, both particular to the criminal law. First, the vagueness of the viability definition was found to condition "criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights."<sup>159</sup> Second, the statute subjected the

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<sup>149</sup> See *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 437, 444-45 (1983).

<sup>150</sup> See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 769-71 (1986).

<sup>151</sup> See *Danforth*, 428 U.S. at 63-65, 79-81.

<sup>152</sup> See *Harris v. McRae*, 448 U.S. 297, 316-17 (1980); *Maher v. Roe*, 432 U.S. 464, 474-77 (1977).

<sup>153</sup> See *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

<sup>154</sup> See *Planned Parenthood Assoc. of Kan. City v. Ashcroft*, 462 U.S. 476, 485-90 (1983).

<sup>155</sup> See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986) (identifying genuine purpose of state regulations as effort to deter exercise of constitutional right).

<sup>156</sup> See, e.g., *id.* at 759 (majority opinion reaffirming *Roe*); *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 426-27 (1983) (same).

<sup>157</sup> 439 U.S. 379 (1979).

<sup>158</sup> *Id.* at 380-81.

<sup>159</sup> *Id.* at 394.

doctor to "criminal liability without regard to fault," thereby compounding the vagueness of the viability definition.<sup>160</sup> The *Colautti* Court laced its opinion with references to the *Roe* abortion right and *Roe*'s deference to the role of the physician.<sup>161</sup> But the Court disposed of the case on criminal-law grounds. *Colautti* indicated that criminal sanctions did not fit comfortably, if at all, into the Court's regime of permissible state regulation of abortion.<sup>162</sup>

## 2. *Webster and Beyond*

The Supreme Court's 1989 decision in *Webster v. Reproductive Health Services*<sup>163</sup> has been heralded by some as the beginning of the end of this era of abortion regulation and as the landmark ruling of a second era of criminal abortion.<sup>164</sup> Recent legislative developments illustrate that at least some view *Webster* as an invitation to reincarnate criminal-abortion laws.<sup>165</sup> At a minimum, *Webster* marks a dramatic expansion of permissible state regulation at the margins of a surviving but weakened constitutional right to abortion.

First, *Webster* revealed a Court that is both divided and in transition on the abortion issue. Parts of Chief Justice Rehnquist's opinion did not command a majority of the Court. In addition, two Justices who firmly supported *Roe* have been replaced by two Justices generally viewed as conservatives.<sup>166</sup> Justices O'Connor and Scalia each wrote separate concurring opinions in *Webster*, and, while they agreed with Chief Justice Rehnquist's conclusion that the viability-testing provision in the Missouri law was constitutional, they declined to join the rationale by which he reached that result.<sup>167</sup> Unlike Chief Justice Rehnquist, Justice Scalia

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<sup>160</sup> *Id.*

<sup>161</sup> See *id.* at 387-89.

<sup>162</sup> Compare *Colautti* with the Court's pre-*Roe* decision in *United States v. Vuitch*, 402 U.S. 62, 71-72 (1971) (rejecting vagueness challenge to word "health" in therapeutic exception in District of Columbia's criminal-abortion statute).

<sup>163</sup> 492 U.S. 490 (1989).

<sup>164</sup> For detailed discussions and critiques of the Supreme Court's abortion jurisprudence and the meaning of *Webster*, see generally Dellinger & Sperling, *Abortion and the Supreme Court*, 138 U. Pa. L. Rev. 83 (1989); Estrich & Sullivan, *supra* note 8.

<sup>165</sup> See text accompanying notes 199-257 *infra*.

<sup>166</sup> See *Webster*, 492 U.S. at 501. Justice Brennan, who joined the dissent in *Webster*, was replaced at the beginning of the 1990 Term by Justice Souter. Justice Marshall, who also joined the *Webster* dissent, was replaced at the beginning of the 1991 Term by Justice Thomas. Neither Justice Souter's nor Justice Thomas's approach as jurists to the constitutional abortion right can be known until they participate in a case squarely presenting the issue. But see note 10 *supra* (discussing their views). Justice Souter voted with the majority in *Rust v. Sullivan*, 111 S. Ct. 1759, 1764 (1991), a case concerning abortion that was decided primarily on first amendment grounds. See note 175 *infra* (discussing holding and meaning of *Rust*).

<sup>167</sup> See *Webster*, 492 U.S. at 522 (O'Connor, J., concurring); *id.* at 532 (Scalia, J., concurring).

would have upheld the viability-testing requirement by explicitly overruling *Roe*.<sup>168</sup> Justice O'Connor, however, would have upheld the viability-testing requirement because it did not "unduly burden" the abortion right, consistent with her preferred abortion analysis as explained in *Akron v. Akron Center for Reproductive Health*.<sup>169</sup> Even if *Webster* had reaffirmed *Roe* convincingly, the diverse opinions and sharp disagreements among the Justices, as well as the changing composition of the Court, would have signaled inevitable change in the Court's approach.<sup>170</sup>

Second, a majority in *Webster* upheld two aspects of the law that were plainly inconsistent with the spirit of the Court's previous abortion-regulation decisions, despite the plurality's assertion that its conclusions broke no new legal ground.<sup>171</sup> Missouri was permitted to declare that life begins at conception, implicitly asserting a state interest in life at that point,<sup>172</sup> and to prohibit the use of public employees and facilities for the performance of abortions.<sup>173</sup> Third, Chief Justice Rehnquist's plurality opinion concerning Missouri's viability-testing requirement limited the abortion right enunciated in *Roe*. He disavowed the trimester framework; upheld a second-trimester regulation allegedly justified by a state interest in fetal life; and acknowledged that his holding permitted regulation that would have been unconstitutional under *Roe*'s progeny.<sup>174</sup>

*Webster* and the other recent abortion cases,<sup>175</sup> with their multiple opinions and shifting cast of characters, can support nothing more than

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<sup>168</sup> See *id.* at 532-37 (Scalia, J., concurring).

<sup>169</sup> 462 U.S. 418, 452 (1983) (O'Connor, J., dissenting); see *Webster*, 492 U.S. at 522-32 (O'Connor, J., concurring); see also notes 264-67 and accompanying text *infra* (describing recent Third Circuit Court of Appeals opinion applying "undue burden" analysis to Pennsylvania statute).

<sup>170</sup> Some prior regulation decisions, particularly the most recent ones, also were marked by close votes and sharp dissents. See, e.g., *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (6-3 vote with dissent arguing that restrictive provisions of municipal abortion ordinance should stand). But the fractious nature of *Webster* was related directly to the status of the *Roe* right and not so much to disagreements over what regulations were permissible.

<sup>171</sup> See text accompanying notes 148-50 *supra*.

<sup>172</sup> See *Webster*, 492 U.S. at 505-07.

<sup>173</sup> See *id.* at 507-11. As to the public employees and facilities ban, the Court relied on its holdings in *Harris v. McRae*, 448 U.S. 297, 316-17 (1980), and *Maher v. Roe*, 432 U.S. 464, 474 (1977), as well as its more recent reasoning in *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989), that the due process clause confers no affirmative right to state aid. A public employees and facilities ban, though, extends the holdings in *Harris* and *Maher*. See *Webster*, 492 U.S. at 539 n.1 (Blackmun, J., concurring in part and dissenting in part); cf. *Rust v. Sullivan*, 111 S. Ct. 1759, 1772 (1991) (applying *Harris* and *Maher* rationale to ban on abortion counseling at federally funded facilities); note 175 *infra* (discussing *Rust*).

<sup>174</sup> See *Webster*, 492 U.S. at 518-21.

<sup>175</sup> The Court has decided three abortion cases since *Webster*, but the opinions give relatively little indication of the future direction of the Court's abortion jurisprudence. In *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), the Court upheld a two-parent notification and judicial bypass scheme for minors seeking abortions. See *id.* at 2948. The Court again was fractured in its opinions and emphasized the parent-child relationship as much as abortion

speculation about the fate of abortion rights in the Supreme Court. Some observers suggest that *Webster* quietly indicated that the constitutional right established in *Roe* effectively is dead, so that in the future the Court will not find it necessary to overrule *Roe* explicitly.<sup>176</sup> Others argue that the *Roe* right will be upheld only nominally, while the Court allows increasingly restrictive regulation (perhaps at all phases of pregnancy, subject only to rationality review), resulting eventually in severely limited access to abortion.<sup>177</sup> Still others maintain that ultimately the votes of Justices O'Connor, Souter, Thomas, and perhaps Kennedy, when actually confronted with a direct challenge to *Roe*, will determine the uncertain constitutional status of abortion.<sup>178</sup>

Academic speculation aside, however, the days of the constitutional right to abortion almost certainly are numbered. Chief Justice Rehnquist and Justices Scalia and White, in direct opposition to *Roe*, continue to dissent from the view that the constitutional right to privacy encompasses abortion. On the basis of his votes in abortion cases, Justice Kennedy either shares their disavowal of *Roe* or believes that states should be permitted to regulate abortion broadly throughout the pregnancy term. Justice O'Connor apparently would sustain the *Roe* right but give states wide latitude to restrict access to abortion under her "undue burden" test. Only Justices Blackmun and Stevens continue to adhere to the *Roe* majority's view of the constitutional abortion right and to the rules concerning permissible regulation announced in *Roe*'s progeny. The views of Justices Souter and Thomas are not known, but their generally con-

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rights. See, e.g., *id.* at 2942-43.

In *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990), the Court, with considerably less division, upheld an Ohio statute requiring parental consent and providing for a judicial bypass procedure for minors seeking abortions. See *id.* at 2978. In a portion of an opinion joined by Chief Justice Rehnquist, and Justices White and Scalia, Justice Kennedy provided a possible glimpse at his approach in a future case, saying, "The Ohio statute, in sum, does not impose an undue, or otherwise unconstitutional, burden on a minor seeking an abortion." *Id.* at 2983.

In *Rust v. Sullivan*, 111 S. Ct. 1759 (1991), the Court upheld regulations prohibiting abortion counseling at facilities receiving federal family planning funds. See *id.* at 1778. Chief Justice Rehnquist's opinion focused mostly on first amendment objections to the regulations and only briefly dismissed the fifth and fourteenth amendments claims by relying on *Webster*, *Maher*, and *Harris*. See *id.* at 1776-78.

<sup>176</sup> See, e.g., Bopp & Coleson, *What Does Webster Mean?*, 138 U. Pa. L. Rev. 157, 158-59 (1989); Dellinger & Sperling, *supra* note 164, at 88.

<sup>177</sup> See, e.g., Dellinger & Sperling, *supra* note 164, at 97; Estrich & Sullivan, *supra* note 8, at 120; see also *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 697-719 (3d Cir. 1991) (applying Justice O'Connor's "undue burden" approach to uphold restrictive Pennsylvania regulatory statute), cert. granted, 112 S. Ct. 391 (1992); text accompanying notes 208-18 *infra* (discussing Pennsylvania statute); notes 264-67 and accompanying text *infra* (discussing *Casey* decision).

<sup>178</sup> See, e.g., Estrich & Sullivan, *supra* note 8, at 155 ("women need Justice Sandra Day O'Connor . . . badly").



servative orientation is apparent.<sup>179</sup>

Given the Court's recent abortion decisions, adherence to *Roe* as the keystone of abortion jurisprudence appears impossible. For the Court to draw some as yet undefined and more circumscribed boundary around a surviving constitutional abortion right, thereby leaving the states free to regulate expansively on abortion, seems improbable at a time when some of the Justices increasingly disavow the construction of complicated, quasi-legislative constitutional schemes such as the one established in *Roe* itself.<sup>180</sup> The return of criminal abortion is a distinct probability. More pointedly, the states themselves have begun to act as if its return is inevitable.

### B. Modern Criminal-Abortion Law

Whatever the decision in *Webster v. Reproductive Health Services*<sup>181</sup> ultimately ends up meaning, it is clear that both sides in the abortion debate have treated the case as a watershed in the history of abortion law.<sup>182</sup> Supporters of abortion rights raised the alarm that a fundamental liberty was at great peril, leading to a pair of important political victories.<sup>183</sup> Opponents of abortion rights declared that the Supreme Court had cleared the way for the return of criminal abortion prohibitions and proceeded to act upon that conviction. In turning to examine the nature of the "new" criminal-abortion laws, two types of laws can be identified: old laws that "survived" *Roe* or only were rendered dormant by the decision, and new laws that ensued directly from *Webster*. The second category is the most prevalent and important, but the first also merits attention.

#### 1. Laws "Surviving" *Roe*

Some states have addressed, through litigation rather than legislation, the question whether certain aspects or provisions of their pre-*Roe*

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<sup>179</sup> See sources cited in note 10 *supra* (discussing uncertainty about abortion views of Justices Souter and Thomas).

<sup>180</sup> See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 110 S. Ct. 2841, 2859 (1990) (Scalia, J., concurring) (warning against development of complex constitutional scheme in right-to-die area as in abortion area); *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 537 (1989) (Scalia, J., concurring) (lamenting survival of "mansion of constitutionalized abortion-law"); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 794-95 (1986) (White, J., dissenting) (criticizing arbitrariness of constitutionalized trimester framework).

<sup>181</sup> 492 U.S. 490 (1989).

<sup>182</sup> See Estrich & Sullivan, *supra* note 8, at 119 (both sides "spun" *Webster* decision to their advantage by overemphasizing its significance).

<sup>183</sup> See Apple, *The 1989 Elections: The Abortion Question*, N.Y. Times, Nov. 9, 1989, at B14 (attributing victories of gubernatorial candidates James Florio in New Jersey and Douglas Wilder in Virginia in part to support of abortion rights against prolife opponents).

criminal statutes could continue to operate permissibly in spite of *Roe*. The Arkansas Supreme Court held that because *Roe* contemplated abortions by licensed physicians only, the state could proceed with the prosecution of a lay abortionist under Arkansas's old criminal statute.<sup>184</sup> The Michigan Supreme Court affirmed a conviction along the same lines, declaring, "[W]e cannot accept as a necessary implication that, because [under *Roe* and Michigan public policy] doctors may perform abortions under prescribed circumstances, . . . anyone who has or will perform an abortion can do so with impunity."<sup>185</sup> Similarly, the New Jersey Supreme Court distinguished its statute from the Texas statute which fell entirely in *Roe*, declaring that the New Jersey law could be saved by judicial construction so as to apply at least to lay abortionists.<sup>186</sup>

Directly following from the concept that pre-*Roe* criminal statutes could continue to operate to the extent of their "validity" under *Roe* is the argument that, if *Roe* is overturned, the pre-*Roe* criminal-abortion statutes simply will awaken from their dormant states and become fully operative again.<sup>187</sup> This argument gives rise to a number of objections, however. First, such legislative "action-by-acquiescence" might preclude the important, fresh debate about how criminal abortion sanctions ought to look today.<sup>188</sup> Second, such subtle reenactment might present questions of fair notice of the law to those later prosecuted under the revived statutes.<sup>189</sup> Third, as a matter of constitutional law, it is not clear that statutes previously declared unconstitutional automatically are reactivated when the decision declaring them so is overruled.<sup>190</sup>

Fourth, the one case that squarely addressed the issue of reviving pre-*Roe* laws rejected the argument on jurisprudential grounds potentially applicable in many states. In *Weeks v. Connick*,<sup>191</sup> a three-judge panel in the Eastern District of Louisiana considered a motion by the Orleans Parish District Attorney and the Louisiana Attorney General asking the court to dissolve its 1976 injunction against enforcement of

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<sup>184</sup> See *May v. State*, 254 Ark. 194, 195-96, 492 S.W.2d 888, 889, cert. denied, 414 U.S. 1024 (1973).

<sup>185</sup> *People v. Bricker*, 389 Mich. 524, 531, 208 N.W.2d 172, 175-76 (1973).

<sup>186</sup> See *State v. Norflett*, 67 N.J. 268, 279-81, 337 A.2d 609, 615 (1975).

<sup>187</sup> See Smolin, *Abortion Legislation after Webster v. Reproductive Health Services*, 20 *Cumb. L. Rev.* 71, 91 (1989) (arguing that pre-*Roe* laws automatically will revive if *Roe* is reversed).

<sup>188</sup> See Givens, *Status of Pre-Webster Criminal Abortion Statutes*, 62 *N.Y. St. B.J.* 55, 55 (1990).

<sup>189</sup> See *id.* at 56.

<sup>190</sup> See Note, *The Phenomenon of Antique Laws*, 58 *Geo. Wash. L. Rev.* 111, 111-24 (1989) (describing courts' various approaches to issue and arguing that current approaches probably would lead to rejuvenation of old statutes).

<sup>191</sup> 733 F. Supp. 1036 (E.D. La. 1990).

Louisiana's criminal-abortion statutes.<sup>192</sup> The state argued that *Webster* had changed the decisional law (*Roe*) on which the injunction had been grounded.<sup>193</sup> The court said that it did not have to reach the issue whether the legal basis for the injunction had been changed because the old abortion statutes had been removed from the books under the doctrine of implied repeal.<sup>194</sup> In 1978, 1980, and 1981, Louisiana had passed typical post-*Roe* statutes regulating abortion procedures, thereby permitting abortion in certain circumstances.<sup>195</sup> The old criminal statutes comprised a blanket prohibition on all abortions.<sup>196</sup> Upholding both sets of laws, then, would undermine the policy behind the doctrine of implied repeal: to maintain a "consistent body of law."<sup>197</sup> Louisiana's statute of general application covering the doctrine of implied repeal was further evidence that the post-*Roe* law must have invalidated the pre-*Roe* law.<sup>198</sup>

While it is important to understand the status of pre-*Roe* criminal-abortion laws and be aware of any continued or renewed validity they might have, those laws do not present the most important current issues concerning criminal abortion for several reasons. No recent prosecutions appear to have been attempted under pre-*Roe* criminal-abortion laws. The issue of lay abortionist prosecutions probably was mooted quickly by the growing availability of professional abortion services in the years following *Roe*. No other state has pursued Louisiana's strategy of seeking judicial revival of a pre-*Roe* law. And most importantly, the forces working to restrict abortion have focused their vigorous efforts almost exclusively on enacting new, post-*Webster* criminal-abortion laws.

## 2. *Post-Webster Laws*

Since *Webster*, many state legislatures have been active in the area of restrictions on abortion.<sup>199</sup> Legislatures in the states of Pennsylvania,<sup>200</sup> Idaho,<sup>201</sup> Utah,<sup>202</sup> and Louisiana,<sup>203</sup> and in the territory of Guam,<sup>204</sup>

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<sup>192</sup> *Id.* at 1037.

<sup>193</sup> *Id.*

<sup>194</sup> See *id.* For the third of the three statutes at issue, the court decided that the decisional law had not changed in light of *Webster*, so the state's argument failed even without the doctrine of implied repeal. See *id.*

<sup>195</sup> *Id.* at 1038.

<sup>196</sup> *Id.* at 1037.

<sup>197</sup> *Id.* at 1039.

<sup>198</sup> See *id.* at 1038.

<sup>199</sup> See Balz & Marcus, *In Year Since Webster, Abortion Debate Defies Predictions*, *Wash. Post*, July 3, 1990, at A1 (since *Webster*, roughly 300 bills affecting abortion rights introduced in 40 states).

<sup>200</sup> See 18 Pa. Cons. Stat. Ann. §§ 1303-1320 (Purdon Supp. 1991).

<sup>201</sup> See H.R. 625, 2d Reg. Sess. (Idaho 1991).

<sup>202</sup> See Utah Code Ann. §§ 76-7-301 to -302, -307 to -308, -314 to -315, -317.1 to -317.2 (Supp. 1991).

however, have come the closest to realizing enactment and enforcement of new criminal sanctions for abortion. The Idaho legislature passed a highly restrictive abortion statute in 1990. Governor Cecil Andrus, after considerable agonizing, both personal and political, vetoed this bill.<sup>205</sup> Because the Idaho law came so close to the books, though, it merits close attention. Louisiana's then-Governor Buddy Roemer also vetoed a tough criminal-abortion law in 1990.<sup>206</sup> In 1991, the Louisiana legislature passed another criminal-abortion bill which Governor Roemer again vetoed, but this time the legislature overrode his veto and the bill became law.<sup>207</sup> Broad criminal-abortion statutes also have been signed into law in Utah and Guam, and Pennsylvania has passed a highly restrictive statute emphasizing abortion regulation rather than criminalization. The Pennsylvania, Utah, Louisiana, and Guam laws all are now the subject of litigation in the lower federal courts.

*a. The Pennsylvania Law.* The Pennsylvania statute is unique among these new laws in that it is drafted in the mold of the post-*Roe* regulatory abortion laws. Pennsylvania has had a history since *Roe* of passing restrictive abortion laws designed to push at the boundaries of the constitutional abortion right.<sup>208</sup> In 1989, the legislature passed the first law in the country in response to *Webster*. While of the general post-*Roe* regulatory type, this law is designed to lead to further erosion of the abortion right.<sup>209</sup> It is not a new criminal-abortion law, like the others, but it might represent the next step down the road from *Webster*.

The law regulates abortion in a number of ways. It prohibits abortions "sought solely because of the sex of the unborn child."<sup>210</sup> It re-

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<sup>203</sup> La. Rev. Stat. Ann. § 14:87 (West 1991).

<sup>204</sup> See Bill 848, 20th Leg., 1st Sess. (Guam 1989).

<sup>205</sup> See Egan, Idaho Governor Vetoes Measure Intended to Test Abortion Ruling, N.Y. Times, Mar. 31, 1990, at 1 (Governor Andrus vetoed Idaho law because it would prohibit abortions for some victims of rape or incest and because legal advisers said Supreme Court would strike it down; legislature lacked votes to override).

<sup>206</sup> See Marcus, In Louisiana, Veto on Abortion Bill, N.Y. Times, July 7, 1990, at 10 (Governor Roemer vetoed Louisiana law and House voted 73-31 to override, but Senate lacked votes to override).

<sup>207</sup> See Suro, Nation's Strictest Abortion Law Enacted in Louisiana Over Veto, N.Y. Times, June 19, 1991, at A1 [hereinafter Suro, June 19] (both houses of Louisiana legislature overrode Governor Roemer's veto); Suro, Louisiana's Chief Vetoes Ban on Most Abortions, N.Y. Times, June 15, 1991, at 9 [hereinafter Suro, June 15] (governor vetoes strict abortion law).

<sup>208</sup> See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 758 (1986); Colautti v. Franklin, 439 U.S. 379, 380-81 (1979).

<sup>209</sup> See Lewis, Guam to Appeal Striking Down of Abortion Curbs, N.Y. Times, Sept. 22, 1990, at 8; see also Schwartz, Federal Judge Nullifies Portions of Pennsylvania Abortion Law, Wash. Post, Aug. 25, 1990, at A2 (American Civil Liberties Union attorney said, "It's clear that if the Supreme Court found the Pennsylvania action to be constitutional, it would so undermine *Roe v. Wade* that it would be the same as overruling it.").

<sup>210</sup> 18 Pa. Cons. Stat. Ann. § 3204(c)-(d) (Purdon Supp. 1991).

quires the physician to inform the woman of certain facts about her abortion and about the availability of prenatal care, to make available certain printed information about abortion, and to obtain a written consent form from the woman.<sup>211</sup> Under penalty of law, the woman must provide a signed statement that she has informed her spouse of the abortion unless the spouse is not the father, cannot be located, is likely to inflict injury upon her if notified, or if the pregnancy is a result of spousal sexual assault reported to the authorities.<sup>212</sup> Performance of an abortion of a fetus that has a gestational age of twenty-four or more weeks that is not necessary to save the life of the mother is a felony of the third degree.<sup>213</sup> Also to abort a fetus of this age, the law requires the presence of a second doctor and that a specific degree of care be exercised to save the fetus, except in the case of a medical emergency.<sup>214</sup> Finally, facilities where abortions are performed are required to file detailed reports of each abortion, including information about compliance with the law's provisions.<sup>215</sup>

The law's enforcement provisions vary. Depending on the section, doctors in violation of the law commit either a third-degree felony or a violation of Pennsylvania's law governing medical practice.<sup>216</sup> Several sections label "any person" violating that section a third-degree felon. But a blanket provision states:

[N]o criminal penalty shall apply to a woman who violates any provision of this chapter solely in order to perform or induce or attempt to perform or induce an abortion upon herself. Nor shall any woman who undergoes an abortion be found guilty of having committed an offense, liability for which is defined under section 306 (relating to liability for conduct of another; complicity) or Chapter 9 (relating to inchoate crimes), by reason of having undergone such abortion.<sup>217</sup>

On its face, this law suggests that Pennsylvania is merely tinkering with long-standing issues of permissible regulation. The law retries some of the regulations that the Court previously found unconstitutional.<sup>218</sup> It adds a few new regulations. It enforces its provisions through a mix of civil and criminal sanctions against doctors. And it explicitly exempts the woman seeking abortion from criminal liability. Looked at as a whole, however, this law probably represents a serious challenge to the

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<sup>211</sup> *Id.* § 3205(a), (c).

<sup>212</sup> *Id.* § 3209.

<sup>213</sup> *Id.* § 3211.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* § 3214(a).

<sup>216</sup> *Id.* §§ 3204-3206, 3209-3212, 3214.

<sup>217</sup> *Id.* § 3218(a).

<sup>218</sup> See *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 762-71 (1986).

constitutional regime of *Roe* and a genuine effort to produce an environment in which abortion is inaccessible. The totality of its provisions will work to limit severely access to abortion in Pennsylvania, and the sheer weight of its regulations belies the claim that the law is motivated solely by the state interest in maternal health after the first trimester and fetal life after viability. Pennsylvania, perhaps believing it might win the Supreme Court's cooperation, simply may be doing indirectly what some other states are doing more directly.

*b. The Idaho Legislation.* The vetoed Idaho bill lay somewhere between the Pennsylvania law and the laws of Utah, Louisiana, and Guam. On the one hand, it represented a noncriminal regulatory scheme enforced through a variety of civil remedies. On the other hand, it restricted abortion even more than did the Pennsylvania law, and it explicitly exempted the woman from liability like all the other laws, except Guam's.<sup>219</sup> The Idaho legislation was drafted by the National Right to Life Committee and introduced after the same legislation had failed in Minnesota and Alabama.<sup>220</sup> In its first section, the bill stated, "The legislature considers that the state's compelling interest in unborn life throughout pregnancy justifies preventing the use of abortion as another means of birth control."<sup>221</sup>

The bill would have prohibited all abortions performed or attempted "as a method of birth control."<sup>222</sup> It defined "abortion for reasons other than birth control" to include those performed when: (1) two doctors (or one in case of emergency) determined the woman's life would be endangered or severe and lasting physical health damage would result; (2) the pregnancy was the result of a rape reported within seven days; (3) the pregnancy was the result of reported incest and the mother was a minor; or (4) two doctors determined that the child would be born with "profound and irremediable physical or mental disabilities."<sup>223</sup>

The bill provided several avenues of enforcement. First, prosecutors, parents of minors, and fathers of fetuses were to have standing to obtain an injunction against an imminent abortion. Knowing violation of such an injunction would have carried a civil contempt penalty of \$10,000 for the first violation and a possible award of attorney's fees.<sup>224</sup>

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<sup>219</sup> See text accompanying notes 252-57 *infra*.

<sup>220</sup> See Balz, *Idaho Votes a Virtual Ban*, Wash. Post, Mar. 23, 1990, at A1. Idaho Governor Andrus complained when he vetoed the law that national antiabortion groups had taken Idaho for a "patsy." See Egan, *supra* note 205, at 1.

<sup>221</sup> H.R. 625, 2d Reg. Sess. (Idaho 1990).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* Violators were to be fined \$30,000 for the second violation and \$50,000 for each succeeding violation. *Id.*

Second, any of the foregoing persons and the woman upon whom the abortion was performed could bring a civil action for damages against any person performing an unlawful abortion.<sup>225</sup> Third, any person who supplied any substance to or used any instrument upon a woman with intent to produce an abortion was liable for a civil penalty, in an action brought by the local prosecutor, of up to \$10,000.<sup>226</sup> The bill also provided for: a civil penalty for anyone advertising or selling abortifacient substances to anyone but physicians; printed material to be provided to the woman describing pregnancy, fetal development, and abortion; parental notice; and a ban on postviability abortions except when two doctors (one in an emergency) determined that the woman's life was endangered.<sup>227</sup>

In terms of the conduct it prohibited, the Idaho bill was a modernized version of the old criminal-abortion statutes. Rather than including a simple, blanket statement of what conduct was prohibited, the bill set out a complex set of definitions explaining under what circumstances the state would deem abortion "a method of birth control." The end result, however, was a legal regime not unlike the ones that existed prior to *Roe*. Almost all abortions would be prohibited,<sup>228</sup> and the few exceptions were less permissive than those found in the Model Penal Code's 1960s "reform" statute.<sup>229</sup>

In terms of enforcement, though, the Idaho law would have been a peculiar innovation. While women would have been exempt from liability as in past schemes,<sup>230</sup> no one would have been subject to criminal punishment. Thus, Idaho might have been enacting an "enlightened" version of the old abortion statutes, as were the drafters of the Model Penal Code. Yet the civil enforcement scheme was genuinely odd. It seems Idaho would have treated the "crime" of abortion something like a speeding violation or perhaps the breach of a pollution law, even though the legislation announced itself not as serving health or safety purposes, but rather as concerning the taking of life. The civil structure of the Idaho regime, however, should not obscure the fact that Idaho would have treated the woman seeking an abortion as incoherently as did any of the criminal-abortion laws of the nineteenth century. The Idaho bill ultimately only compounded the incoherence of its pre-*Roe* predecessors in

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<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> See Balz, *supra* note 220, at A1 (bill estimated to prohibit 90% of over 1500 abortions performed in state annually).

<sup>229</sup> See text accompanying notes 111-19 *supra*.

<sup>230</sup> Theoretically, though the bill was silent on the question, women submitting to abortion in the face of an injunction obtained by a husband or parent could have been found to violate that provision and been subject to its fines.

its strange enforcement devices. In the end, the issues presented by the Idaho bill were mooted by Governor Andrus's veto and the legislature's inability to override that veto.<sup>231</sup>

*c. The Utah Law.* In early 1991, Utah passed its own criminal law in the pre-*Roe* mold.<sup>232</sup> The law states that abortions must be performed in a hospital after the first ninety days of pregnancy and that an abortion may be performed only if: 1) the attending physician certifies that it is necessary to save the woman's life; 2) the pregnancy resulted from a reported rape; 3) the pregnancy resulted from incest; 4) it is necessary to prevent "grave damage to the pregnant woman's medical health"; or 5) the child would be born with "grave defects."<sup>233</sup> The punishment provision in the law states, "Any person who intentionally performs an abortion . . . is guilty of a felony of the third degree."<sup>234</sup> But it also states, "[A] woman who seeks to have or obtains an abortion performed for herself is not criminally liable."<sup>235</sup> The law does not make it clear whether the "grave medical damage" exception would include mental health or postpregnancy emotional problems.<sup>236</sup>

Soon after the Utah law was adopted, the American Civil Liberties Union (ACLU) pointed out that, when read in conjunction with Utah's existing homicide law, the new abortion law would permit women convicted of procuring abortions to be sentenced to life in prison or death.<sup>237</sup> Given Utah's existing homicide law, which made it murder to kill a fetus in an illegal abortion,<sup>238</sup> and the new law's expansion of what constitutes an illegal abortion, the ACLU argued, a woman procuring an abortion still was subject to prosecution under the criminal homicide law, despite being exempted under the new abortion law.<sup>239</sup> Not surprisingly, the Utah legislature moved quickly to adopt legislation amending portions of both the abortion and homicide statutes to remove any possibility of a woman procuring an abortion being subject to criminal liability.<sup>240</sup>

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<sup>231</sup> See note 205 and accompanying text *supra*.

<sup>232</sup> Governor Norman Bangert first warned that he would veto legislation he considered unconstitutional but then signed the highly restrictive measure into law. See Lewin, *Strict Anti-Abortion Law Signed in Utah*, N.Y. Times, Jan. 26, 1991, at 10; *A Proposed Ban on Most Abortion Gains in Utah*, N.Y. Times, Jan. 22, 1991, at A19.

<sup>233</sup> Utah Code Ann. § 76-7-303 (1991).

<sup>234</sup> *Id.* § 76-7-314(1)(a). The sanction for a class three felony in Utah is a \$5000 fine and up to five years in prison. *Id.* §§ 76-3-301(1)(b), -203(3).

<sup>235</sup> *Id.* § 76-7-314(1)(b).

<sup>236</sup> See Lewin, *supra* note 232, at 10.

<sup>237</sup> See Lewin, *Harsh Loophole in Utah Abortion Law*, N.Y. Times, Mar. 9, 1991, at 8.

<sup>238</sup> Utah Code Ann. § 76-5-201.

<sup>239</sup> See Lewin, *supra* note 237, at 8.

<sup>240</sup> See *Utah Moves to Clarify Tough Abortion Law*, N.Y. Times, Apr. 20, 1991, at 6. The amendments also exempted doctors performing abortions from the homicide statutes. See *id.*



Utah has attempted a return to the pre-*Roe* criminalization of abortion. In so doing, the legislature directly confronted the issue of the woman's culpability, choosing to exempt her explicitly from criminal liability. As a result, in Utah a woman who seeks an abortion is considered to have done no criminal wrong, despite a legal regime that clearly seeks to prevent her conduct. The Utah law, then, stands squarely in the tradition of its nineteenth-century predecessors in treating the woman as a blameless victim of the abortion crime. And the Utah legislature's hurried effort to respond to the ACLU's criticism and remove all possibility of the woman's liability from its criminal laws indicates a deep political sensitivity to the prospect of branding the woman a criminal.

*d. The Louisiana Law.* Louisiana has adopted the nation's most recent criminal-abortion law.<sup>241</sup> The Louisiana law first declares, "Life begins at conception."<sup>242</sup> The law then proceeds to define abortion as "the performance of any of the following acts with the specific intent of terminating a pregnancy: (1) Administering or prescribing any drug, potion, medicine, or any other substance to a female; or (2) Using any instrument or external force whatsoever on a female."<sup>243</sup> It is not unlawful for a physician to perform any of these acts if she does so to preserve the life of an unborn child, to preserve the life of the mother, or to terminate a pregnancy resulting from rape or incest.<sup>244</sup> For the rape exception to apply, however, the woman must report the rape to the authorities within five days, she must undergo a physical examination in that same period to verify that she was not already pregnant when raped, and she must obtain the abortion within thirteen weeks of conception.<sup>245</sup> For the incest exception to apply, the woman must report the crime to the authorities and the abortion must be performed within thirteen weeks of conception.<sup>246</sup> The penalty provision of the law states, "Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years and shall be fined not less than ten thousand nor more than one hundred thousand dollars."<sup>247</sup> Both the section defining abortion and the section setting out the penalty for abortion state that the provision "shall not apply to the female who has an

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<sup>241</sup> See Suro, June 19, *supra* note 207, at A1 (Louisiana legislature overrode governor's veto for first time this century). Governor Roemer had vetoed the bill on the ground that it did not provide adequate exceptions for rape, deformed fetuses, and certain risks to the mother's health. See Suro, June 15, *supra* note 207, at 9.

<sup>242</sup> La. Rev. Stat. Ann. § 14:87 (West 1991).

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

abortion."<sup>248</sup>

The Louisiana law is arguably the strongest abortion restriction adopted to date. Whereas the Utah and Guam laws allow an exception if the woman can show a serious medical need for the procedure, the Louisiana law allows an exception for the woman's health only when her life is endangered.<sup>249</sup> The ACLU, as it had done with respect to the Utah law, quickly pointed to difficulties presented by the Louisiana statute. Given the law's definition of life as beginning at conception, the ACLU argued, the law would make doctors criminally liable for prescribing postfertilization methods of birth control, such as intrauterine devices or low-dose birth control pills.<sup>250</sup> A member of the National Right to Life Committee disputed this interpretation, arguing that only the preamble of the bill states that life begins at conception and that one who provides birth control in order to prevent a pregnancy cannot have the specific intent, required by the law's criminal provisions, to terminate a pregnancy.<sup>251</sup>

The Louisiana law, then, stands with the Utah law as a direct descendant of pre-*Roe* abortion statutes. The law is a blanket criminal prohibition, with only a narrow therapeutic exception, and it carries severe penalties. The law is uncompromising in its mission of fetal protection, except with respect to the woman's conduct, which falls entirely outside of the statute's commands.

*e. The Guam Law.* In contrast to the Utah and Louisiana laws, the Guam abortion law condemns all who participate in the act, including the woman herself. The statute is short and direct. After beginning with a legislative finding that life begins at conception,<sup>252</sup> the law defines abortion as "the purposeful termination of a human pregnancy . . . by any person including the pregnant woman herself."<sup>253</sup> The law punishes as a misdemeanor "[e]very woman who solicits of any person" any sub-

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<sup>248</sup> *Id.*

<sup>249</sup> See Suro, June 19, *supra* note 207, at A1.

<sup>250</sup> See Kolata, Opponents of Louisiana's New Law Say It Could Limit Use of Some Contraceptives, *N.Y. Times*, June 21, 1991, at A11. Some scientists have disputed the description of these birth control devices as operating postconception. See *id.*

<sup>251</sup> See *id.* (statement by Burke Balch, state legislative director of National Right to Life Committee).

<sup>252</sup> Bill 848, 20th Leg., 1st Sess. (Guam 1989). The 130,000 residents of Guam are overwhelmingly Catholic and Archbishop Anthony Apuron threatened to excommunicate any Catholic member of the 21-member unicameral legislature who voted against the law. See Lewis, Judge in Guam Rejects Strict Law on Abortion, *N.Y. Times*, Aug. 24, 1990, at A12; Lewin, Guam's Abortion Law Tested by A.C.L.U. Lawyer's Speech, *N.Y. Times*, Mar. 21, 1990, at A24. The governor signed the law while expressing reservations about certain provisions. See Lewin, *supra*, at A24.

<sup>253</sup> Bill 848, 20th Leg., 1st Sess.

stance or "submits to any operation . . . with intent thereby to cause an abortion."<sup>254</sup> Excepted from the definition of abortion is a "medical intervention" in a pregnancy, continuation of which two doctors determine would endanger the life or gravely impair the health of the woman.<sup>255</sup>

The Guam law actually is more severe than the common pre-*Roe* criminal-abortion statute. It deems the abortionist, who provides any substance or uses any instrument to cause an abortion, to be a third-degree felon.<sup>256</sup> In so doing, it raises the familiar questions of accomplice and conspiratorial liability. But the Guam law also adds the innovation of a separate provision punishing anyone who encourages another to seek an abortion. The law punishes as a misdemeanor "[e]very person who solicits any woman to submit to any operation, or to the use of any means whatever, to cause an abortion."<sup>257</sup>

The Guam legislature has taken the most straightforward approach to barring abortion of any of those attempted so far. Despite partially replicating the incoherence of the pre-*Roe* laws by viewing the woman as somehow less at fault than the abortionist, the law does criminalize her conduct. The woman is told not only that abortion no longer will be available and that she is morally weak when she seeks it, but also that she violates the law and will be punished for doing so. One cannot help but question whether Guam's strategy has any broad implications. In a tiny jurisdiction such as Guam, which is almost entirely Catholic, a somewhat consistent approach, viewing the woman as responsible for her own behavior, was politically possible and desirable. In contrast, the explicit exemptions for the woman in the Pennsylvania, Utah, and Louisiana laws demonstrate that lawmakers and voters in those larger, more diverse jurisdictions see branding the woman a criminal as politically unacceptable.

### 3. *The Current Status of Post-Webster Laws*

Because *Webster* did not explicitly overrule *Roe*, all these new restrictive abortion laws face constitutional challenges. The Pennsylvania, Utah, Louisiana, and Guam laws each sit at various stages of the federal judicial process. In Guam, an injunction has been obtained barring enforcement of the Guam statute on the ground that it violates the Constitution under *Roe*.<sup>258</sup> The Guam government first said that it had no

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<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> See *Guam Society of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422, 1427-28 (D. Guam 1990).

interest in leading a national challenge to *Roe*,<sup>259</sup> but “after tremendous soul-searching,” Governor Ada changed his mind and decided to appeal the injunction to the Ninth Circuit Court of Appeals.<sup>260</sup> The appeal has been argued, and a decision is expected soon. In Utah, the ACLU has filed suit challenging the state’s law, and Federal District Judge J. Thomas Greene has approved an agreement between the ACLU and the state suspending the operation of the law while the challenge to its constitutionality moves through the federal courts.<sup>261</sup> A trial has been set for January 1992. In Louisiana, a federal judge reluctantly struck down that state’s statute as unconstitutional in August 1991, on the ground that *Roe* remains the law of the land despite his agreement with the dissent in that case.<sup>262</sup> The Fifth Circuit Court of Appeals will hear argument on the state’s appeal of that decision in February 1992.

As for Pennsylvania, the Federal District Court for the Eastern District of Pennsylvania struck down most of the provisions in that state’s statute on the ground that they violate the commands of *Roe* and its progeny and that *Webster* has not weakened those precedents.<sup>263</sup> The state appealed that decision to the Third Circuit Court of Appeals, which issued an important decision on October 21, 1991, reversing the district court and upholding every part of the statute except its provision for spousal notification.<sup>264</sup> Most significantly, the Third Circuit’s decision announced that *Roe*’s trimester framework is no longer binding law, and that Justice O’Connor’s “undue burden” analysis for abortion cases is now “the law of the land.”<sup>265</sup> Applying that analysis, the court found that only the spousal notification provision placed an “undue burden” on

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<sup>259</sup> See Lewis, *supra* note 252, at A12.

<sup>260</sup> See Lewis, *supra* note 209, at 8. The governor said he would not appeal the provision making it a crime to solicit a woman to have an abortion. See *Guam to Appeal Abortion Cases*, Wash. Post, Sept. 26, 1990, at A22.

<sup>261</sup> See *Utah Abortion Law is Suspended*, N.Y. Times, Apr. 10, 1991, at A18.

<sup>262</sup> See *Louisiana Abortion Law Is Halted in U.S. Court*, N.Y. Times, Aug. 8, 1991, at A16.

<sup>263</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 744 F. Supp. 1323, 1372-95 (E.D. Pa. 1990) *aff’d in part, rev’d in part*, 947 F.2d 682 (3d Cir. 1991), cert. granted, 112 S. Ct. 931 (1992).

<sup>264</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682, 719 (3d Cir. 1991), cert. granted, 112 S. Ct. 391 (1992). One judge on the three-judge panel agreed with all of the majority opinion, except he would have upheld the spousal notification provision. See *id.* (Alito, J., concurring in part and dissenting in part).

<sup>265</sup> See *id.* The Third Circuit’s reasoning was interesting. All three judges on the panel agreed that the law binding on the lower federal courts can be found in the opinion that joins the result of a Supreme Court decision, lacking a majority rationale, on the narrowest grounds. See *id.* at 691-94. In both *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), they argued, a majority of the Justices would have abandoned *Roe*’s trimester framework, though no five would have done so on the same ground. Thus, Justice O’Connor’s reasoning, founded on her “undue burden” test, becomes “the law of the land” since it was the “narrowest” rationale. See *Casey*, 947 F.2d at 694-97, 719.

a woman's constitutional abortion right, thereby triggering "strict scrutiny," which the notification provision failed to surmount.<sup>266</sup> Because the other provisions in the law did not "unduly burden" the abortion right, they were subjected only to "rational basis" review, which they not surprisingly survived.<sup>267</sup> Eager for a definitive abortion ruling from the Supreme Court, both the plaintiffs and the state quickly urged the Court to grant certiorari, which it did on January 21, 1992.<sup>268</sup> The Court will hear oral argument in April 1992 and a decision is expected before the end of the Term.

These new criminal-abortion statutes appear to have a good chance of surviving. The lower federal courts, with the exception of the Third Circuit, initially seem inclined to take the view that *Roe* remains the law of the land and grant preliminary and permanent injunctions against the enforcement of these laws. However, these decisions are only a necessary and intermediate step in a process initiated by the states adopting these laws. For the states, the ultimate object of the current litigation is vindication in the Supreme Court. The Pennsylvania regulatory law has reached the Court first. The result in that case is not likely to be any less—and likely will be even more—encouraging to those pushing new criminal statutes than was the result in *Webster*.<sup>269</sup> If the Guam, Utah, or Louisiana statutes follow, perhaps as early as next Term, the Court might overturn *Roe* directly, giving the green light for new criminal laws.<sup>270</sup>

Until then, the forces pushing for new abortion restrictions will continue to operate as if "*Webster* can fairly be viewed as an invitation by the Justices to pass [a prohibition on previability abortion]. Therefore, a legislator or governor may, in good conscience, proceed to enact statutes regulating or prohibiting abortion, so long as such statutes are well crafted and rational."<sup>271</sup> In 1990 and 1991, legislatures in Alabama, Louisiana, Missouri, North Dakota, and South Dakota all considered bans on abortion in almost all circumstances.<sup>272</sup> Although this new era in abortion law remains in its fledgling stage, the history of abortion laws

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<sup>266</sup> See *Casey*, 947 F.2d at 709-15.

<sup>267</sup> See *id.* at 699-709, 715-19.

<sup>268</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 391 (1992); see also Johnston, *Abortion: Something Two Sides Agree On*, N.Y. Times, Dec. 13, 1991, at B12 (discussing parties' strategies in petitioning for certiorari).

<sup>269</sup> It is conceivable that the Court could uphold the Pennsylvania law while maintaining the constitutional abortion right in some form, as did the Third Circuit.

<sup>270</sup> In order to uphold a blanket criminal prohibition on abortion at all stages of pregnancy, such as Louisiana's or Utah's, the Court surely would have to scrap not just *Roe*'s trimester framework, but also *Roe*'s underlying conception of the right to privacy.

<sup>271</sup> Smolin, *supra* note 187, at 98.

<sup>272</sup> Telephone interview with Andrea Miller, American Civil Liberties Union, Reproductive Rights Project (Jan. 28, 1991).

should inform any dialogue about the adoption of new statutes. Time remains to think deeply about the meaning of such legislative action before plunging ahead.

### III

#### CRIMINAL ABORTION IN THE 1990S

As Parts I and II of this Note demonstrated, criminal-abortion laws have treated and continue to treat women in remarkable fashion. In the nineteenth century, every jurisdiction eventually adopted a criminal-abortion law.<sup>273</sup> Those laws appear to have resulted from a combination of forces, most significantly an early desire to protect women's health and safety followed by the later, more complicated influence of the burgeoning medical profession.<sup>274</sup> Some of those laws condemned the conduct of the woman procuring an abortion, while others explicitly exempted her conduct from criminal liability.<sup>275</sup> Nineteenth- and twentieth-century courts implementing these laws refused to view the woman as a criminal, even where the applicable statutes or established doctrine dictated liability. Instead, the courts deemed her a victim of an event engineered not by her, but by her doctor or the dangerous illegal abortionist.<sup>276</sup> The law was viewed as designed for her protection—not because it ensured her access to safe abortion, but rather because it shielded her from a dangerous and immoral practice that she did not have the power to avoid. The statutes and the attitudes they reflected persisted late into the twentieth century.

Early criminal-abortion statutes and the courts applying them fashioned no more than an uneasy compromise, condemning abortionists while simultaneously absolving the women who sought their services. Subsequent attempts to reform these statutes in the second half of the twentieth century illustrate the instability of this arrangement. Several states "liberalized" their abortion statutes, adopting broader "therapeutic" exceptions in the 1960s because of a perceived threat to the lives and health of women.<sup>277</sup> Those limited reforms, however, failed to address a growing sense that criminal-abortion laws were unacceptable in modern America. Only the abolition of the laws by the declaration in *Roe* of a woman's constitutional right to an abortion resolved, if only temporarily, the perplexing tension between criminal condemnation of abortion and societal acceptance of women seeking abortions.

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<sup>273</sup> See text accompanying notes 40-76 *supra*.

<sup>274</sup> See *id.*

<sup>275</sup> See *id.*

<sup>276</sup> See text accompanying notes 77-101 *supra*.

<sup>277</sup> See text accompanying notes 110-33 *supra*.

The new criminal-abortion laws enacted since *Webster* bring the issue of the woman's conduct back to the fore of the abortion debate. The discourse surrounding the adoption of these statutes has focused overwhelmingly on the well-being of the fetus, rather than the status of the woman.<sup>278</sup> In fact, the treatment of the woman seeking an abortion has been nothing more than an inconvenience hindering the project of eliminating the abortion of fetuses. Rather than seriously consider the proper treatment of the woman's conduct, states, with the exception of the territory of Guam, have legislated the issue away by exempting the woman from criminal liability. What emerges is a legal framework at odds with itself and in service of a paternalistic attitude toward women. Women have been and are at once needful of the law's protection, blameless victims of their own womanhood (i.e., moral weakness), incapable of making important decisions about their own lives, and undeserving of access to the things they seek. The law in this area has condemned women while claiming to protect them. Or, in a favorite epigram, "[t]he pedestal upon which women have been placed has . . . upon closer inspection, been revealed as a cage."<sup>279</sup>

This Part examines the implications, in light of the historical account given in Parts I and II, of returning abortion law to the criminal code. It first poses the hard political choice presented to the supporters of criminal-abortion laws of either embracing paternalism or jailing women. It then posits three categories of argument that supporters of the new criminal-abortion statutes might advance as possible routes out of their political dilemma. For each of these arguments—that the woman truly is a victim, that the woman is less culpable than the abortionist, and that exempting the woman from liability only advances enforcement of the laws and deterrence of abortion—this Part offers a rebuttal. Taken together, the rejections of these possible defenses all demonstrate that criminal-abortion laws that exempt the woman from liability can be explained only as exercises in gender-based paternalism and that the supporters of those laws can find no escape from their political quandary.

### A. *The Political Dilemma*

As President Bush's response to the abortion question in the campaign debate demonstrated, supporters of criminal abortion find themselves atop the horns of a discomfitting political dilemma. They name their project as the protection of fetal life. Logically, then, the woman

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<sup>278</sup> See text accompanying notes 221, 242, 252 *supra*.

<sup>279</sup> *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 20, 485 P.2d 529, 541, 95 Cal. Rptr. 329, 341 (1971).

who willingly seeks an abortion ought to be blameworthy for her part in that crime against life. Yet criminal-abortion laws, by their letter and in their application, almost always have exempted the woman from liability. This result must be because the supporters of those laws either do not view the woman as culpable or are convinced that, as a practical matter, jailing women for abortions is politically unacceptable. In either case, those who advance criminal-abortion laws are embracing and perpetuating a paternalistic view of women that treats them as less than fully autonomous and responsible citizens. The only way to avoid codifying an attitude toward women that we otherwise have rejected as a legitimate basis for legal distinctions is to hold the woman fully and criminally responsible for her conduct by punishing her. But, as President Bush knows, this is for most Americans, with the possible exception of the residents of Guam, an unacceptable answer. Thus, proponents of criminal abortion appear trapped.

This Note decidedly does not invite the conclusion that women ought to be jailed for seeking abortions. It seeks only to isolate and identify the logical result of criminal-abortion statutes exemption women as a means of compelling the supporters of those statutes to justify their project. This Note ultimately concludes that all criminal-abortion statutes are untenable, whichever way they are drafted. Before this point can be proved, however, a series of possible escape devices from the dilemma of criminal-abortion laws must be considered and rejected.

## *B. Arguments to Escape the Dilemma*

### *1. The Woman Is Indeed a Victim*

The strongest argument for proponents of these laws would be to affirm the anomalous treatment of the woman's conduct rather than to minimize or ignore it. The statutes treat the woman as a blameless and weak victim needful of society's protection, the argument would run, because that is what she is. An analogy could be drawn to anti-pornography or statutory-rape laws or to the Mann Act,<sup>280</sup> which sometimes exempt the female participant in the crime on the theory that the activity really victimizes her in spite of her apparent complicity. Women who seek abortions act in response to powerful pressures and emotions they feel when faced with an unwanted pregnancy. In this troubled state, they become incapable of making the responsible, autonomous decisions we normally attribute to the violator of the law. Thus, society must step in and protect women from internal forces they themselves cannot control by eliminating the abortionist who preys upon that

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<sup>280</sup> See note 101 and accompanying text *supra*.



weakness. On most versions of this account, the language of woman-as-victim exhibited by nineteenth-century courts would seem quite reasonable.<sup>281</sup>

This argument fails on two grounds, however—both relating in part to the fundamental paternalism that lies at its core. First, this nation now at least professes to reject this sort of reasoning as a permissible ground for distinctions in the law. The paternalism reflected in the view of the woman as a victim in the new abortion laws is linked directly not just to the abortion laws of the nineteenth century and the jurisprudence of the courts applying them, but also to a now-dated paternalism toward women that pervaded the whole of the law in that era. Today, we have rejected that paternalism and identify the errors in the old examples of its operation as points of modern consensus.<sup>282</sup>

In a nineteenth-century case upholding the right of Illinois to deny women licenses to practice law, a concurring opinion joined by three Supreme Court Justices stated, “The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”<sup>283</sup> The Court went on to observe:

The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.<sup>284</sup>

Thirty-five years later, the Supreme Court upheld an Oregon law placing limits on the number of hours women could work, stating, “[Woman] is properly placed in a class by herself, and legislation designed for her protection may be sustained . . . .”<sup>285</sup> The Court also concluded, “[H]er physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man.”<sup>286</sup> Almost twenty years after that decision, the Supreme Court upheld a Georgia law imposing a poll tax on men but not women, holding that discrimination in favor of all women was permissible. The Court stated: “[W]omen may be exempted on the basis of the special considerations to which they are naturally entitled. In view of the burdens necessarily borne by them for the preservation of the race,

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<sup>281</sup> See notes 77-101 and accompanying text *supra*.

<sup>282</sup> See O'Connor, *Portia's Progress*, 66 N.Y.U. L. Rev. , (1991) (describing nineteenth-century views of women which all now agree were wrong).

<sup>283</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

<sup>284</sup> *Id.* (Bradley, J., concurring)

<sup>285</sup> *Muller v. Oregon*, 208 U.S. 412, 422 (1908).

<sup>286</sup> *Id.*

the State reasonably may exempt them from poll taxes."<sup>287</sup>

In another area of the criminal law, courts evidenced similar attitudes toward women. In 1910, Congress passed the Mann Act, a law that prohibits the transportation of women across state lines for purposes of prostitution.<sup>288</sup> The law presented courts with a difficult problem when applied to women who willingly participated in their own transportation.<sup>289</sup> In 1915, the Supreme Court, citing to the minority view in abortion cases,<sup>290</sup> held that a woman could be guilty of conspiracy in her own transportation.<sup>291</sup> The Court said, "We see . . . little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim."<sup>292</sup> A sharp dissent claimed that the statute "treats the woman who is transported for use in the business of prostitution as a victim—often a willing victim but nevertheless a victim. It treats her as enslaved and seeks to guard her against herself as well as against her slaver."<sup>293</sup> The Court later limited its holding regarding conspiratorial liability in a 1932 case in which it held that, to fall within the statute, the woman must take affirmative steps beyond mere acquiescence in aiding or assisting her transportation.<sup>294</sup> In that case the Court said, "[W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."<sup>295</sup>

In contrast to the abortion context, where the new statutes mimic

<sup>287</sup> *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937), overruled in part by *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663, 669 (1966).

<sup>288</sup> *White Slave Traffic Act*, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1988)). See generally Note, *supra* note 101 (setting forth history of application of Mann Act).

<sup>289</sup> The Mann Act was transformed "from its original formulation as a weapon against commercial vice to its eventual use as a federal morals law." Note, *supra* note 101, at 1111. Furthermore:

The image of the prostitute developed by Progressive Era reformers was of a lonely and confused female. In searching for explanations to what could have led women to so degrade and ultimately destroy themselves, the Progressives maintained that prostitutes were the passive victims of social disequilibrium and the brutality of men. This Progressive Era conception of female weakness and male domination left no room for the possibility that prostitutes might consciously choose their activities.

*Id.* at 1115.

<sup>290</sup> See note 100 and accompanying text *supra*.

<sup>291</sup> See *United States v. Holte*, 236 U.S. 140, 144-45 (1915).

<sup>292</sup> *Id.* at 145.

<sup>293</sup> *Id.* at 147-48 (Lamar, J., dissenting).

<sup>294</sup> See *Gebardi v. United States*, 287 U.S. 112, 119 (1932); see also, Note, *supra* note 101, at 1122 ("[T]he *Gebardi* Court's conclusion was consistent with the contemporary view that women's criminality was primarily due to their economic and psychological dependence on men. It was also more attuned to the Act's original philosophy than was the *Holte* decision.").

<sup>295</sup> *Gebardi*, 287 U.S. at 123.

their nineteenth-century predecessors, direct parallels in other areas of the law between nineteenth-century and modern views of women are more difficult to find. The clearest example of the progress from nineteenth-century views of women is the gender-discrimination cases of the 1970s in which the Court, using the equal protection clause, for the first time recognized that women as a class, like racial minorities, were entitled to heightened scrutiny of legislation discriminating against them on the basis of their sex.<sup>296</sup> In *Frontiero v. Richardson*,<sup>297</sup> Justice Brennan observed: "There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage."<sup>298</sup> More recently, the Court rejected a policy that allegedly sought to protect future children by excluding women capable of becoming pregnant from certain battery manufacturing jobs.<sup>299</sup> The Court stated, "Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."<sup>300</sup>

Modern courts have by no means solved the problem of gender. Courts continue to struggle, often with poor and regressive results, with the difficult tension between striving toward equal treatment of women and recognizing women's unique capacity to bear children.<sup>301</sup> What is

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<sup>296</sup> See, e.g., *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (first case meaningfully upholding equal protection claim based upon gender); see also O'Connor, *supra* note 282, at — (describing revolution since early 1970s in law's portrayal of women in society).

<sup>297</sup> 411 U.S. 677 (1973).

<sup>298</sup> *Id.* at 684.

<sup>299</sup> See *International Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 1209-10 (1991) (unanimous decision).

<sup>300</sup> *Id.* at 1210 (citing *Muller v. Oregon*, 208 U.S. 412 (1908)).

<sup>301</sup> See O'Connor, *supra* note 282, at 1553-54 (identifying tension but not offering resolution). The post-*Roe* Supreme Court opinions concerning abortion themselves contain evidence of this struggle. The decisions in *Maher v. Roe*, 432 U.S. 464 (1977), *Harris v. McRae*, 448 U.S. 297 (1980), and *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), acknowledged the woman's constitutional right to be free of state interference in her decision to terminate pregnancy but permitted the states and federal government actively to promote childbirth over abortion. See *Webster*, 492 U.S. at 509; *Harris*, 448 U.S. at 315; *Maher*, 432 U.S. at 473-74. In addition, the Court's most recent abortion decision, while arguably narrow in its legal implications, might have the practical effect of making mothers of more indigent women who seek to avoid that role. See *Rust v. Sullivan*, 111 S. Ct. 1759, 1767-78 (1991) (upholding law prohibiting doctors from mentioning abortion to patients at facilities receiving federal family planning funds).

In another example, upholding California's statutory-rape law which criminalized only male sexual conduct regardless of the male's age and regardless of the female partner's intent, the Court again perpetuated dated views, failing to recognize female autonomy:

Because virtually all of the significant harmful and inescapably identifiable consequences of teenage pregnancy fall on the young female, a legislature acts well within its authority when it elects to punish only the participant who, by nature, suffers few of the consequences of his conduct. It is hardly unreasonable for a legislature acting to protect

truly remarkable, though, is that the abortion issue now seems to have been left out of that process.<sup>302</sup> Until the early 1970s, when the treatment of women in other areas of the law was beginning to take great strides forward, abortion remained firmly rooted in the nineteenth century. Then, all at once, abortion was yanked into the modern age by the decision in *Roe* invalidating criminal-abortion laws. Yet with the reappearance now of criminal-abortion laws that treat women as victims and the apparent instability of *Roe* itself, abortion seems again to be taking its place, after a brief hiatus, as an exception to the general rules about the legal treatment of women.

Thus, when they explain their view of women seeking abortions as reflecting concern for victims, the supporters of criminal-abortion laws accept and embrace the status of those laws as glaring exceptions to modern, consensus views about the position of women in our society. Abortion laws embody a Victorian paternalism that ought to disturb the body politic for two reasons. First, that paternalistic motivation for the legislation seems a far cry from the stated project of protecting fetal life. Second, according to a professedly enlightened view of female equality and autonomy, that paternalism cannot justify any legal regime.

The other problem with the woman-as-victim argument, aside from the unacceptable paternalism that it embodies, is that the woman participating in abortion is *not* the victim the statute truly seeks to protect.

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minor females to exclude them from punishment.

*Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981). Justice Brennan doubted that a desire to mitigate teenage pregnancy motivated enactment of the law. Common sense, he observed, "suggests that a gender-neutral statutory rape law is potentially a *greater* deterrent of sexual activity than a gender-based law, for the simple reason that a gender-neutral law subjects both men and women to criminal sanctions and thus arguably has a deterrent effect on twice as many potential violators." *Id.* at 493-94 (Brennan, J., dissenting) (emphasis in original); see also Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1000-01 (1984). Professor Law argues that the majority's assertions

prevent us from seeing that women are people who make moral choices and from valuing the nurturing choices women make.

*Michael M.* also accepts and reinforces the sex-based stereotypes that men are naturally, biologically aggressive in relation to sex, while women are sexually passive, and that young women need the law's protection from their own weakness. In sex, the man is the offender and the woman the victim . . . .

*Id.*

<sup>302</sup> Though her reasons might be understandable, it remains conspicuous that Justice O'Connor leaves abortion out of her account. See generally O'Connor, *supra* note 282 (charting progress of law's view of women but failing to discuss abortion). Would she see abortion as an exception to or in support of her thesis of progress? Does the abortion issue further illustrate the difficulty of accounting for childbearing in the law's treatment of women? If so, it seems the law should recognize the abortion right in order to provide women the option of having careers free of childbearing pressures. See *id.* at 1553-57 (discussing difficulty of combining career with motherhood). Or is it simply impossible to square abortion with other areas of the law because of the fetus?

These statutes are meant, at least primarily, to protect the fetus. Anti-pornography and statutory-rape laws are two other areas in which women might be viewed as victims and exempted from liability. Pornography and statutory rape, however, are deemed undesirable because of their effect on women's lives. The wrong of abortion is nominally its effect on fetuses. In addition, the woman participating in abortion is not in fact "victimized" by the conduct in the way that a woman participating in pornography or statutory rape would be. To consider the woman seeking an abortion to be a weak and pliable victim of the temptations of the abortionist is to mischaracterize completely her mental processes. In other words, the view of the woman as a victim is unsupportable not only because it embraces a paternalism otherwise seen as unacceptable, but also because it is factually wrong. It seems farfetched to imagine that any empirical study of women seeking abortions actually would vindicate the notion that they are overwhelmed by emotions and forces beyond their control.

## 2. *The Woman Is Less Culpable*

A second category of argument might take a step back and maintain that, while exempting the woman does not reflect a view that she is blameless, it does reflect a rational view that she is much less culpable than the abortionist. This perspective, the argument would run, explains why even abortion statutes that did not exempt the woman were not enforced against her, why problems of accomplice and conspiratorial liability need not be confronted, and why statutory schemes such as Guam's<sup>303</sup> provide lesser penalties for women. The appropriate analogy might be between criminal-abortion laws and drug laws. Just as we focus prosecution on drug dealers and not users, we focus on abortionists rather than those who procure abortion. Those who provide access to morally wrong conduct over and over again are far more culpable than those who engage in it only once or occasionally.

The trouble with this brand of argument is that criminal-abortion laws claim to condemn the taking of life. With murder laws, we surely do not differentiate (to the degree of not enforcing the laws) between the culpability of those who commit many murders and those who commit a single murder. There can be no abortion, or even attempted abortion, without a woman. In fact, the woman's conduct might be deemed eligible for the harshest of treatment since "it could be argued that the killing of one's own child is a particularly heinous crime given the duty of care that the law generally implies between parents and children."<sup>304</sup> Particu-

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<sup>303</sup> See text accompanying notes 252-57 *supra*.

<sup>304</sup> Smolin, *supra* note 187, at 117.

larly today, when the state's compelling interest in fetal life at all stages is advanced as the justification for new laws, a legal scheme in which anyone performing an abortion is a criminal while anyone procuring one is blameless seems at odds with itself.<sup>305</sup>

Another way to state this objection is to say that if criminal-abortion laws can comfortably and drastically differentiate in culpability between the abortionist and the abortee, then they must *not* be about the taking of life. Instead, they must in fact be quite like drug laws in being about certain *conduct*, as opposed to the results of that conduct. Drug laws are designed to prevent people from using drugs because society believes such use is harmful to the individual. We focus enforcement on the dealer, not the user, because drug laws seek to protect the user by keeping her off drugs. Drug prohibitions do not seek to punish the user because we do not, in any deep sense, view her as immoral. Likewise, then, abortion laws that minimize the woman's culpability must in fact seek to prevent her from engaging in abortion rather than prevent the abortion of fetuses. Thus, an argument that women are less culpable than abortionists, like an argument that women are victims, reveals criminal-abortion laws to be motivated by a paternalism toward women unrelated to the professed goal of protecting fetal life.

### 3. *Exempting the Woman Is Good Law Enforcement*

Finally, a third strand of argument would leave aside the culpability and morality of the woman and shift the focus back to fetal protection by maintaining simply that abortion is conduct society seeks to deter and the most effective way to deter it is to prosecute the abortionist. Again drawing an analogy to drugs, one could say that we focus enforcement on drug dealers and not users because the dealers have more drugs and targeting them is more efficient. Exemption of the woman's conduct, then, is simply a calculated policy choice which has no relation to morality.

Several objections arise to this line of argument. First, the argument does not explain why women should be left out of the statutes. Just because prosecuting them will not contribute measurably to deterring abortion does not mean the criminal law should remain silent about their conduct. It is not enough to say that we want to deter something and to select one option for deterring it. The criminal law is a moral code that all citizens must live by, and an explanation beyond mere expedience must be provided to the imprisoned citizen as to why the next person is allowed to go free. In addition, this argument, like the others, runs head-on into the claim about protecting fetal life. It is true that some jurisdic-

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<sup>305</sup> See L. Tribe, *supra* note 11, at 122; Dellinger & Sperling, *supra* note 164, at 106-07.

tions do not hold users of small amounts of drugs even nominally liable under their criminal laws. If the abortion crime is really a deep moral offense against life and not simply a minor transgression such as infrequent drug use, however, it would seem that the law ought at least to name the woman as a criminal, even if it does not in practice prosecute her.

Second and more significantly, criminal-abortion laws have been massively underenforced, so there is no empirical evidence that an "effective deterrence" claim such as this one is accurate. Even where the woman's conduct was covered explicitly by statute, she went unpunished.<sup>306</sup> More broadly, the abortionists themselves were never prosecuted in great numbers.<sup>307</sup> The rough, consensus figure for abortions in the United States at the end of the era of criminal-abortion laws in the 1960s was one million annually.<sup>308</sup> Despite these numbers and the fact that death by abortion was the leading cause of maternal mortality,<sup>309</sup> abortion prosecutions were rare events and were successful infrequently. Between 1946 and 1953, for example, the New York County District Attorney's Office made a concerted effort to obtain abortion convictions. The result was 136 prosecutions over the seven years.<sup>310</sup>

The question should arise in such circumstances as to why society symbolically would condemn conduct without widely punishing it in practice. Some time ago, Glanville Williams noted that an abortion law is subject to the "inherent unenforceability of a statute that attempts to prohibit a private practice where all parties concerned desire to avoid the restriction."<sup>311</sup> Williams went on to note that when the consequences of these laws "are found to involve social evils greater than the alleged evil of abortion itself, without in fact preventing abortions, the case for continuing the threat of punishment is evidently not made out."<sup>312</sup> Thus, any argument for deterrence must account for a track record of weak enforcement. Given society's demonstrated discomfort in the past with the enforcement of abortion laws, one has to question whether even statutes that make themselves more palatable by exempting the woman would be acceptable once enforced against citizens.

One could argue that the past failure to enforce the laws merely reflected a lack of will that would not necessarily be present in states

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<sup>306</sup> See text accompanying notes 77-80 *supra*.

<sup>307</sup> See *id.*

<sup>308</sup> See N. Davis, *supra* note 15, at 98.

<sup>309</sup> See *id.* at 99.

<sup>310</sup> See Schur, Remarks, in *Abortion in the United States* 36 (M. Calderone ed. 1958) (remarks from conference on abortion); notes 77-101 and accompanying text *supra*.

<sup>311</sup> G. Williams, *supra* note 22, at 207.

<sup>312</sup> *Id.* at 233.

adopting new criminal sanctions after long and open public debate. The problem of enforcing abortion law, though, seems more profound and perhaps is best compared to the problem of enforcing drug laws today. This perception was reached by one criminologist of the 1960s who described abortion laws as the "classic case of the operation of the crime tariff."<sup>313</sup> In such a case, "the legal prohibition has the effect of raising the risk and reward for the illegal practitioner and also of depressing the quality of the services offered."<sup>314</sup> One is impelled to the conclusion that only eliminating the illegal abortion can truly eliminate the illegal abortionist.<sup>315</sup> This dilemma results from the reality that, as with drugs, a large minority always will seek abortions even if a clear majority of the people firmly condemn abortion and support criminal sanctions. Our nation's experience with prohibition demonstrated the impossibility of enforcing criminal laws that a sizeable portion of the population regularly disregards.

The problem of enforcement of criminal-abortion laws has to be explained by the reality that society lacks sufficient consensus on the abortion issue to make it a matter of criminal law. The drafters of the Model Penal Code, in commenting on their own restrictive abortion statute, recognized this reality when they said: "[M]oral standards in this area are in a state of flux, with wide disagreement among honest and responsible persons. . . . To use the criminal law against a substantial body of decent and informed opinion, even if it be a minority view, is contrary to our basic traditions."<sup>316</sup>

The analogy to the drug problem, and the futility of abortion laws when revealed in that light, only grows stronger when one considers the inevitable introduction of the relatively safe and effective abortifacient drug RU-486.<sup>317</sup> The probable effect of this drug is summarized by the observation that "[e]ven people in poor economic circumstances will not be denied a substance they dearly want, as cocaine and heroin addicts demonstrate daily. How much simpler for a person to obtain a contraband tablet or two than an endless supply of illegal narcotics."<sup>318</sup> At a minimum, RU-486 would seem to require that the state proscribe the woman's conduct, lest the state be left with no one to punish and therefore no way to deter abortion.<sup>319</sup>

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<sup>313</sup> H. Packer, *supra* note 122, at 343-44.

<sup>314</sup> *Id.*

<sup>315</sup> See *id.*

<sup>316</sup> Model Penal Code § 230.3 comment at 428 (1962).

<sup>317</sup> See generally Cole, *The End of the Abortion Debate*, 138 U. Pa. L. Rev. 217 (1989) (describing RU-486 and probable effects of introduction into United States).

<sup>318</sup> *Id.* at 221.

<sup>319</sup> See Smolin, *supra* note 187, at 117.



An argument that exempting the woman from liability is only a policy decision about effective enforcement, then, fails for three primary reasons. First, the deterrence claim alone cannot justify this dramatic exemption from liability. Second, the evidence does not support the claim that enforcement against women would not advance the goals of abortion laws. At most, such nonenforcement might mitigate some of society's discomfort about the enforcement of abortion laws, thereby perhaps avoiding the erosion of support for the laws. Third, and perhaps most importantly, an argument about deterrence gives rise to the general question of the enforceability of abortion laws, the answer to which reveals them to be fundamentally impractical regardless of their treatment of the woman's conduct.

### CONCLUSION

This Note has recounted the history of the treatment of women by criminal-abortion laws and considered possible justifications and explanations for that treatment. As the series of arguments and rebuttals outlined in Part III demonstrate, the most plausible explanation for the anomalous, ambivalent, and sometimes contradictory treatment of the woman's conduct by those laws is one that places them in a tradition of legal paternalism toward women. Criminal-abortion laws do not treat women in a special and unusual way on rational policy grounds. To treat the woman as a victim of abortion is to distort the true nature of her conduct and to degrade her. Ironically, women should be deeply troubled by the exemption in criminal-abortion laws for the woman's conduct. Rather than making those laws friendly to women, that exemption indicates a profoundly patronizing view of women.<sup>320</sup> Were the woman held fully responsible for her clearly criminal conduct, at least she could understand that the state, in cutting off her access to abortion, was truly barring her from interfering with fetal life rather than barring her from engaging in conduct with respect to her own body that the state, substituting its own judgment for hers, deems to be against her best interests.

The burden rests with the proponents of criminal-abortion laws to explain those laws' anomalous treatment of the woman's conduct. The public is at least entitled to an open and serious discussion of this issue before new criminal-abortion statutes are rushed through state legislatures. The argument advanced here challenges the proponents of criminal-abortion laws to offer a coherent legal scheme. To say only that

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<sup>320</sup> See Quindlen, *Indictment*, N.Y. Times, Mar. 28, 1991, at A25 ("[The] view that [women seeking abortions are victims] is condescending and insulting. Surely there are some women who have abortions while undone by emotional stress. But surely the majority are responsible adults—remember that three-quarters of all abortions are performed on women over 20—who are not victims but participants.").

women are exempted because we want to exempt them is not enough. In other words, if destruction of fetal life is a crime, then all who participate in the destruction of fetal life should be criminals. If women are exempted from criminal liability, it must be because, as President Bush's performance in the campaign debate reveals,<sup>321</sup> criminalizing women for abortion is politically impossible. If it is politically impossible to criminalize women, that must be because the proponents of criminal-abortion laws perceive that society does not condemn women for abortions, but rather views them as irresponsible.

The purpose of this Note is not to advocate broader criminal-abortion laws that would include the woman's conduct. However, the response to criminal-abortion laws represented by the ACLU's attack on the Utah law<sup>322</sup> seems only to support the inconsistencies in those laws. Laws that exempt the woman's conduct do not necessarily treat her better than those that do not. Furthermore, such exemptions permit the proponents of those laws to avoid a thorny political dilemma without offering a coherent explanation for their statutory scheme. The most direct response proponents might give would be to abandon the anomaly and treat women as fully culpable criminal actors. While this answer would seem to raise the specter of even more state intrusion into the lives of women, it has the merit of consistency. More significantly, it is an answer that never will be heard. Proponents of criminal abortion know, like President Bush and his campaign handlers, that the American people never will go along with such a scheme. If criminal-abortion laws thus persist in their incoherent, paternalistic state, we will be left to question the wisdom of having believed that majoritarian politics would produce a just result when it comes to abortion.

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<sup>321</sup> See text accompanying notes 1-3 *supra*.

<sup>322</sup> See text accompanying notes 237-40 *supra*.