No. 19-1392

In the Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *et al.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* JOSEPH W. DELLAPENNA *in Support of Petitioners*

Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
rick@claybrooklaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

Amicus Joseph W. Dellapenna is a retired professor of law who has taught at law schools in the United States and abroad for 53 years, primarily at Villanova University in Pennsylvania. He is the author of *Dispelling the Myths of Abortion History* (Carolina Academic Press 2006), the only study to combine the medical (technical), social, and legal history of abortion in England and America from the birth of the common law to create a richly textured account of abortion practice and law. *Amicus* has previously submitted briefs on abortion law and history to this Court in *Webster v. Reproductive Health Services* (1989), *Hodgson v. Minnesota* (1990), and *Planned Parenthood v. Casey* (1992). His interest is to bring the Court's attention to the erroneous history on which *Roe v. Wade* (1973) was based, setting before the Court an accurate account of the common and statutory law relating to abortion in England and America across eight centuries, demonstrating that there is no long-term legal or social tradition of acceptance of abortion that could form the basis of a constitutional right to choose abortion.

Amicus has written, either as sole author or as major contributor, *The Encyclopedia of Water Law* (Edward Elgar 2021), *Waters and Water Rights* (LexisNexis 2020), and *The Evolution of the*

---

[1] The parties have consented to the filing of this brief in writing. No counsel for any party authored this brief in whole or in part. No person or entity other than *Amicus* and his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Law and Politics of Water (Springer 2009), as well as other books, articles, and chapters. The first edition of *Suing Foreign Governments and Their Corporations* (BNA 1988; 2d ed. 2003) was cited by both the majority and the dissent in *Saudi Arabia v. Nelson,* 507 U.S. 349 (1993), and that book and other of his works have been widely cited in lower courts. *Amicus* also led the drafting of *The Regulated Riparian Model Water Code* (ASCE 2018), *The Appropriative Rights Model Water Code* (ASCE 2007), and *The Berlin Rules on Water Resources* (Int'l Law Ass'n 2004).

SUMMARY OF ARGUMENT

The majority in *Roe v. Wade*,[2] influenced by deliberately distorted presentations of the history of abortion laws that have also been pressed upon the Court in subsequent cases, erroneously concluded that abortion was not a common-law crime. Instead, the historical record shows that (a) abortion and other killings of unwanted children were condemned by all respected legal authorities in England from the start of the common law and (b) those laws were applied with full rigor in the United States during the colonial era and into the nineteenth and twentieth centuries, including when the Fourteenth Amendment was adopted.

When viewed through the proper historical lens, this leg on which the *Roe* majority rested collapses. Abortion was a common-law crime from the earliest recorded days, and the common law was followed and codified in the states and territories in order to

[2] 410 U.S. 113 (1973).

protect the life of the unborn child. Drawing a line at viability of the fetus has zero support in abortion history. The Court should uphold the challenged provisions of the Mississippi statute, based on its valid and important purposes mirrored in the common law.

ARGUMENT

I. Through Erroneous Readings of the Historical Status of Abortion Under the Common Law, *Roe* Broke Sharply with the Traditional Values of the Common Law

The rule of law requires judicial decisions to have a basis other than the judge's personal predilections. This Court has found that basis in historical traditions regarding the relevant behavior.[3]

This Court in *Roe* recognized that the historical record on abortion is highly relevant to the constitutionality of abortion laws, devoting more than half of its opinion to that topic.[4] In that discussion, it recognized that abortion has always been, and now is, treated differently from other issues of reproductive privacy. [5] Thus, abortion's historical tradition is highly relevant to determining the constitutional power of states to regulate or prohibit abortion, including prior to viability.

The *Roe* majority, relying on tendentious articles,

---

[3] *See, e.g.*, *Timbs v. Ind.*, 139 S. Ct. 682, 686-90 (2019); *Harmelin v. Mich.*, 501 U.S. 957, 967-75 (1991); *McCulloch v. Md.*, 17 U.S. (4 Wheat.) 316, 400-05 (1819).
[4] 410 U.S. at 129-152, 156-162.
[5] *Id. at* 159.

concluded that "it now appear[s] doubtful that abortion was ever . . . a common law crime"[6] and that American abortion statutes were not generally enacted until after the Fourteenth Amendment's adoption.[7] Both conclusions are manifestly wrong. A careful historical review makes clear that abortion and other killings of unwanted children were always prohibited in the common law for the purpose of protecting the life of the unborn child.

A. From *Roe* on, Courts Have Relied on a Deliberately Distorted History of Abortion

The majority in *Roe* relied uncritically on the work of Cyril Means, Jr., who was then general counsel for the National Association for the Repeal of Abortion Laws (NARAL).[8] Means distorted abortion precedents and statutes and ignored the larger social

---

[6] *Id*. at 136.

[7] *Id*. at 139.

[8] C. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971) ("Means II"); C. Means, *The Law of N.Y. Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) ("Means I"). The majority cited Means seven times for the history of abortion, without noting that he was NARAL's general counsel. *See* 410 U.S. at 122 n.21, 123 n.22, 135 n.26, 139 n.33, 148 n.42, 151 n.47. On Mean's relation to abortion advocacy groups, see M. Faux, Roe v. Wade*: The Untold Story of the Landmark Supreme Court Decision That Made Abortion Legal* 289-92, 297-98 (1988).

and technological context in which they were grounded. Abortion advocates also now rely on the work of historian James Mohr, as expressed in the "Historians' Briefs" in *Webster* and *Casey*.[9]

These histories of abortion are advocacy pieces with a highly selective examination of the evidence to support a partisan and distorted reading. Mohr and the authors of the "Historians' Briefs" present the law of abortion as a story of oppressors and oppressed, a story unsupported by the increasingly clear history of the law of abortion. Their project relies on recovering "lost voices"[10] of mute classes who, by definition, find no or scant evidence in the historical record. This enables the advocates to discount attitudes that *do* appear in the historical record and that contradict their preferred theories, regarding them as aberrational, rather than representative.

Recovering "lost voices" allows one to infer at will what the "true" attitudes were. Yet, if the public attitudes of formal, legal institutions did not represent the true values of society, why did those institutions express themselves in such terms, and why did those supposedly unrepresentative terms

---

[9] J. Mohr, *Abortion in America* (1978) ("Mohr"); *see also Amicus* Brief of 281 American Historians, *filed in Webster v. Repro. Health Servs.*, 492 U.S. 490 (1989) ("*Webster* Brief"); *Amicus* Brief of 250 Historians, *filed in Planned P'hood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) ("*Casey* Brief").

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

continue despite major changes in social and political structures spanning more than seven centuries? The "lost voices" project also fails to recognize that the Constitution is a legal document. Ultimately, *legal* traditions must inform the Constitution; social, medical, and moral contexts usefully illuminate legal traditions, but they are not an independent source of legal rights or duties.

Finally, authors of the *Webster* Brief admitted deliberate distortions of the historical record to achieve allegedly more effective advocacy. Sylvia Law, counsel of record on the *Webster* Brief, candidly lamented the authors' "serious deficiencies as truth-tellers."[11] James Mohr does not "consider the brief to be history, as I understand the craft."[12] Historian Estelle Freedman, who also worked on the brief, signed the brief despite knowing that her own research demonstrated a very different story, explaining her decision in a passage of remarkable candor:

> I realize that for the practical purposes of writing this brief, it was necessary to suspend certain critiques to make common cause and to use the legal and political grounds that are available to us.[13]

---

[11] Law at 14-16. In stark contrast, one strong supporter of abortion rights has acknowledged the accuracy of *Myths* regarding the history of abortion laws. *See* Bernstein, *Common Law Fundamentals of the Right to Abortion,* 63 Buff. L. Rev. 1141 (2015).

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

[13] Freedman, *Historical Interpretation and Legal*

The difficulties these admissions present are not resolved simply by asserting, as do the other two lawyers on the *Webster* Brief, that all discourse is necessarily political and that any distinction between scholarship and distortion is illusory.[14]

The *Casey* Brief was written by the same attorneys, relying on the same historians, with only small changes of emphasis. These briefs attempted to buttress the twin claims on which the *Roe* majority hinged its opinion: that abortion (1) has always been a common social practice and (2) was a common-law liberty before the Civil War. Both of these claims were demonstrably false when *Roe* was written, and further scholarship has continued to undercut those claims.[15]

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

Despite the relative unpopularity of abortion techniques to rid oneself of an unwanted child due to the serious risks of abortion treatments to the

---

Advocacy: Rethinking the Webster Amicus *Brief*, 12 The Pub. Historian 27, 32 (1990).

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

[15] Certain historians continue to support *Roe*'s historically inaccurate conclusions with retellings of the "new orthodox" history of abortion. *See, e.g.*, Mary Ziegler, *Abortion and the Law in America:* Roe v. Wade *to the Present* (2020); Mary Ziegler, *After* Roe*, The Lost Years of the Abortion Debate* (2015). In neither work does she cite to or comment on Professor Dellapenna's scholarship that forms the basis for this brief.

mother, common-law indictments and appeals of felony for abortion are recorded as early as 1200.[16] While the terse records often do not indicate the outcome of the proceedings,[17] the many records indicating punishment[18] and judgments of "not guilty" rather than dismissal[19] prove that the indictments and appeals were valid under the common law. Means was simply wrong to assert that only two cases dealt with abortion before 1600 and that the courts in both cases doubted whether abortion was a crime.

In the first case he cited, the 1327 case of *Rex v. de Bourton*,[20] Means (and the *Roe* majority[21]) relied on a faulty text, and even the faulty text did not support Means' highly partisan analysis. Bourton was charged with beating a woman, causing one

---

[16] Joseph W. Dellapenna, *The Myths of Abortion History 127-84* (2006) ("*Myths*"); *see generally* J. Keown, *Abortion, Doctors and the Law* (1988).

[17] *See, e.g., Sibil's Appeal* (1203), 1 Selden Soc'y 32 (no. 73) (1887); *Agnes's Appeal* (1200), *id.* at 39 (no. 82). Many more cases between 1200 and 1600 are summarized and analyzed in *Myths* at 129-84).

[18] *See, e.g.,* cases collected and discussed including decrees of death, imprisonment, and outlawry in *Myths* at 134-43. *See also Leges Henri Primi* ch. LXX.14 (L.J. Downer ed. 1972) (a 12th-century compilation of Anglo-Saxon law as modified by the early Norman kings).

[19] *See Myths* at 137 n.86 (collecting over 30 cases).

[20] Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327).

[21] Justice Blackmun did not refer to the two cases by name, but he did reference Professor Means' use of them to discredit Edward Coke's statement about the criminality of abortion in the seventeenth century. *Roe,* 410 U.S. at 135 n.26.

twin to be born dead and the other to die shortly after birth, and he apparently was released on bail to answer for a different charge. The full record reveals the case actually to have been a dispute over whether the offense was bailable, and not over its criminality. In the end, the charges were not dismissed, but he was pardoned, which also demonstrates that abortion was a criminal offense.[22]

In the 1348 case of *Rex v. Anonymous*,[23] the second case Means cited, the defendant escaped conviction for killing a child in the mother's womb for the dubious reason that the indictment failed to state a baptismal name for the victim[24] and because it was impossible to know if the defendant had killed the child. In both *Bourton* and *Anonymous*, the issues were procedural and evidentiary, not substantive. Bracton, writing in the thirteenth century, also declared abortion (if the child were "formed or animated") to be criminal homicide.[25]

Cases in the sixteenth century clearly held abortions to be crimes. A coroner's inquest held

---

[22] *See Myths* at 143-50 for a full discussion.

[23] (K.B. 1348), Fitzherbert, Graunde Abridgement, tit. Corone, f. 268r, pl. 263 (1st ed. 1516).

[24] "Murder," at least until 1340, meant a fine imposed on a defendant when no one could prove a deceased's identity as an Englishman. 1 W. Holdsworth, *A History of English Law* 65-77, 580-632 (1938). This usage was still common in the Inns of Courts nearly two centuries later. *See Myths* at 152 n.177.

[25] 2 H. de Bracton, *On the Laws and Customs of England* 341 (S. Thorne ed. 1968). *See also* 1 *Fleta* 60-61 (Selden Soc'y ed. 1955). These sources are analyzed in *Myths* at 132-33.

death by abortion to be "felonious suicide."[26] Accusing a woman of offering abortifacients to another supported an action for slander, as such words were sufficient grounds to require a judicial bond for good behavior.[27] A woman was executed for abortion by witchcraft.[28] A woman was "presented" by a coroner's jury for procuring her own abortion.[29]

Two sixteenth-century writers on criminal pleadings, Staunford and Lambard, denied that abortion was a felony.[30] Yet a formbook, with four editions from 1506 and 1544, included a form indictment for abortion by physical assault on the mother.[31] Staunford and Lambard were wrong if they intended their statements broadly, but their statements most likely reflected that they thought abortion was a crime less than a felony or, even more likely, that abortion properly belonged before a court other than the Queen's Bench.

Sixteenth-century legal activity directed at abortion involved the secularization of ecclesiastical

---

[26] *R. v. Lichefeld*, K.B. 27/974, Rex m.4 (1505); *see Myths* at 177-78.

[27] *Cockaine v. Witnam* (1577), Cro. Eliz. 49 (1586); *see Myths*, at 180-81.

[28] *R. v. Turnour*, Assize 35/23/29 (Essex 1581). Turnour was convicted of several acts of witchcraft, only one of which involved abortion, but the abortion was the only capital offense. *See Myths* at 181-82.

[29] *R. v. Robynson*, Q/SR 110/68 (Coroner's Inquest 1589).

[30] 1 W. Staunford, *Pleas of the Crown*, ch. 13 (1557); W. Lambard, *Of the Office of the Justice of the Peace* 217-18 (1st ed. 1581).

[31] *Boke of the Justyces of the Peas* ch. vi, fol. iii (1515).

jurisdiction.[32] Ecclesiastical judicial activity directed at abortion declined during the Reformation, and common-law courts then took full responsibility for abortion.[33] By the seventeenth century, legal activity regarding abortion was well established.[34] In 1601, two Justices of the Queen's Bench in *R. v. Sims*[35] held an abortion in which a child died after its live birth to be murder on grounds that the birth and subsequent death of the child allowed proof of the cause of death. In 1602, in *R. v. Webb*,[36] a woman apparently was saved from punishment for self-abortion only by a general pardon. And Sir Matthew Hale held that the death of a mother from an abortion was a felony homicide.[37] Courts in many other seventeenth-century cases treated abortion as

---

[32] *Before the Bawdy Court* 81, 152, 172, 204, 238 (nos. 150, 369, 427, 531) (P. Hair ed. 1972); R.H. Helmholz, *Infanticide in the Province of Canterbury in the Fifteenth Century*, 2 Hist. Childhood Q. 379, 380-81 (1975).

[33] R. Houlbrooke, *Church Courts and the People during the English Reformation 1520-1570* 78 (1979); *Myths* at 159-84. Witchcraft became an indictable crime by the statute of 5 Eliz. I, ch. 15 (1573); within eight years we find *R. v. Turnour*.

[34] *Myths* at 185-210.

[35] *R. v. Sims*, 75 Eng. Rep. 1075 (Q.B. 1601); *Myths* at 188-93. Failure of proof was occasionally given as a reason for not prosecuting earlier indictments. On the primitive state of forensic medicine even three centuries later, *see* Forbes, *Early Forensic Medicine in England: The Angus Murder Trial*, 36 J. Hist. Med. 296 (1981).

[36] Calendar of Assize Rec., Surrey Indictments, Eliz. I 512 (no. 3146) (J. Cockburn ed. 1980).

[37] *R. v. Anonymous* (Bury Assizes 1670), 1. M. Hale, *History of the Pleas of the Crown,* 429-30 (1736).

a crime.[38]

Sir Edward Coke, often called the "Father of the Common Law," had argued *R. v. Sims* as Attorney-General and discussed the case in his *Third Institute*,[39] generalizing from it a principle that abortion after quickening was "a great misprision [serious misdemeanor], and no murder" if the child died in the womb, but murder if the child died after its birth. Coke's proposition for some time was accepted virtually without question.[40]

Coke did not cite available precedents for his conclusions,[41] but the key point here is that he identified abortion as a common-law crime. Means dismissed Coke's statement as a "masterpiece of perversion,"[42] but he did not grapple with the mountain of evidence that supported Coke's conclusion.

---

[38] *See, e.g., Myths* at 194 nn.84-86 (collecting cases).
[39] 3 E. Coke, *Institutes* 50-51 (1644); *see Myths* at 195-203.
[40] Coke was followed on abortion by Blackstone, among others. *See* 1 W. Blackstone, *Commentaries* 129-30 (1765); 4 Blackstone 198 (1769). Hale's opinion cannot now be established with certainty, but, as noted, he concluded that abortion was a felony sufficient to justify application of the felony murder rule. *See Myths* at 203-11.
[41] Precedents for and against Coke's misdemeanor view are collected in *Myths* at 195-211.
[42] Means II at 359.

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

Most abortion cases before 1700 involved crude physical batterings of the mother, often to her serious injury or death (injury techniques).[43] The remaining abortions were induced by "noxious potions" that were nearly as deadly as the batterings (ingestion techniques).[44] Such ingestion and injury techniques could be effective only with intense pain and a risk of death or permanent injury. Voluntary abortions were rare when the techniques available were often tantamount to suicide.[45]

---

[43] Injury techniques ranged from ineffective, simple body maneuvers to savage assaults, such as cutting the mother and removing the infant. *See Myths* at 32-36.

[44] *Id.* at 37-52. Appeals or indictments for abortion by potion were rarer than for abortion by assault because potions seen as part of magic rituals were punishable as witchcraft, but only by an ecclesiastical court before Elizabeth I.

[45] Shorter concluded that, before 1880, only the truly desperate would risk abortion. E. Shorter, *A History of Women's Bodies* 177 (1982) ("Shorter"). Quaife describes injury techniques in his analysis of violence, while conceding that women rarely used ingestion techniques. G. Quaife, *Wanton Wenches and Wayward Wives* 26, 118 (1979); *see also* L. Gordon, *Women's Body, Women's Right: A Social History of Birth Control in America* 39 (1976); R. Petchesky, *Abortion and Women's Choice* 30, 49-55 (1984); *Myths* at 36-37, 43-44; Anita Bernstein, *Common Law Fundamentals of the Right to Abortion*, 63 Buffalo L. Rev. 1141, 1148 (2015) (relying on the sources collected in *Myths*, concluding that "until

The unpopularity of injury techniques with women hardly needs demonstration. And, while we cannot know all potions available in medieval England, surveys of the medical literature there and in medically similar societies show that the potions ingested for an abortion were either ineffective or highly dangerous.[46] For example, savin (juniper), the abortifacient most widely reported in medieval English sources, works by undermining the woman's health generally so she cannot sustain the pregnancy, all too often enfeebling her to the point of death.[47]

The *Roe* majority accepted the assertion of some historians that abortion was available through other, safer methods.[48] Representative of them is John Riddle, who attempted to prove this supposition in his 1992 work,[49] claiming that doctors and midwives during Roman and medieval times knew and used many safe and effective means to procure abortions. To do so, Riddle employed a pharmacologist who

---

recently—no earlier than the late nineteenth century—abortion was simply too dangerous for a rational actor to choose for herself").

[46] *Id.* at 37-51; *see* J. Noonan, *Contraception* 201-07, 217 (1965).

[47] One modern study found that savin induced an abortion in 10 of 21 women who consumed it: nine of the 10 "successful" ones died, as did four of the "unsuccessful" ones. F. Taussig, *Abortion Spontaneous and Induced* 353 (1936).

[48] 410 U.S. at 130.

[49] J. Riddle, *Contraception and Abortion from the Ancient World to the Renaissance* (1992) ("Riddle"). *See* also Mohr at 6-19. Mohr acknowledged the poisonous nature of some of his "abortifacients." *Id.* at 9, 21-22, 55-58, 71-73.

strongly and publicly disagreed with Riddle's conclusions.[50] Riddle himself admitted that his reconstructions of ancient abortifacient recipes were based on uncertain identifications of herbal ingredients and admonished people not to use them because "possibility for error is too great and the risk might be considerable."[51] Riddle also admitted that the drugs had, at best, highly varied success rates, that success rates approaching 100 percent were "seldom the case,"[52] and that "[s]ome of the plants . . . had marginal value, if any."[53] And Riddle reports that only a little over half (56 percent by the most favorable study) of the drugs he lists have shown any abortifacient or contraceptive effects.[54] Riddle and others like him are reduced to arguing that, because certain potions were used for centuries in the hope of obtaining an abortion, they must have worked.[55] Of course, he never asks how innumerable other discredited medical practices, such as bleeding, persisted for centuries, procedures that helped bring about more deaths than cures. Indeed, nineteenth-century courts were well aware of the dangers these

---

[50] *See* Gina Kolata, *In Ancient Times, Flowers and Fennel for Family Planning,* N.Y. Times, Mar. 8, 1994, at C1, C10.

[51] Riddle at viii-ix.

[52] *Id.* at 38.

[53] *Id.* at 84. Riddle even admitted that for many (if not for all) of the claimed abortifacients, "there is an unresolvable ambiguity as to whether the words describe an action or a desired effect." *Id.* at 50. He also accepted reports of "amulets and incantations" without cataloguing or analyzing such claims. *Id.* at viii, 96, 137.

[54] *Id.* at 52-53.

[55] *Id.* at 144-45.

potions still posed.[56]

Many still cling to the belief that medically primitive cultures, including medieval England and colonial America, had unrecorded abortion techniques that were safe and effective. If so, why would such folk medicines abruptly disappear in the nineteenth century in favor of highly dangerous intrusion techniques? The answer is that this belief is a fable.[57] Before the nineteenth century, the usual ways to rid oneself of an unwanted child were infanticide and abandonment (which often amounted to the same thing).[58]

Infanticide was a frequent crime when abortion was still rare.[59] Royal courts actively punished those convicted of infanticide and denied benefit of clergy to those accused of the crime.[60] The earliest known

---

[56] *See, e.g., Cmwlth. v. W.M.W.*, 3 Pitt. Rep. 462 (1871); *Moore v. State*, 49 S.W. 287 (Tex. Crim. 1897).

[57]Bernstein remarked, "Speaking for myself, I acknowledge having trouble letting go of the belief that in days of old, persons seeking to end pregnancy received efficacious therapies from an unlettered yet sage female network. . . . Yet there is little reason to think that abortion was until modern times an option for someone who intended to survive the experience." 63 Buffalo L. Rev. at 1195 (citing evidence collected in *Myths* and other authorities).

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

[59] *Myths* at 89-124; *see also* J. Boswell, *The Kindness of Others: The Abandonment of Children in Western Europe from Late Antiquity to the Renaissance* (1989); P. Hoffer & N. Hull, *Murdering Mothers: Infanticide in England and New England 1558-1803* (1981) ("Hoffer & Hull").

[60] *See, e.g.*, *R. v. Parker*, 73 Eng. Rep. 410 (1580).

regulations of midwives, published in 1512, were adopted to prevent the killing of infants.[61] Parliament enacted ever more stringent statutes prohibiting infanticide, culminating in "An Act to Prevent the Destroying and Murdering of Bastard Children," legislation that conclusively presumed murder from concealment of the death of a child in order to hide its birth.[62]

Only the emergence of abortion as a real alternative to infanticide reduced the incidence of infanticide, making it a lesser legal problem. The intimate relationship between abortion and infanticide was demonstrated by Lord Ellenborough's Act, the first English statutory prohibition of abortion, which in its very next section lessened the penalty for concealment of the death of a newborn,[63] making explicit the link between abortion and infanticide and recognizing their shifting rates by giving abortion primacy.

D. The American Colonies Applied Laws Against Abortion Rigorously

The English colonists brought the common law of abortion with them. In just one colony, Maryland, three prosecutions for criminal abortion arose before

---

[61] J. Donnison, *Midwives and Medical Men* 18-20 (1988). These regulations were repeatedly strengthened. T. Forbes, *The Midwife and the Witch* 144-147 (1966). Wet-nurses were also seen as a major population control device, J. Guillemeau, *The Nursing of Children* preface (1612).

[62] 21 James I, ch. 27, § 3 (1624).

[63] 43 Geo. III ch. 58, §§ 2-4 (1803).

1660.[64] Two of the defendants escaped conviction in their cases because, before trial, they married (and thereby disqualified) the principal witness against them. The third was convicted of attempted murder, apparently because of a failure to prove the cause of death for the stillborn child.

Prosecutions for abortion also arose in other colonies. A Rhode Island woman received 15 lashes for fornication and attempted abortion.[65] Indictments also survive from Delaware[66] and Virginia.[67] And a 1716 New York municipal ordinance forbade midwives to aid or counsel abortion.[68]

While abortion and infanticide do not seem to

---

[64] *Proprietary v. Lambrozo*, 53 Md. Archives 387-91 (1663); *Proprietary v. Brooks*, 10 Md. Archives 464-65, 486-88 (1656); *Proprietary v. Mitchell*, 10 Md. Archives 171-86 (1652); *see also Proprietary v. Robins*, 41 Md. Archives 20 (1658); *Robins v. Robins*, 41 Md. Archives 85 (1658).

[65] *Colony v. Allen*, Newport Cnty. Gen. Ct. Trials: 1671-1724A n.p. (Sept. 4, 1683 sess.), *noted in* L. Koehler, *A Search for Power: The "Weaker Sex" in Seventeenth-Cent. N. Eng.* 329, 336 n.132 (1980).

[66] *In re the Stillbirth of Agnita Hendricks' Bastard Child* (1679), Ct. Rec. of New Castle on Del. 1676-1681, at 274-75 (1904).

[67] *Colony v. Powell* (Va. 1635), 7 Am. L. Rec. 43 (1954).

[68] 3 Min. of the Common Council of N.Y. 122, *noted in* M. Gordon, *Aesculapius Comes to the Colonies: The Story of the Early Days of Medicine in the Thirteen Original Colonies* 174-75 (1949). For a similar ordinance in Virginia see S. Massengill, *A Sketch of Medicine and Pharmacy* 294 (2d ed. 1942).

have been common in colonial America,[69] more colonial legal activity, just as in England, was directed against infanticide than abortion.[70] Still, one of the few secondary sources of the period concluded that the common law prohibiting abortion was part of New York law.[71]

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

Abortion statutes were enacted throughout the nation and the world in the nineteenth century.[72] *Roe*'s majority viewed this, and the accompanying increase in prosecutions, as resulting from Victorian sexual attitudes, fears for maternal health, and

---

[69] J. D'Emilio & E. Freedman, *Intimate Matters: A History of Sexuality in America* 26, 65 (1988); C. Scholten, *Childbearing in American Society 1650-1850* 9 (1985).

[70] Hoffer & Hull at 33-113. Concealment statutes were enacted in eight colonies or states before an abortion statute. Eleven states enacted a concealment statute contemporaneously with the state's first abortion statute and 20 states codified the two statutes together. *See generally Myths* at 110-24, 213-14.

[71] J. Parker, *Conductor Generalis: Or, the Office, Duty, and Authority of Justices of the Peace* 216-17 (1764).

[72] *See generally Myths* at 243-370; Quay, *Justifiable Abortion-Medical and Legal Foundations (Pt. II)*, 49 Geo. L.J. 395 (1961).

concern for fetal life.[73] Means insisted that only fear for maternal health motivated the legislation.[74] But neither explained why these reasons became weighty only in the nineteenth century. Mohr and his associates, while recognizing a "moral prejudice" favoring the life of unborn children,[75] argued that the central reason for the statutes was to ensure the dominance of the newly organized allopathic physicians over competitors, especially midwives, and to a lesser degree to reverse falling birthrates among the native-born middle classes and to ensure paternal dominance in the household.[76] These reasons, they asserted, were sufficient, without concern over fetal life, to overcome allegedly strong public support, among men as well as women, for the free availability of abortions.[77]

The actual reasons are quite different and rooted in technological change. The first report of an intrusion technique in England was in a case in 1732.[78] A woman was sentenced to the pillory and to

---

[73] 410 U.S. at 147-52.

[74] Means I at 511-15; Means II at 382-92.

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

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

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

[78] The earliest description of an intrusion procedure anywhere was in Diderot's *Encyclopedie* (at 452 (1766)), which described an experiment in 1714. Shorter, at 188-208, places the invention of effective intrusion techniques

three years in prison for inserting an iron rod into a second woman's womb, inducing an abortion at less than 14 weeks of gestation (well before viability and quickening).[79] Similar prosecutions arose in 1781 and 1803.[80]

Abortion by intrusion remained highly dangerous; the inserted object served as a highway for infection, and the procedure often was sufficiently painful to induce life-threatening shock.[81] Death was not as certain, however, as with injury and ingestion techniques. Intrusion quickly became the technique of choice.

Lord Ellenborough himself spoke to the sudden upsurge in abortions in the preamble to the eponymous act: It concerned "certain . . . heinous offenses . . . of late also frequently committed . . . ."[82] The drafters of the first Pennsylvania abortion statute made a similar observation.[83] The Maryland Court of Appeals made the point even more directly in the 1901 decision of *Worthington v. State*:

---

late in the 19th century.

[79] *R. v. Beare*, 2 The Gentleman's Mag. 931 (Aug. 1732).

[80] *R. v. Anonymous*, 3 J. Chitty, *Criminal Law* 798-801 (1816); *R. v. Tinckler* (1781), 1 E. East, *Pleas of the Crown* 354-356 (1806).

[81] J. Bates & E. Zawadski, *Criminal Abortion* 85-87 (1964). Apparently, abortions killed about one-third of the women undergoing them early in the 19th century. *See Myths* at 308-09; *see also* O.W. Bartley, *A Treatise on Forensic Med.* 3, 5 (1815); T.R. Beck & J. Beck, *Elements of Med. Jurisprudence* 276-77 (1823); J. Burns, *The Anatomy of the Gravid Uterus* 57-58 (1799); G. Male, *An Epitome of Judicial or Forensic Med.* 116-117 (1816).

[82] 43 Geo. III, ch. 58.

[83] *Pa. Daily Legis. Rec*. No. 19, at 151 (1860).

> It is common knowledge that death is not now the usual, nor, indeed, the always probable, consequence of an abortion. The death of the mother, doubtless, more frequently resulted in the days of rude surgery, when the character and properties of powerful drugs were but little known, and the control over their application more limited. But, in these days of advanced surgery and marvelous medical science and skill, operations are performed and powerful drugs administered by skillful and careful men without danger to the life of the patient. Indeed, it is this comparative immunity from danger to the woman which has doubtless led to great increase of the crime, to the establishment of a class of educated professional abortionists, and to the enactment of the severe statutes almost everywhere . . . .[84]

Abortion prohibitions almost invariably were enacted in a general codification of common-law crimes,[85] suggesting that the statutes were not thought to change the law, but to affirm it. Moreover, all nineteenth-century surgery was dangerous for the same reasons as beset intrusion abortions (infection and shock), yet only for abortion were social or other pressures likely to induce someone to undergo the procedure despite risk to life or limb, indicating that intrusion abortions were just as criminal as either

---

[84] 48 A. 355, 356-57 (Md. 1901).

[85] Lord Ellenborough's Act, officially the "Offenses Against the Person Act," was the first comprehensive criminal statute in English law.

injury or ingestion abortions and that abortions were criminal regardless of the stage of pregnancy. As further discussed in part II *infra*, the statutes solemnly reaffirmed the criminality of abortion in the face of technological innovations that made it safer to perform.[86]

F. The Prohibitions of Abortion Represented a Widely Shared Consensus on the Value of Fetal Life, a Consensus that Included Nineteenth-Century Feminists and, Thus, Cannot Properly Be Characterized as a Conspiracy by Male Physicians and Others to Suppress Women

The nineteenth century saw a steady broadening of abortion statutes to reach all abortions, regardless of the technique used or the stage of pregnancy, with a number of states including punishment for the mother.[87] This broadening

---

[86] Nineteenth-century cases split over whether pre-quickening abortion was a common-law crime. *Compare*, *e.g.*, *Mills v. Cmwlth.*, 13 Pa. 631 (1850) (yes), *with Smith v. State*, 33 Me. 48, 57 (1851) (no). Two leading early treatises on American criminal law both concluded that it was. 1 J.P. Bishop, *Criminal Law* § 386 (2d ed. 1858); 1 F. Wharton, *The Criminal Law of the United States* §§ 1220-1230 (5th rev. ed. 1861).

[87] The broadening is illustrated by the New York abortion statutes. In 1845, New York made it a misdemeanor for a woman to seek or procure an abortion, raising it to a felony in 1872. *See generally Myths* at 328. Both "Historians' Briefs" flatly (and falsely) assert that women were never subject to punishment for abortion. *Casey* Brief at 1; *Webster* Brief at 1.

suggests, as contemporary courts generally held, that protection of fetal life was the major purpose of the statutes.[88] Many religious and social leaders also supported treating abortion as a crime.[89] Only by impugning the integrity of innumerable social and professional leaders can one argue that protection of unborn children from abortion was not a significant concern.

Historians favoring abortion rights would have us believe that nineteenth-century abortion statutes were adopted as instances of male oppressors subjugating oppressed females, with doctors usurping the market for midwives and husbands dominating their wives in their home life.[90] This fanciful history is refuted by the stance of nineteenth-century feminists; even the most militant and well-known, including Susan B. Anthony and

---

[88] *See, e.g.*, *Dougherty v. People*, 1 Colo. 514 (1872); *State v. Lee*, 37 A. 75 (Conn. 1897); *State v. Moore*, 52 Iowa 128 (1868); *State v. Watson*, 1 P. 770 (Kan. 1883); *Smith v. State*, 33 Me. 48 (1851); *People v. Sessions*, 26 N.W. 291 (Mich. 1886); *State v. Gedicke*, 43 N.J.L. 86 (1881); *State v. Crook*, 51 P. 1091 (Utah 1898); *State v. Howard*, 32 Vt. 380 (1859).

[89] *See* Resolution of the Medical Society of the State of New York, 1867 N.Y. Assembly J. 443-44 (Feb. 28, 1867) ("Resolution"). The *Roe* majority quoted other representative statements, 410 U.S. at 141-42. *See also* M. Olasky, *The Press and Abortion, 1838-1988* 17-53 (1988) ("Olasky").

[90] *Cf. Gonzales v. Carhart*, 550 U.S. 124, 171-72 (2007) (Ginsberg, J., dissenting) (describing abortion as needed to allow women to be free from pregnancy to be able to realize their equal potential with men in the marketplace).

Elizabeth Cady Stanton, were adamantly opposed to legal abortion.[91] This attitude continued among feminists into the twentieth century, with Margaret Sanger initially advancing her abhorrence of abortion as a major reason for founding what was to become Planned Parenthood Federation.[92]

Feminist abhorrence of abortion arose because the feminists viewed abortion as the killing of a child. Indeed, Stanton entitled her article published contemporaneously with the adoption of the Fourteen Amendment, "Child Murder."[93] In contrast to their antipathy to abortion, the nineteenth-century feminists supported legal access to contraception because it did not involve the killing of a child.[94] Even where contraception was illegal, the penalties for abortion were harsher, again recognizing the basic difference.[95] As the story of the early feminists demonstrates, nineteenth-century legislatures responded to a widely shared consensus that abortion was the taking of human life and, thus, far different from contraception. This history provides no support whatsoever to the manufactured claims of advocacy pieces such as the Means articles

---

[91] *See, e.g.*, E. Duffy, *The Relations of the Sexes* 274-75 (1876); A. Stockham, *Tokology* 246-50 (1887); Susan B. Anthony, *Marriage and Maternity*, 4 The Revolution 4 (July 8, 1869); Elizabeth Cady Stanton, *Child Murder*, 1 The Revolution 146-47 (Mar. 12, 1868). *See generally Myths* at 371-409. Only professional abortionists defended the social propriety of abortion. *Myths* at 337, 392, 412-13, 453, 461; Olasky at 3-17.

[92] *See* M. Sanger, *Motherhood in Bondage* 394-96 (1928).

[93] 1 The Revolution 146-47 (Mar. 12, 1868).

[94] *Myths* at 376-77.

[95] *Id.* at 376-77, 386-87, 397-98.

on which the *Roe* majority and the "Historians' Briefs" filed in *Webster* and *Casey* relied so heavily.

II. Contrary to *Roe*, the English and American Legal Understanding Before Adoption of the Fourteenth Amendment Was That Abortion Killed a Child at Any Stage of Fetal Development, an Understanding Expressed in Case Law and Statutes

The claim in *Roe* that American abortion statutes were not generally enacted until after the Fourteenth Amendment's adoption is inaccurate.[96] That a unique human life begins at conception was established scientifically by the early 1800's.[97] An English court promptly interpreted the earlier statutory term "quick with child" to mean conception, rather than the felt movement of the child within the womb, returning to the original understanding of that term.[98]

---

[96] *Compare* 410 U.S. at 138-39 *with Myths* at 315-19. Justice Rehnquist, in his dissent to *Roe,* listed 36 state or territorial statutes prohibiting abortion in 1868 when the Fourteenth Amendment was adopted. 410 U.S. at 175.

[97] *See Myths* at 259.

[98] *R. v. Wycherley*, 173 Eng. Rep. 486 (N.P. 1838); *see also* The Offenses Against the Persons Act, 7 Will. IV & 1 Vict., ch. 85 (1837). That there was some confusion over this term historically is not surprising. The standard phrase down through the centuries was "quick with child," which refers not to quickening as felt in the womb but to alive as opposed to dead, as in the phrase "the quick and the dead," a phrase that has nothing to do with a stage of gestation and applies to adults as well as children, as recognized *Wycherley*. Mr. Philip Rafferty's research persuaded the Oxford English Dictionary to

After these scientific developments in the early 1800's, many states revised their abortion statutes to clarify that, at whatever stage of pregnancy, whether before or after quickening, abortion was a crime that involved the taking of a human life.[99] The American Medical Association unanimously adopted in 1859 a committee report that called for protection of fetal life because of the "independent and actual existence of the child before birth, as a living being."[100] Similarly, the Medical Society of New York in 1867 "condemned abortion at every stage of gestation as 'murder.'"[101] All of this was well known when the Fourteenth Amendment was ratified in 1868.[102]

American jurisdictions followed suit, both in statutes and decisional law. The nineteenth-century evolution of the statutes underlined that they were crafted to protect human life. By 1900 all states and territories uniformly made abortion a serious crime (except to save the life of the mother).[103] The large majority of the statutes referred to the fetus as a *child*. The statutes of 30 states did so by 1868, as well as those of seven territories and one nation (all of which later became states). That of Connecticut is

---

change its definition of "quick with child" to conform to the *Wycherley* definition. *See* 23 Nov. 1990 ltr. from J.A. Simpson, coeditor of OED, to Rafferty (copy in Dellapenna's possession). The phrase apparently became confused with the phrase "with quick child." *But see State v. Cooper*, 22 N.J.L. 53, 57 (1849).

[99] *Myths* at 234-55, 260, 268, 282.

[100] 12 Transactions of the AMA 75-76 (1859).

[101] Resolution; *see Myths* at 46.

[102] *See, e.g.,* C. Morrill, *The Physiology of Women* 318-19 (1868); *see generally Myths* at 260-61.

[103] *See generally Myths* chs. 6-9.

illustrative:

> That any person with intent to procure the miscarriage or abortion of any woman shall give or administer to her, prescribe for her, or advise, or direct, or cause or procure her to take, any medicine, drug or substance whatever, or use or advise the use of any instrument, or other means whatever, with the like intent, unless the same shall have been necessary to preserve the life of such woman, or of her *unborn child*, shall be deemed guilty of felony, and upon due conviction . . . [pay a fine up to $1,000 and suffer imprisonment of one to five years].[104]

The Pennsylvania Supreme Court in 1850 held that the common law supported an action for abortion at any stage of gestation: "the moment the womb is instinct with embryo life, and gestation has begun, the crime may be perpetrated."[105] The state legislature in 1860 followed this lead, statutorily criminalizing abortion of "any woman, pregnant or quick with child."[106] Some states, as illustrated above, removed any ambiguity regarding quickening by defining an unlawful abortion as involving a

---

[104] Conn. Pub. Acts, ch. LXXI, §§ 1, 2, at 65 (1860) (emphasis added); *see also* Me. Rev. Stat., ch. 160 § 13 (1840) (outlawing abortion by any woman *pregnant with child*, whether *such child* be quick or not) (emphasis added); Ore. Gen. Laws, Crim. Code, ch. 43, §509, at 528 (1845-64) (referring to woman "pregnant with a child").
[105] *Mills v. Cmwlth.* 13 Pa. 631, 632-33 (1850).
[106] Pa. Laws No. 374, § 87 (1860).

woman "pregnant with a child"[107] or "any woman then being with child."[108] Similarly, Texas defined the offense as to "destroy the vitality or life in a child, in a state of being born, and before actual birth . . . ."[109]

Quotes could be multiplied, but the conclusions are obvious: (1) with the advance of medical knowledge, judges and legislators in the 1800's clarified that they understood that a unique human life is formed at conception; (2) in light of that knowledge, they considered the fetus a person and acted to protect that child, including eliminating the distinction in some common-law precedents between children that had already quickened (been felt to move in the womb) and those that had not.

The history of abortion law provided no support for *Roe*'s finding of a fundamental right for a mother to abort her fetus prior to viability (and thereafter if her "health" were implicated). The genius of the common law accommodates underlying principles to changing circumstances and knowledge. For abortion, the underlying principle of the common law was that a gestating, living fetus was entitled to protection from being killed by an abortion. The common law recognized growing scientific knowledge and did away with confused earlier precedents that some read as suggesting that a fetus was only alive after being felt by the mother in

---

[107] *See* Tenn. Acts, ch. CXL, § 1, at 188-89 (1883); Vt. Acts, no. 33, § 1 (1846).
[108] Wyo. (Terr.) Laws, 1st Sess., ch. 3, § 25, at 104 (1869).
[109] Tex. Gen. Stat. Dig., ch. VII, art. 535, at 524 (Oldham & White 1859).

the womb. Statutory law in the states and territories codified this scientifically informed understanding, consistently with the principal purpose of the common law, by protecting innocent life of unborn children from conception.

CONCLUSION

The historical predicates on which *Roe* was based are incorrect. The common law always made abortion illegal, and the main motivation was protection of the lives of unborn children, from the earliest moment of their life in the womb. By the early nineteenth century, medical science had firmly established that a unique human life begins upon conception. With that knowledge, courts and legislators in England and America confirmed that abortion prohibitions applied uniformly during a woman's entire pregnancy, largely eliminating differences in penalties before and after quickening. The common law never made viability a touchstone for the severity of its penalization of abortion. Indeed, viability occurs later than when a child is normally felt to move in the womb by its mother.

Roe should be overruled, with the Court adopting an accurate statement of the common law and the history of abortion. With that established, the viability distinction of *Roe* should be abandoned and the Mississippi statute should be upheld.

Respectfully submitted
this 29th day of July, 2021,

/s/ Frederick W. Claybrook, Jr.
Frederick W. Claybrook, Jr.
Counsel of Record
Claybrook LLC
700 Sixth St., NW, Ste. 430
Washington, D.C. 20001
(202) 250-3833
rick@claybrooklaw.com