

# Overruling *Roe v. Wade*: the Implications for Women and the Law

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ABSTRACT: This paper addresses two issues that would arise upon the overruling of *Roe v. Wade*: First, whether pregnant women who self-abort or consent to an abortion performed upon them by a third party would likely be subject to prosecution in those States where abortion was illegal. Second, what the legal status of abortion would be in the States. The paper concludes, in Part I, that, based upon our history and experience women would not be prosecuted for abortion, and in Part II, that the immediate consequences of an overruling decision upon the legality of abortion would be very limited.\*\*

**T**HE ELECTION of Donald Trump as president on November 8, 2016, has led to widespread speculation that he will appoint several justices to the Supreme Court who, together with those already on the Court, will

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overrule *Roe v. Wade*<sup>1</sup> and return the issue of abortion to the States. The appointment of conservative judge Neil Gorsuch to replace the late Justice Antonin Scalia on the Court has only added to that speculation. Supporters of the judicially-imposed regime of abortion, which allows abortion for *any* reason *before* viability, and very possibly for virtually any reason *after* viability, claim that the overruling of *Roe* would immediately result in the widespread criminalization of abortion, including the conduct of the pregnant woman herself, a development that they assert has already begun with the prosecution of women for self-abortion. Opponents of *Roe*, while disputing that the overruling of *Roe* would lead to the prosecution of pregnant women, believe that such a decision would promptly lead to abortion being outlawed throughout most or all of the country. Neither the supporters nor the opponents of *Roe* are correct.

Part I of this paper discusses the issue of prosecuting women for abortion. A review of our history and experience reveals that, prior to *Roe*, pregnant women were never punished and, with only one or two exceptions, were never even prosecuted either for self-abortion or procured abortion. Indeed, the last documented case of a pregnant woman being prosecuted for abortion (prior to *Roe*) occurred more than one hundred years ago. There are compelling reasons of principle and practicality why women were not prosecuted for abortion before *Roe* was decided. Although there have been a handful of cases, subsequent to *Roe*, in which women were prosecuted for self-abortion, in each case in which a conviction resulted the woman pleaded guilty and was sentenced to time already served while awaiting trial, allowing for her immediate release from custody. In every case in which the woman contested the charge, however, either the charges were dismissed, she was acquitted after a trial, or her conviction was reversed on appeal.

Part II of this paper explores what impact a Supreme Court decision overruling *Roe* would have upon the legality of abortion in the States. Three-fourths of the States have repealed their pre-*Roe* abortion statutes and those statutes would not be revived by an overruling decision. Only four of those States have enacted post-*Roe* statutes that would affect most abortions if *Roe* were overruled. Of the one-fourth of the States that have not repealed their pre-*Roe* statutes, the statutes in almost half of those States would not affect the

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<sup>1</sup> 410 U.S. 113 (1973).

legality of most abortions, either because the statutes allow abortion-on-demand throughout all or most of pregnancy, because they allow abortions for mental health reasons or undefined reasons of health, or because they would be unenforceable on state constitutional grounds. Based upon the present state of the law, no more than eleven States, which account for only twenty percent of the population, would have enforceable statutes on the books that would prohibit most abortions if the Supreme Court restored their authority over this issue. Moreover, in many of those States, abortion advocates would argue that the older statutes *prohibiting* abortion have been repealed by implication with the enactment of newer statutes *regulating* abortion or that the statutes violate the State's constitution (an argument that has prevailed in many other States). In sum, although an overruling decision would be welcome, it would not have the immediate dramatic consequences on the legality of abortion that supporters of legal abortion claim that it would.

#### Part I: Should Women be Prosecuted for Abortion?

At a March 30, 2016 town hall interview, Donald Trump, then the presumptive Republican candidate for president, told MSNBC's Chris Matthews that "there has to be some form of punishment" for women who have abortions.<sup>2</sup> Following the inevitable firestorm of criticism, Mr. Trump backed away from his suggestion, claiming instead that physicians (or anyone else who performs an abortion) are the ones who should be punished, not the women themselves. In a statement posted on his campaign website, Trump said, "The woman is a victim in this case as is the life in her womb." In May 2016, Trump further clarified his position in an interview with *The New York Times Magazine's* Robert Draper. Women, he explained, "punish themselves" in having abortions; he had not meant to imply that they should be imprisoned.<sup>3</sup>

Notwithstanding his retraction, candidate Trump's exchange with Chris Matthews generated a wave of synthetic hysteria: If he were elected (we were told by politicians, talking heads and pundits), President Trump would propose

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<sup>2</sup> The interview may be accessed at [www.msnbc.com/hardball/watch/trumps-hazy-stance-on-abortion](http://www.msnbc.com/hardball/watch/trumps-hazy-stance-on-abortion) (last visited June 18, 2017).

<sup>3</sup> Robert Draper, "Mr. Trump's Wild Ride," *The New York Times Magazine*, May 18, 2016.

federal legislation to “punish” women for having an abortion. Even assuming that, under *Roe v. Wade*, women *could* be prosecuted for inducing (or attempting to induce) their own abortion (an issue that the Supreme Court has not addressed), the overwrought reaction to Trump’s remark ignores the fact that Congress has *never* enacted a law prohibiting physicians (or other third parties) from performing abortions (as opposed to one prohibiting an abortion *procedure*), much less a prohibition that would extend to pregnant women themselves. Nor would it be likely to do so even if the Republicans controlled both the executive and legislative branches of the federal government, as they now do. Indeed, the “Pain-Capable Unborn Child Protection Act” (H.R. 36, 115th Congress), which would ban abortions after twenty weeks, the “Heartbeat Protection Act of 2017” (H.R. 490 115th Congress), which would ban them after the unborn child has a detectable heartbeat, and the “Dismemberment Abortion Ban Act of 2017” (H.R. 1192, 115th Congress), which would ban dismemberment abortions performed on live, unborn children, all contain explicit language exempting women upon whom abortions are performed from the scope of the criminal prohibition,<sup>4</sup> as does the “Partial-Birth Abortion Ban Act of 2003,”<sup>5</sup> which the Supreme Court upheld in *Gonzales v. Carhart*.<sup>6</sup>

#### The Pre-*Roe* History

Contrary to what advocates of legal abortion may believe, women were *not* punished for abortion before *Roe v. Wade* was decided in 1973. There is not one reported case from *any* State, prior to *Roe*, in which a woman was prosecuted, convicted and sentenced for inducing her own abortion, or for consenting to an abortion performed upon her by a third party. Indeed, out of the hundreds of reported abortion cases, there appear to be only two in which a woman was even charged for having had an abortion. In a very old Pennsylvania case, a pregnant woman who induced her own abortion through the

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<sup>4</sup> Each of these bills would add a new section to the federal criminal code, one subsection of which expressly exempts pregnant women from criminal prosecution thereunder. See H.R. 36, §3, subsection (d); H.R. 490, §2, subsection (c); H.R. 1192, §2, subsection (d).

<sup>5</sup> 18 U.S.C. §1531(e).

<sup>6</sup> 550 U.S. 124 (2007).

ingestion of a drug was found guilty by a jury, but the trial judge refused to enter judgment on the verdict, explaining that the statute was not intended to apply to the woman herself. The trial court's order was affirmed by the Pennsylvania Superior Court.<sup>7</sup> In another case, decided in 1922, involving the prosecution of an abortionist, the Texas Court of Criminal Appeals noted that the woman upon whom the abortion had been performed had also been indicted.<sup>8</sup> There is no record, however, that the woman was ever tried, much less convicted and sentenced, for the offense. Moreover, other decisions of the same court clearly held that the woman herself was *not* an accomplice in her own abortion,<sup>9</sup> which implies that she could not be prosecuted as a principal, either,<sup>10</sup> and that a woman does not commit a crime by performing an abortion on herself.<sup>11</sup>

The nearly uniform rule followed in the United States prior to *Roe v. Wade* was that, in the absence of a statute making self-abortion or consenting to an abortion a distinct criminal offense, a woman who did either of these committed no crime.<sup>12</sup> And even in those States that enacted such legislation,<sup>13</sup>

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<sup>7</sup> *Commonwealth v. Weible*, 45 Pa. Super. Ct. 207 (1911).

<sup>8</sup> *Grissman v. State*, 245 S.W. 438 (Tex. Crim. App. 1922).

<sup>9</sup> *Easter v. State*, 536 S.W.2d 233, 229 n7 (Tex. Crim. App. 1976); *Hunter v. State*, 41 S.W. 602, 603 (Tex. Crim. App. 1897); *Watson v. State*, 9 Tex. Crim. App. 237, 244-45 (1880).

<sup>10</sup> *Willingham v. State*, 25 S.W. 424, 424 (Tex. Crim. App. 1894): "She, in law, being guilty of no offense (though desiring an abortion and consenting to what was done to produce the same), was the innocent agent of appellant [the abortionist], and he was the principal and was properly prosecuted as such." See also *Watson*, supra n9, 9 Tex. Crim. App. at 244-45 (same); *Miller v. State*, 40 S.W. 313, 315 (1897) (same).

<sup>11</sup> *Fondren v. State*, 169 S.W. 411, 414 (Tex. Crim. App. 1914).

<sup>12</sup> See, e.g., *Heath v. State*, 459 S.W.2d 420, 422 (Ark. 1970); *State v. Carey*, 56 A. 632, 636 (Conn. 1904) ("[a] common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another") (emphasis added); *In re Vickers' Petition*, 123 N.W.2d 253, 254 (Mich. 1963) (under abortion statute, a woman "cannot held for commission of the crime of abortion upon herself"); *People v. Blank*, 29 N.E.2d 73, 73-74 (N.Y. 1940); *State v. Barnett*, 427 P.2d 821, 822 (Or. 1968) ("[a] reading of the [abortion] statute indicates that the acts prohibited are those which are performed upon the mother rather than any action taken by her"); *Weible*, supra n7.

<sup>13</sup> The statutes are cited in the author's article, "*Planned Parenthood v. Casey*:"

there is not a single reported prosecution under any of those statutes.<sup>14</sup>

### The Post-*Roe* Experience

Subsequent to the Supreme Court's decision in *Roe*, women seldom have been prosecuted for a self-induced abortion (or homicide of an unborn child resulting from a self-induced abortion). In a recently published law review article, which the authors themselves describe as "the most comprehensive accounting of such cases," Lynn M. Paltrow and Jeanne Flavin were able to identify only *eight* cases in a thirty-three year period (1973-2005) in which, according to the authors, "pregnant women were alleged to have self-induced an abortion," in four of which the woman "was also charged under murder or manslaughter statutes."<sup>15</sup> This represents less than *one* case every *four* years since *Roe* was decided (through 2005), but even that number is too high. One of the eight cases that Paltrow and Flavin cite did not involve a self-abortion at all but, instead, concerned an unsuccessful attempt by prosecutors to force a pregnant woman who had herpes to undergo a Caesarean section.<sup>16</sup>

There *have* been a handful of cases, post-*Roe*, where women have pleaded guilty to a charge of inducing their own abortion. Paltrow and Flavin identify three cases in which, as my own research indicates, the defendants pleaded guilty to self-abortion. In two of these cases, the defendants were sentenced to time already served while awaiting trial.<sup>17</sup> In a third case, the defendant was

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The Flight from Reason in the Supreme Court," 18 *St. Louis University Public Law Review* 15, 115 (Appendix A), n61 (listing statutes) (1993).

<sup>14</sup> *Ibid.* at 115.

<sup>15</sup> Lynn M. Paltrow and Jeanne Flavin, "Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health," 38 *Journal of Health Politics, Policy and Law* 305, 317 & n46 (identifying three cases), 322 & n66 (identifying five other cases) (April 2013). Regrettably, the authors do not bother to mention the outcome of any of these cases, which are discussed below in the text.

<sup>16</sup> See *In re Unborn Child of J.B.*, Docket No. 84-7-5000060, Benton and Franklin (Washington) County Court, April 19, 1984, "Appeals court won't rule on forced Cesarean birth," *Tri-City Herald*, April 21, 1984, A3 (appellate court refused to review trial court ruling denying request to compel woman to under a Caesarean section).

<sup>17</sup> See *People v. Tucker*, No. 147092, Santa Barbara-Goteta (California) Municipal Court (June 1973), Beca Wilson, "Cal. Abortion Brings Prolonged Ordeal," 22 *Santa Barbara News & Review*, May 3, 1974 (original murder charge against woman who

originally charged with manslaughter in the second degree and criminally negligent homicide (felonies) and self-abortion in the first degree and self-abortion in the second degree (misdemeanors). The defendant, who was near term (thirty-six weeks), injected herself with local anesthetics and used a scalpel to make incisions in her abdomen, attempting to induce a miscarriage, which resulted in the premature birth of a baby who died thirty hours later from loss of loss of blood and oxygen. The defendant pleaded guilty to attempted self-abortion in the first degree and was sentenced to “unconditional discharge,” a sentence that entails no incarceration, no probation, no conditions and no fines. The other charges were dismissed.<sup>18</sup>

Two other cases that arose after Paltrow and Flavin’s article was published should be noted. In August 2013, an Indiana woman who had ingested rat poison in an attempt to kill herself and her unborn child pleaded guilty to a misdemeanor charge of criminal negligence and was sentenced to time served, including good behavior. As part of her plea agreement, the original charges of murder and attempted feticide were dropped.<sup>19</sup> More recently, in a Tennessee case that received major press coverage, a woman pleaded guilty to a felony charge of attempting to cause her own miscarriage in exchange for a sentence of one year in prison, which she had already served while awaiting the disposition of her case.<sup>20</sup>

In contrast to the (very few) cases in which women have pleaded guilty to self-abortion (five cases since 1973), whenever women have challenged the application of an abortion (or homicide) law to their conduct, the charges were dismissed or, if the charges were not dismissed, the women were acquitted following a trial or, if convicted, their convictions were reversed on appeal.<sup>21</sup>

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shot herself in the abdomen was dismissed, and defendant pleaded guilty to the offense of performing an illegal abortion, for which she was sentenced to time served); *People v. Flores*, No. H-820216, Lexington County (South Carolina) Court of General Sessions, February 28, 2008 (defendant sentenced to ninety days, time served).

<sup>18</sup> *People v. Jenkins*, Index No. 900-84, Westchester County (New York) Court, November 5, 1984. “Court drops charges in self-abortion case,” *Poughkeepsie Journal*, November 6, 1984, p. 11.

<sup>19</sup> John Ericson, “Bei Bei Shuai Freed: Murder Charges Dropped Against Indiana Who Ate Rat Poison While Pregnant,” *Medical Daily*, August 4, 2013.

<sup>20</sup> Liam Stack, “Woman Accused of Coat-Hanger Abortion Pleads Guilty to Felony,” *The New York Times*, January 11, 2017.

<sup>21</sup> This includes four of the eight cases cited by Paltrow and Flavin, see *State v.*

State reviewing courts have uniformly rejected efforts to prosecute women for self-abortion (or homicide of the unborn child based upon a self-induced abortion).<sup>22</sup> In light of the foregoing, the experience since *Roe* supports the conclusion that pregnant women who induce (or attempt to induce) their own abortions do not face a serious risk of criminal prosecution.

#### Why Were Women Not Prosecuted for Abortion?

There were both principled and practical reasons why women were not prosecuted for abortion prior to *Roe v. Wade*. Abortion was traditionally viewed as an assault upon the woman because, in the words of the Oregon Supreme Court, she “was not deemed able to assent to an unlawful act against

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*Ashley*, 701 So.2d 338 (Fla. 1997) (common law immunity of pregnant woman for causing death or injury to her unborn child was not affected by the enactment of felony murder, manslaughter and abortion statutes) (pregnant woman shot herself in the abdomen with a handgun during the third trimester of pregnancy); *Hillman v. State*, 503 S.E.2d 610 (Ga. Ct. App. 1998) (criminal abortion statute does not apply to a pregnant woman’s own conduct in inducing a self-abortion, regardless of the means used) (pregnant woman shot herself in the abdomen with a handgun when she was approximately eight months pregnant); and *Commonwealth v. Pitchford*, No. 78-CR-392, Warren County (Kentucky) Court, Michael Sneed, “Kentucky jury acquits coed in self-abortion,” *Chicago Tribune*, August 31, 1978, A1; *People v. Lyerla*, No. 96-CF-8, Montgomery County (Illinois) Circuit Court, Nancy Slepicka, “Judge Acquits Mother of Attempted Abortion,” *Montgomery County News*, May 13, 1997, p. 1. Efforts to prosecute women for self-abortion were dropped by prosecutors in several other cases not mentioned by Paltrow and Flavin. See Andrea Rowan, “Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion,” 18 *Guttmacher Policy Review* 70, 71-72 and accompanying notes (Summer 2015) (citing cases from Georgia, Idaho, Massachusetts and Utah). Rowan acknowledges that “Women are not commonly charged in the United States for the crime of self-inducing an abortion, and they have rarely been convicted....” *Ibid.* at 70. In another case not cited by Paltrow and Flavin, a Tennessee woman was found not guilty by reason of insanity of murdering her unborn child by shooting herself in the abdomen. Carl Cronan, “Woman ordered to undergo evaluation,” *Times Daily*, October 3, 1987, 1A. See also *Patel v. State*, 60 N.E.3d 1041, 1055-62 (Ind. Ct. App. 2016) (neither feticide statute nor abortion statute was intended to apply to a self-induced abortion) (reversing defendant’s feticide conviction).

<sup>22</sup> See *Ashley*, *Hillman* and *Patel*, supra n21.



herself....”<sup>23</sup> The woman was regarded as a second victim of the abortion,<sup>24</sup> along with her unborn child, at least in part because of the relative dangerousness of the operation, especially in the decades long before *Roe* was decided. However, by the late 1950s – slightly more than a decade before *Roe* – the overwhelming majority (90 percent, according to one estimate) of illegal abortions were performed by physicians; self-abortions accounted for only a small percentage (perhaps eight percent) of all illegal abortions (the remainder being performed by persons with some medical training).<sup>25</sup> In order to prosecute the abortionist successfully, the testimony of the pregnant woman upon whom the abortion was performed was usually necessary. If she were regarded as an accomplice, however, her testimony could not be compelled (because it would tend to incriminate her in a crime) and, whether she testified voluntarily or under a grant of immunity, her testimony would be viewed with suspicion and would have to be corroborated by independent evidence, which often was not available. Thus, for a very practical reason, she was not treated as an accomplice.<sup>26</sup>

Both of those reasons apply to self-abortion, an extremely dangerous assault by the pregnant woman upon herself. Given the relatively rare circumstances in which a woman would attempt to induce her own abortion and the very high risk to her life or physical health that such an attempt would

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<sup>23</sup> *State v. Farnum*, 161 P. 417, 419 (Or. 1916).

<sup>24</sup> See, e.g., *State v. Carey*, 56 A. 632, 636 (Conn. 1904); *Zutz v. State*, 160 A.2d 727, 729-30 (Del. 1960); *Basoff v. State*, 119 A.2d 917, 923 (Md. 1956); *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *People v. Vedder*, 98 N.Y. 630, 632 (1885); *Dunn v. People*, 29 N.Y. 523, 527 (1864); *Thompson v. United States*, 30 App. D.C. 352, 362-64 (1908).

<sup>25</sup> Mary Steichen Calderone, “Illegal Abortion as a Public Health Problem,” 50 *American Journal of Public Health* 948, 949 (1960). At the time her article was published, Dr. Calderone was the Medical Director of Planned Parenthood Federation of America and a vigorous advocate of legalized abortion.

<sup>26</sup> The dozens of cases so holding are collected in an annotation in the *American Law Reports*, Jonathan M. Purver, “Woman Upon Whom Abortion Is Committed or Attempted as Accomplice For Purposes of Rule Requiring Corroboration of Accomplice Testimony,” 34 ALR 3d 858 (1970). The rule that the woman herself is not an accomplice “has been applied even where the woman performed the operation on herself at the instigation of another.” *Ibid.* at 861, citing *Wilson v. State*, 252 P. 1106 (Okla. Crim. App. 1927).

pose (other than by using an illegally obtained abortifacient), it is unlikely that a prohibition of self-abortion would have much of a deterrent effect (any more than a law against attempted suicide would deter anyone from attempting to kill himself). And where the woman survives an attempt to induce her own abortion, she should not be deterred from seeking prompt medical care (for herself *or* her unborn child) because of the possibility that she might be charged with a crime.

Moreover, at least in some instances, a woman who induces her own abortion *has* been assisted in some fashion by a third person (other than a physician) who may have provided the means of inducing an abortion (for example, an illegally obtained abortifacient) or actually participated in the self-abortion. That is the person who should face prosecution, not the woman herself. But, if inducing one's own abortion were a crime, then the testimony of the woman herself could not be compelled (in the absence of a grant of immunity) and, whether compelled or volunteered, would have to be corroborated by other, independent evidence that might not be available.

#### Conclusion of Part I

A comprehensive review of the law reports of all fifty States fails to disclose a reported case anywhere in the United States, prior to *Roe*, in which a woman was prosecuted, convicted, and sentenced either for inducing her own abortion, or for consenting to an abortion performed upon her by another. Nor is there any case in which a woman has been prosecuted for the homicide of her unborn child based upon an illegal abortion (where the child's death was caused by the abortion itself and not by any conduct of the woman after live birth). And while, subsequent to *Roe*, there have been a handful of cases in which women have pleaded guilty to an abortion-related offense (usually misdemeanors) in exchange for immediate release from custody, efforts to prosecute women for a self-induced abortion (or homicide of an unborn child resulting from a self-induced abortion) have been rejected by state courts whenever the application of the law to the woman has been challenged. As explained above, there were (and are) compelling reasons of both principle and practicality why pregnant women were not (and should not be) prosecuted for abortion. That, in turn, suggests that the specter of women being prosecuted, convicted and sentenced for abortion is a figment conjured up in the imagination of abortion advocates whose intention is to scare the public into believing

that punishing women for abortion is a real threat to their liberty, especially if *Roe v. Wade* were overruled and the States once again could prohibit abortion.

## Part II: What Would be the Legal Implications of a Decision Overruling *Roe*?

The immediate impact of a Supreme Court decision overruling *Roe v. Wade* has been the subject of much comment over the years, by both supporters of *Roe* and opponents of *Roe*. The former fear (or *say* that they fear) that an overruling decision would promptly result in abortion becoming illegal throughout much or most of the country. The latter hope that they are right. Both, in fact, are wrong. The overruling of *Roe* would not affect the legality of abortion in most States, but would simply return the issue of abortion to the States for resolution by the democratic process.

### Pre-*Roe* Statutes

Pre-*Roe* abortion statutes fell into five categories. Thirty States prohibited abortion except to save the life of the pregnant woman.<sup>27</sup> Thirteen States

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<sup>27</sup> Arizona: Ariz. Rev. Stat. Ann. §§13-211, 13-212 (1956); Connecticut: Conn. Gen. Stat. Ann. §§53-29, 53-30 (West 1960); Idaho: Idaho Code §§18-601, 18-602 (Supp. 1972); Illinois: Ill. Rev. Stat. ch. 38, ¶23-1 (1971); Indiana: Ind. Code Ann. §§35-1-58-1, 35-1-58-2 (Burns 1971); Iowa: Iowa Code §701.1 (1950); Kentucky: Ky. Rev. Stat. §§436.020, 436.040 (Michie 1962); Louisiana: La. Rev. Stat. Ann. §14:87 (1964), construed *in pari materia* with La. Rev. Stat. Ann. §32:1285(6), see *Rosen v. Louisiana State Board of Medical Examiners*, 318 F. Supp. 1217, 1225 (E.D. La. 1970), *vacated and remanded*, 412 U.S. 902 (1973); Maine: Me. Rev. Stat. Ann. tit. 17, §51 (West 1964); Michigan: Mich. Comp. Laws Ann. §§750.14, 750.323 (West 1968); Minnesota: Minn. Stat. Ann. §§617.18, 617.19 (West 1971); Missouri: Mo. Ann. Stat. §599.100 (Vernon 1969); Montana: Mont. Code Ann. §§94-401, 94-402 (1969); Nebraska: Neb. Rev. Stat. §§28-404, 28-405 (1964); Nevada: Nev. Rev. Stat. §§200.220, 201.120 (1967); New Hampshire: N.H. Rev. Stat. Ann. §585.12 *et seq.* (1955); New Jersey: N.J. Stat. Ann. §2A:87-1 (West 1969) (prohibiting performance of an abortion upon a pregnant woman “maliciously or without lawful justification,” which language was interpreted by the New Jersey Supreme Court to allow abortions necessary to save the life of the woman, see *State v. Moretti*, 244 A.2d 499, 504 (N.J. 1968)); North Dakota: N.D. Cent. Code §12-25-01 (1970); Ohio: Ohio Rev. Code Ann. §2901.16 (Baldwin 1953); Oklahoma: Okla. Stat. Ann. tit. 21, §§861, 862 (West 1971); Pennsylvania: Pa. Stat. Ann. tit. 18, §§4718, 4719 (West 1963) (prohibiting “unlawful” abortions without defining what abortions were “unlawful”); Rhode Island: R.I. Gen. Laws §11-3-1 (1956); South Dakota: S.D. Compiled Laws §§22-17-1, 22-17-2 (1967);

adopted one version or another of the Model Penal Code provision on abortion (§ 230.3) drafted by the American Law Institute,<sup>28</sup> allowing abortion to preserve the woman's life, her physical or mental health, to end a pregnancy resulting from rape or incest, or to end a pregnancy where the child would likely be born with a physical or mental defect (the precise wording of the permissible reasons for performing abortions under these statutes differed from State to State).<sup>29</sup> Two States – by statute or court interpretation – allowed abortion either for undefined reasons of health or for both physical and mental health reasons.<sup>30</sup> One State allowed abortion to save the woman's life or to end a pregnancy resulting from rape.<sup>31</sup> Finally, four States allowed abortion for any

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Tennessee: Tenn. Code Ann. §§39-301, 39-302 (1956); Texas: Texas Penal Code Ann. articles 1191, 1192, 1193, 1194, 1196 (West 1961), transferred to Tex. Rev. Civ. Stat. Ann. articles §§4512.1, 4512.2, 4512.3, 4512.4, 4512.6 (West 1976); Utah: Utah Code Ann. §§76-2-1, 76-2-2 (1953); Vermont: Vt. Stat. Ann. tit. 13, §101 (1972); West Virginia: W.Va. Code §61-2-8 (1966); Wisconsin: Wis. Stat. Ann. §940.04 (1971); Wyoming: Wyo. Stat. §6-77 (1957).

<sup>28</sup> The complete text of §230.3 of the Model Penal Code is set out in Appendix B to the Supreme Court's decision in *Doe v. Bolton*, 410 U.S. 410 U.S. 179, 205-07 (1973).

<sup>29</sup> Arkansas: Ark. Stat. Ann. §41-303 *et seq.* (Supp. 1969); California: Cal. Health & Safety Code §25950 *et seq.* (West Supp. 1971) (law did not include exception for fetal anomaly); Colorado: Colo. Rev. Stat. §40-6-101 *et seq.* (Perm. Supp. 1971); Delaware: 57 Del. Laws, chapters 145, 235, 344, 58 Del. Laws, ch. 497, at 1623, codified at Del. Code Ann. tit. 11, §§222(21), 651-654 (1975), *ibid.* tit. 24, §§1766(b), 1790-1793 (1975); Florida: 1972 Fla. Laws 608, ch. 72-196; Georgia: Ga. Code Ann. § 26-1201 *et seq.* (1972); Kansas: Kan. Stat. Ann. §21-3407 (Vernon 1971); Maryland: Md. Code Ann. art. 43, § 137 (1971) (law did not contain exception for incest); New Mexico: N.M. Stat. Ann. §40A-5-1 *et seq.* (Michie 1972) (subsequently renumbered as § 30-5-1 *et seq.*); North Carolina: N.C. Gen. Stat. §14-44 *et seq.* (1969); Oregon: Or. Rev. Stat. § 435.405 *et seq.* (1969); South Carolina: S.C. Code Ann. §16-82 *et seq.* (1971); Virginia: Va. Code Ann. §18.1-62 *et seq.* (Michie Supp. 1971).

<sup>30</sup> Alabama: Ala. Code tit. 14, §9 (1958); Massachusetts: Mass. Gen Laws Ann. ch. 272, §19 (West 1968) (prohibiting "unlawful" abortions without defining what abortions were "unlawful"). In a series of pre-*Roe* decisions, the Massachusetts statute was interpreted to allow an abortion if, in the good faith judgment of the physician, the procedure was necessary to preserve the pregnant woman's life or her physical or mental health. See *Kudish v. Board of Registration in Medicine*, 248 N.E.2d 264, 265-66 (Mass. 1969); *Commonwealth v. Brunelle*, 171 N.E.2d 850, 851-52 (Mass. 1961); *Commonwealth v. Wheeler*, 53 N.E.2d 4, 5 (1944).

<sup>31</sup> Mississippi: Miss. Code Ann. §2223 (Supp. 1970) (subsequently renumbered

reason (“on demand”) at least until late in pregnancy.<sup>32</sup> Significantly, an overwhelming majority of States (thirty-one) rejected legislative efforts to “liberalize” their abortion statutes before *Roe*.

#### Mental Health Exceptions

Some comment is appropriate about the mental health exceptions in the pre-*Roe* statutes based upon the Model Penal Code. In 1967 the California Legislature enacted the Therapeutic Abortion Act.<sup>33</sup> Under the Act, an abortion could be performed (up to the twentieth week of pregnancy) to prevent “grave impairment” to the pregnant woman’s physical or mental health and to end pregnancies resulting from rape or incest.<sup>34</sup> Under the Act, an abortion for reasons permitted thereunder had to be approved by a hospital committee consisting of at least two physicians (or three, if the abortion was to be performed after the thirteenth week of pregnancy) and their approval had to be unanimous (if the committee consisted of no more than three physicians).<sup>35</sup> An abortion could not be performed for mental health reasons unless it appeared that the pregnant woman suffered from a “mental illness to the extent that [she] is dangerous to herself or to the person or property of others or is in need of supervision or restraint.”<sup>36</sup> This definition, the *only* attempt to define the scope of a mental health exception in an abortion law in the United States prior to the Supreme Court’s decision in *Roe*, was essentially the same standard that is used to determine whether a person may be involuntarily committed because he is a danger to himself or to others, a very strict standard that, one would think, could not be easily met.

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as §97-3-3).

<sup>32</sup> Alaska: Alaska Stat. §11.15.060 (1970) (before viability); Hawaii: Haw. Rev. Stat. §453-16 (Supp. 1971) (before viability and, because of the structure of the statute, at any time after viability, as well); New York: N.Y. Penal Law §125.00 *et seq.* (McKinney Supp. 1971) (twenty-four weeks); Washington: Wash. Rev. Code §9.02.060 *et seq.* (West Supp. 1971) (before “quickening” and within four lunar months).

<sup>33</sup> Cal. Health & Safety Code §25950 *et seq.* (West Supp. 1971).

<sup>34</sup> *Ibid.* §25951. Under a separate provision of California law, an abortion could be performed at any stage of pregnancy to preserve the pregnant woman’s life. See Cal. Penal Code §§274, 275 (West. Supp. 1971).

<sup>35</sup> Cal. Health & Safety Code §25951 (West Supp. 1971).

<sup>36</sup> *Ibid.* §25954.

In 1972, a four-to-three majority of the California Supreme Court declared major provisions of the Therapeutic Abortion Act unconstitutional because, in the view of the majority of the court, several of its key provisions were too vague to understand.<sup>37</sup> What is of particular interest in *Barksdale* is the court's discussion of the numbers and reasons for abortions performed in California in 1970. In that year, more than 65,000 (sixty-five thousand) abortions were approved by hospital committees and almost 63,000 (sixty-three thousand) abortions were performed. More than 98% of the approvals (63,872) and more than 98% of the abortions performed (61,572) were "for reasons of mental health."<sup>38</sup> These astonishing figures perplexed the California Supreme Court:

Serious doubt must exist that such a considerable number of pregnant women could have been committed to a mental institution. Either pregnancy carries risks to mental health beyond those ever imagined, or legal writers and members of therapeutic abortion committees, two groups we must assume to be of at least common intelligence, have been forced to guess at the meaning of this provision and have reached radically different interpretations.<sup>39</sup>

There is a third, and more plausible, explanation – that the physicians serving on the hospital committees routinely approved abortions for reasons of mental health because they were determined to approve the abortions, knew that their approvals were not subject to review by any court or agency, and understood that no other reason could plausibly be invoked to "justify" the abortion.

The California Supreme Court's conclusion that the standard for approving an abortion for mental health reasons was impermissibly vague cannot be squared with the fact that the very same standard – essentially the standard used for civil commitment – is one that has been used throughout the United States, including California, for many, many decades, all without any suggestion or indication that the standard is incomprehensible. The experience with the California Therapeutic Abortion Act of 1967 demonstrates that a mental health exception, even a narrowly drafted one that employs a well-established standard (e.g., the standard for civil commitment) could not be

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<sup>37</sup> *People v. Barksdale*, 503 P.2d 257 (Cal. 1972).

<sup>38</sup> *Ibid.* at 265.

<sup>39</sup> *Ibid.*

limited to genuine mental health reasons. Accordingly, whenever *Roe* is overruled, States that intend to restrict abortions to serious health reasons should not consider including a mental health exception in their legislation, otherwise the exception would likely swallow the rule.

#### Undefined Health Exceptions

In 1901, Congress enacted a code of law for the District of Columbia which included a statute that allowed abortion if the procedure was necessary “for the preservation of the mother’s life or health.”<sup>40</sup> In *United States v. Vuitch*,<sup>41</sup> the Supreme Court considered a vagueness challenge to the statute; what does “health” mean? The Court rejected the challenge, stating that the undefined word “health” “includes psychological as well as physical well-being,” and concluding that “whether a particular operation is necessary for a patient’s physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.”<sup>42</sup>

In *Doe v. Bolton*,<sup>43</sup> the companion case to *Roe v. Wade*, the Supreme Court rejected a vagueness challenge to a Georgia abortion statute that, as interpreted by the district court, allowed a physician to perform an abortion whenever he determined it was “necessary.” Relying upon its decision in *Vuitch*, the Court said that “the medical judgment” as to whether an abortion is “necessary” “may be exercised in the light of all factors – physical, emotional, psychological, familial, and the woman’s age – relevant to the well-being of the patient. All these factors may relate to health.”<sup>44</sup> The Court’s decisions in *Vuitch* and *Bolton* suggest that, like a mental health exception, an undefined health exception in a statute prohibiting abortion could not be contained.

#### The Impact of *Roe* and the Repeal of State Abortion Statutes

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<sup>40</sup> 31 Stat. 1322, ch. 854, §809, codified as D.C. Code Ann. §22-201 (1967) (renumbered as §22-101 in 1988), repealed by Act No. 15-255 (Nov. 25, 2003), D.C. Law 15-154.

<sup>41</sup> 402 U.S. 62 (1971).

<sup>42</sup> *Ibid.* at 72.

<sup>43</sup> 410 U.S. 179 (1973).

<sup>44</sup> *Ibid.* at 192.

*Roe v. Wade* effectively overturned the abortion laws of all fifty States and made abortion legal for any reason before viability and, arguably, for virtually any reason after viability, although the Court has not yet decided how broad or narrow is the scope of the authority of the States to prohibit post-viability abortions. Because *Roe* made abortion legal throughout the country, it is natural to believe that a decision overruling *Roe* would make abortion illegal throughout the country. But, of course, that is not the case. The Supreme Court does not decide what conduct is illegal, only what conduct constitutionally may be made illegal.

Three-fourths of the States (thirty-seven States) have expressly repealed their pre-*Roe* statutes, which would not be revived or reinstated by a decision overruling *Roe v. Wade*.<sup>45</sup> Four of those States, however, have enacted post-

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<sup>45</sup> Alaska: 1997 Alaska Sess. Laws ch. 14, §6; California: 2000 Cal. Stat. ch. 692 §2 (repealing provisions in Penal Code), 2002 Cal. Stat. ch. 385, §§2-7 (repealing provisions in Health & Safety Code); Colorado: 2013 Laws, ch. 372, §3, p. 2192; Connecticut: 1990 Conn. Acts 90-113, §4 (Reg. Sess.); Delaware: Senate Substitute No. 1 for Senate Bill No. 5, 149th Delaware General Assembly, 81 Del. Laws ch.35; Florida: 1979 Fla. Laws 1618, ch. 79-302, §5; Georgia: Ga. Laws No. 328, §1 (1973), Vol. 1 Ga. Acts & Resolutions 635, 636-37 (1973); Idaho: 1973 Idaho Sess. Laws 443, ch. 197, §2; Illinois: Ill. Public Act 78-225, §10 (1973); Indiana: 1977 Ind. Acts 1513, 1524, Pub. L. No. 335, §21; Iowa: 1976 Iowa Acts 549, 774, ch. 1245, §526; Kansas: 1992 Kan. Sess. Laws 723, 729, ch. 183, §9; Kentucky: 1974 Ky. Acts 484, 487, ch. 255, §19; 1974 Ky. Acts 831, 889, ch. 406, §336; Louisiana: 1991 La. Acts No. 26, §2, 2006 La. Acts No. 467, § 2); Maine: 1979 Me. Laws 513, ch. 405, §1 (1st Sess.); Maryland: 1991 Md. Laws 1, ch. 1, §1; Minnesota: 1974 Minn. Laws 265, ch. 177, §7; Missouri: 1977 Mo. Laws 658, 662-63; Montana: 1977 Mont. Laws 1130, 1171-72, ch. 359, §77; Nebraska: 1973 Neb. Laws 801, 806, L.B. 286, §24; Nevada: 1973 Nev. Stat. 1637, 1639-40, ch. 766, §§7, 8; New Hampshire: 1997 N.H. Laws 81, ch. 99, §1; New Jersey: 1978 N.J. Laws 482, 687-88, ch. 95, §2C:98-2; North Carolina: 1973 N.C. Sess. Laws 1057-58, ch. 711, §§1, 2; North Dakota: 1973 N.D. Laws 215, 300, ch. 116, §41; Ohio: 135 Ohio Laws 988 (1974); Oregon: 1983 Or. Laws 868, ch. 470, §1; Pennsylvania: 1974 Pa. Laws 639, Acts No. 209, §10; Rhode Island: 1973 R.I. Pub. Laws 67, 68, ch. 15, §1; South Carolina: 1974 S.C. Acts 2837, 2841, Act No. 1215, §8; South Dakota: 1973 S.D. Laws 206, 209 ch. 146, § 15; 1976 S.D. Laws 227, 257, ch. 158, §17-1; 1977 S.D. Laws 258, 282, ch. 189, §126; Tennessee: 1973 Tenn. Pub. Acts 901 et seq., ch. 235, §§1, 3; Utah: 1973 Utah Laws 584, 684, ch. 196 (sub.) ch. 10, pt. 14, §76-10-1401; Vermont: 2013 Vt. Acts, No. 98, § 1 (Adj. Sess.); Virginia: 1975 Va. Acts 18, ch. 14, §1, ch. 15, §1; Washington: 1992 Wash. Laws, ch. 1, §9, Initiative Measure No. 120, approved Nov. 5, 1991; Wyoming: 1977 Wyo. Sess. Laws 11, 14,



*Roe* statutes that would make most abortions illegal again upon the overruling of *Roe*.<sup>46</sup>

One-fourth of the States have not repealed their pre-*Roe* statutes (thirteen States).<sup>47</sup> The statutes in six of these States would not affect the legality of most abortions. The Hawaii and New York statutes allow abortion-on-demand throughout pregnancy (Hawaii) or through twenty-four weeks (New York); the Alabama and Massachusetts statutes allow abortions either for undefined

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ch. 11, §2.

<sup>46</sup> Louisiana: La. Rev. Stat. Ann. §§14:87 (2012), 40:1061 (Supp. 2016) (prohibiting abortion except to preserve the life of the pregnant woman or to prevent permanent impairment of a life-sustaining organ); North Dakota: N.D. Cent. Code §12.1-31-12 (2009) (prohibiting abortion except to prevent the death of the pregnant woman or where the pregnancy resulted from “gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest); Rhode Island: R.I. Gen. Laws §11-3-1 (2002) (life-of-the-mother only); South Dakota: S.D. Codified Laws §22-17-5-1 (2006). The Louisiana, North Dakota and South Dakota statutes are “trigger” laws that would take effect only upon the overruling of *Roe v. Wade*; the Rhode Island statute, enacted in response to *Roe* and not currently in effect, would be enforceable upon the overruling of *Roe*.

<sup>47</sup> Alabama: Ala. Code §13A-13-7 (LexisNexis 2005); Arizona: Ariz. Ann. Rev. Stat. §§13-3603, 13-2604 (LexisNexis 2015); Arkansas: as previously noted, the pre-*Roe* abortion statute was based upon § 230.3 of the Model Penal Code but, as a result of a post-*Roe* codification of Arkansas law in 1987, all of the provisions of the pre-*Roe* statute (including the exceptions allowing abortion for various reasons) were repealed, other than the prohibition itself and a provision protecting the rights of conscience of physicians opposed to abortion, see Ark. Code Ann. §§5-61-102 (2005) (prohibition), 20-16-601 (rights of conscience); (2014); Hawaii: Haw. Rev. Stat. §453-16 (LexisNexis 2015); Massachusetts: Mass. Gen. Laws Ann. ch. 272, §19 (West 2014); Michigan: Mich. Comp. Laws Ann. §§750.14, 750.323 (West 2004); Mississippi: Miss. Code Ann. §97-3-3 (West 2011) (Mississippi has also enacted a “trigger” law, with the same prohibition, that would take effect upon the overruling of *Roe v. Wade*, see Miss. Code Ann. §41-41-45 (West Supp. 2014), but which would not be enforceable on state constitutional grounds, see n58, *infra*, and accompanying text); New Mexico: N.M. Stat. Ann. §30-5-1 et seq. (LexisNexis 2004); New York: N.Y. Penal Law §125.00 et seq. (McKinney 2009); Oklahoma: Okla. Stat. Ann. tit. 21, §§861, 862 (West 2002); Texas: Tex. Rev. Civ. Stat. Ann. articles 4512.1, 4512.2, 4512.3, 4512.4, 4512.6 (West 1976) (although the Texas statutes struck down in *Roe* have not been reprinted in the current volumes of the Texas Penal Code or the Texas Revised Civil Statutes, they have not been repealed by the Texas Legislature); West Virginia: W.Va. Code §61-2-8 (2014); Wisconsin: Wis. Stat. Ann. §940.04 (West 2005).

reasons of health (Alabama) or for both physical and mental health reasons (Massachusetts); the New Mexico statute allows abortion for a broad range of reasons, including mental health; and both the New Mexico and Mississippi statutes would be unenforceable on state constitutional grounds.<sup>48</sup>

The unrepealed pre-*Roe* statutes in seven States would prohibit all abortions (Arkansas) or all abortions except those necessary to save the life of the mother (Arizona, Michigan, Oklahoma, Texas, West Virginia and Wisconsin). In sum, no more than eleven States would have enforceable laws on the books prohibiting most or all abortions if *Roe* were overruled – the seven States just named, along with the four discussed earlier – Louisiana, North Dakota, Rhode Island and South Dakota. Those eleven States account for only 20% of the population of the United States. In the other thirty-nine States, where 80% of the population lives, abortion would be legal for most or all reasons throughout pregnancy. Even in those eleven States, however, there may be some doubt as to whether all those statutes would be enforceable.

#### Implied Repeal

There is a doctrine in American law called repeal by implication. Under this doctrine, a later enacted statute may repeal by implication an earlier enacted statute if the two statutes are determined to be in irreconcilable conflict. Repeal by implication is disfavored in the law and courts generally will try to harmonize statutes that, at least on the surface, appear to conflict.

In the area of abortion, a repeal-by-implication argument would basically claim that the enactment of *post-Roe* statutes *regulating* abortion cannot be reconciled with *pre-Roe* statutes *prohibiting* abortion because the State cannot regulate that which it prohibits. As a consequence, even in the absence of express repeal, according to this argument, enactment of abortion regulations after *Roe* must have repealed by implication abortion prohibitions enacted before *Roe*. Although a federal court of appeals has accepted this argument and has held that the pre-*Roe* Texas statutes prohibiting abortion were repealed by

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<sup>48</sup> See *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998) (striking down abortion funding restrictions on the basis of the state equal rights amendment); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981) (same on the basis of a state constitutional implied right of privacy).

implication with post-*Roe* statutes regulating abortion,<sup>49</sup> the opinion is not binding upon a state court, presenting, as it does, purely a matter of state law,<sup>50</sup> and, in any event, is unpersuasive on its own terms. As an initial matter, the court did not need to address the issue of repeal-by-implication because the underlying issue was whether the pseudonymous plaintiff in *Roe v. Wade* (Norma McCorvey) had standing to seek to reopen the district court's judgment in that case. Because Ms. McCorvey was not pregnant at the time she sought to relitigate *Roe*, she lacked standing, in either an individual or representative capacity, to attack the underlying judgment. Apart from that, the repeal-by-implication analysis is deeply flawed. In a remarkable error of analysis, the court of appeals relied in part upon a post-*Roe* administrative regulation restricting public funding of abortion in support of its repeal-by-implication holding.<sup>51</sup> Of course, an administrative regulation cannot repeal by implication a duly enacted statute. Moreover, as one commentator has noted, "a claim that a subsequent *regulation* of abortion has impliedly repealed a prior *prohibition* should fail, given the need to regulate those abortions which are lawful under the prohibition, combined with the general presumption against implied repeal."<sup>52</sup> Finally, the court of appeals simply ignored the fact that Texas enacted statutes regulating the practice of abortion only because its statutes prohibiting abortion were not, in light of *Roe*, constitutionally

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<sup>49</sup> *McCorvey v. Hill*, 385 F.3d 846, 849 (5th Cir. 2004).

<sup>50</sup> See *Westchester Fire Insurance v. Admiral Insurance*, 152 S.W.3d 172, 183 (Tex. App.–Fr. Worth 2004, *no writ*) ("in matters of state law, state courts are not bound by decisions of federal courts of appeals").

<sup>51</sup> *McCorvey*, 385 F.3d at 849, citing, *inter alia*, 25 Tex. Admin. Code §29.1121 (2002).

<sup>52</sup> David M. Smolin, "The Status of Existing Abortion Prohibitions in a Legal World without *Roe*: Applying the Doctrine of Implied Repeal to Abortion," 11 *St. Louis U. Pub. L. Rev.* 385, 399-400 (1992) (emphasis in original) (Smolin). The two statutes on which the Fifth Circuit relied in finding repeal by implication – the parental notice statute and the statute regulating abortion clinics – do not create an irreconcilable conflict with the pre-*Roe* statutes prohibiting abortion. Given the legality of abortions required to save the life of the mother, both statutes would have some (albeit limited) room to operate. The statute regulating abortion clinics would ensure that any abortion undertaken to save the life of the mother would be performed under conditions that would be as safe as possible for her. The parental notice statute would apply in those cases in which life-threatening circumstances did not pose an immediate risk of death to a minor.

enforceable. An intent to repeal the pre-*Roe* prohibitions cannot be imputed to a legislature that has merely sought to regulate what it cannot, for the time being, prohibit. As Professor Smolin has explained, “the judicial constraint upon enforcement of the prohibition is in itself a sufficient explanation of the claimed conflict [between the pre-*Roe* prohibition and the post-*Roe* regulations].”<sup>53</sup> Accordingly, “[t]he passage of regulatory provisions after *Roe* is evidence of a desire to fill a gap created by the judiciary, rather than evidence of a desire to repeal abortion prohibitions.”<sup>54</sup> In sum, “[t]he doctrine of implied repeal should not be used as a backdoor effort to exercise a judicial power of repeal of statutes that, under our system of separation of powers, cannot and does not exist.”<sup>55</sup>

In contrast to the Fifth Circuit’s superficial and unconvincing repeal-by-implication analysis in *McCorvey v. Hill*, both the Michigan Court of Appeals and the Wisconsin Supreme Court have rejected repeal-by-implication arguments, holding that their pre-*Roe* statutes prohibiting abortion except to the save the life of the pregnant woman have not been repealed by implication with the enactment of post-*Roe* statutes regulating abortion.<sup>56</sup> No state court has adopted or followed the flawed reasoning of the Fifth Circuit in *McCorvey v. Hill*.<sup>57</sup>

#### State Constitutional Issues

In addition to the repeal-by-implication argument, abortion advocates would likely argue that state abortion prohibitions violate one or more provisions of a State’s constitution. State constitutions made be interpreted in ways that are independent of the federal constitution and provide broader

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<sup>53</sup> *Ibid.* at 401.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.* at 402. For an example of a proper application of the doctrine of repeal-by-implication see *Smith v. Bentley*, 493 F. Supp. 916 (E.D. Ark. 1980) (holding that enactment of pre-*Roe* statute based upon the Model Penal Code allowing abortions under a broad range of reasons implicitly repealed a nineteenth century statute prohibiting abortions except to save the life of the mother).

<sup>56</sup> *People v. Higuera*, 625 N.W.2d 444, 448-49 (Mich. Ct. App. 2001); *State v. Black*, 526 N.W.2d 132, 135, n. 2 (Wis. 1994).

<sup>57</sup> The issue of repeal-by-implication has not been addressed by the reviewing courts in any other State.

rights. Ten state supreme courts have already recognized a state right to abortion that is separate from, and independent of, the federal right to abortion,<sup>58</sup> although the decision in one of those States (Tennessee) has been overturned by state constitutional amendment which the author helped to draft. Only one of those decisions is in a State where there is either a pre- or post-*Roe* statute on the books prohibiting most or all abortions (Mississippi). An eleventh State – Vermont – has a pre-*Roe* state supreme court decision that appears to recognize a right to abortion,<sup>59</sup> but it is unclear whether the decision rests on state or federal law (or both). A state supreme court in a twelfth State – New Mexico – has struck down restrictions on public funding of abortion on the basis of the state Equal Rights Amendment,<sup>60</sup> but without deciding whether there is a state right to abortion. The decision, however, would likely require invalidation of any meaningful abortion restriction the state legislature might enact. As of this writing, there are state constitutional challenges pending to abortion statutes in Iowa, Kansas, and Oklahoma. There is no doubt that state constitutional challenges would be brought against state abortion statutes upon the overruling of *Roe v. Wade*. The success of at least some of those challenges would further reduce the number of States that would have abortion statutes on the books that would be enforceable.

#### Express Repeal

Needless to say, at the same time that abortion advocates would be in state court presenting implied repeal or state constitutional arguments, they would

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<sup>58</sup> *State v. Planned Parenthood of Alaska*, 35 P.3d 30 (Alaska 2001); *State of Alaska, Dep't of Health & Human Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904 (Alaska 2001); *Valley Hospital Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963 (Alaska 1997); *Committee to Defend Reproductive Rights v. Myers*, 625 P.2d 779 (Cal. 1981); *In re T.W.*, 551 So.2d 1186 (Fla. 1989); *Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387 (Mass. 1981); *Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17 (Minn. 1995); *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998); *Armstrong v. State*, 989 P.2d 364 (Mont. 1999); *Right to Choose v. Byrne*, 450 A.2d 925 (N.J. 1982); *Hope v. Perales*, 634 N.E.2d 183 (N.Y. 1994) (by implication); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1 (Tenn. 2000) (overturned by state constitutional amendment).

<sup>59</sup> *Beacham v. Leahy*, 287 A.2d 836 (Vt. 1972).

<sup>60</sup> *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841 (N.M. 1998).

also be in state legislatures seeking to repeal existing abortion statutes. Regardless of the success or failure of any of these strategies, however, no more than eleven States – the ones mentioned above – would have enforceable statutes on the books that would prohibit most abortions upon the overruling of *Roe v. Wade*.

#### Alternatives to Prohibitions if *Roe* were Overruled

In thinking about a legal environment in which the States could exercise their traditional authority over the practice of abortion, both supporters and opponents of legalized abortion tend to think exclusively in terms of States *prohibiting* abortion, as opposed to *regulating* abortion. There is, of course, another option that a number of States might want to consider, and that is to enact regulations that might not pass muster under current constitutional doctrine, but would be permissible options in a post-*Roe* setting. Such options could include requiring parental consent or notice without a judicial bypass mechanism; requiring spousal consent or notice; mandating longer waiting periods (as is the case in some European countries); banning specific abortion procedures (e.g., dismemberment abortions); or mandating counseling by third party entities that have no financial or other association with abortion clinics (as is the case in Germany). Many other regulatory options could be considered, especially in those States where there would be no consensus in support of enacting a prohibition.

#### Conclusion of Part II

It is hard to say when *Roe v. Wade* will be overruled, but it is easy to say that the overruling of *Roe* will not have the immediate dramatic consequences that advocates of legal abortion claim that it would. In the absence of new legislation prohibiting abortion, for which there would have to be a contemporary political consensus supporting such legislation, abortion would remain legal throughout most of the country throughout most of pregnancy. Even in States that have prohibitions on the books, such prohibitions would be challenged on the basis that they have been repealed by implication with the enactment of statutes regulating abortion, that their enforcement is precluded on state constitutional grounds or, failing either of those gambits, that they should be expressly repealed. The overruling of *Roe* is the indispensable first step toward reestablishing legal protection for unborn children, but it is only

the first step. Much work will remain to be done – in state and federal courts, in state legislatures and in the hearts and minds of the American people.