The Legal Status of Abortion in the States if *Roe v. Wade* is Overruled

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Introduction

The possibility that a Republican will be elected president this November and the likelihood that whoever is elected president will have an opportunity to name one or more justices to the Supreme Court during his term of office have fueled speculation that a differently constituted Court may overrule *Roe v. Wade*, 410 U.S. 113 (1973), as modified by *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and return the issue of abortion to the States. This speculation is decidedly premature. Only two justices now on the Court – Associate Justices Scalia and Thomas – have voted to overrule *Roe*. Chief Justice Roberts and Associate Justice Alito are believed to be "anti-*Roe*," but in the abortion cases in which they have participated to date, they have not voted to overrule *Roe*. Although Justice Kennedy dissented in the Supreme Court's decision striking down the Nebraska partial-birth abortion ban act in 2000,[1] he did not join the dissenting opinions of the late Chief Justice Rehnquist, Justice Scalia and Justice Thomas calling for *Roe* and *Casey* to be overruled.[2] Nor, in his majority opinion for the Court in *Gonzales*

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[1] *Stenberg v. Carhart*, 530 U.S. 914, 956-79 (2000) (Kennedy, J., dissenting).

[2] *Id*. at 952 (Rehnquist, C.J., dissenting); 953-56 (Scalia, J., dissenting); 980-83 (Thomas, J., dissenting).

v. Carhart, 550 U.S. 124 (2007), upholding the federal Partial-Birth Abortion Ban Act, did Justice Kennedy express any dissatisfaction with *Roe*, as modified by *Casey*, or even hint that either decision should be overruled. Thus, even assuming that both Chief Justice Roberts and Justice Alito were willing to overrule *Roe* (and neither justice has so indicated to date), there would still have to be at least one more vacancy on the Court after the 2012 election before there was even a possibility that *Roe* and *Casey* could be overruled by a combination of new appointments and present justices. And that possibility would require the election of a president who was opposed to *Roe*, who was willing to appoint an anti-*Roe* justice to the Court regardless of the political opposition to such an appointment and who was able to obtain Senate approval of the nominee (possibly requiring a cloture vote to end a filibuster), as well as a case properly presenting that issue to the Court.

However remote an overruling decision may appear to be at this point, the mere possibility of such a decision has led to concern regarding the legal status of abortion in the States if *Roe* and *Casey* are overruled. Regrettably, much that has been written about the effect of an overruling decision is inaccurate or misleading. The purpose of this article is to evaluate, on a State-by-State basis, the impact of a decision overruling *Roe v. Wade* and *Planned Parenthood v. Casey* on the legal

status of abortion. A review of the relevant statutes and cases leaves no doubt that, in the absence of new legislation, for which there would have to be a strong contemporary political consensus, abortion would be legal in the overwhelming majority of States at least through viability and very probably after viability, as well. No more than eleven States, and possibly as few as eight, would have enforceable laws on the books outlawing most abortions throughout pregnancy.

Executive Summary

There is a widespread popular belief, shared by some commentators, that a decision of the Supreme Court overruling *Roe v. Wade*, as modified by *Planned Parenthood v. Casey*, in and of itself would make abortion illegal. This belief may be based on the notion that because the Supreme Court in *Roe* exercised the power to make abortion *legal* in all fifty States, it would also have the corresponding power to make abortion *illegal*, an illogical, if understandable, process of reasoning. The Court, however, does not have the authority to prohibit abortion. There is another belief, somewhat less widespread, that an overruling decision would somehow "revive" pre-*Roe* statutes that have been expressly repealed by state legislatures, and return us to the legal *status quo ante* of January 22, 1973. This belief is also mistaken. With the exceptions of Louisiana, Mississippi, North Dakota and South Dakota, no State currently has an abortion prohibition on the

books that, by its express terms, becomes effective upon the overruling of *Roe* (and for the reasons set forth in this article the Mississippi statute would not be enforceable). This article is intended to dispel these myths and present an accurate picture of the legal status of abortion in the United States if *Roe*, as modified by *Casey*, were overruled.

More than two-thirds of the States have repealed their pre-*Roe* statutes or have amended those statutes to conform to the (subsequently abandoned) trimester scheme mandated by *Roe v. Wade*. Only one of those States – Rhode Island – has enacted a post-*Roe* statute purporting to prohibit most abortions throughout pregnancy and, of course, that statute has been declared unconstitutional by the federal court and is not enforceable under current constitutional doctrine. If *Roe*, as modified by *Casey*, were overruled, only the Rhode Island statute would effectively prohibit most abortions.

Of the slightly less than one-third of the States that have not repealed their pre-*Roe* statutes, most would be ineffective in prohibiting abortions, either because of the broad exceptions provided in the language of the statutes themselves (or state court rulings interpreting the statutes) allowing abortions for reasons of mental health or for undefined health reasons, or because of state constitutional limitations or both. In yet other States, the pre-*Roe* statutes

prohibiting abortion may have been repealed by implication with the enactment of comprehensive post-*Roe* statutes regulating abortion. No more than six States – Arizona, Michigan, Oklahoma, Texas, West Virginia and Wisconsin – and possibly as few as three – Michigan, Oklahoma and Wisconsin – would have enforceable pre-*Roe* statutes that would prohibit most abortions throughout pregnancy. In addition, an unrepealed provision of the pre-*Roe* Arkansas statute probably would prohibit all abortions.

In sum, no more than eleven States – Arizona, Arkansas, Louisiana, Michigan, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, West Virginia and Wisconsin – and possibly as few as eight – Arkansas, Louisiana, Michigan, North Dakota, Oklahoma, Rhode Island, South Dakota and Wisconsin – would have enforceable statutes on the books that would prohibit most abortions in the event *Roe* and *Casey* were overruled. In the other thirty-nine States (and the District of Columbia), abortion would be legal for most or all reasons throughout pregnancy.

Alabama

The pre-*Roe* statute prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life or health and done

for that purpose."[3] The statute, which has not been repealed,[4] has not been declared unconstitutional nor has its enforcement been enjoined. Because the scope of the health exception is not defined, the statute may not effectively prohibit many abortions, even if *Roe v. Wade* were overruled.[5] Under a recently enacted statute, however, currently in effect, abortions may not be performed during or after the twentieth week of pregnancy (as measured from the first day of the woman's last menstrual period) unless, in reasonable medical judgment, the procedure is necessary to prevent the pregnant woman's death or serious risk of substantial and irreversible physical impairment of a major bodily function.[6] That statute would be in force and effective (with respect to the abortions it covers), without regard to

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[3] ALA. CODE tit. 14, § 9 (1958).

[4] *See* ALA. CODE § 13A-13-7 (LexisNexis 2005).

[5] If *Roe* were overruled, an argument probably would be made that the health exception should be given an open-ended interpretation. Such an argument could be based upon the broad interpretation the Supreme Court gave to the health exception in the District of Columbia statute in *United States v. Vuitch*, 402 U.S. 62, 72 (1971) ("the general usage and modern understanding of the word 'health' . . . includes psychological as well as physical well-being"). In *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*, the Court, relying on *Vuitch*, held that in determining whether an abortion is medically necessary, "all factors–physical, emotional, psychological, familial, and the woman's age–relevant to the well-being of the patient" may be considered. *Id*. at 192.

[6] H.B. 18 (2011 Reg. Sess.). H.B. 18 and another statute, ALA. CODE § 26-22-1 *et seq*. (LexisNexis 2009), which prohibits post-viability abortions (but which has been modified pursuant to a consent decree), are discussed in Appendix A.

the interpretation state courts might give to the scope of the undefined health exception in § 13A-13-7.

Alaska

The pre-*Roe* statute allowed abortion on demand prior to viability,[7] and impliedly prohibited abortion after viability.[8] Section 18.16.010(d) was repealed in 1997.[9] The provision of the pre-*Roe* statute that prohibited post-viability abortions would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason at any stage of pregnancy.[10] Regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in Alaska would be barred by the Alaska Supreme Court's decision recognizing a fundamental right to abortion on state constitutional grounds (privacy).[11]

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[7] ALASKA STAT. § 11.15.060 (1970), renumbered as § 18.16.010 in 1978 and reorganized in 1986.

[8] *Id*. § 11.15.060(a) (second sentence), renumbered as § 18.16.010(a) (second sentence) in 1978, and as § 18.16.010(d) in 1986.

[9] 1997 Alaska Sess. Laws ch. 14, § 6.

[10] ALASKA STAT. §§ 18.16.010(a)(1), (2) (2004).

[11] *Valley Hospital Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997) (defining the scope of the fundamental right to an abortion as "similar to that expressed in *Roe v. Wade*"). In a decision reviewing Alaska's parental consent statute four years later, the Alaska Supreme Court reaffirmed this holding. *State of Alaska v. Planned Parenthood of Alaska*, 35 P.3d 30, 35-39 (Alaska 2001).

Arizona

The principal pre-*Roe* statutes prohibited abortion on a pregnant woman unless the procedure was "necessary to save her life,"[12] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[13] Pursuant to *Roe*, the statutes were declared unconstitutional by the

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[12] ARIZ. REV. STAT. ANN. § 13-211 (1956), renumbered as § 13-3603 by 1977 Ariz. Sess. Laws ch. 142, § 99.

[13] ARIZ. REV. STAT. ANN. § 13-212 (1956), renumbered as § 13-3604 by 1977 Ariz. Sess. Laws ch. 142, § 99. No prosecutions were reported under this statute. Although more than one-third of the States had statutes prohibiting a woman from aborting her own pregnancy or submitting to an abortion performed on her by another, no prosecutions were reported under any of those statutes. Research has disclosed only two cases in which a woman was charged in any State with participating in her own abortion. In *Commonwealth v. Weible*, 45 Pa. Super. 207 (1911), the defendant was found guilty in a jury trial of self-abortion. The trial court, however, arrested judgment on the ground that a woman could not be convicted at common law or under statute of administering drugs to herself with the intent of causing a miscarriage. The Pennsylvania Superior Court affirmed, stating that in the absence of clear statutory authority, "the woman who commits an abortion on herself is regarded rather as the victim than the perpetrator of the crime." *Id*. at 209. The words used in the abortion statute "reasonably imply that the actor in the crime is intended to be some person other than the mother, and they must be given a strained and artificial construction to include her." *Id*. at 210. And in *Crissman v. State*, 245 S.W. 438 (Tex. Crim. App. 1922), an appeal from a conviction of an abortionist, the court made passing reference to the fact that the woman upon whom the abortion has been performed had been indicted for the same offense. *Id.* at 438. No American court has ever upheld the conviction of a woman for self-abortion or consenting to an abortion and, with the exception of *Weible* and *Crissman*, there is no record of a woman even being charged with either offense as a principal or as an accessory. That experience suggests that if *Roe* were overruled, no woman would be prosecuted for self-abortion or consenting to an abortion, even in those few States where abortion prohibitions would be enforceable.

Arizona Court of Appeals.[14] Their enforcement was not enjoined. Although the pre-*Roe* statutes have not been expressly repealed,[15] they may not be enforceable, even if *Roe v. Wade* were overruled, because of a state supreme court decision striking down restrictions on public funding of therapeutic abortions on state constitutional grounds (privileges and immunities).[16] It is also possible that the statutes have been repealed by implication with the enactment of substantial post-*Roe* legislation regulating abortion. Entirely apart from the pre-*Roe* statutes, under a statute currently in effect, abortions may not be performed during or after the twentieth week of pregnancy (as measured from the first day of the woman's last menstrual period) except in a "medical emergency," which is defined as "a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will

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[14] *Nelson v. Planned Parenthood Center of Tucson*, 505 P.2d 580, 590 (Ariz. Ct. App. 1973) (*on rehearing*); *State v. Wahlrab*, 509 P.2d 245 (Ariz. Ct. App. 1973). In its original opinion in *Nelson*, decided less than three weeks before *Roe v. Wade*, the Arizona Court of Appeals upheld the statutes.

[15] *See* ARIZ. REV. STAT. ANN. §§ 13-3603, 13-3604 (2010).

[16] *See Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002). In deciding the case on the basis of the privileges and immunities provision of the Arizona Constitution, however, the supreme court expressly refrained from deciding whether art. 2, § 8, of the state constitution confers a right to abortion independent of the one recognized on federal constitutional grounds in *Roe*. *Id*. at 34.

create serious risk of substantial and irreversible impairment of a major bodily function."[17]

Arkansas

Analysis of the current status of the Arkansas pre-*Roe* statutes is complex. The pre-*Roe* statutes included an 1875 law that prohibited all abortions except to save the life of the mother,[18] and a more recently minted law based upon § 230.3 of the Model Penal Code,[19] which prohibited abortions except when there was "substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the . . . woman," when there was "substantial risk that the child would be born with grave physical or mental defect," or when the pregnancy resulted from a promptly reported act of rape or incest.[20] In 1980, a

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[17] ARIZ. REV. STAT. ANN. § 36-2151(4), (6) (2009) (defining "gestational age" and "medical emergency"); H.B. 2036 (2012 Reg. Sess.), § 7, adding § 36-2159 (prohibition of abortions during and after the twentieth week of pregnancy). This statute and Arizona's post-viability statute, *see* ARIZ. REV. STAT. ANN. § 36-2301.01 (2009), are discussed in Appendix A.

[18] ARK. STAT. ANN. § 41-301 (Supp. 1969), renumbered as § 41-2551 in 1977.

[19] The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[20] ARK. STAT. ANN. §§ 41-303, 41-304 (Supp. 1969), renumbered as §§ 41-2553, 41-2554 in 1977. The law imposed other conditions. Abortions could be performed only in licensed, accredited hospitals and two physicians, in addition to the attending physician, had to certify that the procedure was justified by one of the circumstances specified in the statute. *Id.* §§ 41-306, 41-307, 41-308, renumbered as §§ 41-2557, 41-2558, 41-2559 in 1977. If the abortion was being sought by an unmarried minor or an

three-judge federal district court held that the substantive provisions of the 1875 law had been repealed by implication with the enactment of the 1969 law, and then declared unconstitutional and enjoined the provisions of the 1969 law.[21]

All of the abortion provisions on the books on January 22, 1973, were superseded by or omitted from the Arkansas Code of 1987, except § 41-2553, the first section of 1969 law, which prohibits all abortions,[22] and section 41-2560, which guarantees rights of conscience.[23] The exceptions in the 1969 law based on the Model Penal Code were deleted from the books with the adoption of the Arkansas Code of 1987, leaving only the section prohibiting abortion.[24] Thus, current Arkansas law is based upon a *post-Roe* codification of law that substantially revised the *pre-Roe* laws.

The prohibition of abortion embodied in § 5-61-102 may be subject to a challenge that it has been repealed by implication with significant post-1987

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incompetent, the consent of her parents or guardian was required and, if she was married, the consent of her husband was required. *Id*. § 41-305, renumbered as § 41-2555 in 1977. There was also a residency requirement. *Id*. § 41-306, renumbered as § 41-2556 in 1977.

[21] *Smith v. Bentley*, 493 F.Supp. 916 (E.D. Ark. 1980).

[22] Now codified as ARK. CODE ANN. § 5-61-102 (2005).

[23] Now codified as ARK. CODE ANN. § 20-16-601 (2005).

[24] *See* ARK. CODE ANN. Tables, Vol. A (1995) at 299 (Act No. 4 of 1875); Vol. B (1995) at 86 (Act No. 61 of 1969).

legislation regulating abortion. Assuming, however, that § 5-61-102 is not successfully challenged on that basis, abortion would be illegal in Arkansas if *Roe v. Wade* were overruled, once the injunction issued in *Smith v. Bentley* is dissolved.[25]

California

The pre-*Roe* abortion statutes were based upon § 230.3 of the Model Penal Code.[26] The California Penal Code prohibited abortions not performed in compliance with the "Therapeutic Abortion Act" of 1967,[27] and made a woman's participation in her own abortion a criminal offense (subject to the same

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[25] Section § 2 of a state constitutional amendment adopted on November 8, 1988, provides that "The policy of Arkansas is to protect the life of every unborn child from conception until birth, to the extent permitted by the federal constitution." ARK. CONST. amend. LXVIII, § 2. This language "would empower the General Assembly to prohibit abortion under any circumstances to the extent permitted under the Constitution of the United States." *Arkansas Women's Political Caucus v. Riviere*, 677 S.W.2d 846, 849 (Ark. 1984) (enjoining, on technical grounds, state officials from placing earlier version of Amendment LXVIII on the ballot). Apart from specific statutory language prohibiting abortion (*e.g.*, § 5-61-102), however, the constitutional language, by its own terms, does not criminalize or otherwise prohibit abortion. Section 2 "merely expresses the public policy of the state," and is not self-executing because it "does not provide any means by which [that] policy is to be effectuated." *Knowlton v. Ward*, 889 S.W.2d 721, 726 (Ark. 1994). Whether, apart from § 5-61-102, the Arkansas post-viability statute, ARK. CODE ANN. § 20-16-705(a) (2005), would effectively prohibit post-viability abortions is discussed in Appendix A.

[26] CAL. HEALTH & SAFETY CODE § 25950 *et seq*. (West Supp. 1971), renumbered as § 123400 *et seq*. in 1995. The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[27] CAL. PEN. CODE § 274 (West Supp. 1971).

exception).[28] The Therapeutic Abortion Act authorized the performance of an abortion on a pregnant woman if the procedure was performed by a licensed physician and surgeon in an accredited hospital, and was unanimously approved in advance by a medical staff committee.[29] An abortion could not be approved unless the committee found that there was a "substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother," or that "[t]he pregnancy resulted from rape or incest."[30] An abortion could not be performed on grounds of rape or incest unless there was probable cause to believe

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[28] *Id*. § 275. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[29] CAL. HEALTH & SAFETY CODE § 25951 (West Supp. 1971), renumbered as § 123405 in 1995.

[30] *Id*. Unlike other statutes based upon § 230.3 of the Model Penal Code, the California Therapeutic Abortion Act did not expressly authorize an abortion for reasons of genetic defect. Alone among pre-*Roe* statutes with a mental health exception, California attempted to define what would qualify as a mental health related abortion in terms at least as strict as the standard for civil commitment, *i.e*., that the pregnant woman "would be dangerous to herself or to the person or property of others or is in need of supervision or restraint." *Id*. § 25954, renumbered as § 123415 in 1995. Notwithstanding that narrow definition, more than 60,000 abortions were performed in California in 1970, 98.2% of which were performed for mental health reasons. *People v. Barksdale*, 503 P.2d 257, 265 (Cal. 1972). In *Barksdale*, the California Supreme Court expressed "[s]erious doubt . . . that such a considerable number of pregnant women could have been committed to a mental institution" as the result of becoming pregnant. *Id.* The experience in California strongly suggests that mental health exceptions in abortion statutes are inherently manipulable and subject to abuse.

that the pregnancy resulted from rape or incest.[31] No abortion could be approved after the twentieth week of pregnancy for any reason.[32]

In a pre-*Roe* decision, the California Supreme Court declared substantial provisions of the Therapeutic Abortion Act unconstitutional on state and federal due process grounds (vagueness).[33] Sections 274 and 275 of the Penal Code were repealed in 2000;[34] the Therapeutic Abortion Act was repealed in 2002.[35] None of these statutes would be revived by a decision overruling *Roe v. Wade*.[36] Abortions

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[31] CAL. HEALTH & SAFETY CODE § 25952 (West Supp. 1971), renumbered as § 123407 in 1995.

[32] *Id*. § 25953, renumbered as § 123410 in 1995.

[33] *Barksdale*, 503 P.2d at 262-67.

[34] 2000 Cal. Stat. ch. 692, § 2.

[35] 2002 Cal. Stat. ch. 385, §§ 2-7.

[36] In repealing the Therapeutic Abortion Act, California enacted the "Reproductive Privacy Act." *Id*. § 8, codified as CAL. HEALTH & SAFETY CODE § 123460 *et seq*. (West 2006). The Act declares that "every individual possesses a fundamental right of privacy with respect to personal reproductive decisions." *Id*. § 123462. Consistent with that declaration, the Act expresses the public policy of the State of California that, "Every woman has the fundamental right to choose to bear a child or to choose and to obtain an abortion, except as specifically limited by this article," *id.* § 123462(b), and that "The state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion, except as specifically limited by this article." *Id*. § 123462(c). In repealing their pre-*Roe* statutes, several other States have enacted similar expressions of public policy. No such statement of public policy is required to make abortion legal. In the absence of specific legislation making abortion criminal (either pre- or post-*Roe*), abortion would remain legal even if *Roe v. Wade* were overruled.

could be performed for any reason before viability, and for virtually any reason after viability.[37]

Finally, regardless of *Roe*, any attempt to enact meaningful restrictions on abortion in California would be precluded by the California Supreme Court's 1981 decision in *Committee to Defend Reproductive Rights v. Myers*.[38] In *Myers*, the state supreme court struck down restrictions on public funding of abortion on state constitutional grounds (privacy). In the course of its decision, the court stated that under the privacy guarantee of the state constitution, "all women in this state–rich and poor alike–possess a fundamental constitutional right to choose whether or not to bear a child."[39]

Colorado

The pre-*Roe* abortion statute was based upon § 230.3 of the Model Penal

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[37] Whether the California post-viability statute, CAL. HEALTH & SAFETY CODE § 123468 (West Supp. 2005), would effectively prohibit post-viability abortions is discussed in Appendix A.

[38] 625 P.2d 779 (Cal. 1981).

[39] *Id*. at 784. In a decision striking down California's parental consent statute sixteen years later, the California Supreme Court reaffirmed this holding. *American Academy of Pediatrics v. Lungren*, 940 P.2d 797, 809-10 (Cal. 1997) ("the protection afforded by the California Constitution of a pregnant woman's right of choice is broader than the constitutional protection afforded by the federal Constitution as interpreted by the United States Supreme Court").

Code.[40] Under the statute, an abortion could be performed at any stage of pregnancy (defined as "the implantation of an embryo in the uterus") when continuation of the pregnancy was likely to result in the death of the woman, "serious permanent impairment" of her physical or mental health, or the birth of a child with "grave and permanent physical deformity or mental retardation."[41] An abortion could be performed within the first sixteen weeks of pregnancy (gestational age) when the pregnancy resulted from rape (statutory or forcible) or incest, and the local district attorney confirmed in writing that there was probable cause to believe that the alleged offense had occurred.[42] Pursuant to *Roe v. Wade*, the limitations on circumstances under which abortions could be performed and the requirement that all abortions be performed in hospitals were declared

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[40] COLO. REV. STAT. ANN. § 40-6-101 *et seq*. (West Perm Supp. 1971), renumbered and rearranged as § 18-6-101 *et seq*. The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[41] *Id.* § 40-6-101(1)(a), renumbered and rearranged as § 18-6-101(1)(a).

[42] *Id*. § 40-6-101(b), renumbered and rearranged as § 18-6-101(1)(b). The law imposed other conditions. The procedure had to be unanimously approved by a three-member hospital review board and could be performed only in a hospital. *Id*. §§ 40-6-101(1), (4), renumbered and rearranged as §§ 18-6-101(1), (4). If the abortion was requested on mental health grounds, the diagnosis had to be confirmed in writing by a psychiatrist. *Id*.§ 40-6-101(a), renumbered and rearranged as § 18-6-101(a). If the abortion was being sought by a minor, the consent of one of her parents or her guardian was required; if the woman was married, the consent of her husband was required. *Id*. § 40-6-101(1), renumbered and rearranged as § 18-6-101(1).

unconstitutional by the Colorado Supreme Court in *People v. Norton*.[43] Enforcement of the statute was not enjoined.

The pre-*Roe* statute has not been repealed,[44] and would be enforceable if *Roe v. Wade* were overruled. The broad exceptions in the statute, however, in particular the exception for mental health,[45] would allow almost all abortions to be performed.

Connecticut

The principal pre-*Roe* statutes, based upon an 1860 law, prohibited performance of an abortion on a woman unless it was "necessary to preserve her life or that of her unborn child,"[46] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[47] In a pre-*Roe* decision, those statutes were declared unconstitutional by a three-judge federal district court.[48] Enforcement of the statutes was not enjoined. After the district

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[43] 507 P.2d 862 (Colo. 1973).

[44] COLO. REV. STAT. ANN. § 18-6-101 *et seq*. (West 2004).

[45] The potential abuse of mental health exceptions is discussed in n. 30, *supra*.

[46] CONN. GEN. STAT. ANN. § 53-29 (West 1958).

[47] CONN. GEN. STAT. ANN. § 53-30 (West 1958). No prosecutions were reported under this statute. *See* n. 13, *supra*.

[48] *Abele v. Markle*, 342 F.Supp. 800 (D. Conn. 1972), *judgment vacated and cause remanded for consideration of question of mootness*, 410 U.S. 951 (1973).

court entered its judgment and before the case was remanded by the Supreme Court, Connecticut enacted a new abortion statute with provisions similar to those previously invalidated by the federal district court.[49] Section 1 of the Act stated in part that it was "[t]he public policy of the state and the intent of the legislature to protect and preserve human life from the moment of conception . . . ."[50] This statute was also declared unconstitutional (and permanently enjoined) by the same three-judge federal district court.[51] On remand from the Supreme Court, the federal district court held that the older statutes had not been repealed with the enactment of the newer statute and declared both sets of statutes unconstitutional under *Roe* and permanently enjoined their enforcement.[52] The pre-*Roe* statutes were repealed in 1990,[53] and would not be revived by a decision overruling *Roe v. Wade*.[54] Abortions could be performed for any reason before viability, and for

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[49] *See* 1972 Conn. Acts 1, § 1 (Spec. Sess.), *codified as* CONN. GEN. STAT. ANN. § 53-31a (West Supp. 1972).

[50] *Id.*

[51] *Abele v. Markle*, 351 F.Supp. 224 (D. Conn. 1972), *judgment vacated and cause remanded for further proceedings in light of Roe v. Wade*, 410 U.S. 951 (1973).

[52] *Abele v. Markle*, 369 F.Supp. 807 (D. Conn. 1973).

[53] 1990 Conn. Acts 90-113, § 4 (Reg. Sess.).

[54] In repealing its pre-*Roe* statutes, Connecticut enacted a new section which provides that "The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician." *Id*. § 3(a),

virtually any reason after viability.[55]

Delaware

The principal pre-*Roe* statutes were based on § 230.3 of the Model Penal Code.[56] The statutes prohibited performance of an abortion on a pregnant woman unless the procedure was a "therapeutic abortion,"[57] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[58] An abortion could be performed at any time when continuation of the pregnancy was "likely to result in the death of the mother."[59] An abortion could be performed within the first twenty weeks of gestational age when (1) there was "substantial risk of the birth of [a] child with grave and permanent physical

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codified as CONN. GEN. STAT. ANN. § 19a-602(a) (West 2003). As previously noted, *see* n. 36, *supra*, no such statement of public policy is required to make abortion legal in any State. In the absence of specific legislation making abortion criminal (either pre- or post-*Roe*), abortion would remain legal even if *Roe v. Wade* were overruled.

[55] Whether Connecticut's post-viability statute, *see* CONN. GEN. STAT. ANN. § 19a-602(b) (West 2003), would effectively prohibit post-viability abortions is discussed in Appendix A.

[56] 57 Del. Laws ch. 145 (1969), *id*. ch. 235, *codified as* DEL. CODE ANN. tit. 11, §§ 222(21), 651-654 (1975); *id*. tit. 24, §§ 1766(b), 1790-1793 (1975). The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[57] DEL. CODE ANN. tit. 11, § 651. A "therapeutic abortion" was one performed pursuant to title 24. *Id*. § 222(21).

[58] *Id*. § 652. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[59] *Id*. tit. 24, §§ 1790(a)(1), (b)(1).

deformity or mental retardation," (2) the pregnancy resulted from incest or rape, or (3) continuation of the pregnancy would involve "substantial risk of permanent injury to the physical or mental health of the mother."[60] The pre-*Roe* statutes have not been declared unconstitutional, nor has their enforcement been enjoined.[61] The statutes have not been repealed,[62] and would enforceable if *Roe v. Wade* were overruled. The exception in the statute for mental health,[63] however, would allow almost all abortions to be performed throughout the twentieth week of gestation. After the twentieth week, however, abortions could be performed only if

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[60] *Id*. § 1790(a)(2)-(4). The law imposed other conditions. An abortion could be performed only in an accredited hospital and had to be approved by a hospital abortion review authority. Two physicians had to certify that the procedure was justified under one of the circumstances specified in the statute (except in cases where the pregnancy resulted from rape, in which case the Attorney General had to certify that there was probable cause to believe that the alleged rape did occur). *Id*. §§ 1790(a), 1790(a)(3)(B), (b)(2), (c). In the case of an unmarried minor under the age of 19 or a mentally ill or incompetent woman, the written consent of her parents or guardian was required. *Id*. § 1790(b)(3).

[61] Based upon an Attorney General opinion that the statutes were unconstitutional and a formal policy not to enforce them, a challenge to the constitutionality of the statutes was dismissed for want of a "justiciable controversy." *Delaware Women's Health Organization, Inc. v. Weir*, 441 F.Supp. 497, 499 n. 9 (D. Del. 1977).

[62] *See* DEL. CODE ANN. tit. 11, §§ 222(26), 651-54 (2007); tit. 24, §§ 1766(b), 1790-93 (2005).

[63] The potential abuse of mental health exceptions is discussed in n. 30, *supra*.

continuation of the pregnancy was "likely to result in the death of the mother."[64]

District of Columbia

The pre-*Roe* statute prohibited performance of an abortion unless the procedure was "necessary for the preservation of the mother's life or health . . . ."[65] The constitutionality of the statute was upheld in *United States v. Vuitch*,[66] where the Supreme Court broadly defined "health" as "the state of being . . . sound in body [or] mind," which "includes psychological as well as physical well-being."[67] The pre-*Roe* statute was repealed in 2003.[68] The overruling of *Roe v. Wade* would not affect the legality of abortion in the District of Columbia. Abortions could be performed for any reason at any stage of pregnancy.

Florida

The pre-*Roe* statute was based on § 230.3 of the Model Penal Code.[69] The

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[64] DEL. CODE ANN. tit. 24, § 1790(b)(1) (1997). This statute is discussed in Appendix A.

[65] D.C. CODE ANN. § 22-201 (1967), renumbered as § 22-101 in 1988.

[66] 402 U.S. 62 (1971).

[67] *Id*. at 72 (citation and internal quotation marks omitted).

[68] Act No. 15-255, signed Nov. 25, 2003, effective April 29, 2004, D.C. Law 15-154.

[69] 1972 Fla. Laws 608, ch. 72-196. The text of § 230.3 of the Model Penal Code is set out in Appendix B. The Florida legislature enacted the 1972 statute in response to a decision of the Florida Supreme Court decision the same year striking down, on

statute provided that an abortion could be performed at any stage of pregnancy when (1) "continuation of the pregnancy would substantially impair the life or health of the female," (2) there was "substantial risk that the continuation of the pregnancy would result in the birth a child with a serious physical or mental defect," or (3) there was "reasonable cause to believe that the pregnancy resulted from rape or incest."[70] Pursuant to *Roe*, major portions of the 1972 law were declared unconstitutional by a three-judge federal district court in *Coe v. Gerstein*,[71] and by the Florida Supreme Court in *Wright v. State*.[72] The statute was later repealed.[73] The overruling of *Roe v. Wade* would not revive the pre-*Roe* statute. Abortions could be performed for reason before the third trimester, and

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vagueness grounds, older statutes that prohibited abortion unless the procedure was necessary to preserve the life of the pregnant woman. *State v. Barquet*, 262 So.2d 431 (Fla. 1972), invalidating FLA. STAT. ANN. §§ 782.10, 791.10 (West 1965).

[70] 1972 Fla. Laws 608, ch. 72-196, § 2. The law imposed other conditions. Abortions could be performed only by licensed physicians in approved facilities. *Id*. §§ 1, 2. Except in emergency cases, an unmarried woman under 18 years of age had to obtain the written consent of either parent or of her guardian; a married woman living with her husband had to obtain his written consent. *Id*. §§ 3(1), (2).

[71] 376 F.Supp. 695 (S.D. Fla. 1974), *appeal dismissed for want of jurisdiction*, *cert. denied*, 417 U.S. 279 (1974), *aff'd sub nom. Poe v. Gerstein*, 517 F.2d 787 (5th Cir. 1975), *aff'd sub nom. Gerstein v. Coe*, 428 U.S. 901 (1976).

[72] 351 So.2d 708 (Fla. 1977).

[73] 1979 Fla. Laws 1618, ch. 79-302, § 5.

for virtually any reason thereafter.[74] Regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in Florida would be barred by the Florida Supreme Court's decision recognizing a fundamental right to abortion on state constitutional grounds (privacy).[75]

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[74] Whether Florida's third-trimester statute, *see* FLA. STAT. ANN. § 390.0111(1) (West 2002), would effectively prohibit abortions at that stage of pregnancy (defined as after the twenty-fourth week of pregnancy, *see* FLA. STAT. ANN. § 390.011(8) (West 2002)), is discussed in Appendix A.

[75] *In re T.W.* 551 So.2d 1186, 1196 (Fla. 1989) (striking down parental consent statute). Fourteen years later, the Florida Supreme Court invalidated a parental notice statute. *North Florida Women's Health and Counseling Services, Inc. v. State of Florida*, 866 So.2d 612 (Fla. 2003). Although that decision has been effectively overturned by an amendment to the Florida Constitution adopted on Nov. 2, 2004, *see* FLA. CONST. art. X, § 22, the amendment does not purport to overturn the Florida Supreme Court's doctrine on privacy rights generally or abortions specifically other than recognizing the authority of the legislature to enact a parental notice statute.

The Florida General Assembly has proposed an amendment to the Florida Constitution which would effectively overturn the decision in *In re T.W.* and restore the State's authority to regulate abortion within federal constitutional limits. The amendment, Committee Substitute for House Joint Resolution 1179, which will appear on the ballot this November, would add a new section (§ 28) to the Florida Declaration of Rights (art. I), which provides:

> Prohibition on public funding of abortions; construction of abortion rights.--
>
> (a) Public funds may not be expended for any abortion or for health-benefits coverage that includes coverage of abortion. This subsection shall not apply to:
>
> (1) Expenditures required by federal law;

Georgia

The pre-*Roe* statute was based upon § 230.3 of the Model Penal Code.[76] Under the statute, an abortion could not be performed unless (1) "continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health," (2) the "fetus would very likely be born with a grave, permanent, and irremediable mental or physical defect," or (3) the pregnancy resulted from forcible or statutory rape.[77] The statute did not place any

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> (2) An abortion that is necessary to save the life of the mother;
>
> (3) Pregnancies that result from rape or incest.
>
> (b) This constitution may not be interpreted to create broader rights to an abortion than those contained in the United States Constitution.

[76] GA. CODE ANN. § 26-1201 *et seq*. (1972). The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[77] *Id*. §§ 26-1202(a)(1), (2), (3). Unlike most statutes based upon § 230.3 of the Model Penal Code (other than Maryland), the Georgia statute did not expressly authorize an abortion where the pregnancy resulted from incest. The law imposed other conditions. The abortion had to be performed in a licensed and accredited hospital and had to be approved in advance by a majority vote of a medical staff committee of the hospital. *Id*. §§ 26-1202(b)(4), (5). In addition to the attending physician, two other physicians had to certify in writing that, based upon their separate personal examinations of the pregnant woman, the abortion was, in their judgment, necessary because of one of the reasons specified in § 26-1202(a). *Id*. § 1202(b)(3). If the abortion was sought because the pregnancy resulted from rape, the rape had to be reported in writing under oath to a local law enforcement officer or agency and both a certified copy of the police report and a written statement by the solicitor general for the judicial circuit where the rape occurred (or allegedly occurred) that there was probable cause to believe that the rape had occurred

express limits on the stage of pregnancy at which an authorized abortion could be performed. Major provisions of the statute were declared unconstitutional by a three-judge federal district court in *Doe v. Bolton*,[78] which decision was affirmed, as modified, by the Supreme Court.[79] The statute was repealed in 1973,[80] and would not be revived by the overruling of *Roe v. Wade* and *Doe v. Bolton*. Abortions could be performed for any reason before the twentieth week of pregnancy. Under a recently enacted statute, however, abortions could not be performed during and after the twentieth week of pregnancy (as measured from the date of fertilization) unless the procedure was necessary to prevent the death of the pregnant woman or substantial and irreversible impairment of a major bodily function of the pregnant woman or if the pregnancy was diagnosed as "medically

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had to be completed. *Id*. § 26-1202(b)(6). The woman upon whom the abortion was to be performed had to certify in writing under oath that she was a bona fide legal resident of the State, *id*. § 26-1202(b)(1), and the attending physician had to certify in writing that he believed that the woman was a bona fide resident of the State, *id*. § 26-1202(b)(2). The law also allowed the solicitor general of the judicial circuit in which an abortion was to be performed and any person who would be a relative of the child within the second degree of consanguinity to petition the superior court of the county in which the abortion was to be performed for a declaratory judgment to determine whether the performance of the abortion would violate any constitutional or other legal rights of the fetus. *Id*. § 26-1202(c).

[78] 319 F.Supp. 1048 (N.D. Ga. 1970).

[79] 410 U.S. 179 (1973).

[80] 1973 Ga. Laws No. 328, § 1; Vol. I Ga. Acts & Resolutions 635, 636-37 (1973).

futile."[81]

Hawaii

The pre-*Roe* statute explicitly allowed abortion on demand *prior* to viability and implicitly allowed abortion *after* viability for any reason.[82] The statute, which has not been repealed,[83] has not been declared unconstitutional nor has its enforcement been enjoined. The Hawaii Legislature has amended the pre-*Roe* statute to eliminate the hospitalization and residency requirements,[84] which were unenforceable under *Doe v. Bolton*. The legality of abortion would not be affected by a decision overruling *Roe v. Wade*. Abortions could be performed for any

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[81] H.B. 954 (2011-12 Reg. Sess.), amending GA. CODE ANN. § 16-12-140 *et seq*., and adding a new § 31-9B-1 *et seq*. (a pregnancy is "medically futile" if, "in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth"). This bill is discussed in Appendix A.

[82] HAW. REV. STAT. ANN. § 453-16 (Supp. 1971). The statute prohibited "abortion" unless the procedure was performed by a licensed physician or surgeon, or a licensed osteopathic physician and surgeon, in a hospital licensed by the Hawaii Department of Health or operated by the federal government or an agency thereof. *Id* §§ 453-16(a)(1), (2). The statute also imposed a residency requirement. *Id.* § 453-16(a)(3). The term "abortion," however, was limited to the intentional termination of a pregnancy of a "*non*viable fetus." *Id.* § 453-16(b) (emphasis added). As a result, the "prohibition" set forth in the first sentence of the statute did not prohibit (and does not prohibit) any abortion of a viable fetus.

[83] *Id*. § 453-16 (Supp. 2010).

[84] *See* H.B. No. 1242 H.D. 1, 2006 Haw. Sess. Laws Act 35 (signed April 26, 2006).

reason before or after viability.[85]

Idaho

The principal pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[86] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[87] These statutes were repealed in 1973,[88] and would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before twentieth week of pregnancy. Under separate statutes, however, abortions could not be performed during the third trimester except to preserve the life of the pregnant woman or when the pregnancy would result in the birth or delivery of a fetus unable to survive,[89] or during or after the twentieth week of pregnancy (as measured from the date of fertilization) unless the procedure was necessary to prevent the death of the pregnant woman or substantial and

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[85] *See* n. 82, *supra*, and Appendix A.

[86] IDAHO CODE § 18-601 (Supp. 1972).

[87] *Id*. § 18-602. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[88] 1973 Idaho Sess. Laws 443, ch. 197, § 2.

[89] IDAHO CODE § 18-608(3) (2004).

irreversible impairment of a major bodily function.[90] In 1998, the Idaho Attorney General issued an opinion that the former statute is unconstitutional to the extent that it prohibits health-related abortions.[91] More recently, the Attorney General has expressed the view that the latter statute is unconstitutional "insofar as it proscribes some non-therapeutic abortions even before a fetus has reached viability."[92]

Illinois

The principal pre-*Roe* statute prohibited performance of an abortion unless the procedure was "necessary for the preservation of the woman's life."[93] Pursuant to *Roe*, this statute was declared unconstitutional by the Illinois Supreme

[90] H.B. 1165 (2011 1st Reg. Sess.), adding § 18-501 *et seq*. to the Idaho Code.

[91] Op. Att'y Gen. 98-1.

[92] Letter of February 14, 2011, from Steven L. Olsen, Chief, Civil Litigation Division, Office of the Attorney General, State of Idaho, to Hon. Chuck Winder. Section 18-603(3) and H.B. 1165 are discussed in Appendix A.

[93] ILL. REV. STAT. ch. 38, ¶ 23-1 (1971).

Court in *People v. Frey*,[94] and was later repealed.[95] The statute would not be revived by a decision overruling *Roe v. Wade*.[96] Abortions could be performed for any reason before viability, and for virtually any reason after viability.[97]

Indiana

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[98] and made a

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[94] 294 N.E.2d. 257 (Ill. 1973). Prior to the Supreme Court's decision in *Roe v. Wade*, the Illinois Supreme Court rejected an attempt to engraft mental or psychiatric grounds onto the statute. *People ex rel. Hanrahan v. White*, 285 N.E.2d 129 (Ill. 1972). The pre-*Roe* statute was also struck down by a three-judge federal district court. *Doe v. Scott*, 321 F.Supp. 1385 (N.D. 1971), *vacated and remanded sub nom. Hanrahan v. Doe*, 410 U.S. 950 (1973).

[95] Ill. Public Act 78-225, § 10 (1973).

[96] The preamble to the Illinois Abortion Act of 1975 states that if the decisions of the United States Supreme Court recognizing a right to abortion are "ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated." 720 ILL. COMP. STAT. ANN. 510/1 (West 2003). In the absence of new legislation criminalizing abortion (the pre-*Roe* statute having been repealed), the preamble would not, by its own terms, make abortion illegal. It contains no operative provisions and authorizes no punishment. Conduct is not criminal in Illinois unless a statute defines the particular conduct as criminal. *See* 720 ILL. COMP. STAT. ANN. 5/1-3 (West 2002). Moreover, one General Assembly cannot bind another to enact legislation. *See* EFFECTS ON ILLINOIS IF *ROE V. WADE* IS MODIFIED OR OVERRULED, Illinois General Assembly Legislative Research Unit (Feb. 9, 1989).

[97] Whether the Illinois post-viability statute, *see* 720 ILL. COMP. STAT. ANN. 510/5 (West 2003), would effectively prohibit post-viability abortions is discussed in Appendix A.

[98] IND. CODE ANN. § 35-1-58-1 (Burns 1971).

woman's participation in her own abortion a criminal offense (subject to the same exception).[99] Both statutes were repealed in 1977,[100] and neither would be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before the twentieth week of pregnancy. Under another statute, however, currently in effect, abortions may not be performed at the earlier of viability or during or after the twentieth week of pregnancy (as measured from the date of fertilization) unless, in the attending physician's professional, medical judgment, the procedure is necessary "to prevent a substantial permanent impairment of the life or physical health of the pregnant woman."[101]

Iowa

The principal pre-*Roe* statute prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to save her life."[102]

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[99] *Id*. § 35-1-58-2. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[100] 1977 Ind. Acts 1513, 1524, Pub. L. No. 335, § 21. In *Cheaney v. State*, 285 N.E.2d 265 (Ind. 1972), *cert. denied for want of standing of petitioner*, 410 U.S. 991 (1973), the Indiana Supreme Court rejected a challenge to the constitutionality of the state abortion statute brought by a nonphysician who had been convicted of performing an abortion.

[101] IND. CODE ANN. § 16-34-2-1(a)(3) (West Supp. 2011). This statute is discussed in Appendix A.

[102] IOWA CODE § 701.1 (1950).

Pursuant to *Roe*, this statute was declared unconstitutional by a three-judge federal district court in *Doe v. Turner*,[103] and was repealed in 1976.[104] The pre-*Roe* statute would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason through the second trimester, and for virtually any reason thereafter.[105]

Kansas

The principal pre-*Roe* statute was based on § 230.3 of the Model Penal Code.[106] An abortion could be performed at any stage of pregnancy when (1) there was "substantial risk that a continuance of the pregnancy would impair the physical or mental health of the mother," (2) there was "substantial risk . . . that the child would be born with physical or mental defect," or (3) "the pregnancy resulted from rape, incest or other felonious intercourse."[107] This statute was

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[103] 361 F.Supp. 1288 (S.D. Iowa 1973). Prior to the Supreme Court's decision in *Roe v. Wade*, the Iowa Supreme Court upheld the statute, rejecting arguments that it was impermissibly vague and denied equal protection of the law. *State v. Abodeely*, 179 N.W.2d 347 (Iowa 1970), *appeal dismissed*, *cert. denied*, 402 U.S. 936 (1971).

[104] 1976 Iowa Acts 549, 774, ch. 1245, § 526.

[105] *See* IOWA CODE ANN. § 707.7 (West 2003). Whether Iowa's statute would effectively prohibit abortions after the second trimester is discussed in Appendix A.

[106] KAN. STAT. ANN. § 21-3407 (Vernon 1971). The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[107] *Id*. § 21-3407(2). The law imposed other conditions. Abortions could be performed only by licensed physicians in licensed, accredited hospitals. *Id*. §§ 21-

repealed in 1992,[108] and would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before the twenty-second week of pregnancy. Under separate statutes, however, currently in effect, abortions may not be performed after viability or during or after the twenty-second week of pregnancy (as measured from the first day of the woman's last menstrual period), unless, in either case, the procedure is necessary "to preserve the life of the pregnant woman" or "a continuation of the pregnancy will cause a substantial and permanent impairment of a major bodily function of the pregnant woman."[109]

Kentucky

The pre-*Roe* statutes prohibited performance of an abortion upon a pregnant woman unless it was "necessary to preserve her life,"[110] and punished the offense as a homicide if the woman died as a result thereof.[111] Pursuant to *Roe*, these

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3407(2), 65-444. Except in emergency cases, no abortion could be performed unless three physicians certified in writing the circumstances that existed that justified the abortion. *Id*. §§ 21-3407(2)(a), (b), 65-444. The hospitalization and three-physician concurrence requirements were declared unconstitutional by a three-judge federal district court in a pre-*Roe* decision. *Poe v. Menghini*, 339 F.Supp. 986 (D. Kan. 1972). The potential abuse of mental health exceptions is discussed in n. 30, *supra*.

[108] 1992 Kan. Sess. Laws 723, 729, ch. 183, § 9.

[109] KAN. STAT. ANN. § 65-6703 (Supp. 2011) (post-viability); H.B. No. 2218 (2011 Reg. Sess.) (twenty-two weeks). These statutes are discussed in Appendix A.

[110] KY. REV. STAT. ANN. § 436.020 (Michie 1962).

[111] *Id*. § 435.040.

statutes were declared unconstitutional by the Kentucky Court of Appeals (the name of Kentucky's highest court before 1976) in *Sasaki v. Commonwealth*,[112] and were repealed in 1974.[113] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*.[114] Abortions could be performed for any reason before viability, and for virtually any reason after viability.[115]

Louisiana

The principal pre-*Roe* statute prohibited all abortions.[116] Although § 14:87

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[112] 497 S.W.2d 713 (Ky. 1973) In its original decision, the Kentucky Court of Appeals upheld the statute. *Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972), *vacated and remanded*, 410 U.S. 951 (1973). Prior to *Roe*, a three-judge federal district court also upheld the statute. *Crossen v. Attorney General*, 344 F.Supp. 587 (E.D. Ky. 1972), *vacated and remanded*, 410 U.S. 950 (1973).

[113] 1974 Ky. Acts 484, 487, ch. 255, § 19; 1974 Ky. Acts 831, 889, ch. 406, § 336.

[114] Kentucky has enacted a statute stating that "[i]f . . . the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored." KY. REV. STAT. ANN. § 311.710(5) (LexisNexis 2007). In the absence of new legislation criminalizing abortion (the pre-*Roe* statutes having been repealed), this expression of legislative policy would not, by its own terms, make abortion illegal. It contains no operative provisions and authorizes no punishment. Conduct is not criminal in Kentucky unless a statute defines the particular conduct as criminal. *See* KY. REV. STAT. ANN. § 500.020(1) (LexisNexis 2008).

[115] Whether Kentucky's post-viability statute, KY. REV. STAT. ANN. § 311.780 (LexisNexis 2007), would effectively prohibit post-viability abortions is discussed in Appendix A.

[116] LA. REV. STAT. ANN. § 14:87 (1964).

did not on its face permit any exceptions, given the requirement of a specific criminal intent,[117] an abortion performed to save the life of the mother probably was lawful. This construction would have been consistent with another statute that barred disciplinary action against a physician who performed an abortion for that purpose.[118] Pursuant to *Roe*, § 14:87 and § 37:1285(6) were declared unconstitutional in a pair of three-judge federal district court decisions.[119]

Following the Supreme Court's decision in *Webster v. Reproductive Health Services*,[120] the Louisiana Attorney General and the District Attorney for New Orleans Parish sought to reopen the earlier decisions invalidating § 14:87 and enjoining its enforcement. A three-judge federal district court convened to hear

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[117] *See State v. Sharp*, 182 So.2d 517, 518 (La. 1966).

[118] The state board of medical examiners was empowered to revoke the license of a physician who performed an abortion "unless [the procedure was] done for the relief of a woman whose life appears in peril after due consultation with another licensed physician." LA. REV. STAT. ANN. § 37:1285(6) (1964). In *Rosen v. Louisiana Board of Medical Examiners*, 318 F.Supp. 1217, 1225 (E.D. La. 1970), *vacated and remanded*, 412 U.S. 902 (1973), the court construed §§ 14:87 and 37:1285(6) *in pari materia* and upheld their constitutionality.

[119] *Rosen v. Louisiana State Board of Medical Examiners*, 380 F.Supp. 875 (E.D. La. 1974), *summarily affirmed*, 419 U.S. 1098 (1975); *Weeks v. Connick*, Civil Action No. 73-469 (E.D. La. 1976), *summarily affirmed sub nom. Guste v. Weeks*, 429 U.S. 1056 (1977). Prior to *Roe*, the Louisiana Supreme Court consistently rejected attacks on the constitutionality of § 14:87. *State v. Campbell*, 270 So.2d 506 (La. 1972); *State v. Scott*, 255 So.2d 736 (La. 1971); *State v. Shirley*, 237 So.2d 676 (La. 1970); *State v. Pesson*, 235 So.2d 568 (La. 1970).

[120] 492 U.S. 490 (1989).

the case held that § 14:87 had been repealed by implication with the enactment of comprehensive post-*Roe* legislation regulating abortion.[121] The legislature thereafter enacted a new § 14:87 prohibiting abortion except to preserve the life or health of the unborn child, to save the life of the mother or to terminate a pregnancy that resulted from a reported act of rape or incest.[122] This statute was also declared unconstitutional.[123] The Louisiana Legislature thereafter repealed and reenacted § 14:87, deleting the exceptions for rape and incest, retaining the life-of-the-mother exception and adding a very narrow physical health exception (preventing permanent impairment of a life-sustaining organ of a pregnant woman).[124] The amendments take effect when *Roe v. Wade* is overruled or the United States Constitution is amended to restore the authority of the States to prohibit abortion.[125] Section 14:87 would take effect and be enforceable if *Roe v. Wade* were overruled or if the federal constitution were amended to restore the

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[121] *Weeks v. Connick*, 733 F.Supp. 1036 (E.D. La. 1990).

[122] 1991 La. Acts, No. 26, codified as LA REV. STAT. ANN. § 14:87 (2004).

[123] *Sojourner T. v. Roemer*, 772 F.Supp. 930 (E.D. La. 1991), *aff'd sub nom. Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992), *cert denied*, 507 U.S. 972 (1993).

[124] 2006 La. Acts Pub. Act 467, § 2 (signed June 17, 2006).

[125] *Id*. § 1 (adding § 40:1299.30 to the Louisiana Revised Statutes Annotated).

States' authority to prohibit abortion.[126]

Maine

The pre-*Roe* statute prohibited performance of an abortion unless the procedure was "necessary for the preservation of the mother's life."[127] The statute was repealed in 1979,[128] and would not be revived by a decision overruling *Roe v. Wade*.[129] Abortions could be performed for any reason before viability, and for virtually any reason after viability.[130]

Maryland

The principal pre-*Roe* statute was based on § 230.3 of the Model Penal

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[126] Whether, apart from § 14:87, Louisiana's post-viability statute, LA. REV. STAT. ANN. § 40:1299.35.4 (Supp. 2010), would effectively prohibit post-viability abortions is discussed in Appendix A.

[127] ME. REV. STAT. ANN. tit. 17, § 51 (1964).

[128] 1979 Me. Laws 513, ch. 405, § 1 (1st Sess.).

[129] In 1993, Maine enacted a statement of policy regarding abortion: "It is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability except as provided in section 1597-A [transferred to § 1598(A)]." 1993 Me. Laws ch. 61, § 2. As previously noted, *see* n. 36, *supra*, no such statement of public policy is required to make abortion legal in any State. In the absence of specific legislation making abortion criminal (either pre- or post-*Roe*), abortion would remain legal even if *Roe v. Wade* were overruled.

[130] Whether Maine's post-viability statute, ME. REV. STAT. ANN. tit. 22, § 1598(4) (2004), would effectively prohibit post-viability abortions is discussed in Appendix A.

Code.[131] An abortion could be performed at any stage of pregnancy when "continuation of the pregnancy [was] likely to result in the death of the mother."[132] An abortion could be performed within the first twenty-six weeks of gestation when (1) there was "substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother," (2) there was "substantial risk of the birth of [a] child with grave and permanent physical deformity or mental retardation," or (3) the pregnancy resulted from a forcible rape.[133] The State's Attorney had to confirm that there was probable cause to believe that the rape had in fact occurred.[134]

Pursuant to *Roe* and *Doe*, the limitations on the circumstances under which abortions may be performed and the requirement that all abortions be performed in

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[131] MD. ANN. CODE art. 43, § 137 (1971), transferred to MD. HEALTH-GEN. CODE ANN. § 20-208 (LexisNexis 1990), by 1982 Md. Laws 4184, 4184-85. The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[132] *Id.* § 137.

[133] *Id*. Unlike most statutes based on § 230.3 of the Model Penal Code (other than Georgia), the Maryland statute did not expressly authorize an abortion where the pregnancy resulted from incest. The potential abuse of mental health exceptions is discussed in n. 30, *supra*.

[134] *Id.* The law imposed other conditions. Abortions could be performed only by licensed physicians in licensed hospitals accredited by the Joint Committee on Accreditation of Hospitals. *Id.* § 137(a). The procedure had to be approved by a hospital review authority, which was required to keep detailed written records of all requests for authorization and its action thereon. *Id*. §§ 137(b)(2), (c).

hospitals were declared unconstitutional by the Maryland Court of Special Appeals in *State v. Ingel*,[135] and *Coleman v. Coleman*,[136] and by the United States Court of Appeals for the Fourth Circuit in *Vuitch v. Hardy*.[137] With the exception of the conscience provisions, all of the provisions of the pre-*Roe* statutes, recodified in 1987,[138] were repealed in 1991.[139] These statutes would not be revived by a decision overruling of *Roe v. Wade*. Abortions could be performed for any reason at any stage of pregnancy.[140]

Massachusetts

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[135] 308 A.2d 223 (Md. Ct. Sp. App. 1973).

[136] 471 A.2d 1115 (Md. Ct. Sp. App. 1984).

[137] 473 F.2d 1370 (4th Cir. 1973), *cert. denied*, 414 U.S. 824 (1973).

[138] MD. HEALTH-GEN. CODE ANN. §§ 20-103, 20-201 to 20-208, 20-210, 20-214 (1990).

[139] 1991 Md. Laws 1, ch. 1, § 1. In repealing its pre-*Roe* statutes, Maryland enacted a new statute providing, *inter alia*, that "the State may not interfere with the decision of a woman to terminate a pregnancy: (1) Before the fetus is viable; or (2) At any time during the woman's pregnancy, if: (i) The termination procedure is necessary to protect the life or health of the woman; or (ii) The fetus is affected by genetic defect or serious deformity or abnormality." *Id*., codified as MD. HEALTH-GEN. CODE ANN. § 20-209(b) (LexisNexis 2009). As previously noted, *see* n. 36, *supra*, no such legislative statement is required to make abortion legal in any State. In the absence of specific legislation making abortion criminal (either *pre-* or *post-Roe*), abortion would remain legal even if *Roe v. Wade* were overruled. Moreover, nothing in the Maryland Code attempts to limit the reasons for which abortions may be performed after viability.

[140] MD. HEALTH-GEN. CODE ANN. § 20-209(b)(2) (LexisNexis 2009). Viability is defined in § 20-209(a). This statute is discussed further in Appendix A.

The principal pre-*Roe* statute prohibited performance of "unlawful" abortions.[141] Although the statute itself did not define what constituted an "unlawful" abortion, in a series of cases the Massachusetts Supreme Judicial Court interpreted the statute to allow abortions for reasons of the pregnant woman's physical or mental health.[142] Pursuant to *Roe*, § 19 of ch. 272 was declared unconstitutional in an unreported decision of a three-judge federal district court.[143] The pre-*Roe* statute has not been repealed.[144] However, in light of the judicially engrafted exceptions for physical and mental health, it is doubtful that the statute would effectively prohibit any abortions even if *Roe v. Wade* were overruled.[145] Moreover, regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in Massachusetts would be barred by the Massachusetts Supreme

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[141] MASS. GEN LAWS ANN. ch. 272, § 19 (West 1968).

[142] *Kudish v. Board of Registration in Medicine*, 248 N.E.2d 264, 266 (Mass. 1969); *Commonwealth v. Brunelle*, 171 N.E.2d 850, 851-52 (Mass. 1961); *Commonwealth v. Wheeler*, 53 N.E.2d 4, 5 (Mass. 1944). The potential abuse of mental health exceptions is discussed in n. 30, *supra*.

[143] *Women of the Commonwealth v. Quinn*, Civil Action No. 71-2420-W (D. Mass. Feb. 21, 1973).

[144] *See* MASS. GEN. LAWS ANN. ch. 272, § 19 (West 2000).

[145] The same may be said of the Massachusetts statute, MASS. GEN. LAWS ANN. ch. 112, § 12M (West 2003), which allows abortions to be performed during or after the twenty-fourth week of pregnancy to save the life of the mother or where continuation of the pregnancy would imposed on her a substantial risk of grave impairment of her physical or mental health. This statute is discussed further in Appendix A.

Judicial Court's decisions recognizing a fundamental right to abortion on state constitutional grounds (due process).[146]

Michigan

The principal pre-*Roe* statute prohibited performance of an abortion on a pregnant woman "unless the same shall have been necessary to preserve the life of such woman."[147] Another statute provided: "Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be guilty of manslaughter."[148] And under a third statute, the "wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed

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[146] *See Moe v. Secretary of Administration & Finance*, 417 N.E.2d 387, 397-99 (Mass. 1981) (striking down restrictions on public funding of abortion); *Planned Parenthood League of Massachusetts v. Attorney General*, 677 N.E.2d 101, 103-04 (Mass. 1997) (partially invalidating parental consent statute). In *Moe*, the majority opinion stated, "we have accepted the formulation of rights that [*Ro*e] announced as an integral part of our jurisprudence." 417 N.E.2d at 398.

[147] MICH. COMP. LAWS ANN. § 750.14 (West 1968).

[148] *Id*. § 750.323.

manslaughter."[149]

In *People v. Bricker*,[150] and *Larkin v. Calahan*,[151] the Michigan Supreme Court considered the constitutionality of these statutes in light of the Supreme Court's decisions in *Roe v. Wade* and *Doe v. Bolton*. In *Bricker*, the court, while affirming the conviction of a layman for conspiracy to commit an abortion, held that under the Supremacy Clause, the State's public policy to proscribe abortion had to be subordinated to the federal constitutional requirements elucidated in *Roe* and *Doe.*[152] Accordingly, § 750.14 was construed not to apply to an abortion performed by a physician in the exercise of his or her medical judgment.[153] "[A] physician," however, "may not cause a miscarriage after viability except where necessary, in his or her medical judgment, to preserve the life or health of the mother."[154] "[E]xcept as those cases defined and exempted under *Roe v. Wade* and

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[149] *Id*. § 750.322.

[150] 208 N.W.2d 172 (Mich. 1973).

[151] 208 N.W.2d 176 (Mich. 1973).

[152] *Bricker*, 208 N.W.2d at 175. This gloss on the pre-*Roe* statute, effectively limiting its application to post-viability abortions, is discussed in Appendix A.

[153] *Id*.

[154] *Id*.

Doe v. Bolton, . . . criminal responsibility attaches."[155]

In *Larkin*, the supreme court held that § 750.322 "is limited in its scope to abortions caused by felonious assault upon the mother, which result in the death of an unborn quick child *en ventre sa mere*."[156] Finally, in conformity with *Roe v. Wade*, the court held that the word "child," as used in §§ 750.322 and 750.323, means "a viable child in the womb of its mother."[157] The pre-*Roe* statutes have not been repealed,[158] and would be enforceable if *Roe v. Wade* were overruled.

Minnesota

The principal pre-*Roe* statutes prohibited performance of an abortion upon a pregnant woman unless the procedure was "necessary to preserve her life, or that of the child with which she [was] pregnant,"[159] and made a woman's participation

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[155] *Id*. at 176. *See, e.g., People v. Higuera*, 625 N.W.2d 444 (Mich. Ct. App. 2001) (upholding indictment of physician for performing non-therapeutic, post-viability abortion in violation of § 750.14, as construed by *Bricker*).

[156] *Larkin*, 208 N.W.2d at 179.

[157] *Id*. at 180.

[158] *See* MICH. COMP. LAWS ANN. §§ 750.14, 750.322, 750.323 (West 2004). The Michigan Court of Appeals has held that § 750.14 has not been repealed by implication with the enactment of substantial post-*Roe* legislation regulating abortion. *People v. Higuera*, 625 N.W.2d at 448-49.

[159] MINN. STAT. ANN. § 617.18 (West 1971).

in her own abortion a criminal offense (subject to the same exception).[160] Pursuant to *Roe*, § 617.18 was declared unconstitutional in a pair of decisions by the Minnesota Supreme Court.[161] Both § 617.18 and § 617.19 were repealed in 1974,[162] and neither would be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before viability, and for virtually any reason after viability.[163] Regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in Minnesota, even if *Roe* were overruled, would be barred by a Minnesota Supreme Court decision recognizing a fundamental right to abortion on state constitutional grounds (privacy).[164]

Mississippi

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[160] MINN. STAT. ANN. § 617.19 (West 1971). No prosecutions were reported under this statute. *See* n. 13, *supra*.

[161] *State v. Hultgren*, 204 N.W.2d 197 (Minn. 1973); *State v. Hodgson*, 204 N.W.2d 199 (Minn. 1973). Prior to *Roe*, a three-judge federal district court dismissed a challenge to the principal pre-*Roe* statutes for want of a justiciable "case or controversy." *Doe v. Randall*, 314 F.Supp. 32, 34 (D. Minn. 1970).

[162] 1974 Minn. Laws 265, 268, ch. 177, § 7.

[163] Whether Minnesota's post-viability statute, MINN. STAT. ANN. § 145.412 subd. 3 (West 2011), would effectively prohibit post-viability abortions is discussed in Appendix A.

[164] *See Women of the State of Minnesota v. Gomez*, 542 N.W.2d 17, 27 (Minn. 1995) ("the right of privacy under the Minnesota Constitution encompasses a woman's right to decide to terminate her pregnancy") (striking down restrictions on public funding of abortion).

The principal pre-*Roe* statute prohibited the performance of an abortion except when (1) the procedure was "necessary for the preservation of the mother's life," or (2) when the pregnancy was caused by rape."[165] Pursuant to *Roe,* the Mississippi Supreme Court held that § 97-3-3 is unconstitutional with respect to physicians, but constitutional with respect to non-physicians and upheld the conviction of a laywoman for performing an abortion.[166] Section 97-3-3 has not been repealed.[167] In 2007, Mississippi reenacted the pre-*Roe* abortion statute (§ 97-3-3), but converted the prohibition into a "trigger" statute that would take effect if *Roe v. Wade* is overruled.[168] Nevertheless, neither § 97-3-3 nor § 41-41-45 would be enforceable, even if *Roe* were overruled, because of a Mississippi Supreme Court decision recognizing a right to an abortion on state constitutional grounds (an implied right of privacy).[169] The court reviewed the "undue burden" standard of review the Supreme Court developed in *Planned Parenthood v.*

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[165] MISS. CODE ANN. § 2223 (Supp. 1970), renumbered as § 97-3-3.

[166] *Spears v. State*, 278 So.2d 443 (Miss. 1973). In its original opinion, the Mississippi Supreme Court rejected a challenge to the statute. *Spears v. State*, 257 So.2d 876 (Miss. 1972) (*per curiam*), *cert. denied*, 409 U.S. 1106 (1973).

[167] MISS. CODE ANN. § 97-3-3 (West 2005).

[168] *Id*. § 41-41-45 (West Supp. 2011).

[169] *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645, 650-54 (Miss. 1998).

Casey[170] for evaluating the constitutionality of abortion regulations under the United States Constitution and chose to adopt that standard for measuring the validity of abortion regulations under the Mississippi Constitution.[171] Under that standard, abortions could be performed for any reason before viability, and for virtually any reason after viability.

Missouri

The principal pre-*Roe* statute prohibited performance of an abortion on a woman unless the procedure was "necessary to preserve her life or that of an unborn child."[172] Pursuant to *Roe*, this statute was declared unconstitutional and permanently enjoined in an unreported decision of a three-judge federal court.[173] The statute was later repealed,[174] and would not be revived by a decision

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[170] 505 U.S. 833 (1992).

[171] *Pro-Choice Mississippi*, 716 So.2d at 654-55.

[172] MO. ANN. STAT. § 559.100 (Vernon 1969).

[173] *Rodgers v. Danforth*, Civ. No. 18360-2 (W.D. Mo. May 18, 1973), *aff'd*, 414 U.S. 1035 (1973). In its original decision, the three-judge court dismissed the challenge to the law on abstention grounds. *Rodgers v. Danforth*, Civ. No. 18360-2 (W.D. Mo. Sep. 10, 1970). That judgment was vacated and the cause was remanded for further consideration in light of *Roe v. Wade*. *Rodgers v. Danforth*, 410 U.S. 949 (1973). In another pre-*Roe* decision, the Missouri Supreme Court rejected a challenge to the statute. *Rodgers v. Danforth*, 486 S.W.2d 258 (Mo. 1972), *vacated and remanded*, 410 U.S. 949 (1973).

[174] 1977 Mo. Laws, 658, 662-63.

overruling *Roe v. Wade*.[175] Abortions could be performed for any reason before viability. Under a recently enacted statute, however, currently in effect, abortions may not be performed after viability unless the procedure is necessary "to preserve the life of the pregnant woman" or "continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the woman."[176]

Montana

The principal pre-*Roe* statutes prohibited performance of an abortion unless the procedure was "necessary to preserve the life of the mother,"[177] and made a

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[175] Missouri has enacted a statute stating:

> It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decisions of the United States Supreme Court, and federal statutes.

MO. ANN. STAT. § 188.010 (West 2004). In the absence of new legislation criminalizing abortion (the pre-*Roe* statutes having been repealed), this expression of legislative intent would not, by its own terms, make abortion illegal. It contains no operative provisions and authorizes no punishment. Conduct is not criminal in Missouri unless a statute defines the particular conduct as criminal. *See* MO. ANN. STAT. § 556.026 (West 1999).

[176] Senate Bill No. 65 (2011 Reg. Sess.), repealing MO. ANN. STAT. § 188.030 (West 2004) and enacting a new § 188.030 in lieu thereof. This statute is discussed in discussed in Appendix A.

[177] MONT. CODE ANN. § 94-401 (1969), later renumbered as § 94-5-611 by 1973 Mont. Laws 1335, 1416-17, ch. 513, § 29.

woman's participation in her own abortion a criminal offense (subject to the same exception).[178] Pursuant to *Roe v. Wade*, these statutes were declared unconstitutional by a three-judge federal district court in *Doe v. Woodahl*,[179] and were later repealed.[180] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before viability. Under a separate statute, however, currently in effect, an abortion may not be performed after viability unless the procedure is necessary to save the life of the pregnant woman or to prevent substantial and irreversible impairment of a major bodily function.[181]

Finally, regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in Montana would be precluded by the Montana Supreme Court's decision recognizing a fundamental right to abortion on state constitutional

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[178] MONT. CODE ANN. § 94-402 (1969), later renumbered as § 94-5-612 by 1973 Mont. Laws 1335, 1416-17, ch. 513, § 29. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[179] 360 F.Supp. 20 (D. Mont. 1973).

[180] 1977 Mont. Laws 1130, 1171-72, ch. 359, § 77.

[181] MONT. CODE ANN.§ 50-20-109 (2003). Montana's post-viability statute is discussed in Appendix A.

grounds (privacy).[182]

Nebraska

The pre-*Roe* statutes prohibited performance of an abortion unless the procedure was "necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose."[183] Pursuant to *Roe*, these statutes were declared unconstitutional in an unreported judgment of a three-judge federal district court,[184] and were later repealed.[185] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before the twentieth week of pregnancy. Under another statute, however, currently in effect, abortions may not be performed during or after the twentieth week of pregnancy (as measured from the date of fertilization) unless, in reasonable medical judgment, the procedure is necessary to prevent the pregnant woman's death or serious risk of substantial and permanent impairment of a major bodily function of the pregnant woman or to preserve the life of an

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[182] *Armstrong v. State of Montana*, 989 P.2d 364 (Mont. 1999) (striking down statute prohibiting non-physicians from performing abortions).

[183] NEB. REV. STAT. §§ 28-404, 28-405 (1964).

[184] *Doe v. Exon*, Civil No. 71-L-199 (D. Neb. Feb. 21, 1973).

[185] 1973 Neb. Laws 801, 806, L.B. 286, § 24.

unborn child.[186]

Nevada

The principal pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life or that of the child,"[187] and made a woman's participation in her own abortion after quickening a criminal offense (subject to the same exception).[188] An attorney general opinion stated that the statutes were unconstitutional under *Roe* to the extent that they prohibited most first and second trimester abortions.[189] The substantive provisions of these statutes were repealed in 1973 and replaced with provisions conforming to the requirements of *Roe v. Wade* and *Doe v. Bolton*.[190] The substance of the pre-*Roe* provisions would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before the

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[186] NEB. REV. STAT. ANN. § 28-3,102 *et seq*. (LexisNexis Supp. 2011). This statute and Nebraska's post-viability statute, *see* NEB. REV. STAT. ANN. § 28-329 (LexisNexis 2009), are discussed in Appendix A.

[187] NEV. REV. STAT. § 201.120 (1967).

[188] *Id*. § 200.220. No prosecutions were reported under this statute. *See* n 13, *supra*.

[189] Op. Nev. Att'y Gen. (Feb. 2, 1973).

[190] 1973 Nev. Stat. 1637, 1639-40, ch. 766, §§ 7, 8.

twenty-fourth week of pregnancy, and for virtually any reason thereafter.[191]

New Hampshire

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman before quickening for any reason,[192] and after quickening unless, "by reason of some malformation or of difficult or protracted labor, it shall have been necessary to preserve the life of the woman or shall have been advised by two physicians to be necessary for that purpose."[193] These statutes were repealed in 1997,[194] and would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason at any stage of pregnancy.

New Jersey

The pre-*Roe* statute prohibited performance of an abortion on a pregnant woman "maliciously or without lawful justification."[195] This statute was declared

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[191] Nevada allows abortions to be performed after the twenty-fourth week of pregnancy to prevent grave impairment of the pregnant woman's physical or mental health. NEV. REV. STAT. ANN. § 442.250 (LexisNexis 2009). This statute is discussed in Appendix A. The potential abuse of mental health exceptions is discussed in n. 30, *supra*.

[192] N.H. REV. STAT. ANN. § 585.12 (1955) (a misdemeanor).

[193] *Id.* § 585.13 (1955) (a felony).

[194] 1997 N.H. Laws 81, ch. 99, § 1.

[195] N.J. STAT. ANN. § 2A:87-1 (West 1969). There was little case law interpreting this language, though, at a minimum, it appears that the statute would have allowed those abortions necessary to save the life of the mother. *See State v. Moretti*, 244 A.2d 499, 504 (N.J. 1968).

unconstitutional by a three-judge federal court in 1972,[196] and was repealed in 1978.[197] The pre-*Roe* statute would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason at any stage of pregnancy. Regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in New Jersey would be barred by the New Jersey Supreme Court's decisions recognizing a fundamental right to abortion on state constitutional grounds (privacy).[198]

New Mexico

The pre-*Roe* abortion statute was based on § 230.3 of the Model Penal Code.[199] An abortion could be performed at any stage of pregnancy (defined as the "implantation of an embryo in the uterus") when (1) continuation of the pregnancy

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[196] *Y.W.C.A. of Princeton, N.J. v. Kugler*, 342 F.Supp. 1048 (D. N.J. 1972), *vacated and remanded*, 475 F.2d 1398 (3d Cir. 1973), *judgment reinstated*, Civil No. 264-70 (D. N.J. July 24, 1973), *aff'd mem. op.*, 493 F.2d 1402 (3d Cir. 1974). Prior to *Roe*, the New Jersey Supreme Court rejected a vagueness challenge to the statute. *State v. Moretti*, 244 A.2d at 504.

[197] 1978 N.J. Laws 482, 687-88, ch. 95, § 2C:98-2.

[198] *See Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982) ("The right to choose whether to have an abortion . . . is a fundamental right of all pregnant women") (striking down restrictions on public funding of abortion); *Planned Parenthood of Central New Jersey v. Farmer*, 762 A.2d 620 (N.J. 2000) (invalidating parental notice statute).

[199] N.M. STAT. ANN. § 40A-5-1 *et seq*. (Michie 1972). The text of § 230.3 of the Model Penal Code is set out in Appendix B.

was likely to result in the death of the woman or "grave impairment" of her physical or mental health," (2) the child probably will have a "grave physical or mental defect," or (3) the pregnancy resulted from reported rape or incest.[200] Pursuant to *Roe* and *Doe*, the limitations on the circumstances under which abortions could be performed and the requirement that all abortions be performed in hospitals were declared unconstitutional by the New Mexico Court of Appeals in *State v. Strance*.[201] Enforcement of the statute was not enjoined. The pre-*Roe* statute has not been repealed,[202] but would not be enforceable, even if *Roe v. Wade* were overruled, because of a state supreme court decision striking down abortion funding restrictions on the basis of the state equal rights amendment.[203]

New York

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[200] *Id.* § 40A-5-1. The law imposed other conditions. Abortions could be performed only in accredited hospitals by licensed physicians "using acceptable medical procedures," and the justification for performing the abortion (for one of the reasons set forth in the statute) had to be certified in writing by a "special hospital board," composed of two physicians who were on the medical staff of the hospital. *Id*. § 40A-5-1(C), (D). If the woman requesting the abortion was a minor, the consent of her parent or guardian was required. *Id*. § 40A5-1(C). The potential abuse of mental health exceptions is discussed in n. 30, *supra.*

[201] 506 P.2d 1217 (N.M. Ct. App. 1973).

[202] The statute has been renumbered and now appears at N.M. STAT. § 30-5-1 *et seq*. (2004).

[203] *See New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 850-57 (N.M. 1998), *cert. denied*, 526 U.S. 1020 (1999).

The pre-*Roe* statutes allowed abortion on demand through the twenty-fourth week of pregnancy.[204] After the twenty-fourth week, an abortion could be performed on a pregnant woman only if there was "a reasonable belief that such is necessary to preserve her life."[205] In a pre-*Roe* decision, the New York Court of Appeals (New York's highest court) rejected a challenge to the law brought by a guardian *ad litem* for unborn children.[206] The legality of abortion would not be affected by the overruling of *Roe v. Wade*. The pre-*Roe* statutes, which have not been repealed,[207] allow abortion on demand through the twenty-fourth week of pregnancy. After the twenty-fourth week, however, abortions could be performed only to preserve the woman's life.

Regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in New York probably would be barred by language in the New York Court of Appeals' decision in *Hope v. Perales*,[208] a challenge to the New York Prenatal

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[204] N.Y. PENAL LAW § 125.00 *et seq*. (McKinney Supp. 1971).

[205] *Id*. § 125.05(3). This statute is discussed in Appendix A. Although, under New York law, self-abortion was a criminal offense under certain circumstances, no prosecutions were reported under the law. *See* n. 13, *supra.*

[206] *Byrn v. New York City Health & Hospitals Corp*., 286 N.E.2d 887 (N.Y. 1972), *appeal dismissed for want of a substantial federal question*, 410 U.S. 949 (1973).

[207] N.Y. PENAL LAW § 125.00 *et seq*. (McKinney 2009).

[208] 634 N.E.2d 183 (N.Y. 1994).

Care Assistance Program. In *Hope*, the court of appeals noted in passing that "it is undisputed by defendants that the fundamental right of reproductive choice, inherent in the due process liberty right guaranteed by our State Constitution, is at least as extensive as the Federal constitutional right [recognized in *Roe v. Wade*]."[209]

[209] *Id.* at 186.

North Carolina

The pre-*Roe* statutes were based on § 230.3 of the Model Penal Code.[210] Sections 14-44 and 14-45 prohibited all abortions.[211] Section 14-45.1 excepted from the scope of §§ 14-44 and 14-45 abortions performed by licensed physicians in licensed hospitals when (1) there was "substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of [the pregnant woman]," (2) there was "substantial risk the child would be born with grave physical or mental defect," or (3) the pregnancy resulted from incest or promptly reported rape.[212] The statutes did not place any express limitation on the stage of pregnancy at which an authorized abortion could be performed.[213]

In May 1973, § 14.45.1 was substantially amended to conform to the

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[210] N.C. GEN. STAT. § 14-44 *et seq*. (1969). The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[211] *Id*. §§ 14-44, 14-45.

[212] *Id.* § 14-45.1. The statute imposed other conditions. Except in emergency cases, no abortion could be performed unless the attending physician and two other physicians examined the woman and certified in writing the circumstances which they believed justified an abortion. *Id*. If the woman seeking the abortion was a minor, the written consent of her parents or guardian was required, or her husband, if the minor was married. *Id*. There was also a residency requirement. *Id*.

[213] In a pre-*Roe* decision, a three-judge federal court rejected a challenge to the statutes. *Corkey v. Edwards*, 322 F.Supp. 1248 (W.D. N.C. 1971), *vacated and remanded*, 412 U.S. 902 (1973).

Supreme Court's decisions in *Roe v. Wade* and *Doe v. Bolton*.[214] Under current law, abortions may be performed after the twentieth week of pregnancy by licensed physicians in licensed hospitals only "if there is substantial risk that continuance of the pregnancy would threaten the life or gravely impair the health of the woman."[215]

The substance of the pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before the twentieth week of pregnancy and, depending upon how the post-twenty week statute is interpreted, for virtually any reason thereafter.[216]

North Dakota

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[217] and made a woman's participation in her own abortion a criminal offense (subject to the same

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[214] 1973 N.C. Sess. Laws 1057-58, ch. 711, §§ 1, 2.

[215] N.C. GEN. STAT. § 14-45.1(b) (2005).

[216] North Carolina's statute on abortions performed after the twentieth week of pregnancy, N.C. GEN. STAT. § 14.45.1(b) (2003), is discussed in Appendix A.

[217] N.D. CENT. CODE §§ 12-25-01, 12-25-02 (1970).

exception).[218] Pursuant to *Roe*, these statutes were declared unconstitutional by a federal district court in *Leigh v. Olson*,[219] and were later repealed.[220] The statutes would not be revived by a decision overruling *Roe v. Wade*.

In 2007, the North Dakota Legislature passed a "trigger" law which would make abortion illegal except "to prevent the death of the pregnant female," and in cases where the pregnancy resulted from "gross sexual imposition, sexual imposition, sexual abuse of a ward, or incest," all of which are treated as affirmative defenses.[221] The law takes effect "on the date the legislative council approves by motion the recommendation of the attorney general to the legislative council that it is reasonably probable that Section 1 . . . would be upheld as constitutional."[222]

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[218] *Id*. § 12-25-04. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[219] 385 F.Supp. 255 (D. N.D. 1974).

[220] 1973 N.D. Laws 215, 300, ch 116, § 41.

[221] H.B. 1466, § 1 (2007 Reg. Sess.), codified as N.D. CENT. CODE § 12.1-31-12 (Supp. 2009).

[222] *Id*. § 2. Whether, apart from H.B. 1466, North Dakota's post-viability statute, *see* N.D. CENT. CODE § 14.02.1-04(3) (2009), would effectively prohibit post-viability abortions is discussed in Appendix A.

Ohio

The pre-*Roe* statute prohibited performance of an abortion on a pregnant woman unless it was "necessary to preserve her life, or [it was] advised by two physicians to be necessary for that purpose."[223] Pursuant to *Roe*, this statute was declared unconstitutional by the Ohio Supreme Court in *State v. Kruze* on remand from the Supreme Court.[224] While Kruze's petition for *certiorari* was pending, the statute was repealed,[225] and its substantive provisions reenacted.[226] That statute, in turn, was repealed in 1974.[227] The pre-*Roe* statute would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before viability. Under a recently enacted statute, however, currently in effect, abortions may not be performed after viability unless the procedure is necessary to prevent the death of the pregnant woman or to prevent substantial and irreversible

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[223] OHIO REV. CODE ANN. § 2901.16 (Baldwin 1953).

[224] 295 N.E.2d 916 (Ohio 1973). Prior to *Roe*, the Ohio Supreme Court, in a pair of unreported orders, dismissed defendant's appeal in *Kruze* for want of a substantial constitutional question and overruled his motion for leave to appeal. *State v. Kruze*, No. 72-11, Ohio Supreme Court (March 10, 1972), *vacated and remanded*, 410 U.S. 951 (1973). In another pre-*Roe* decision, Ohio's pre-*Roe* abortion statute was upheld in an unappealed decision of a three-judge federal district court. *Steinberg v. Brown*, 321 F.Supp. 741 (N.D. Ohio 1970).

[225] 134 Ohio Laws 1868.

[226] *Id*. at 1943-44.

[227] 135 Ohio Laws 988 (1974).

impairment of a major bodily function.[228]

Oklahoma

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[229] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[230] Pursuant to *Roe*, these statutes were declared unconstitutional by the Oklahoma Court of Criminal Appeals in *Jobe v. State*,[231] and by a three-judge federal district court in *Henrie v. Derryberry*.[232] Enforcement of the statutes was

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[228] H.B. No. 78 (2011 Reg. Sess.), amending, *inter alia*, OHIO REV. CODE ANN. § 2919.17. This statute is discussed in Appendix A. A decision of the Ohio Court of Appeals appears to recognize a right to abortion under the liberty language of the Ohio Constitution. *See Preterm Cleveland v. Voinovich*, 627 N.E.2d 570, 574-75 (Ohio Ct. App. 1993) (upholding informed consent statute). The court held that "the choice of a woman whether to bear a child is one of the liberties guaranteed by Section 1, Article I, Ohio Constitution." 627 N.E.2d at 575. Although the Ohio Supreme Court denied review of that decision, *Preterm Cleveland v. Voinovich,* 624 N.E.2d 194 (Ohio 1993), in a later decision it held that art. I, § 1, does not confer any judicially enforceable rights. *State v. Williams*, 728 N.E.2d 342, 354 (Ohio 2000). As a result of the state supreme court's decision in *Williams*, the constitutional foundation for the court of appeals' decision in *Preterm Cleveland* has been undermined.

[229] OKLA. STAT. ANN. tit. 21, § 861 (West 1971). When an abortion was performed upon a woman "pregnant with a quick child" and the death of either the mother or the child resulted, the offense was manslaughter. *Id*. § 714.

[230] *Id*. § 862. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[231] 509 P.2d 481 (Okla. 1973).

[232] 358 F.Supp. 719 (N.D. Okla. 1973).

not enjoined.

The pre-*Roe* statutes have not been expressly repealed,[233] and would be enforceable if *Roe v. Wade* were overruled, assuming that they have not been repealed by implication with the enactment of comprehensive post-*Roe* legislation regulating abortion. Apart from Oklahoma's pre-*Roe* statutes, the State has enacted a statute, currently in effect, that prohibits abortions during or after the twentieth week of pregnancy (as measured from the date of fertilization) unless, in reasonable medical judgment, the procedure is necessary to prevent the pregnant woman's death or serious risk of substantial and permanent impairment of a major bodily function.[234]

Oregon

The pre-*Roe* statutes were based on § 230.3 of the Model Penal Code.[235] The statutes allowed an abortion to be performed before the one hundred fiftieth day of pregnancy when (1) there was "substantial risk that continuance of the pregnancy [would] greatly impair the physical or mental health of the mother," (2)

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[233] *See* OKLA. STAT. ANN. tit. 21, §§ 861, 862 (West 2002).

[234] OKLA. REV. STAT. ANN. tit. 63, § 1-745.1 *et seq*. (West Supp. 2011). This statute and Oklahoma's post-viability statute, *see* OKLA. STAT. ANN. tit. 63, § 1-732 (West 2004), are discussed in Appendix A.

[235] OR. REV. STAT. § 435.405 *et seq*. (1969). The text of § 230.3 of the Model Penal Code is set forth in Appendix B.

"the child would be born with serious physical or mental defect," or (3) the pregnancy resulted from felonious intercourse.[236] After the one hundred fiftieth day, abortion was permitted only if "the life of the pregnant woman [was] in imminent danger."[237]

Pursuant to *Roe*, most of these statutes were declared unconstitutional in an unreported decision of a three-judge federal court,[238] and were later repealed.[239] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason at any stage of pregnancy.[240]

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[236] *Id*. §§ 435.415, 435.425(1). The potential abuse of mental health exceptions is discussed in n. 30, *supra*.

[237] *Id*. § 445(1). The law imposed other conditions. Abortions could be performed only by licensed physicians in licensed hospitals. *Id*. §§ 435.415(3), 435.405(1), 435.405(2). Except in emergency cases, two other physicians had to certify in writing the circumstances justifying an abortion. *Id*. §§ 435.425, 435.445(1). If the person seeking an abortion was a minor, the written consent of her parent was required; and, if she was married and living with her husband, his written consent. *Id*. § 435.435.

[238] *Benson v. Johnson*, No. 70-226 (D. Or. Feb. 1973).

[239] 1983 Or. Laws 868, ch. 470, § 1.

[240] Although the Oregon Court of Appeals held an administrative rule restricting public funding of abortions violated the state privileges and immunities provision, *see Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources*, 663 P.2d 1247, 1257-61 (Or. Ct. App. 1983), the Oregon Supreme Court affirmed the decision on other (statutory) grounds, holding that the court of appeals' "ruling and the constitutional challenge are premature." *Planned Parenthood Ass'n, Inc. v. Dep't of Human Resources*, 687 P.2d 785, 787 (Or. 1984).

Pennsylvania

The pre-*Roe* statutes prohibited "unlawful" abortions.[241] The statutes themselves did not define what an "unlawful" abortion was, nor was the word given an authoritative interpretation by the Pennsylvania Supreme Court. Pursuant to *Roe*, the statutes were declared unconstitutional by the Pennsylvania Supreme Court in a pair of decisions,[242] and were later repealed.[243] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before the twenty-fourth week of pregnancy. Under a separate statute, however, currently in effect, abortions may not be performed after the twenty-fourth week of pregnancy unless the procedure is necessary to prevent the death of the pregnant woman or to prevent substantial and irreversible impairment of a major bodily function.[244]

Rhode Island

The principal pre-*Roe* statute prohibited the performance of an abortion on a

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[241] 18 PA. STAT. ANN. §§ 4718, 4719 (West 1963).

[242] *Commonwealth v. Page*, 303 A.2d 215 (Pa. 1973); *Commonwealth v. Jackson*, 312 A.2d 13 (Pa. 1973).

[243] 1974 Pa. Laws 639, Act No. 209, § 10.

[244] 18 PA. CONS. STAT. ANN. § 3211 (West 2000). This statute is discussed in Appendix A.

woman unless the procedure was "necessary to preserve her life."[245] Pursuant to *Roe*, this statute was declared unconstitutional in a pair of unreported decisions by a three-judge federal district court,[246] and was repealed in 1973.[247] In response, Rhode Island reenacted the statute, adding a "conclusive presumption" that "human life commences at the instant of conception" and that said human life "is a person within the language and meaning of the fourteenth amendment of the Constitution of the United States."[248] This statute was declared unconstitutional by a federal district court in *Doe v. Israel*,[249] but its enforcement was not enjoined.

In 1975, Rhode Island enacted a statute which prohibited performance of an abortion on a "woman pregnant with a quick child" unless "the same be necessary to preserve the life of such mother."[250] This statute was declared unconstitutional

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[245] R.I. GEN. LAWS § 11-3-1 (1956).

[246] *Women of Rhode Island v. Israel*, No. 4605 (D. R.I. Feb. 7, 1973); *Rhode Island Abortion Counseling Service v. Israel*, No. 4586 (D. R.I. Feb. 7, 1973).

[247] 1973 R.I. Pub. Laws 67, 68, ch. 15, § 1.

[248] *Id*. 68-70, ch. 15, § 2.

[249] 358 F.Supp. 1193 (D. R.I. 1973), *aff'd*, 482 F.2d 156 (1st Cir. 1973) (dissolving stay and denying stay), *cert. denied*, 416 U.S. 993 (1974).

[250] 1975 R.I. Laws 624, ch. 231, § 1, codified at R.I. GEN. LAWS § 11-23-5 (repl. vol. 1981). The statute defines "quick child" in terms of viability. *See* § 11-23-5(c). This statute is discussed in Appendix A.

by a federal district court in *Rodos v. Michaelson*,[251] but that judgment was later reversed by the court of appeals, which found that the plaintiffs lacked standing to challenge the statute.[252] Neither the 1973 statute nor the 1975 statute has been repealed.[253] Assuming that the 1973 statute has not been repealed by implication with the enactment of the 1975 statute and other legislation regulating the practice of abortion, it would be enforceable if *Roe v. Wade* were overruled.

South Carolina

The pre-*Roe* abortion statutes were based on § 230.3 of the Model Penal Code.[254] Sections 16-82 and 16-83 prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life or the life of [her] child,"[255] and § 16-84 made a woman's participation in her own abortion a criminal offense.[256] Section 16-87 excepted from these sections abortions performed on pregnant women by licensed physicians in licensed

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[251] 396 F.Supp. 768 (D. R.I. 1975).

[252] 527 F.2d 582 (1st Cir. 1975).

[253] R.I. GEN. LAWS §§ 11-3-1, 11-23-5 (2002).

[254] S.C. CODE ANN. § 16-82 *et seq*. (Law. Co-op. Supp. 1971). The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[255] *Id*. §§ 16-82, 16-83.

[256] *Id*. § 16-84. No prosecutions were reported under this statute. *See* n. 13*, supra.*

hospitals when (1) there was "substantial risk that continuance of the pregnancy would threaten the life or gravely impair the mental or physical health of the woman," (2) there was "substantial risk that the child would be born with grave physical or mental defect," or (3) the pregnancy resulted from promptly reported rape or incest.[257] This statute did not place any express limits on the stage of pregnancy at which an authorized abortion could be performed. Pursuant to *Roe*, the abortion statutes were declared unconstitutional by the South Carolina Supreme Court in *State v. Lawrence*,[258] and were repealed in 1974.[259] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before viability, and for virtually any reason after viability.[260]

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[257] *Id.* § 16-87. The law imposed other conditions. Abortions could be performed only in a licensed hospital, after three physicians had examined the woman and certified in writing to the existence of the circumstances justifying the abortion under the law. *Id*. § 16-87(1). Except in emergency cases, the woman had to be a resident of the State for ninety days immediately preceding the operation. *Id*. If the woman seeking the abortion was a minor or an incompetent, the written consent of her parents or guardian was required and, if she was married, the written consent of her husband or guardian. *Id*. The potential abuse of mental health exceptions is discussed in n. 30, *supra*

[258] 198 S.E.2d 253 (S.C. 1973).

[259] 1974 S.C. Acts 2837, 2841, Act No. 1215, § 8.

[260] Whether South Carolina's post-viability statute, S.C. CODE ANN. § 44-41-20(c) (2002), would effectively prohibit post-viability abortions is discussed in Appendix A.

South Dakota

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[261] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[262] Pursuant to *Roe*, the former statute was declared unconstitutional by the South Dakota Supreme Court in *State v. Munson*,[263] and both statutes were later repealed.[264] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. In 2005, however, South Dakota enacted a "trigger" statute which would prohibit abortion, except "to preserve the life of the pregnant female," which statute takes effect "on the date that the states are recognized by the United States Supreme Court to have the authority to prohibit abortion at all stages of pregnancy."[265]

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[261] S.D. CODIFIED LAWS § 22-17-1 (1967).

[262] *Id*. § 22-17-2. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[263] 206 N.W.2d 434 (S.D. 1973). In its original decision, the South Dakota Supreme Court upheld the constitutionality of the statute. *State v. Munson*, 201 N.W.2d 123 (S.D. 1972), *vacated and remanded*, 410 U.S. 950 (1973).

[264] 1973 S.D. Laws 206, 209, ch. 146, §§ 15, 16; 1976 S.D. Laws 227, 257, ch. 158, §§ 17-1, 17-2; 1977 S.D. Laws 258, 282, ch. 189, § 126.

[265] S.D. CODIFIED LAWS § 22-17-5.1 (2006). Whether, apart from the trigger statute, South Dakota' statute prohibiting abortions after the twenty-fourth week of pregnancy, S.D. CODIFIED LAWS § 34-23A-5 (Supp. 2010), would effectively prohibit

Tennessee

The pre-*Roe* statutes prohibited performance of an abortion unless the procedure was necessary "to preserve the life of the mother."[266] The substantive provisions of these statutes were repealed with the enactment of post-*Roe* legislation,[267] and would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before viability, and for virtually any reason after viability.[268] Regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in Tennessee would be barred by a decision of the Tennessee Supreme Court recognizing a fundamental right to abortion based on state constitutional grounds (privacy).[269]

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abortions at that stage of pregnancy is discussed in Appendix A.

[266] TENN. CODE ANN. §§ 39-301, 39-302 (1956).

[267] 1973 Tenn. Pub. Acts 901 *et seq*., ch. 235, §§ 1,3.

[268] Whether Tennessee's post-viability statute, TENN. CODE ANN. § 39-15-201(c)(3) (2010), would effectively prohibit post-viability abortions is discussed in Appendix A.

[269] *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d 1, 10-17 (Tenn. 2000) (striking down various statutes regulating abortion).

The Tennessee General Assembly has proposed an amendment to the Tennessee Constitution which would effectively overturn the decision *Planned Parenthood of Middle Tennessee* and restore the State's authority to regulate abortion within federal constitutional limits. The amendment, Senate Joint Resolution 127, which will appear on the ballot in November 2014, provides: "Nothing in this Constitution secures or protects a right to abortion or requires the funding of an abortion. The people retain the right

Texas

The principal pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was undertaken "for the purpose of saving [her] life."[270] These statutes were declared unconstitutional in *Roe v. Wade*.[271] Enforcement of the statutes was not enjoined. Although the pre-*Roe* abortion statutes have not been expressly repealed,[272] the United States Court of Appeals for the Fifth Circuit has held that the statutes have been repealed by implication with the enactment of significant post-*Roe* legislation regulating the practice of abortion.[273] That holding, however, is not binding upon a state court. Whether the pre-*Roe* statutes would be enforceable if *Roe v. Wade* were overruled thus depends

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through their elected state representatives and state senators to enact, amend, or repeal statutes regarding abortion, including, but not limited to, circumstances of pregnancy resulting from rape or incest or when necessary to save the life of the mother."

[270] TEX. PENAL CODE ANN. arts. 1191, 1192, 1193, 1194, 1196 (West 1961), *transferred to* TEX. REV. CIV. STAT. ANN. arts. 4512.1, 4512.2, 4512.3, 4512.4, 4512.6 (West 1976). *See* Tex. Acts 1973, ch. 399, § 5 & Disp. Table at 996e.

[271] 410 U.S. 113 (1973). Prior to *Roe*, the Texas Court of Criminal Appeals rejected a constitutional challenge to the statutes. *Thompson v. State*, 493 S.W.2d 913 (Tex. Crim. App. 1971), *vacated and remanded*, 410 U.S. 950 (1973), *on remand*, 493 S.W.2d 793 (Tex. Crim. App. 1973).

[272] The statutes struck down in *Roe* have not been reprinted in the current volumes of either the Texas Revised Civil Statutes Annotated or the Texas Penal Code. The statutes, however, have not been expressly repealed.

[273] *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), *cert. denied,* 543 U.S. 1154 (2005).

on whether they have been repealed by implication, a question on which no state court has pronounced an opinion to date.[274]

Utah

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[275] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[276] Pursuant to *Roe*, these statutes were declared unconstitutional in an unreported decision of a three-judge federal district court.[277] The statutes were repealed in 1973.[278]

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[274] Apart from the pre-*Roe* statutes, current Texas law prohibits a physician from performing a third trimester, post-viability abortion unless the procedure is necessary to prevent the death of the pregnant woman or the pregnant woman "is diagnosed with a significant likelihood of suffering imminent, severe, irreversible brain damage or imminent, severe, irreversible paralysis," or "the viable child has a severe, irreversible brain impairment." TEX. OCC. CODE § 164.052(a)(18) (Vernon 2010). This statute is discussed in Appendix A.

[275] UTAH CODE ANN. § 76-2-1 (1953).

[276] *Id.* § 76-2-2. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[277] *Doe v. Rampton*, No. C-234-70 (D. Utah 1973). Prior to *Roe*, the same three-judge district court upheld the pre-*Roe* statutes. *Doe v. Rampton*, No. C-234-70 (D. Utah. Sep. 29, 1971), *vacated and remanded*, 410 U.S. 950 (1973).

[278] 1973 Utah Laws 584, 684; ch. 196, (sub.) ch. 10, pt. 14, § 76-10-1401.

In 1991, Utah enacted a comprehensive new abortion statute.[279] Under that statute, an abortion could be performed at any time of pregnancy if the procedure was "necessary to save the pregnant's woman's life," "to prevent grave damage to the pregnant woman's medical health," or "to prevent the birth of a child that would be born with grave defects."[280] An abortion could also be performed during the first twenty weeks of gestation when the pregnancy resulted from a reported act of rape or incest.[281] The statute was declared unconstitutional by the federal courts.[282] The post-*Roe* statute has been substantially modified. Under current law, an abortion may be performed for any reason before viability.[283] After viability, however, an abortion may be performed only if the procedure is necessary to avert the death of the pregnant woman or "a serious risk of substantial and irreversible impairment of a major bodily function" of the woman, "if two physicians who practice maternal fetal medicine concur, in writing, in the patient's

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[279] 1991 Utah Laws ch. 2 (1st Spec. Sess.)

[280] UTAH CODE ANN. §§ 76-7-302(2)(a), (d), (e) (Supp. 2004).

[281] *Id*. §§ 76-7-302(b), (c).

[282] *Jane L. v. Bangerter*, 809 F.Supp. 865 (D. Utah 1992), *aff'd in part*, *rev'd in part*, 61 F.3d 1493 (10th Cir. 1995), *reversed and remanded sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996), *on remand*, 102 F.3d 1112 (10th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997).

[283] UTAH CODE ANN. § 76-7-302(3)(a) (Supp. 2010).

medical record that the fetus has a defect that is uniformly diagnosable and uniformly lethal," or the woman is pregnant as the result of an act of rape, rape of a child or incest and, before the abortion is performed, the physician who performs the abortion verifies that the incident has been reported to law enforcement and has reported the incident himself or herself.[284]

Vermont

The principal pre-*Roe* statute prohibited performance of an abortion on a woman unless the procedure was "necessary to preserve her life."[285] In *Beacham v. Leahy*,[286] a pre-*Roe* decision, the Vermont Supreme Court held that the abortion statute is unconstitutional because it arbitrarily and unreasonably prevents a woman from obtaining a safe and antiseptic abortion from a physician. Although the pre-*Roe* statute has not been repealed,[287] the decision in *Beacham v. Leahy* would prevent that statute from being enforced. The legality of abortions would not be affected by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason at any stage of pregnancy.

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[284] *Id.* § 76-7-302(3)(b).

[285] VT. STAT. ANN. tit. 13, § 101 (1972).

[286] 287 A.2d 836 (Vt. 1972).

[287] *See* VT. STAT. ANN. tit. 13, § 101 (2009).

Virginia

The pre-*Roe* statutes were based on § 230.3 of the Model Penal Code.[288] An abortion could be performed only by a licensed physician in an accredited hospital when (1) continuation of the pregnancy was likely to result in the death of the woman or "substantially impair" her mental or physical health, (2) there was a "substantial medical likelihood" that "the child [would] be born with an irremediable and incapacitating mental or physical defect," or (3) the pregnancy resulted from incest or promptly reported rape.[289] The statutes did not place any express limits on the stage of pregnancy at which an authorized abortion could be performed.

The pre-*Roe* statutes were repealed in 1975,[290] and would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason

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[288] VA. CODE ANN. § 18.1-62 *et seq*. (Supp. 1971). The text of § 230.3 of the Model Penal Code is set out in Appendix B.

[289] *Id*. §§ 18.1-62, 18.1-62.1. The law imposed other conditions. A hospital review board had to give its written consent *Id*. § 18.1.62.1(d). If the abortion was being sought because of the child's mental or physical defect, the written consent of the woman's husband was necessary. *Id*. § 18.1.62.1(e). In the case of a minor, the written consent of her parent or guardian was required, or, if the woman was married, the written consent of her husband. *Id*. The potential abuse of mental health exceptions is discussed in n. 30, *supra*.

[290] 1975 Va. Acts 18, ch. 14, § 1.

before viability, and for virtually any reason after viability.[291]

Washington

Washington had two sets of pre-*Roe* abortion statutes. Older statutes prohibited performance of an abortion upon a woman unless the procedure was "necessary to preserve her life or that of [her] child,"[292] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[293] In November 1970, however, the voters approved by referendum a new abortion act.[294] This act, which by its terms did not repeal the older statutes,[295] allowed abortion on demand of a woman "not quick with child and not more than four lunar months after conception."[296] Following *Roe v. Wade*, the

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[291] Whether Virginia's post-viability statute, VA. CODE ANN. § 18.2-74 (2009), would effectively prohibit post-viability abortions is discussed in Appendix A.

[292] WASH. REV. CODE ANN.§ 9.02.010 (West. Supp. 1971).

[293] *Id*. § 9.02.020. No prosecutions were reported under this statute. *See* n. 13, *supra*.

[294] *Id*. §§ 9.02.060 to 9.02.090.

[295] *Id*. § 9.020.060.

[296] *Id*. §§ 9.02.060, 0.02.070. The statutes adopted by referendum imposed other conditions. An abortion could be performed only by a licensed physician in a licensed hospital or approved medical facility. If the abortion was being sought by a married woman, the consent of her husband was necessary and, if she was an unmarried minor, the consent of her legal guardian. *Id*. § 9.020.070. The law also required physical domicile in the State for ninety days prior to the performance of the abortion. *Id*.

attorney general stated that the hospitalization requirement in the statutes adopted in November 1970 was unenforceable during the first trimester of pregnancy, and that the residency requirement was also unconstitutional.[297] The parental consent requirement was declared unconstitutional on federal constitutional grounds by the Washington Supreme Court in *State v. Koome*.[298] Washington repealed all of its pre-*Roe* statutes in 1991,[299] and the overruling of *Roe v. Wade* would not revive those statutes. Abortions could be performed for any reason before viability, and for virtually any reason after viability.[300]

West Virginia

The pre-*Roe* statute prohibited performance of an abortion on a pregnant

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[297] 1973 Wash. Op. Att'y Gen. 7, 11-14.

[298] 530 P.2d 260 (Wash. 1975).

[299] 1992 Wash. Laws ch. 1, § 9, Initiative Measure No. 120, approved Nov. 5, 1991. The Reproductive Privacy Act declares that "every individual possesses a fundamental right of privacy with respect to personal reproductive decisions," including abortions. *Id*. § 1, codified as WASH. REV. CODE ANN. § 9.02.100 (West 2010). Consistent with that declaration, the Act provides further that "The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health." *Id*. § 2, codified as WASH. REV. CODE ANN. § 9.02.110 (West 2010). As previously noted, *see* n. 36, *supra*, no such statement of public policy is required to make abortion legal in any State. In the absence of specific legislation making abortion criminal (either pre- or post-*Roe*), abortion would remain legal even if *Roe v. Wade* were overruled.

[300] Whether Washington's post-viability statutes, WASH. REV. CODE ANN. §§ 9.02.110, 9.02.120 (West 2010), would effectively prohibit post-viability abortions is discussed in Appendix A.

woman unless the procedure was done "in good faith, with the intention of saving the life of [the] woman or [her] child."[301] Pursuant to *Ro*e, the statute was declared unconstitutional by a federal court of appeals in *Doe v. Charleston Area Medical Center, Inc*.[302] The statute has not been repealed,[303] and may be enforceable if *Roe v. Wade* were overruled. Because of the West Virginia Supreme Court of Appeals decision in *Women's Health Center of West Virginia, Inc. v. Panepinto*,[304] however, there is some uncertainty as to the enforceability of the pre-*Roe* statute. In *Panepinto*, the state supreme court struck down state restrictions on public funding of abortions performed on indigent women. The basis of the decision was that the restrictions violated the equal protection guarantee of the state constitution because they discriminated against the exercise of a *federal* constitutional right. The court, however, declined to decide whether the *state* constitution protects a right to abortion separate from and independent of *Roe v. Wade*.[305] Whether

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[301] W. VA. CODE ANN. § 61-2-8 (1966).

[302] 529 F.2d 638 (4th Cir. 1975).

[303] *See* W. VA. CODE ANN. § 61-2-8 (2010).

[304] 446 S.E.2d 658 (W.Va. 1993).

[305] *Id*. at 664 (noting that "[b]ecause there is a *federally-created right of privacy* that we are required to enforce in a non-discriminatory manner, it is inconsequential that no prior decision expressly determines the existence of an analogous right" under the state constitution) (emphasis added); *id*. at 667 ("for an indigent woman, the state's offer of

Panepinto would allow enforcement of the pre-*Roe* abortion statute is uncertain and undecided.

Wisconsin

The pre-*Roe* statute prohibited the performance of an abortion unless the procedure was "necessary to save the life of the mother."[306] In *Babbitz v. McCann*,[307] a three-judge federal district court declared the statute unconstitutional, insofar as it prohibited abortions before quickening (16-18 weeks gestation). The same court thereafter permanently enjoined enforcement of the statute.[308] That injunction, however, was subsequently vacated by the Supreme Court.[309] The pre-*Roe* statute, which has not been repealed,[310] would be

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subsidies for one reproductive option and the imposition of a penalty for the other necessarily influences her *federally-protected choice*) (emphasis added); *id*. (abortion funding limitations "constitute undue government interference with the exercise of the *federally-protected right to terminate a pregnancy*") (emphasis added).

[306] WIS. STAT. ANN. § 940.04 (1969). Under subsection (3), "[a]ny pregnant woman who intentionally destroy[ed] the life of her unborn child or who consents to such destruction by another" was guilty of a misdemeanor. No prosecutions were reported under this subsection. *See* n. 13, *supra*.

[307] 310 F.Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S.1 (1970).

[308] *Babbitz v. McCann*, 320 F.Supp. 219 (E.D. Wis. 1970).

[309] *McCann v. Babbitz*, 402 U.S. 903 (1971).

[310] *See* WIS. STAT. ANN. § 940.04 (West 2005). The Wisconsin Supreme Court has held that § 940.04 has not been repealed by implication with enactment of post-*Roe* statutes regulating abortion. *State v. Black*, 526 N.W.2d 132, 134-35 (Wis. 1994).

enforceable if *Roe v. Wade* were overruled.[311]

Wyoming

The principal pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[312] and made a woman's participation in her own abortion a criminal offense "except when necessary for the purpose of saving the life of the mother or the child."[313] Pursuant to *Roe*, the statutes were declared unconstitutional by the Wyoming Supreme Court in *Doe v. Burk*,[314] and were later repealed.[315] The repealed pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before viability, and depending upon how the post-viability statute is interpreted, for virtually any reason thereafter.[316]

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[311] Whether, apart from the pre-*Roe* statute, Wisconsin's post-viability statute, WIS. STAT. ANN. § 940.15 (West 2005), would effectively prohibit post-viability abortions is discussed in Appendix A.

[312] WYO. STAT. § 6-77 (1957).

[313] *Id*. § 6-78 (1957). No prosecutions under reported under this statute. *See* n. 13, *supra*.

[314] 513 P.2d 643 (Wyo. 1973).

[315] 1977 Wyo. Sess. Laws 11, 14, ch. 11, § 2.

[316] Whether Wyoming's post-viability statute, WYO. STAT. ANN. § 35-6-102 (2009), would effectively prohibit post-viability abortions is discussed in Appendix A.

Conclusion

As the foregoing survey indicates, more than two-thirds of the States have repealed their pre-*Roe* statutes or have amended those statutes to conform to *Roe v. Wade*, which allows abortion for any reason before viability and for virtually any reason after viability (no reviewing court has ever upheld a law restricting post-viability abortions). Those statutes would not be revived if *Roe* were overruled. Only two of those States – Louisiana and Rhode Island – have enacted post-*Roe* statutes purporting to prohibit some or most abortions throughout pregnancy (those statutes have been declared unconstitutional by the federal courts and are currently enforceable). Louisiana and three other States – Mississippi, North Dakota and South Dakota – have enacted "trigger" statutes that would prohibit abortions in almost all circumstances if state authority to regulate and prohibit abortion is restored. Of the foregoing States, only Louisiana, North Dakota, Rhode Island and South Dakota have enacted post-*Roe* statutes (or "trigger" statutes) that would effectively prohibit most abortions if *Roe*, as modified by *Casey*, were overruled. The Mississippi statute would be unenforceable, at least before viability, because of a state supreme court decision recognizing a state constitutional right to abortion.

Of the slightly less than one-third of the States that have not repealed their

pre-*Roe* statutes, most would be ineffective in prohibiting most abortions, either because the statutes, by their terms or as interpreted, allow abortion on demand (Hawaii and New York), for a broad range of reasons, including mental health (Colorado, Delaware, Massachusetts and New Mexico), or for undefined reasons of health (Alabama), and/or because of state constitutional limitations (Massachusetts, New Mexico, New York, Vermont and, possibly, Arizona and West Virginia). In yet other States, pre-*Roe* statutes prohibiting abortion may have been repealed by implication with the enactment of comprehensive post-*Roe* statutes regulating abortion, as the Fifth Circuit has already determined with respect to the Texas statutes struck down in *Roe v. Wade*. No more than six States – Arizona, Michigan, Oklahoma, Texas, West Virginia and Wisconsin – and as few as three – Michigan, Oklahoma and Wisconsin – would have enforceable pre-*Roe* statutes that would prohibit most abortions throughout pregnancy. In addition, an unrepealed provision of the pre-*Roe* Arkansas statute probably would prohibit all abortions.

Taking into account both pre-*Roe* and post-*Roe* enactments, no more than eleven States – Arizona, Arkansas, Louisiana, Michigan, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, West Virginia and Wisconsin – and very possibly as few as eight – Arkansas, Louisiana, Michigan, North Dakota,

Oklahoma, Rhode Island, South Dakota and Wisconsin – would have enforceable statutes on the books that would prohibit most abortions in the event *Roe* and *Casey* are overruled. In the other thirty-nine States (and the District of Columbia), abortion would be legal for most or all reasons throughout pregnancy.

Appendix A

Post-Viability and Other Late Term Abortion Prohibitions and Restrictions

Thirty-nine States have enacted statutes purporting to prohibit or restrict post-viability and other late-term abortions (unless otherwise indicated, all of the statutes cited are post-viability statutes). Although very few abortions are performed after viability, even those few abortions would not be effectively prohibited by most of the statutes presently on the books.

Seventeen States permit post-viability (or third trimester) abortions to preserve (or save) the life or health of the mother (health not being defined in any of these statutes).[317] Because health related abortions may include virtually any reason a woman may have for seeking an abortion, including psychological and emotional factors,[318] the undefined health exception in these statutes effectively allows post-viability (or late-term) abortions for any reason:

Arizona	Illinois	Maine	South Dakota
Arkansas	Iowa	Michigan	Tennessee
California	Kentucky	Minnesota	Washington
Connecticut	Louisiana	South Carolina	Wisconsin
Florida			

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[317] ARK. CODE ANN.§ 20-16-705(a) (2005); ARIZ. REV. STAT. ANN. § 36-2301.01 (2009) (*see also* Arizona statute cited in n. 322, *infra*); ; CAL. HEALTH & SAFETY CODE § 123468 (West 2006); CONN. GEN. STAT. ANN.§ 19a-602(b) (West 2011); FLA. STAT. ANN. §§ 390.011(8), 390.0111(1) (West Supp. 2012) (after 24th week); 720 ILL. COMP. STAT. ANN. 510/5 (West 2010); IOWA CODE ANN. § 707.7 (West 2003); KY. REV. STAT. ANN. § 311.780 (LexisNexis 2007); LA. REV. STAT. ANN. § 40:1299.35.4 (2008); ME. REV. STAT. ANN. tit. 22, § 1598(4) (West 2004); MICH. COMP. LAWS ANN. § 750.14 (West 2004) (as construed in *People v. Bricker*, 208 N.W.2d 172, 175-76 (Mich. 1973)); MINN. STAT. ANN. § 145.412 subd. 3 (West 2011); S.C. CODE ANN. § 44-41-20(c) (2002); S.D. CODIFIED LAWS § 34-23A-5 (Supp. 2011) (after 24th week); TENN. CODE ANN.§ 39-15-201(c)(3) (2010); WASH. REV. CODE ANN. §§ 9.02.110, 9.02.120 (West 2010); WIS. REV. STAT. § 940.15 (West 2005).

[318] *Doe v. Bolton*, 410 U.S. 179, 191-92 (1973)

Four States expressly or impliedly allow post-viability (or other late-term abortions) for mental, as well as physical, health reasons.[319] Thus, they effectively allow post-viability (or other late-term) abortions for any reason:

Massachusetts	North Dakota
Nevada	Virginia

Two States attempt to quantify the degree of risk the pregnant woman must assume before she may obtain a post-viability (or late-term abortion), but do not limit such abortions to physical health reasons.[320] As a result, they may be interpreted to allow post-viability abortions for virtually any reason:

North Carolina	Wyoming

Four States purport to forbid post-viability (or late term) abortions except to save the life of the woman.[321] These statutes, although clearly unenforceable under current constitutional constraints (because they lack the health exception required by *Roe*), would be enforceable if *Roe* were overruled:

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[319] MASS. GEN. LAWS ANN. ch. 112, § 12M (West 2003) (during or after the 24th week) (necessary to save the life of the mother or where continuation of the pregnancy would impose on her a substantial risk of grave impairment of her physical or mental health); NEV. REV. STAT. ANN. § 442.250 (LexisNexis 2009) (after 24th week) (gravely impair physical or mental health); N.D. CENT. CODE § 14-02.1-04(3) (2009) (same); VA. CODE ANN. § 18.2-74 (2009) (prevent death or substantial and irremediable impairment of mental or physical health).

[320] N.C. GEN. STAT. § 14.45.1(b) (2009) (after 20th week) (threat to life or grave impairment of health); WYO. STAT. ANN. § 35-6-102 (2009) (imminent peril that substantially endangers life or health).

[321] DEL. CODE ANN. tit. 24, § 1790(b)(1) (2005) (after twenty weeks); IDAHO CODE ANN. § 18-608(3) (2004) (also allows abortion where pregnancy would result in the birth of fetus unable to survive) (an Idaho Attorney General Opinion issued on January 26, 1998, determined that the third-trimester ban was unconstitutional to the extent that it prohibited health-related abortions, *see* Op. Att'y Gen. 98-1) (*see also* Idaho statute cited in n. 322, *infra*); N.Y. PENAL LAW §§ 125.00, 125.05, 125.45 (McKinney 2009) (after 24th week); R.I. GEN. LAWS § 11-23-5 (2002).

Delaware	New York
Idaho	Rhode Island

Fourteen States attempt to prohibit post-viability (or other late term abortions) except where the procedure is necessary to save the life (or prevent the death) of the pregnant woman or to prevent substantial and irreversible impairment of a major bodily function.[322] One of these statutes has been construed (pursuant to a

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[322] ALA. CODE §§ 26-22-1 *et seq*. (LexisNexis 2009) (post-viability abortions), 26-23B-1 *et seq*. (LexisNexis Supp. 2011) (abortions performed during or after the twentieth week of pregnancy, as measured from the date of fertilization); ARIZ. REV. STAT. ANN. § 36-2159, added by H.B. 2036 (2012 Reg. Sess.) (abortions performed during or after the twentieth week of pregnancy, as measured from the first day of the woman's last menstrual period); *Georgia*: H.B. 954 (2011-12 Reg. Sess), amending GA. CODE ANN. § 16-12-140 *et seq*., and adding § 31-9B-1 *et seq*., (abortions performed during or after the twentieth week of pregnancy, as measured from the date of fertilization) (also allows abortions to be performed if the pregnancy is diagnosed as "medically futile," which is defined to mean that, "in reasonable medical judgment, the unborn child has a profound and irremediable congenital or chromosomal anomaly that is incompatible with sustaining life after birth"); IDAHO CODE ANN. § 18-501 *et seq*., added by H.B. 1165 (2011 1st Reg. Sess.); IND. CODE ANN. § 16-34-2-1(a)(3) (West Supp. 2011) (abortions performed at the earlier of viability or during or after the twentieth week of pregnancy, as measured from the date of fertilization); KAN. STAT. ANN. § 65-6703 (Supp.2011) (post-viability abortions); H.B. No. 2218 (2011 Reg. Sess.) (abortions performed during or after the twenty-second week of pregnancy, as measured from the first day of the woman's last menstrual period); MO. ANN. STAT. § 188.030 (West Supp. 2012) (post-viability abortions); MONT. CODE ANN.§ 50-20-109 (2011); NEB. REV. STAT. ANN. § 28-3,102 *et seq*. (LexisNexis Supp. 2011) (abortions performed during or after the twentieth week of pregnancy, as measured from the date of fertilization); OHIO REV. CODE ANN. § 2919.17, as amended by H.B. No. 78 (2011 Reg. Sess.) (post-viability abortions); OKLA. REV. STAT. ANN. tit. 63, § 1-745.1 *et seq*. (West Supp. 2012) (abortions performed during and after the twentieth week of pregnancy, as measured from the date of fertilization); 18 PA. CONS. STAT. ANN. § 3211 (West 2000) (during or after the 24th week); TEX. OCC. CODE § 164.052(a)(18) (Vernon 2010) (third trimester, post-viability abortions) (abortion necessary to prevent the death of the pregnant woman or the pregnant woman "is diagnosed with a significant likelihood of suffering imminent, severe, irreversible brain damage or imminent severe, irreversible paralysis," or "the viable child has a severe, irreversible brain impairment"); TEX. HEALTH & SAFETY CODE ANN. § 76-7-302(3)(b) (Supp. 2010) (post-viability abortions) (also allows abortions to be performed to end a

consent decree following litigation over the statute's constitutionality) to allow a post-viability abortion whenever it is necessary to preserve the mother's life or health.[323] The constitutionality of the other thirteen statutes has not been litigated.

Alabama	Kansas	Oklahoma
Arizona	Missouri	Pennsylvania
Georgia	Montana	Texas
Idaho	Nebraska	Utah
Indiana	Ohio	

Neither Hawaii nor Maryland is included in the list of States with post-viability statutes on the books. The (pre-*Roe*) Hawaii statute provides that no abortion shall be performed unless certain criteria (not related to the reason for the abortion) are satisfied (*e.g.*, the abortion must be performed by a physician).[324] The statute then provides that an "abortion" shall mean "an operation to intentionally terminate the pregnancy of a nonviable fetus. The termination of a pregnancy of a viable fetus is not included in this section."[325] Although it may have been the intent of the drafters of Hawaii's 1970 statute to prohibit post-viability abortions, they clearly failed to achieve that intent because their statutory definition of "abortion" in the statute purporting to "prohibit" abortions after viability excludes post-viability abortions from the definition. Hence, they are not prohibited.

Maryland law provides that the legislature shall not prohibit post-viability abortions that are necessary to save the life or health of the pregnant woman (or if

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pregnancy that results from a reported act of rape or incest and when two physicians concur in writing that "the fetus has a defect that is uniformly diagnosable and uniformly lethal").

[323] *Summit Medical Associates, P.C. v. James*, 984 F.Supp. 1404 (M.D. Ala. 1998), *aff'd in part*, *rev'd in part and remanded with instructions sub nom. Summit Medical Associates, P.C. v. Pryor*, 180 F.3d 1326 (11th Cir. 1999).

[324] HAW. REV. STAT. ANN. § 453-16(a) (LexisNexis 2005)

[325] *Id*. § 453-16(b).

the fetus is affected by a genetic defect or abnormality),[326] but the law itself does not *restrict* post-viability abortions to those reasons.

[326] MD. CODE ANN. HEALTH-GEN. II § 20-209(b) (2000).

In sum, while post-viability (and other late term) abortion statutes would be enforceable if *Roe v. Wade*, *Doe v. Bolton* and *Planned Parenthood v. Casey* were overruled, most of those statutes would have no impact on the incidence of such abortions because of their open-ended exceptions for health (or mental health).

Appendix B

Section 230.3, Model Penal Code (1962), American Law Institute[327]

(1) *Unjustified Abortion*. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) *Justifiable Abortion*. A licensed physician is justified in terminating a pregnancy if he believes that there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this [S]ubsection. Justifiable abortions shall be performed only in a licensed hospital except in case of emergency when hospital facilities are unavailable. [Additional exceptions from the requirement of hospitalization may be incorporated here to take account of situations in sparsely settled areas where hospitals are not generally accessible.]

(3) *Physicians' Certificates*; *Presumption from Non-Compliance*. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

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[327] Prior to *Roe*, the abortion statutes of thirteen States were based in whole or in part on § 230.3 of the Model Penal Code: Arkansas, California, Colorado, Delaware, Florida, Georgia, Kansas, Maryland, New Mexico, North Carolina, Oregon, South Carolina and Virginia. Only Colorado, Delaware, New Mexico have not repealed their pre-*Roe* statutes which, of course, are unenforceable under *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973).

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

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

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

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

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

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

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

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