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

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Introduction

The re-election of President Bush last November and the likelihood that the President will have an opportunity to appoint one or more justices to the Supreme Court in the next four years have fueled speculation that the a differently-constituted Court may overrule *Roe v. Wade*,[1] as modified by *Planned Parenthood v. Casey*,[2] and return the issue of abortion to the States. This speculation is decidedly premature. Only three justices now on the Court—Chief Justice Rehnquist and Associate Justices Scalia and Thomas—have voted to overrule *Roe*. Although Justice Kennedy dissented in the Supreme Court's decision striking down the Nebraska partial-birth abortion ban act five years ago,[3] he did not join the dissenting opinions of the Chief Justice, Justice Scalia and Justice Thomas calling for *Roe* and *Casey* to be overruled.[4] Given Chief Justice Rehnquist's age and health, it is highly improbable that two of the six justices now on the Court who

[1] 410 U.S. 113 (1973).

[2] 505 U.S. 833 (1992).

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

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

support the retention of *Roe*, as modified by *Casey*—Justices Stevens, O'Connor, Kennedy, Souter, Ginsburg and Breyer—would retire and be replaced by justices opposed to *Roe* while the Chief Justice is still on the Court. Thus, as a practical matter, there would have to be at least three vacancies on the Court in the next four years before there was even a possibility that *Roe* and *Casey* could be overruled by a combination of new appointments and present justices. Although President Bush may have an opportunity to make as many as three appointments to the Court, that opportunity is neither imminent nor inevitable.

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 contemporary political consensus, abortion would be legal in the overwhelming majority of States at least through viability and very probably after viability, as well. Barely a handful of States would have laws on the books outlawing abortions in most circumstances 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."[5] The statute, which has not been repealed,[6] 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.[7]

ALASKA

The pre-*Roe* statute allowed abortion on demand prior to viability,[8] and impliedly prohibited abortion after viability.[9] Section 18.16.010(d) was repealed in

[5] ALA. CODE tit. 14, § 9 (1958).

[6] *See* ALA. CODE § 13A-13-7 (1994).

[7] 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. Whether, apart from the pre-*Roe* statute, Alabama's post-viability statute, *see* ALA. CODE § 26-22-1 *et seq*. (Supp. 2004), would effectively prohibit post-viability abortions is discussed, along with other post-viability statutes, in Appendix A.

[8] ALASKA STAT. § 11.15.060 (1970), renumbered as § 18.16.010 in 1978 and reorganized in 1986. *See* ALASKA STAT. § 18.16.010 (Michie 1994).

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

1997.[10] 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.[11] 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).[12]

ARIZONA

The principal pre-*Roe* statutes prohibited abortion on a pregnant woman unless the procedure was "necessary to save her life,"[13] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[14] Pursuant to *Roe*, the statutes were declared unconstitutional by the

[10] 1997 Alaska Sess. Laws ch. 14, § 6.

[11] *See* ALASKA STAT. §§ 18.16.010(a)(1), -(2) (Michie 2004).

[12] *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. *See State of Alaska v. Planned Parenthood of Alaska*, 35 P.3d 30, 35-39 (Alaska 2001).

[13] ARIZ. REV. STAT. ANN. § 13-211 (1956), renumbered as § 13-3603 by 1977 Ariz. Sess. Laws ch. 142, § 99. *See* ARIZ. REV. STAT. ANN. § 13-3603 (West 1989).

[14] ARIZ. REV. STAT. ANN. § 13-212 (1956), renumbered as § 13-3604 by 1977 Ariz. Sess. Laws ch. 142, § 99. *See* ARIZ. REV. STAT. ANN. § 13-3604 (West 1989). 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

Arizona Court of Appeals.[15] Their enforcement was not enjoined. Although the pre-*Roe* statutes have not been expressly repealed,[16] 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).[17] It is also possible that the statutes have been repealed by implication with the enactment of substantial post-*Roe* legislation regulating abortion.[18]

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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 410. 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 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.

[15] *See 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 had upheld the statutes.

[16] *See* ARIZ. REV. STAT. ANN. §§ 13-3603, 13-3604 (West 2001).

[17] *See Simat Corp. v. Arizona Health Care Cost Containment System*, 56 P.3d 28 (Ariz. 2002). The supreme court expressly refrained from deciding whether art. 2, § 8, of the Arizona Constitution confers a right to abortion independent of the one recognized on federal constitutional grounds in *Roe v. Wade*. *Id*. at 34.

[18] Whether, apart from the pre-*Roe* statutes, Arizona's post-viability statute, *see* ARIZ. REV. STAT. ANN. § 36-2301.01 (West 2003), would effectively prohibit post-viability abortions is discussed in Appendix A.

ARKANSAS

Analysis of the current status of the 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,[19] and a more recently minted law based upon § 230.3 of the Model Penal Code,[20] 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.[21] In 1980, a 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.[22]

All of the abortion provisions on the books on January 22, 1973 were

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[19] ARK. STAT. ANN. § 41-301 (Supp. 1969), renumbered as § 41-2551. *See* ARK. STAT. ANN. § 41-2551 (1977).

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

[21] ARK. STAT. ANN. §§ 41-303, 41-304. (Supp. 1969), renumbered as §§ 41-2553, 41-2554 in 1977. *See* ARK. STAT. ANN. §§ 41-2553, 41-2554 (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 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. The potential abuse of mental health exceptions is discussed in n. 31, *infra*.

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

superseded by or omitted from the Arkansas Code of 1987, except § 41-2553, the first section of 1969 law, which prohibits all abortions,[23] and section 41-2560, which guarantees rights of conscience.[24] 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.[25] 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 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.[26]

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[23] Now codified as ARK. CODE ANN. § 5-61-102 (Michie 1997).

[24] Now codified as ARK. CODE ANN. § 20-16-601(Michie 2000).

[25] *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).

[26] 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,

CALIFORNIA

The pre-*Roe* abortion statutes were based upon § 230.3 of the Model Penal Code.[27] The California Penal Code prohibited abortions not performed in compliance with the "Therapeutic Abortion Act" of 1967,[28] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[29] 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.[30]§ 123405 in 1995. 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."[31] An

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see ARK. CODE ANN. § 20-16-705(a) (Michie 2000), would effectively prohibit post-viability abortions is discussed in Appendix A.

[27] CAL. HEALTH & SAFETY CODE § 25950 *et seq*. (West Supp. 1971), renumbered as § 123400 *et seq*. in 1995. *See* CAL. HEALTH & SAFETY CODE § 123400 *et seq*. (West 1996). The text of § 230.3 of the Model Penal Code is set out in Appendix B.

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

[29] *Id*. § 275. No prosecutions were reported under this statute. See n. 14, *supra*.

[30] CAL. HEALTH & SAFETY CODE § 25951 (West Supp. 1971), renumbered as

[31] *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

abortion could not be performed on grounds of rape or incest unless there was probable cause to believe that the pregnancy resulted from rape or incest.[32] No abortion could be approved after the twentieth week of pregnancy for any reason.[33]

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).[34] Sections 274 and 275 of the Penal Code were repealed in 2000;[35] the Therapeutic Abortion Act was repealed in 2002.[36] None of these statutes would be revived by a decision overruling *Roe v. Wade*.[37] Abortions could be performed for any reason before viability, and for virtually any reason

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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.

[32] *Id.* § 25952, renumbered as § 123407 in 1995.

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

[34] *See People v. Barksdale*, n. 31, *supra*.

[35] 2000 Cal. Stat. ch. 692, § 2.

[36] 2002 Cal. Stat. ch. 385, §§ 2-7.

[37] In repealing the Therapeutic Abortion Act, California enacted the "Reproductive Privacy Act." *Id*. § 8, codified as CAL. HEALTH & SAFETY CODE § 123460 *et seq*. (West Supp. 2005). 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

after viability.[38]

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*.[39] 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."[40]

COLORADO

The pre-*Roe* abortion statute was based upon § 230.3 of the Model Penal Code.[41] Under the statute, an abortion could be performed at any stage of pregnancy (defined as "the implantation of an embryo in the uterus") when

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overruled.

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

[39] 625 P.2d 779 (Cal. 1981).

[40] *Id*., 625 P.2d at 784. In a decision striking down California's parental consent statute sixteen years later, the California Supreme Court reaffirmed this holding. *See 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").

[41] COLO. REV. STAT § 40-6-101 *et seq*. (Perm Supp. 1971), renumbered and rearranged as § 18-6-101 *et seq*. *See* COLO. REV. STAT. ANN. § 18-6-101 *et seq*. (West 1986).

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."[42] 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.[43] 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 unconstitutional by the Colorado Supreme Court in *People v. Norton*.[44] Enforcement of the statute was not enjoined.

The pre-*Roe* statute has not been repealed,[45] and would be enforceable if *Roe v. Wade* were overruled. The broad exceptions in the statute, however, in

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

[43] *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).

[44] 507 P.2d 862 (Colo. 1973).

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

particular the exception for mental health,[46] 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,"[47] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[48] In a pre-*Roe* decision, those statutes were declared unconstitutional by a three-judge federal district court.[49] Enforcement of the statutes was not enjoined. After the district 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.[50] 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

[46] The potential abuse of mental health exceptions is discussed in n. 31, *supra*.

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

[48] CONN. GEN. STAT. ANN. § 53-30 (West 1958). No prosecutions were reported under this statute. *See* n. 14, *supra*.

[49] *See 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).

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

protect and preserve human life from the moment of conception . . . ."[51] This statute was also declared unconstitutional (and permanently enjoined) by the same three-judge federal district court.[52] 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.[53] The pre-*Roe* statutes were repealed in 1990,[54] and would not be revived by a decision overruling *Roe v. Wade*.[55] Abortions could be performed for any reason before viability, and for virtually any reason after viability.[56]

DELAWARE

The principal pre-*Roe* statutes were based on § 230.3 of the Model Penal

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[51] *Id.*

[52] *See 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).

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

[54] 1990 Conn. Acts 90-113, § 4 (Reg. Sess.).

[55] 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), codified as CONN. GEN. STAT. § 19a-602(a) (West 2003). As previously noted, *see* n. 37, *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.

[56] 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.

Code.[57] The statutes prohibited performance of an abortion on a pregnant woman unless the procedure was a "therapeutic abortion,"[58] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[59] An abortion could be performed at any time when continuation of the pregnancy was "likely to result in the death of the mother."[60] 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 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."[61] The pre-*Roe* statutes have not been declared unconstitutional, nor has their enforcement been enjoined.[62] The

[57] 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.

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

[59] *Id*. § 652. No prosecutions were reported under this statute. *See* n. 14, *supra*.

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

[61] *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).

[62] 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).

statutes have not been repealed,[63] and would enforceable if *Roe v. Wade* were overruled. The exception in the statute for mental health,[64] 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 continuation of the pregnancy was "likely to result in the death of the mother."[65]

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 . . . ."[66] The constitutionality of the statute was upheld in *United States v. Vuitch*,[67] 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."[68] The pre-*Roe* statute was repealed in 2003.[69] The overruling of *Roe v. Wade* would not affect the legality of abortion in the District of Columbia. Abortions could be

[63] *See* DEL. CODE ANN. tit. 11, §§ 222(26), 651-54 (2001 & Supp. 2004); tit. 24, §§ 1766(b), 1790-93 (1997).

[64] The potential abuse of mental health exceptions is discussed in n. 31, *supra*.

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

[66] D.C. CODE ANN. § 22-201 (1967), renumbered as § 22-101 in 1988. *See* D.C. CODE ANN. § 22-101 (2001).

[67] 402 U.S. 62 (1971).

[68] *Id*. at 72.

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

performed for any reason at any time of pregnancy.

FLORIDA

The pre-*Roe* statute was based on § 230.3 of the Model Penal Code.[70] The 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."[71] Pursuant to *Roe*, major portions of the 1972 law were declared unconstitutional by a three-judge federal district court in *Coe v. Gerstein*,[72] and by the Florida Supreme Court in *Wright v. State*.[73] The statute was later

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

[71] 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).

[72] 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).

[73] 351 So.2d 708 (Fla. 1977).

repealed.[74] The overruling of *Roe v. Wade* would not revive the pre-*Roe* statute. Abortions could be performed for reason before the third trimester, and for virtually any reason thereafter.[75] 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).[76]

GEORGIA

The pre-*Roe* statute was based upon § 230.3 of the Model Penal Code.[77] 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

[74] 1979 Fla. Laws 1618, ch. 79-302, § 5.

[75] 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.

[76] *In re T.W.* 551 So.2d 1186, 1196 (Fla. 1989) (striking down parental consent statute). More recently, the Florida Supreme Court invalidated a parental notice statute. *See 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.

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

pregnancy resulted from forcible or statutory rape.[78] The statute did not place any 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*,[79] whose decision was affirmed, as modified, by the Supreme Court.[80] The statute was repealed in 1973,[81] 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 third trimester, and for virtually any reason thereafter.[82]

[78] *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 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 whether the performance of the abortion would violate any constitutional or other legal rights of the fetus. *Id*. § 26-1202(c).

[79] 319 F.Supp. 1048 (N.D. Ga. 1970).

[80] 410 U.S. 179 (1973).

[81] 1973 Ga. Laws No. 328, § 1; Vol. I Ga. Acts & Resolutions 635, 636-37 (1973).

[82] Whether Georgia's third-trimester statute, *see* GA. CODE ANN. § 16-12-141(c) (2003), would effectively prohibit abortions at that stage of pregnancy is discussed in Appendix A.

HAWAII

The pre-*Roe* statute allowed abortion on demand through viability (and arguably thereafter).[83] The statute, which has not been repealed,[84] has not been declared unconstitutional nor has its enforcement been enjoined. The legality of abortion would not be affected by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before viability, and probably for any reason 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 decision overruling *Roe v. Wade*. Abortions could be performed for any reason before the third trimester. Under a separate statute, however, abortions

[83] HAW. REV. STAT. § 453-16 (Supp. 1971).

[84] *Id*. § 453-16 (2002).

[85] Whether Hawaii's pre-*Roe* statute prohibits post-viability abortions is discussed in Appendix A.

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

[87] *Id*. § 18-602. No prosecutions were reported under this statute. *See* n. 14, *supra*.

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

could not be performed during the third trimester except to preserve the life of the pregnant woman or where the pregnancy would result in the birth or delivery of a fetus unable to survive.[89]

ILLINOIS

The principal pre-*Roe* statute prohibited performance of an abortion unless the procedure was "necessary for the preservation of the woman's life."[90] Pursuant to *Roe*, this statute was declared unconstitutional by the Illinois Supreme Court in *People v. Frey*,[91] and was later repealed.[92] The statute would not be revived by a decision overruling *Roe v. Wade*.[93] Abortions could be performed for any reason

[89] IDAHO CODE § 18-608(3) (2004). Idaho's third-trimester statute is discussed in Appendix A.

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

[91] 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. *See 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. *See Doe v. Scott*, 321 F.Supp. 1385 (N.D. 1971), *vacated and remanded sub nom. Hanrahan v. Doe*, 410 U.S. 950 (1973).

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

[93] 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).

before viability, and for virtually any reason after viability.[94]

INDIANA

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[95] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[96] Both statutes were repealed in 1977,[97] and neither would be revived by a decision overruling *Roe v. Wade*. Abortions could be performed for any reason before viability. Under a separate statute, however, abortions after viability could be performed only to prevent substantial permanent impairment to the life or physical health of the pregnant woman.[98]

IOWA

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

[94] 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.

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

[96] *Id*. § 35-1-58-2. No prosecutions were reported under this statute. *See* n. 14, *supra*.

[97] 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.

[98] *See* IND. CODE ANN. § 16-34-2-1(a)(3) (Michie Supp. 2004). Indiana's post-viability statute is discussed in Appendix A.

pregnant woman unless the procedure was "necessary to save her life."[99] Pursuant to *Roe*, this statute was declared unconstitutional by a three-judge federal district court in *Doe v. Turner*,[100] and was repealed in 1976.[101] 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.[102]

KANSAS

The principal pre-*Roe* statute was based on § 230.3 of the Model Penal Code.[103] 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

[99] IOWA CODE § 701.1 (1950).

[100] 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. *See State v. Abodeely*, 179 N.W.2d 347 (Iowa 1970), *appeal dismissed*, *cert. denied*, 402 U.S. 936 (1971).

[101] 1976 Iowa Acts 549, 774, ch. 1245, § 526.

[102] *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.

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

from rape, incest or other felonious intercourse."[104] This statute was repealed in 1992,[105] and 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, abortions could be performed after viability only to preserve the life of the pregnant woman or to prevent substantial and irreversible impairment of a major bodily function.[106]

KENTUCKY

The pre-*Roe* statutes prohibited performance of an abortion upon a pregnant woman unless it was "necessary to preserve her life,"[107] and punished the offense as a homicide if the woman died as a result thereof.[108] Pursuant to *Roe*, these statutes were declared unconstitutional by the Kentucky Court of Appeals (the name of

[104] *Id*. § 21-3407(2). The law imposed other conditions. Abortions could be performed only by licensed physicians in licensed, accredited hospitals. *Id*. §§ 21-3407(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. *See Poe v. Menghini*, 339 F.Supp. 986 (D. Kan. 1972). The potential abuse of mental health exceptions is discussed in n. 31, *supra*

[105] 1992 Kan. Sess. Laws 723, 729, ch. 183, § 9.

[106] *See* KAN. STAT. ANN. § 65-6703 (2002). The Kansas post-viability statute is discussed in Appendix A.

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

[108] *Id*. § 435.040.

Kentucky's highest court before 1976) in *Sasaki v. Commonwealth*,[109] and were repealed in 1974.[110] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*.[111] Abortions could be performed for any reason before viability, and for virtually any reason after viability.[112]

LOUISIANA

The principal pre-*Roe* statute prohibited all abortions.[113] Although § 14:87 did not on its face permit any exceptions, given the requirement of a specific criminal intent,[114] 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

[109] 497 S.W.2d 713 (Ky. 1973) In its original decision, the Kentucky Court of Appeals had upheld the statute. *See 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. *See Crossen v. Attorney General*, 344 F.Supp. 587 (E.D. Ky. 1972), *vacated and remanded*, 410 U.S. 950 (1973).

[110] 1974 Ky. Acts 484, 487, ch. 255, § 19; 1974 Ky. Acts 831, 889, ch. 406, § 336.

[111] 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) (Michie 2001). 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) (Michie 1996).

[112] Whether Kentucky's post-viability statute, *see* KY. REV. STAT. ANN. § 311.780 (Michie 2001), would effectively prohibit post-viability abortions is discussed in Appendix A.

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

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

purpose.[115] Pursuant to *Roe*, § 14:87 and § 37:1285(6) were declared unconstitutional in a pair of three-judge federal district court decisions.[116] Following the Supreme Court's decision in *Webster v. Reproductive Health Services*,[117] 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 the case held that § 14:87 had been repealed by implication with the enactment of comprehensive post-*Roe* legislation regulating abortion.[118] 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.[119] This statute was

[115] 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) (West 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.

[116] *See 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. *See 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).

[117] 492 U.S. 490 (1989).

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

[119] 1991 La. Acts, No. 26, codified as LA REV. STAT. ANN. § 14:87 (West 2004).

also declared unconstitutional.[120] Section 14:87 would be enforceable if *Roe v. Wade* were overruled.[121]

MAINE

The pre-*Roe* statute prohibited performance of an abortion unless the procedure was "necessary for the preservation of the mother's life."[122] The statute was repealed in 1979,[123] and would not be revived by a decision overruling *Roe v. Wade*.[124] Abortions could be performed for any reason before viability, and for virtually any reason after viability.[125]

[120] *See 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).

[121] Whether, apart from § 14:87, Louisiana's post-viability statute, *see* LA. REV. STAT. ANN. § 40:1299.35.4 (West Supp. 2005), would effectively prohibit post-viability abortions is discussed in Appendix A.

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

[123] 1979 Me. Laws 513, ch. 405, § 1 (1st Sess.).

[124] 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. 37, *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.

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

MARYLAND

The principal pre-*Roe* statute was based on § 230.3 of the Model Penal Code.[126] 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."[127] 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.[128] The State's Attorney had to confirm that there was probable cause to believe that the rape had in fact occurred.[129]

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 hospitals were declared unconstitutional by the Maryland Court of Special Appeals

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

[127] *Id.* § 137.

[128] *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. 31, *supra*.

[129] *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).

in *State v. Ingel*,[130] and *Coleman v. Coleman*,[131] and by United States Court of Appeals for the Fourth Circuit in *Vuitch v. Hardy*.[132] With the exception of the conscience provisions, all of the provisions of the pre-*Roe* statutes, recodified in 1987,[133] were repealed in 1991.[134] These statutes would not be revived by a decision overruling of *Roe v. Wade*. Abortions could be performed for any reason before viability, and for virtually any reason after viability.[135]

MASSACHUSETTS

The principal pre-*Roe* statute prohibited performance of "unlawful" abortions.[136] Although the statute itself did not define what constituted an "unlawful" abortion, in a series of cases the Massachusetts Supreme Judicial Court

[130] 308 A.2d 223 (Md. Ct. Sp. App. 1973).

[131] 471 A.2d 1115 (Md. Ct. Sp. App. 1984).

[132] 473 F.2d 1370 (4th Cir. 1973), *cert. denied*, 414 U.S. 824 (1973).

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

[134] 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) (Supp. 1991). As previously noted, *see* n. 37, *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.

[135] MD. HEALTH-GEN. CODE ANN. § 20-209(b)(2) (2000). Viability is defined in § 20-209(a). This statute is discussed further in Appendix A.

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

interpreted the statute to allow abortions for reasons of the pregnant woman's physical or mental health.[137] Pursuant to *Roe*, § 19 of ch. 272 was declared unconstitutional in an unreported decision of a three-judge federal district court.[138] The pre-*Roe* statute has not been repealed.[139] 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.[140] Moreover, regardless of *Roe*, any attempt to prohibit abortion (at least before viability) in Massachusetts would be barred by the Massachusetts Supreme Judicial Court's decisions recognizing a fundamental right to abortion on state constitutional grounds (due process).[141]

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[137] *See 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. 31, *supra*.

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

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

[140] The same may be said of the Massachusetts statute, *see* 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.

[141] *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 [*Roe*] announced as an integral part of our jurisprudence." 417 N.E.2d at 398.

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."[142] 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."[143] 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 manslaughter."[144]

In *People v. Bricker*,[145] and *Larkin v. Calahan*,[146] 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

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

[143] *Id*. § 750.323.

[144] *Id*. § 750.322.

[145] 208 N.W.2d 172 (Mich. 1973).

[146] 208 N.W.2d 176 (Mich. 1973).

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*.[147] Accordingly, § 750.14 was construed not to apply to an abortion performed by a physician in the exercise of his or her medical judgment.[148] "[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."[149] "[E]xcept as those cases defined and exempted under *Roe v. Wade* and *Doe v. Bolton*, . . . criminal responsibility attaches."[150]

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*."[151] 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."[152] The pre-*Roe* statutes have not been repealed,[153] and would be enforceable if *Roe v. Wade* were overruled.

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[147] *Bricker*, *supra*, n. 145, 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.

[148] *Id*.

[149] *Id*.

[150] *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*).

[151] *Larkin*, *supr*a, n. 146, 208 N.W.2d at 179.

[152] *Id*. at 180.

[153] *See* MICH. COMP. LAWS ANN. §§ 750.14, 750.322, 750.323 (West 2004). The Michigan Court of

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,"[154] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[155] Pursuant to *Roe*, § 617.18 was declared unconstitutional in a pair of decisions by the Minnesota Supreme Court.[156] Both § 617.18 and § 617.19 were repealed in 1974,[157] 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.[158] 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

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Appeals has held that § 750.14 has not been repealed by implication with the enactment of substantial post-*Roe* legislation regulating abortion. *See People v. Higuera*, *supra*, n. 150, 625 N.W.2d at 444, 448-49.

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

[155] MINN. STAT. ANN. § 617.19 (West 1971). No prosecutions were reported under this statute. *See* n. 14, *supra*.

[156] *See 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).

[157] 1974 Minn. Laws 265, 268, ch. 177, § 7.

[158] Whether Minnesota's post-viability statute, *see* MINN. STAT. ANN. § 145.412 subd. 3 (West 1998), would effectively prohibit post-viability abortions is discussed in Appendix A.

state constitutional grounds (privacy).[159]

MISSISSIPPI

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."[160] 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.[161] Although § 97-3-3 has not been repealed,[162] it would not 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).[163] The court reviewed the "undue burden" standard of review the Supreme Court developed in *Planned*

[159] *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).

[160] MISS. CODE ANN. § 2223 (Supp. 1970), renumbered as § 97-3-3. *See* MISS. CODE ANN.§ 97-3-3 (1991).

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

[162] *See* MISS. CODE ANN. § 97-3-3 (1999).

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

Parenthood v. Casey[164] 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.[165] 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."[166] Pursuant to *Roe*, this statute was declared unconstitutional and permanently enjoined in an unreported decision of a three-judge federal court.[167] The statute was later repealed,[168] and would not be revived by a decision overruling *Roe v. Wade*.[169]MO. ANN. STAT. § 188.010 (West 2004). In the absence

[164] 505 U.S. 833 (1992).

[165] *Pro-Choice Mississippi*, *supra*, n. 163, 716 So.2d at 654-55.

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

[167] *See 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 had dismissed the challenge to the law on abstention grounds. *See 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*. *See Rodgers v. Danforth*, 410 U.S. 949 (1973). In another pre-*Roe* decision, the Missouri Supreme Court rejected a challenge to the statute. *See Rodgers v. Danforth*, 486 S.W.2d 258 (Mo. 1972), *vacated and remanded*, 410 U.S. 949 (1973).

[168] 1977 Mo. Laws, 658, 662-63.

[169] Missouri has enacted a statute stating:

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). Abortions could be performed for any reason before viability, and for virtually any reason after viability.[170]

MONTANA

The principal pre-*Roe* statutes prohibited performance of an abortion unless the procedure was "necessary to preserve the life of the mother,"[171] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[172] Pursuant to *Roe v. Wade*, these statutes were declared unconstitutional by a three-judge federal district court in *Doe v. Woodahl*,[173] and

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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.

[170] Whether Missouri's post-viability statute, *see* MO. ANN. STAT. § 188.030 (West 2004), would effectively prohibit post-viability abortions is discussed in Appendix A.

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

[172] 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. 14, *supra*.

[173] 360 F.Supp. 20 (D. Mont. 1973).

were later repealed.[174] 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, abortions after could be performed after viability only to save the life of the pregnant woman or to prevent substantial and irreversible impairment of a major bodily function.[175]

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 grounds (privacy).[176]

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."[177] Pursuant to *Roe*, these statutes were declared unconstitutional in an unreported judgment of a three-

[174] 1977 Mont. Laws 1130, 1171-72, ch. 359, § 77.

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

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

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

judge federal district court,[178] and were later repealed.[179] 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.[180]

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,"[181] and made a woman's participation in her own abortion after quickening a criminal offense (subject to the same exception).[182] An attorney general opinion ruled that the statutes were unconstitutional under *Roe* to the extent that they prohibited most first and second trimester abortions.[183] 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*.[184]

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

[179] 1973 Neb. Laws 801, 806, L.B. 286, § 24.

[180] Whether Nebraska's post-viability statute, *see* NEB. REV. STAT. ANN. § 28-329 (Michie 2003), would effectively prohibit post-viability abortions is discussed in Appendix A.

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

[182] *Id*. § 200.220. No prosecutions were reported under this statute. *See* n. 14, *supra*.

[183] *See* Op. Nev. Att'y Gen. (Feb. 2, 1973).

[184] 1973 Nev. Stat. 1637, 1639-40, ch. 766, §§ 7, 8.

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 twenty-fourth week of pregnancy, and for virtually any reason thereafter.[185]

NEW HAMPSHIRE

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman before quickening for any reason,[186] 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."[187] These statutes were repealed in 1997,[188] 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

[185] 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. *See* NEV. REV. STAT. ANN. § 442.250 (Michie 2000). This statute is discussed in Appendix A. The potential abuse of mental health exceptions is discussed in n. 31, *supra*.

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

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

[188] 1997 N.H. Laws 81, ch. 99, § 1.

woman "maliciously or without lawful justification."[189] This statute was declared unconstitutional by a three-judge federal court in 1972,[190] and was repealed in 1978.[191] 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).[192]

NEW MEXICO

The pre-*Roe* abortion statute was based on § 230.3 of the Model Penal Code.[193] An abortion could be performed at any stage of pregnancy (defined as the

[189] 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).

[190] *See 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. *See State v. Moretti*, *supra*, n.189.

[191] 1978 N.J. Laws 482, 687-88, ch. 95, § 2C:98-2.

[192] *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).

[193] 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.

"implantation of an embryo in the uterus") when (1) continuation of the pregnancy 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.[194] 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*.[195] Enforcement of the statute was not enjoined. The pre-*Roe* statute has not been repealed,[196] 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.[197]

NEW YORK

The pre-*Roe* statutes allowed abortion on demand through the twenty-fourth

[194] *Id.* § 40A-5-1. The law imposed other conditions. Abortions could be performed only in licensed hospitals by licensed physicians "using acceptable medical procedures." *Id*. No abortion could be performed unless a "special hospital board," composed of two physicians, reviewed the request for an abortion and certified that the request satisfied one of the grounds specified in the statute. *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. 31, *supra*.

[195] 506 P.2d 1217 (N.M. Ct. App. 1973).

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

[197] *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).

week of pregnancy.[198] 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."[199] In a pre-*Roe* decision, the New York Court of Appeals rejected a challenge to the law brought by a guardian *ad litem* for unborn children.[200] The legality of abortion would not be affected by the overruling of *Roe v. Wade*. The pre-*Roe* statutes, which have not been repealed,[201] 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*,[202] a challenge to the New York Prenatal 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*]."[203]

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

[199] *Id*. § 125.05(3). This statute is discussed in Appendix A. Although self-abortion was a criminal offense under certain circumstances, no prosecutions have been reported under the law. *See* n. 14, *supra.*

[200] *See 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).

[201] N.Y. PENAL LAW § 125.00 *et seq*. (McKinney 2004).

[202] 634 N.E.2d 183 (N.Y. 1994).

[203] *Id.*, 634 N.E.2d at 186.

NORTH CAROLINA

The pre-*Roe* statutes were based on § 230.3 of the Model Penal Code.[204] Sections 14-44 and 14-45 prohibited all abortions.[205] 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.[206] The statutes did not place any express limitation on the stage of pregnancy at which an authorized abortion could be performed.[207]

In May 1973, § 14.45.1 was substantially amended to conform to the Supreme Court's decisions in *Roe v. Wade* and *Doe v. Bolton*.[208] 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

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[204] 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.

[205] *Id*. §§ 14-44, 14-45.

[206] *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*.

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

[208] 1973 N.C. Sess. Laws 1057-58, ch. 711, §§ 1, 2.

the pregnancy would threaten the life or gravely impair the health of the woman."[209]

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.[210]

NORTH DAKOTA

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[211] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[212] Pursuant to *Roe*, these statutes were declared unconstitutional by a federal district court in *Leigh v. Olson*,[213] and were later repealed.[214] The 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.[215]

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[209] N.C. GEN. STAT. § 14-45.1(b) (1986).

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

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

[212] *Id*. § 12-25-04. No prosecutions were reported under this statute. *See* n. 14, *supra*.

[213] 385 F.Supp. 255 (D. N.D. 1974).

[214] 1973 N.D. Laws 215, 300, ch 116, § 41.

[215] Whether North Dakota's post-viability statute, *see* N.D. CENT. CODE § 14.02.1-04(3) (1997), 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."[216] Pursuant to *Roe*, this statute was declared unconstitutional by the Ohio Supreme Court in *State v. Kruze.*[217] While Kruze's petition for *certiorari* was pending, the statute was repealed,[218] and its substantive provisions re-enacted.[219] That statute, in turn, was repealed in 1974.[220] 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 separate statute, however, abortions could be performed after viability only to prevent the death of the pregnant woman or to prevent substantial and irreversible impairment of a major bodily function.[221]

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

[217] 295 N.E.2d 916 (Ohio 1973). Prior to *Roe*, the Ohio Supreme Court, in a pair of unreported orders, had dismissed defendant's appeal in *Kruze* for want of a substantial constitutional question and overruled his motion for leave to appeal. *See State v. Kruze*, No. 72-11, March 10, 1972 (Ohio Supreme Court), *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. *See Steinberg v. Brown*, 321 F.Supp. 741 (N.D. Ohio 1970).

[218] 134 Ohio Laws 1868.

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

[220] 135 Ohio Laws 988 (1974).

[221] *See* OHIO REV. CODE ANN. § 2919.17 (Anderson 2003). This statute, which is not currently enforceable, 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 (Oh. 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,

OKLAHOMA

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[222] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[223] Pursuant to *Roe*, these statutes were declared unconstitutional by the Oklahoma Court of Criminal Appeals in *Jobe v. State*,[224] and by a three-judge federal district court in *Henrie v. Derryberry*.[225] Enforcement of the statutes was not enjoined.

The pre-*Roe* statutes have not been expressly repealed,[226] 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.[227]

Article I, Ohio Constitution." 627 N.E.2d at 575. Whether the Ohio Supreme Court would adopt the reasoning of the court of appeals is unknown because the supreme court denied review *See Preterm Cleveland v. Voinovich* 624 N.E.2d 194 (Oh. 1993).

[222] 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.

[223] *Id*. § 862. No prosecutions were reported under this statute. *See* n. 14, *supra*.

[224] 509 P.2d 481 (Okla. 1973).

[225] 358 F.Supp. 719 (N.D. Okla. 1973)

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

[227] Whether, apart from the pre-*Roe* statutes, Oklahoma's post-viability statute, *see* OKLA. STAT. ANN. tit.

OREGON

The pre-*Roe* statutes were based on § 230.3 of the Model Penal Code.[228] 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) "the child would be born with serious physical or mental defect," or (3) the pregnancy resulted from felonious intercourse.[229] After the one hundred fiftieth day, abortion was permitted only if "the life of the pregnant woman [was] in imminent danger."[230]

Pursuant to *Roe*, most of these statutes were declared unconstitutional in an unreported decision of a three-judge federal court,[231] and were later repealed.[232] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*.

63, § 1-732 (West 2004), would effectively prohibit post-viability abortions is discussed in Appendix A.

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

[229] *Id*. §§ 435.415, 435.425(1). The potential abuse of mental health exceptions is discussed in n. 31, *supra*.

[230] *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.

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

[232] 1983 Or. Laws 868, ch. 470, § 1.

Abortions could be performed for any reason at any stage of pregnancy.[233]

PENNSYLVANIA

The pre-*Roe* statutes prohibited "unlawful" abortions.[234] 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,[235] and were later repealed.[236] 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, abortions could be performed after the twenty-fourth week of pregnancy only to prevent the death of the pregnant woman or to prevent substantial and irreversible impairment of a major bodily function.[237]

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[233] 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).

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

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

[236] 1974 Pa. Laws 639, Act No. 209, § 10.

[237] *See* PA. CONS. STAT. ANN. tit. 18, § 3211 (West 2000). This statute is discussed in Appendix A.

RHODE ISLAND

The principal pre-*Roe* statute prohibited the performance of an abortion on a woman unless the procedure was "necessary to preserve her life."[238] Pursuant to *Roe*, this statute was declared unconstitutional in a pair of unreported decisions by a three-judge federal district court,[239] and was repealed in 1973.[240] 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."[241] This statute was declared unconstitutional by a federal district court in *Doe v. Israel*,[242] but its enforcement was not enjoined.

In 1975, Rhode Island enacted a statute which prohibited performance of an abortion on a pregnant woman "with a quick child" unless "the same be necessary to preserve the life of such mother."[243] This statute was declared unconstitutional

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[238] R.I. GEN. LAWS § 11-3-1 (1956).

[239] *See 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).

[240] 1973 R.I. Pub. Laws 67, 68, ch. 15, § 1.

[241] *Id*. 68-70, ch. 15, § 2.

[242] 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).

[243] 1975 R.I. Laws 624, ch. 231, § 1, codified at R.I. GEN. LAWS § 11-23-5 (repl. vol. 1981). The statute defined "quick with 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*,[244] but that judgment was later reversed by the court of appeals, which found that the plaintiffs lacked standing to challenge the statute.[245] Neither the 1973 statute nor the 1975 statute has been repealed.[246] 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.[247] Sections 16-82 and 16-83 and prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life or the life of [her] child,"[248] and § 16-84 made a woman's participation in her own abortion a criminal offense.[249] Section 16-87 excepted from these sections abortions performed on pregnant women by licensed physicians in licensed hospitals when (1) there was "substantial risk that continuance of the pregnant

[244] 396 F.Supp. 768 (D. R.I. 1975).

[245] 527 F.2d 582 (1st Cir. 1975).

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

[247] 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.

[248] *Id*. §§ 16-82, 16-83.

[249] *Id*. § 16-84. No prosecutions were reported under this statute. *See* n. 14, *supra*.

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.[250] 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*,[251] and were repealed in 1974.[252] 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.[253]

SOUTH DAKOTA

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

[250] *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. 31, *supra*

[251] 198 S.E.2d 253 (S.C. 1973).

[252] 1974 S.C. Acts 2837, 2841, Act No. 1215, § 8.

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

woman unless the procedure was "necessary to preserve her life,"[254] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[255] Pursuant to *Roe*, the former statute was declared unconstitutional by the South Dakota Supreme Court in *State v. Munson*,[256] and both statutes were later repealed.[257] The pre-*Roe* statutes would not be revived by a decision overruling *Roe v. Wade*. South Dakota, however, has recently passed a "trigger" statute that would prohibit abortion, except "to preserve the life of the pregnant female," which 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."[258]

TENNESSEE

The pre-*Roe* statutes prohibited performance of an abortion unless the

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

[255] *Id*. § 22-17-2. No prosecutions were reported under this statute. *See* n.14, *supra*.

[256] 206 N.W.2d 434 (S.D. 1973). In its original decision, the South Dakota Supreme Court had upheld the constitutionality of the statute. *See State v. Munson*, 201 N.W.2d 123 (S.D. 1972), *vacated and remanded*, 410 U.S. 950 (1973).

[257] 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.

[258] House Bill 1249, §§ 6, 7, as amended by House Bill 1266, § 1. Whether, apart from the trigger statute, South Dakota' statute prohibiting abortions after the twenty-fourth week of pregnancy, *see* S.D. CODIFIED LAWS § 34-23A-5 (Michie 1994), would effectively prohibit abortions at that stage of pregnancy is discussed in Appendix A.

procedure was necessary "to preserve the life of the mother."[259] The substantive provisions of these statutes were repealed with the enactment of post-*Roe* legislation,[260] 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.[261] 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).[262]

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."[263] These statutes were declared unconstitutional in *Roe v. Wade*.[264]

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

[260] 1973 Tenn. Pub. Acts 901 *et seq*., ch. 235, §§ 1,3.

[261] Whether Tennessee's post-viability statute, *see* TENN. CODE ANN. § 39-15-201(c)(3) (2003), would effectively prohibit post-viability abortions is discussed in Appendix A.

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

[263] 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.

[264] 410 U.S. 113 (1973). Prior to *Roe*, the Texas Court of Criminal Appeals rejected a constitutional challenge to the statutes. *See 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).

Enforcement of the statutes was not enjoined. Although the pre-*Roe* abortion statutes have not been expressly repealed,[265] 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.[266] That holding is not binding upon a state court, but may be persuasive. Whether the pre-*Roe* statutes would be enforceable if *Roe v. Wade* were overruled thus depends on whether they have been repealed by implication, a question on which no state court has pronounced an opinion to date.[267]

UTAH

The pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[268] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[269] Pursuant to *Roe*, these statutes were declared unconstitutional in an

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[265] 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.

[266] *See McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), *cert. denied,* Feb. 22, 2005, Docket No 04-967.

[267] Whether, apart from the pre-*Roe* statutes, the Texas post-viability statute, *see* TEX. HEALTH & SAFETY CODE § 170.002 (West 2001), would effectively prohibit post-viability abortions is discussed in Appendix A.

[268] UTAH CODE ANN. § 76-2-1 (1953).

[269] *Id.* § 76-2-2. No prosecutions were reported under this statute. *See* n. 14, *supra*.

unreported decision of a three-judge federal district court.[270] The statutes were repealed in 1973.[271]

In 1991, Utah enacted comprehensive new abortion statutes.[272] Under those statutes, an abortion could be performed at any time of pregnancy if the procedure was "necessary to save the pregnant 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."[273] An abortion could also be performed during the first twenty weeks of gestation where the pregnancy resulted from a reported act of rape or incest.[274] Those statutes were declared unconstitutional by the federal courts.[275] The post-*Roe* statutes have not been repealed,[276] and would be enforceable if *Roe v. Wade* were overruled. Nevertheless, the statutory language allowing abortion "to prevent grave damage to the pregnant woman's medical health," could be subject to abuse. The Abortion Task Force Committee that

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

[271] 1973 Utah Laws 584, 684; ch. 196, (sub.) ch. 10, pt. 14, § 76-10-1401.

[272] *See* 1991 Utah Laws ch. 2 (1st Spec. Sess.)

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

[274] *Id*. §§ 76-7-302(b), -(c).

[275] *See 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).

[276] *See* nn. 273, 274, *supra*.

drafted the bill that the legislature enacted considered and rejected a definition of the "grave danger to maternal health" exception that would exclude mental health.[277]

VERMONT

The principal pre-*Roe* statute prohibited performance of an abortion on a woman unless the procedure was "necessary to preserve her life."[278] In *Beacham v. Leahy*,[279] 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,[280] 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.

[277] *See Jane L. v. Bangerter*, 794 F.Supp. 1537, 1544 (D. Utah 1992). The potential abuse of mental health exceptions is discussed in n. 31, *supra*.

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

[279] 287 A.2d 836 (Vt. 1972).

[280] VT. STAT. ANN. tit. 13, § 101 (1998).

VIRGINIA

The pre-*Roe* statutes were based on § 230.3 of the Model Penal Code.[281] An abortion could be performed only by a licensed physician in an accredited hospital when (1) continuation of the pregnancy was like 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.[282] 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,[283] 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.[284]

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

[282] *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. 31, *supra*.

[283] 1975 Va. Acts 18, ch. 14, § 1.

[284] Whether Virginia's post-viability statute, *see* VA. CODE ANN. § 18.2-74 (Michie 2004), would effectively prohibit post-viability abortions is discussed in Appendix A.

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,"[285] and made a woman's participation in her own abortion a criminal offense (subject to the same exception).[286] In November 1970, however, the voters approved by referendum a new abortion act.[287] This act, which by its terms did not repeal the older statutes,[288] allowed abortion on demand of a woman "not quick with child and not more than four lunar months after conception."[289] Following *Roe v. Wade*, the attorney general ruled 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 constitutional.[290] The parental consent

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

[286] *Id*. § 9.02.020. No prosecutions were reported under this statute. *See* n. 14, *supra*.

[287] *Id*. §§ 9.02.060 to 9.02.090.

[288] *Id*. § 9.020.060. An attorney general opinion, issued February 15, 1973, ruled that § 9.02.010 (one of the pre-referendum statutes) prohibited performance of an abortion after four lunar months unless the procedure was necessary to preserve the life of the mother or her unborn child. 1973 Op. Wash. Att'y Gen. 7, 9-10, 12 n.10. In light of the Supreme Court's decision in *Roe v. Wade*, however, this prohibition would not have been enforceable at any time before viability and after viability only if an exception were also made for any reason relating to the mother's health, broadly defined.

[289] *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*.

[290] *See* 1973 Wash. Op. Att'y Gen. 7, 11-14.

requirement was declared unconstitutional on federal constitutional grounds by the Washington Supreme Court in *State v. Koome*.[291] Washington repealed all of its pre-*Roe* statutes in 1991,[292] 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.[293]

WEST VIRGINIA

The pre-*Roe* statute prohibited performance of an abortion on a pregnant woman unless the procedure was done "in good faith, with the intention of saving the life of [the] woman or [her] child."[294] Pursuant to *Ro*e, the statute was declared unconstitutional by a federal court of appeals in *Doe v. Charleston Area Medical Center, Inc*.[295] The statute has not been repealed,[296] and may be enforceable if *Roe*

[291] 530 P.2d 260 (Wash. 1975).

[292] 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 2003). 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 2003). As previously noted, *see* n. 37, *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.

[293] Whether Washington's post-viability statutes, *see* WASH. REV. CODE ANN. §§ 9.02.110, 9.02.120 (West 2003), would effectively prohibit post-viability abortions is discussed in Appendix A.

[294] W.VA. CODE § 61-2-8 (1966).

[295] 529 F.2d 638 (4th Cir. 1975).

[296] W.VA. CODE ANN. § 61-2-8 (2000).

v. Wade should be overruled. Because of the West Virginia Supreme Court of Appeals decision in *Women's Health Center of West Virginia, Inc. v. Panepinto*,[297] however, there is some uncertainty as to 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*.[298] Whether *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."[299] In *Babbitz v.*

[297] 446 S.E.2d 658 (W.Va. 1993).

[298] *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); 667 ("for an indigent woman, the state's offer of 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).

[299] 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

McCann,[300] 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.[301] That injunction, however, was subsequently vacated by the Supreme Court.[302] The pre-*Roe* statute, which has not been repealed,[303] would be enforceable if *Roe v. Wade* were overruled.[304]

WYOMING

The principal pre-*Roe* statutes prohibited performance of an abortion on a pregnant woman unless the procedure was "necessary to preserve her life,"[305] 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."[306] Pursuant to *Roe*, the statutes were declared unconstitutional by the Wyoming Supreme Court

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misdemeanor. No prosecutions were reported under this subsection. *See* n. 14, *supra*.

[300] 310 F.Supp. 293 (E.D. Wis. 1970), *appeal dismissed*, 400 U.S.1 (1970).

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

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

[303] WIS. STAT. ANN. § 940.04 (West 1996 & Supp. 2004). The Wisconsin Supreme Court has held that § 940.04 has not been repealed by implication with enactment of post-*Roe* statutes regulating abortion. *See State v. Black*, 526 N.W.2d 132, 134-35 (Wis. 1994).

[304] Whether, apart from the pre-*Roe* statute, Wisconsin's post-viability statute, *see* WIS. STAT. ANN. § 940.15 (West Supp. 2004), would effectively prohibit post-viability abortions is discussed in Appendix A.

[305] WYO. STAT. § 6-77 (1957).

in *Doe v. Burk*,[307] and were later repealed.[308] 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.[309]

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[306] *Id*. § 6-78 (1957). No prosecutions under reported under this statute. *See* n. 14, *supra*.

[307] 513 P.2d 643 (Wyo. 1973).

[308] 1977 Wyo. Sess. Laws 11, 14, ch. 11, § 2.

[309] Whether Wyoming's post-viability statute, *see* WYO. STAT. ANN. § 35-6-102 (Michie 2003), 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). Only three of those States—Louisiana, Rhode Island and Utah—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). One other State—South Dakota—has enacted a "trigger" statute that would prohibit abortions except to preserve the life of the pregnant woman if state authority to regulate and prohibit abortion is restored. If *Roe*, as modified by *Casey*, were overruled, only the Louisiana and Rhode Island post-*Roe* statutes would effectively prohibit most abortions. The legislative history of the Utah statute suggests that abortions could be performed for reasons relating to the mental health of the pregnant woman, an exception which, based upon the experience of States (particularly California) before *Roe*, proved to be unworkable.

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), or because of state constitutional limitations (Massachusetts, Mississippi, 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*. Only three States that have not repealed their pre-*Roe* statutes would prohibit most abortions throughout pregnancy—Michigan, Oklahoma and Wisconsin. 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, Oklahoma, Rhode Island, South Dakota, Texas, Utah, West Virginia and Wisconsin—and very possibly as few as seven States—Louisiana, Michigan, Oklahoma, Rhode Island, South Dakota, Wisconsin and probably Arkansas—would have enforceable statutes on the books that would prohibit most abortions in the event *Roe* and *Casey* are overruled (the Arizona and West Virginia statutes may be unenforceable on state constitutional grounds; the Texas statutes may have been repealed by implication; and the Utah statute, depending upon how it is interpreted, may not effectively prohibit most abortions). These seven States

account for less than 10% of the total population in the United States. In the other forty-three States (and the District of Columbia), which account for more than 90% of the population, 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 some type of statute on the books 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.

Twenty 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).[310] Because health related abortions may include virtually any reason a woman may have for seeking an abortion, including psychological and emotional factors,[311] the undefined health exception in these statutes effectively allows post-viability (or late-term) abortions for any reason:

Arizona	Georgia	Maine	Oklahoma
Arkansas	Illinois	Michigan	South Dakota
California	Iowa	Minnesota	Tennessee
Connecticut	Kentucky	Missouri	Washington
Florida	Louisiana	Nebraska	Wisconsin

[310] ARIZ. REV. STAT. ANN. § 36-2301.01(A) (West 2003); ARK. CODE ANN.§ 20-16-705(a) (Michie 2000); CAL. HEALTH & SAFETY CODE § 123468 (West Supp. 2005); CONN. GEN. STAT. ANN. § 19a-602(b) (West 2003); FLA. STAT. ANN. §§ 390.011(8), 390.0111(1) (West 2002) (after 24th week); GA. CODE ANN. § 16-12-141(c) (2003); 720 ILL. COMP. STAT. ANN. 510/5 (West 2003); IOWA CODE ANN. § 707.7 (West 2003); KY. REV. STAT. ANN. § 311.780 (Michie 2001); LA. REV. STAT. ANN. § 40:1299.35.4 (West Supp. 2005); ME. REV. STAT. ANN. tit. 22, § 1598(4) (West 2004); MICH. COMP. LAWS ANN. § 750.14 (West 1991), as construed in *People v. Bricker*, 208 N.W.2d 172, 175-76 (Mich. 1973); MINN. STAT. ANN. § 145.412 subd. 3 (West 1998); MO. ANN. STAT. § 188.030 (West 2004); NEB. REV. STAT. ANN.§ 28-329 (Michie 2003); OKLA. STAT. ANN. tit. 63, § 1-732 (West 2004); S.D. CODIFIED LAWS § 34-23A-5 (Michie 1994) (after 24th week); TENN. CODE ANN.§ 39-15-201(c)(3) (2003); WASH. REV. CODE ANN. §§ 9.02.110, 9.02.120 (West 2003); WIS. STAT. ANN. § 940.15 (West Supp. 2004).

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

Six States expressly, impliedly or by court interpretation allow post-viability (or other late-term abortions) for mental, as well as physical, health reasons.[312] Thus, they effectively allow post-viability (or other late-term) abortions for any reason:

Massachusetts	North Dakota	Texas
Nevada	South Carolina	Virginia

Three 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.[313] As a result, they may be interpreted to allow post-viability abortions for virtually any reason:

North Carolina	Utah	Wyoming

Four States purport to forbid post-viability abortions except to save the life of the woman.[314] 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:

Delaware	New York
Idaho	Rhode Island

[312] 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 (Michie 2000) (after 24th week) (gravely impair physical or mental health); N.D. CENT. CODE § 14-02.1-04(3) (1997) (same); S.C. CODE ANN. § 44-41-20(c) (Law. Co-op. 2002) (life or physical or mental health); TEX. HEALTH & SAFETY CODE § 170.002 (West 2001) (serious impairment of physical or mental health) (also allows abortion after viability where fetus has severe and irremediable abnormality); VA. CODE ANN. § 18.2-74 (Michie 2004) (prevent death or substantial and irremediable impairment of mental or physical health).

[313] N.C. GEN. STAT. § 14.45.1(b) (2003) (after 20th week) (threat to life or grave impairment of health); UTAH CODE ANN. §§ 76-7-302(2), 76–302(3) (2003) (after 20 weeks gestational age) (prevent death or grave impairment to medical health) (also allows late abortions to prevent the birth of a child that would be born with grave defects), *see Jane L. v. Bangerter*, 794 F.Supp. 1537, 1544 (D. Utah 1992) (noting legislative history indicating an intent *not* to exclude mental health from scope of exception); WYO. STAT. ANN. § 35-6-102 (Michie 2003) (imminent peril that substantially endangers life or health)

[314] DEL. CODE ANN. tit. 24, § 1790(b)(1) (1997); IDAHO CODE § 18-608(3) (1997) (also allows abortion where pregnancy would result in 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); N.Y. PENAL LAW §§ 125.00, 125.05, 125.45 (McKinney 1998) (after 24th week); R.I. GEN. LAWS § 11-23-5 (2002).

One State attempts to prohibit post-viability abortions except to prevent substantial permanent impairment to the life or physical health of the woman.[315] The constitutionality of this statute has not been litigated.

Indiana

Five 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.[316] One of these statutes has been declared unconstitutional,[317] and another one has been construed (pursuant to 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.[318] The constitutionality of the other three statutes has not been determined in litigation.

Alabama	Montana	Pennsylvania
Kansas	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).[319] 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

[315] IND. CODE ANN. § 16-34-2-1(a)(3) (Michie Supp. 2003).

[316] ALA. CODE § 26-22-1 *et seq*. (Supp. 2004); KAN. STAT. ANN. § 65-6703 (2002); MONT. CODE ANN.§ 50-20-109 (2003); OHIO REV. CODE ANN. § 2919.17 (Anderson 2002); PA. CONS. STAT. ANN. tit. 18, § 3211 (West 2000) (during or after the 24th week).

[317] *Women's Medical Professional Corp. v. Voinovich*, 911 F.Supp. 1051, 1078-81 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187, 203-10 (6th Cir. 1997), *cert denied*, 523 U.S. 1036 (1999). *See also Jane L. v. Bangerter*, 102 F.3d 1112, 1118 n. 7 (10th Cir. 1996) (strongly implying that a statute purporting to restrict post-viability abortions to those necessary to prevent grave damage to the woman's health would be unconstitutional), *cert. denied sub nom. Leavitt v. Jane L.*, 520 U.S. 1274 (1997).

[318] *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), *cert. denied*, 529 U.S. 1012 (2000).

[319] *See* HAW. REV. STAT. § 453-16(a) (2002)

viable fetus is not included in this section."[320] Although it may have been the intent of the drafters of Hawaii's 1970 abortion-on-demand 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 the fetus is affected by a genetic defect or abnormality),[321] but the law itself does not *restrict* post-viability abortions to those reasons.

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, few of those statutes would have any impact on the incidence of such abortions because of their open-ended exceptions for health (or mental health).

[320] *Id*. § 453-16(b).

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

Appendix B

Section 230.3, Model Penal Code (1962), American Law Institute[322]

(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.

[322] 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.