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Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment.

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REEXAMINING *ROE:* NINETEENTH-CENTURY ABORTION STATUTES AND THE FOURTEENTH AMENDMENT

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I. INTRODUCTION: THE HISTORICAL FOUNDATION OF *ROE V. WADE*

In *Roe v. Wade,*[1] the United States Supreme Court held that (1) human fetuses are not "persons" protected by the fourteenth amendment, and (2) states do not have a "compelling interest" in protecting the lives of human fetuses, sufficient under the fourteenth amendment to justify prohibition of abortion, either before fetal viability, or even after viability where abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[2] The Court based these conclusions most fundamentally on its assertion of *historical fact* that the nineteenth-century state common law and statutory law of criminal abortion never manifested a recognition of the personhood of human fetuses.[3] This assertion is fundamentally

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

2. *See id.* at 157-62.

3. *See id.* at 161-62. In support of its critical historical conclusion that "the unborn have never been recognized in the law as persons in the whole sense," the Court asserted that at common law it was not a criminal offense to attempt to produce an abortion before "quickening," which the Court defined as "the first recognizable movement of the fetus *in utero,* appearing usually from the 16th to the 18th week of pregnancy." *See id.* at 132. Because the statements of American courts that post-quickening abortion was a common law crime were "dictum" and uncritically based on the erroneous assertions of Coke, the Court doubted that even post-quickening abortion was ever firmly established as a common law crime. *See id.* at 134-36 & n.26.

The Court asserted that the common law pertaining to abortion remained in effect in "all but a few states until [the] mid-19th century," and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law." *See id.* at 138-39. The Court asserted that most of these initial statutes were lenient towards pre-quickening abortion, did not impose any increased punishment if the attempt to produce abortion was completed, and permitted abortions advised by one or more physicians to be necessary to save the mother's life. *See id.* at 138-39. The Court favorably recounted the contention that the legislatures enacting these statutes did not intend thereby to protect the life of the fetus, but only to protect the health of the pregnant woman from dangerous abortion operations, saying that this contention is supported by the lack of legislative history showing an intent to protect the fetus, case law on abortion, the failure of many states to incriminate the woman's participation in her own abortion, and the imposition of lesser punishment for pre-quickening than for post-quickening abortion. *See id.* at 151-52. The Court concluded that these statutes are inconsistent with the personhood of the fetus under the fourteenth amendment because they permit abortions necessary to save the life of the mother, fail to incriminate the woman's participation in her own abortion, and impose a lesser punishment for abortion than for murder. *See id.* at 157-58 n.54.

The Supreme Court's analysis relied heavily on the following law review articles: Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?,* 17 N.Y.L.F. 335 (1971); Means, *The Law of New York Concerning Abortion and the* erroneous; the history of the development of the law of criminal abortion in the nineteenth century demonstrates that the legislatures ratifying the fourteenth amendment did consider human fetuses to be persons. Assuming like the *Roe* Court that this historical question is determinative of the issue, one must conclude that states have a "compelling interest" in protecting the lives of human fetuses throughout pregnancy, as three Supreme Court justices have recently concluded,[4] and that the Court erred in holding that state antiabortion statutes violate the fourteenth amendment.

II. THE COMMON LAW OF CRIMINAL ABORTION

The common law pertaining to criminal abortion implicitly recognized the personhood of the human fetus, and differences between that law and the common law of homicide are attributable primarily to difficulties of proof.[5] In the earliest periods of the common law, abortion causing the death of a living fetus was considered homicide.[6] However, the English courts soon discovered that it was difficult to *prove* that an attempted abortion caused the death of a living fetus, because it was difficult to prove that (1) the woman on whom the abortion was attempted was actually pregnant; (2) the fetus was alive at the time of the attempt; and (3) the attempt caused the death of the fetus.[7] Where it was proven that the child was born alive after the abortion, bearing the marks of the means used to produce abortion,

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Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y.L.F. 411 (1968).

4. *See* City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 460-61 (1983) (O'Connor, J., with White, J., and Rehnquist, J., dissenting) (*Roe* decision has inherent flaw, as there is "potential" life for state interest to attach at all points during pregnancy).

5. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807, 815-27 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment,* 63 CAL. L. REV. 1250, 1267-73 (1975). For a pre-*Roe* reply to the Means analysis, *see* G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 187-88, 190-93, 374-97 (1970). For arguments that the nineteenth-century American antiabortion statutes also manifested a recognition of the personhood of the human fetus, *see* G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 187-88, 190-93, 374-97 (1970); Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807, 827-35 (1973); Destro, *Abortion and the Constitution: The Need for a Life-Protective Amendment,* 63 CAL. L. REV. 1250, 1278-82; The Human Life Bill: Hearings Before the Subcommittee on Separation of Powers of the Committee on the Judiciary, U.S. Senate, 97th Cong., 1st Sess. 675-85 (1981) (prepared statement of Professor Joseph P. Witherspoon).

6. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807, 816 (1973).

7. *See id.* at 817-19.

and then died, these three facts could be inferred with sufficient certainty, and the actor was deemed guilty of *murder.*[8] In an instance where the mother had felt the child move within her, and the child was born dead after the abortion, it could be inferred with certainty that the woman was pregnant and that the child had been alive at the time of the movement. Proof of quickening, therefore, rendered it more probable, although not absolutely certain, that the child was alive at the time of the attempt, and that the attempt caused its death. Because of the uncertainty of these facts, the actor in such a case was deemed guilty not of homicide but rather of a "great misprision," or a "heinous misdemeanor."[9] Without proof of quickening, it was even less certain that the fetus was alive at the time of the attempt, and often there was no other sufficient proof that the woman was even pregnant; therefore, for this reason the actor was not criminally liable.[10] Clearly, the quickening doctrine was not based on an absurd belief that a living fetus is worthy of protection by virtue of its capacity for movement or its mother's perception of such movement. The occurrence of quickening was deemed significant *only* because it showed that the fetus was alive, and because it was *alive* and *human,* it was protected by the criminal law.[11] This solution was deemed acceptable as long as the belief persisted that the fetus was not alive until it began to move, a belief that would be refuted in the early nineteenth century.[12] Even before quickening, however, attempted abortions causing the death of the mother were deemed murder notwithstanding the mother's consent, because of the actor's unlawful *intent* to destroy the child.[13]

III. NINETEENTH-CENTURY CRIMINAL ABORTION STATUTES

A. *Displacement of the Common Law*

Even assuming that the common law did not recognize the per-

8. *See id.* at 819. The "live birth" required for homicide affords evidence that the child could have survived outside the womb after a normal gestation and, therefore, that the abortion deprived the child of a life outside the womb. *See id.* at 819.

9. *See id.* at 819-20 (citing E. COKE, THIRD INSTITUTE 50 (1644)).

10. *See id.* at 823-25 (proof of quickening deemed necessary to establish child was alive).

11. *Id.* at 825. Indeed, had medical science provided reliable testimony which verified that the fetus had a separate and distinct existence before quickening, earlier courts would have followed that standard. *See id.* at 825.

12. *See id.* at 825.

13. *See id.* at 822.

sonhood of human fetuses, the Supreme Court in *Roe* erred in inferring that legislatures that ratified that fourteenth amendment did not do so. The Court's statements that the common law on abortion remained in effect "in all but a few states until [the] mid-19th century," and that "[i]t was not until after the War Between the States that legislation began generally to replace the common law" are incorrect.[14] At the end of 1849 eighteen of the thirty states had enacted antiabortion statutes, and by the end of 1864 twenty-seven of the thirty-six states had done so. At the end of 1868, the year in which the fourteenth amendment was ratified, thirty of the thirty-seven states had such statutes, including twenty-five of the thirty ratifying states, along with six territories.[15] Because the common law of criminal abortion had been replaced or substantially altered by a statute in the vast majority of states before ratification of the fourteenth amendment, the understanding of the framers and ratifiers of that amend-

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14. *See* Roe v. Wade, 410 U.S. 113, 138-39 (1973).

15. By the end of 1849, the following states had antiabortion statutes: *Alabama,* Act of Jan. 9, 1841, ch. 6, § 2, 1841 ALA. ACTS 143; *Arkansas,* Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, §§ 5, 6 (1838); *Connecticut,* CONN. STAT. tit. 21, § 25 (1835); *Illinois,* ILL. REV. CODE, div. 5, § 46 (1833); *Indiana,* Act of Feb. 7, 1835, ch. 47, § 3, 1835 IND. GEN. LAWS 66; *Iowa,* Act of Feb. 16, 1843, IOWA REV. STAT. § 10 at 162-63; *Maine,* ME. REV. STAT. ch. 160, §§ 11-14 (1840); *Massachusetts,* Act of Jan. 31, 1845, ch. 27, 1845 MASS. ACTS 406; *Michigan,* MICH. REV. STAT. ch. 153, §§ 32-34 (1846); *Mississippi,* Act of Feb. 15, 1839, ch. 66, art. 1, tit. 3, art. 1, §§ 8, 9, 1839 MISS. LAWS 112-113; *Missouri,* Act of Mar. 20, 1835, MO. REV. STAT. art. 1, §§ 9, 10, 36 at 168-69, 172 (1835); *New Hampshire,* Act of Jan. 4, 1849, ch. 743, 1849 N. H. LAWS 708-09; *New Jersey,* Act of Mar. 1, 1849, 1849 N. J. LAWS 266-67; *New York,* Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19; *Ohio,* Act of Feb. 27, 1834, §§ 1, 2, 1834 OHIO LAWS 20-21; *Vermont,* Act of Oct. 30, 1846, No. 33, 1846 VT. ACTS 34-35; *Virginia,* Act of Mar. 14, 1848, tit. 1, ch. 3, § 9, 1848 VA. ACTS 96, VA. CODE tit. 54, ch. 191, § 8 (1849); and *Wisconsin,* WIS. REV. STAT. ch. 133, §§ 10-11 (1849).

By the end of 1864, the following states also had such statutes: *California,* Act of May 20, 1861, ch. 521, 1861 CAL. STAT. 588; *Kansas,* Act of Feb. 3, 1859, ch. 28, §§ 9, 10, 37, 1859 KANSAS LAWS 232-33, 237; *Louisiana,* LA. REV. STAT. § 24 at 138 (1856); *Minnesota,* MINN. REV. STAT. ch. 100, §§ 10-11 at 493 (1851); *Nevada,* Act of Nov. 26, 1861, ch. 28, div. 4, § 42, 1861 NEV. LAWS 63; *Oregon,* OR. STAT. ch. 3, § 13 (1854), Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *Pennsylvania,* Act of Mar. 31, 1860, No. 374, tit. 6, §§ 87-88, 1860 PA. LAWS 404-05; *Texas,* Act of Aug. 28, 1856, TEX. PEN. CODE arts. 531-36 (1856), 1858 TEX. GEN. LAWS 172; *West Virginia,* Act of Mar. 14, 1848, tit. 1, ch. 3, § 9, 1848 VA. ACTS 96, VA. CODE tit. 54, ch. 191, § 8 (1849).

By the end of 1868 these states had such statutes: *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, §§ 10-11, ch. 8, §§ 9-11, 1868 FLA. LAWS 64, 97; *Maryland,* Act of Mar. 28, 1868, ch. 179, 1868 MD. LAWS 314-16; *Nebraska,* Act of Feb. 12, 1866, NEB. REV. STAT. tit. 4, ch. 4, § 42 (1866).

Of the thirty states ratifying the fourteenth amendment as of July 21, 1868, all but Georgia, North Carolina, Rhode Island, South Carolina, and Tennessee had enacted antiabortion statutes.

ment, with respect to the personhood of human fetuses and the "value" of their lives, is presumably more reliably reflected in those statutes than in the common law, contrary to the Court's evident assumption.

B. *The Prohibition of Pre-Quickening Attempts and the Elimination of the Quickening Distinction*

In discussing early American law pertaining to abortion, the Supreme Court stated that "most of [the] initial statutes dealt severely with abortion after quickening but were lenient with it before quickening."[16] The Court also emphasized the fact that the Connecticut Legislature did not amend its 1821 antiabortion statute to proscribe pre-quickening abortions until 1860.[17] These statements are quite misleading. At the end of 1868, twenty-seven of the thirty states with antiabortion statutes prohibited attempts to induce abortion *before* quickening.[18]

While prohibiting all attempted abortions, some of these statutes required proof of quickening for application of an increased range of punishment.[19] Even more clearly than under the common law, these statutes did not attribute any greater value to fetal life because the mother had detected its movement. If the occurrence of quickening rendered the fetus more worthy of protection, attempted abortions should have been punished more severely upon proof of quickening

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16. *See* Roe v. Wade, 410 U.S. 113, 139 (1974).

17. *See id.* at 138-39.

18. Of the thirty states listed in n.15 *supra*, all but Arkansas, Minnesota, and Mississippi prohibited abortions before quickening by the end of 1868.

19. At the end of 1868, the following states required proof of quickening for application of an increased range of punishment: *Arkansas*, Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); *Florida*, Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, ch. 8, § 9, 1868 FLA. LAWS 64, 97; *Kansas*, Act of Mar. 3, 1868, ch. 31, art. 2, §§ 15, 44, 1868 KANSAS LAWS 320-21, 325; *Michigan*, MICH. REV. STAT. ch. 153, §§ 33-34 (1846); *Minnesota*, MINN. REV. STAT. ch. 100, § 11 (1851); *Mississippi*, Act of Feb. 2, 1857, MISS. CODE § 34, art. 173 (1857); *Missouri*, Act of Mar. 10, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, §§ 10, 34 (1865); *New Hampshire*, Act of Jan. 4, 1849, ch. 743, 1849 N.H. LAWS 708-09; *New York*, Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19; *Pennsylvania*, Act of Mar. 31, 1860, no. 374, tit. 6, §§ 87-88, 1860 PA. LAWS 404-05.

New York eliminated the requirement in 1869, but reinstated it in 1881. *See* Act of May 6, 1869, ch. 631, 1869 N.Y. LAWS 1502-03; Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 191, 3 N.Y. REV. STAT. at 2478-80 (1881). Minnesota eliminated the requirement in 1873. *See* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19.

alone. However, with very few exceptions, these statutes required for enhancement for punishment not only proof of quickening but also proof that the attempt caused the death of the fetus.[20] Even the few statutes under which proof of quickening was necessary for conviction or was sufficient by itself for enhancement of punishment[21] did not manifest a belief that quickening renders the fetus more worthy of protection. In each case, as under the common law, proof of quickening was deemed necessary to support the inference that the attempt caused the death of a living fetus.

Moreover, under an ever increasing majority of statutes, the occurrence or non-occurrence of quickening had no bearing whatsoever on the punishment applicable to attempted or completed abortions. At the end of 1868, twenty of the thirty states with antiabortion statutes punished abortions equally whether or not quickening had occurred. At the end of 1883, twenty-seven of the thirty-six states with antiabor-

20. All states listed in n.19 *supra* required proof of the death of the child except Kansas, Mississippi and New Hampshire. In *Roe,* the Supreme Court noted that the provision of increased punishment for post-quickening abortions was a response to greater maternal health risks in late-term abortions. *See* Roe v. Wade, 410 U.S. 113, 152 (1973). This argument is easily refuted by two additional points. First, there is absolutely no evidence and no reason to believe that attempted abortion became more dangerous to maternal health at the time of quickening. Second, in the nineteenth-century late-term abortions were *less dangerous* to maternal health than early abortions. *See* H. STORER, ON CRIMINAL ABORTION IN AMERICA 8 (1860) ("Granting that the attempt was only upon the mother's health or temporary welfare, how absurd to punish the offence in early pregnancy, where her risks are greatest, by a trifling penalty or not at all, and in more advanced pregnancy, where these risks are daily lessened, with increased severity.").

21. *See* Act of Jan. 4, 1849, ch. 743, 1849 N.H. LAWS 708-09 (New Hampshire law provided for increased range of punishment for attempted abortions after quickening, without requiring proof that attempt caused death); HAW. PEN. CODE § 1 (1850) (Kingdom of Hawaii law required no proof that attempted abortion actually caused death of quick child, but provided an enlarged measure of punishment for attempted abortions after quickening); *see also* Act of Dec. 10, 1828, N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 9 (1828) (New York law declared mere attempted abortion to be manslaughter if performed after quickening). Obviously, the legislature did not intend that the mere attempt would be manslaughter unless the attempt was shown to have caused the death of the quick child, and the New York law was amended in 1830 to so provide. *See* Act of Apr. 20, 1830, ch. 320, § 58, 1830 N.Y. LAWS 401. However, this error in the 1828 law was incorporated into the 1835 Missouri law, the 1839 Mississippi law, the 1845 New York law, and the 1855 Kansas law. *See* Act of Feb. 15, 1839, ch. 66, art. 1, tit. 3, art. 1, § 9, 1839 MISS. LAWS 112-113; Act of Mar. 20, 1835, MO. REV. STAT. art. 2, § 10 (1835); Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; ch. 48, § 10, 1855 KANS. TERR. STAT. 238, 243-44. This defect was corrected in New York in 1846, in Missouri in 1865, and in Mississippi in 1892. *See* Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19; Act of Mar. 20, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 10 (1865); Act of April 12, 1892, MISS. REV. CODE § 1157 (1892).

tion statutes did so.[22]

C. *The Crucial Significance of the Death of the Unborn Child*

Instead of the occurrence of quickening, the crucial factor which determined the range of punishment applicable to an attempted abortion was whether the attempt caused the death of the child. Shortly after the adoption of the fourteenth amendment, a majority of the states with antiabortion statutes provided for an increased punishment if it were proven that the attempt killed a fetus. Some of these statutes also required proof of quickening for enhancement of punishment as support for the conclusion that the attempt had caused the death of a living fetus, but a majority did not. For example, on February 18, 1870, thirty-two states had ratified the fourteenth amendment. Twenty-seven of these had antiabortion statutes. Fourteen of these twenty-seven provided for a higher range of punishment if it were proven that the attempted abortion caused the death of the fetus, and eight of these did not require proof of quickening.[23] By 1883,

22. By the end of 1868, the occurrence of quickening was irrelevant to the determination of the applicable range of punishment in the following states: *Alabama,* ALA. CODE § 3605 (1867); *California,* Act of May 20, 1861, ch. 521, 1861 CAL. STAT. 588; *Connecticut,* CONN. GEN. STAT. tit. 12, ch. 2, §§ 22-25 (1866); *Illinois,* Act of Feb. 28, 1867, 1867 ILL. LAWS 89; *Indiana,* Act of Mar. 5, 1859, ch. 81, 1859 IND. LAWS 130-31; *Iowa,* Act of Mar. 15, 1858, ch. 58, 1858 IOWA ACTS 93; *Louisiana,* LA. REV. STAT. § 24 at 138 (1856); *Maine,* ME. REV. STAT. tit. 11, ch. 124, § 8 (1857); *Maryland,* Act of Mar. 18, 1868, ch. 179, 1868 MD. LAWS 314-16; *Massachusetts,* MASS. GEN. STAT. ch. 165, §§ 9-11 (1860); *Nebraska,* Act of Feb. 12, 1866, NEB. REV. STAT. tit. 4, ch. 4, § 42 (1866); *Nevada,* Act of Nov. 26, 1861, ch. 28, div. 4, § 42, 1861 NEV. LAWS 63; *New Jersey,* Act of Mar. 1, 1849, 1849 N.J. LAWS 266-67; *Ohio,* Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36; *Oregon,* Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *Texas,* TEX. PEN. CODE arts. 531-36 (1856), 1858 TEX. GEN. LAWS 172; *Vermont,* Act of Nov. 21, 1867, no. 57, 1867 VT. ACTS 64-66; *Virginia,* VA. CODE tit. 54, ch. 191, § 8 (1849); *West Virginia,* VA. CODE tit. 54, ch. 191, § 8 (1860); *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 11, ch. 169, § 58 (1858).

By 1883, the following states were added to this list: *Colorado,* COLO. REV. STAT. ch. 11, § 42 (1868); *Delaware,* Act of Feb. 13, 1883, ch. 226, 1883 DEL. LAWS 522; *Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113; *Minnesota,* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *North Carolina,* Act of Mar. 12, 1881, ch. 351, 1881 N.C. LAWS 584-85; *South Carolina,* Act of Dec. 24, 1883, no. 354, 1883 S.C. ACTS 547-48; *Tennessee,* Act of Mar. 26, 1883, ch. 140, 1883 TENN. ACTS 188-89. These statutes fall into two categories: (1) statutes which prohibit attempted abortions throughout pregnancy and do not provide for increased punishment in event of death of fetus, or if attempt performed after quickening; (2) statutes which prohibit attempted abortions throughout pregnancy (either through separate section for mere attempted abortion, or general criminal attempt laws) and provide for increased punishment in event of completion of abortion or death of any fetus, whether quick or not.

23. The fourteen ratifying states that provided for increased punishment upon proof that

twenty of the thirty-six states with antiabortion statutes provided for an increased range of punishment if it were proven that the attempted

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the attempt caused the death of the fetus were the following: *Arkansas,* Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, ch. 8, § 9, 1868 FLA. LAWS 64, 97; *Maine,* ME. REV. STAT. tit. 11, ch. 124, § 8 (1857); *Michigan,* MICH. REV. STAT. ch. 153, §§ 33-4 (1846); *Minnesota,* MINN. REV. STAT. ch. 100, § 11 (1851); *Missouri,* Act of Mar. 20, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 10, 34 (1865); *New York,* Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; Act of Mar. 4, 1846, 1846 N.Y. LAWS 19; *Ohio,* Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36; *Oregon,* Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *Pennsylvania,* Act of Mar. 31, 1860, no. 374, tit. 6, §§ 87-88, 1860 PA. LAWS 404-05; *Texas,* TEX. PEN. CODE art. 531 (1856), 1858 TEX. GEN. LAWS 172; *Virginia,* VA. CODE tit. 54, ch. 191, § 8 (1849); *West Virginia,* W. VA. CODE ch. 144, § 8 (1868); *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 11, ch. 169, § 58 (1858). Of these, Arkansas, Florida, Michigan, Minnesota, Missouri, and Pennsylvania also required proof of quickening.

For the sake of simplicity, two types of statutes have been included in the lists in this and the following note as statutes which provide for an increased range of punishment if it is proven that the abortion caused the death of the fetus. One type of statute expressly and specifically provides for one range of punishment for the mere attempt, and expressly provides, usually in a different section, an increased range of punishment for abortions causing the abortion or death of the child. The other type requires proof that the abortion was completed or that the abortion caused the death of the child as an element of the offense, and does not expressly provide for punishment of the mere attempt to induce abortion. However, the mere attempt undoubtedly constituted an offense in states with such statutes, subject to lesser punishment, under general attempt statutes or common law principles. Both of these types of statutes make the criminal liability or the punishment of the abortionist dependent on whether the attempt causes the abortion or death of the fetus, and therefore both equally demonstrate the point made in the text.

Also for sake of simplicity, in this article statutes which provide an increased range of punishment for attempts proven to have caused *an abortion* are included as statutes which provide an increased range of punishment for attempted abortions proven to have caused *the death of the child,* even though the latter need not be proven. This inclusion is legitimate for the following reason. A completed abortion (separation of the child from the mother) may accidentally be more dangerous to the mother's health than an unsuccessful attempt, but it is almost always fatal to the child. By providing enhanced punishment for attempts actually causing *an abortion,* states obviously intended to protect the life of the child, not just the health of the mother, just as much as the states providing increased punishment for attempts causing *the death of the child.* However, an act causing an abortion does not always cause the death of the child: the child may survive the abortion, or may already be dead, or may die from other causes. It is probably easier to prove that an attempt caused an abortion than to prove that it caused the death of the child.

Finally, only the following statutes provided increased punishment for completion of the abortion rather than the death of the child: *Indiana,* Act of Apr. 14, 1881, ch. 37, § 22, 1881 IND. LAWS 177; Act of Mar. 8, 1905, ch. 169, § 367, 1905 IND. LAWS 663-64; *Maryland,* Act of Mar. 20, 1867, ch. 185, § 11, 1867 MD. LAWS 342-44; *Texas,* Act of Aug. 28, 1856, TEX. PEN. CODE art. 531 (1856); *Wyoming,* ch. 73, § 31, 1890 WYO. LAWS 131. The 1849 Virginia and 1868 West Virginia statutes provided an increased range of punishment if it was proven either that the attempt "destroyed the child" *or* produced the abortion. *See* VA. CODE tit. 54, ch. 191, § 8 (1849); W. VA. CODE ch. 144 § 8 (1868).

abortion caused the death of a fetus, and fourteen of these did so without also requiring proof of quickening.[24]

The significance of the statutes providing for an increased range of punishment, if it could be proven that the attempted abortion caused the death of the fetus, is obvious. The death of the fetus is totally irrelevant to the health of the mother. If the state antiabortion statutes were intended solely to protect the health of the pregnant woman, there would be no reason whatsoever for the state legislatures to authorize the judge or jury to assess a greater punishment if it were proven that the attempted abortion killed the fetus. The only explanation of this element of these statutes is that the enacting legislatures attributed value to the life of the unborn child.

Of course, the statutes, which did not expressly provide for an increased range of punishment if it were proven that the attempted abortion killed the fetus, do not show that the primary intent of the legislatures in enacting these statutes was not to protect the unborn, or that they did not consider the unborn to be persons in the whole sense. In this respect it is very significant that in 1860 the Connecticut Legislature enacted a statute that was virtually a verbatim copy of one proposed by Dr. Horatio Robinson Storer, the leader of the antiabortion efforts of the American medical profession in the mid-nineteenth century. This statute did not expressly provide for increased punishment if it were proven that the attempt killed the fetus,

24. By the end of 1883, the following states provided enhanced punishment for attempts shown to have caused the death of the fetus: *Arkansas,* Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); Act of Nov. 8, 1875, no. 4, 1875 ARK. ACTS 5-6; *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, ch. 8, § 9, 1868 FLA. LAWS 64, 97; *Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113; *Indiana,* Act of Apr. 14, 1881, ch. 37, § 22, 1881 IND. LAWS 177; *Maine,* ME. REV. STAT. tit. 11, ch. 124, § 8 (1857); *Michigan,* MICH. REV. STAT. ch. 143, §§ 33-4 (1846); *Minnesota,* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *Missouri,* Act of Mar. 20, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, §§ 10, 34 (1865); *Nebraska,* Act of Mar. 4, 1873, NEB. GEN. STAT. ch. 58, ch. 2, § 6, ch. 6, § 39 (1873); *New Jersey,* Act of Mar. 25, 1881, ch. 191, 1881 N.J. LAWS 240; *New York,* Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, §§ 191, 194, tit. 10, ch. 4, § 295, ch. 7, §§ 318-21, 3 N.Y. REV. STAT. at 2478-80 (1881); *Ohio,* Act of April 13, 1867, 1867 OHIO LAWS 135-36; *Oregon,* Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *Pennsylvania,* Act of Mar. 31, 1860, no. 374, tit. 6, §§ 87-88, 1860 PA. LAWS 404-05; *South Carolina,* Act of Dec. 24, 1883, no. 354, 1883 S.C. ACTS 547-48; *Tennessee,* Act of Mar. 26, 1883, ch. 140, 1883 TENN. ACTS 188-89; *Texas,* Act of Aug. 28, 1856, TEX. PEN. CODE art. 531 (1856), 1858 TEX. GEN. LAWS 172; *Virginia,* Act of Mar. 14, 1878, ch. 311, ch. 2, § 8, 1878 VA. ACTS 281-82; *West Virginia,* ch. 118, § 8, 1882 W. VA. ACTS; *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 11, ch. 169, § 58 (1858). Of these, only Arkansas, Florida, Michigan, Missouri, New York, and Pennsylvania still also required proof of quickening.

notwithstanding Dr. Storer's insistence on the personhood of the unborn.[25] Statutes prohibiting attempted abortion throughout pregnancy without providing for increased punishment for attempts proven to have killed the fetus may only have been intended to supplement and not replace the common law, under which abortion causing the death of a quick child was already a "great misprision" or a "heinous misdemeanor."[26] Further, statutes providing a single broad range of punishment for all attempts, without expressly providing for an increased punishment if it were proven that the attempt caused the death of the fetus, may have contemplated that the judge or jury would assess a more severe punishment within the prescribed range if the evidence showed that the attempt caused the death of the fetus, even though this fact need not be proven to constitute the offense.[27] Also, almost every state enacted legislation in the nineteenth century prohibiting attempts to induce abortion throughout pregnancy, probably in response to the scientific discovery that the life of each human being begins at conception. Nevertheless, it was still difficult to prove with sufficient certainty in any particular case that the attempt caused the death of a living fetus. States which did not impose a higher range of punishment for attempts causing the death of the fetus may have just considered that it was so difficult to prove these facts that it was not worthwhile to encourage attempts to do so. States which provided for an increased range of punishment only if the attempt killed a quick child were simply following the common law view that it could not be reliably inferred that the attempt caused the death of an unborn child unless the mother had felt the child move. In addition, where attempts at abortion were punished throughout pregnancy, there was no urgent need to amend the statute to provide for an increased range of punishment for attempts which could be proven to have caused the death of a pre-quickened child. The abortionist could be convicted and punished under the attempt statute without such proof of causation. Finally, some states might have provided an increased range of punishment only if it were proven that the attempt caused the death of a quick child, partly because they considered post-quickening abortion to be more culpable than pre-quickening abor-

25. *See* H. STORER, ON CRIMINAL ABORTION IN AMERICA 99 (1860).

26. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807, 819-20, 823 (1973).

27. *See, e.g.,* Act of Nov. 21, 1867, no. 57, 1867 VT. ACTS 64-66 (three to ten years in jail); Act of May 10, 1861, ch. 521, 1861 CAL. STAT. 588 (two to five years imprisonment).

tion. The reasoning here is that the person who performed the abortion before quickening may have been laboring under the common misimpression that the life of the fetus did not begin until it began to move, but could not have done so if the child's movement was palpable.

D. *Equal Punishment of Abortions Killing Mother or Child*

Moreover, it is clear not only that nineteenth-century legislatures attributed value to the life of the unborn child, but that they considered the unborn child to be a "person" in the whole sense. At the end of 1868, fourteen states provided an increased range of punishment for attempted abortions resulting in the death of the child; of these, nine, all of which ratified the fourteenth amendment, expressly provided that the *same* range of punishment would apply if the attempt caused the death of the mother.[28] Six of these nine states required proof of quickening to support the finding that the attempt killed the child.[29] At the end of 1883, twenty states provided an increased range of punishment for attempts causing the death of the child; fourteen of these expressly provided that the same range of punishment would apply if the attempt caused the death of the mother. Nine of these fourteen did *not* also require proof of quickening for enhancement of punishment.[30] Of all the states which have provided an increased

28. The nine states which in 1868 imposed the same increased range of punishment for abortions killing the mother as for abortions killing the child were the following: *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, 1868 FLA. LAWS 64; *Michigan,* MICH. REV. STAT. ch. 153, § 33 (1867); *Minnesota,* MINN. REV. STAT. ch. 100, § 11 (1851); *Missouri,* Act of Mar. 20, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 10 (1866); *New York,* Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19; *Ohio,* Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36; *Oregon,* Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *Pennsylvania,* Act of Mar. 31, 1860, no. 374, tit. 6, § 87, 1860 PA. LAWS 404-05; *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 164 § 11 (1858).

Only statutes which *expressly* specify that the same range of punishment should apply to abortions causing the death of the mother as to abortions causing the death of the child have been included in the lists in this and the following note. Many statutes failed to specify what punishment should apply to abortions causing the death of the mother, leaving such abortions to be punished as any other attempted abortion, or as felony murder as under the common law.

29. Of the statutes listed in n.28 *supra,* only Ohio, Oregon, and Wisconsin did not require proof of quickening.

30. By the end of 1883, Georgia, Indiana, Nebraska, New Jersey, and South Carolina joined the nine states listed in n.28 *supra. See Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113; *Indiana,* Act of Apr. 14, 1881, ch. 37, § 22, 1881 IND. LAWS 177, 193-94; *Nebraska,* Act of Mar. 4, 1873, NEB. GEN. STAT. ch. 58, ch. 2, § 6 (1873); *New Jersey,* Act of

range of punishment if it were proven that the attempt killed the fetus, at least twenty-one states and the District of Columbia[31] have at some time expressly provided that the same range of punishment should apply to an attempt resulting in the death of the mother; only three ever expressly provided that a higher range of punishment should apply to an attempt resulting in the death of the mother.[32]

Some might argue that these statutes do not necessarily imply the personhood of the unborn, because the punishment for attempted abortions causing the death of the mother might have been reduced because she consented to the abortion. However, as discussed later,[33] there are other considerations which militate against imposing severe punishment for attempted abortion even though it caused the death of the mother or child. These factors more or less balance each other, to the extent the legislatures can be presumed to have consciously con-

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Mar. 25, 1881, ch. 191, 1881 N.J. LAWS 240; *South Carolina,* Act of Dec. 24, 1883, no. 354, 1883 S.C. ACTS 547-48. By 1883, only Florida, Michigan, Missouri, New York and Pennsylvania also required proof of quickening among these fourteen states.

31. *See Alaska,* Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899); *District of Columbia,* Act of Jan. 19, 1872, 1872 D.C. ACTS 26-29, Act of Mar. 3, 1901, ch. 854, § 809, 31 STAT. 1189, 1322 (1901); *Florida**, Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, 1868 FLA. LAWS 64; *Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113; *Indiana,* Act of Apr. 14, 1881, ch. 37, § 22, 1881 IND. LAWS 177, 193-94; *Michigan**, MICH. REV. STAT. ch. 153, § 33 (1846); *Minnesota,* MINN. REV. STAT. ch. 100, § 11 at 493 (1851*), Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *Missouri**, Act of Mar. 20, 1865, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 10 (1865); *Nebraska,* Act of Mar. 4, 1873, NEB. GEN. STAT. ch. 58, ch. 2, § 6 (1873); *New Jersey,* Act of Mar. 26, 1872, ch. 337, 1872 N.J. LAWS 45-46, Act of Mar. 25, 1881, ch. 191, 1881 N.J. LAWS 240; *New Mexico**, Act of Feb. 15, 1854, no. 28, § 11, 1854 N.M. LAWS 88; Act of Mar. 18, 1907, ch. 31, § 6, 1907 N.M. LAWS 42; *New York,* Act of Apr. 20, 1830*, ch. 320, § 58, 1830 N.Y. LAWS 401; Act of Mar. 4, 1846*, ch. 22, 1846 N.Y. LAWS 19; Act of May 6, 1869, ch. 631, 1869 N.Y. LAWS 1502-03; Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10; Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 191, 3 N.Y. REV. STAT. 2478-80 (1881*); *North Dakota**, Act of Feb. 17, 1877, DAK. PEN. CODE § 252; *Ohio,* Act of Feb. 27, 1834*, § 2, 1834 OHIO LAWS 20-21; Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36; *Oklahoma** OKLA. STAT. § 2098 (1890); *Oregon,* OR. STAT. ch. 3, § 13 (1854*); Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *Pennsylvania**, Act of Mar. 31, 1860, no. 374, tit. 6, § 87, 1860 PA. LAWS 404-05; Act of June 24, 1939, no. 375, § 525, art. 7, § 719, 1939 PA. LAWS 958; *South Carolina,* Act of Dec. 24, 1883, no. 354, 1883 S.C. ACTS 547-48; *South Dakota**, Act of Feb. 17, 1877, DAK. PEN. CODE § 252, S.D. COMP. LAWS §§ 4022 (1929); *Washington**, Act of Apr. 28, 1854, WASH. TERR. STAT. ch. 2, § 37 at 81-82 (1854); *Wisconsin**, WIS. REV. STAT. ch. 133, § 11 (1849), Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 11 (1858); *Wyoming,* ch. 73, § 31, 1890 WYO. LAWS 131. Statutes marked with an asterisk required proof of quickening for enhanced punishment.

32. *See Kentucky,* Act of Mar. 22, 1910, ch. 57, 1910 KY. ACTS 189-90; *Texas,* Act of Aug. 28, 1856, TEX. PEN. CODE arts. 531, 534 (1856); *West Virginia,* W. VA. CODE ch. 61, art. 2, § 8 (1931).

33. *See* nn.63-69 *infra* & accompanying text.

sidered them, and the only plausible explanation for the provision of the same range of punishment for attempted abortions killing the mother as for those killing the child is that the legislatures considered the mother and child to be equal in their personhood.

E. *Attempted Abortion and Other Acts Killing Unborn Child Declared Manslaughter*

Perhaps the most conclusive evidence that nineteenth-century legislatures considered unborn children to be persons in the whole sense is that so many declared attempted abortions causing the death of the fetus to be *manslaughter.* By the end of 1868, eight states (all of which ratified the fourteenth amendment) had statutes declaring attempts causing the death of an unborn child to be manslaughter. Six of these required proof of quickening.[34] The territory of New Mexico declared attempts killing a quick child to be murder.[35] Two more states, by an obvious error, declared post-quickening attempted abortion to be manslaughter without requiring that the abortion kill the child.[36] The New York Legislature, deleting the word "quick," declared attempts killing a "child" to be manslaughter in 1869,[37] and the Legislative Assembly of the District of Columbia, acting under

34. At the end of 1868, the eight states declaring abortion causing the death of the child to be manslaughter were the following: *Arkansas,* Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, 1868 FLA. LAWS 64 (designated offense as manslaughter "in the second degree"); *Michigan,* MICH. REV. STAT. ch. 153, § 33 (1846); *Minnesota,* MINN. REV. STAT. ch. 100, § 11 (1851) (second degree manslaughter); *Missouri,* Act of Mar. 20, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 10 (1865) (manslaughter in second degree); *New York,* Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19 (abortion considered second degree manslaughter); *Oregon,* Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 11 (1858). The statutes of Oregon and Wisconsin did not require proof of quickening.

35. *See* Act of Feb. 15, 1854, no. 28, § 11, 1854 N.M. LAWS 88.

36. *See* Act of Mar. 3, 1868, ch. 31, art. 2, § 15, 1868 KANS. LAWS 320-21; Act of Feb. 2, 1857, MISS. CODE § 34, art. 173 (1857).

37. *See* Act of May 6, 1869, ch. 631, 1869 N.Y. LAWS 1502-03. In 1872, the New York Court of Appeals, obviously in error and over an unanswerable dissenting opinion, read the word "quick" back into the New York statute. *See* Evans v. People, 49 N.Y. 86, 90-91 (1872) (fetal quickening, which signifies beginning of life, must occur before charge of manslaughter for abortion may be sustained). Several days later the legislature removed the word "manslaughter" from the statute and simply declared abortion causing the death of the mother or child to be a felony. *See* Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10. However, in 1881 the legislature conformed the statute to the court of appeals' decision and required proof of quickening to constitute abortion manslaughter. *See* Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 191, 3 N.Y. REV. STAT. at 2478-80 (1881).

authority of Congress, did so in 1872, less than three and one-half years after the fourteenth amendment was ratified.[38] In 1876, the Georgia Legislature enacted a statute providing that a person who attempted an abortion on a woman "pregnant with a *child* . . . shall, in case the death of *such child* or mother be thereby produced, be declared guilty of an *assault with intent to murder.*"[39] In 1899 Congress, enacting a penal code for Alaska, followed Oregon law and declared attempted abortion causing the death of a "child" to be manslaughter.[40]

It is also important to note that a significant number of states enacted a law providing that acts other than acts intended to produce abortion would constitute manslaughter (or murder, in New Mexico) if they killed an unborn child.[41] These laws were modeled on the 1828 New York law which provided that "[t]he 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 in the first degree."[42] Wisconsin followed this statute to a great extent but deleted the word "quick" in 1858.[43] In 1876, the Georgia Legislature provided that "the wilful killing of an unborn child, so far developed as to be ordinarily called quick," by any such injury to the mother, was a felony "punishable by death or

38. *See* Act of Jan. 19, 1872, 1872 D.C. ACTS 26-29.

39. *See* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113.

40. *See* Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899).

41. *See Arkansas,* Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, § 5 (1838); *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 10, 1868 FLA. LAWS 64; *Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113; *Iowa,* Act of Feb. 16, 1843, IOWA REV. STAT. § 10 at 162-63; *Kansas,* ch. 48, § 9, 1855* KANS. TERR. STAT. 238; *Michigan,* MICH. REV. STAT. ch. 153, § 32 (1846); *Minnesota,* MINN. REV. STAT. ch. 100, § 10 (1851)* (unborn infant child); *Mississippi,* Act of Feb. 15, 1839*, ch. 66, art. 1, tit. 3, art. 1, § 8, 1839 MISS. LAWS 112-13; *Missouri,* Act of Mar. 20, 1835*, MO. REV. STAT. art. 2, § 9 (1835); Act of Mar. 20, 1865*, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 9 (1865); *New Mexico,* Act of Feb. 15, 1854, no. 28, § 10, 1854 N.M. LAWS 88 (murder in third degree); Act of Mar. 18, 1907, ch. 36, § 5, 1907 N.M. LAWS 42 (murder in second degree); *New York,* Act of Dec. 10, 1828*, N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 8 (1828); Act of July 26, 1881*, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 190, 3 N.Y. REV. STAT. 2478-80 (1881); *North Dakota,* Act of Feb. 17, 1877*, DAK. PEN. CODE § 251, DAK. COMP. LAWS § 6451 (1887); *Oklahoma,* OKLA. STAT. § 2097 (1890)*; OKLA. REV. LAWS § 2322 (1910)*; *South Dakota,* Act of Feb. 17, 1877*, DAK. PEN. CODE § 251, DAK. COMP. LAWS § 6451 (1887); *Wisconsin,* WIS. REV. STAT. ch. 133, § 10 (1849)*, Act of May 17, 1858*, WIS. REV. STAT. ch. 164, § 10 (1858). Statutes marked with an asterisk designated the offense as manslaughter "in the first degree." All statutes required proof of quickening except the 1858 Wiconsin statute.

42. *See* Act of Dec. 10, 1828, N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 8 (1828).

43. *See* Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 10 (1858).

imprisonment for life."[44] These statutes inflicted a greater punishment on a person if he killed an unborn child by "an injury to the mother" rather than by an attempted abortion, apparently recognizing the lesser culpability of the actor in the abortion context. By the end of 1868, nine states, all but one of which had ratified the fourteenth amendment[45], had statutes of this type, and several other states later enacted similar statutes.[46]

In all, seventeen states and the District of Columbia at some time had a statute denominating acts causing the death of an unborn child "manslaughter," "murder," or "assault with intent to murder."[47] Ten states, nine of which had ratified the fourteenth amendment, had such statutes at the end of 1868.[48] Obviously, these legislatures would not have used these words unless they considered the unborn to be persons in the whole sense.

44. *See* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113.

45. Arkansas, Florida, Kansas, Michigan, Minnesota, Mississippi, Missouri, New York, Wisconsin. Only Mississippi had not ratified the fourteenth amendment.

46. *See Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113; *North Dakota,* Act of Feb. 17, 1877, DAK. PEN. CODE § 251, DAK. COMP. LAWS § 6451 (1887); *Oklahoma,* OKLA. STAT. § 2097 (1890), OKLA. REV. LAWS § 2322 (1910); *South Dakota,* Act of Feb. 17, 1877, DAK. PEN. CODE § 251, DAK. COMP. LAWS § 6451 (1887).

47. *See Alaska,* Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899); *Arkansas,* Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, §§ 5, 6 (1838); *District of Columbia,* Act of Jan. 19, 1872, 1872 D.C. ACTS 26-29; *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, §§ 10-11, 1868 FLA. LAWS 64; *Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113; *Iowa,* Act of Feb. 16, 1843, IOWA REV. STAT. § 10; *Kansas,* ch. 48, §§ 9, 10, 1855 KANS. TERR. STAT. 238; *Michigan,* MICH. REV. STAT. ch. 153, §§ 32-33 (1846); *Minnesota,* MINN. REV. STAT. ch. 100, §§ 10, 11 at 493 (1851); *Mississippi,* Act of Feb. 15, 1839, ch. 66, art. 1, tit. 3, art. 1, §§ 8, 9, 1839 MISS. LAWS 112-13; *Missouri,* Act of Mar. 20, 1835, MO. REV. STAT. art. 2, §§ 9, 10 (1835); Act of Mar. 20, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, §§ 9, 10 (1865); *New Mexico,* Act of Feb. 15, 1854, no. 28, §§ 10-11, 1854 N.M. LAWS 88; Act of Mar. 18, 1907, ch. 36, §§ 5, 6, 1907 N.M. LAWS 42; *New York,* Act of Dec. 10, 1828, N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, §§ 8-9 (1828); Act of Apr. 20, 1830, ch. 320, § 58, 1830 N.Y. LAWS 401; Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19; Act of May 6, 1869, ch. 631, 1869 N.Y. LAWS 1502-03; Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, §§ 190-91, 3 N.Y. REV. STAT. 2478-80 (1881); *North Dakota,* Act of Feb. 17, 1877, DAK. PEN. CODE §§ 251-52, DAK. COMP. LAWS §§ 6451-52 (1887); *Oklahoma,* OKLA. STAT. §§ 2097-98 (1890), OKLA. REV. LAWS §§ 2322-23 (1910); *Oregon,* OR. STAT. ch. 3, § 13 (1854); Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *South Dakota,* Act of Feb. 17, 1877, DAK. PEN. CODE §§ 251-52, DAK. COMP. LAWS §§ 6451-52 (1887), S.D. COMP. LAWS §§ 4022 (1929); *Wisconsin,* WIS. REV. STAT. ch. 133, §§ 10-11 (1849); Act of May 17, 1858, WIS. REV. STAT. ch. 164, §§ 10-11 (1858).

48. Arkansas, Florida, Kansas, Michigan, Minnesota, Mississippi, Missouri, New York, Oregon, Wisconsin. Only Mississippi had not ratified the fourteenth amendment.

IV. Legislative Recognition of Personhood of Unborn Child in Narrow Scope of Therapeutic Exception

One of the strongest legislative recognitions of the "personhood" of the unborn is the narrow scope of the "therapeutic exceptions" to the statutory prohibitions on abortion enacted by nineteenth-century legislatures. With only a few exceptions, the state antiabortion statutes enacted between 1828 and 1960 excepted from criminal prohibitions only those abortions which were, or were believed by the actor and/or a physician or physicians to be, necessary to preserve the life of the pregnant woman, or done for that purpose.[49] By prohibiting all abortions except those necessary or thought to be necessary to preserve the life of the mother, the state legislatures manifested their belief that no lesser beneficial consequence could justify the destruction of the unborn child. If the legislatures did not consider the child to be a person in the whole sense, undoubtedly they would not have required the mother to bear serious health risks and heavy burdens in order to preserve the life of the child. Furthermore, if the legislatures had not

49. With the few exceptions listed below, all of the statutes designated at least one, and sometimes more than one, of the following circumstances as necessary to be present before an attempt to induce abortion would be excepted from criminal liability: (1) the abortion was actually necessary to preserve the mother's life; (2) the actor believed the abortion to be necessary to preserve the mother's life; (3) one or more physicians advised the abortion to be necessary to preserve the mother's life; (4) the act was done with the intent to preserve the mother's life. Colorado, from and after 1868, Wyoming, from 1869 to 1890, and New Mexico, from and after 1919, permitted the performance of abortions to prevent "serious and permanent bodily injury" to the pregnant woman. *See* COLO. REV. STAT. ch. 11, § 42 (1868); ch. 3, § 25, 1869 WYO. LAWS 104; Act of Feb. 21, 1919, ch. 4, 1919 N.M. LAWS 6. Since 1867, Maryland permitted regular practitioners of medicine to induce abortions when they deemed it necessary to secure the mother's "safety." *See* Act of Mar. 20, 1867, ch. 185, § 11, 1867 MD. LAWS 342-44. Between 1867 and 1874 Illinois permitted abortions "for *bona fide* medical or surgical purposes." Act of Feb. 18, 1867, 1867 ILL. LAW. § 89. In the District of Columbia, from and after 1901, and Alabama, from and after 1951, abortions were permitted when necessary to preserve the mother's health. *See* Act of Mar. 3, 1901, ch. 854, § 809, 31 STAT. 1189, 1322 (1901); Act of Sept. 12, 1951, no. 956, 1951 ALA. ACTS 1630. The following statutes prohibited only those abortions performed "unlawfully," "feloniously," or "without lawful justification," leaving the precise definition of these terms to the judiciary: *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, ch. 8, § 9, 1868 FLA. LAWS 64, 97; *Louisiana,* LA. REV. STAT. § 24 (1856); *Massachusetts,* Act of Jan. 31, 1845, ch. 27, 1845 MASS. ACTS 406; *New Jersey,* Act of Mar. 1, 1849, 1849 N.J. LAWS 266-67; Act of Mar. 26, 1872, ch. 337, 1872 N.J. LAWS 45-46; Act of Mar. 25, 1881, ch. 191, 1881 N.J. LAWS 240; *Pennsylvania,* Act of Mar. 31, 1860, no. 374, tit. 6, §§ 87-88, 1860 PA. LAWS 404-05; Act of June 24, 1939, no. 375, §§ 718-719, 1939 PA. LAWS 958; *Texas,* Act of Feb. 9, 1854, § 1, 1854 TEX. GEN. LAWS 58; *Vermont,* Act of Oct. 30, 1846, no. 33, 1846 VT. ACTS 34-35. By 1868, Texas and Vermont had both limited the exception to abortions necessary to save the mother's life.

considered the child to be a "person," surely their overriding concern in regulating abortion would have been to protect the health of pregnant women. Legislatures would have defined the therapeutic exception so as to minimize the number and gravity of injuries to women resulting from pregnancy, childbirth, and induced abortion. If it would have *reduced* the number and severity of such injuries to permit physicians, after due consultation, to perform abortions found necessary to prevent serious health injury to the woman, and not just those necessary to save her life, the legislatures would have done so. The legislatures knew that most abortions, especially those performed by incompetent doctors or laymen, were more dangerous to the health of the woman than continuation of pregnancy and childbirth.[50] However, there is much evidence that abortions performed by skillful physicians, after due consultation, were not nearly so dangerous, even in the mid-nineteenth century,[51] and that legislatures believed that it would *promote* maternal health to permit such abortions when deemed necessary by physicians to prevent serious injury to the woman. For example, the legislatures of Colorado and Wyoming permitted abortions deemed necessary to protect the woman from "serious and permanent bodily injury," although in 1890 Wyoming eliminated this exception.[52] In 1881, an amendment was offered in the Indiana Legislature to permit abortion whenever necessary to preserve the mother's *health,* but was rejected;[53] surely the amendment would never have been offered if its effect would have been to endanger rather than promote the health of women. Even though they believed that it would promote maternal health to permit some abortions under carefully defined conditions, other than those necessary to save the mother's life, almost all of the nineteenth-century legislatures *refused to do so.* The only possible conclusion is that the legislatures permitted abortions only when necessary to preserve the life of the mother, because they believed that the avoidance of no lesser harm could justify an act which would kill the unborn child. This is an unequivocal indication that these legislatures considered the unborn to be persons in the whole sense.

50. *See* 1867 OHIO S.J. 234 (discussion of risks of abortion to maternal health).

51. *See* J. MOHR, ABORTION IN AMERICA 18-19, 64-65, 76-77 (1978).

52. *See* COLO. REV. STAT. ch. 11, § 42 (1868); ch. 3, § 25, 1869 WYO. LAWS 104; ch. 73, §§ 31, 32, 1890 WYO. LAWS 131.

53. *See* 1881 IND. H.J. 744.

Although the Supreme Court in *Roe* failed to recognize the significance of the narrowness of the therapeutic exceptions contained in the state statutes, it seized on the fact that they were not narrower. The Supreme Court's evident conclusion, that the inclusion in these statutes of the exception permitting abortions necessary to preserve the life of the mother demonstrates that the framers of these statutes, and that the framers and ratifiers of the fourteenth amendment, did not consider human fetuses to be persons,[54] is erroneous. This exception is based not on a legislative preference for the life of the mother over the life of the child, but on the general defense of "legal necessity," which is related to the defense of self-defense. These doctrines have been applied to authorize acts causing the death of innocent, *born* persons when necessary to avoid a harm that is deemed equal or greater. Although there is controversy concerning the circumstances in which one should be authorized to take actions causing the death of another person, statutory authorization of abortions deemed necessary to save the life of the mother clearly does not demonstrate a lack of legislative recognition of the personhood of the unborn child.[55]

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54. *See* Roe v. Wade, 410 U.S. 113, 157-58 n.54 (1974).

55. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807, 854-55 & n.277-78 (1973) (application of doctrine of legal necessity to abortions necessary to save mother's life not relevant to determination of personhood of fetus); MODEL PENAL CODE §§ 3.02, 3.03, 3.04. It has been held that one who kills an innocent person on a lifeboat to save the rest from starvation, or one who throws some passengers off a ship to keep it afloat and thereby save the remaining passengers, is nevertheless guilty of homicide. United States v. Holmes, 26 F. Cas. 360, 368-69 (C.C.E.D. Pa. 1842) (under some circumstances homicide justifiable, but not in this case); Regina v. Dudley & Stephens, 14 Q.B.D. 273, 281 (1884) (killing another who is "neither attacking nor threatening yours nor is guilty of any illegal act whatsoever" to save one's own life is not justifiable homicide). *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 381-88, 391-98 (1972); Krimmell & Foley, *Abortion: An Inspection Into the Nature of Human Life and Potential Consequences of Legalizing Its Destruction,* 46 U. CINN. L. REV. 725, 771-79 (1977) (there must be "wrongful attack" for innocent life to be taken); Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law,* 52 DENVER L. J. 839, 859-61 (1975) (common statutory language provides that if otherwise valid defense proven, conduct of killing innocent person justified). Surely the authors of the Model Penal Code did not consider this necessity defense to be inconsistent with the personhood of the victims; neither did the legislatures enacting anti-abortion statutes providing a life-of-the-mother exception consider this exception inconsistent with the personhood of the unborn child. Nevertheless, the life-of-the-mother exception may be considered consistent both with the personhood of the child and the stricter view reflected in the cases of *Holmes* and *Dudley & Stephens.* From the moral standpoint, some philosophers consider acts which in and of themselves kill a human being, i.e., "direct" or "intended" killing, to be absolutely impermissible, regardless of the magnitude of the beneficial ulterior consequences. Such acts would certainly include the acts condemned in *Holmes* and *Dudley & Stephens.* On the other hand, they recognize that acts intended to save the life of a person may be morally

V. REFERENCE TO THE FETUS AS A "CHILD" AND A "PERSON," AND CLASSIFICATION OF ABORTION WITH OFFENSES AGAINST BORN PERSONS

Another manifestation of the recognition by nineteenth-century legislatures of the personhood of the unborn is the language which they used to refer to the fetus, and their classification of abortion offenses. In marked contrast to those today who insist on the use of the term "fetus" in order to avoid any connotation of personhood, at the end of 1868 the statutes of at least twenty-three states[56] and six territories[57] referred to the fetus as a "child;" other states did the same at earlier or later dates.[58] It is unlikely that the state legislatures would have so referred to the fetus if they had not considered the fetus to be a "person."

Also, many states classified their abortion statutes among "offenses against the *person,*" "offenses against the lives and *persons* of individuals," and categories of statutes similarly denominated.[59] Where legis-

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permissible even though they cause the "unintended" and "incidental" result of the death of another innocent person, i.e., "indirect" killing. Such acts would include the acts of exclusive appropriation of a plank in a shipwreck, or the act of a mountaineer in cutting the line of his partner to prevent the weight from pulling him off the mountain, or firing a bullet to stop an aggressor. *See* J. FINNIS, NATURAL LAW & NATURAL RIGHTS 118-25 (1980). Some of these philosophers consider that abortions performed to save the life of the mother may fall into the latter category. However, realizing that such a distinction, based as it is on such subjective factors, cannot be written into the law, and perhaps recognizing that not all morally unjustifiable acts should be made the subject of criminal sanctions, they consider an "objective" life-of-the-mother exception (and possibly even other *limited* exceptions) to be justifiable and perfectly consistent with the personhood of the unborn child. *See* G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES, THE ARGUMENTS 321-46, 429-30 (1970). *But see* Krimmel & Foley, *Abortion: An Inspection Into The Nature of Human Life and Potential Consequences of Legalizing Its Destruction,* 46 U. CINN. L. REV. 725, 771-79 (1977). Finally, it should be noted that some consider that a woman has a moral and constitutional right to obtain an abortion without limitation even if the fetus is a person in the moral and constitutional sense. Thomson, *A Defense of Abortion,* 1 PHIL. & PUB. AFF. 47 (1971); Regan, *Rewriting Roe v. Wade,* 77 MICH. L. REV. 1569 (1979).

56. Arkansas, California, Colorado, Connecticut, Florida, Illinois, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, Pennsylvania, Virginia, West Virginia, Wisconsin.

57. Arizona, Colorado, Idaho, Montana, New Mexico, Washington.

58. Alaska, District of Columbia, Georgia, Hawaii, Indiana, Kentucky, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Wyoming.

59. A partial list includes *Alaska,* Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899); *Arizona,* ARIZ. CODE ch. 10, div. 5, § 45 (1865); *Arkansas,* Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, §§ 5, 6 (1838); *California,* Act of Apr. 16, 1850, ch. 99, div. 5, § 45, 1850 CAL. STAT. 223; *Colorado,* Act of Nov. 5, 1861, div. 4, § 42, 1861 COLO. SESS. LAWS 296-97, COLO. REV. STAT. ch. 11, § 42 (1868); *Connecticut,* CONN. GEN.

latures defined the offense of attempted abortion without referring to the fetus as a "child" or providing for increased punishment if the attempt caused the death of the fetus, it is plausible that the "person" referred to by such categorization was the woman. However, in light of the irrefutable evidence that even these statutes were intended primarily to protect the life of the fetus, it is possible that one of the "persons" referred to by these statutes was the fetus. Where, however, the statute classified under "offenses against the person" or some similar title provided for an enhanced punishment if the attempted abortion caused the death of the "child,"[60] there can be no doubt whatsoever that the word "person" referred to the fetus. Therefore, the state legislatures (and Congress, in legislating for Alaska and the District of Columbia) used the very word "person" in reference to the fetus. It may be objected that in this context, the word "person" is not being used as synonymous with "human being," but rather as synonymous with "body." This is indicated by the language "offenses against the *persons of individuals,*" and the fact that such offenses were typically distinguished from offenses categorized as "offenses

STAT. tit. 12, ch. 2, §§ 22-25 (1866); *Delaware,* Act of Feb. 13, 1883, ch. 226, 1883 DEL. LAWS 522; *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, §§ 10-11, 1868 FLA. LAWS 64; *Georgia,* GA. CODE div. 4, art. 2, §§ 77-82 (1895); *Idaho,* Act of Feb. 4, 1864, ch. 4, § 42, 1864 IDAHO SESS. LAWS 443; Act of Jan. 14, 1875, ch. 4, § 42, 1875 IDAHO SESS. LAWS 328; *Illinois,* Act of Jan. 6, 1827, ILL. REV. CODE div. 5, § 46 (1827), ILL. REV. CODE div. 5, § 46 (1833); *Indiana,* Act of Apr. 14, 1881, ch. 37, §§ 22-23, 1881 IND. LAWS 177; Act of Mar. 10, 1905, ch. 169, §§ 367-68, 1905 IND. LAWS 663-64; *Iowa,* Act of Jan. 25, 1839, IOWA TERR. STAT. div. 1, § 18 (1838-39); *Kansas,* ch. 48, §§ 9, 10, 39, 1855 KANS. TERR. STAT. 238, 243-44; *Louisiana,* LA. REV. STAT. § 24 at 138 (1856); LA. REV. STAT. § 807 (1870); *Maryland,* MD. CODE tit. 27, art. 72, §§ 16, 17 (1878); *Michigan,* MICH. REV. STAT. ch. 153, §§ 32-34 (1846); *Mississippi,* Act of Feb. 15, 1839, ch. 66, art. 1, tit. 3, art. 1, §§ 8, 9, 1839 MISS. LAWS 112-13; Act of Feb. 2, 1857, MISS. CODE § 34, arts. 172-73 (1857); *Missouri,* Act of Mar. 20, 1835, MO. REV. STAT. art. 2, §§ 9, 10, 36 (1835); Act of Mar. 20, 1865, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, §§ 9, 10, 34 (1865); *Nebraska,* § 43, 1858 NEB. LAWS 47, Act of Feb. 12, 1866, NEB. REV. STAT. tit. 4, ch. 4, § 42 (1866); *Nevada,* Act of November 26, 1861, ch. 28, div. 4, § 42, 1861 NEV. LAWS 63; *New Jersey,* Act of Mar. 27, 1874, N.J. REV. STAT. § 75 (1874); *New York,* Act of Dec. 10, 1828, N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, §§ 8, 9 (1828); Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, §§ 190-91, 194, 3 N.Y. REV. STAT. 2478-80 (1881); *Oregon,* OR. STAT. ch. 3, § 13 (1854); *Pennsylvania,* Act of Mar. 31, 1860, no. 374, tit. 6, §§ 87-88, 1860 PA. LAWS 404-05; Act of June 24, 1939, no. 375, §§ 718-19, 1939 PA. LAWS 958; *Rhode Island,* R.I. GEN. LAWS ch. 277, §§ 22-23 (1896); *Texas,* Act of Aug. 28, 1856, TEX. PEN. CODE arts. 531-36 (1856); *Virginia,* Act of Mar. 14, 1848, tit. 2, ch. 3, § 9, 1848 VA. ACTS 96, Act of Mar. 14, 1878, ch. 311, ch. 2, § 8, 1878 VA. ACTS 281-82; *Washington,* Act of Apr. 28, 1854, WASH. TERR. STAT. ch. 2, § 37-39, at 81-82 (1854); *Wisconsin,* WIS. REV. STAT. ch. 133, §§ 10-11 (1849), Act of May 17, 1858, WIS. REV. STAT. ch. 164, §§ 10-11 (1858).

60. *See* nn.23-24 *supra.*

against property" and the like. Nevertheless, it is obvious that an offense cannot be an "offense against the person" unless it is an offense against the bodily integrity of a human being, i.e., a *"person."*

Legislative recognition of the personhood of the unborn is also manifested in the grouping and classification of offenses. Legislatures sometimes grouped the abortion offenses together with the homicide offenses, whether or not they also declared the killing of the unborn child to be "manslaughter."[61] This grouping manifests the legislatures' recognition that these offenses had an essential element in common, namely, the unjustifiable destruction of human life. Sometimes the legislatures grouped the abortion offenses with crimes against born children. Most often they were placed next or in close proximity to the statute which prohibited a woman from concealing the birth and subsequent death of her illegitimate child, so that it could not be known whether the child was stillborn or killed after birth.[62] Again, this grouping manifests legislative recognition that the unborn child and the born child are essentially the same in their personhood.

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61. In the 1895 Georgia Code, article 1 of Crimes Against the Person was entitled "Homicide," and article 2 was entitled "Concealing Child's Death, Advising to Kill Infants, Abortion, and Foeticide." *See* GA. CODE div. 4, art. 2, §§ 77-82 (1895). The 1876 Georgia Act was entitled "An Act to prevent and punish foeticide or criminal abortion in the State of Georgia." *See* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113. The 1858 Iowa Act was entitled "An Act for the Punishment of Foeticide." *See* Act of Mar. 15, 1858, ch. 58, 1858 IOWA ACTS 93.

62. *See Connecticut,* CONN. STAT. tit. 22, §§ 14, 16 (1821); *Delaware,* Act of Feb. 13, 1883, ch. 226, 1883 DEL. LAWS 522 (after sections dealing with prostitution and sexual abuse of female child); *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 8, §§ 9, 11, 1868 FLA. LAWS 97; *Georgia,* GA. CODE div. 4, art. 2 §§ 77-82 (1895) (contained an article entitled "Concealing Child's Death, Advising to Kill Infants, Abortion, and Foeticide"); *Hawaii,* HAW. PEN. CODE §§ 1-3 (1850); *Idaho,* IDAHO REV. STAT. §§ 6794-95, 6843 (1887) (next to sections incriminating abandonment and neglect of wife and child); *Maine,* ME. REV. STAT. ch. 160, §§ 11-14 (1840); *Massachusetts,* MASS. GEN. STAT. ch. 165 §§ 9-11 (1860); *Michigan,* MICH. REV. STAT. ch. 153, §§ 32-34 (1846) (next to sections dealing with exposure of child); *Montana,* Act of Jan. 12, 1872, ch. 4, §§ 41-42, 1872 MONT. LAWS 269; *New Jersey,* ch. 235, §§ 118-19, 1898 N.J. LAWS 827; *New York,* Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; Act of July 26, 1881, N.Y. PEN. CODE ch. 4, §§ 294-97, 3 N.Y. REV. STAT. 2478-80 (1881) (under chapter 4 entitled "Abortion and Concealing Death of Infant"); *Oklahoma,* OKLA. REV. LAWS §§ 2322-23, 2436-37 (1910); *Pennsylvania,* Act of Mar. 31, 1860, no. 374, tit. 6, §§ 87-88, 1860 PA. LAWS 404-05 (next to sections incriminating concealment of death of bastard child and maltreatment of infant); *Rhode Island,* R.I. GEN. LAWS ch. 277, §§ 22-23 (1896) (providing that person indicted for murder of infant child may be convicted of abortion); *Texas,* Act of Aug. 28, 1856, TEX. PEN. CODE arts. 531-36 (1856) (next to section punishing act of killing child during parturition); *Vermont,* Act of Nov. 21, 1867, no. 57, 1867 VT. ACTS 64-66 (person indicted for murder of infant child may be convicted of abortion); *Wyoming,* ch. 3, § 25, 1869 WYO. LAWS 104.

VI. Punishment of Attempts to Produce Abortion

The Supreme Court in *Roe* considered the Texas statute to be inconsistent with fetal personhood under the fourteenth amendment because it imposed a penalty for abortion "significantly less than the maximum penalty for murder prescribed" by the Texas statutes.[63] This inference is clearly incorrect. First, the imposition of a lesser penalty for the mere attempt to induce abortion, without proof that the attempt killed a living fetus, obviously does not contradict the personhood of the unborn.

Second, the difficulty of proving that an attempted abortion really caused the death of a fetus may have induced legislatures to punish completed abortion less severely than homicide, just as the same difficulty caused the common law to declare that abortion was not homicide unless the child was born alive after the abortion and then died.[64]

Third, even though they considered the human fetus to be a person, the legislatures may have considered that the state of mind of one who performs an abortion is less culpable or malicious than the state of mind of the person who commits murder. The act may be performed because of the dire circumstances of the woman, or because of a defective understanding of the rights of the tiny, invisible fetus. The law has always varied the punishment for homicide in proportion to the culpability of the actor,[65] and the consideration of such factors in mitigation of punishment does not constitute an unconstitutional discrimination against the victim or the negation of his personhood.

Fourth, the imposition of severe penalties for homicide of born persons is necessary to protect the security of their persons, and their ability to move freely in society with as little fear as possible, and to prevent persons from having to resort to other and possibly violent means to protect themselves. These considerations do not apply to abortion. Also, the overall pain inflicted on the victim, his family, and his friends, is far greater in the case of the homicide of a born human being than in the case of the friendless and merely sentient unborn child. The criminal law and state legislatures have long taken cognizance of the degree of harm to *society* in determining the relative punishments of different kinds of homicidal acts, for example, in im-

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63. *See* Roe v. Wade, 410 U.S. 113, 158 n.54 (1974).

64. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 Fordham L. Rev. 807, 819-20 (1973).

65. *See id.* at 855.

posing more severe penalties on one who kills a peace officer.[66] In no way is this adjustment of punishment inconsistent with the personhood of the victims of the homicidal acts carrying lesser punishments.

Finally, the state legislatures may have reduced the range of punishment for abortion to insure that juries would not be reluctant to convict offenders. In 1872, a special committee of the New York Medico-Legal Society articulated this rationale very clearly. The committee considered a proposal that abortion be made a capital felony and rejected it, saying that "[h]owever instrinsically just such a view may be, and is in the opinion of your committee, any serious attempt to carry it into practice at the present time would probably lessen the chances for a conviction in any case. . . ."[67] It is likely that the New York Legislature shared this opinion, since in that year it enacted antiabortion legislation which closely followed the committee's recommendations, including those pertaining to the range of punishment.[68] Some states have categorized reckless driving causing the death of another as a crime less than homicide for the same reason.[69]

All the foregoing considerations justify the imposition of a greater punishment for the murder of born persons than for an attempted abortion killing the unborn child, and this does not in the least contradict the personhood of the unborn child. Indeed, in light of these considerations, it is remarkable that the penalties imposed by the nineteenth-century legislatures for abortion were as severe as they

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66. *See* Byrn, *Homicide Under the Proposed New York Penal Law,* 33 FORDHAM L. REV. 173, 199 (1964) (same acts would be felony murder in killing of policeman that would be voluntary manslaughter at any other time); *Abortion: Hearings on S.J.R. 119 and S.J.R. 130 Before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary,* U.S. Senate, 93rd Cong. 2nd Sess., pt. IV, at 111-13 (statement of Robert M. Byrn, Professor, Fordham University Law School) (degree of punishment for crime varied in accordance with "requirement of community security").

67. New York Medico-Legal Society, *Report on Criminal Abortion,* 15 N.Y. MED. J. 77, 84-87 (1872). *See also* Means, *The Law of New York Concerning Abortion and the Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 475 (1968).

68. *See* Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10.

69. *See* Byrn, *Homicide Under the Proposed New York Penal Law,* 33 FORDHAM L. REV. 173, 204 & n.186 (1964) (reasoning is that trier of fact usually reluctant to convict of crime of severe penalty); *Abortion: Hearings on S.J.R. 119 and S.J.R. 130 Before the Subcommittee on Constituitional Amendments of the Committee on the Judiciary,* U.S. Senate, 93rd Cong. 2nd Sess., pt. IV, at 111-13 (punishment for crime varied in accordance with "the degree of empathy" of prospective jurors in order to insure convictions).

were.[70] Maximum punishments for abortions killing the child in-

70. *Punishment ranges for attempt* alone (statutes which provide higher range of punishment for completed abortion marked with asterisk): *$100-$1000* fine: Texas 1858*. Imprisonment *Up to 6 months:* Georgia 1876 (and/or fine up to $1000)*. *3-6 months:* Alabama 1841 (and fine up to $500). *Up to 12 months:* Indiana 1835, 1852, 1859 (and fine up to $500), Iowa 1858 (and fine up to $1000), Kansas 1855 (and/or fine up to $500), Maine 1840 (or fine up to $1000)*, 1857 (and fine up to $1000)*, Michigan 1846 (and/or fine up to $500)*, Missouri 1835, 1865* (and/or fine up to $500), Nebraska 1873 (and fine up to $500)*, New Hampshire 1849 (and/or fine up to $1000), New York 1828 (and/or fine up to $500), Ohio 1834, 1867 (and/or fine up to $500)*. *3-12 months:* Alabama 1852 (and fine up to $500), New York 1845*, Wisconsin 1858 (and/or fine up to $500)*. *6-12 months:* Wisconsin 1898 (and/or $250-$500 fine)*. *Up to 2 years:* Hawaii 1850 (and fine up to $500) (before quickening). *1-2 years:* Minnesota 1873 (and/or $500-$5000 fine)*. Mississippi 1839 (and/or fine up to $500) (after quickening). *1-2-1/2 years:* Texas 1856*. *Up to 3 years:* Colorado 1861, 1891, Illinois 1827 (and fine up to $1000), Iowa 1839 (and fine up to $1000), Maryland 1868 (and/or $500-$1000 fine), Nebraska 1858, 1866 (and fine up to $1000), Oklahoma 1890, 1910,* Pennsylvania 1860 (and/or fine up to $3000),* Wyoming 1869 (and fine up to $1000). *1-3 years:* New York 1872,* North Dakota 1877,* Tennessee 1883,* Vermont 1846 (and fine up to $200). *Up to 4 years:* New York 1881.* *Up to 5 years:* District of Columbia 1901,* Hawaii 1850 (and fine up to $1000) (after quickening), New Jersey 1881 (and/or fine up to $1000),* Pennsylvania 1939 (and/or fine up to $3000),* South Carolina 1883 (and/or fine up to $5000).* *1-5 years:* Arkansas 1875 (and fine up to $1000),* California 1957 (or fine up to $5000), Delaware 1883 (and $100-$500 fine), Iowa 1882 (and fine up to $1000), New Mexico 1919 (and/or $500-$2000 fine), North Carolina 1881 (and fine) (if intent to cause miscarriage), Washington 1854.* *2-5 years:* Alabama 1894 (and fine up to $500), Arizona 1865, 1887, California 1850, 1861, 1872, Idaho 1864, 1887, Montana 1864, 1871-72, Nevada 1861. *3-5 years:* Missouri 1835 (if attempted after quickening), Kansas 1855 (if attempted after quickening). *Up to 7 years:* Missouri 1825 (and fine up to $3000), New Jersey 1849 (and/or fine up to $500). *1-7 years:* Florida 1868,* Rhode Island 1896. *4-7 years:* New York 1828, 1845 (if attempted after quickening). *Up to 10 years:* Texas 1854. *1-10 years:* Kentucky 1910,* Louisiana 1856, Mississippi 1952,* Nevada 1869, New Hampshire 1849 (and fine up to $1000) (if attempted after quickening), North Carolina 1881 (and fine) (if intent to destroy child). *2-10 years:* Illinois 1867, 1874, Utah 1876. *3-10 years:* Vermont 1867. *Minimum 2 years:* New Jersey 1872 (and fine up to $500).*

Punishment for completed abortion: 1-12 months: Virginia 1848 (if before quickening). *Up to 5 years:* Maine 1840, 1857 (and fine up to $1000). *1-5 years:* Tennessee 1883, Virginia 1848 (if after quickening), 1849. *2-5 years:* Texas 1856. *3-5 years:* Missouri 1865 (quick child), Virginia 1876. *Up to 7 years:* Arkansas 1838, 1875 (and $1000-$10000 fine) (quick child), Iowa 1843 (and $500-$1000 fine), Pennsylvania 1860. *1-7 years:* Ohio 1834 (quick child), 1867. *4-7 years:* District of Columbia 1872, Florida 1868 (quick child), New York 1830, 1846 (quick child), Wisconsin 1898. *Up to 10 years:* Pennsylvania 1939 (and/or fine up to $6000). *1-10 years:* Mississippi 1952, Nebraska 1873. *2-10 years:* Georgia 1876, Illinois 1867, 1874. *3-10 years:* Minnesota 1873, New Mexico 1854 (quick child), Virginia 1878, West Virginia 1882, 1931. *Up to 14 years:* Wyoming 1890. *3-14 years:* Indiana 1881, 1905. *Up to 15 years:* Michigan 1846 (and/or fine up to $1000) (quick child), New Jersey 1881 (and/or fine up to $5000), New York 1881. *1-20 years:* Alaska 1899, Washington 1854 (quick child). *3-20 years:* District of Columbia 1901. *4-20 years:* New York 1872. *5-20 years:* New York 1881 (quick child), South Carolina 1883. *2-21 years:* Kentucky 1910. *Minimum 3 years:* New Mexico 1907 (quick child). *Minimum 4 years:* Oklahoma 1910 (quick child). *Minimum 10 years:* New Jersey 1872 (and fine up to $1000).

cluded imprisonment terms of five, seven, ten, fourteen, fifteen, twenty, and twenty-one years.[71] In 1872, the New Jersey Legislature provided that abortion killing the child should be punished by a *minimum* of ten years imprisonment.[72] The severity of the punishment prescribed by many of the states, despite the considerations enumerated above, strongly implies that the legislatures believed the unborn to be persons.

It is also very significant that while the common law provided that attempted abortion causing the death of the mother constituted murder,[73] a considerable number of the nineteenth-century statutes *reduced* the degree of this offense. Only nine states[74] (and Congress, legislating for the District of Columbia) have, at any time, enacted statutes which expressly continued this common law rule, and only three states (Illinois, New Hampshire, and Texas) had done so by 1868.[75] However, at different times fifteen states and the District of Columbia[76] enacted statutes reducing this offense to manslaughter,

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71. *See* n.70 *supra.*

72. *See* n.70 *supra.*

73. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807, 819 (1973).

74. *See Colorado,* Act of Apr. 13, 1891, 1891 COLO. SESS. LAWS 122-23; *Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113 (assault with intent to murder); *Illinois,* Act of Feb. 28, 1867, § 2, 1867 ILL. LAWS 89; Act of Mar. 27, 1874, ILL. REV. STAT. ch. 38, div. 1, §§ 3-6 (1874); *Kentucky,* Act of Mar. 22, 1910, ch. 57, 1910 KY. ACTS 189-90 (murder or manslaughter as facts justify); *Mississippi,* Act of Apr. 16, 1952, ch. 260, 1952 MISS. LAWS 289; *New Hampshire,* Act of Jan. 4, 1849, ch. 743, 1849 N.H. LAWS 708-09 (murder in second degree); *New Mexico,* Act of Feb. 15, 1854, no. 28, § 11, 1854 N.M. LAWS 88 (murder in third degree); Act of Mar. 18, 1907, ch. 36, § 6, 1907 N.M. LAWS 42; Act of Feb. 21, 1919, ch. 4, 1919 N.M. LAWS 6 (murder in second degree); *Texas,* Act of Aug. 28, 1856, TEX. PEN. CODE art. 534 (1856); *West Virginia,* W. VA. CODE ch. 61, art. 2, § 8 (1931).

75. *See* n.74 *supra.*

76. *See Alaska,* Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899); *Colorado,* COLO. REV. STAT. ch. 11, § 42 (1868); *District of Columbia,* Act of Jan. 19, 1872, 1872 D.C. ACTS 26-29; *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, 1868 FLA. LAWS 64 (manslaughter "in second degree"); *Kansas,* Act of Apr. 4, 1957, ch. 216, KANS. SESS. LAWS 466 (manslaughter in first degree); *Kentucky,* Act of Mar. 22, 1910, ch. 58, 1910 KY. ACTS 189-90 (manslaughter or murder as facts justify); *Michigan,* MICH. REV. STAT. ch. 153, § 33 (1846); *Minnesota,* MINN. REV. STAT. ch. 100, § 11 (1851) (manslaughter in second degree); *Missouri,* Act of Mar. 20, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 10 (1866) (manslaughter in second degree); *New York,* Act of Apr. 20, 1830, ch. 320, § 58, 1830 N.Y. LAWS 401 (manslaughter in second degree); Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19 (manslaughter in second degree); Act of May 6, 1869, ch. 631, 1869 N.Y. LAWS 1502-03 (manslaughter in second degree); Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 191, 3 N.Y. REV. STAT. 2478-80 (1881) (manslaughter in first degree); *North Dakota,* Act of Feb. 17, 1877, DAK. PEN. CODE § 252 (manslaughter in first degree); *Oklahoma,* OKLA. STAT.

and eight states[77] had such statutes by the end of 1868. Thirteen other states, and Congress, legislating for the District of Columbia, at some time enacted statutes prescribing punishment for attempted abortion causing the death of the mother, less than the punishment for murder, and without denominating the offense as any form of "murder."[78] In reducing the degree of the offense of attempted abortion causing the death of the mother, these legislatures were undoubtedly simply taking account of the woman's consent and the diminished culpability of the abortionist. Nevertheless, the fact that state legislatures, in enacting antiabortion statutes, *reduced* the degree of the offense of attempted abortion causing the death of the mother, is very strong evidence that those statutes were not solely or even primarily intended to protect the health of the mother, but rather were intended primarily to protect the life of the unborn child. The remaining states did not expressly provide an increased range of punishment for attempted abortions causing the death of the mother.

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§ 2098 (1890); OKLA. REV. LAWS § 2323 (1910); *Oregon,* OR. STAT. ch. 3, § 13 (1854); Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *South Dakota,* Act of Feb. 17, 1877 DAK. PEN. CODE § 252, S.D. COMP. LAWS § 4022 (1929) (manslaughter in first degree); *Wisconsin,* WIS. REV. STAT. ch. 133, § 11 (1849) (manslaughter in second degree); Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 11 (1858) (manslaughter in second degree); *Wyoming,* ch. 3, § 25, 1869 WYO. LAWS 104.

77. *See Colorado,* COLO. REV. STAT. ch. 11, § 42 (1868); *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, 1868 FLA. LAWS 64; *Michigan,* MICH. REV. STAT. ch. 153, § 33 (1846); *Minnesota,* MINN. REV. STAT. ch. 100, § 11 (1851); *Missouri,* Act of Mar. 10, 1865, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 10 (1865); *New York,* Act of Apr. 20, 1830, ch. 320, § 58, 1830 N.Y. LAWS 401; Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19; *Oregon,* OR. STAT. ch. 3, § 13 (1854); Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *Wisconsin,* WIS. REV. STAT. ch. 133, § 11 (1849); Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 11 (1858).

78. *See District of Columbia,* Act of Mar. 3, 1901, ch. 854, § 809, 31 STAT. 1322; *Indiana,* Act of Apr. 14, 1881, ch. 37, § 22, 1881 IND. LAWS 177; Act of Mar. 10, 1905, ch. 169, § 367, 1905 IND. LAWS 663-64; *Massachusetts,* Act of Jan. 31, 1845, ch. 27, 1845 MASS. ACTS 406; *Minnesota,* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *Nebraska,* Act of Mar. 4, 1873, NEB. GEN. STAT. ch. 58, ch. 2, § 6 (1873); *New Jersey,* Act of Mar. 1, 1849, N.J. LAWS 266-67; Act of Mar. 26, 1872, ch. 337, 1872 N.J. LAWS 45-46; Act of Mar. 25, 1881, ch. 191, 1881 N.J. LAWS 140; Act of Mar. 14, 1898, ch. 235, § 119, 1898 N.J. LAWS 827; *New York,* Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10; *Ohio,* Act of Feb. 27, 1834, § 2, 1834 OHIO LAWS 20-21; Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36; *Pennsylvania,* Act of Mar. 31, 1860, no. 374, tit. 6, § 87, 1860 PA. LAWS 404-05; Act of June 24, 1939, no. 375, art. 7, § 719, 1939 PA. LAWS 958; *Rhode Island,* R.I. GEN. LAWS ch. 277, § 22 (1896); *South Carolina,* Act of Dec. 24, 1883, no. 354, 1883 S.C. ACTS 547-48; *Vermont,* Act of Oct. 30, 1846, no. 33, 1846 VT. ACTS 34-35; Act of Nov. 21, 1867, no. 57, 1867 VT. ACTS 64-66; *Washington,* Act of Apr. 28, 1854, WASH. TERR. STAT. ch. 2, § 37 at 81 (1854); WASH. CODE § 820 (1881); *Wyoming,* ch. 73, § 31, 1890 WYO. LAWS 131.

Such attempts were left to be punished as any other attempted abortion, or perhaps as felony murder under the common law rule. In either case, the failure of these statutes to *specify* a punishment for attempted abortions causing the death of the mother indicates that these statutes were not primarily intended to protect the health of the mother.

VII. THE PREGNANCY REQUIREMENT AND ITS ELIMINATION

Many statutes prohibited only those abortions performed on a *pregnant* woman.[79] The requirement of proof of pregnancy is inconsistent with the claim that antiabortion statutes were intended solely or primarily to protect the health of the pregnant woman. If this were the primary goal of the legislatures, presumably they would have prohibited the administration of dangerous drugs to women or the dangerous use of instruments upon them whether or not they were pregnant. On the other hand, this requirement is readily understandable if the primary purpose of the legislatures was to protect the life of the unborn child: only if the woman is actually pregnant is there any possibility that the attempted abortion will cause the death of an unborn child. In many cases of attempted abortion, however, it could not be *proven* that the woman was actually pregnant, even if she actually was.[80] In such cases, the abortionist could not be convicted even though the attempted abortion might have actually caused the death

79. Statutes which did not require that the woman be pregnant are as follows: *California,* Act of May 13, 1935, ch. 528, § 1, 1935 CAL. STAT. 1605; *Colorado,* COLO. REV. STAT. § 40-2-23 (1953); *Delaware,* Act of Feb. 13, 1883, ch. 226, 1883 DEL. LAWS 522; *District of Columbia,* Act of Mar. 3, 1901, ch. 854, § 809, 31 STAT. 1189, 1322 (1901); Act of June 29, 1953, ch. 159, § 203, 67 STAT. 93 (1953); *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, ch. 8, § 9, 1868 FLA. LAWS 97; *Indiana,* Act of Mar. 5, 1859, ch. 81, 1859 IND. LAWS 130-31; Act of Apr. 14, 1881, ch. 37, §§ 22-3, 1881 IND. LAWS 177; *Iowa,* Act of Mar. 24, 1915, ch. 45, 1915 IOWA ACTS 69; *Kentucky,* Act of Mar. 22, 1910, ch. 57, 1910 KY. ACTS 189-90; *Massachusetts,* MASS. GEN. STAT. ch. 165, § 9 (1860); *Minnesota,* MINN. STAT. ANN. § 617.18 (1953); *Missouri,* MO. REV. STAT. § 559.100 (1949); *Nevada,* NEV. REV. STAT. §§ 200.220, 201.120 (1959); *New York,* Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10; Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 191, tit. 10, ch. 4, § 294, 3 N.Y. REV. STAT. 2478-80 (1881); *Ohio,* OHIO REV. CODE ANN. § 2901 (1953); *Pennsylvania,* Act of Mar. 31, 1860, no. 374, tit. 6, §§ 87-88, 1860 PA. LAWS 404-05; *Rhode Island,* R.I. GEN. LAWS ch. 277, § 22 (1896); *Tennessee,* TENN. CODE ANN. §§ 10791-92 (1932); *Vermont,* Act of Nov. 21, 1867, no. 57, 1867 VT. ACTS 64-66; *Virginia,* VA. CODE tit. 54, ch. 191, § 4 (1849); *Washington,* Act of Apr. 28, 1854, WASH. TERR. STAT. ch. 2, §§ 37, 38 (1854); *West Virginia,* W. VA. CODE ch. 144, § 8 (1868).

80. *See* H. STORER, ON CRIMINAL ABORTION IN AMERICA 44, 86 (1860).

of the child. In order to protect the lives of unborn babies and the health of the pregnant woman, it was necessary to eliminate the requirement that the woman be pregnant. According to the antiabortionist, Dr. Storer, "the attempt being considered criminal, it follows that proof of pregnancy is not necessary."[81] Several states signified their agreement with Storer by eliminating the requirement of proof of pregnancy.[82] Statutes of this sort delete all references to the child, leading some to believe that they were not intended to protect the child. This is ironic, because the removal of references to pregnancy and the death of the child was manifestly designed to facilitate convictions for attempted abortions and to provide more complete protection to the life of the unborn child and the health of the pregnant woman.

VIII. THE SPECIFIC INTENT REQUIREMENT

Every criminal abortion statute required that abortifacients be administered to a woman with intent to produce an abortion, or to "destroy the child"[83] with which she was pregnant. Of course, the intent

81. *See id.* at 44, 86, 97, 99.

82. *See Connecticut,* Act of June 23, 1860 CONN. ACTS 65-66; *see also* statutes cited in n.79 *supra.*

83. The following statutes required an intent to "destroy the child": *Alaska,* Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899); *Arkansas,* Act of Feb. 16, 1838, ARK. REV. STAT. ch. 44, div. 3, art. 2, § 6 (1838); *Connecticut,* Act of June 5, 1830, ch. 1, § 16, 1830 CONN. PUB. STAT. LAWS 255; CONN. STAT. tit. 21, § 15 (1835); *Florida,* Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, § 11, 1868 FLA. LAWS 64; *Georgia,* Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113; *Iowa,* Act of Feb. 16, 1843, IOWA REV. STAT. § 10; *Kansas,* ch. 48, § 10, 1855 KANS. TERR. STAT. 238; *Maine,* ME. REV. STAT. ch. 160, § 13 (1840), ME. REV. STAT. tit. 11, ch. 124, § 8 (1857); *Michigan,* MICH. REV. STAT. ch. 153, § 33 (1846); *Minnesota,* MINN. REV. STAT. ch. 100, § 11 (1851); *Mississippi,* Act of Feb. 15, 1839, ch. 66, art. 1, tit. 3, art. 1, § 9, 1839 MISS. LAWS 112-13; *Missouri,* Act of Mar. 20, 1835, MO. REV. STAT. art. 2, § 10 (1835); Act of Mar. 20, 1866, MO. GEN. STAT. pt. 4, tit. 45, ch. 200, § 10 (1865); *Nebraska,* Act of Mar. 4, 1873, NEB. GEN. STAT. ch. 58, ch. 2, § 6 (1873); *New Hampshire,* Act of Jan. 4, 1849, ch. 743, 1849 N.H. LAWS 708-09; *New Mexico,* Act of Feb. 25, 1854, no. 28, § 11, 1854 N.M. LAWS 88; N.M. GEN. LAWS ch. 51, § 11 (1880); Act of Mar. 18, 1907, ch. 36, § 6, 1907 N.M. LAWS 42; *New York,* Act of Dec. 10, 1828, N.Y. REV. STAT. pt. 4, ch. 1, tit. 2, art. 1, § 9 (1828); Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19; *North Carolina,* Act of Mar. 12, 1881, ch. 351, 1881 N.C. LAWS 584-85; *Ohio,* Act of Feb. 17, 1834, § 2, 1834 OHIO LAWS 20-21; Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36; *Oregon,* OR. STAT. ch. 3, § 13 (1854); Act of Oct. 19, 1864, ch. 43, § 509, 1864 OR. LAWS 523; *South Dakota,* S.D. COMP. LAWS §§ 4022 (1929); *Tennessee,* Act of Mar. 26, 1883, ch. 140, 1883 TENN. ACTS 188-89; *Virginia,* Act of Mar. 14, 1848, tit. 2, ch. 3, § 9, 1848 VA. ACTS 96; VA. CODE tit. 54, ch. 191, § 8 (1849); *Washington,* Act of Apr. 18, 1854, WASH. TERR. STAT. ch. 2, § 37 (1854); *West Virginia,* W. VA. CODE ch. 144, § 8

of the actor in performing such acts is completely irrelevant to the health of the pregnant woman. If the primary goal was to protect the woman from poisoning or from dangerous surgical operations, then the legislature should have prohibited the intentional, reckless, or negligent performance of these acts, whether or not these acts were done with intent to produce an abortion. However, the antiabortion statutes were far narrower in scope. Attempted abortions were singled out for special treatment not because of any peculiar danger to the woman, but because of the peculiar culpability which distinguishes it from other "treatments" performed upon a woman. This culpability is derived from its goal of terminating a woman's pregnancy, with the usual consequence that the life of the unborn child is destroyed.

IX. Incrimination of the Woman's Participation in Her Own Abortion

The Supreme Court found it very significant that "in many states, . . . by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another."[84] The Court thought that this fact supported the argument that state antiabortion statutes were intended solely to protect maternal health and not prenatal life,[85] and that this was inconsistent with the contention that the human fetus is a "person" within the meaning of the fourteenth amendment.[86] The failure of legislatures to impose criminal penalties on women for participation in their own abortions does not in the least indicate that they did not consider the unborn child to be a person. There are several other reasons why they might have refused to impose such penalties. First, they might have considered that the woman who would attempt such an act would only do so out of desperation, and that it would be inhumane to inflict criminal penalties on her after having suffered through such an experience. That legislatures were moved by such considerations is indicated by the fact the legislatures which did incriminate the woman's participation generally imposed less severe penalties on the woman for this participation than on the person who

(1868), W. VA. CODE ch. 61, art. 2, § 8 (1931); *Wisconsin,* WIS. REV. STAT. ch. 133, § 11 (1849); Act of May 17, 1858, WIS. REV. STAT. ch. 164, § 11 (1858).

84. *See* Roe v. Wade, 410 U.S. 113, 151 & n.50 (1974).

85. *See id.* at 151-52.

86. *See id.* at 158 n.54.

actually attempted to induce the abortion.[87]

Second, it is also possible that this immunization of women from criminal liability for participation in their own abortions was a result of the paternalism of the era, which limited the criminal responsibility of women at the same time that it limited their civil rights. Despite her consent to the act, the woman was considered a victim rather than a perpetrator of the act.[88]

Third, this immunity might have been motivated in part by practical considerations. Often the only testimony which could be secured against the criminal abortionist was that of the woman on whom the abortion was performed; perhaps the woman was granted complete immunity so that she would not be deterred from revealing the crime or from testifying against the abortionist by any risk of incurring criminal liability herself.[89] That the non-incrimination of the woman's participation was motivated by this practical consideration is indicated by the fact that those states which *did* incriminate the woman's participation often enacted statutes granting a woman immunity from prosecution in exchange for her testimony, or providing that this evidence would not be admissible in any criminal prosecution against her.[90] State legislatures which did not incriminate the woman's participation probably thought that this method was not sufficient to avoid deterring the woman from revealing the crime and testifying against the abortionist.

In view of such considerations, it is surprising that at least seventeen or more than one-third of the state legislatures did enact laws *expressly* incriminating the woman's participation in her own abortion.[91] Most of these laws were enacted after the ratification of the

87. For a discussion of this factor, see J. MOHR, ABORTION IN AMERICA 16-18, 44-45, 46-47, 86-90, 124, 128-29, 133-34 (1978).

88. *See* Byrn, *An American Tragedy: The Supreme Court on Abortion,* 41 FORDHAM L. REV. 807, 854-55 nn.282-83 (1973).

89. *See id.* at 854-55 nn.282-83.

90. *See, e.g., Minnesota,* MINN. STAT. ANN. § 617.21 (1953); *Nevada,* NEV. REV. STAT. § 201.140 (1959); *New Jersey,* Act of Mar. 26, 1872, ch. 337, § 2, 1872 N.J. LAWS 45-46; Act of Mar. 27, 1874, N.J. REV. STAT. § 115 (1874); *New York,* Act of May 6, 1869, ch. 631, § 3, 1869 N.Y. LAWS 1502-03; Act of May 11, 1942, ch. 791, 1942 N.Y. LAWS 1704; *South Carolina,* Act of Mar. 24, 1883, No. 354, § 4, 1883 S.C. ACTS 547-48.

91. *See Arizona,* ARIZ. PEN. CODE § 455 (1887); *California,* Act of May 20, 1861, ch. 521, 1861 CAL. STAT. 588; Act of Feb. 14, 1872, CAL. PEN. CODE § 275 (1872); *Connecticut,* Act of June 23, 1860, ch. 71, 1860 CONN. ACTS 65-66; *Idaho,* IDAHO REV. STAT. § 6795 (1887); *Indiana,* Act of Apr. 14, 1881, ch. 37, § 23, 1881 IND. LAWS 177; *Minnesota,* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *Montana,* MONT. REV. CODE § 94-402

fourteenth amendment; but five were in effect at that time.[92] States enacted laws making it a crime for a woman to "solicit or apply"[93] to a person for abortifacients, to "solicit and take,"[94] "purchase and take," "obtain and take," "procure and take," "receive and take,"[95] or simply "take"[96] abortifacient drugs, to "submit" or "consent" to, or "suffer"[97] the use of instruments upon her to produce an abortion,

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(1947); *Nevada,* Act of Feb. 16, 1869, ch. 22, § 1, 1869 NEV. LAWS 64-65; NEV. REV. STAT. § 200.220 (1959); *New Hampshire,* Act of Jan. 4, 1849, ch. 743, 1848 N.H. LAWS 708-09; *New York,* Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10; *North Dakota,* Act of Feb. 17, 1877, DAK. PEN. CODE § 338; *Oklahoma,* OKLA. STAT. § 2188 (1890); OKLA. REV. LAWS § 2437 (1910); *South Carolina,* Act of Mar. 24, 1883, no. 354, 1883 S.C. ACTS 547-48; *South Dakota,* Act of Feb. 17, 1877, DAK. PEN. CODE § 338; *Utah,* UTAH CODE ANN. § 76-2-2 (1953); *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 169, § 59 (1858); *Wyoming,* ch. 73, § 32, 1890 WYO. LAWS 131.

92. *See California,* Act of May 20, 1861, ch. 521, 1861 CAL. STAT. 588; *Connecticut,* Act of June 23, 1860, ch. 71, 1860 CONN. ACTS 65-66; *New Hampshire,* Act of Jan. 4, 1849, ch. 743, 1849 N.H. LAWS 708-09; *New York,* Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 185-86; *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 169, § 59 (1858).

93. *See Minnesota,* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *South Carolina,* Act of Mar. 24, 1883, no. 354, 1883 S.C. ACTS 547-48.

94. *See Arizona,* ARIZ. PEN. CODE § 55 (1887); *Connecticut,* Act of June 23, 1860, ch. 71, 1860 CONN. ACTS 65-66; *Idaho,* IDAHO REV. STAT. § 6795 (1887); *Indiana,* Act of Apr. 14, 1881, ch. 37, § 23, 1881 IND. LAWS 177, 193-94; Act of Mar. 10, 1905, ch. 169, § 368, 1905 IND. LAWS 663-64; *Montana,* MONT. REV. CODE ANN. 94-402 (1947); *New York,* Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; *North Dakota,* Act of Feb. 17, 1877, DAK. PEN. CODE § 338; *Oklahoma,* OKLA. STAT. § 2188 (1890); OKLA. REV. LAWS § 2437 (1910); *South Dakota,* S.D. CODE § 13.3102 (1960); *Utah,* UTAH CODE ANN. § 76-2-2 (1953); *Wyoming,* ch. 73, § 32, 1890 WYO. LAWS 131.

95. *See* Act of June 23, 1860, ch. 71, 1860 CONN. ACTS 65-66.

96. *See Minnesota,* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *Nevada,* Act of Feb. 16, 1869, ch. 22, § 1, 1869 NEV. LAWS 64-65; *New York,* Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10; Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 194, tit. 10, ch. 4, § 297, 3 N.Y. REV. STAT. 2478-80 (1881); *South Carolina,* Act of Mar. 24, 1883, no. 354, 1883 S.C. ACTS 547-48; *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 169, § 59 (1858).

97. *See Arizona,* ARIZ. PEN. CODE § 455 (1887); *California,* Act of May 20, 1861, ch. 521, 1861 CAL. STAT. 588; *Connecticut,* Act of June 23, 1860, ch. 71, 1860 CONN. ACTS 65-66; *Idaho,* IDAHO REV. STAT. § 6795 (1887); *Indiana,* Act of Apr. 14, 1881, ch. 37, § 23, 1881 IND. LAWS 177; Act of Mar. 10, 1905, ch. 169, § 368, 1905 IND. LAWS 663-64; *Minnesota,* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *Montana,* MONT. REV. CODE ANN. § 94-402 (1947); *Nevada,* NEV. REV. STAT. § 200.220 (1959); *New Hampshire,* Act of Jan. 4, 1849, ch. 743, 1849 N.H. LAWS 708-09; *New York,* Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86; Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10; Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 194, tit. 10, ch. 4, § 297, 3 N.Y. REV. STAT. 2478-80 (1881); *North Dakota,* DAK. COMP. LAWS § 6539 (1887); *Oklahoma,* OKLA. STAT. § 2188 (1890); OKLA. REV. LAWS, § 2437 (1910); *South Carolina,* Act of Mar. 24, 1883, no. 354, 1883 S.C. ACTS 547-48; *South Dakota,* S.D. CODE § 13.3102 (1960); *Utah,* UTAH CODE ANN.

or to "use" or "cause to be used"[98] upon herself instruments with this purpose. In light of the above considerations militating against the imposition of criminal sanctions on women for participating in their own abortions, it is clear that these laws were not enacted for the sole purpose of discouraging women from engaging in acts dangerous to their own health. Rather, the enactment of these laws, not mentioned by the Supreme Court in *Roe,* manifests an overriding concern on the part of legislatures to protect the lives of fetuses.

X. Legislative Recognitions of the Personhood of the Unborn in Legislative Histories of the Nineteenth-Century Statutes

After disregarding all the foregoing textual evidence showing that nineteenth-century antiabortion statutes were intended to protect the lives of human fetuses, the Supreme Court assumed that there is no legislative history to support this conclusion.[99] For sake of brevity, this article will examine in depth the legislative history of only one of these statutes, to show how erroneous the Court's assumption was.

On January 4, 1867, the Ohio House ratified the fourteenth amendment by a vote of 54 to 25.[100] The Senate ratified the amendment on January 11 by a vote of 21 to 12.[101] On February 1, a bill to amend Ohio's 1834 antiabortion statute was introduced in the Senate as S. 285.[102] The bill was referred by the Senate, sitting as a committee, to a select committee composed of Senators L. D. Griswold, Toland

§ 76-2-2 (1953); *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 169, § 59 (1858); *Wyoming,* ch. 73, § 32, 1890 WYO. LAWS 131.

98. *See California,* Act of May 20, 1861, ch. 521, 1861 CAL. STAT. 588; *Connecticut,* Act of June 23, 1860, ch. 71, 1860 CONN. ACTS 65-66; *Minnesota,* Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19; *Nevada,* NEV. REV. STAT. § 200.220 (1959); *New York,* Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10; Act of July 26, 1881, N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, § 194, tit. 10, ch. 4, § 297, 3 N.Y. REV. STAT. 2478-80 (1881); *South Carolina,* Act of Mar. 24, 1883, no. 354, 1883 S.C. ACTS 547-48; *Wisconsin,* Act of May 17, 1858, WIS. REV. STAT. ch. 169, § 59 (1858).

99. *See* Roe v. Wade, 410 U.S. 113, 151 (1974). "Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. *Pointing to the absence of legislative history to support the contention,* they claim that most state laws were designed solely to protect the woman." *Id.* at 151 (emphasis added).

100. *See* 1867 OHIO H.J. 12.

101. *See* 1867 OHIO S.J. 9.

102. *See id.* at 112.

Jones, and Henry West.[103] Both Senators Griswold and West had voted to ratify the fourteenth amendment; Senator Jones had not voted.[104] On February 19, the select committee made its report to the full Senate. This report, which was included in the appendix to the Senate Journal,[105] constitutes the clearest statement of the purposes underlying the enactment of an antiabortion statute yet found.

The committee began by noting "the alarming and increasing frequency" of abortion.[106] The committee regretted the existence in Ohio cities and villages of "a class of quacks who make child-murder a trade."[107] The committee asserted that the prevalence of criminal abortion in Ohio was due in large part to the "ridiculous distinction" in the punishment of abortion before and after quickening.[108] They considered this distinction to be ridiculous because "[p]hysicians have now arrived at the unanimous opinion that the foetus in utero is alive from the very moment of conception."[109] The committee noted the declaration of Dr. Percival, the author of a famous book on medical ethics, that "[t]o extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man."[110] According to the committee, "no opinion could be more erroneous" than the opinion "that the life of the foetus commences only with quickening, [and] that to destroy the embryo before that period is not child-murder."[111] Quickening is only a mechanical phenomenon completely unrelated to the vitality of the fetus.[112] The

103. *See id.* at 155.

104. *See id.* at 9.

105. *See id.* at 193; 1867 OHIO S.J. APP. 233-35.

106. *See* 1867 OHIO S.J. APP. 233. The increased frequency of abortion was considered by physicians to be the cause of lowered birth rates among certain classes of persons. *See id.* at 233.

107. *Id.* at 233.

108. *Id.* at 233.

109. *Id.* at 233.

110. *Id.* at 233.

111. *Id.* at 233.

112. According to the Committee,

> [q]uickening is purely mechanical. The uterus, in consequence of its enlargement, rises from the cavity of the pelvis to that of the abdomen. Hence the sensation of motion.
>
> The period of quickening is uncertain. Some women are conscious of foetal motion during the whole period of pregnancy. Others are sensible of it much before the usual time. Physiological researches have demonstrated that it exists in the early stages of utero-gestation, but it is too feeble to be perceived by the mother.

Id. at 233. Concerning the independent existence of the fetus, the Committee said:

> When the impregnated ovum leaves the ovary and enters the womb, it becomes attached

committee then said: "[l]et it be proclaimed to the world, and let it be impressed upon the conscience of every woman in the land, 'that the willful killing of a human being, at any stage of its existence, is murder.' "[113]

The committee then reviewed at some length the dangers of induced abortion to the pregnant woman, noting that more women died from abortion than from giving birth, and that abortion often caused sterility or chronic illness.[114]

After adopting amendments recommended by the Judiciary Committee, the Senate passed the bill by a vote of 21-8.[115] After some difficulty, the House on April 11 passed S. 285 by a vote of 53-30.[116] As finally passed, S. 285 made it a "high misdemeanor" punishable by one to seven years imprisonment to attempt, advise, or devise instruments for an abortion which caused the death of a "vitalized embryo, or foetus, or mother."[117]

Contrary to the Supreme Court's crucial conclusion in *Roe* that "the unborn have never been recognized in the law as persons in the whole sense,"[118] the statements made and quoted with approval by the select committee on S. 285 clearly show that the members of that

to that organ by a net-work of vessels, through which it receives its nourishment from the mother, just as after birth it is nourished from its mother's breast, and it had an independent existence as much in one case as the other. *Id.* at 233.

113. *Id.* at 234 (quoting H. STORER, ON CRIMINAL ABORTION IN AMERICA (1860)).

114. *Id.* at 234.

115. *See* 1867 OHIO S.J. 221-22, 237. Of those who voted for the bill, thirteen had voted to ratify the Fourteenth Amendment, four had opposed it, and four had not voted. Of those who voted against S. 285, four had voted to ratify the Fourteenth Amendment, three had voted against it, and one had not voted. Of those who voted to ratify the Fourteenth Amendment, thirteen voted for S. 285, four voted against it, and four did not vote. Of those who voted against ratification of the Fourteenth Amendment, four voted for S. 285, three voted against it, and four did not vote. *See id.* at 660-61.

116. *See id.* at 660-61. Of the fifty-three who voted for S. 285, twenty-six had voted to ratify the Fourteenth Amendment, thirteen had opposed it, and fourteen had not voted. Of the thirty who voted against S. 285, eighteen had voted to ratify the Fourteenth Amendment, eight had voted against ratification, and four had not voted. Of the fifty-four who voted to ratify the Fourteenth Amendment, twenty-six voted for S. 285, eighteen voted against it, and ten did not vote. Of the twenty-five who voted against ratification of the Fourteenth Amendment, thirteen voted for S. 285, eight voted against it, and four did not vote. The House had initially tabled the bill on the recommendation of the House Judiciary Committee, but on motion of Representative Wiles, the House agreed to reconsider its action, and referred the bill to the Committee on Medical Colleges and Societies. *See id.* at 348, 380, 389. This Committee recommended passage of the bill. *See id.* at 596-97.

117. *See* Act of Apr. 13, 1867, 1867 OHIO LAWS 135-36.

118. *See* Roe v. Wade, 410 U.S. 113, 158-59 (1974).

committee did consider the unborn to be persons in the whole sense. Otherwise, the committee would not have insisted that "to extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man,"[119] or that abortion is "child-murder."[120] Had Senators Griswold and West been asked whether they intended and understood the word "person," as used in the first section of the fourteenth amendment, to include the unborn, there can be no doubt that they would have answered affirmatively.[121]

Clearly the Ohio Legislature as a whole agreed with this assessment of the select committee: the 1867 statute expressly provided the *same* range of punishment for attempted abortion killing the mother as for attempted abortion killing the child at any stage of pregnancy. By imposing the same punishment on those who merely *advised* the abortion, the legislature showed its determination to protect both mother and child.[122]

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119. *See* 1867 OHIO S.J. APP. 233.

120. *See id.* at 233.

121. It is also interesting to note that the committee did not consider, as did the Supreme Court, that the personhood of the unborn required that the woman who submits to an abortion be a principal or an accomplice to the crime of abortion, or that abortion be punished as severely as murder, or that abortion not be permitted when necessary to save the life of the mother. The statute which they proposed, and the statute enacted by the Ohio Legislature, did none of these things.

Remarkable too is the clarity with which a legislative committee, over one hundred years ago, could state biological facts, avoiding the obfuscation evident in the Supreme Court's opinion. They knew, as we know now, that "the foetus in utero is alive from the very moment of conception." *See id.* at 234-35. They understood that purely biological phenomena in the fetus' development, such as quickening and birth, to which might be added "viability," have absolutely no bearing on the status of the fetus as a person and hence its right to life. Quickening is "purely mechanical," and the child in the womb has "an independent existence as much" as the infant which is "nourished from its mother's breast." *See id.* at 233. The committee did not hide behind the fact that various groups in society disagreed concerning the point at which human life (worthy of protection) begins to justify a refusal to intervene on behalf of the unborn child, much less to justify intervention on behalf of those who wished to be free to destroy it. Nor did the committee tolerate, much less insist, in the name of individual autonomy and privacy, that the unborn baby be left to the mercies of the "educated, the fashionable and wealthy," for whom the highest priorities are, in accordance with the "demoralized state of public sentiment," to meet "the demands of society and fashionable life," and "freedom from care." *See id.* at 235. Rather, the committee was unafraid to challenge what they perceived to be the "demoralized state of public sentiment," to foster "the diffusion of a correct public sentiment," and "a proper understanding of the dangers and criminality of the act" of abortion. *See id.* at 235.

122. It may be objected that the Ohio Legislature as a whole did not share the select committee's views on the personhood of the unborn, because the Ohio Senate did reject Sena-

It is also clear that other legislatures ratifying the fourteenth amendment, and the many legislatures subsequently enacting antiabortion laws with the understanding that they did not violate the Constitution, shared the views of the Ohio Legislature on the personhood of the unborn child. Many of these legislatures, as we have seen, enacted laws which went further than the Ohio law, by incriminating the woman's participation in her own abortion,[123] and by imposing greater penalties for violations, among other things.[124] Moreover, the legislative histories of the statutes of other states show that these statutes were often enacted pursuant to a request of state medical societies.[125] The recognition of the personhood of the unborn

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tor Griswold's efforts to make it a crime for a woman to attempt to perform an abortion on herself, defeating his amendment to penalize self-abortion by a married woman by the margin of one vote. *See id.* at 221-22, 237. However, their rejection of this amendment does not mean that they rejected the committee's insistence on the personhood of the unborn; as noted in the text accompanying nn.87-90 *supra,* there are several other reasons why the legislature may have done so. Among these reasons, the Ohio Senate was obviously moved by the fact that the woman who submitted to an abortion often did so as a desperate attempt to avoid the shame of an illegitimate birth. This is indicated by Senator Griswold's nearly successful attempt to secure passage of criminal prohibition of self-abortion by limiting the prohibition to married women: while a woman understandably might resort to desperate measures to avoid the social disgrace of pregnancy out of wedlock, a married woman with an unwanted pregnancy usually did not face such pressures and her act of self-abortion was deemed less excusable. That the legislature did share the committee's views on the personhood of the unborn is indicated by the terms of the statute which it passed, as noted in the text.

123. *See* statutes cited in n.91 *supra.*

It may be argued that the legislative history of the 1867 Ohio enactment is irrelevant to interpretation of the fourteenth amendment because Ohio, along with New Jersey, rescinded its ratification of the amendment before the requisite three-fourths of the states had ratified it. *See* Jt. Res. of January 15, 1868, 1868 OHIO LAWS 280-82; Jt. Res. of March 27, 1868, No. 4, 1868 N.J. ACTS 1225-31. Even if the Ohio legislative history is irrelevant *in itself* for this reason, it remains relevant insofar as one can infer that other ratifying states shared the intent expressed by the Senate committee. Such an inference is justified for the reasons stated in the text.

124. *See* n.70 *supra* & accompanying text.

125. This is supported by the legislative histories of the laws enacted in several states in the years near the ratification of the fourteenth amendment. *See, e.g., Maryland,* Act of Mar. 20, 1867, ch. 185, §§ 11, 16, 1867 MD. LAWS 342-44; *New York,* Act of Apr. 28, 1868, ch. 430, 1868 N.Y. LAWS 856-58; *Vermont,* Act of Nov. 21, 1867, no. 57, 1867 VT. ACTS 64-66. In 1867, the New York Medical Society sent a memorial to the New York Legislature declaring that "from the first moment of conception, there is a living creature in process in development to full maturity," and that "the intentional arrest of this living process, eventuating in the destruction of life . . . is consequently murder." *See* 1867 N.Y. ASS. J. 443-44. The Society requested that the legislature enact laws to "arrest this flagrant corruption of morality," including a law prohibiting publication of abortion-related advertisements. *See id.* at 443-44. The Senate resolved to refer the memorial to a committee "with instructions to report by bill *in accordance*" therewith. *See id.* at 444. The legislature passed such laws in the 1868 and 1869

legislative sessions by overwhelming margins. *See* Act of Apr. 28, 1868, ch. 430, 1868 N.Y. LAWS 856-58; Act of May 6, 1869, ch. 631, 1869 N.Y. LAWS 1502-03. In 1872, the New York Medico-Legal Society appointed a special committee to recommend further changes in the laws to reduce the number of criminal abortions. In its report, the committee declared that "[t]he foetus is alive from conception, and all intentional killing of it is murder." *See* 15 N.Y. MED. J. 77, 79 (1872); Means, *The Law of New York Concerning Abortion and the Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 476 (1968). As already noted at text accompanying nn.67-68 *supra,* the committee thought that abortion ideally should be punished as such, but in order to insure that juries would convict, the committee recommended that abortion be characterized as a felony punished by a minimum of four years imprisonment. The legislature *unanimously* adopted this recommendation, as well as the committee's recommendation that induction of premature labor be permitted when necessary to save the child's life. *See* Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10, Assembly Bill 10, 1872 N.Y. ASS. J. 137, 689-91, 805-06, N.Y.S.J. 388, 556.

In his influential article, Professor Means argued that the 1869 and 1872 New York laws manifest a legislative rejection rather than an affirmation of the personhood of the fetus. Although Professor Means conceded that "it could be argued" that the 1869 Legislature had adopted the view expressed in the 1867 resolution of the state medical society, by "enacting that a foetus, even before quickening, was a 'man,' who could be the subject of 'manslaughter,' " Means argued that the Legislature had used the term "manslaughter" merely as an arbitrary title to indicate the punishment applicable to the offense. Means, *The Law of New York Concerning Abortion and the Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 463, 486 (1968). However, this argument is implausible. If the Legislature's only concern had been to indicate the punishment applicable to the offense, it would have simply specified the range of punishment in the first section of the 1869 statute, just as it did in the second section.

Also, New York's 1846 statute had provided that abortion killing the mother or child did not constitute manslaughter without proof of quickening. *See* Act of Mar. 4, 1846, ch. 11, 1846 N.Y. LAWS 19. The Legislature in the 1869 statute eliminated the requirement of proof of quickening. Means argues that the Legislature did so in order to insure that those who killed women by attempted abortions could be convicted of manslaughter without proof of quickening. *See* Means, *The Law of New York Concerning Abortion and the Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 464 (1968). If the Legislature had primarily been concerned to eliminate obstacles to such convictions, the Legislature would have also eliminated the requirement that the woman be proven to have been pregnant, a fact that was often difficult to prove. H. STORER, CRIMINAL ABORTION IN AMERICA 44, 86 (1860). Also, the Legislature easily could have eliminated the quickening element from the offense of manslaughter of the woman and retained it in the offense of manslaughter of the child, simply by moving the location of the word "quick." *See, e.g.,* Act of Mar. 31, 1860, No. 374, tit. 6, § 87, 1860 PA. LAWS 404; 1881 N.Y. PEN. CODE tit. 10, ch. 2, § 191. The Legislature did not do this, but eliminated the quickening element from both offenses. The most natural explanation of the intent of the Legislature in 1869 is that indicated by the language of its statute: it believed that abortion causing the death of a fetus was manslaughter, whether or not quickening had occurred, and that it was no longer necessary to require proof of quickening to support the finding that the fetus had been alive at the time of the attempted abortion and was killed by it.

Means further argues that the New York Legislature of 1872 actually rejected the medical society's view that the foetus was a person from conception. In support of this argument, Means refers to the Legislature's limitation of the maximum term of imprisonment for abortion killing the mother or child to twenty years. *See* Means, *The Law of New York Concerning*

Abortion and the Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y.L.F. 411, 483 (1968). This limitation does not indicate that the Legislature considered the human fetus to be a non-person. Other aspects of the statute indicate that the Legislature did consider the unborn child to be a person. The Legislature provided that the same range of punishment should apply to an abortion killing the child as to an abortion killing the mother; prohibited all abortions except those necessary to save the life of the mother; referred to the fetus as a "child;" and incriminated the woman's participation in the abortion. In limiting the maximum punishment to twenty years, the Legislature was probably just considering the factors mentioned in the text accompanying nn. 63-69 *supra.* In light of these considerations, the Legislature's willingness to allow imprisonment for up to twenty years must be seen as a confirmation and not a rejection of the personhood of the unborn child.

Means makes an even more radical argument based on the opinion of the New York Court of Appeals in the case of Evans v. People, 49 N.Y. 86 (1872). To understand this argument, some background information is required. Before 1869, attempted abortions were punished by an 1845 act. Act of May 13, 1845, ch. 260, § 2, 1845 N.Y. LAWS 285-86. An 1846 act provided increased punishment for abortions proven to have caused the death of a "quick child" or the mother pregnant with a quick child. Act of Mar. 4, 1846, ch. 22, § 1, 1846 N.Y. LAWS 19. These two sections were replaced by the first section of the 1869 act, which provided that a person performing an abortion on any "woman with child . . . shall, in case the death of such child, or of such woman be thereby produced, be deemed guilty of manslaughter in the second degree." This statute eliminated the requirement of section one of the 1846 act that the woman be proven to be "pregnant with a quick child," and merely required that the woman be "with child." The statute also required proof that the abortion produced the death of the "child." By "child" the Legislature obviously meant the embryo or fetus from the moment of conception, in accordance with the 1867 resolution of the state medical society, which declared that "from the first moment of conception, there is a living creature in process of development," and that the destruction of this creature was "murder." *See* 1867 N.Y. ASS. J. 443-44. The 1869 act did not expressly provide for the punishment of attempted abortions which could not be proven to have killed the "child," as the second section of the 1845 act had done, but such attempts would nevertheless be punishable.

In the case of Evans v. People, brought under the 1869 act, it could not be proven that the abortion had caused the death of the fetus, and the defendant Evans was tried on the charge of assault with intent to commit manslaughter of the "child" under the first section of the 1869 act. Judge Bedford instructed the jury that it need not find that quickening had occurred in order to convict Evans of the assault, and Evans was convicted. The Supreme Court affirmed the conviction on February 10, 1872. *See* Evans v. People, 49 N.Y. 86, 87 (1872).

The New York Court of Appeals reversed the conviction of Evans and ordered a new trial. The Court of Appeals held that Judge Bedford had erred in instructing the jury that it need not find that quickening had occurred before it could convict Evans of assault with intent to commit manslaughter under the 1869 act. The court reasoned that the attempted abortion could not constitute manslaughter unless it produced the death of the child, and it could not do this unless the child was alive at the time of the attempt. The court said that "until the period of quickening there is no evidence of life. . . .'Quick' is synonymous with 'living,' and both are the opposite of 'dead.' The woman is not pregnant with a living child until the child has become quick." *See id.* at 90. Because abortion of a child not proven to be quick could not constitute manslaughter, attempted abortion could not constitute attempted manslaughter.

In dissent, Judge Grover pointed out that the majority's construction rendered the deletion of the word "quick" by the 1869 act of no effect, and legalized all attempted abortions where quickening could not be proven. *See id.* at 95-97 (Grover, J., dissenting). This result was a "strange anomaly" because the 1869 act had made it a crime "to supply or procure any child by these medical societies is well documented,[126] and it can be reliably inferred that legislatures enacting these statutes shared their

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medicine, drug, substance or thing whatever, knowing that the same is intended to procure the miscarriage of any woman, *whether she be or be not pregnant.*" (emphasis added) As Judge Grover concluded, this text alone, not to mention the legislative history of the 1869 act, showed "a design to increase the safeguards against this offence instead of relaxing them," completely inconsistent with any intent to legalize prequickening abortion. *See id.* at 96. Also, the 1869 act had left in effect the third section of the 1845 act making it a crime for any woman to solicit and take drugs or submit to an operation "with intent to procure a miscarriage," at any stage of pregnancy. According to Means, the legalization of prequickening abortion effected by the majority's construction of the 1869 Act did not disturb the majority because "[a]pparently they realized that from 1845 to 1869 *surgical* abortion had been outside the statute and therefore not a crime . . . ." *See* Means, *The Law of New York Concerning Abortion and the Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 487 (1968). However, Means' repeated assertion that the 1845 statute did not incriminate attempted surgical abortion before quickening is simply incorrect. The statute by its terms applied to any person "who shall . . . use or employ any instruments or other means whatever" with intent to procure miscarriage. Therefore, Judge Grover was certainly correct about the anomaly involved in the Court's construction.

In 1872 the New York Legislature changed the denomination of abortion in which "the death of [a] child . . . be thereby produced" from second-degree manslaughter to a "felony" and raised the maximum punishment from seven to twenty years. Means argues that the Legislature adopted the Court of Appeals' construction of the quoted words to require proof of quickening for this offense. Although the 1872 law was passed by both houses of the New York Legislature before the court of appeals handed down its decision, Means argues that the briefs of the defendant Evans, which made the arguments adopted by the court "were available" to the Senate Judiciary Committee, and that the Senate amended the bill in anticipation that the Court would adopt those arguments. *See* Means, *The Law of New York Concerning Abortion and the Status of the Foetus 1664-1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411, 485-86 (1968). Means claims that "[i]t is a familiar principle that when a legislature enacts a provision from an earlier act, it is presumed that the language it reenacts has the same meaning as the courts either have held, or may hereafter hold." *See id.* at 487. Means also claimed that the third section of the 1872 act, which expressly prohibited attempts to induce abortion throughout pregnancy, would have been superfluous if the Legislature had already covered prequickening abortions by the first section of the act. *See id.* at 487-88. These arguments are easily refuted. First, if the Legislature had intended to adopt the position in the brief of defendant Evans that abortion cannot "produce the death of a child" unless the child is quick, it very easily could have inserted the word "quick" back into the statute. The Legislature did not do so. Second, if the Legislature had any judicial construction in mind in reenacting this language, surely it was the obviously correct construction of the two lower courts which held that that language did not require proof of quickening, and not the preposterous construction which had not yet been adopted by the court of appeals. Third, the third section of the 1872 act would not be superfluous if the Legislature had intended to reach prequickening abortions in the first section. Section one reached abortions which could be proven to have caused the death of the fetus, and section three expressly reached all abortions which did not or could not be proven to have killed the fetus. Section three also attached the same penalty to the manufacture or advertisement of abortifacients.

126. *See* J. MOHR, ABORTION IN AMERICA 325-28 (1978) (many articles in medical journals).

views on the matter. Large newspapers also clamored for antiabortion legislation in the period,[127] in terms recognizing the personhood of the unborn; the legislatures can fairly be presumed to have shared the virtually unanimous antiabortion consensus held by influential societal groups.

The legislative history of the 1867 Ohio enactment *is* however atypical of nineteenth-century antiabortion legislation in one respect, namely, in the existence of significant opposition to the legislation. With few exceptions, antiabortion bills rolled through the legislatures of other states with very few and sometimes no dissenting votes at all.[128]

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127. *The Root of the Evil,* N.Y. DAILY TRIBUNE, Aug. 30, 1871 at 4, col. 3-4 ("The distinction between being "pregnant" and "quick with child" is founded upon what is now generally admitted to be a physiological mistake, and the probability is that abortion at any period is homicide."); *Advertising Facilities for Murder,* N.Y. TIMES, Aug. 30, 1871 at 4, col. 2-3 ("murder made easy"); *The Evil of the Age,* N.Y. TIMES, Aug. 23, 1871 at 6, col. 1-3 ("Thousands of human beings are thus murdered before they have seen the light of this world."); N.Y. TIMES, May 19, 1871 at 4, col. 6; N.Y. TIMES, Jan. 26, 1871 at 3, col. 2-3 ("nothing less than ante-natal murder"); *The Least of These Little Ones,* N.Y. TIMES, Nov. 3, 1870 at 4, col. 4 (for discussion of this editorial, see Means at 469-70); *Child Murder,* N.Y. DAILY TRIBUNE, Jan. 27, 1868 at 3, col. 5 ("The murder of children, either before or after birth, has become so frightfully prevalent."). The feminist press of the day also often spoke out against abortion (often referred to as "Restellism," after Madame Restell, the famous New York abortionist), sometimes calling for more restrictive laws. *See The Revolution,* Vol. 1 at 65, 146-47, 170, 215-17, 279 (1868); *see also The Revolution,* Vol. 3 at 135, 221; Vol. 4 at 4, 138-39, 346 (1869).

128. The following are the record votes by which antiabortion legislation was passed by various legislatures, which can be located in the legislative journal pages cited in the appendix. Votes on general criminal codes including antiabortion sections are excluded, except for votes on amendments pertaining to the abortion sections. Many states passed antiabortion legislation without record votes. *Alabama* 1894: House 26-0, Senate 83-0; 1911: Senate 18-0; *Arkansas* 1875: House 86-3, 70-1, Senate 19-0; *District of Columbia* 1872: Council 7-0; *Illinois* 1867: House 63-0, Senate 24-0; *Indiana* 1859: House 77-0, Senate 33-7; *Iowa* 1858: Senate 27-0, House 63-1; 1882: Senate 40-2, House 79-2; *Kansas* 1874: Senate 21-2, House 65-3, *Kentucky* 1910: House 84-0, Senate 27-0; *Maryland* 1867: Senate 15-2, House 34-11, 49-7; 1868: House 49-0, Senate 15-0; *Michigan* 1867: Senate 22-1, House 78-0; *Minnesota* 1873: Senate 37-0, House 55-1; *Nevada* 1869: Senate 17-0, Assembly 32-0; *New Jersey* 1849: Assembly 44-0, Senate 14-0; 1872: Assembly 34-0, Senate 18-0; 1881: Assembly 34-3, 31-1, 31-0, Senate 16-0; *New York:* 1869: Senate 20-0, Assembly 85-0; 1872: Assembly 98-0, 81-0, 85-0, Senate 10-0, 10-0; 1875: Senate 20-0, 20-0; Assembly 85-0; *South Carolina* 1883: Senate 15-8 (defeating amendment to remove provision eliminating privilege against self-incrimination but granting immunity from prosecution); 14-12 (defeating amendment to strike out enacting clause), 14-13 (defeating amendment to strike sections punishing mere attempts, etc., and section incriminating woman's participation, etc.), 17-15 (final passage) (this bill passed without record vote in House); *Tennessee* 1883: House 80-0, Senate 23-0; *Texas* 1907: House 98-0, 94-0, Senate 22-0, 23-0. Florida passed its 1868 law less than two months after it ratified the amendment; Illinois passed its 1867 law less than a month and a half after its ratification vote; Michigan one month

XI. Conclusion

That the primary purpose of the nineteenth-century antiabortion statutes was to protect the lives of unborn children is clearly shown by the terms of the statutes themselves. This primary purpose, or legislative recognition of the personhood of the unborn child, or both, are manifested, in the following elements of these statutes, taken individually and collectively: (1) the provision of an increased range of punishment for abortion if it were proven that the attempt caused the death of the child; (2) the provision of the same range of punishment for attempted abortions killing the unborn child as for attempted abortions killing the mother; (3) the designation of attempted abortion and other acts killing the unborn child as "manslaughter"; (4) the prohibition of all abortions except those necessary to save the life of the mother; (5) the reference to the fetus as a "child"; (6) the use of the term "person" in reference to the unborn child; (7) the categorization of abortion with homicide and related offenses and offenses against born children; (8) the severity of punishments assessed for abortions; (9) the provision that attempted abortion killing the mother is only manslaughter or a felony rather than murder as at common law; (10) the requirement that the woman on whom the abortion is attempted be pregnant; (11) the requirement that abortion be attempted with intent to produce abortion or to "destroy the child"; and (12) the incrimination of the woman's participation in her own abortion. Legislative recognition of the personhood of the unborn child is also shown by the legislative history of these statutes.

In short, the Supreme Court's analysis in *Roe v. Wade* of the development, purposes, and the understandings underlying the nineteenth-century antiabortion statutes, was fundamentally erroneous. That analysis can provide no support whatsoever for the Court's conclusions that the unborn children are not "persons" within the meaning of the fourteenth amendment, and that states do not otherwise have a "compelling interest" in protecting their lives by prohibiting abortion. A correct analysis of these statutes weighs entirely and heavily against these conclusions, to the extent that these conclusions depend on the purposes and understandings of the legislatures which proposed, ratified, and legislated in purported compliance with the fourteenth

later. New Jersey, Kansas, Missouri, Nebraska, Oregon, Vermont also strengthened or reenacted their antiabortion laws close in time to their ratifications. Maryland passed its 1867 law three days before it rejected the fourteenth amendment. *See* appendix.

amendment. If the Supreme Court is to be faithful to the purposes and understandings of those who enacted and have implemented the fourteenth amendment, it must reevaluate and overrule its decision in *Roe.*

APPENDIX

Many of the following statutes are quoted in Quay, *Justifiable Abortion - Medical and Legal Foundations,* 49 GEORGETOWN L. J. 395, 447-520 (1961). The legislative history of many of these statutes is dealt with in J. MOHR, ABORTION IN AMERICA (1978). Mohr's book is particularly useful for its references to original materials. However, by omission, emphasis, deemphasis, and sheer speculation unsupported by the historical sources cited in his footnotes, Mohr systematically obscures the primary purpose of those advocating and enacting antiabortion legislation to protect the lives of unborn human beings.

Alabama. Act of Jan. 9, 1841, ch. 6, § 2, 1841 ALA. ACTS 143. Act of Feb. 5, 1852. ALA. CODE, § 3230 (1852). Act of Feb. 23, 1866. 1866 ALA. PEN. CODE, tit. 1, ch. 5, § 64 at 31. ALA. CODE § 3605 (1867). Act of Dec. 13, 1894, No. 80, 1894 ALA. ACTS 131-32. H. R. 32. 1894 ALA. H. J. 156. 1894 ALA. S. J. 328. Act of Apr. 21, 1911, No. 450, 1911 ALA. ACTS 548. H. R. 250. 1911 ALA. S. J. 1609. Act of Sept. 12, 1951, No. 956, 1951 ALA. ACTS 1630.

Alaska. Act of Mar. 3, 1899, ch. 429, tit. 1, ch. 2, § 8, 30 STAT. 1253-54 (1899). H. R. 8571. H. R. Rep. 1482, 55th Cong., 2d Sess. 2, 4. ALASKA COMP. LAWS ANN. § 65-4-6 (1949).

Arizona. ARIZ. CODE, ch. 10, div. 5, § 45 (1865). ARIZ. PEN. CODE §§ 454, 455 (1887). ARIZ. REV. STAT. ANN. §§ 13-211, -212, -213 (1956).

Arkansas. Act of Feb. 16, 1838. ARK. REV. STAT. ch. 44, div. 3, art. 2, §§ 5, 6 (1838). Act of Nov. 8, 1875, No. 4, 1875 ARK. ACTS 5-6. H. R. 68. 1875 ARK. H. J. 567, 60-61 (adj. sess.). 1875 ARK. S. J. 174-75.

California. Act of Apr. 16, 1850, ch. 99, div. 5, § 45, 1850 CAL. STAT. 233. Act of May 10, 1861, ch. 521, 1861 CAL. STAT. 588. Act of Feb. 14, 1872, CAL. PEN. CODE §§ 274, 275 (1872). Ch. 528, § 1, 1935 CAL. STAT. 1605. Act of May 6, 1957, ch. 270, 1957 CAL. STAT. 921.

Colorado. Act of Nov. 5, 1861, div. 4, § 42, 1861 COLO. SESS. LAWS 196-97. COLO. REV. STAT. ch. 11, § 42 (1868). Act of Apr. 13, 1891, 1891 COLO. SESS. LAWS 122-23. COLO. REV. STAT. § 40-2-23 (1953).

Connecticut. CONN. STAT. tit. 22, §§ 14, 16 (1821). Act of June 5, 1830, ch. 1, § 16, 1830 CONN. PUB. STAT. LAWS 255. CONN. STAT.

tit. 21, § 15 (1835). Act of June 23, 1860, ch. 71, 1860 CONN. ACTS 65-66. CONN. GEN. STAT. tit. 12, ch. 1, §§ 22-25 (1866).

Delaware. Act of Feb. 13, 1883, ch. 226, 1883 DEL. LAWS 522.

District of Columbia. Act of Jan. 19, 1872, 1872 D.C. ACTS 26-29. H. D. 2. 3 D.C. COUNCIL J. 2d Spec. Sess., 111 (1872). D.C. COMP. STAT. ch. 16, §§ 13, 20 (1887-89). Act of Mar. 3, 1901, ch. 854, §§ 809, 872, 31 STAT. 1189, 1322, 1332 (1901). Act of June 29, 1953, ch. 159, § 203, 67 STAT. 93 (1953).

Florida. Act of Aug. 6, 1868, ch. 1637, no. 13, ch. 3, §§ 10-11, ch. 8, §§ 9-11, 1868 FLA. LAWS 64, 97.

Georgia. Act of Feb. 25, 1876, ch. 130, 1876 GA. LAWS 113, H. R. 264. GA. CODE div. 4, art. 2, §§ 77-82 (1895).

Hawaii. HAW. PEN. CODE §§ 1-3 (1850). HAW. PEN. CODE ch. 12, §§ 1, 2 (1869). 1869 HAW. P. L. 83, 84.

Idaho. Act of Feb. 4, 1864, ch. 4, § 42, 1864 IDAHO SESS. LAWS 443. Act of Jan. 14, 1875, ch. 4, § 42, 1875 IDAHO SESS. LAWS 328. IDAHO REV. STAT. §§ 6794-95, 6843 (1887).

Illinois. Act of Jan. 6, 1827, ILL. REV. CODE div. 5, sec. 46 (1827). ILL. REV. CODE div. 5, sec. 46 (1833). Act of Feb. 28, 1867, 1867 ILL. LAWS 89, H.R. 592, 1867 ILL. H.J. 689-690. 1867 ILL. S.J. 1107. Act of Mar. 27, 1874, ILL. REV. STAT. ch. 38, div. 1, secs. 3-6 (1874). Act of June 28, 1919, 1919 ILL. LAWS 427-28.

Indiana. Act of Feb. 7, 1835, ch. 47, sec. 3, 1835 IND. GEN. LAWS 66. Act of June 14, 1852, sec. 36. Act of Mar. 5, 1859, ch. 81, 1859 IND. LAWS 130-31. H.R. 206. 1859 IND. H.J. 459-60, 565, 780-81. 1859 IND. S.J. 1009-10, 1050. Act of Apr. 14, 1881, ch. 37, secs. 22-23, 91-93, 1881 IND. LAWS 177, 193-94, H.R. 393. 1881 IND. J. 742, 744, 956, 1529, 1582-83, 1881 IND. S.J. 960, 999, 1016-17. Act of Mar. 10, 1905, ch. 169, secs. 367-68, 462-63, 465, 1905 IND. LAWS 663-64, 691-92.

Iowa. Act of Jan. 25, 1839. IOWA TERR. STAT. div. 1, sec. 18 (1838-39). Act of Feb. 16, 1843. IOWA REV. STAT. sec. 10, at 162-63. Act of Mar. 15, 1858, ch. 58, 1858 IOWA ACTS 93. S. 134. 1858 IOWA S.J. 284, 388. 1858 IOWA H.J. 612-13. Act of Feb. 23, 1882, ch. 19, 1882 IOWA ACTS 20. S. 52. 1882 IOWA S.J. 84. 1882 IOWA H.J. 238-239. Act of Mar. 24, 1915, ch. 45, 1915 IOWA ACTS 69.

Kansas. Act of Mar. 3, 1868, ch. 31, art. 2, secs. 14, 15, 44, 1868 KANS. LAWS 320-21, 325. Act of Apr. 4, 1957, ch. 216, 1957 KANS. SESS. LAWS 466. H.R. 526.

Kentucky. Act of Mar. 22, 1910, ch. 57, 1910 KY. ACTS 189-90. H.R. 108. 1910 KY. H.J. 428. 1910 KY. S.J. 1461.

Louisiana. LA. REV. STAT. sec. 24, at 138 (1856). LA. REV. STAT. sec. 807 (1870).

Maine. ME. REV. STAT. ch. 160, secs. 11-14 (1840). ME. REV. STAT. tit. 11, ch. 124, sec. 8 (1857).

Maryland. Act of Mar. 20, 1867, ch. 185, secs. 11, 16, 1867 MD. LAWS 342-44. Senate Bill. 1867 MD. S.J. 410, 712-713. 1867 MD. H.J. 829-830, 1030-1031, 1048-1049. Act of Mar. 28, 1868, ch. 179, 1868 MD. LAWS 314-16. House Bill. 1868 MD. H. 377-78, 492-93. 1868 MD. S.J. 396-397. MD. CODE tit. 27, art. 72, secs. 16, 17 (1878).

Massachusetts. Act of Jan. 31, 1845, ch. 27, 1845 MASS. ACTS 406. MASS. GEN. STAT. ch. 165, secs. 9-11 (1860). MASS. GEN. STAT. ch. 165 (1869).

Michigan. MICH. REV. STAT. ch. 153, secs. 32-34 (1846). Act of Mar. 15, 1867, No. 61, 1867 MICH. LAWS 87. H. 69. 1867 MICH. H.J. 761. 1867 MICH. S.J. 819.

Minnesota. MINN. REV. STAT. ch. 100, secs. 10, 11, at 493 (1851). Act of Mar. 10, 1873, ch. 9, 1873 MINN. LAWS 117-19. S. 189. 1873 MINN. S.J. 391. 1873 MINN. H.J. 585. MINN. STAT. ANN. secs. 617.18-.22, .25-.26 (1953).

Mississippi. Act of Feb. 15, 1839, ch. 66, art. 1, tit. 3, art. 1, secs. 8, 9, 1839 MISS. LAWS 112-13. Act of Feb. 2, 1857. MISS CODE sec. 34, arts. 172-73 (1857). Act of Apr. 2, 1892. MISS. REV. CODE secs. 1156-57, 1217 (1892). Act of Apr. 16, 1952, ch. 160, 1952 MISS. LAWS 289.

Missouri. Act of Feb. 12, 1825. MO. REV. LAWS, vol. 1, sec. 12, at 283 (1825). Act of Mar. 20, 1835. MO. REV. STAT. art. 2, secs. 9, 10, 36, at 168-69, 172 (1835). Act of Mar. 20, 1866. MO. GEN. STAT. pt. 4, tit. 45, ch. 200, secs. 9, 10, 34 (1865). MO. REV. STAT. secs. 559.090, .010 (1949)

Montana. Sec. 41, 1864 MONT. LAWS 184. Act of Jan. 12, 1872, ch. 4, secs. 41-41, 1872 MONT. LAWS 269. MONT. REV. CODE ANN. secs. 94-401, -402 (1947).

Nebraska. Sec. 43, 1858 NEB. LAWS 47. Act of Feb. 12, 1866. NEB. REV. STAT. tit. 4, ch. 4, § 42 (1866). Act of Mar. 4, 1873. NEB. GEN. STAT. ch. 58, ch. 2, § 6, ch. 6, §§ 39, 45 (1873).

Nevada. Act of Nov. 26, 1861, ch. 28, div. 4, § 42, 1861 NEV. LAWS 63. Act of Feb. 16, 1869, ch. 22, § 1, 1869 NEV. LAWS 64-65.

S. 53. 1869 NEV. S. J. 91. 1869 NEV. ASS. J. 118. NEV. REV. STAT. §§ 200.210, .220, 201.120, .130, .140, .150 (1959).

New Hampshire. Act of Jan. 4, 1849, ch. 743, 1848 N.H. LAWS 708-09.

New Jersey. Act of Mar. 1, 1849, 1849 N.J. LAWS 266-67. Assembly Bill. 1849 N.J. ASS. MINUTES 759-60. 1849 N.J. S. J. 876-78. Act of Mar. 26, 1872, ch. 337, 1872 N.J. LAWS 45-46. Assembly Bill 427. 1872 N.J. ASS. MINUTES 966. 1872 N.J. S. J. 874-75. Act of Mar. 27, 1874. N.J. REV. STAT. §§ 44-49, 75, 115 (1874). Act of Mar. 25, 1881, ch. 191, 1881 N.J. LAWS 240. Assembly Bill 53. 1881 N.J. ASS. MINUTES 197, 623, 1027-28. 1881 N.J. S. J. 458, 750. Ch. 235, § 53, 119, 1898 N.J. LAWS 808, 827.

New Mexico. Act of Feb. 15, 1854, no. 28, §§ 10-11, 1854 N.M. LAWS 88. N.M. GEN. LAWS ch. 51, §§ 10-11 (1880). Act of Mar. 18, 1907, ch. 36, §§ 5-6, 1907 N.M. LAWS 42. Act of Feb. 21, 1919, ch. 4, 1919 N.M. LAWS 6.

New York. Act of Dec. 10, 1828. N.Y. REV. STAT. pt. 4, ch. 1, tit. 1, §§ 20-22, tit. 2, art. 1, §§ 8-9, tit. 6, § 21 (1828). Act of Apr. 20, 1830, ch. 320, § 58, 1830 N.Y. LAWS 401. Act of May 13, 1845, ch. 260, 1845 N.Y. LAWS 285-86. Act of Mar. 4, 1846, ch. 22, 1846 N.Y. LAWS 19, 1867 N.Y. S. J. 194, 481, 637. 1867 N.Y. ASS. J. 443-44, 1120, 1411, 1631, 1716. Act of Apr. 28, 1868, ch. 430, 1868 N.Y. LAWS 856-58. Senate Bill. 1868 N.Y. S. J. 227, 768-69, 810. 1868 N.Y. ASS. J. 1250-51, 1284-1286. Act of May 6, 1869, ch. 631, 1869 N.Y. LAWS 1502-03. Senate Bill. 1869 N.Y. S. J. 585. 1869 N.Y. ASS. J. 1900-01. Act of Apr. 6, 1872, ch. 181, 1872 N.Y. LAWS 509-10. Assembly Bill 10. 1872 N.Y. ASS. J. 137, 689-691, 805-06. 1872 N.Y. S. J. 388, 556. Act of May 15, 1875, ch. 352, 1875 N.Y. LAWS 337-38. Senate Bill. 1875 N.Y. S. J. 444, 735. 1875 N.Y. H. J. 1257. Act of July 26, 1881. N.Y. PEN. CODE ch. 676, tit. 9, ch. 2, §§ 190-91, 194, tit. 10, ch. 4, §§ 294-97, ch. 7, §§ 318-21. 3 N.Y. REV. STAT. at 2478-80 (1881). Act of May 11, 1942, ch. 791, 1942 N.Y. LAWS 1704.

North Carolina. Act of Mar. 12, 1881, ch. 351, 1881 N.C. LAWS 584-85.

North Dakota. Act of Feb. 17, 1877, DAK. PEN. CODE §§ 251-52, 337-39. DAK. COMP. LAWS §§ 6451-52, 6538-40 (1887). N.D. REV. CODE § 12-2501-04 (1943).

Ohio. Act of Feb. 17, 1834, §§ 1, 2, 1834 OHIO LAWS 20-21. Senate Bill. 1834 OHIO S. J. 712. 1834 OHIO H. J. 642. Act of Apr. 13,

1867 OHIO LAWS 135-36. S. 285. 1867 OHIO S. J. 112, 147, 155, 193, 221-22, 235, 237, 238, 299, 318, 428-29, 546-47, 566, 574, Appendix, 233-35. 1867 OHIO H. J. 290-91, 305, 348, 380, 389, 596-97, 660-61, 678. OHIO REV. CODE ANN. § 2901.16 (1953).

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Rhode Island. R.I. GEN. LAWS ch. 277, §§ 22-23 (1896). Act of Apr. 23, 1915, ch. 1258, §§ 9, 30, 1915 R.I. PUB. LAWS 201.

South Carolina. Act of Mar. 24, 1883, no. 354, 1883 S.C. ACTS 547-48. S. 47. 1883 S.C. S. J. 190-92, 260. 1883 S.C. H. J. 362.

South Dakota. See North Dakota for Dakota Territory law of 1877. S.D. COMP. LAWS §§ 4022, 4116 (1929). S.D. CODE §§ 13.3101, .3102 (1960).

Tennessee. Act of Mar. 26, 1883, ch. 140, 1883 TENN. ACTS 188-89. H. R. 423. 1883 TENN. H. J. 701-02. 1883 TENN. S. J. 671. TENN. CODE ANN. §§ 10791-92 (1932).

Texas. Act of Feb. 9, 1854, § 1, 1854 TEX. GEN. LAWS 58. Act of Aug. 28, 1856. TEX. PEN. CODE arts. 531-36 (1856). 1858 TEX. GEN. LAWS 172. Act of Mar. 20, 1907, ch. 33, 1907 TEX. GEN. LAWS 55. H. R. 140. 1907 TEX. H. J. 633-34, 940. 1907 TEX. S. J. 472.

Utah. UTAH COMP. LAWS tit. 9, ch. 3, § 142 (1876). UTAH CODE ANN. §§ 76-2-1, -2 (1953).

Vermont. Act of Oct. 30, 1846, no. 33, 1846 VT. ACTS 34-35. Act of Nov. 21, 1867, no. 57, 1867 VT. ACTS 64-66. S. 25. 1867 VT. S. J. 112, 154, 231. 1867 VT. H. J. 290.

Virginia. Act of Mar. 14, 1848, tit. 2, ch. 3, § 9, 1848 VA. ACTS 96. VA. CODE tit. 54, ch. 191, § 8 (1849). Act of Feb. 4, 1876, ch. 35, 1876 VA. ACTS 24-25. Act of Mar. 14, 1878, ch. 311, ch. 2, § 8, ch. 10, § 11, 1878 VA. ACTS 281-82.

Washington. Act of Apr. 28, 1854. WASH. TERR. STAT. ch. 2, §§ 37-39 at 81-82 (1854). WASH. CODE §§ 820-21 (1881).

West Virginia. For law before 1868, *see* VIRGINIA CODE 1860. W.

VA. CODE ch. 144, § 8 (1868). Ch. 118, § 8, 1882 W. VA. ACTS. W. VA. CODE ch. 61, art. 2, § 8 (1931).

Wisconsin. WIS. REV. STAT. ch. 133, §§ 10-11 (1849). Act of May 17, 1858. WIS. REV. STAT. ch. 164, §§ 10-11, ch. 169, §§ 58-59 (1858). Act of Aug. 20, 1897. WIS. STAT. §§ 4347, 4352, 4583-84 (1897).

Wyoming. Ch. 3, § 25, 1869 WYO. LAWS 104. Ch. 73, §§ 31, 32, 1890 WYO. LAWS 131.