

# THE LONG HISTORY AND TRADITION OF A RIGHT TO PRE-QUICKENING ABORTION IN THE UNITED STATES

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## ABSTRACT

*This Comment argues that evaluation of the history and tradition of abortion in the United States shows that a right to pre-quickenings abortion—that is, before the pregnant woman feels fetal movement—is deeply rooted and fundamental in this country. The Comment asserts that when the experiences of women regarding abortion, abortion practices, and the works of feminist and consensus legal historians analyzing the history of abortion in this country are considered, a different outcome is reached than that in Dobbs, because of its focus on blackletter law, which historically underrepresents women.*

*Further, the Comment shows that even during periods of illegality, pre-quickenings abortion has been broadly tolerated. As a case example, even with Idaho’s statutory history of nearly absolute abortion bans, its scant common law history implies acquiescence to pre-quickenings abortion.*

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## I. INTRODUCTION

### A. Some Experiences of Women

I was a senior in high school when *Roe v. Wade*<sup>1</sup> was decided on January 22, 1973. To be honest, at my high school in my small town in South Dakota, it did not make waves. However, when one of the cheerleaders got pregnant, it was a tsunami for my class. My classmates and I watched her gestation advance, and we continued to watch as her pregnancy became pronounced when she cheered our team at the State A boys basketball tournament that March, which we won, and then she seemed to vanish.

Fifty years later, after the reversal of *Roe*, I tracked my classmate down for this Comment.

"My only choice was to have the baby, I felt. I never considered anything else . . . I would never have had an abortion. It's just not something I would do. I didn't know what the hell I was going to do . . . It wasn't easy. It was embarrassing to go to school . . . Everybody knew.

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1. *Roe v. Wade*, 410 U.S. 113, 116 (1973).

“A lot of people said, ‘Well, you can give . . . [t]he baby up for adoption.’ I couldn’t do that either. I just knew I was supposed to keep her. So, I did.” My classmate finished high school, she married someone other than the biological father, never attended college, but worked for years as a legal assistant. “I had a great life and a great marriage. I have two . . . wonderful kids . . . . God takes care of everything.”<sup>2</sup>

A divorced, professional woman whom the author also interviewed already had children when she got an abortion. With her children and her career as her world, she immediately viewed the unintended pregnancy as a mistake.<sup>3</sup> The paths of these women were different. For one, an abortion was not an option. But for the other, the trajectory of her life would have gone in a direction she never would have chosen, her relationships with her existing children would have profoundly changed, and her position at her company uncertain.

Both women agree about reproductive autonomy and oppose *Dobbs v. Jackson Women’s Health Organization*<sup>4</sup> overruling *Roe*. “I think it’s ridiculous,” my classmate said. “It’s just like somebody saying to me, ‘Well, you’re pregnant, you better get an abortion. What? . . . I mean it’s between you and God, or your God, or whoever you talk to.’”<sup>5</sup>

The professional woman sees a detrimental economic effect: “It throws us back to a time when young women generally were viewed as having their careers interrupted by pregnancy. That’s a financial and psychological setback for my daughter and for all women.”<sup>6</sup>

The past is all too vivid for Chicagoan Dorie Barron, who in the 1960s desperately looked for an abortion—illegal in every state: “An acquaintance said, ‘Here’s a phone number.’ And it was the Mob. They had to talk in code. They said, ‘Do you want a Cadillac, a Chevrolet, or a Rolls Royce? The Chevy was the cheapest, \$500. The Cadillac was something like \$750. And, if you wanted the Rolls Royce—we’re talking about the Sixties here—it was a thousand dollars. That’s what the Mob charged for an abortion.”<sup>7</sup> While Barron could pay for the “Chevy,” many women had to keep looking.

#### B. Overview of Landmark Case Law

Once a woman becomes pregnant and does not want the child, she faces a dichotomy: “abortion or compulsory pregnancy,” observed Shirley Chisolm, the first

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2. Telephone Interview with author’s high school classmate requesting anonymity (Nov. 21, 2022) (on file with author).

3. Email from woman requesting anonymity to author (Dec. 30, 2022) (on file with author).

4. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

5. Telephone Interview, *supra* note 2.

6. Email, *supra* note 3.

7. THE JANES (HBO 2022); Ian Webster, *CPI Inflation Calculator*, <https://www.in2013dollars.com/us/inflation/1960?amount=1000> (last visited Sept. 3, 2023) (\$1,000 in 1960 converts to \$10,327.40 in 2023).

Black woman U.S. Representative.<sup>8</sup> A brief review of *Roe* to *Dobbs* boils down to whether compulsory pregnancies are considered acceptable.<sup>9</sup>

On January 22, 1973, *Roe* held that women have a constitutional right to abortion, not because the Constitution says so explicitly, but because a woman's right to terminate a pregnancy qualifies as a right of privacy under the penumbra of the Bill of Rights and is a "fundamental" right or is "implicit in the concept of ordered liberty" under the Fourteenth Amendment.<sup>10</sup> Thus, nowhere in the country, *Roe* found, should a pregnancy be compulsory before the state interest becomes compelling, when a fetus becomes "viable"—roughly at the third trimester of pregnancy.<sup>11</sup>

On January 29, 1992, the *Planned Parenthood of Southeastern Pennsylvania v. Casey* plurality held that states could impose restrictions on women wanting an abortion during any period of pregnancy, instead of only during the third trimester's viability as *Roe* allowed, if the restrictions did not create an "undue burden" for a woman to obtain an abortion.<sup>12</sup> Also rejecting *Roe*'s privacy right for abortion, the *Casey* Court held that only restrictions imposing an undue burden intrude on the "heart of the liberty" protection under Fourteenth Amendment's due process clause.<sup>13</sup> In *Casey*, *Roe* author Justice Blackmun defended *Roe*'s level of abortion protections because they guarded against "compelled continuation of a pregnancy."<sup>14</sup>

On June 24, 2022, the *Dobbs* majority overthrew the nearly fifty years of *Roe* and *Casey* precedent, holding that pregnancy could be compulsory at any time during a woman's pregnancy if a state so chooses.<sup>15</sup> *Roe*'s premise of the right to abortion based on privacy under the Fourteenth Amendment had to be rejected, the *Dobbs* majority maintained, because the Court's privacy precedent deals with rights such as marriage and birth control, but not ending "potential life," which makes abortion "fundamentally different."<sup>16</sup> Further, the *Dobbs* majority termed a "glaring deficiency" in *Roe* a failure to justify its distinction between pre- and post-viability abortions for when that potential life could be terminated.<sup>17</sup> The majority asked, if the state has an interest in potential life after viability, "why isn't

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8. DIANE SCHULDER & FLORYNCE KENNEDY, ABORTION RAP: TESTIMONY BY WOMEN WHO HAVE SUFFERED THE CONSEQUENCES OF RESTRICTIVE ABORTION LAWS, viii (1971).

9. This Comment acknowledges that pregnant people can include transgender men and nonbinary persons.

10. *Roe v. Wade*, 410 U.S. 113, 152 (1973) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

11. *Id.* at 155, 160.

12. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874 (1992).

13. *Id.*

14. *See id.* at 927 (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part).

15. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242, 2236 (2022). Since the *Dobbs* decision, the states enacting complete abortion bans with limited exceptions include Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Missouri, Mississippi, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and West Virginia. *Interactive Map: US Abortion Policies and Access After Roe*, Guttmacher Institute, Nov. 22, 2023, <https://states.guttmacher.org/policies/>.

16. *Id.* at 2242.

17. *Id.* at 2268.

that interest ‘equally compelling before viability’?”<sup>18</sup> The majority, thus, points to state interest whenever a woman is carrying “potential life” because of pregnancy, intimating compulsory pregnancy, which *Dobbs* by definition allows through permitting states to ban abortions at all phases of pregnancy.

*Casey*’s finding of a substantive due process right to abortion under the liberty interest of the Fourteenth Amendment had to be overruled, the *Dobbs* majority wrote, because the right was not demonstrated to be “deeply rooted in this Nation’s history and tradition”—a requirement “*before* [an unenumerated right] can be recognized as a component of ‘liberty’” protected under the Due Process Clause.<sup>19</sup> Using the history and tradition test based on how the country’s laws have treated abortion, the *Dobbs* Court found that no right to abortion is deeply rooted in the history and tradition of this country and thus no right to abortion under the Fourteenth Amendment is implied.<sup>20</sup>

A history and tradition test becomes a misnomer if it focuses on blackletter statutory laws and legal principles, but is blind to the lived experience, practices, and customs of the people whom the laws and legal principles affect. A blackletter focus on legal rules and laws is especially misrepresentative of the views of women,<sup>21</sup> given that most women lacked the right to vote and had minimal presence in government or legal positions from the time of the founding of the U.S. Constitution through ratification of the Fourteenth Amendment.<sup>22</sup>

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18. *Id.* (quoting *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989)).

19. *Id.* at 2246, 2260.

20. *Id.* at 2242, 2249–53 (presenting a history of abortion laws from the thirteenth century to *Roe*, but failing to discuss gender bias or antiquated notions embedded in the laws, or the actual practices of women, and failing to cite a single feminist historian or other pro-choice historians). The *Dobbs* minority opinion, however, discussed at length the experiences of women and relied on works of feminist historians. *Dobbs*, 142 S. Ct. at 2319, 2325, 2354 nn.3, 27 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

21. See, e.g., Reva B. Siegel, *Commentary: How “History and Tradition” Perpetuates Inequality: Dobbs on Abortion’s Nineteenth-Century Criminalization*, 60 Hous. L. Rev. 901, 906, 926 (2023) (tying the outcome of the history and tradition test in *Dobbs* to the majority’s focus on the laws that were “wholly masculine”) (quoting Antoinette Brown [Blackwell], *THE PROCEEDINGS OF THE WOMEN’S RIGHTS CONVENTION, HELD AT SYRACUSE, SEPT. 8TH, 9TH, & 10TH, 1852* 20–21).

22. The first woman admitted to any state bar was Arabella Mansfield in Iowa in 1869, one year after the passage of the 14th Amendment. See *History of American Women, Arabella Mansfield*, <https://www.womenhistoryblog.com/2012/06/arabella-mansfield.html> (last visited Nov. 26, 2023). The first woman admitted to practice before the U.S. Supreme Court was Belva Lockwood in 1879. See Jill Norgren, *Blazing the Trail for Women in Law*, 37 Prologue Magazine (Spring 2005). The first woman elected to Congress was Jeanette Rankin in 1916, and the first Black woman elected to Congress was Shirley Chisholm in 1968. Milestones for *Women in American Politics*, Rutgers Eagleton Institute of Politics, <https://cawp.rutgers.edu/facts/milestones-women-american-politics> (last visited Dec. 4, 2023). The first woman to serve in the U.S. Senate was suffragist, and white supremacist, Rebecca Felton of Georgia in 1922, and the first Black woman elected to the Senate was Carol Moseley Braun in 1992. *Id.* The first woman appointed to the U.S. Supreme Court was Sandra Day O’Connor in 1981, and the first Black woman appointed to the Court was Ketanji Brown Jackson in 2022. *Id.*; *The Current Court: Justice Ketanji Brown Jackson*, Supreme Court Historical Society, <https://supremecourthistory.org/supreme-court-justices/associate-justice-ketanji-brown-jackson/> (last visited Dec. 4, 2023).

A history and tradition test fully incorporating women's abortion history and tradition tells a different story than that in *Dobbs*. This Comment shows that women's lived experiences, abortion practices, and the custom of tolerance demonstrate that a right to abortion before "quickening"—when a pregnant woman first feels the fetus move around the fourth month of pregnancy<sup>23</sup>—is "deeply rooted" in the history and tradition of women in this country.

### C. Overview of Abortion History

"[T]o talk of abortion is to speak of power"<sup>24</sup>—the power of men to impregnate, the power of women to refuse to be impregnated, the state's power to boost or curb population, and women's role in the economy, society, and politics.<sup>25</sup> Or at least that was the case. Today, technology has blurred absolute co-dependency of the sexes. Gay couples, singles, and infertile people may be able to parent through surrogacy, donor eggs, or in vitro fertilization. But the ultimate power of reproductive "self-sovereignty" for millions of women still relies on abortion.<sup>26</sup> Abortion may be relied on because of an abusive spouse, the power differential behind date rape, lack of economic power to buy birth control, or the simple power of a mistake.

An early record of an induced abortion is on papyrus from 1550 B.C.<sup>27</sup> As suggested on the papyrus, techniques ranged from honey douches to vaginal pessaries from the dung of crocodiles.<sup>28</sup> Pregnancies have resulted in abortion, perhaps "as long as human beings have existed."<sup>29</sup> Restated, as long as there is sex, there will be unwanted pregnancies; as long as there are unwanted pregnancies, there will be abortions.

In this country, from colonial times until the mid-nineteenth century, common law in most states treated pre-quickening abortion as legal, and abortion was at

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23. See *Quickening in Pregnancy*, Cleveland Clinic, <https://my.clevelandclinic.org/health/symptoms/22829-quickening-in-pregnancy> (last visited Mar. 4, 2023).

24. CARROLL SMITH-ROSENBERG, *The Abortion Movement and the AMA, 1850–1880*, in *DISORDERLY CONDUCT* 217 (1985).

25. *Id.*

26. Approximately twenty-five percent of U.S. women before the overturning of *Roe* were estimated to have an abortion by the end of their childbearing years. Margot Sanger-Katz et al., *Who Gets Abortions in America*, N.Y. TIMES, Dec. 14, 2021, <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html>. Elizabeth Cady Stanton coined the term "self-sovereignty" for reproductive autonomy. See *infra* p. 335.

27. Malcolm Potts & Martha Campbell, *History of Contraception*, 6 GYN. AND OBST. CLINICAL MED. (May 2009).

28. *Id.*

29. Annalies Winny, *A Brief History of Abortion in the U.S.: Abortion Wasn't Always a Moral, Political, and Legal Tinderbox. What Changed?*, Hopkins Bloomberg Public Health (updated Nov. 2, 2022), <https://magazine.jhsph.edu/2022/brief-history-abortion-us>.

times widely practiced with the acquiescence of organized religions,<sup>30</sup> as evidenced by the birth rate plummeting during the time period from 1800 to 1900.<sup>31</sup> The birth rate at the beginning of the nineteenth century was 7.04 per woman, but by 1900 it had dropped to 3.56.<sup>32</sup> Much of that decline is attributed to “deliberate contraception and abortion.”<sup>33</sup>

The distinction between a “quick and unquick” pregnancy was essential, with pregnant women viewing the time period before quickening as their time to decide whether to go forward with a pregnancy or take measures to terminate it.<sup>34</sup> During the mid-1800s, the American Medical Association (AMA) began denigrating the quickening doctrine compared to “[m]edical wisdom” in diagnosing pregnancy.<sup>35</sup> The AMA’s aggressive opposition to abortion helped sustain a more than 100-year ban of abortion until *Roe*. Even so, when comparing general common law tolerance of pre-quickening abortions from colonial America to the mid-1800s and from *Roe* to *Dobbs*, the total time period of common law legality is longer than the period of illegality. As this Comment shows, the common law period of legality of pre-quickening abortions lasted from the Colonial Era<sup>36</sup> and the statutory legal period during *Roe*, until its overturning, totaling roughly 200 years. The period of illegality lasted from the mid-1800s to *Roe*, totaling roughly 123 years. Of course, the practice of abortion continued even during the period of illegality.<sup>37</sup>

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30. See, e.g., LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973 8 (2022) (discussing that before quickening “no one believed a human life existed[,] not even the Catholic Church”); JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA 40–41 (1994) (noting some eighteenth-century Puritan women adhered to a “replenish the earth” mentality, others such as Abigail Adams viewed repeated pregnancies as “sad slavery;” and still others such as Jane Josselin, a clergy’s wife, likely aborted pregnancies later in reproductive years—after nine children, Josselin had three “miscarriages” at “exactly” the earliest point she could have known she was pregnant and could have used an abortifacient); MARY ZIEGLER, REPRODUCTION AND THE CONSTITUTION IN THE UNITED STATES 15 (2020) (discussing that the pre-quickening doctrine “treated abortions as a regulation of menstruation, not a criminal act”).

31. BRODIE, *supra* note 30, at 2.

32. *Id.*

33. *Id.* at 4.

34. JAMES C. MOHR, ABORTION IN AMERICA 5 (1978).

35. See Carroll Smith-Rosenberg & Charles Rosenberg, *The Female Animal: Medical and Biological Views of Woman and Her Role in Nineteenth-Century America*, 60 J. AM. HIST. 332, 335, 344 (1973) [hereinafter *Female Animal*].

36. *History of the United States*, USEmbassy.gov, <https://usa.usembassy.de/history-colonial.htm> (last visited Sept. 10, 2023). The Colonial Era commenced with the founding of the first English colony at Jamestown, Virginia, in 1607. The Colonial Era ended prior to independence in 1775. *Id.*

37. For example, from 1840 to 1880 when anti-abortion laws were becoming prevalent, the birth rate dropped by more than half, much attributed to abortions. See BRODIE, *supra* note 30, at 2.

## II. THE HISTORY AND TRADITION TEST TO DETERMINE A FUNDAMENTAL RIGHT TO ABORTION

### A. Origins of the History and Tradition Test

The history and traditions test that the *Dobbs* Court used first arose under two early cases: *Snyder v. Massachusetts*, where the defendant facing the death penalty was not allowed to accompany the judge, the jury, the lawyers, and a court stenographer to observe the crime scene,<sup>38</sup> and *Palko v. Connecticut*, in which the Court upheld a state's right to appeal criminal cases because at the time double jeopardy applied only at the federal level.<sup>39</sup> In *Snyder*, the lawyers for the 19-year-old defendant argued that under due process he had a fundamental right to go to the crime scene.<sup>40</sup> Reaching to cases as far back as 1747, Justice Benjamin Cardozo found that denying a defendant's visit to the crime scene did not "offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."<sup>41</sup>

*Palko* and the case that later overruled it, *Benton v. Maryland*,<sup>42</sup> illustrate that use of the history and tradition test can result in opposite outcomes. The *Palko* Court held that based on case law and historical practices in Europe, the federal prohibition on double jeopardy did not apply to the states because the prohibition was not "so rooted" to be "fundamental."<sup>43</sup> Breaking with *Palko*, *Benton* held that in "Greek and Roman times" the prohibition against double jeopardy was a "fundamental" right and, thus, had to be applied to the states.<sup>44</sup>

Justice Harlan's dissent in *Poe v. Ullman* further shaped the history and tradition test by demanding that the test regard "what history teaches are the traditions from which [the country] developed as well as the traditions from which it broke."<sup>45</sup>

### B. Problems Generally with the History and Tradition Test

Because the history and tradition test looks backward to assess whether a current right is fundamental, its application can entrench an unjust history.<sup>46</sup> The *Dred Scott* decision illustrates the point to its most mortifying extent.<sup>47</sup> Writing for the pro-slavery Court in 1857, Southerner and former slave owner Chief Justice

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38. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934); see also Jill Lepore, *The History Test: How Should the Court Use History?*, THE NEW YORKER, (March 20, 2017), <https://www.newyorker.com/magazine/2017/03/27/weaponizing-the-past>.

39. *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937).

40. Lepore, *supra* note 38.

41. *Snyder*, 291 U.S. at 105.

42. *Benton v. Maryland*, 395 U.S. 784, 787 (1969).

43. *Palko*, 302 U.S. at 325.

44. *Benton*, 395 U.S. at 795.

45. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

46. See, e.g., Lepore, *supra* note 38.

47. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

Roger Taney<sup>48</sup> claimed that his survey of the Declaration of Independence and state constitutions and laws at the time of the founding provided a “faithful index” to the meaning of “general terms” in the Constitution: “They show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed . . . with absolute and despotic power.”<sup>49</sup> Based on such “historical facts,” Taney concluded that at time of the founding “[Blacks] had for more than a century before been regarded as beings of an inferior order, . . . so far inferior, that they had no rights which the white man was bound to respect.”<sup>50</sup> Thus, the “true meaning and intention” of the Constitution “when it was formed and adopted” had to be “construed and administered” accordingly, despite a “change in public opinion”: a “free negro” was not a “citizen” within the meaning of the Constitution of the United States.”<sup>51</sup> The Fourteenth Amendment constitutionally overthrew Taney’s perverse use of history and tradition. *Brown v. Board of Education*<sup>52</sup> jurisprudentially did so by finding historical analysis insufficient to provide justice for Black children, and instead relied on social science and empirical data.<sup>53</sup>

Law professor Neoshia Roemer sees the test misleading regarding women’s reproductive autonomy at the time of the founding, because a “plethora of practices, especially around reproductive health care, never became written law simply because they did not necessarily impact the men framing the Constitution.”<sup>54</sup>

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48. *The Human Factor of History: Dred Scott and Roger B. Taney*, SMITHSONIAN NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE, <https://nmaahc.si.edu/explore/stories/human-factor-history-dred-scott-and-roger-b-taney> (last visited Dec. 2, 2023).

49. *Dred Scott*, 60 U.S. at 393, 409. Procedurally, *Dred Scott*’s appeal to the U.S. Supreme Court followed his loss in the U.S. Circuit Court for the District of Missouri. *Id.* at 393. In the underlying Missouri Supreme Court decision, which returned Scott to slavery after his trial court win of freedom, the state’s chief justice wrote with naked racism: “[T]he consequences of slavery . . . are much more hurtful to the master than the slave. There is no comparison between the slave in the United States and the cruel, uncivilized negro in Africa . . . [W]e are almost persuaded, that the introduction of slavery amongst us was[] . . . in the providence of God.” *Scott v. Emerson*, 15 Mo. 576, 587 (1852).

50. *Dred Scott*, 60 U.S. at 407, 409.

51. *Id.* at 393–96, 455 (remanding for dismissal based on holding that Blacks lacked citizenship, thus lacking the capability to show diversity of citizenship for access to federal courts; and holding that the Missouri Compromise was unconstitutional because Congress lacked authority to prohibit transport of slave “property” in the territories). The Fourteenth Amendment overruled *Dred Scott* by distinguishing legal citizenship from personhood status. *Fletcher v. Haas*, 851 F. Supp. 2d 287, 294 (2012). While “citizens” are protected under the Privileges and Immunities Clause, “any person” is protected against deprivation of “life, liberty, or property” under the Due Process Clause. *Id.*; U.S. Const. amend. XIV, § 1, cl. 2; *id.* at cl. 3.

52. *Brown v. Board of Education*, 347 U.S. 483 (1954).

53. *Id.* at 489. The *Brown* Court said that the condition of public education at enactment of the Fourteenth Amendment or when *Plessy v. Ferguson*, 163 U.S. 537 (1896), was written did not approach advancements in public education by 1954, requiring consideration of current data to determine whether segregated schools provided equal protection. *Id.* at 492–93.

54. Neoshia Roemer, *The Indian Child Welfare Act as Reproductive Justice*, 103 B.U. L. REV. 55, 72–73 (2023).

The same majority that overruled *Roe* overruled in *Kennedy v. Bremerton School District* a sixty-year precedent that public school teachers must be neutral regarding religious practices in their official capacity.<sup>55</sup> That decision prompted legal scholar John Dayton to see numerous substantive due process rights at risk under the history and tradition analysis:

The majority's history and tradition test not only fails to provide useful guidance for future legal compliance, but it is also fatally flawed as a constitutional theory. Unjust historical practices and traditions cannot become the constitutional measure for current justice. Any honest review of U.S. history shows history and traditions deeply rooted in racism, sexism, religious bigotry, LGBTQ+ bigotry, and other historical injustices that are now rightly rejected by the vast majority of Americans. Requiring courts to make decisions on the rights of vulnerable minorities in conformity with this history and tradition serves to normalize and perpetuate discrimination and bigotry in the present.<sup>56</sup>

Law professor Reva Siegel faults the history and tradition test for facilitating jurists' use of historical sources to "ventriloquize" their own values.<sup>57</sup> The allegiance to the past shown in *Dobbs* may well support embracing rather than confronting past injustices.

### C. Problems Specific to Use of the History and Tradition Test in *Dobbs*

The *Dobbs* Court used the *Glucksberg* two-step "history and tradition" test<sup>58</sup> to overrule *Roe*: an unenumerated "fundamental" right and worthy of Fourteenth Amendment due process protection, must be (1) "deeply rooted in this Nation's history and tradition" and (2) "implicit in the concept of ordered liberty."<sup>59</sup>

As the *Brown* Court implied, the history and tradition test may encourage courts to be out of step with mainstream views. For example, rigidly applying the test could justify marital rape because it is "deeply rooted" in the history and tradition of the country, even though society has evolved to condemn it.<sup>60</sup>

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55. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2431–33 (2022).

56. John Dayton, *An Analysis of the U.S. Supreme Court's Decision in Kennedy v. Bremerton School District: What is the Status of Church-State Law in Public Schools After Kennedy?* 402 ED. LAW REP. 1, 16–17 (2022) (citing Philip Perlmuter, *The Decline of Bigotry in America*, 46 SOCIETY 517 (2009)).

57. Siegel, *supra* note 21, at 902, 905 (noting that Justice Alito, who wrote the *Dobbs* majority ruling, was "perfectly willing" to attack traditional past practices in *Espinoza v. Mont. Dept. of Revenue*, 140 S. Ct. 2246 (2020), where religious liberty was at stake, rather than abortion rights).

58. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

59. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (quoting *Glucksberg*, 521 U.S. at 721).

60. See Taylor Kordsiemon, *Essay: A Right to Marital Rape? The Immorality of the Dobbs Approach to Unenumerated Rights*, 12 HOUSTON L. REV. 90, 92 (2022) (using marital rape as a hypothetical to show that the *Dobbs* "stringent" application of the *Glucksberg* history and tradition test could plausibly be used to justify marital rape and other "morally outrageous outcomes").

Such concern hits close to home in *Dobbs*. Justice Alito cited at least twelve times Matthew Hale, a seventeenth-century English jurist who wrote that “the husband cannot be guilty of rape committed by himself upon his lawful wife”<sup>61</sup> because by “matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”<sup>62</sup> Scholars have called Justice Alito’s invoking of Hale “astonishing” and “shock[ing]” because Hale was “particularly misogynistic” even in his own time, sentencing women to death for witchcraft—and laying the foundation for the Salem witch trials three decades later.<sup>63</sup>

Referring to Hale as one of the “great common law authorities,” Justice Alito also relied on Hale’s “proto-felony murder rule” regarding pre-quickening abortion purportedly to claim that England did not condone pre-quickening abortions.<sup>64</sup> Under Hale’s theory, a pre-quickening abortion could constitute a “proto-felony murder” if the woman died after being given an abortifacient “unlawfully.”<sup>65</sup> Alito’s focus on that “rule” is notable: pre-quickening abortions were considered legal in England for another 125 years after Hale’s lifetime.<sup>66</sup>

Legal historian Mary Ziegler characterizes the approach of the *Dobbs* majority as “unusual” for “discount[ing] the consensus of when, why, and how abortion was criminalized” that exists among legal historians.<sup>67</sup> Careful review of that progression from legality to criminality reveals a fundamental right to abortion.

### III. SUBSTANTIVE DUE PROCESS REVIEW FOR A FUNDAMENTAL RIGHT TO ABORTION DURING THREE HISTORICAL PERIODS

The *Dobbs* majority leaned heavily on *Glucksberg*’s two-step application of the history and tradition test and its survey of “more than 700 years of ‘Anglo-American common law tradition’” when *Glucksberg* held that no constitutional right exists for

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61. Laurence H. Tribe, *Deconstructing Dobbs*, THE NEW YORK REVIEW, Sept. 22, 2022. It is noteworthy that forty-two years before *Dobbs*, the U.S. Department of Justice decried Hale for originating “the contractual consent theory” regarding spousal consent. S. Barry, *Spousal Rape—The Uncommon Law*, 66 AM. BAR ASS’N J. 1088–91 (1980).

62. MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (1736).

63. Deanna Pan, *Who Was Matthew Hale, the 17th-century Jurist Alito Invokes in His Draft Overturning Roe?*, BOS. GLOBE (May 6, 2022, 8:21 PM), <https://www.bostonglobe.com/2022/05/06/metro/who-was-matthew-hale-17th-century-jurist-alito-invokes-his-draft-overturning-roe/>.

64. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2236, 2250 (2022).

65. *Id.* at 2236, 2250.

66. See MOHR *supra* note 34, at 5 (noting that Parliament past its first law to make abortion before quickening criminal in 1803). See also Carla Spivack, “Bring Down the Flowers”: The Cultural Context of Abortion Law in Early Modern England, 14 WM. & MARY J. WOMEN & L. 107, 111 (2007) (providing multiple sources showing that pre-quickening abortion was commonplace in Europe and that early abortions among married women—termed “bring[ing] down the flowers”—were culturally accepted (quoting ANGUS MCLAREN, REPRODUCTIVE RITUALS: THE PERCEPTION OF FERTILITY IN ENGLAND FROM THE SIXTEENTH CENTURY TO THE NINETEENTH CENTURY 102 (1984))).

67. E-mail from Mary Ziegler, Martin Luther King Jr. Professor of Law, UC Davis School of Law, to author (Dec. 28, 2022, 07:32 PST) (on file with author).

physician-assisted suicide.<sup>68</sup> Relying on the *Glucksberg* template, the *Dobbs* majority asserted that until shortly before *Roe* “there was no support in American law for a constitutional right to obtain an abortion.”<sup>69</sup>

The analysis below of the treatment of abortion in the three time periods of colonial America, the first abortion statute in 1821 to the Fourteenth Amendment, and the Fourteenth Amendment to *Roe* disputes the majority’s assertion.

#### A. Colonial America

Justice Alito failed to accurately reflect in *Dobbs* the abortion history during colonial America: “The few cases available from the early colonial period corroborate that abortion was a crime.”<sup>70</sup> That is simply not true for pre-quickening abortions.

##### i. Abortion Was Not Criminal in Colonial America

In colonial America, abortion was viewed not as criminal but as a “morality issue,” “natural,” and “accepted.”<sup>71</sup> A profitable “trade” related to abortion involved “[p]eddlers” going “from town to town selling various herbs and powders to induce a miscarriage.”<sup>72</sup> Cornelia H. Dayton, a feminist historian of colonial America, faults *Dobbs* for dismissing the long-term legality of pre-quickening abortion: “The recent U.S. Supreme Court decision on abortion [ignores] the fact that in English common law, going back to the medieval period and up through the early 19th century, attempts to miscarry or abort before quickening were not illegal. To repeat, these were not criminalized.”<sup>73</sup>

Common law recognized abortion only as an offense after quickening.<sup>74</sup>

##### “Taking the Trade”

In colonial Connecticut, “taking the trade” was code for consuming an abortifacient. Other euphemisms for the common practice of aborting before quickening were “bringing down the flowers” or “courses,” and “provoking the terms.”<sup>75</sup> Courses that were “staid” indicated skipped menstruation, or

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68. *Dobbs*, 142 S. Ct. at 2247 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 711 (1997)).

69. *Id.* at 2248.

70. *Id.* at 2251.

71. Kimberly Phillips, *Abortion in Colonial America: A Time of Herbal Remedies and Accepted Actions*, UCONN TODAY (Aug. 22, 2022), <https://today.uconn.edu/2022/08/abortion-in-colonial-america-a-time-of-herbal-remedies-and-accepted-actions/#>.

72. Olga Khazan, *Bringing Down the Flowers: The Controversial History of Abortion*, THE ATLANTIC (Mar. 2, 2016), <https://www.theatlantic.com/health/archive/2016/03/bringing-down-the-flowers-the-controversial-history-of-abortion/471762/>.

73. Phillips, *supra* note 71.

74. Aaron Tang, *After Dobbs: History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1098 (2023) (arguing that a liberty interest to abortion exists under the Fifth Amendment because all states allowed abortion at the time of the founding).

75. Spivack, *supra* note 66, at 107, 120, 123 (quoting MCLAREN, *supra* note 66, at 102).

pregnancy.<sup>76</sup> When nineteen-year-old Sarah Grosvenor told her sister that she was “taking the trade,” the sister and their young confidantes knew exactly what Sarah meant,<sup>77</sup> and so did her lover, who supplied her with the abortifacient and coerced her to take it.<sup>78</sup> Only when Sarah died in 1742 after “the trade” did not work because she was past quickening, and had a botched surgical abortion apparently causing sepsis, did she become an integral part of common law abortion history.<sup>79</sup> Illustrating the acquiescence to abortion, the legal focus of the offense was not “the act of abortion” but the death from the malpractice of abortion.<sup>80</sup>

## ii. The Quickening Doctrine

The importance of the distinction between a pre- and post-quickening abortion during this time period is hard to overstate. “[E]nsoulment” was believed to occur with quickening, and thus also fetal personhood.<sup>81</sup> Consistent with this view, the Catholic Church “implicitly accepted” abortion before quickening and condemned it only after the issue became politicized nearly a century later.<sup>82</sup>

Abortion historian James Mohr draws the divergent views between the United States and England regarding the “quickening doctrine” as an important indication of its rootedness in this country.<sup>83</sup> While England criminalized pre-quickening abortion in 1803, U.S. common law was becoming more tolerant of pre-quickening abortion in the early decades of the nineteenth century.<sup>84</sup>

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76. *Id.* at 26.

77. Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 WM. & MARY Q. 19, 25 (1991).

78. BRODIE, *supra* note 30, at 39; Dayton, *supra* note 77, at 1, 25 (describing that Sarah had not wanted to take the concoction because she knew that she was near quickening, and then the procedure would be “unlawful”).

79. Dayton, *supra* note 77, at 1, 19–20, 28 (reporting that Sarah expelled the fetus about two days after John Hallowell, a “self-proclaimed ‘practitioner of physick,’” unsuccessfully attempted to surgically remove “her Conception” and she died about ten days later, growing “feverish and weak” and suffering “delirium [and] convulsions”) (quoting Rex v. John Hallowell et al., Superior Ct. Records, Book 9, 113, 173, 175 (1745–47); Windham Cnty. Superior Ct. Files, Box 172, Conn. State Libr., Hartford, Conn.); see also Phillips, *supra* note 71. About two months after taking the first dose, Sarah finally started taking the doses regularly and became ill. *Id.* at 1, 25. At nearly six months into her gestation when she was visibly pregnant, the surgical abortion was attempted, *Id.* at 25. Sarah’s sister who helped bury the expelled, decaying fetus described it as “a perfect Child” and “pritty.” *Id.* at 28. Dayton notes that a “marked sexual double standard” had emerged between the sexes at the time of Sarah’s death. *Id.* at 21. In the seventeenth century, Sarah’s lover would have been pressured to marry her, but by the mid-1700s, fornication became decriminalized for men while women were prosecuted and fined for bearing illegitimate children. *Id.* at 22. The lover, Amasa Sessions, was indicted but not convicted for his role in Sarah’s death, still inherited the family farm, eventually fathered ten children, and lived out his life as a respected member of the community. *Id.* at 46, 48, 49.

80. *Id.* at 20.

81. REAGAN, *supra* note 30, at 7.

82. *Id.*

83. MOHR, *supra* note 34, at 5.

84. *Id.*

The 1812 case *Commonwealth v. Bangs* illustrates the degree of pre-quickening abortion acquiescence.<sup>85</sup> Bangs was indicted for administering a “potion” to a woman pregnant with a “bastard child,” but was freed because the indictment lacked proof “that the woman was quick with child at the time.”<sup>86</sup>

James Dellapenna’s Misreading of European History  
Regarding Pre-Quickening Abortion

The *Dobbs* majority relied heavily on law professor Joseph Dellapenna. Dellapenna dates pre-quickening criminalization in English common law “all the way back to the 13<sup>th</sup> century.”<sup>87</sup> In 2006, Dellapenna wrote *DISPELLING THE MYTHS OF ABORTION HISTORY* to, he stated, correct “distortions of the history” of abortion law underlying *Roe v. Wade*, to show that “abortion was considered a serious crime throughout most of European history,” and to also show that courts “punish[ed] abortions before quickening during the Middle Ages.”<sup>88</sup>

Early English legal history professor Carla Spivack disputes Dellapenna’s “absolutist position about the legal history” of abortion at the expense of context and culture.<sup>89</sup> Dellapenna relies on “serious misreading” of the historical information, she argues, by wrongly presenting, as abortions, cases in which women filed suit because they were assaulted, causing the loss of a fetus.<sup>90</sup> Abortion cases were overstated because within the feudal appeals system, women were allowed to prosecute felony appeals based only on three alleged crimes—the murder of her husband in her arms, rape, and abortion—and so assault was categorized as “abortion.”<sup>91</sup> The commonality of abortion is implied in sixteenth-century midwifery manuals and legal texts that use the term “bring[ing] down the flowers” for an accepted form of “early-term, intra-marital abortion” through inducing menstruation.<sup>92</sup>

Public Acquiescence of Pre-Quickening Abortions

The *Dobbs* majority also did not include that even Benjamin Franklin included detailed, step-by-step instructions for performing an abortion in his popular book *The American Instructor*.<sup>93</sup> Feminist historian Dayton notes that prosecutions for abortions were so rare in the United States before the early 1800s that discerning a precise degree of concern that people had about abortion is difficult: “They did not seem terribly concerned that this was a widespread societal issue.”<sup>94</sup>

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85. See *Commonwealth v. Bangs*, 9 Mass. 387 (1812).

86. *Id.* at 387–88.

87. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2249 (2022) (citing JOSEPH DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 126, n.16, 134–42, 188–94, nn.84–86 (2006)).

88. Spivack, *supra* note 66, at 108 (quoting DELLAPENNA, *supra* note 87, at xii, 18, 260).

89. *Id.*

90. *Id.* at 107.

91. *Id.* at 109.

92. *Id.* at 111.

93. Molly Farrell, *Ben Franklin Put an Abortion Recipe in His Math Textbook*, SLATE (May 5, 2022, 10:54 AM), <https://slate.com/news-and-politics/2022/05/ben-franklin-american-instructor-textbook-abortion-recipe.html>.

94. Phillips, *supra* note 71.

Prosecutions of abortions were rare. For example, in Middlesex County, Massachusetts, only four were documented between 1633 and 1699,<sup>95</sup> and in Idaho only six abortion-related prosecutions are documented in Idaho case law from 1864 to 1973.<sup>96</sup> Sarah Grosvenor's abortion was brought to the attention of the court because of her fatal complications after her late-term abortion.<sup>97</sup>

#### B. The First Abortion Statute to the Fourteenth Amendment

At the time of the country's founding, "every state respected the right to abortion before quickening."<sup>98</sup> The unanimity changed by 1821 when the nation's first abortion statute was enacted. Yet, the first wave of abortion statutes that followed did not deter the broad commercialism of abortions. Territorial Idaho would enact its first statutory restriction on abortion in 1864 during the rise of the abortion business.<sup>99</sup>

##### i. First Wave of Abortion Statutes

The common-law legality of pre-quickening abortions remained sacrosanct during the first wave of abortion restrictions. When Connecticut passed the nation's first anti-abortion law in 1821, it applied only to abortions performed after quickening.<sup>100</sup> The law imposed "imprisonment, in newgate prison," the nation's first state prison, for providing "deadly poison, or other noxious and destructive substance . . . to cause or procure the miscarriage of any woman, then being quick with child."<sup>101</sup> The law criminalized abortifacients but not surgical procedures, likely because of the recognition that in large doses, powerful purgatives and extracts being sold to women could end not just the women's pregnancies but their lives.<sup>102</sup> Idaho and other western states also preferred over poisons "instrumental means" such as "crochet hooks . . . scissors, button hooks, a bone stay out of a corset, a chicken feather."<sup>103</sup>

The risk of fatal doses of abortifacients reveals the entrenchment of the pre-quickening practice of inducing "miscarriage": "[M]ost forms of abortion were not illegal and those American women who wished to practice abortion did so."<sup>104</sup>

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95. BRODIE, *supra* note 30, at 39 (citing ROGER THOMPSON, *SEX IN MIDDLESEX: POPULAR MORES IN A MASSACHUSETTS COUNTY, 1649–1699*, at 10–11 (1986)).

96. Kelcie Moseley-Morris, *What Does History Tell Us About How the Idaho Supreme Court Might Rule on Abortion*, IDAHO CAPITAL SUN (Nov. 14, 2022, 4:35 AM), <https://idahocapitalsun.com/2022/11/14/what-does-history-tell-us-about-how-the-idaho-supreme-court-might-rule-on-abortion>. See also *infra* p. 37.

97. Dayton, *supra* note 77, at 20.

98. Aaron Tang, *The Originalist Case for an Abortion Middle Ground*, SSRN (Sept. 13, 2021, last revised Sept. 1, 2022), <https://papers.ssrn.com/sol3/>.

99. Act of Feb. 4, 1864, ch. IV, § 42, 1863–64 IDAHO TERR. SESS. LAWS 443.

100. MOHR, *supra* note 34, at 20–21.

101. *Id.* at 21.

102. *Id.*

103. Paula Huff Bryant, *Josie Kensler: Murder and Survival in Southern Idaho*, 89 UTAH HIST. Q. 143, 151 (2021).

104. MOHR, *supra* note 34, at vii, 25.

Thus, the early laws actually could be viewed as pro-quickening rather than “anti-abortion,”<sup>105</sup> and did not interfere with societal changes making controlling family size appealing for women.

“Regulars” and “Irregulars” Compete to Meet Demands for Birth Control

The mid-nineteenth century would see an increasing number of women dissatisfied with traditional roles.<sup>106</sup> The industrial revolution fed a growing economy and middle class that liberated at least some middle-class women from the time-consuming drudgery of economic subsistence.<sup>107</sup> Some women began to demand access to higher education and medical schools.<sup>108</sup> “A far greater number began, though more covertly, to see family limitation as a necessity if they would preserve health, status, economic security, and individual autonomy.”<sup>109</sup> In addition, because of technological changes, large families were less important economically and even presented financial impediments for those striving to reach or maintain middle-class status.<sup>110</sup> The changes, including the availability of abortifacients, gave women options. Death or injury from childbirth so long accepted with “fatalism and passivity”—and with gynecological care still primitive—could, potentially, be avoided.<sup>111</sup> “[M]arried women could begin to consider, probably for the first time, alternative life-styles to that of multiple pregnancies extending over a third of their lives.”<sup>112</sup>

Providing evidence of such views, the birthrate for married, white women declined from seven children to four from 1800 to 1900,<sup>113</sup> and between 1840 and 1880 a fifty-five percent drop in the birthrate occurred.<sup>114</sup>

By 1840, ten states enacted abortion laws, split evenly between those expressly excluding pre-quickening abortions from criminality and those criminalizing pre-quickening abortions.<sup>115</sup> Similarly, medical practitioners were divided into two camps: the “regulars” and “irregulars,” with abortion being a general dividing line.

Much of the debate regarding abortion during the late nineteenth century focused on the immorality or morality of abortion. While most “regulars” spoke out against abortion, other physicians, stealthily, built up their private practices around abortion because, after performing an abortion, the physician often became the family doctor.<sup>116</sup> On the other hand, the “irregulars”—midwives, lay healers, and part-time folk doctors—often made their practices well known as “women’s doctors” and performed most of the abortions.<sup>117</sup>

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105. *Id.* at 25.

106. *See generally Female Animal*, *supra* note 35.

107. *Id.* at 339.

108. *Id.*

109. *Id.*

110. *Id.* at 345–46.

111. *Id.*

112. *Id.* at 346.

113. BRODIE, *supra* note 30, at 2.

114. *Id.*

115. MOHR, *supra* note 34, at 43.

116. *Female Animal*, *supra* note 35, at 232.

117. *Id.* at 232–33; *see* MOHR, *supra* note 34, at 33, 92.

The “regulars” were usually well-to-do graduates of medical schools, and the “irregulars” were self-taught practitioners, lay healers, folk doctors, and midwives who at times provided the effective methods that the regulars claimed to possess but lacked.<sup>118</sup>

The regulars wore the Hippocratic oath as a badge of honor and, consequently, as a group were opposed to abortion.<sup>119</sup> The irregulars on the other hand were anti-elitists, appealed to the time’s populism, and promoted “laissez faire medicine.”<sup>120</sup> With the changes a more open, industrial society wrought, the irregulars gained ground.<sup>121</sup> By the early 1840s, nearly 60,000 people reportedly signed petitions in New York and Connecticut opposing regulation of medicine.<sup>122</sup>

While the *Dobbs* majority discounted the legal right to a pre-quickenings abortion as stemming from a lack of knowledge of pregnancy rather than a right to abortion,<sup>123</sup> the plummeting birth rate suggests that women were well aware of their early pregnancies and many terminated them.<sup>124</sup> The demand for abortions invited a “regularly-established money making trade” for both “abortion folk practitioners *and* physicians.”<sup>125</sup> Abortion became one of the first specialties in American medical history.<sup>126</sup>

## ii. Abortion Commercialization

Advertisements for abortion services, such as Madame Restell’s “Female Monthly Pills,” “French Lunar Pills,” and “French Periodical Pills” began appearing on newspaper pages, sometimes prominently, during the 1840s to late 1860s.<sup>127</sup> From 1800 to 1830, abortion rates were about one in every twenty-five to thirty live births and jumped to as high as one in every five or six live births by the 1850s and 1860s.<sup>128</sup> The commercialization of abortion had become so widespread that abortion services were advertised even in religious journals and “a substantial portion of the mass audience publications” in the mid-century United States.<sup>129</sup>

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118. See MOHR, *supra* note 34, at 32–33.

119. *Id.* at 35. While in the early history of the AMA members’ adhered allegiance to the Hippocratic oath was cited as forbidding harm to the fetus, the Hippocratic Corpus itself cited the “Lacedaemonian Leap”—jumping up and down to induce a miscarriage. Suchitra Dalvie, *Abortion Rights: Past, Present and Possible Future*, Institut de Relations Internationales et Stratégiques 3 (Sept. 2017), <https://www.iris-france.org/wp-content/uploads/2017/09/Obs-sant%C3%A9-ENG-Abortion-sept-17.pdf> (stating that Hippocrates wrote of advising a prostitute to perform the leap to induce a miscarriage).

120. MOHR, *supra* note 34, at 38.

121. See, e.g., Jennifer Clark, *The American Image of Technology from the Revolution to 1840*, 39 AM. Q. 431 (1987); see also LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* (1964).

122. MOHR, *supra* note 34, at 39, 273.

123. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2251–52 (2022).

124. BRODIE, *supra* note 30, at 3.

125. MOHR, *supra* note 34, at 48 (emphasis added).

126. *Id.* at 47.

127. *Id.* at 51, 54, 56; ZIEGLER, *supra* note 30, at 13.

128. MOHR, *supra* note 34, at 50.

129. *Id.* at 47.

By the 1840s, the trade in abortifacients and emmenagogues was described as “enormous.”<sup>130</sup> The paying clientele often included “educated,” “wealthy,” “middle class, white, and married” women, and physicians and midwives were on hand to surgically perform abortions when the drugs failed.<sup>131</sup> With women becoming influential in the workforce during this time, single working women, presumably, also supported the abortion business.<sup>132</sup>

The climate was ideal for abortion folk practitioners. Women after 1840 continued to self-abort using abortifacients marketed with names “every schoolgirl” understood.<sup>133</sup> Abortion instruments also were readily available from the local drugstore or by mail from wholesale druggists’ catalogs.<sup>134</sup> A physician even in a small farming town in Illinois noted the rise in “professional” abortionists:

I know three married women, respectable ones, who are notorious for giving instructions to their younger sisters as to the modus operandi of ‘coming around.’ After the failure of tansy, savin, ergot, cotton root, lifting, rough trotting horses, etc., knitting needle is the stand by. One old doctor near here . . . furnish[ed] a wire with a handle, to one of his patients . . ., after which she passed it to one of her neighbors, who succeeded in destroying the foetus and nearly so herself.<sup>135</sup>

#### Rise of “Restellism” and “Women’s Doctors”

The pre-eminent “women’s doctor”—a euphemism for abortionist—was Ann Lohman, who called herself “Madame Restell, Female Physician.”<sup>136</sup> Restell developed a lucrative abortion enterprise that lasted for 42 years from 1836 to 1878.<sup>137</sup> By the mid-1840s, she added offices in Boston and Philadelphia to her home base in New York City, employed traveling agents who sold her abortifacients, and when the powders failed, she performed surgical abortions on a sliding scale charging \$100 for wealthy women and twenty dollars for poor women.<sup>138</sup> In 1862, Restell moved to a Fifth Avenue mansion in New York City, and in 1871 alone she

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130. *Id.* at 58 (quoting physician-pharmacologist Ely Van de Warker, who took doses of leading brands of abortifacients himself to determine their efficacy, finding some inert but others highly toxic in large doses).

131. *Id.* at 94 (quoting *Abortion*, VII MEDICO-LEGAL J. 177 (1889)); MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 12 (2020); REAGAN, *supra* note 30, at 10.

132. See M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 MINN. J. L. & INEQUALITY (1987) 33, 80. By 1870, forty percent of single women were working. *Id.*

133. BRODIE, *supra* note 30, at 225 (discussing “Uterine regulator,” “Periodical Drops,” and a Boston drug company’s seven brands of “female pills”).

134. *Id.* at 227.

135. *Id.*

136. SMITH-ROSENBERG, *supra* note 24, at 233; MOHR, *supra* note 34, at 48, 50–51.

137. REAGAN, *supra* note 30, at 10; MOHR, *supra* note 34, at 48.

138. *Id.*; *Life Story: Ann Trow Lohman, a.k.a. Madame Restell (1812–1878)*, NEW-YORK HISTORICAL SOCIETY MUSEUM & LIBRARY, <https://wams.nyhistory.org/expansions-and-inequalities/politics-and-society/madame-restell/> (last visited Nov. 29, 2023) (stating that Restell would perform surgical abortions, and three days after the procedure, the women could go to their regular doctor claiming a miscarriage) [hereinafter *Madame Restell*].

spent \$60,000 on advertising<sup>139</sup> with “many wealthy and respectable people in her power.”<sup>140</sup> Eventually, “Restellism” became synonymous with abortion, and she was called the “wickedest woman in New York”—tracking an eventual and dramatic shift in abortion policy.<sup>141</sup>

For procedures performed both before and after quickening, the abortion business was not without problems. For example, New York’s 1828 law, though largely unenforced, was one of the most restrictive in the nation, and could be interpreted as criminalizing even pre-quickenings abortions.<sup>142</sup> By 1847, Restell had been arrested numerous times and was convicted in New York for providing an abortion for a young servant woman whose pregnancy was close to eight months.<sup>143</sup>

An “open secret,” abortion was largely unseen in legal spheres but was advertised or practiced privately in homes, “drug stores, doctors’ and midwives’ offices, hospitals, and birth control clinics.”<sup>144</sup> However, the dangers of abortifacients and rate of abortions would soon become matters of public concern.

### C. The Fourteenth Amendment to *Roe*

By the mid-1850s, support for abortion had begun to wane for policy reasons including growing support for restrictions on abortifacients as part of anti-poison regulations and because of the continuing increase in the rate of abortions.<sup>145</sup>

In an 1898 report, the Michigan Board of Health estimated that one-third of the state’s pregnancies were aborted.<sup>146</sup> The report estimated that the vast majority of the abortions—seventy to eighty percent—were obtained by “prosperous and otherwise respectable married women” who could not even share the “excuse of shame” of an unmarried woman.<sup>147</sup>

#### i. Horatio Storer and the AMA

The Michigan Board of Health report was likely written by prominent physician Horatio Storer, the leading “regular” opposed to abortion.<sup>148</sup> Storer was especially piqued that married women were getting most of the abortions.<sup>149</sup>

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139. *Madame Restell*, *supra* note 138; MOHR, *supra* note 34, at 52, 272 (citing *The Evil of the Age*, N.Y. TIMES (Aug. 23, 1871); Webster, *supra* note 7 (\$60,000 in 1871 converts to \$1.4 million in 2023).

140. BRODIE *supra* note 30, at 230, 345 (quoting THOMAS LOW NICHOLS, *THE LADY IN BLACK: A STORY OF NEW YORK LIFE, MORALS, AND MANNERS* (1844)).

141. Tracy A. Thomas, *Misappropriating Women’s History in the Law and Politics of Abortion*, 36 SEATTLE U.L. REV. 24 n.155 (2012); ZIEGLER, *supra* note 30, at 13; MOHR, *supra* note 34, at 48.

142. See MOHR, *supra* note 34, at 39.

143. See BRODIE, *supra* note 30, at 230 (stating that Restell typically performed late-term abortions when implored upon).

144. REAGAN, *supra* note 30, at 19, 21.

145. ZIEGLER, *supra* note 131, at 12.

146. *Female Animal*, *supra* note 35, at 344.

147. *Id.*

148. *Id.* n.2. See also ZIEGLER, *supra* note 131, at 12.

149. See, HORATIO R. STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* (1868); *Female Animal*, *supra* note 35, at 344; Mohr, *supra* note 34, at 158.

Abortion was appealing to married women because they were “immediately affected by the realities of childbearing and child rearing.”<sup>150</sup>

A few in the medical community supported abortion rights for women. For example, the author of a study finding that married women obtained seventy-five to ninety percent of abortions in New York State from 1870 to 1887 supported full repeal of anti-abortion laws.<sup>151</sup> A supportive physician wrote that women felt that if they “must submit to sexual intercourse, they are justifiable before God and good men to prevent conception.”<sup>152</sup> Most “regulars,” however, took the view of a prominent New York gynecologist who bristled over the sheer numbers of women who asked for an abortion “as casually as they would for a cut of beefsteak at their butcher.”<sup>153</sup>

Storer singularly took the lead in trying to reverse the widespread practice of abortion that was “a quiet reality, legal until ‘quickening.’”<sup>154</sup> He urged the fledgling AMA, founded in 1847, to join his crusade against abortion.<sup>155</sup> In 1856, Storer joined the AMA and at the next annual meeting implored the group to publicly oppose abortion.<sup>156</sup> The AMA responded by appointing a committee, headed by Storer, to draft its position paper on abortion.<sup>157</sup> Comprising a “who’s who” of physicians, the committee included a doctor publicizing the lucrative abortion business of Madame Restell and influential physicians with ties to state legislatures.<sup>158</sup> Storer wrote the position paper himself and targeted the quickening doctrine,<sup>159</sup> claiming that his position was not only the moral high ground but that abortion should be framed, like pregnancy, as medical terrain.<sup>160</sup>

#### AMA Efforts to Undermine the Quickening Doctrine

The strategy of Storer and other AMA members was designed to convince practitioners—and especially women—to reject as “false and immoral” the traditional view that pre-quickening abortions were not a crime.<sup>161</sup> Storer wrote in the AMA position paper that tolerance of pre-quickening abortions was largely responsible for the “general demoralization” in the country and that viewing quickening as significant was based on “wide-spread popular ignorance.”<sup>162</sup> Moreover, quickening was “in fact but a sensation”<sup>163</sup> of women, not medical diagnosis. After all, Storer joked about women’s perceptions, “Many women never quicken at all, though their children are born living.”<sup>164</sup>

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150. *Female Animal*, *supra* note 35, at 343.

151. MOHR, *supra* note 34, at 90.

152. SMITH-ROSENBERG, *supra* note 24, at 220.

153. *Female Animal*, *supra* note 35, at 344.

154. Winny, *supra* note 29.

155. See MOHR, *supra* note 34, at 147, 149.

156. *Id.* at 154.

157. *Id.*

158. See MOHR, *supra* note 34, at 156.

159. *Id.*

160. See ZIEGLER, *supra* note 30, at 14.

161. *Female Animal*, *supra* note 35, at 344 n.28.

162. MOHR, *supra* note 34, at 156.

163. REAGAN, *supra* note 30, at 12 (quoting STORER, *supra* note 149).

164. *Id.*

Success of the AMA Anti-Abortion Crusade

Storer's anti-abortion position paper was sent from the AMA national office to every governor and legislature in the nation.<sup>165</sup> While the appeal of Storer's anti-abortion crusade to the AMA body was likely in part sincere, it also was tied to their pocketbooks.<sup>166</sup> The crusade discredited the irregulars, encouraged legislatures to sanction them through passing restrictive laws, converting their clientele to physicians, and resulted in greater physician control over the practice of medicine generally.<sup>167</sup> The anti-abortion crusade became one of the most successful public policy campaigns in the history of the AMA.<sup>168</sup>

While physicians "made a fortune" catering to the demand for abortions of especially married, wealthy women,<sup>169</sup> the era's yellow press fed the AMA's campaign with sensational stories and exposés about "almost unchecked" abortions.<sup>170</sup> In 1863, the NEW YORK TIMES ran a story about the death of a Mrs. Elizabeth Huntington and the jury empaneled in her home to get a deathbed confession from her about her abortion, and ran an eight-part series by a reporter who went undercover to investigate Restell and other well-known abortionists.<sup>171</sup>

In a twenty-year span the landscape was altered. In 1859, Storer lamented that abortion was "not at the present-day murder under the common law," and in the majority of states was not indictable before quickening if performed with a

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165. MOHR, *supra* note 34, at 158.

166. See, e.g., Siegel, *supra* note 21, at 926 (discussing that L.C. Butler, and other physicians, connected abortions to women venturing into male-dominated occupations and so sought to entrench the maternal roles that women were resisting: "Instead of the retirement of domestic life, woman must now mingle in public affairs. She must occupy the pulpit, the forum, the rostrum, the stump. . . . These are inconsistent with the condition of pregnancy. One or the other must give place." L.C. Butler, *The Decadence of the American Race, as Exhibited in the Registration Reports of Massachusetts, Vermont [and Rhode Island]; The Cause and the Remedy*, 77 BOS. MED. SURG. J. 89, 92 (1867), <http://www.nejm.org/doi/pdf/10.1056/NEJM186709050770501>.

167. MOHR, *supra* note 34, at 160.

168. *Id.* at 148.

169. ZIEGLER, *supra* note 30, at 13.

170. Thomas, *supra* note 141, at 24.

171. *Undercover Reporting: Augustus St. Clair, The Evil of the Age*, <https://undercover.hosting.nyu.edu/s/undercoverreporting/> (last visited Feb. 28, 2023).

woman's consent.<sup>172</sup> By the early 1880s, the AMA's work was evident with all states restricting abortion and many enacting harsh abortion bans.<sup>173</sup>

The undermining of pre-quickening abortion is a tenet in the *Dobbs* decision. According to the *Dobbs* majority, the "most important historical fact" of its reasoning is that by 1868 when the Fourteenth Amendment was enacted, the "vast majority" of the thirty-seven states had criminalized abortion at all stages, including before quickening—and consequently did not view abortion as a right under substantive due process.<sup>174</sup>

However, the Court may have overstated the number of states with abortion bans in 1868. Law professor Aaron Tang asserts that the *Dobbs* majority "demonstrably erred" in its count with several "glaring" errors.<sup>175</sup> Instead of the "vast majority" of twenty-eight states banning abortion as *Dobbs* counted, Tang counts a *minority* of sixteen states actually banning pre-quickening abortions in 1868, and concludes that the actual number should have changed the outcome given the Court's terming of state laws on abortion in 1868 as its key historical fact.<sup>176</sup>

#### James Dellapenna's Likely Misrepresentation of Elizabeth Cady Stanton

Dellapenna, on whom *Dobbs* relied, in an amicus brief supporting *Dobbs* did not accurately represent Elizabeth Cady Stanton's position regarding abortion.<sup>177</sup>

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172. Horatio R. Storer, *Contributions to Obstetric Jurisprudence, Criminal Abortion: Its Obstacles to Conviction*, 3 THE NORTH AMERICAN MEDO-CHIRURGICAL REVIEW 851 (S.D. Gross & T.G. Richardson, eds. 1859). Storer presented the status of abortion laws in the then thirty-three states and the District of Columbia: twelve states (Delaware, Florida, Georgia, Iowa, Kentucky, Maryland, North Carolina, New Jersey, Pennsylvania, South Carolina, Tennessee, and Virginia) and the District of Columbia had no abortion statute, five states made abortion a crime only after quickening (Arkansas, Connecticut, Minnesota, Mississippi, and Oregon), five states made abortion a crime throughout pregnancy but guilt advanced with gestation (Maine, Michigan, New Hampshire, New York, and Ohio), ten states made abortion a crime throughout pregnancy but required proof of pregnancy (Alabama, California, Illinois, Louisiana, Massachusetts, Missouri, Texas, Wisconsin, Vermont, and Virginia), and Indiana made abortion and attempted abortion crimes without requiring proof of pregnancy. *Id.* at 837–38.

173. *Historical Abortion Law Timeline: 1850 to Today*, Planned Parenthood, <https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/> (2023); SMITH-ROSENBERG, *supra* note 24, at 221.

174. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2253–54, 2267 (2022).

175. Tang, *supra* note 74, 1098, 1153 (providing examples such as *Dobbs* counting Alabama as having a total abortion ban in 1868 when its supreme court actually held that the state law codified common law's punishing of abortion only after quickening).

176. *See id.* at 1098–99.

177. *Supra* pp. 345–46; Brief of Amicus Curiae Joseph W. Dellapenna in Support of Petitioners, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (No. 19-1392). *See also* Amici Curiae Supporting Petitioners, Billy Graham Evangelistic Ass'n et al., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (No. 19-1392) (citing "Elizabeth Cady Stanton, *Child Murder*, THE REVOLUTION, Mar. 12, 1868; *see generally* Joseph W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY, 374–75 (2006)"). For analysis of the impact of the claim by some anti-abortion organizations, such as Feminists for Life, that Stanton and other nineteenth-century feminist icons condemned abortion, *see* Thomas, *supra* note 141, at 1–2.

In *DISPELLING THE MYTHS OF ABORTION HISTORY*, Dellapenna wrote that leading nineteenth-century feminists were “virtually unanimous in supporting the prohibition of abortion as a crime because of a professed concern to protect prenatal human life.”<sup>178</sup> In his *Dobbs* amicus brief, Dellapenna wrote that nineteenth-century feminists “even the most militant and well-known,” including Stanton and Susan B. Anthony, “were adamantly opposed to legal abortion.”<sup>179</sup>

Dellapenna bases his contention on an unsigned March 12, 1868, article in *THE REVOLUTION*, Stanton and Anthony’s women’s rights newspaper, titled *Child Murder*<sup>180</sup>:

Infanticide is on the increase to an extent inconceivable. Nor is it confined to the cities by any means. Androscoggin county in Maine is largely a rural district, but a recent Medical Convention there unfolded . . . that there were 400 murders annually produced by abortion in that county alone. The statement is made . . . before a meeting of “regular” practitioners in the county . . . There must be a remedy for such a crying evil as this . . . in the complete enfranchisement and elevation of women[.]<sup>181</sup>

Although Dellapenna attributed the article to Stanton, that is disputed. Stanton passionately spoke of a right of reproductive autonomy, which she termed “self-sovereignty,”<sup>182</sup> and she viewed “voluntary motherhood” as an essential element of that sovereignty.<sup>183</sup> Further, Stanton scholar and archivist Ann Gordon does not believe Stanton authored the article or another unsigned article in the newspaper titled *Infanticide*<sup>184</sup> because Stanton generally signed her articles “E.C.S.” or by her full name.<sup>185</sup> Legal historian Tracy Thomas attributes the two articles to Parker Pillsbury, Stanton’s co-editor, who opposed abortion and in whose rhetorical style the articles are written.<sup>186</sup> Dellapenna does not hint about the anonymous authorship in his *Dobbs* amicus brief: “Stanton entitled her article

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(terming the claimed condemnation “misappropriation” of feminist history). See also *First Wave Feminists—Elizabeth Cady Stanton*, FEMINISTS FOR LIFE, <https://www.feministsforlife.org/first-wave-feminists-elizabeth-cady-stanton/> (last visited Dec. 14, 2023).

178. Thomas, *supra* note 141, at 2 n.4.

179. Dellapenna Brief for the Petitioners, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), at 24–25.

180. *Id.* at 25.

181. *Child Murder*, 1 THE REVOLUTION 146–47 (Mar. 12, 1868), <https://specialcollections.lclark.edu/items/show/37743>.

182. BRODIE, *supra* note 30, at 5 (recounting that Stanton also spoke of “the gospel of fewer children and a healthy, happy maternity.”)

183. *Id.*; TRACY A. THOMAS, ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATION OF FAMILY LAW, 160–61 (2016). (Stanton has been labeled by some as bigoted based on public statements that women deserved the right to vote before “the lower orders of black and white, washing and unwashed, lettered and unlettered manhood.” FEMALE SUFFRAGE COMMITTEE IN THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY 72–73 (Ann D. Gordon, ed. 2000)).

184. *Infanticide*, 1 THE REVOLUTION 57–58 (Jan. 29, 1868), <https://specialcollections.lclark.edu/items/show/37753>.

185. Thomas, *supra* note 141, at 36.

186. *Id.* at 58–62.

published contemporaneously with the adoption of the Fourteen (sic) Amendment, “Child Murder.”<sup>187</sup>

#### Madam Restell’s Demise

Madam Restell had become well to do with her business model of aggressive, regional newspaper advertising of selling abortifacients through the mail and her abortion services.<sup>188</sup> Ironically, her critical press coverage only increased her clientele of wealthy white women.<sup>189</sup> However, crusaders such as Storer and Anthony Comstock, the head of the New York Society for the Suppression of Vice, eventually held sway.<sup>190</sup> By 1873, Comstock successfully lobbied Congress to pass the Comstock Act.<sup>191</sup> The Act, still in effect today, bans the mailing of obscene material, including “[e]very article or thing designed, adapted, or intended for producing abortion,” and “[e]very article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for producing abortion.”<sup>192</sup> Congress named Comstock a special agent of the U.S. Post Office and gave him broad authority to arrest people violating the law.<sup>193</sup> In 1878, Comstock arrested feminist Ezra Heywood for mailing his pamphlet *Cupid Yokes*, which advocated for women to have the right to self-govern their bodies.<sup>194</sup> The same year, Comstock posed as a husband wanting an abortion prescription for his wife.<sup>195</sup> Restell filled it, and Comstock arrested her as part of his

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187. Brief of Amicus Curiae Joseph W. Dellapenna in Support of Petitioners, *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (No. 19-1392), at 25; LANA F. RAKOW & CHERIS KRAMARAE, *THE REVOLUTION IN WORDS: RIGHTING WOMEN 1868–1871* 76–77 (1990). Stanton refocused abortion on laws disfavoring women, women’s deaths, and the double standard of not holding men accountable for their contributions in pregnancy. Thomas, *supra* note 141, at 44. For example, Stanton championed the cause of Hester Vaughan after she was convicted of infanticide and sentenced to be hanged. *Id.* at 42, 45. In winter cold, Vaughan gave birth by herself in a room with no heat, food, or water and was found in a near delirium with the baby dead beside her. *Id.* at 42–43. She was not allowed to testify and was convicted by an all-male jury. *Id.* at 43. Stanton personally begged the governor of Pennsylvania to pardon Vaughan, which the governor eventually did. *Id.* at 44, 46, 49.

188. BRODIE, *supra* note 30, at 229.

189. *Id.*

190. ZIEGLER, *supra* note 30, at 13; MOHR, *supra* note 30, at 97; *see also* Brandon R. Burnette, *Comstock Act of 1873 (1873)*, *THE FIRST AMEND. ENCYCLOPEDIA* (Jan. 1, 2009), <https://firstamendment.mtsu.edu/article/comstock-act-of-1873-1873/>.

191. Burnette, *supra* note 190 (noting that the law, controversial even at the time, prompted more than 50,000 petitioners in 1878 to demand that Congress repeal it because it deprived “liberty of conscience”); *see also* ZIEGLER, *supra* note 30, at 13.

192. 18 U.S.C. § 1461; Application of the Comstock Act to the Mailing of Prescription Drugs That Can Be Used for Abortions, 46 Op. O.L.C. (Dec. 23, 2022). After *Dobbs*, the Department of Justice issued an opinion from its Office of Legal Counsel that the mailing of abortion pills mifepristone and misoprostol did not violate the Comstock Law. *Id.*

193. Burnette, *supra* note 190.

194. *Id.* Heywood was convicted and sentenced to hard labor, but after six months President Rutherford B. Hayes pardoned him. HAL D. SEARS, *THE SEX RADICALS: FREE LOVE IN HIGH VICTORIAN AMERICA* 170 (1977).

195. ZIEGLER, *supra* note 30, at 13.

strategy to arrest abortionists.<sup>196</sup> The day before her scheduled trial weeks later, Restell was found dead in her bathtub with her throat cut from “ear to ear”—reportedly by suicide.<sup>197</sup>

#### The AMA Reverses Course

By the late 1950s, forty-six states had enacted anti-abortion statutes.<sup>198</sup> But the repercussions from abortion going underground had risen in proportion.<sup>199</sup> Abortions became more expensive, harder to obtain, and more dangerous.<sup>200</sup>

Also, in the late 1950s, physicians began seeing a “mismatch” between best medical practices for their patients and what the existing laws allowed.<sup>201</sup> In 1959, the American Law Institute developed a model statute to allow abortion in three circumstances: rape or incest, severe fetal defects, and to protect a woman’s health.<sup>202</sup> During the decades before *Roe*, large hospitals, serving especially the poor, such as Los Angeles County Hospital and Cook County Hospital, had septic abortion wards solely to treat women after botched illegal abortions.<sup>203</sup> Dr. Quentin Young, who served in the septic abortion ward at Cook County Hospital, recalled: “They douched with bleach or peroxide. They used paintbrushes and cocktail stirrers and pencils and knitting needles. And yes, they did use wire coat hangers.”<sup>204</sup> Dr. Allan Weiland, who also served on the ward, estimated that fifteen to twenty women daily were transferred to the ward from the hospital’s emergency room and that one died weekly from complications following an illegal abortion.<sup>205</sup> Until *Roe*, complications from illegal abortions were the leading cause of maternal deaths in this country by as much as a seven to one margin.<sup>206</sup>

Though it was not until 1970 when the AMA called for abortions to be between “a woman and her doctor,”<sup>207</sup> some physicians led efforts to change the laws. The reasons included the number of fatalities—with rough estimates of as many as 5,000 to 10,000 women dying annually from complications after illegal

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196. *Id.* at 14; MOHR, *supra* note 34, at 97; *End of a Criminal Life, Mrs. Lohman’s History*, N.Y. TIMES, Apr. 2, 1898, at 1 [hereinafter *End of a Criminal Life*].

197. *End of a Criminal Life*, *supra* note 196, at 1 (chronicling in detail Lohman’s arrest, imminent trial, and death). Yet the cause of Restell’s death remains a controversy. By one account, she committed suicide in prison after losing her appeals. Thomas, *supra* note 141, at 24 n.155. Another suggests that her wealthy patrons may have instigated her death. *Before Roe: The Physicians’ Crusade*, NPR (May 19, 2022, 12:10 AM), <https://www.npr.org/transcripts/1099795225>.

198. *Roe v. Wade*, 410 U.S. 113, 139 (1973).

199. REAGAN, *supra* note 30, at 193.

200. *Id.*

201. See ZIEGLER, *supra* note 131, at 14.

202. *Id.*

203. *Horror, Death, and Illegal Abortion: The Cook County Septic Obstetrics Ward*, personalPAC, <https://www.personalpac.org/horror-death-and-illegal-abortion-the-cook-county-septic-obstetrics-ward/> (last visited Sept. 3, 2023) [hereinafter *Horror, Death*].

204. *Id.*

205. THE JANES, *supra* note 7.

206. *Horror, Death*, *supra* note 203.

207. Julie Rovner, *American Medical Association Wades into Abortion Debate with Lawsuit*, NPR (July 2, 2019, 4:43 PM), <https://www.npr.org/sections/health-shots/2019/07/02/738100166/american-medical-association-wades-into-abortion-debate-with-lawsuit>.

abortions,<sup>208</sup> and with poor and minority women leading in deaths.<sup>209</sup> In the words of the *Dobbs* minority, the history of illegal abortions “is a history of woman dying.”<sup>210</sup>

### Societal Acquiescence

While acquiescence of abortion to varying degrees has been a common thread throughout the history of abortion in this country, it has been insufficient to protect women’s reproductive autonomy.

*Poe v. Ullman* provides an analogy.<sup>211</sup> With the wave of anti-abortion laws and the 1873 Comstock Act, in 1879, Connecticut passed the country’s most stringent reproductive prohibition—banning even the use of contraceptives.<sup>212</sup> In 1961, when a married couple and their doctor asked for a declaratory judgment that the law was invalid under the Fourteenth Amendment, a U.S. Supreme Court plurality held that the couple had no standing to appeal the lower court upholding of the law because the state had “tacitly agree[d]” to allow married couples to use contraceptives for “eighty years.”<sup>213</sup> The Court noted that sales of contraceptives were “ubiquitous, open,” and “notorious[.]”<sup>214</sup> However, couples could be arrested at any time.

Judge Harlan wrote in his influential dissent that instead of relying on acquiescence, the Court needed to recognize the couple’s “right to enjoy the privacy of their marital relations free of the enquiry of criminal law.”<sup>215</sup> The Connecticut law violated the Fourteenth Amendment because such rights, he

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208. Christopher Tietze & Sarah Lewis, *Abortion*, SCIENTIFIC AMERICAN (Jan. 1969), <https://www.jstor.org/stable/24927606> (stating that a generally accepted estimate of the number of women dying from complications from illegal abortions during the 1930s was 5,000 to 10,000 annually). See Katha Pollit, *Abortion in American History*, ATL. MONTHLY May 1997 <https://www.theatlantic.com/magazine/archive/1997/05/abortion-in-american-history/376851/> (putting the number of estimated deaths during the 1920s at 15,000 women annually, and noting the endorsement in 1902 of the editors of JAMA to the then practice of denying women treatment for abortion complications unless the woman “confessed” to having the abortion (citing REAGAN (see *supra* note 30, at 122))).

209. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2345 n.27 (2022) (Breyer, J., Sotomayor, J., and Kagan, J., dissenting) (citing REAGAN, *supra* note 30, at 42–43, 198–199, 208–209). As Berkeley legal scholar Khara M. Bridges stated about criminalized abortion, “The most marginalized are the ones being forced to carry pregnancies to term.” Feliz Moreno, *Invasion of Privacy: Khiara M. Bridges on Poverty and Reproductive Justice*, SUN, Nov. 2022, at 7.

210. *Dobbs*, 142 S. Ct. at 2345 n.27 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).

211. *Poe v. Ullman*, 367 U.S. 497 (1961).

212. See Ellen Wexler, *The 150-year-old Comstock Act Could Transform the Abortion Debate*, SMITHSONIAN MAGAZINE (June 15, 2023), <https://www.smithsonianmag.com/history/comstock-act-transform-abortion-debate-180982363/>. See also Anthony Comstock’s “Chastity” Laws, PBS, <https://www.pbs.org/wgbh/americanexperience/features/pill-anthony-comstocks-chastity-laws/> (last visited Nov. 26, 2023) (noting that while birth-control bans often were not enforced, the Connecticut law allowed the arrest of married couples using birth control in the privacy of their own bedrooms, and a one-year prison term upon conviction).

213. *Poe*, 367 U.S. at 508.

214. *Id.* at 502.

215. *Id.* at 536 (Harlan, J., dissenting).

wrote, are part of a “rational continuum . . . [that] includes a freedom from all substantial arbitrary impositions and purposeless restraints.”<sup>216</sup> Justice Harlan’s dissent in *Poe* would be relied on in *Roe*.<sup>217</sup>

Justice Douglas’s dissent in *Poe* decried the Court’s dismissal of the case based on acquiescence because it forced married couples to “flout the law” to use contraceptives, making such a “freedom” in name only, “bootlegged around the law,” and “crippled.”<sup>218</sup> Just four years later, a Planned Parenthood director in Connecticut and the physician of the couple in *Poe* were arrested for advising married couples on means to prevent conception, and the two asserted their constitutional right to do so in *Griswold v. Connecticut*.<sup>219</sup> This time, Justice Douglas wrote the majority opinion—relied on in *Roe*<sup>220</sup>—that deciding whether to use contraception must be recognized as a privacy right under the Bill of Rights penumbra as well as under the broad due process rights enumerated in the *Poe* dissents.<sup>221</sup>

## ii. Twentieth-Century Feminist Movement

During much of the twentieth century, abortion was commonly a practice of wealthy women who could cover the cost, but that too would change. An example of abortion practices aligning with women’s assertion of power before *Roe* is the Chicago Jane collective.<sup>222</sup> The Jane collective performed an estimated 11,000 abortions, with some of the more than 100 women members performing many of the abortions themselves.<sup>223</sup> While the practices were clandestine, the collective worked “under the police’s watchful eye,” with a cop even directing a woman to its door.<sup>224</sup>

Eventually, the underground abortion practices would give way to the demands for rights of many twentieth-century feminists. To convert the taboo of abortion into open conversation, in 1972 prominent women such as Gloria Steinem, Barbara Tuchman, Billie Jean King, Judy Collins, and others signed a petition in *Ms. MAGAZINE* declaring that they had had abortions.<sup>225</sup> It was a “powerful strategy” to end the secrecy surrounding abortion and implied the magnitude of the numbers

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216. *Id.* at 543.

217. *Roe v. Wade*, 410 U.S. 113, 169 (1973).

218. *Poe*, 367 U.S. at 513, 515 (Douglas, J. dissenting).

219. *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

220. *Roe*, 410 U.S. at 169.

221. See *Griswold*, 381 U.S. at 484–86. *Griswold* also addressed the rights of married couples to use contraceptives. *Id.* at 481.

222. JUDITH ARCANA ET AL., JANE, THE LEGENDARY STORY OF THE UNDERGROUND ABORTION SERVICE, 5, 1968–1973 (2019) (The Jane collective was officially called Abortion Counseling Services of Women’s Liberation); *Id.* at 5.

223. *Id.*

224. *Id.* at 7.

225. Barbaralee D. Diamondstein, *We Have Had Abortions*, *Ms. MAGAZINE* 34–35 (1972).

of women who had obtained an abortion.<sup>226</sup> Female lawyers writing amici supporting *Roe* in the *Dobbs* decision followed a similar approach.<sup>227</sup>

#### IV. IDAHO AS A CASE STUDY

Idaho's abortion history shows that even in a state with some of the most restrictive abortion bans in the nation, abortion was tolerated—unless the woman died.

Idaho enacted its first anti-abortion statute in 1864 as other states began criminalizing abortion, and by thirteen years later, laws were enacted against the performer and against the woman:

Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take, any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the Territorial prison not less than two nor more than five years.

Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, *unless the same is necessary to preserve her life*, is punishable by imprisonment in the Territorial prison not less than one nor more than five years.<sup>228</sup>

This harshness carried through Idaho's statutory history until *Roe*.<sup>229</sup> However, practice reflected anything but. From 1864 until *Roe* in 1973, just six cases related to abortion, two of which resulted in the deaths of the pregnant women, advanced to the Idaho Supreme Court.<sup>230</sup>

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226. See Jodie Tillman, 'We Have Had Abortions': 1972 Petition Changed Abortion Rights Movement, WASHINGTON POST (May 16, 2022, 7:00 AM), <https://www.washingtonpost.com/history/2022/05/16/ms-magazine-abortion-petition/>.

227. Brief for Organization of Women Lawyers et al. at 27, as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. \_\_\_\_ (2022) (No. 19-1392), 2021 WL 4311865 (citing Brief for Michele Coleman Mayes, Claudia Hammerman, Charanya Krishnaswami, and 365 Other Legal Professional Who Have Exercised Their Constitutional Right to an Abortion as Amici Curiae Supporting Petitioners, *June Med. Servs., v. Gee*, 139 S. Ct. 663 (2019) (Nos. 18-1323, 18-1460), 2019 WL 6650222).

228. *Planned Parenthood Great Northwest v. State*, 171 Idaho 374, 392, 522 P.3d 1132, 1150 (Idaho 2023).

229. See *id.* at 1150–52 (documenting the uniformity of Idaho's abortion laws until *Roe*).

230. Moseley-Morris, *supra* note 96.

Idaho's abortion history was a history of "popular tolerance" because prosecutors found jurors largely unwilling to convict unless the woman died.<sup>231</sup> By comparison, twenty abortion-related cases advanced to the Missouri Supreme Court during an eighty-five year history of illegality.<sup>232</sup> That, ironically, makes Idaho, one of the states with the strictest abortion bans, an outlier nationally regarding its low rate of prosecution for abortion. And the dissonance between "the laws on the books" and "the law in operation" is a matter for the courts to consider, according to University of Idaho constitutional law professor Richard Seamon.<sup>233</sup>

Prosecutors before the nineteenth century did not see abortion as "a matter for the courts," according to historian Evan Hart, unless the woman was injured or died: "If someone died, then yes, it was. But . . . for a lot of prosecutors, it was like, 'That's [the family's] business.'"<sup>234</sup>

#### A. Idaho Case Law

When it considered its first abortion case in 1901, Idaho's high court denied the physician's appeal of his manslaughter conviction. Its last case in 1954 reflected the trend toward less tolerance when the court upheld a physician's conviction for performing an abortion deemed not necessary to preserve the life of the pregnant woman. These cases, summarized below, also show the desperation of women having illegal abortions in the backroom of a drug store perhaps self-inflicted by a hairpin, or induced by a knitting needle.

#### iii. State v. Alcorn, 1901

Idaho's first supreme court case involved the death of a young woman. Cora A. Burke was twenty years old, a widow, engaged to be married, with an infant son, and about six weeks pregnant. She died two days after a botched abortion performed in the back room of a drug store in 1899.<sup>235</sup> The defendant was sentenced to seven years in the state penitentiary.<sup>236</sup> A witness recounted what he saw through the drug store window. The appellant held a dark liquid to the woman's nostril:

whereupon appellant took her in his arms and laid her upon the table, which witness had previously assisted to carry into the office, laid her on her back, her lower limbs spread apart, removed her drawers, rolled up her shirts, placed a speculum in her vagina, and examined her organs, and then took a probe about a foot long and introduced it into

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231. *Id.* (quoting Rosemary Wimberly, "She Should Be Made an Example Of": Gender, Politics, and Criminal Abortion in Idaho, 1864–1973 (1996) (M.A. Thesis, Boise State University) (on file with Boise State University Library, Special Collections and Archives).

232. *Id.*

233. *See id.*

234. *Id.*

235. State v. Alcorn, 7 Idaho 599, 64 P. 1014 (Idaho 1901).

236. *Id.* at 603, 64 P. at 1015.

her person through the speculum, which caused some blood to flow, which appellant removed with a cloth.<sup>237</sup>

The next day, the practitioner examined Burke, “suffering greatly” from an inflamed uterus, and prescribed ergot.<sup>238</sup> Two days later when he examined her two hours before her death, “her feet and hands were cold . . . her hands blue, and her lips purple.”<sup>239</sup> He told the mother that Burke would “soon be up,” and he left the state.<sup>240</sup> The jury found his defense “improbable” that complications arose after he had to remove “a piece of hair dart” lodged in Burke’s uterus when she tried to self-abort.<sup>241</sup>

In upholding the verdict, the court noted the wide gap between common law and Idaho statutory law: “At the common law an abortion could not be committed prior to the quickening of the foetus. This is not the case under our statutes.”<sup>242</sup> The court opined that both the physician and woman were guilty of a felony, which for the woman was pre-quickening at six weeks:

The crime for which appellant has been convicted is one of the worst known to the law. An unnatural abortion, brought about by means of drugs or instruments, violates decency, the best interests of society, the divine law, the law of nature, the criminal statutes of this state, and is not only destructive of a life unborn, but places in jeopardy the life of a human being,—the pregnant woman. Both actors, when there are two, as in the case at bar, are guilty of felony.<sup>243</sup>

#### iv. State v. Sayer, 1913

Scant details are available about State v. Sayer. The Idaho Supreme Court reversed the verdict of the defendant for performing an abortion, finding “no evidence” in the record justifying the verdict of guilty. The defendant served “well-nigh a year in the penitentiary.”<sup>244</sup>

#### v. Nash v. Meyer, 1934

In this civil trial, married couple Clyde and Jean Nash sued a Caldwell physician for damages they alleged followed a botched illegal abortion.<sup>245</sup> They claimed that the surgeon, John Meyer, likely caused the woman’s sterility and long convalescence, and loss of companionship.<sup>246</sup> The couple claimed Meyer refused to provide urgent follow-up care in Boise, and that they thought the abortion was legal

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237. *Id.* at 604, 64 P. at 1015.

238. *Id.*

239. *Id.* at 604, 64 P. at 1016.

240. *Id.*

241. *Alcorn*, 7 Idaho at 605, 64 P. at 1016.

242. *Id.* at 606, 64 P. at 1016.

243. *Id.*

244. State v. Sayer, 23 Idaho 536, 130 P. 458 (1913) (noting that evidence of an illicit relationship may be admissible to prove a pregnancy but not an abortion).

245. Nash v. Meyer, 54 Idaho 283, 31 P.2d 273 (1934).

246. *Id.* at 285–86, 31 P.2d at 273–74.

to save her life.<sup>247</sup> Meyer countered that the couple told him that they wanted the abortion because they already had three children, one by the former wife, and could not financially support another child.<sup>248</sup> The Idaho Supreme Court ruled in favor of the physician based on his not agreeing contractually to provide care “until cured.”<sup>249</sup>

vi. *State v. McMahan*, 1937

The court reversed a conviction of a physician for felony manslaughter for performing an alleged criminal abortion after the pregnant woman, Stella Fleischman, died.<sup>250</sup> The abortion was performed in Nez Perce County and was found to cause “general peritonitis” because of “negligence and lack of skill,” according to the prosecution.<sup>251</sup> The court found reversible error, however, because a jury instruction allowed the standard for civil negligence—failure of ordinary care—to suffice for conviction of criminal negligence.<sup>252</sup>

vii. *State v. Proud*, 1953

Pregnant Mrs. Darlene Pigg and her friend, both from Boise, went to the home of appellant Lena Proud in Homedale, where Proud allegedly performed an abortion in a bedroom for a fee of \$10.<sup>253</sup> Having a search warrant for an earlier alleged abortion, the deputy sheriff and prosecuting attorney arrived at the appellant’s home shortly after the procedure while Pigg and the friend were still there.<sup>254</sup> The officers seized “a knitting needle wrapped in a wet washrag, a large white washbowl with the fluid content thereof, and a record book or diary which was in the hands of the appellant at the time.”<sup>255</sup> The book was filled with “countless names of cities and villages throughout the United States, each name followed by a number,” allegedly referring to previous abortions.<sup>256</sup>

The appellant, who claimed she was only checking for pregnancy, was arrested and convicted of felony procuring of an abortion in violation of Idaho Code 18-602, and incarcerated in the state penitentiary.<sup>257</sup> The trial court allowed in evidence a letter in the record book that the defendant held when she was arrested: “Mrs. Lena Proud: You asked me to let you know how I am. You gave me the number Fresno 62. I have had trouble from the abortion and want my money back immediately. Mail it to (name of sender), General Delivery, Council Idaho. (Signed)”<sup>258</sup>

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247. *Id.* at 286, 31 P.2d at 274.

248. *Id.* at 288, 31 P.2d at 275.

249. *Id.* at 306, 31 P.2d at 282.

250. *State v. McMahan*, 57 Idaho 240, 65 P.2d 156, 164 (1937).

251. *Id.* at 249, 65 P.2d at 159.

252. *Id.* at 257, 65 P.2d at 163.

253. *State v. Proud*, 74 Idaho 429, 432–33, 262 P.2d 1016, 1018 (1953).

254. *Id.* at 433, 262 P.2d at 1018.

255. *Id.*

256. *Id.* at 436, 262 P.2d at 1020.

257. *Id.* at 433, 439, 262 P.2d at 1018, 1022.

258. *Id.* at 437, 262 P.2d at 1021.

The court found the letter hearsay, held its admission to be reversible error, and remanded for a new trial.<sup>259</sup>

viii. *State v. Rose*, 1954

The Idaho Supreme Court upheld the conviction of a physician for performing an illegal abortion in violation of Idaho Code 18-601, procuring an abortion “not being necessary to preserve the life” of the pregnant woman, Bonnie Jean Taylor.<sup>260</sup> Taylor’s suitor provided the \$150 fee<sup>261</sup> for the abortion.<sup>262</sup> Taylor was later admitted to a Twin Falls hospital after intense cramping, and discharged the fetus.<sup>263</sup> She was not found to be an accomplice to the illegal abortion.<sup>264</sup>

B. Idaho Supreme Court’s Use of the History and Tradition Test

In 2023, the Idaho Supreme Court applied the history and tradition test by reviewing Idaho’s blackletter laws, but not the implication of the lack of prosecution of those laws, in *Planned Parenthood Great Northwest v. State*.<sup>265</sup> The court determined that no “deeply rooted” right to abortion existed at the time of statehood in Idaho in 1889 and that the “plain and ordinary meaning” of the text of the Idaho constitution does not include a “fundamental right” to abortion.<sup>266</sup> The court majority upheld the constitutionality of Idaho’s “Total Abortion Ban” (IDAHO CODE § 18-622(2)), “Civil Liability Law” (IDAHO CODE 18-1807(1)), and “6-Week Ban” (also called “fetal heartbeat law”) (IDAHO CODE §§ 18-8804 and -8805).<sup>267</sup> The total abortion ban allows a physician to perform an abortion only to prevent the death of the pregnant woman or if the pregnant woman reported rape or incest to law enforcement.<sup>268</sup> Conviction is a felony with a two- to five-year sentence.<sup>269</sup> The civil liability law allows relatives of an aborted “preborn child” to sue a medical provider who performed the abortion up to four years after the abortion and for a minimum of \$20,000 in damages.<sup>270</sup> The six-week ban was superseded by the total abortion ban, which took effect as a trigger law one month after the *Dobbs* decision.<sup>271</sup>

Dissenting Justice Colleen Zahn found that Idaho’s anti-abortion statutes are unconstitutional because they do not grant a right to abortion “to preserve the life or health” of the pregnant woman.<sup>272</sup> Zahn found this narrow right over and above

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259. *Id.* at 438, 440, 262 P.2d at 1021, 1023.

260. *State v. Rose*, 75 Idaho 59, 60, 267 P.2d 109, 110 (1954).

261. Webster, *supra* note 7 (\$150 in 1954 converts to \$1,704 in 2023).

262. *Rose*, 75 Idaho at 61, 267 P.2d at 110.

263. *Id.* at 61–62, 267 P.2d at 110.

264. *Id.* at 64, 267 P.2d at 112.

265. *Planned Parenthood Great Northwest v. Idaho*, 171 Idaho 374, 522 P.3d 1132 (2023).

266. *Id.* at 390, 522 P.3d at 1148.

267. *Id.* at 389, 522 P.3d at 1147.

268. Idaho Code § 18-622(2).

269. *Id.*

270. Idaho Code § 18-8807.

271. Idaho Code § 18-8805.

272. *Planned Parenthood*, 171 Idaho at 461, 522 P.3d at 1219 (Zahn, J., dissenting) (emphasis added).

the existing statutory exemptions to save the *life* of the pregnant woman or in cases of reported rape or incest because Idaho's history and tradition "permitted and condoned abortions to preserve the life or health of the mother."<sup>273</sup> Zahn pointed to the 1901 *Alcorn* case as recognizing that criminal abortion was "not only destructive of a life unborn, but place[d] in jeopardy the life of a human being,—the pregnant woman."<sup>274</sup>

Dissenting Justice John Stegner found "broader fundamental rights" to abortion under Idaho's constitution because "pregnancy—and whether pregnancy may be terminated—has a profound effect" on women's "inalienable right to liberty, as well as their rights to life and safety."<sup>275</sup>

#### V. ABORTION STATISTICS

The *Dobbs* majority in focusing only on the blackletter law failed to address the sheer number of women who have gotten pregnant, did not want to be, and obtained an abortion.

State-by-state legality will affect the number of vulnerable women able to obtain an abortion. For example, before New York legalized abortion in 1970, the clients at the Chicago Jane collective were from all walks of life: "[D]aughters, wives, mistresses of the police, state's attorneys, judges,"<sup>276</sup> as well as "[p]olice department employees . . . [p]olitician's wives, daughters and mistresses."<sup>277</sup> But after the New York legalization, the Jane's clientele became much poorer because the wealthy could "hop on a plane and have the procedure done legally."<sup>278</sup>

The reason as many as one in four U.S. women will have at least one abortion by the end of their childbearing years<sup>279</sup> may be public when a woman dies, such as Idahoan Cora Burke, or in secret, when a woman seeks to escape a violent partner.

Abortions statistics are hard to come by. When the Centers for Disease Control (CDC) began obtaining abortion data in 1969, it obtained data provided by

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273. *Id.* at 465, 522 P.3d at 1223.

274. *Id.* (quoting *State v. Alcorn*, 7 Idaho 599, 606, 64 P. 1014, 1016 (Idaho 1901)). See *supra* pp. 360–61.

275. *Planned Parenthood*, 171 Idaho at 469, 522 P.3d at 1227 (Stegner, J., dissenting) (Justice Stegner relies on *Alcorn* to point to common law acceptance of pre-quickenings abortion *Id.* at 486, 522 P.3d at 1234 (citing *Alcorn*, 7 Idaho at 606, 65 P. at 1016)).

276. THE JANES, *supra* note 7.

277. Judith Arcana, *Feminist Politics and Abortion in the USA*, CWLU HERSTORY COMM., <https://www.cwluherstory.org/jane-articles-media-articles/feminist-politics-and-abortion-in-the-usa> (last visited Sept. 9, 2023) (noting that no women were local politicians and nearly no women were police officers in those days).

278. Jeanne Galatzer-Levy, *On the Job with Jane*, CWLU HERSTORY COMM., <https://www.cwluherstory.org/text-memoirs-articles/on-the-job-with-jane> (last visited Sept. 9, 2023). The Jane Collective accepted whatever women could pay, and after abortion became legal in New York, Jane averaged fifty dollars for an abortion and often the pay was "a lot of singles." *Id.*

279. Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), <https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html>.

the states on a voluntary basis.<sup>280</sup> On the other hand, the Guttmacher Institute, founded as part of Planned Parenthood but becoming independent in 2007,<sup>281</sup> contacted abortion providers directly to obtain abortion statistics.<sup>282</sup> According to the Guttmacher Institute, from 1973 through 2020—the latest year for which data are available—60,909,930 legal abortions were performed in the United States.<sup>283</sup> The CDC’s total for the same time period by comparison is 47,762,605.<sup>284</sup> In Idaho, the state’s vital statistics from 2005 to 2020 indicate 22,353 abortions were performed.<sup>285</sup> Estimates from other less reliable sources make the Idaho total from 1973 to 2020 approximately 68,319.<sup>286</sup> The national and state totals show the vast number of women who have terminated unwanted pregnancies and also suggest the number of women losing that choice because they live in states that have made abortion illegal since *Dobbs*. Depriving women of the agency of deciding whether or not to bear a child places women outside the rational continuum of Fourteenth Amendment protection considered essential to liberty in this country.

The abortion data show that the great majority of women over time who have obtained abortions do so before quickening. In 1972, ninety percent of abortions reported to the CDC were performed before sixteen weeks of pregnancy, the general time period before quickening.<sup>287</sup> From 2011 and later years, that percentage increased to ninety-five percent.<sup>288</sup>

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280. Laurie D. Elam-Evans et al., *Abortion Surveillance—United States, 1999*, 51 CDC: MORBIDITY AND MORTALITY WKLY. REP., Nov. 2002, at 1. From 1973 through 1997, the CDC received abortion data from all fifty states and the District of Columbia. *Id.* However, beginning in 1998, reporting became less reliable with California, Maryland, New Hampshire, and the District of Columbia not reporting for several years and other states occasionally not reporting. *See id.* *See also* Katherine Kortsmit et al., *Abortion Surveillance—United States, 2020*, 71 CDC: MORBIDITY AND MORTALITY WKLY. REP., Nov. 2022, at 13.

281. *The History of the Guttmacher Institute*, Guttmacher Inst., <https://www.guttmacher.org/history-guttmacher-institute> (last visited Sept. 11, 2023).

282. Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States*, 2020, 54(4), PERSP. ON SEXUAL AND REPROD. HEALTH 128, 129 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10099841/>.

283. *See id.* Using an Excel spreadsheet, the author compiled the total number for 1973 to 2020 from the annual totals provided in Jones, *supra* note 282.

284. *See* Elam-Evans, *supra* note 280, at 12; Karen Pazol et al., *Abortion Surveillance—United States, 2009*, 61 CDC: MORBIDITY AND MORTALITY WKLY. REP. 18 (2012); Karen Pazol et al., *Abortion Surveillance—United States, 2012*, 64 CDC: MORBIDITY AND MORTALITY WKLY. REP. 17 (2015) and *Erratum: VI. 64, No. SS-10*, 69 CDC: MORBIDITY AND MORTALITY WKLY. REP. (2020); Kortsmit, *supra* note 280, at 13. Using an Excel spreadsheet, the author compiled the number of abortions for 1973 to 2020 from the annual totals provided in the separate reports.

285. *See* Pam Harder, *Idaho Vital Statistics—Induced Abortion 2015*, BUREAU OF VITAL RECS. AND HEALTH STATS. 7 (2017); Pam Harder, *Idaho Vital Statistics—Induced Abortion 2021*, Bureau of Vital Recs. and Health Stats. 7 (2022).

286. William Robert Johnston, compiler, *Historical Abortion Statistics, Idaho (USA)*, JOHNSTON’S ARCHIVE, <https://www.johnstonsarchive.net/policy/abortion/usa/ab-usa-ID.html>.

287. Elam-Evans, *supra* note 280, at 12.

288. *See* Kortsmit, *supra* note 280, at 23.

## VI. RECOMMENDATION

A federal law granting a right to pre-quickenning abortion would legalize approximately ninety-five percent of abortions, and would encourage early abortions. If the law were challenged, the Court could apply the history and tradition test but with full consideration of the experiences of women regarding abortion, abortion practices, and the works of feminist and consensus legal historians analyzing the history abortion in this country.

## VII. CONCLUSION

A history and tradition test of abortion rights in the United States needs to fully consider the experiences of women regarding abortion, abortion practices, and the works of feminist and consensus legal historians analyzing the history of abortion in this country. As Justice Harlan recounted, the Court's precedent establishing substantive due process rights is a balance that regards those "traditions from which [the nation] developed as well as the traditions from which it broke."<sup>289</sup>

The right to pre-quickenning abortion is a tradition from which the nation has developed. As shown, when legal in only some states, legal abortions become an option only for some women and out of reach for vulnerable others. Inequitable access to safe, legal abortions and inevitable compulsory pregnancies for the most vulnerable women must not again become a tradition from which the nation must break.

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289. *Poe v. Ullman*, 367 U.S. 497, 542 (1961).

