No. 19-1392

IN THE
Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENT OF HEALTH, *ET AL.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR *AMICI CURIAE* AMERICAN HISTORICAL ASSOCIATION AND ORGANIZATION OF AMERICAN HISTORIANS IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

This brief, based on decades of study and research by professional historians, aims to provide an accurate historical perspective as the Court considers the State of Mississippi's challenge to a woman's right to abortion, a right that was affirmed by the Court in *Roe* v. *Wade*.

The American Historical Association (AHA) is the largest professional organization (11,500 members) in the world devoted to the study and promotion of history and historical thinking. It is a non-profit membership organization, founded in 1884 and incorporated by Congress in 1889. The AHA provides leadership to the discipline on such issues as academic freedom, access to archives, professional standards, and the centrality of history to public culture.

The Organization of American Historians (OAH) is the largest scholarly organization devoted to the history of the United States, and to promoting excellence in the scholarship, teaching, and presentation of that history. An international non-profit membership organization, the OAH has over 5,500 members who are university and college professors as well as individuals employed in a variety of scholarly and institutional settings, including libraries, museums, national parks, and historical societies. The OAH is committed to the principle that the past is a key to understanding

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[1] All parties have consented to the filing of this amicus brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief.

the present, and has an interest—as a steward of history, not as an advocate of a particular legal standard—to ensure that the Court is presented with an accurate portrayal of American history and traditions.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

When the United States was founded and for many subsequent decades, Americans relied on the English common law. The common law did not regulate abortion in early pregnancy. Indeed, the common law did not even recognize abortion as occurring at that stage. That is because the common law did not legally acknowledge a fetus as existing separately from a pregnant woman until the woman felt fetal movement, called "quickening," which could occur as late as the 25th week of pregnancy. This was a subjective standard decided by the pregnant woman alone and was not considered accurately ascertainable by other means.

The history and traditions of the United States inform modern abortion jurisprudence and deserve great weight. *See, e.g.*, *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Moore* v. *City of E. Cleveland*, 431 U.S. 494 (1977); *Illinois ex rel. McCollum* v. *Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty.*, 333 U.S. 203 (1948). This Court recognized as much in *Roe* v. *Wade*, examining the nation's "history of abortion" to help explain "the state purposes and interests behind the criminal abortion laws." 410 U.S. 113, 129 (1973). After parsing the available historical information, the Court determined that not all abortion was illegal at common law at the time of the adoption of the Constitution. *Id.* at 140. Indeed, the Court held: "At least with respect to

the early stage of pregnancy," meaning prior to quickening, "and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the nineteenth century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy." *Id.* at 140-141.

These central claims were accurate in *Roe* and remain so today. In the five decades since *Roe*, our ability to confirm this history has grown through the digitization of historical newspapers and records. These records show that the influence of the common law persisted even as states slowly began to create laws of their own. Up to the Civil War, the majority of state abortion laws either codified the common law by prohibiting abortion only in later stages of pregnancy, or followed the common law's reasoning by punishing abortion prior to quickening more lightly. Some states, including Mississippi, continued to conform to the common law via statute until the mid-twentieth century.

The new and stricter statutes enacted in the 1840s to 1850s were often a response to alarming newspaper stories about women's deaths from abortion. Yet despite these new laws on the books, abortion convictions remained rare. Frustrated with what he viewed as lax laws and insufficient enforcement, in 1857, Dr. Horatio Storer mounted a calculated effort to pass more stringent legislation and gained the support of the newly-formed American Medical Association. Mixed motives drove these physicians' zeal, including consternation over immigrant Catholics out-reproducing native white Protestants, and resentment of married women apparently shunning their proper roles as

mothers by choosing abortion. Their concerted efforts to strengthen abortion prohibitions resulted in more punitive statutes.

But Storer and his allies were not universally successful. Although they persuaded many doctors and legislators, abortions continued taking place, and many ordinary citizens continued to believe that abortion prior to quickening was not a crime. Nor did Storer's organized attack result in complete legal rejection of the common law's reasoning: as of 1868, nearly one-third of states, including Mississippi, continued to draw on the common law, either by prohibiting only post-quickening abortions, or by imposing a lighter sentence on pre-quickening abortions.

Newly accessible historical evidence further refutes any claim that, from the adoption of the Constitution through 1868, our nation had a settled view on the criminality of abortion. If it had been widely accepted that all abortions were criminal, there would have been no need for the physicians' campaign. If the common law had been fully rejected, states would not have continued to differentiate between abortions at different stages of pregnancy. As we understand now better than ever before, American history and tradition regarding abortion under the common law undergirds *Roe* v. *Wade*'s holding that women have a constitutional right to decide for themselves whether to choose to terminate a pregnancy.

ARGUMENT

I. THE EARLY UNITED STATES FOLLOWED THE COMMON LAW IN GOVERNING ABORTION.

At common law, as explained by authorities such as Coke and Blackstone, life was deemed legally to begin only when a pregnant woman sensed the fetus stirring in her womb. Accordingly, the common law did not prohibit abortion prior to that point. This common-law principle relied heavily on the woman's experience, as only she could know when this stirring—commonly called quickening—had occurred. Early American law enunciated and followed this same female-centric principle: abortion was not recognized or prohibited until a pregnant woman felt the fetus move.

A. The Common Law Did Not Criminalize Abortions In All Stages Of Pregnancy.

The common-law principle, under which abortion was not criminal before a woman recognized quickening, reflected a legal tenet, not a moral judgment. As Blackstone explained in his *Commentaries on the Common Law*, life "begins in contemplation of law a[s] soon as an infant is able to stir in the mother's womb." 1 St. George Tucker, *Blackstone's Commentaries* 129 (William Young Birch & Abraham Small eds. 1803) (hereinafter, "Blackstone"). Blackstone's view echoed that of prior authorities, including Coke, Fleta, and Hale. *See, e.g.*, Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* 50 (E. & R. Brooke 1797) (explaining in discussing what constituted murder that, "[i]f a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby

the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison [misdemeanor], and no murder"); Matthew Hale, *Pleas of the Crown: A Methodical Summary* 53 (P.R. Glazebrook ed., 1972) (1678) (similar); *Fleta*, *in* 72 *Publications of the Selden Society* 60-61 (H.G. Richardson & G.O. Sayles eds. trans. 1955) (similar).

Only the pregnant woman could definitively determine whether terminating a pregnancy at a given time was permissible or prohibited, because only she could detect whether this "stirring"—also known as "quickening"—had occurred.[2] *See* Alfred Swaine Taylor et al., *A Manual of Medical Jurisprudence* 421 (Phila., H.C. Lea, 6th ed. 1866) ("No evidence but that of the female can satisfactorily establish the fact of quickening."). A woman's perception and recognition of movement signified in the common law that the fetus had an existence separate from hers. For the lawyers and judges announcing and applying this

[2] Nineteenth century sources used "quick" and "quickening" consistently to mean the woman's perception of fetal movement. 1 William Oldnall Russell et al., *A Treatise on Crimes and Indictable Misdemeanors* 553 (Phila., T. & J.W. Johnson, 4th ed. 1841) ("The words 'quick with child' are to be construed according to the common understanding, in which they signify that the woman has felt the child move within her."); *State* v. *Cooper*, 22 N.J.L. 52, 57 (1849) (rejecting the claim that "quick with child" means "having conceived," and explaining that "[t]here is no foundation whatever in law for this distinction"). Because only the pregnant woman definitely knew whether quickening had occurred, courts often accepted that a woman "big" or "great" with child was post-quickening. *Cooper*, 22 N.L.J. at 55 ("the term 'big' or 'great' is obviously used as tantamount to 'quick' "); *see Mitchell* v. *Commonwealth*, 78 Ky. 204, 209 (1879) ("while it is not alleged that the woman was quick with child, it is charged that she was pregnant and big with child").

principle, "[i]t [was] not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period." *Cooper*, 22 N.J.L. at 54. That is because, "*[i]n contemplation of law* life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life." *Id.* Accordingly, under the common law, a woman could terminate a pregnancy at her discretion prior to physically feeling the fetus move.

B. America Adopted The Common Law Governing Abortion.

Blackstone's "works constituted the preeminent authority on English law for the founding generation." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999). James Wilson, who crafted the preamble to the U.S. Constitution, quoted and endorsed Blackstone's words in his seminal lectures of 1790: "In the contemplation of law, life begins when the infant is first able to stir in the womb." James Wilson, *Natural Rights of Individuals* (1790), *reprinted in* 2 *The Works of James Wilson* 316 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896).

In practice, this meant that early American law did not recognize abortion before the fetus "stir[red]," *see id.*, which nineteenth-century writers on medical jurisprudence acknowledged could occur as late as 25 weeks, *see, e.g.*, L.S. Joynes, M.D., *On Some of the Legal Relations of the Foetus in Utero*, Va. Med. J. 187 (Sept. 1856). For example, the Massachusetts Supreme Judicial Court wrote in 1845 that, "at common law, no indictment will lie, for attempts to procure abortion with the consent of the mother, until she is quick with child." *Commonwealth* v. *Parker*, 50 Mass.

(9 Met.) 263, 265-266 (1845). As it explained, the common law considered "the child [to have] a separate and independent existence" only "when the embryo had advanced to that degree of maturity designated by the terms 'quick with child,' " even though an infant in utero was "regarded as a person in being" prospectively for certain civil law purposes, as Blackstone had clarified. *Id.* at 266; *see* Blackstone, *supra*, at 129. In support, *Parker* cited Blackstone and Coke, and noted that "the more ancient authorities of Bracton and Fleta" agreed. 50 Mass. at 266. Later cases cited *Parker*'s discussion of the common law as definitive precedent. *See, e.g.*, *Smith* v. *State*, 33 Me. 48, 55 (1851); *Abrams* v. *Foshee*, 3 Clarke 274, 278 (Iowa 1856); *Smith* v. *Gaffard*, 31 Ala. 45, 51 (1857); *Mitchell*, 78 Ky. at 206; *Eggart* v. *State*, 40 Fla. 527, 532 (1898).

Other courts reached the same conclusion. In *State* v. *Cooper*, the New Jersey Supreme Court explained that, prior to the enactment of the first English statute criminalizing abortion in 1803, there was "no precedent, no authority, nor even a *dictum* * * * which recognizes the mere procuring of an abortion as a crime known to the law." 22 N.J.L. at 55. It therefore concluded: "[T]he procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law * * * . There is neither precedent nor authority to support it." *Id.* at 58. And because the common law did not criminalize the procuring of an abortion, it also did not criminalize attempting to do so. *Id.* The court also rejected the prosecution's claim that such an attempt was an offense against the fetus. "[T]he very point of inquiry is, whether that be at all an offence or not, and whether the child be *in esse* [in

being], so that any crime can be committed against its person." *Id.* at 54.

The outlier, *Mills* v. *Commonwealth*, 13 Pa. 631 (1850), rejected the quickening distinction only in *dicta* and then was heavily criticized as having no basis in precedent. In *Mills*, Pennsylvania charged the defendant with "intent to cause and procure the miscarriage and abortion of" a woman who was "pregnant and big with child," meaning post-quickening. *Id.* at 633-634; *see supra*, n.2. Despite this fact, *Mills* opined that the common law's approach to abortion "never ought to have been the law anywhere" because any abortion was "the destruction of gestation, by wicked means and against nature." 13 Pa. at 633. This naturalistic view about what the common law *should* have been lacked any basis in precedent, and other courts rejected it. *Mitchell*, 78 Ky. at 206-207.[3]

Legal treatises likewise consistently enunciated the common-law principle, except when describing statutes that states had enacted to replace it. These treatises echoed Blackstone's view about when life began. And, like Blackstone, these sources explained that the reason for this principle was the legal belief that a fetus was not considered a cognizable life for purposes of the law until quickening. *See, e.g.*, Henry Roscoe, et al., *A Digest of the Law of Evidence in Criminal Cases* 652 (London, William Benning & Co., 3d ed. 1846) ("A child in the womb is considered *pars viscerum matris* [part of the mother's body], and not possessing an individual existence, and cannot therefore be the subject of murder."); Russell, *supra*, 424, 553;

[3] Although *State* v. *Slagle* quoted *Mills* with approval, that too was dicta: the alleged abortion at issue occurred after quickening. 83 N.C. 630, 632 (1880).

John A.G. Davis, *A Treatise on Criminal Law with an Exposition of the Office and Authority of Justices of the Peace in Virginia* 339 (Phila., C. Sherman & Co. 1838); Oliver L. Barbour, *The Magistrate's Criminal Law, a Practical Treatise on the Jurisdiction, Duty, and Authority of Justices of the Peace in the State of New York in Criminal Cases* 30, 60 (Albany, WM. & A. Gould & Co., 1841). Even Dr. John Beck, who disapproved of abortion, had to acknowledge that "[t]he *English law* 'considers life not to commence before the infant is able to stir in its mother's womb.'" John B. Beck, M.D., *Researches in Medicine and Medical Jurisprudence* 27 (Albany, E. Bliss, 2d ed. 1835) (quoting Blackstone, *supra*, at 129).

The few mid-nineteenth century treatises outside this consensus usually relied on the critique voiced in *Mills*. One was authored by Francis Wharton, who opposed allowing any abortion; he argued that the fetus was as injured a week before quickening as a week after. Francis Wharton, *A Treatise on the Criminal Law of the United States* 456-457 (Phila., James Kay, Jun. and Bro., 2d ed. 1852). Besides the dicta from *Mills,* he referred to two other cases. But he cited a statement in *Commonwealth* v. *Demain*, which was, as he later conceded, not the court's holding but part of the argument Wharton himself had advanced as counsel in the case. *See* Wharton, *supra*, at 455-456; *Commonwealth* v. *Demain*, 1 Brightly 441, 443 (Pa. 1846). Similarly, a statement from *Regina* v. *Wycherley*, an English case that he said distinguished "quick with child" from "with quick child," *see* Wharton, *supra*, at 457 (citing *Regina* v. *Wycherley*, 8 Car. & P. 262, 264 (1838)), offered no legal basis for this distinction. *Cooper*, 22 N.J.L. at 57; *Mitchell*, 78 Ky. at 207-208; *see supra*, n.2. The one other significant treatise

that refused to acknowledge that the common law did not prohibit abortion in all stages of pregnancy likewise relied solely on *Mills* and *Wycherley*. 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 386 (1856).

Neither Wharton nor Bishop emphasized fetal protection in critiquing the common law on abortion. Rather, they focused on motives they saw as socially desirable in extraneous ways. Wharton wanted to regulate abortion from "a social and a moral point of view," but his moral arguments focused on "illicit" sexual activity, not on fetal life. Wharton, *supra*, at 457. He argued that permitting any abortions to occur would "remov[e] * * * the chief restraint upon illicit intercourse," and thereby undermine "the institution of marriage." *Id.* Bishop thought that abortion should always be prohibited because it was "a crime against population"—rather than particularly because it harmed the fetus. Bishop, *supra*, § 387. In his view, by reducing population growth, which Bishop considered the basis for national growth, abortion depleted national wealth. *Id.* (reiterating this view).

C. Pre-1700 Cases Do Not Support The View That The Common Law Or Early America Criminalized All Abortion.

Contrary to the assertion of an amicus for the State, medieval and colonial cases do not support the view that the common law criminalized all abortion throughout pregnancy. *See* Dellapenna Amicus Br. 7-13. As noted above, the significant common-law authorities recognized abortion as criminal only in the latter part of pregnancy. *See supra*, pp. 5-7.

The cases identified from the 1200s-1500s deal with felonious *percussio* (battery) on a pregnant woman,

not abortion. These cases concern unwanted assaults that harmed a woman and endangered or ended her pregnancy. A woman so injured could then bring a private action seeking punishment of her batterer.

These are not "abortion" cases as we understand that term today. Wolfgang Muller, *The Criminalization of Abortion in the West* 75 (2012) ("[P]rocurement of abortion in the modern acceptance of the term, performed with the consent of the pregnant mother, had never held a place among thirteenth-century appeals and indictments. Adjudication of criminal *percussiones* had been the sole concern."). They focused on the injury to the woman, not the termination of the fetus. Carla Spivack, *To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England*, 14 Wm. & Mary J. of Women & L. 107, 110 (2007) ("[T]hese cases resemble modern torts and are based on recognition of the injury done to the woman.").[4] They do not involve voluntary efforts by a pregnant woman to terminate her pregnancy. *See Fleta*, *supra*, at 88 ("A woman may bring an appeal * * * for a quickened child in her womb wickedly crushed or wickedly killed by a blow.").

The few known American colonial cases likewise do not suggest that abortions were criminal throughout pregnancy. These cases involved one individual accusing another of wrongdoing, not a prosecution by colonial authorities for a known crime. For example, one supposed "indictment" from colonial Delaware was merely the standard examination of an unmarried woman to ascertain the father of her stillborn

[4] Spivack has also debunked the claim that proceedings in ecclesiastical courts support the view that pre-quickening abortions were prohibited at common law. *See* Spivack, *supra*, at 142-150.

"bastard" child; when she named him, she accused him of beating her during pregnancy, but the examiners did not take further action. *In re Stillbirth of Agnita Hendricks' Bastard Child* (1679), *in Records of the Court of New Castle on Delaware 1676-1681*, at 274-275 (1904). A supposed "abortion" in colonial Virginia involved only a contested accusation of one neighbor against another. 7 Susie M. Ames, Am. Hist. Ass'n, *County Court Records of Accomack-Northampton, Virginia, 1632-1640*, at 29-32, 37, 43 (1973). In a Maryland case, a wife sued her husband after he beat her, causing miscarriage, but the wife later retracted her allegation. *Proprietary* v. *Brooks*, 10 Md. Archives 464-465 (1656).

Two other supposed "abortion" cases from the Catholic colony of Maryland targeted religious outsiders who did not adhere to community sexual mores. *Proprietary* v. *Mitchell* involved a known atheist suspected of murdering his wife, who also committed multiple sexual offenses with three women, including giving one a potion to end her pregnancy (which nonetheless continued to term). 10 Md. Archives 80-81, 177-186 (1652). He was convicted for several offenses at once, including "murderous intention," but it is unclear whether that referred to his dead wife or the fetus. *Id.* *Proprietary* v. *Lambrozo* targeted a Jewish doctor who raped his servant and then cohabited with her, impregnated her, aborted the pregnancy, then married her. 53 Md. Archives 387-391 (1663). Once they were married, the former servant retracted her story. *Id.*

Even if these "cases" were to support the claim that abortion was always criminally prosecuted many centuries ago, the State's amicus has *no* evidence that

these cases were known to Americans in the eighteenth and nineteenth centuries. Nor are we aware of any. Rather, ample historical evidence demonstrates that Americans knew of and followed the common law, which allowed extensive decision-making by a pregnant woman.

II. STATES SLOWLY BEGAN REGULATING ABORTION IN THE 1820s.

The common law continued to govern abortion in America until the 1820s and in some states for considerably longer. The earliest statutes, enacted between 1821 and 1839, were written at the time of state code creation or revision; several simply included abortion drugs in legislation punishing poisonous medicines. *See* James C. Mohr, *Abortion in America: The Origins and Evolution of A National Policy, 1800-1900*, at 20-45 (1978). Three states, including Mississippi in 1839, codified the common law when creating a first abortion statute. Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 Geo. L.J. 395, 450, 453, 489 (1961). A surge of sensationalized news reports on women's deaths during abortion later in the 1830s and 1840s spurred states to enact further abortion restrictions.

1. Connecticut was first in 1821, when it included abortion in an anti-poisoning statute. *Id.* at 435, 453. Abortion-inducing methods in the 1820s (like many other health remedies) typically required ingesting potentially risky plant-derived compounds. Edward Shorter, *A History of Women's Bodies* 179-188 (1982). Connecticut acted in the wake of publicity surrounding the trial of a local minister who had impregnated a 17-year old and then forced her to ingest an abortion-inducing potion. *Report of the Trial of Ammi*

Rogers, viii-x (Oct. 5-7, 1820). Even so, Connecticut's statute codified the common law. Quay, *supra*, at 453.

Other states took a different approach. New York revised its criminal code completely in 1828, and incorporated restrictions on abortion. The legislator in charge of the revision worked closely with Dr. T.R. Beck of Albany, who had recently published a work of medical jurisprudence highly critical of the significance of quickening. 1 Theodric Romeyn Beck, *Elements of Medical Jurisprudenc*e 202-203 (Albany, Webster and Skinners, E.W. Skinner & Co. 1823). Their collaboration produced the first American law to stipulate explicitly that abortion before quickening was punishable by law. James C. Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth-Century America* 79-82 (1993). But New York retained the common-law tradition by penalizing abortion before quickening lightly, as a misdemeanor only; abortion afterward was a felony. Quay, *supra*, at 436. Some other states followed, likewise differentiating penalties when they eventually punished abortion. Many also copied New York's innovation, likely due to Dr. Beck's influence, of allowing abortions if needed to save the mother's life, as attested by two physicians. *See id.*; Beck, *Elements of Medical Jurisprudenc*e, *supra*, at 277, 201.

2. Up to 1839, only eight states regulated abortion by statute, while the other 18 states retained the common law. *See* Quay, *supra*, at 435-437. A surge of sensational stories in newspapers, beginning in the 1840s, changed the situation. Mohr, *Abortion in America*, *supra*, at 46-85. Newspapers at the time printed detailed trial reports, including witness testimony. Recently digitized newspaper databases reveal

only a dozen individual cases reported between 1820 and 1839, growing to roughly 50 cases during the 1840s, and more than 150 in the 1850s, a crescendo resounding in newspapers across the nation.[5]

Abortion cases became newsworthy when they involved a woman's death, triggering a public inquest. In the large majority of trials reported in newspapers, the coverage focused on the death of the woman, not on the fetus. *See, e.g.*, Ralph Frasca, *Legacy of Ignorance: Abortion and Journalism in the Early Republic*, *in* Life and Learning XVI: University Faculty for Life Conference at Villanova University 457 (2006) (observing that "solicitations of public sympathy" for the fetus were "absent from newspapers of the Early Republic"). These cases played an outsized role in shaping public attitudes, given that the circumstances of uneventful abortions were not publicized.

Nearly all trial stories presented the narrative of a vulnerable and victimized young unmarried woman, led astray by an aggressive seducer. Trial reports with sordid details occupied newspaper pages for days or weeks, generating sympathy for the victim far beyond her own locale, since the news traveled widely. The fetus was mentioned only to clarify its gestational age, if necessary. *See, e.g.*, *The Death of Sarah Decker*, Boston Courier, Oct. 11, 1845, at 2; *Trial of Madame Restell, alias Ann Lohman for Abortion and Causing the Death of Mrs. Purdy* 5-8, 14-17, New York City, 1841.

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[5] This data was collected using a systematic search in genealogybank.com to locate news reports involving abortion cases between 1800 and 1860, which found approximately 200 cases, locating two to thirty newspaper articles on each.

As these sensationalized reports became common, states began to enact or alter abortion laws. For example, soon after dozens of newspapers lavished attention on two riveting cases in the late 1830s (in Lowell, Massachusetts and Philadelphia), Maine enacted a statute in 1840 that overrode the common law, punishing anyone who performed an abortion with five years in prison. Mohr, *Abortion in America*, *supra*, at 41; Quay, *supra*, at 478; *see also The Trial of Doctor William Graves*, N.H. Patriot & State Gazette, Dec. 31, 1838; *The Murder Trial in Philadelphia*, New-Bedford Mercury, Feb. 1, 1839, at 4.

The Massachusetts legislature likewise acted after Boston's Grand Jury implored them, in the midst of three cases that saturated the Boston news in 1844. *Municipal Court*, Boston Courier, Sept. 9, 1844, at 2. In two cases, a woman died. *Trial of Fenner Ballou and Dr. Alexander S. Butler for the Murder of Maria Aldrich*, Boston Daily Times, Jan. 1, 1845, at 2; *Dr. Ephraim Whitney Discharged, as also Benjamin Welch and Wife*, Boston Daily Times: Police Court, Jan. 1, 1845, at 2. The third case concerned three married women receiving abortions. *Municipal Court*, Boston Daily Times, Dec. 19, 1844, at 2. In response, Massachusetts made providing an abortion at any stage a misdemeanor, but tied the punishment to the fate of the woman: If the woman died, it became an egregious crime deserving a five- to twenty-year sentence in state prison; if the woman survived, the sentence was only one to seven years in a local jail. Quay, *supra*, at 481.

By 1859, fifteen of thirty-three states continued to follow the common law: in ten, abortion during any

stage of pregnancy was not criminalized by statute;[6] in five, abortion was criminalized by statute only after quickening.[7] Of the remaining eighteen states, six continued to bear the imprint of the common law by penalizing abortion differently depending on the stage of pregnancy.[8]

III. STATES RESTRICTED ABORTION MORE STRINGENTLY FOLLOWING AN ELITE-DRIVEN PHYSICIANS' CAMPAIGN BUILT ON MIXED AND DISCRIMINATORY MOTIVES.

Abortion restrictions accelerated in the 1860s because of a national campaign initiated by gynecologist Dr. Horatio Storer in 1857. In Storer's view, neither the American tradition of the common law nor existing state laws sufficiently protected fetal life: "By the Common Law and by many of our State Codes foetal life, per se, is almost wholly ignored and its destruction unpunished; abortion in every case being considered an offence mainly against the mother, and as such, unless fatal to her, a mere misdemeanor, or wholly disregarded." Horatio Storer, *Criminal Abortion in America* 1 (Phila., J.B. Lippincott & Co. 1860).

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[6] *See* Quay, *supra*, at 455-456 (Delaware), 457-458 (Florida), 459-460 (Georgia), 474-476 (Kentucky), 478-480 (Maryland), 502-503 (North Carolina), 506-509 (Pennsylvania), 509-510 (Rhode Island), 510-512 (South Carolina), 513 (Tennessee).

[7] *See* Quay, *supra*, at 450 (Arkansas), 453 (Connecticut), 486-487 (Minnesota), 489 (Mississippi), 505 (Oregon).

[8] *See* Quay, *supra*, at 483-84 (Michigan), 490 (Missouri), 493-494 (New Hampshire), 500 (New York), 504 (Ohio), 517 (Virginia).

Even in states that criminalized abortion, convictions were rare.[9] A Boston physician in 1857 questioned the worth of anti-abortion laws: "The law now is strict and severe against the practice, and the penalty high for the offence; but who ever knew of a conviction under it? * * * The difficulty is, in getting the proof * * * ." Medicus, *Suffolk District Medical Society*, 2 Med. World 211, 212 (1857). Multiple hurdles derailed most cases, including the absence of credible witnesses to a private medical procedure, technical flaws in the pleadings, and questions about the woman's reputation for chastity or truth. *See, e.g.*, *Conclusion of the Trial of Dr. Moses P. Clark & Elizabeth M. Clark*, Boston Herald, June 26, 1850, at 2; *Dr. James H. Smith*, New London (CT) Daily Star, April 20, 1852, at 2; *Acquittal of Dr. Shove*, N.Y. Evening Post, Oct. 19, 1846, at 2.

Storer, perturbed by what he viewed as insufficient or lax statutes and enforcement regimes, launched a campaign to shift the course of American abortion law. Indeed, because of the hold of common-law tradition, Storer's initial efforts immediately met resistance from Boston colleagues. When he proposed criminalizing all abortion and holding women criminally responsible too, several colleagues scoffed, one of them predicting that Storer would "fail to convince the public that abortion in the early months is a crime." "B." Dr. Charles Buckingham, *The Report Upon Criminal Abortions*, 56 Boston Med. & Surgical J. 346, 346 (1857).

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[9] The District Attorney for Boston said he was informed of thirty to fifty women's abortion deaths but prosecuted very few of them. *See Trial of Dr. John Stevens*, Boston Herald, Mar. 23, 1849, at 4.

But Storer enlisted support from the newly-formed all-male American Medical Association (AMA), playing to certain physicians' fears that "abortions are infinitely more frequent among Protestant women than among Catholic," and encouraging their disapproval of women shirking the maternal duties for which they were "physiologically constituted" and "destined by nature." Horatio Robinson Storer, *Why Not? A Book For Every Woman* 64, 75-76 (2d ed. 1868). Storer's message gained acceptance among certain influential physicians who began to repeat his themes, mounting a calculated and widespread attack on abortion that influenced legislators and additional physicians coast-to-coast.

Despite this organized attack on the common-law reasoning embedded in American history and tradition, many states continued to reflect the common-law tenet that not all abortions were prohibited. As of 1868, nearly half of the states continued either not to prohibit abortion entirely or to impose lesser punishments for abortions prior to quickening. Even in states that prohibited all abortions, the common-law view still resonated among the public. As contemporaneous sources demonstrate, ordinary citizens continued to believe that not all abortions were criminal and that women held the power to determine whether to terminate a pregnancy.

A. Constitutionally Impermissible Motives Influenced Storer, Other Physicians, And Legislators.

Historians widely acknowledge that Storer launched a coordinated national attack on abortion beginning in 1857. *See, e.g.*, Mohr, *Abortion in America*, *supra*, at 147-159; Simone M. Caron, *Who Chooses?*

American Reproductive History since 1830, at 21-22 (2008); Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States 1867-1973*, at 11-12 (1997); *see generally* Frederick N. Dyer, *The Physicians' Crusade against Abortion* (2005). Storer believed that abortions were endangering what he saw as the ideal America: a society of white Protestants in which women adhered strictly to their proper "duties"—marriage and childbearing.[10] While Storer believed that abortion was always morally wrong, two other concerns were inextricable from his condemnation of abortion on that ground: his ethnocentric concerns about rising immigrant birthrates and his blame of married Protestant women for abandoning their primary responsibility of motherhood, thus becoming especially culpable for the falling birth rate.

1. Storer claimed that white, American-born, middle-class married women were increasingly using abortion to limit the size of their families, causing precipitous fertility decline in New England. Horatio Storer et al., Suffolk Dist. Med. Soc'y, *Report of the Committee on Criminal Abortion* 10 (1857) (insisting that "marriage, where the parties shrink from its highest responsibilities, is nothing less than legalized prostitution"). He viewed these women's actions as unnatural, selfish, and contrary to their "duties" as wives. *See* Storer, *Why Not? A Book For Every Woman*, *supra*, at 64, 74-76. Often he cited his own experience, that within six months he was called to attend fifteen married women suffering from the

[10] This Court has long denounced this view as part of America's regrettable history of constitutionally-prohibited sex discrimination. *See* Br. for Respondents at 40-41 (collecting sources).

aftereffects of a botched abortion. Storer et al., *Report of the Committee on Criminal Abortion*, *supra*, at 4; Horatio R. Storer, M.D., *On Criminal Abortion in America* 31 (1860).

In contrast, Storer claimed that immigrants, being mostly Catholic, obeyed the Pope's prohibition of abortion. *See* Storer, *On Criminal Abortion in America*, *supra*, at 38-42. Storer warned that foreign immigrants' large families were poised to overwhelm the white Protestant "American" population. Horatio Robinson Storer, *On the Decrease of the Rate of Increase of Population Now Obtaining in Europe and America*, 43 Am. J. Sci. & Arts 141 (1867) (hereinafter, "*On the Decrease*") (first published as Horatio R. Storer, *Contributions to Obstetric Jurisprudence: Criminal Abortion, pt. II*, 3 N. Am. Medico-Chirurgical Rev., Original Commc'ns art. I, at 260 (1859)). He stressed that in Massachusetts, "the excess of the births over the deaths, has been *wholly* of those of *recent foreign origin*," which was "explained by the watchful protection exercised by the Catholic church over foetal life." *Id.* at 145-146, 155.

Storer bolstered his thematic arguments with a cascade of alarming statistics that he claimed showed an epidemic of abortions and its impact on native-born fertility. The native-born population in the Northeast was indeed producing fewer children, owing to a number of causes. Storer blamed abortion alone. *See id.* at 145-155; *cf.* J. David Hacker, *Ready, Willing, and Able? Impediments to the Onset of Marital Fertility Decline in the U.S.*, 53 Demography 1657, 1687 (2016). Storer's statistical methods began with poor data and were rife with erroneous assumptions. For example, he scoured vital registers for Massachusetts, New

York City, and European cities for recorded stillbirths and premature births (of live infants who soon died), and falsely claimed that an accelerating increase in these numbers was due to criminal abortion, when in fact it was due to differing practices in categorizing infant mortality. *Fourteenth Report to the Legislature of Massachusetts, Relating to the Registry and Returns of Births, Marriages, and Deaths in the Commonwealth for the Year Ending December 31, 1855*, at 98, 106 (1857); *Annual Report of the City Inspector of the City of New York for the year ending December 31, 1854*, at 3, 8, 10-14, 218 (1855). He also selectively chose data to make comparisons to exaggerate change over time in the frequency of "abortions." *See, e.g.*, Storer, *On the Decrease*, *supra*, at 152-153 ("[T]he frequency of abortions * * * is at least 8 times as great in Massachusetts as in the worst statistics of the city of New York."). Although his numerical data were invented and inaccurate, they covered page after page of his writings and appeared to be unassailable, encouraging readers to believe his shocking conclusions. *See, e.g.*, Montrose A. Pallen, M.D., *Foeticide, or Criminal Abortion*, 3 Med. Archives 193, 198 (1869) ("such a paper as * * * Storer's * * * [shows] a national crime of abortion!"); Andrew Nebinger, M.D., *Criminal Abortion: Its Extent and Prevention* 5-8 (1870) (noting Storer's "figures of unquestioned and unquestionable correctness" and "where the foreign population abounds, we find an abundance of children").

With these themes and alarming statistics in hand, Storer took his agenda to the AMA. He convinced the nascent organization to sign on to his project, thereby gaining a means to reach other trained male physicians, governors, and legislators nationwide. Storer ghost-wrote a "memorial" that was signed by the AMA

president and sent to every governor, urging that laws be made more stringent. *See* Henry Miller, *Memorial to the Governor and Legislature of the State of Rhode Island* (1860), *reprinted in* Caron, *supra*, app. B. He also ghost-wrote a letter that the AMA sent to every medical society urging it to pressure its state's governor and legislature. *See id.*; *Address of Henry Miller, M.D.*, 13 Transactions of the Am. Med. Ass'n 55, 56 (1860) (thanking Storer for "preparation of the Memorial as well as of the Address * * * to * * * State Medical Societies").

The mailings sent to all of them included Storer's statistical article (introduced by the cover letter as "reliable, and not to be controverted") and a model statute that made procuring, aiding, or attempting miscarriage on "a woman"—with no mention of pregnancy—a felony, unless advised by two consulting physicians to be "necessary to preserve the life of such woman, or of her unborn child." Caron, *supra*, apps. B & C (reprinting model law). The model act criminalized equally a woman seeking abortion or operating on herself, and also punished advertisements or mailings implying abortion services. Caron, *supra*, app. C. Consistent with Storer's paternalistic and ethnocentric concerns, his model allowed the court to increase the punishment for an aborting woman if she were married. *Id.*; Dyer, *supra*, at 77-78.

2. Thanks in large part to his influence over the AMA, Storer's paternalistic and anti-immigrant arguments reached doctors and legislators nationwide. Positive reviews of Storer's writings reiterated his emphases, including "the comparative size of families now and formerly," "the pecuniary success of known abortionists," and the "constantly increasing demand

for abortion-producing nostrums." D.F. Condie, *Review 19,* 78 Am. J. Med. Scis. 465 (1860) (reviewing Horatio R. Storer, M.D., *On Criminal Abortion in America* (1860)). Colleagues persuaded by Storer broadcast his statistics, his contemptuous portrayal of women, and his anti-immigrant fears. *See, e.g.*, Editorial, *Criminal Abortions*, 14 Buff. Med. J. 247, 247-251 (1858); *Criminal Abortion*, 62 Boston Med. & Surgical J. 65 (1860). Storer's claims about "native stock" ceding population growth to "foreigners" traveled intact to the West Coast, where a leader in the California State Medical Society, Dr. Henry Gibbons Sr., thundered against "feticide," warning of the prospective "deterioration of race * * * demonstrated by [Storer's] statistics." Henry Gibbons, Sr., M.D., *On Foeticide*, Transactions of the Cal. State Med. Soc'y 4-5 (pamphlet 1878).

Certain doctors seemed to welcome the opportunity to chastise women for abandoning their maternal roles and seeking other opportunities. *See* D.H., *On Producing Abortion: A Physician's Reply to the Solicitations of a Married Woman to Produce a Miscarriage for Her*, 17 Nashville J. Med. & Surgery 200, 201 (1876) ("[Y]ou have no right to attempt to escape from what you knew beforehand is one of [marriage's] most natural consequences, and a duty you tacitly promised the State * * * ."). A minority of women of the respectable Protestant sort that Storer reproved for abortion were indeed seeking higher education, professional employment opportunities, and even the right to vote. *See generally* Alison M. Parker, *Articulating Rights: Nineteenth-Century American Women on Race, Reform, and the State* (2010). There was much controversy over whether higher education and similar pursuits for women compromised their "natural" role as

mothers. *See* Pallen, *supra*, at 205 ("Woman's rights and woman's sphere are, as understood by the American public, quite different from that understood by us as Physicians, or as Anatomists, or Physiologists."); G.L. Austin, M.D., *Perils of American Women* 143 (1883) ("[W]oman must realize that she shines and thrives best in the home.").[11]

B. This Campaign Had Only Partial Success In Replacing The Common Law With State Statutes And Did Not Fully Convince The Public.

Storer's efforts had mixed success. In the initial wake of his campaign between 1860 and 1868, five states enacted new statutes criminalizing abortion;[12] and another five strengthened existing statutes.[13] More states responded in the 1870s and 1880s. *See* Mohr, *Abortion in America*, *supra*, at 200-230. Storer's direct influence can be seen in legislative committees citing his demographic claims and his

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[11] Storer's and his colleagues' animus against women taking anything other than domestic roles was also clear in their efforts to keep women from entering medical schools and becoming members of the AMA. Reagan, *supra*, at 11-12; Frederick N. Dyer, *Champion of Women and the Unborn: Horatio Robinson Storer, M.D.* 374-376 (1999) (Storer arguing before the AMA that "women * * * are inferior [to men] in the matter of judgment").

[12] Pennsylvania, 1860, *see* Quay, *supra*, at 507; Nevada territory, 1861 (retained in state of Nevada, 1868), *see id.* at 493; Florida, 1868, *see id.* at 457-458; Maryland, 1868, *see id.* at 479-480; Rhode Island, 1861 and 1867, *see* 30 Gen. Statutes of the State of Rhode Island and Providence Plantations ch. 228, § 23, at 541 (1872).

[13] Connecticut, 1860, *see* Quay, *supra*, at 454; Oregon, 1864, *see id.* at 505-506; Illinois, 1867, *see id.* at 467; Vermont, 1867, *see id.* at 516; Ohio, 1867, *see* 1867 Ohio Laws 135-136.

views on married women to justify strengthening anti-abortion laws. For example, Ohio cited Storer's writing in support of "proper legislation" to suppress abortion, noting that women "avoiding the duties and responsibilities of married life * * * are, in effect, living in a state of legalized prostitution" and would leave "our broad and fertile prairies to be settled only by the children of aliens." *Additional Report from the Select Committee To Whom Was Referred S.B. No. 285*, 63 J. of Senate of State of Ohio, app. 233, 235 (1867). A Storer-inspired address to the Vermont Medical Society in 1867 resulted in the group pressing the legislature to adopt overall lengthier punishments for abortion, and longer still if the woman died. L. C. Butler, M.D., *The Decadence of the American Race, as Exhibited in the Registration Reports of Massachusetts, Vermont [and Rhode Island]; The Cause and the Remedy*, 77 Boston Med. & Surgical J. 89, 96-99 (1867); *see Bills Approved and Signed by the Governor*, Middlebury (VT) Register (Dec. 3, 1867), at 2. The Medical Society of Rhode Island, upset about a local influx of immigrants, similarly drew on Storer's nativist writings in drafting a bill against abortion and lobbying for it in the state legislature. Caron, *supra*, at 36-37.

In spite of this campaign, the common-law view persisted in American law and popular opinion. By the time the Fourteenth Amendment was ratified in 1868, nearly half of the states retained some vestige of the common law: in eleven states abortions remained legal before quickening; [14] and of the twenty-six

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[14] *See* Quay, *supra*, at 449-450 (Arkansas), 455-456 (Delaware), 459-460 (Georgia), 474-476 (Kentucky), 485-488 (Minnesota),

remaining states, seven imposed a lesser punishment during that stage.[15]

The campaign, too, converted more legislators than ordinary citizens. For example, after an abortion trial in Massachusetts in 1867 resulted in a hung jury, the Northampton Free Press noted that "public sentiment in Hampden county does not deem abortion a crime at all * * * and possibly public sentiment is just about the same everywhere else as in Hampden county." Springfield Daily Republican, Dec. 27, 1867, at 4. Doctors continued to observe the persistence of common-law reasoning among their patients. One doctor, for example, concluded in 1870 that "many individuals, otherwise learned, * * * do not look upon abortion as foeticide." Pallen, *supra*, at 197. He further noted (among other instances) that a married woman's pastor told her that abortion prior to quickening was "no crime, because the child was not alive." *Id.* Numerous other doctors reported to the Philadelphia County Medical Society that their women patients "almost universally" believed that a pregnancy was not meaningfully real "until the fourth and half-month." Nebinger, *supra*, at 19.

Abortions continued to take place, legally in some states and illegally in others. Not all physicians participated in the campaign organized by Storer, and

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488-489 (Mississippi), 491-492 (Nebraska), 502-503 (North Carolina), 510-512 (South Carolina), 513 (Tennessee), 518 (West Virginia).

[15] *See* Quay, *supra*, at 458-459 (Florida), 482-485 (Michigan), 489-490 (Missouri), 493-495 (New Hampshire), 506-509 (Pennsylvania), 516-517 (Virginia); 1 Gen. Laws of the Territory of Kansas ch. 28, §§ 9-10, at 232-233 (1859) (retained in State of Kansas, 1861).

some continued to provide abortions. *See, e.g.*, Pallen, *supra*, at 204 (noting that "[a]mong the medical fraternity" there are doctors "who are thought by the public to be upright, honorable men," and who provide abortions); *Infanticide*, Chi. Times, Dec. 12-24, 1888; Reagan, *supra*, at 50-57 (revealing that many doctors with standard medical degrees, members of medical societies, remained willing to perform abortions or supply referrals).

In the years following the campaign, low prosecution and conviction rates persisted. Several doctors publicly commented on the rarity of convictions of abortion providers. *See, e.g.*, Pallen, *supra*, at 203 ("[N]o one within my recollection has ever been punished for it."); O. E. Herrick, M.D, *Abortion and its Lesson*, Mich. Med. News (Jan. 10, 1882) ("Conviction is the exception, instead of * * * the rule."). Police investigators and prosecutors often concentrated only on abortions in which a woman died, especially if she made a dying declaration that named the abortion provider. Nonetheless, in Chicago in the beginning of the twentieth century, coroners' inquests outnumbered cases going to grand juries by 5 to 1 on the average, and only a small fraction of cases proceeding to trial obtained conviction. Reagan, *supra*, 116-130; *see also* Mohr, *Abortion in America*, *supra*, at 230-237. A Chicago Medical Society symposium of 1904 emphasized the ineffectiveness of abortion law: Dr. C. S. Bacon, among others, lamented how difficult it was to obtain sufficient evidence of abortion unless the woman died—and even then, her family would cover it up. C. S. Bacon, M.D., *The Duty of the Medical Profession in Relation to Criminal Abortion*, 7 Ill. Med. J. 18, 18-24 (1905).

Thus even while abortion became more stringently criminalized, the ultimate object of the physicians' campaign was foiled by persisting popular belief that not all abortions were criminal and decision-making over terminating pregnancies belonged to pregnant women. Reagan, *supra*, at 21-36; *see also* Nebinger, *supra*, at 16 ("[M]any ladies of elevated standing in society and even in the church, are in the habit of having abortion produced without the [least] hesitancy as to any impropriety in the procedure.").

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In sum, despite coordinated efforts to undermine the common-law reasoning embedded in American history and tradition, the physicians' campaign did not succeed in displacing longstanding common-law principles. Many state statutes retained the common-law approach. Even where states prohibited abortion, common-law reasoning resonated in public opinion, deeply affecting the practice of abortion. These historical findings confirm that *Roe*'s central conclusion was correct: American history and traditions from the founding to the post-Civil War years included a woman's ability to make decisions regarding abortion, as far as allowed by the common law.

CONCLUSION

For the foregoing reasons, the decisions below should be affirmed.

Respectfully submitted,

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